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Stewart L. Winger, Jonathan W. White, eds. *Ex Parte Milligan Reconsidered: Race and Civil Liberties from the Lincoln Administration to the War on Terror.* Lawrence: University Press of Kansas, 2020. 392 pp. $45.00, cloth, ISBN 978-0-7006-2936-7.

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Ex Parte Milligan Reconsidered offers a fresh perspective on the eponymous Supreme Court case, in which Justice David Davis held that Congress had no power to try civilians in military tribunals in locations where civil courts were functioning. The case involved a Confederate sympathizer in Indiana, Lambdin P. Milligan, who was accused and convicted in a military tribunal of planning to free Confederate prisoners of war and incite insurrection in the Midwest. Milligan's lawyers brought a writ of ***habeas corpus*** to the Supreme Court, arguing that the military tribunal's exercise of jurisdiction over Milligan was unconstitutional. In 1866, Justice Davis agreed with Milligan that Congress had no power to authorize military tribunals in locales where war had not disrupted the operation of civil courts, proclaiming, "Civil liberty and this kind of martial law cannot endure together."[1] Chief Justice Salmon Chase concurred in the holding, but stressed a narrower interpretation of the law, arguing that Congress did have the power to authorize military tribunals in places where civil courts were technically functioning, when those civil courts were "wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators."[2]

The central claim of *Ex Parte Milligan Reconsidered* is that Justice Davis broke constitutional ground in *Milligan* by positioning the judiciary as guardian of the "civil liberties" of individuals. *Milligan*, the authors claim, has been erroneously dismissed as an "irrelevant" case, on the grounds that subsequent major Supreme Court decisions upheld the federal government's broad power to impair individual liberty in the name of national security, such as in the infamous ***Korematsu v. United States*** (upholding the constitutionality of Japanese internment during WWII).[3] This book seeks to rehabilitate *Milligan* by revealing its power in the aftermath of the Civil War, as well as its continued relevance today in cases involving the indefinite detention of Guantanamo detainees.

Yet in their attempt to rehabilitate *Milligan*, the contributors risk overstating their case. In his introduction, Stuart Winger claims that *Milligan* was a "remarkable holding": "In upholding the rights of an alleged traitor, the Court here ***for the first time*** used the Bill of Rights to expand civil liberty" (p. 20, emphasis in original). Michael Les Benedict similarly obliquely asserts that the *Milligan* decision was "the first in which the Supreme Court linked the Constitution to the great Anglo-American heritage of liberty" (pp. 319-20). The problem with these pronouncements is that the

term "liberty," particularly "civil liberty," is never explicitly defined in the book. Rather, "civil liberty" is used retrospectively to describe the rights at play in ***Milligan***, although the phrase had no distinct doctrinal meaning at the time and appears only once in the opinion. (Other terms used interchangeably in the lawyers' arguments and Davis's opinion include "liberty," "individual liberty," "Public Liberty," "personal liberty," "American liberty," and "Anglo-Saxon liberty.") It is also unclear whether each contributor shares the same definition of the term; for instance, Winger appears to conflate "civil liberty" with the Bill of Rights, yet the most important right claimed by Milligan—the writ of ***habeas corpus***—is guaranteed by the text of the Constitution itself (Article I, Sec. 9). From the beginning, this ambiguity creates an obstacle to the tightness and clarity of the book's overall argument. It is evident that ***Milligan*** did do important work in reconfiguring the relationship of the rights-bearing individual to the state in the postbellum era. Yet the Court had used the rights enumerated in both the Constitution and the Bill of Rights— diversity jurisdiction, the Contract clause, Article IV's protection of the privileges and immunities of citizens of different states, andthe Fifth Amendment's due process and takings clauses—to protect various aspects of individual "liberty" for decades before ***Milligan***. Because of the authors' reliance on the indeterminate and anachronistic catch-all "civil liberties," the explanation of how exactly ***Milligan*** "pioneer[ed] new ground" (p. 217) remains obscure.

So what ***are*** the so-called civil liberties involved in ***Milligan***? According to Milligan's lawyers, they are those rights that "give the citizen [a] shield against his government" in "the administration of punitive justice."[4] These include: the rights to be informed of the charges, to a grand jury indictment for capital crimes, to the assistance of counsel, to a speedy and public trial, to an impartial jury, to confront witnesses, and to be free from cruel or unusual punishment; the requirement of a unanimous verdict; the privilege against self-incrimination; the prohibition against ***ex post facto*** laws; protection against illegal search and seizure; and protection against double indemnity. Justice Davis adopted a similar view, referring to the right at risk as "the birthright of every American citizen when charged with crime, to be tried and punished according to law."[5] This includes Article I's right "to test the validity of his trial and sentence" through writs of ***habeas corpus***; the Fifth Amendment's right to due process, including a grand jury indictment for capital offenses; and the right to trial by jury, expressed in the Sixth Amendment and "fortified in the organic law."[6]

This suggests that rather than employ the capacious term "civil liberties" (particularly in light of the confusing history of the term and the contemporary distinctions drawn between civil rights and civil liberties[7]), a more descriptive category for the rights involved would be helpful in clarifying the precise role of ***Milligan*** in the development of nineteenth-century rights jurisprudence. The focus on legal process—as Milligan's lawyer put it, rights involved in "the administration of punitive justice"—indicates that something like "procedural due process rights in the criminal context," albeit more ungainly, would be more precise.

This unfortunate ambiguity aside, ***Ex Parte Milligan Reconsidered*** makes a number of compelling claims. One is that the protection of the civil liberties (procedural due process rights in the criminal context) of black persons was "inversely related" to protection of civil liberties for white persons (p. 19). By employing military tribunals, Jonathan W. White explains, the procedural due process rights of black persons were augmented, even as those of men like Milligan were infringed. This was because the ability of African Americans to access justice in the courts of Southern and border states was severely limited by such discriminatory laws as, for instance, prohibitions on black witnesses' testifying against white persons, as well as by racist judges, prosecutors, and other legal

actors who effectively prevented black victims from obtaining redress. Military tribunals offered a forum not governed by Black Code criminal procedure and less permeated by racism, so black persons were able to exercise their rights and liberties more fully there than in civil courts. As Michael Haggerty deftly illuminates, the greater protection of black persons' due process rights offered by military tribunals was starkly apparent to Justice Salmon P. Chase, whose background included defending fugitive slaves (p. 230). This, Haggerty argues, motivated Chase's disagreement with Davis in his concurrence; in asserting that there might be situations in which military tribunals would be necessary even in locales where civil courts were functioning, Chase was thinking about Southern courts' willingness to deprive African Americans of their rights.

By situating ***Milligan*** within the context of the struggle by African Americans for justice in the legal system during and after the Civil War, the chapters by White, Haggerty, and Mark S. Schantz provide a valuable addition to a growing trend of scholarship intent on unearthing the role of race in all areas of American law. Yet other chapters in the book do not address the issue of race, focusing on other important aspects of ***Milligan***'s context. Although this is no way detracts from the value of the scholarship in this book, the subtitle "Race and Civil Liberties from the Lincoln Administration to the War on Terror" and the introduction's claim that the book "put[s] African Americans back in the center of the picture" (p. 19) is somewhat misleading. What these chapters do reveal is that tensions over abolitionism and the rights of African Americans was one crucial element of a multifaceted conflict—which also included political factionalism, economic conditions, and class antagonism—that formed the legal landscape in which ***Milligan*** was decided.

An additional inquiry that emerges from this book is how, if at all, ***Milligan*** and similar cases impacted the drafting of and debates over the Fourteenth Amendment. The casual mention in chapter 11 that Representative John Bingham, a drafter of the amendment, opposed the ***Milligan*** ruling, raises the question of whether and how the concept of "liberty" was understood differently in the case versus in the amendment. The Fourteenth Amendment constitutionalized the role of the courts in protecting individual rights, including the right to due process in the protection of liberty, against state incursion. If ***Milligan*** was, as Davis and Milligan's lawyers claimed, a case about shielding individual liberty from authoritarian government, why did Bingham criticize the case, yet embrace the Fourteenth Amendment? As all good works of history do, ***Ex Parte Milligan*** leaves the reader with more questions than answers.

Lastly, as the United States grapples with the current state of politics, in which violent insurgencies, domestic terrorism, and lack of access to justice in the criminal law system for African Americans are issues of immediate concern, ***Ex Parte Milligan Reconsidered*** is strikingly relevant. Using military tribunals to try current and former veterans who took part in the January 6th insurrection at the Capitol has already begun to be discussed.[8] It bears considering how ***Milligan*** illuminates the history of these contemporary challenges, as well as the lessons we can draw from it.

Notes

[1]. Ex parte Milligan, 71 U.S. 2, 125 (1866).

[2]. ***Milligan***, 71 U.S. at 141 (Chase, C. J., concurring).

[3]. 323 U.S. 214 (1944).

[4]. ***Milligan***, 71 U.S. at 67.

[5]. ***Milligan***, 71 U.S. at 119.

[6]. ***Milligan***, 71 U.S. at 112, 119, 123.

[7]. See Laura Weinrib, *The Taming of Free Speech: America's Civil Liberties Compromise* (Cambridge, MA: Harvard University Press, 2016); Christopher W. Schmidt, "The Civil Rights-Civil Liberties Divide," *Stanford Journal of Civil Rights & Civil Liberties* 12, no. 1 (February 2016): 1-42.

[8]. *See* Jeet Heer, "Military in the Capitol Insurrection Should Face Courts-Martial," *The Nation* (January 11, 2021), https://www.thenation.com/article/politics/capitol-insurrection-court-martial/; Meghann Myers, Leo Shane III, Todd South, and Kyle Rempfer, "How Many Troops Were Involved in the Capitol Riot? Figuring That Out Won't Be Easy," *Military Times* (January 11, 2021), https://www.militarytimes.com/news/your-military/2021/01/11/how-many-troops-were-involved-in-the-capitol-riot-figuring-that-out-wont-be-easy/).