AMERICAN CONSTITUTIONALISM
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Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 6: The Civil War and Reconstruction—Criminal Justice/Due Process and Habeas Corpus/Reconstruction

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

William McCardle was the editor of the Vicksburg Daily Times. *He regularly published articles sharply critical of Reconstruction policies and the military officials carrying out Reconstruction policies. One article described a Union officer as "a vulgar, spectacled brute," who "upon the complaint of any negro, will send his bayonets and bring before him any white man in the city, and then bully, browbeat, and insult the unfortunate victim in his power." Another urged "every decent white man" to refrain from voting in elections to approve the Fourteenth Amendment. For these and other articles championing white supremacy, McCardle was arrested for "encourag[ing] resistance to legal authority." Consistent with the First Reconstruction Act, a military commission was organized to try McCardle. Before that trial took place, McCardle asked a federal court for a writ of habeas corpus. Judge Hill, the local federal judge, rejected McCardle's petition. Hill's opinion declared, "the offense is one upon which he is subject to arrest and trial before the military tribunal. This is an offence against the public peace—one of the very objects which the military commander is enjoined to preserve."*

McCardle appealed to the Supreme Court. His petition for habeas corpus claimed that the First Reconstruction Act unconstitutionally authorized military trials in the South. David Dudley Field (1805–94), the country's leading authority on civil procedure,[1] *and Jeremiah Black (1810–83), the attorney general in the Buchanan administration, were among the "dream team" of prominent Democrats who saw the* McCardle *case as a vehicle to gain a judicial decision striking down the First Reconstruction Act. The Johnson administration had no interest in prosecuting McCardle's case. The government was instead represented by Senator Lyman Trumbull, the chair of the Senate Judiciary Committee.*

The Supreme Court refused to hear McCardle's appeal. After oral argument took place, Congress passed a statute repealing the law, which provided jurisdiction. The justices ruled that the repeal was constitutional. The Supreme Court never ruled on the constitutionality of martial law in the South.

The excerpts below are from the Field and Trumbull briefs in Ex parte McCardle. *What congressional powers did Trumbull believe justified martial law? Why did Field claim those powers do not justify martial law? President Andrew Johnson's veto message maintained that martial law was unnecessary in the Reconstruction South. How do the briefs in* Ex parte McCardle *depict those conditions? Does the constitutionality of martial law depend on whose characterization of those conditions is correct? The Field brief relies heavily on* Ex Parte Milligan. *Senator Trumbull's brief does not mention* Milligan. *Would a court committed to* Milligan *declare the First Reconstruction Act unconstitutional? Could you make an argument that martial law in the South was consistent with* Ex parte Milligan*?*

Brief of DAVID DUDLEY FIELD, for Appellant

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. . . My proposition is that a military government cannot be set up in the United States for any of the purposes mentioned, and the reason is this: *military government is prohibited by the Constitution*. Not disputing the proposition that Congress may pass all laws necessary or proper for carrying into effect any

[1] David Dudley Field was Justice Stephen Field's brother.

of the express powers conferred upon any department of the government, and that Congress is in general the judge both of the necessity and the means, the proposition is to be taken with this qualification or limitation; that is, that the means must not be such as are prohibited by other parts of the Constitution. A lawful end, an end expressly authorized by the Constitution, cannot be obtained by *prohibited means*.

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. . . Among the prohibitions are the following: that Congress cannot abridge the freedom of speech or of the press; cannot infringe the right of the people to keep and bear arms; cannot subject any person not in the military service to answer for crime, but upon the previous action of a grand jury; cannot bring an accused person to trial but by a jury; cannot deprive any person of life, liberty, or property, without due process of law. Therefore, in the choice of means for obtaining an end, however good, Congress cannot authorize the trial of any person, not impressed with a military character, for any crime whatever, except by means of a grand jury first accusing, and a trial jury afterwards deciding the accusation.

This prohibition is fatal to the military government of civilians wherever, whenever, and under whatever circumstances attempted. Such a government cannot exist without military courts, military arrests, and military trials. The military government set up in Mississippi could not exist a day without them.

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. . . It is true that the judgment [in *Ex parte Milligan*] did not *in terms* embrace the rebel States, for the discussions at the bar, as well as the opinions from the bench, appear to have been carefully withdrawn from their disturbing influence; but it is nevertheless to be observed, that the principles declared are universal in their application. Among other things, it was adjudged that "the guaranty of trial by jury contained in the Constitution was intended for a state or war as well as a time of peace and is equally binding upon rulers and people at all times and under all circumstances:" and also that "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 tis given to suspend in certain cases the privilege of the writ of habeas corpus."

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Whether there is "*adequate* protection for life and property" in the State of Mississippi I do not know, as I do not know what is meant by *adequate* protection. According to European ideas there is not "adequate protection for life or property" in some of the most loyal States of this Union.

. . .

A third reason given for the military government of the South is, that the rebel States and their people forfeited their rights by the rebellion. To this argument it might be answered, that our present concern is not what they deserve, but what we have a right to do. We are restrained by the Constitution which we have fought to maintain, and which we now assert for the sake of our own rights. . . [I]t is not true that traitors have no rights; they have all their rights until they are judicially condemned, or perhaps the better form of stating the proposition is, that they are not to be accounted traitors until they are convicted of treason. The Constitution has carefully defined treason to consist in levying war against the United States or adhering to their enemies, giving them aid and comfort, and has declared that no person shall be convicted of crime unless on the testimony of two witnesses to the same overt act, or upon confession in open court. So there can be neither treason nor penalty of treason, until after conviction; and Congress has not competency to convict however great and manifest may be the crime.

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[C]ivil war can no longer be recognized as existing in Mississippi, because the courts are open. Therefore, whether during the war, the just exercise of belligerent rights would have authorized the Federal Government to take into its hands the entire government of that State, there is no warrant for any such exercise now.

. . . I might add as an additional and conclusive argument of itself, that in a civil war there can be strictly speaking, no such occupation—*occupatio bellica*. . . .

. . . In a civil war, the military power is called in only to maintain the Government in the exercise of its legitimate civil authority. No success can extend the power of any department beyond the limits

prescribed by the organic law. That would be not to maintain the Constitution, but to subvert it. Any act of Congress which would annul the rights of any State under the Constitution, and permanently subject the inhabitants to arbitrary power, would be as utterly unconstitutional and void as the secession ordinances with which this atrocious rebellion commenced. . . .

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Argument of HON. LYMAN TRUMBULL

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The propositions which I have endeavored to maintain are, first, that this court has no jurisdiction of the case, because the act of February 5, 1867, did not authorize the Circuit Court to take jurisdiction of it.

2d. That if it has jurisdiction, it is bound to follow the decision of the political departments of the government and hold that no legal State government exists in Mississippi, and that its condition is such as to warrant the employment of a military force therein to prevent insurrection and preserve the public peace.

3d. That Congress having called forth this military power, and the President having assigned a general of the army to command in Mississippi, this court cannot question the propriety of what has been done.

4th. If, however, the court should hold differently, and that it may inquire into these questions, then it is insisted that the act of Congress of March 2, 1867, is strictly constitutional, and that the power to pass it is to be found in the specific grants of war powers to Congress by the Constitution.

5th. It is insisted that, according to the law of nations, this government, having belligerent rights had authority, through its military power, to inaugurate a government at the close of the war over the people of Mississippi, temporarily at least; that there must be a time between the overthrow of the hostile government and the inauguration of a new civil government, when to prevent anarchy the military authority must intervene, and it is for Congress to determine how long that intervention is necessary. But if this court was competent to make the inquiry, it is insisted the facts of the case are such as to warrant the exercise of military power in Mississippi for the present.

We say next, that the jury trial which is guaranteed by the Constitution is no more a constitutional right than the right to make war and suppress insurrection, and that both these provisions of the constitution are to be construed with reference to the state of things to which they are applicable; that a jury trial is as inapplicable to a state of war as is an army to the decision of judicial questions in time of peace. . . .

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. . . I ask the court not to lose sight of the fact, that to preserve the liberty of the citizen, it is necessary also to maintain the authority of the government. It is by virtue of the Constitution and the laws that you yourselves preside here. Can the Constitution be maintained, if the doctrine is to prevail that this government has not the necessary power to preserve itself?

And how can it preserve itself if the moment a hostile State is overcome in arms, its traitorous subjects can inaugurate a new government for the persecution of Union men? The only reason for interfering in the rebel States after the close of the war was to protect Union men, and have governments that should be in obedience and conformity to the Constitution and the laws of the United States. Does not the power exist to exact such conditions? If it does not, then the Constitution of the United States is a failure. I cannot believe this court will come to such a conclusion, as it would render the whole war abortive, and deny to the government the means of self-preservation. No; as you love the Constitution, and as you love liberty protected by the Constitution, I beg you remember that the two are inseparable, and that any construction of the former which shall take from it the means of self-preservation, will also destroy the liberties it was made to secure.