

Presidential War Powers—The *Merryman*, *Milligan*, and *Quirin* Cases

Introduction

The Constitution divides powers among three branches of government. This separation and enumeration of powers occasionally come into conflict when the nation is at war. Article II, Section 2 stipulates that the president is the commander in chief of the armed forces. The authority to declare war and support forces is enumerated as among the powers of Congress in Article I. Over time conflicts between the executive and the legislature have emerged as presidents sought to deploy troops and prosecute wars without formal declarations of war by Congress.

Further complicating these power struggles are issues relating to definitions of war, what constitutes a theater of war, and who is the enemy. Abraham Lincoln, facing the secession crisis of 1861 and the firing on Fort Sumter, stopped short of defining the conflict as a war. This in turn created several constitutional issues relating to the extent of his war powers as events unfolded over the next several years. Lincoln also faced difficulties in many border states and around Washington, D.C. as he sought to exercise his powers under the commander in chief clause in areas that were geographically proximate to but not a part of the Confederacy. Short-term military operations in the 20th century throughout the Caribbean and Central America have factored into how we think about the exercise of executive power and armed conflict. In the wake of the Vietnam War, Congress passed the War Powers Act stipulating the procedures that limited the use of executive powers that could lead to armed conflict. Every president since has consistently taken the position that the War Powers Act is an unconstitutional encroachment on the war powers of the executive.

More recently, the war on terrorism has added another set of circumstances to complicate clear understandings of what constitutes traditional definitions of theaters of operation. Individuals without being in any nation's armed forces have committed terrorist acts on civilian populations. This has led many to suggest that previous definitions of the enemy or being a soldier should be abandoned.

Another constitutional issue often associated with war is the provision in Article I Section 9, which guarantees the writ of habeas corpus. This provision means that a prisoner has the right to ask a judge to issue an order that requires the prisoner to appear before a judge to determine if the prisoner is being lawfully detained. Although the Constitution does allow Congress to suspend the writ in times of rebellion, invasion, or as the public safety may require it, conflicts have occurred as various presidents have in fact suspended the right. In the first two cases that serve as the basis for this script, habeas corpus was an issue since both John Merryman and Lambdin Milligan argued they were being held unlawfully during the Civil War. Merryman was detained in Maryland while Milligan was detained in Indiana. The issue also is central in the *Quirin* case. Both Herbert Haupt and Ernest Burger, prisoners of war captured on American soil during WW II, sought a writ of habeas corpus as U.S. citizens.

Additionally, in all three cases, military tribunals are at issue. Article III, Section 1 of the Constitution serves as the blueprint for the judicial system for the national government. It also provides that Congress can create inferior courts. Congress has in fact passed legislation creating military courts to try members of the U.S. military as well as tribunals designed to try members of enemy forces during wartime. Both systems operate outside the scope of traditional practices of criminal and civil trial procedures. John Merryman and Lambdin Milligan argued that their trials in military courts were unconstitutional since civilian courts were operating and neither were members of the military. What follows is a hypothetical conversation among Supreme Court justices.

Supreme Court Cases Used in Script

Ex Parte Merryman, 17 F. Cas. 144 (1861)

Ex parte Milligan, 71 U.S. 2 (1866)

Ex Parte Quirin, 317 U.S. 1 (1942)

Central Constitutional Issues in Cases Used in Script

Ex Parte Merryman, 1861

What is the legal status of enemy belligerents? Do enemy belligerents have the constitutional rights to habeas corpus, Fifth, and Sixth amendment protections in the civilian courts?

Ex Parte Milligan, 1866

Can the President suspend a citizen's 5th and 6th amendment rights in the case of national emergency? Can a citizen be tried in military tribunals when regular civilian courts are in operation? Can the President suspend the writ of habeas corpus?

Ex Parte Quirin, 1942

Was FDR's executive order creating military commissions a legitimate exercise of his authority under the Congressionally enacted Articles of War? Did prisoners of war have the right to file for a writ of habeas corpus?

Roles in Script-5 (L-large role)

Moderator (L)

Chief Justice Salmon P. Chase (L)

Justice David Davis (L)

Justice Harlan Fiske Stone (L)

Chief Justice Roger B. Taney (L)

The Script

Moderator: Through the miracle of modern science, we are very excited to have with us today four Supreme Court justices. Joining us from the 19th century are justices Roger B. Taney, Salmon P. Chase, and David Davis. Justice Harlan Fiske Stone joins us from the 20th century. Gentlemen, welcome.

Justices: Hello, It's good to be here. Thank you for having me. Etc.

Moderator: Today our discussion centers on presidential powers and specifically on wartime powers. I do not need to remind our panelists the provisions of the Constitution that are in play when this issue comes to the Court. But for our audience, I would start by noting that the Constitution allocates wartime power to both the executive and legislative branches. Article II stipulates that the President is the commander in chief, while Article I authorizes Congress to declare war and support the armed forces.

Chase: [That's right.] Congress has the power not only to raise and support and govern armies, but to declare war. It has therefore the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war . . . and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by <the Constitution>¹. Their extent must be determined by their nature and by the principles of our institutions.

Moderator: This sounds fairly simple. What is the problem?

Chase: The power to make the necessary laws is in Congress, the power to execute in the President. Both powers imply many <secondary>² and <supporting>³ powers. Each includes all authorities essential to its due exercise.

Moderator: And I take it, a key word so far in our discussion is the word "imply."

Taney: [But,] the Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution, and neither of its branches—executive, legislative or judicial—can exercise any of the powers of government beyond those specified and granted.

Moderator: So then, there are no implied powers in the Constitution?

Stone: [Justice Taney, you know it's not that simple.] The Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Moderator: That seems to be an argument for implied powers within the legislative branch. What about implied powers for the executive branch?

Stone: [In Article II, Section 1, Clause 1] the Constitution confers on the President the executive Power and in Article II Section 3 imposes on him the duty to "take Care that the Laws be faithfully executed." The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war.

Moderator: So, when you add up all these, there is an argument to be made that the executive does possess some implied powers.

Stone: [Yes.]

Moderator: Well, I presume that we are all in agreement that the text of the Constitution clearly says that a person has a privilege to a writ of habeas corpus.

Justices: Yes. Certainly. Absolutely. Etc.

Moderator: Let's start there then. In Article I, Section 9 the Constitution reads, "the Privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Section 9 applies to the Congress of the United States.

Taney: [Thank-you. I appreciate a plain reading of the text.]

Moderator: In the Merryman case, Justice Taney, would you explain how habeas corpus was an issue?

Taney: A military officer residing in Pennsylvania issue[d] an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears. Under this order his house [was] entered . . . he [was] seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement.

Moderator: And I assume he filed for a writ of habeas corpus?

Taney: [Yes.] when [the] *habeas corpus* [was] served on the commanding officer, requiring him to produce the prisoner before a Justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is that he is authorized by the President to suspend the writ of *habeas corpus* at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

Moderator: Were there similar circumstances in the Milligan case?

Davis: An armed rebellion against the national authority . . . was raging, and the public safety required that the privilege of the writ of habeas corpus should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial but his authority to do this was questioned.

Moderator: Wait a minute. I thought only Congress was authorized to suspend the privilege?

Davis: [Yes. In the Milligan case,] it was claimed that Congress alone could exercise this power, and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested.

Moderator: Did President Lincoln have any legitimate reason to take such an action?

Stone: We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents.

Moderator: Justice Stone, we will get to the 20th century in a bit. For now, let's stick to Lincoln.

Chase: The act of Congress of March 3d, 1863, comprises all the legislation which seems to require consideration in this connection.

Moderator: What did that law say?

Chase: The first section [of the law] authorized the suspension, during the Rebellion, of the writ of habeas corpus throughout the United States by the President.

Moderator: And in the Merryman case, did the President have congressional authorization to suspend the writ of habeas corpus?

Taney: [None whatsoever.] I [understood] that the President not only claim[ed] the right to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.

Moderator: Wow! You can't be serious!

Taney: No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the President claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there is no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended except by act of Congress.

Taney: [Back in 1807] when the conspiracy of . . . Aaron Burr . . . became so <difficult>⁴ . . . Mr. Jefferson . . . claimed . . . no power to suspend it, but communicated his opinion to Congress, with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject, and determine whether the public safety required it. And . . . no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.

Moderator: But, if I am not mistaken, the events surrounding the arrest of Merryman were in early 1861 and Congress was not in session.

Taney: [Yes. That is true.]

Moderator: Does that change anything for you?

Taney: [No. Again, the Constitution's first] article is devoted to the Legislative Department of the United States, and has not the slightest reference to the Executive Department.

Moderator: Perhaps this was a factor influencing Congress to pass the Habeas Corpus Act of March 3, 1863, which did authorize President Lincoln to suspend the privilege at his discretion?

Davis: [But, it's more complicated than that.]

Chase: The trial and sentence of Milligan were by military commission convened in Indiana during the fall of 1864.

Moderator: And am I correct in assuming Milligan was challenging the law passed by Congress that allowed the President to authorize the military to conduct the trial?

Chase: [Not exactly. Milligan argued that Congress] did not . . . authorize trials by military commission in Indiana, but . . . prohibited them.

Moderator: In other words, his trial was in the wrong type of court.

Chase: [Exactly.] The Federal courts were open . . . and undisturbed in the execution of their functions, and [additionally] . . . the judges and officers of the courts were loyal to the government.

Moderator: But didn't the circumstances in Southern Indiana at the time justify Milligan being tried in a military court?

Chase: It is established by the papers in the record, that the state was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion.

Moderator: And, Milligan wasn't exactly a choirboy.

Chase: [Yes.] It appears also that a powerful secret association, composed of citizens and others, existed within the state, under military organization, conspiring against the draft and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.

Stone: [Exactly.] Armed prowlers . . . 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 . . .

Moderator: Again, Justice Stone, if you could wait a bit longer we will get to you. Justice Taney, could you summarize in a sentence or two the decision in the Merryman case?

Taney: Up to that time there had never been the slightest resistance or obstruction to the process of any Court or judicial officer of the United States in Maryland. . . . There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military. . . . And yet . . . a military officer . . . without giving any information

to the District Attorney, and without any application to the judicial authorities, assumes to himself the judicial power . . . [chose] to decide what constitutes the crime of treason or rebellion; what evidence . . . is sufficient to support the accusation . . . without having a hearing.

Moderator: It sounds like you are talking about a person's right to due process?

Taney: [Yes.] The Constitution provides, as I have before said, that "no person shall be deprived of life, liberty, or property, without due process of law." It declares that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. . . . It provides that the party accused shall be entitled to a speedy trial in a court of justice.

Moderator: Justice Davis, can you summarize the Court's finding in the Milligan case?

Davis: Milligan insist[ed] that . . . a military commission had no <authority>⁵ to try him upon the charges preferred, or upon any charges whatever, because he was a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

Moderator: And so you found in favor of Milligan?

Chase: [Yes.]

Moderator: But, ironically, the Court's decision was after the Civil War in 1866?

Chase: [Yes.]

Moderator: Well, so far the President has not fared well in the Supreme Court when he exercises his powers during time of war. Justice Stone, in your case, the Court concluded differently.

Stone: [Yes.] After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing.

Moderator: And they came to the United States, correct?

Stone: [Correct.] The four landed [on Long Island, New York] from [a] submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses, and incendiary and timing devices. While landing, they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing, they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.

Moderator: There were others as well?

Stone: [Yes.] The remaining four . . . boarded another German submarine, which carried them . . . to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness, wearing caps of the German Marine Infantry and carrying with them a supply of

explosives, fuses, and incendiary and timing devices. They immediately . . . proceeded in civilian dress to Jacksonville, Florida, and thence to various points in the United States.

Moderator: And these individuals were captured?

Stone: All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States.

Moderator: So what is the issue that the Court had to decide?

Stone: The President, as President and Commander in Chief . . . by Order of July 2, 1942, appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War . . . on the same day, by Proclamation the President declared that all persons who are subjects, citizens or residents of any nation at war with the United States . . . who during time of war enter or attempt to enter the United States . . . charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.

Moderator: Ah, military tribunals again. Did Congress authorize any such tribunals?

Stone: By the Articles of War . . . Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army.

Moderator: But these individuals were not members of the U.S. military.

Stone: [True, but] our Government has . . . recognized that those who, during time of war, pass . . . from enemy territory into our own . . . for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission.

Moderator: Fine, but does any other nation recognize this rationale other than the United States?

Stone: This <principle>⁶ of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

Moderator: So the argument of these individuals was what?

Stone: Petitioners' main <argument>⁷ is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that, in consequence, they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses.

Moderator: And the government responded how?

Stone: The Government challenges each of these propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. It is urged that, if they are enemy aliens or if the Proclamation has force, no court may afford the petitioners a hearing.

Moderator: Is there anything in the past that would support such a view?

Stone: [Yes.] Such was the practice of our own military authorities before the adoption of the Constitution and during the Mexican and Civil wars. General Order No. 100 of April 24, 1863, directed that: 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.

Moderator: But doesn't the Constitution state that persons are entitled to certain rights and privileges which would include basic due process in regular courts?

Stone: [Not exactly.]

Moderator: Now that I think about it, there is an exception in the 5th Amendment.

Stone: [Exactly.] The fact that "cases arising in the land or naval forces" are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment.

Moderator: And I take it the government attempted to cast the status of these individuals as something other than citizens as well?

Stone: Our Government, by . . . defining lawful belligerents . . . has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who, though combatants, do not wear "fixed and distinctive emblems."

Moderator: But some might suggest that since Herbert Haupt and Ernest Burger were actually U.S. citizens, they should not be tried in military tribunals.

Stone: Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and, with its aid, guidance and direction, enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.

Davis: [I am astonished.] No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people, for it is the birthright of every American citizen when charged with crime to be tried and punished according to law.

Stone: [These individuals are no] less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.

Davis: This question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials.

Stone: It is that each individual, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines. . . . [Their] offense was complete when . . . they entered, or . . . remained upon our territory in time of war

Davis: The founders of our government were familiar with the history of that struggle, and secured in a written constitution every right which the people had wrested from power during a contest of ages.

Stone: [An] Act of Congress of April 10, 1806, derived from the Resolution of the Continental Congress of August 21, 1776 imposed the death penalty on alien spies “according to the law and usage of nations, by sentence of a general court martial.”

Davis: So strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that, when the original Constitution was proposed for adoption, it encountered severe opposition, and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Stone: We cannot say that Congress, in preparing the Fifth and Sixth Amendments, intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission . . . with <violations>⁸ of the Articles of War punishable by death.

Davis: Time has proven the discernment of our ancestors. . . . These provisions, expressed in such plain English words that it would seem the <cleverness>⁹ of man could not evade them, are now . . . sought to be avoided. Those great and good men foresaw that troublous times would arise when rulers and people would become restive under restraint, and seek . . . to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be in peril unless established by irrevocable law.

Stone: Accordingly, we conclude that [these individuals] were properly detained for trial by the Military Commission, [for] an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order, and that the Commission was lawfully constituted; that the petitioners were held in lawful custody, and did not show cause for their discharge.

Davis: [This] 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.

Moderator: I see we are at a point where we are at loggerheads and out of time. I would like to thank our esteemed justices for being with us today. I suppose it is not an easy task, traveling here from the 1860s and 1940s. Perhaps we could at some future date, discuss the patents of such an invention that would facilitate such a voyage. Until then, we will need to leave it to future generations to sort out the contours of presidential powers and how they might function safely in time of war. Good night and good luck.

Endnotes

¹ that instrument

² subordinate

³ auxiliary

⁴ formidable

⁵ jurisdiction

⁶ precept

⁷ contention

⁸ infraction

⁹ ingenuity

Pedagogical Materials

T-Chart for Notes—Presidential War Powers

Instructions: As students listen to the scripted conversation, they should take notes using the T-Chart below to organize and summarize the key ideas from the *Merryman*, *Milligan*, and *Quirin* cases.

	<u>Merryman</u>	<u>Milligan</u>	<u>Quirin</u>
Background Information			
Central Issue			
Decision			

Review Questions—Presidential War Powers

1. What are the arguments made by the Presidents justifying their actions in each of these instances?
2. What is the role of Congress in each of these cases?
3. How does habeas corpus factor into each of these cases?

Discussion Questions—Presidential War Powers

1. In your opinion, is there a difference between official enemy soldiers and those supporting the enemy? If so, do the Court's decisions in these cases help in making those distinctions?
2. To what extent does the location of war matter in deciding issues of who is an enemy?
3. Would you say Lincoln's and FDR's actions in these cases were similar or different?