

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

Justia Opinion Summary and Annotations

Annotation

Primary Holding

It is unconstitutional to try civilians by military tribunals unless there is no civilian court available.

Syllabus Case

U.S. Supreme Court

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

Ex parte Milligan

71 U.S. (4 Wall.) 2

Syllabus

1. Circuit Courts, as well as the judges thereof, are authorized, by the fourteenth section of the Judiciary Act, to issue the writ of habeas corpus for the purpose of inquiring into the cause of commitment, and they have

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jurisdiction. except in cases where the privilege of the writ is suspended. to hear and

determine the question whether the party is entitled to be discharged.

2. The usual course of proceeding is for the court, on the application of the prisoner for a writ of habeas corpus, to issue the writ, and, on its return, to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.

3. When the Circuit Court renders a final judgment refusing to discharge the prisoner, he may bring the case here by writ of error, and, if the judges of the Circuit Court, being opposed in opinion, can render no judgment, he may have the point upon which the disagreement happens certified to this tribunal.

4. A petition for a writ of habeas corpus, duly presented, is the institution of a cause on behalf of the petitioner, and the allowance or refusal of the process, as well as the subsequent disposition of the prisoner is matter of law, and not of discretion.

5. A person arrested after the passage of the act of March 3d, 1863, "relating to habeas corpus and regulating judicial proceedings in certain cases," and under the authority of said act, was entitled to his discharge if not indicted or presented by the grand jury convened at the first subsequent term of the Circuit or District Court of the United States for the District.

6. The omission to furnish a list of the persons arrested to the judges of the Circuit or District Court as provided in the said act did not impair the right of said person, if not indicted or presented, to his discharge.

7. Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious State nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power.

8. The guaranty of trial by jury contained in the Constitution was intended for a state of war, as well as a state of peace, and is equally binding upon rulers and people at all times and under all circumstances.

9. The Federal authority having been unopposed in the State of Indiana, and the Federal courts open for the trial of offences and the redress of grievances, the usages of war could

not, under the Constitution, afford any sanction for the trial there of a citizen in civil life not connected with the military or naval service, by a military tribunal, for any offence whatever.

10. Cases arising in the land or naval forces, or in the militia in time of war or public danger, are excepted from the necessity of presentment or indictment by a grand jury, and the right of trial by jury in such cases is subject to the same exception.

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11. Neither the President nor Congress nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution except so far as the right is given to suspend in certain cases the privilege of the writ of habeas corpus.

12. A citizen not connected with the military service and a resident in a State where the courts are open and in the proper exercise of their jurisdiction cannot, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law.

13. Suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course, and, on its return, the court decides whether the applicant is denied the right of proceeding any further.

14. A person who is a resident of a loyal State, where he was arrested, who was never resident in any State engaged in rebellion, nor connected with the military or naval service, cannot be regarded as a prisoner of war.

This case came before the court upon a certificate of division from the judges of the Circuit Court for Indiana, on a petition for discharge from unlawful imprisonment.

The case was thus:

An act of Congress -- the Judiciary Act of 1789, [Footnote 1] section 14 -- enacts that the Circuit Courts of the United States

"Shall have power to issue writs of habeas corpus. And that either of the justices of the Supreme Court, as well as judges of the District Court, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. *Provided,*"

&c.

Another act -- that of March 3d. 1863. [Footnote 2] "relating to habeas corpus. and

regulating judicial proceedings in certain cases" -- an act passed in the midst of the Rebellion -- makes various provisions in regard to the subject of it.

The first section authorizes the suspension, during the Rebellion, of the writ of habeas corpus, throughout the United States, by the President.

Two following sections limited the authority in certain respects.

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The second section required that lists of all persons, being citizens of States in which the administration of the laws had continued unimpaired in the Federal courts, who were then held, or might thereafter be held, as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished by the Secretary of State and Secretary of War to the judges of the Circuit and District Courts. These lists were to contain the names of all persons, residing within their respective jurisdictions, charged with violation of national law. And it was required, in cases where the grand jury in attendance upon any of these courts should terminate its session without proceeding by indictment or otherwise against any prisoner named in the list, that *the judge* of the court should forthwith make an order that such prisoner, desiring a discharge, should be brought before him or the court to be discharged, on entering into recognizance, if required, to keep the peace and for good behavior, or to appear, as the court might direct, to be further dealt with according to law. Every officer of the United States having custody of such prisoners was required to obey and execute *the judge's* order, under penalty, for refusal or delay, of fine and imprisonment.

The third section enacts, in case lists of persons other than prisoners of war then held in confinement or thereafter arrested, should not be furnished within twenty days after the passage of the act, or, in cases of subsequent arrest, within twenty days after the time of arrest, that any citizen, after the termination of a session of the grand jury without indictment or presentment, might, by petition alleging the facts and verified by oath, obtain *the judge's* order of discharge in favor of any person so imprisoned, on the terms and conditions prescribed in the second section.

This act made it the duty of the District Attorney of the United States to attend examinations on petitions for discharge.

By proclamation, [Footnote 3] dated the 15th September following,

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the President, reciting this statute, suspended the privilege of the writ in the cases where, by his authority, military, naval, and civil officers of the United States

"hold persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy, . . . or belonging to the land or naval force of the United States, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services, by authority of the President, or for resisting a draft, or for any other offence against the military or naval service."

With both these statutes and this proclamation in force, Lamdin P. Milligan, a citizen of the United States, and a resident and citizen of the State of Indiana, was arrested on the 5th day of October, 1864, at his home in the said State, by the order of Brevet Major-General Hovey, military commandant of the District of Indiana, and by the same authority confined in a military prison at or near Indianapolis, the capital of the State. On the 21st day of the same month, he was placed on trial before a "military commission," convened at Indianapolis, by order of the said General, upon the following charges, preferred by Major Burnett, Judge Advocate of the Northwestern Military Department, namely:

1. "Conspiracy against the Government of the United States;"
2. "Affording aid and comfort to rebels against the authority of the United States;"
3. "Inciting insurrection;"
4. "Disloyal practices;" and
5. "Violation of the laws of war."

Under each of these charges, there were various specifications. The substance of them was joining and aiding, at different times between October, 1863, and August, 1864, a secret society known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government and duly constituted authorities of the United States; holding communication with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate

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prisoners of war, &c.; resisting the draft, &c.; . . .

"at a period of war and armed rebellion against the authority of the United States, at or near Indianapolis [and various other places specified] in Indiana. a State within the

military lines of the army of the United States and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy."

These were amplified and stated with various circumstances.

An objection by him to the authority of the commission to try him being overruled, Milligan was found guilty on all the charges, and sentenced to suffer death by hanging, and this sentence, having been approved, he was ordered to be executed on Friday, the 19th of May, 1865.

On the 10th of that same May, 1865, Milligan filed his petition in the Circuit Court of the United States for the District of Indiana, by which, or by the documents appended to which as exhibits, the above facts appeared. These exhibits consisted of the order for the commission; the charges and specifications; the findings and sentence of the court, with a statement of the fact that the sentence was approved by the President of the United States, who directed that it should "be carried into execution without delay;" all "by order of the Secretary of War."

The petition set forth the additional fact that, while the petitioner was held and detained, as already mentioned, in military custody (and more than twenty days after his arrest), a grand jury of the Circuit Court of the United States for the District of Indiana was convened at Indianapolis, his said place of confinement, and duly empaneled, charged, and sworn for said district, held its sittings, and finally adjourned without having found any bill of indictment, or made any presentment whatever against him. That at no time had he been in the military service of the United States, or in any way connected with the land or naval force, or the militia in actual service; nor within the limits of any State whose citizens were engaged in rebellion against the United States, at any time during the war, but, during all the time aforesaid, and for twenty years last past, he had been an

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inhabitant, resident, and citizen of Indiana. And so that it had been

"wholly out of his power to have acquired belligerent rights or to have placed himself in such relation to the government as to have enabled him to violate the laws of war."

The record, in stating who appeared in the Circuit Court, ran thus:

"Be it remembered, that on the 10th day of May, A.D. 1865, in the court aforesaid, before the judges aforesaid, comes Jonathan W. Gorden, Esq., of counsel for said Milligan, and

files here, in open court, the petition of said Milligan, to be discharged. . . . At the same time comes John Hanna, Esquire, the attorney prosecuting the pleas of the United States in this behalf. And thereupon, by agreement, this application is submitted to the court, and day is given, &c."

The prayer of the petition was that, under the already mentioned act of Congress of March 3d, 1863, the petitioner might be brought before the court and either turned over to the proper civil tribunal to be proceeded with according to the law of the land or discharged from custody altogether.

At the hearing of the petition in the Circuit Court, the opinions of the judges were opposed upon the following questions:

I. On the facts stated in the petition and exhibits, ought a writ of habeas corpus to be issued according to the prayer of said petitioner?

II. On the facts stated in the petition and exhibits, ought the said Milligan to be discharged from custody as in said petition prayed?

III. Whether, upon the facts stated in the petition and exhibits, the military commission had jurisdiction legally to try and sentence said Milligan in manner and form, as in said petition and exhibit is stated?

And these questions were certified to this court under the provisions of the act of Congress of April 29th, 1802, [Footnote 4] an act

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which provides

"that whenever any question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon the request of *either party* or their counsel, be stated under the direction of the judges and certified under the seal of the court to the Supreme Court, at their next session to be held thereafter, and shall by the said court be *finally* decided, and the decision of the Supreme Court and their order in the premises shall be remitted to the Circuit Court and be there entered of record, and shall have effect according to the nature of the said judgment and order; *Provided*, That nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits."

The three several questions above mentioned were argued at the last term. And along with them, an additional question raised in this court, namely:

IV. A question of jurisdiction, as -- 1. Whether the Circuit Court had jurisdiction to hear the case there presented? -- 2. Whether the case sent up here by certificate of division was so sent up in conformity with the intention of the act of 1802? in other words, whether this court had jurisdiction of the questions raised by the certificate?

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