No Trial By Jury With Lincoln

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During the American Civil War, President Lincoln and his Administration suspended the right to a jury trial by suspending the writ of Habeas Corpus and using military commissions to try civilians. This study first explores the suspension of the writ of Habeas Corpus. It then discusses 262 military commission cases, selected for comparative study. These cases took place between 1861 and 1866. The purpose of this study is to bring to light a little-known aspect of the Civil War, the use of military commissions to try civilians, for use as a tool in future studies, and show that the suspension of the right to a jury trial in the past connects to current issues involving suspended civil liberties.

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1.0 WHAT IF THERE WAS NO JURY?

Trial by jury is one of the most basic rights Americans possess. When we hear this phrase, our minds almost instantly conjure images of wood-paneled courtrooms, complete with high ceilings, council tables for the attorneys, a jury box, and the judge's bench. But what if there were no attorneys? Or, the attorneys were not allowed to speak? (Some might say that both of these are good ideas!) But, what if there was no judge? What if, instead of presenting your case to a judge, you presented your case to a panel—a commission. What if the members of this commission were military officers instead of civilians? Furthermore, what if there was no jury?

In his book American Bastile (1881), John A. Marshall asks a judge, "Do you think, Judge, that the people are aware to what extent their rights have been lately trampled on and their liberties disregarded?"[1] I was unable to find any biography or background information on Marshall. It is also unclear whether Marshall's conversation with his Honorable friend is accurate (it is quite an extensive conversation!). What can be determined, however, is that Marshall, writing almost immediately after the Civil War, has a very strong opinion about the Lincoln Administration's suspension of the civil liberty of a trial by jury.

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[1] Marshall, John A. American Bastile: A History of the Illegal Arrests and Imprisonment of American Citizens in the North and Border States, on Account of Their Political Opinions, During the Late Civil War Philadelphia, PA: Thomas Hartley & Co., 1881, p. xii*
*Title spelled in this document as it appeared in original print.

During the American Civil War, President Abraham Lincoln, with the help of his administration and members of the Republican Party, decided to suspend the civil liberty of a trial by jury. He did this in two ways. Lincoln suspended the writ of Habeas Corpus and allowed civilians to be tried in military courts during the Civil War. This created a great deal of dissent from the United States Supreme Court, the Democratic Party, and civilians. Lincoln and his administration responded to this by defending the suspension of the right to a jury trial as necessary for the safety of the Union.

The right to a trial by jury and the right of a civilian to not be ruled by military law have long been cherished in English and American history. Magna Carta, the Petition of Right, the Declaration of Independence, and the Bill of Rights all state how inappropriate it is to use military law against civilians or hold a person in prison without charging him with a crime. Writs of Habeas Corpus protect the right to a trial by jury. The Latin phrase 'Habeas Corpus' means 'you have the body'.[2] A writ of Habeas Corpus allows a detainee to be brought before a judge to determine the sufficiency of the charges being brought against him and to set a date for a formal trial proceeding. The act of suspending the writ of Habeas Corpus forced detainees to remain in prison for an undetermined amount of time without a trial. Lincoln also authorized his commanding generals to try those arrested by military commission or military tribunal, a trial very similar to a court-martial. Military tribunals use officer juries as a part of the adjudication process, thus denying American citizens the right to a trial by a civilian jury.[3]

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[2] US Legal Definitions http://definitions.uslegal.com © 2001-2008, September 2008

[3] Neely, Mark E. The Fate of Liberty: Abraham Lincoln and Civil Liberties Oxford University Press, NY 1991. 41.*

* In my research, the phrase "military commissions" and "military trial" have been used interchangeably to mean "trials of civilians by military authority". I will also use these terms interchangeably. Furthermore, the Old Military Records located at the National Archives use the term "courts-martial" to reference a trial of military personnel by the military, whereas the term "military commission" is used to indicate a trial of a civilian by the military.

The use of military commissions to try civilians during war did not stop in the nineteenth century. In fact, the precedent set down by Lincoln made possible the use of military commissions in the twenty-first century, under the Bush Administration, following the events of September 11.

2.0 "LET ME KNOW WHAT YOU FIND"

In order to graduate with Honors in History at the University of Pittsburgh, students must complete an Honors Seminar Course in Writing. It was my Honors Writing Professor, Dr. Hall, who first introduced me to the idea of 'looking into' Lincoln's suspension of the right to a jury trial. In the second week of the Fall Term of 2008, I still did not have a topic to begin researching for my final paper. After discovering my obsession with legal history and my fervent desire to attend law school, he suggested I do a simple Google search on "Lincoln and civil liberties," just to "get the ball rolling." He said, "Let me know what you find. I think you'll be surprised."

And surprised I was. I had discovered an ugly part of American History, a part that none of my high school history teachers, for all of my Advanced Placement classes, had taught me about, a part of history that I was not supposed to know about. One of America's most mythological figures, Lincoln, had jeopardized one of the most basic liberties—the right to a trial by jury. Why did this happen? I followed my research down several avenues. First to the arguments presented by historians on whether or not Lincoln was correct to suspend the right to a jury trial. What did the 'experts'—mostly lawyers and historians—think of this? The jury was out. The debate was still ongoing. Additionally, the sources were few. While many historians have studied Lincoln, and equally as many—if not, more—the Civil War as a whole, few from either category even mentioned the suspension of the right to a jury trial. If the suspension was

mentioned, the historian would point out the suspension of the writ of Habeas Corpus, but completely ignore the use of the military commissions to try civilians.

Such is the case in Abraham Lincoln and a Nation worth Fighting For by James A. Rawley. The book details the steps taken by President Lincoln to preserve the Union throughout the duration of the Civil War. The suspension of Habeas Corpus is briefly mentioned, along with the famous case *ex parte Merryman*. There is no mention, however, of the use of military commissions to try civilians. Rawley writes:

> As the war progressed he would by sweeping proclamations suspend the privilege of the writ of Habeas Corpus, suppressing civil liberties in the North; emancipate rebels' slaves held in bondage under state law in the South; and assume control of Reconstruction—a power the Supreme Court four years after the war ruled belonged to Congress. Still, Lincoln was not a dictator as sometimes charged.[4]

I include this quote not to agree with or dispute Rawley, only to show that this passage is typical of the historical record's treatment of the suspension of Habeas Corpus. A passage like this is similar to most of the secondary sources I found on Lincoln and/or the Civil War. This passage simply acknowledges that the suspension of Habeas Corpus occurred while ignoring the use of military commissions for civilian trials. It is easy to see how many of the secondary sources available to me were not very useful for my research.

In my research, I have only found two sources with more details of the suspension of civil liberties: The Fate of Liberty: Abraham Lincoln and Civil Liberties by Mark E. Neely, and Lincoln's Constitution by Daniel Farber.

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[4] Rawley, James A. Abraham Lincoln and a Nation worth Fighting For University of Nebraska Press: 2003 p. 47

Neely presents the suspension of Habeas Corpus, a study of the military arrest records, and a brief study of the military commissions that took place in Missouri. For example, when discussing the military commissions, Neely states:

> The system of trials by military commission definitely stood a step above no law at all, and it embodied some mercy as well as military justice. The president did have some kind of systematic effect here, because certain kinds of cases were always referred to him, because good records were kept of these trials, and because their quantity was limited enough to allow Lincoln to examine a substantial percentage of the cases. This is unlike the situation for the masses of prisoners of state who were not tried by military commission.[5]

Neely's work, though similar, is fundamentally different, from my work. Neely states in his introduction that his book "…will examine…the practical impact on civil liberties of the policies Lincoln developed to save the Union."[6] Throughout the course of his study, Neely is looking for a whole picture of civil liberties in the civil war. Like me, Neely discusses the development of the suspension of Habeas Corpus and the justifications given by the Republican party for this measure. Neely also briefly discusses the use of the military to try civilians in Missouri.

This, however, is where the similarities end. Neely uses the arrest records to understand violations of civil liberties during the civil war. My research has centered on the use of military commissions. That is to say, instead of looking to the numbers of how many people were arrested and where they were imprisoned during the course of the civil war, I looked to the records of the trial proceedings. Although Neely also uses trial records from Missouri, I did not limit my information to one state because I wanted to understand the widespread use of military commissions.

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[5] Neely, 166
[6] Neely, xi

The military court proceedings of the Civil War are more useful for examining the widespread suspension of the right to a jury trial because this they give us more than just numbers. Instead of saying "X number of people were arrested and held at Fort Y," we can compare the trial records to see how the system was put into practice—how the suspension of the right to a trial by jury was actually applied.

Farber concentrates on the constitutionality of the suspension of Habeas Corpus, specifically dealing with how much power the constitution gives the president. For example, in Chapter Six, Farber delineates both sides of the question: How much power does the President actually have?

> Advocates of broad presidential power argue that the vesting clause is the key to Article II. Like the clause vesting the judicial power in the federal courts, they contend, it infuses the relevant officials with general powers….Their [advocates of broad presidential power] argument has not gone unchallenged. Critics retort that there was no well-understood bundle of executive powers that could simply be conveyed by the vesting clause….[7]

Although both sources have been beneficial to my study of President Lincoln and the suspension of the right to a jury trial, they did not give me a full picture. Neither offered much information regarding the broader scope of the use of military trials on civilians.

I decided that maybe it would be best to 'hear' from the man himself: Lincoln. Several editions of "The Collected Works of Lincoln" later, I had a clear picture that Lincoln was doing what he thought the situation called for to save the Union. I also saw that Lincoln's actions to suspend the civil liberty of a trial by jury were challenged even in his own time, however. At this point, my research took me through letters written by Roger Taney, Chief Justice of the Supreme Court, and Edward Bates, Attorney General, to name a few.

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[7] Farber, Daniel Lincoln's Constitution University of Chicago Press, 2003. 123

I was still not satisfied with my knowledge—or lack thereof—of the military commissions authorized by Lincoln and carried out by his commanding officers during the Civil War; the second way that Lincoln suspended the right to a trial by jury. I was unsure of what to do at this point, however, having almost nothing from secondary sources on the subject. Fortunately, I had been reviewing the cases in The War of the Rebellion: The Official Records of the Union and Confederate Armies, Serial 2, Volume 1. This compilation of the official records from the Civil War included a few examples of military commission trials of civilians in the state of Missouri. Setting up a simple Excel Spreadsheet on my computer, I recorded the name of the defendant, the date of the trial, the charges brought against the defendant, how the defendant pleaded, the findings of the court, the sentence, and whether or not the sentence was carried out, in addition to any other relevant trial notes. It was my project advisor, Dr. Karsten, who suggested that I expand my comparable data to include cases from other states such as Ohio and Maryland. He spoke to the Dean of the Honors College to help fund my trip to the National Archives in Washington, D.C., to do more research—examine cases from other states. After contacting the National Archives and the University Honors College, I was on my way.

I spent three days in the second floor research room for eight hours each day. In twenty - four total hours, I read 162 cases, adding the data from each case to my spreadsheet. Including the 100 trials contained in the Official Records, all of which were from Missouri, my final case total count came to 262 cases.

Another source of great interest to me was John A. Marshall's American Bastile. This book is by far the closest thing to what I am attempting to do. It compiles the stories of a number of civilians in the Northern states who were arrested and tried by military commission. Marshall

recounts stories of the arrests and trials of civilians. This source is the closest thing I have to a first-hand account of the trials.

This source, however, was not without problems. One of the most pressing problems with Marshall is the fact that he is terribly biased against the Republicans and the Lincoln Administration. This opens up the possibility that Marshall exaggerates details of the arrests and trials. As Neely puts it, American Bastile is "essentially a book of martyrs."[8] Another problem is that his accounts of the arrest and trial of the various individuals narrative accounts of individuals, without many details of the trial procedure. He is more concerned with the fact that those arrested were judges and other, mainly Democratic, public officials, and the conditions these people were forced to endure during their incarceration, rather than the trial, the sentence, and the evidence. For example, in his account of Clement L. Vallandigham's arrest, Marshall gives so much background on Vallandigham that that chapter takes on the appearance of a mini-biography.

My work will focus on the trials themselves. The purpose of my research is to shed light on an area of history that, previously, has been rarely studied and, when studied, studied ineffectively. I will try to delineate, without bias, how the military commissions were employed and how extensively they were used. My work centers on the actual trials, as I attempt to understand what occurred during them. My hope is to introduce the military commission transcripts as a unique tool that allows Civil War historians to view the suspension of the right to a jury trial in multiple ways.

[8] Neely, 225

3.0 ROADMAP

My aim is to determine the nature of the military tribunals that took place in the course of the Civil War. These records can be of great use in future studies. The trial records contain rich details that can be compared. Additionally, understanding the military trials of the Civil War as a facet of the suspension of civil liberties during the Civil War can give insight into current instances of suspended civil liberties—in particular, the suspension of the right to a trial by jury. We can see how our present has been shaped by the past. I will connect the military trials of civilians and the suspension of Habeas Corpus during the Civil War with the military commissions and the suspension of Habeas Corpus that were recently enacted under George W. Bush's Presidency.

First, I will set the stage for the presentation of my findings by discussing a few cases that many historians are already familiar with: the cases of *ex parte Merryman, ex parte Vallandigham,* and *ex parte Milligan.* I will detail the facts of the cases, the court rulings and opinions, and the historical significance of each case. This will set up a chronological context for my findings. I will also bring to light less well-known cases that I found in my research.

After laying the foundation, I will relate my findings to the greater picture that is American History. The Civil War was certainly not the only time that civilians were tried in military courts. Under the Bush Administration, "enemy combatants" were detained in military prisons in Iraq and Guantanamo Bay without a trial and no ability to petition a court for a writ of

Habeas Corpus. Arguments both for and against the actions of the Bush Administration can be said to have their roots in Lincoln's suspension of the right to a jury trial. I will then outline the current, ongoing debate amongst modern historians about whether or not Lincoln had the power to utilize military commissions for civilians and suspend the privilege of the writ of Habeas Corpus.

Next, I will move into the historical context of the suspension of the civil liberty of a trial by jury. I will first discuss the suspension of the writ of Habeas Corpus. I will provide actual legislation that was passed by Lincoln, his cabinet, and Congress. I will show both sides of the historical debate on the subject. Both sides, those defending Lincoln's act to suspend the writ of Habeas Corpus and those opposing it, drew on the Constitution to support their arguments.

I will present my research on the military commissions at this point. I will first discuss the set-up of the court and the procedures of the court. I will detail my research experience—my method and process, problems that I faced while researching, as well as comparing my expectations of what I might find to what I actually found. I will then move into explanation of my findings. After outlining my research findings, I will explain my conclusion that the military commission records can be used as a valuable resource in future studies. The military commission records of the Civil War may also help us to understand the current instance of the suspension of the right to a jury trial occurring at the United States military prison in Guantanamo Bay. I then will outline potential future studies in which the military commission records can be utilized.

4.0 LINCOLN, TANEY, HABEAS CORPUS, AND MILITARY AUTHORITY

In 1861, just after the fighting at Fort Sumter began, President Lincoln issued executive orders to suspend the privilege of the writ of Habeas Corpus. The early order suspended the writ in and around the Washington, D.C. area and along the railroads leading to Philadelphia including Maryland. John Merryman was arrested in Maryland for his participation in the destruction of railroad lines and his role in recruiting men for the Confederate Army.[9]

Jailed by the military, Merryman petitioned the Supreme Court for a writ of Habeas Corpus. Sitting in the Circuit Court at Baltimore, Chief Justice Taney requested that the prisoner, with a copy of the warrant and orders used to arrest the prisoner, be brought before him in court. General Cadwalader, the commanding general of Fort McHenry where Merryman was imprisoned, refused to comply with the court, citing the executive orders from Lincoln.[10]

Acting on his own, Taney constructed and published his opinion on Merryman's situation. Taney held that the military had no authority to arrest John Merryman. He argued that President Lincoln had no power to suspend the writ of Habeas Corpus or use the military against a civilian.

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[9] Finkelman, Paul, "Limiting Rights in Times of Crisis: Our Civil War Experience—A History Lesson for a Post-9-11 America" Yeshiva University, Cardozo Public Law, Policy, and Ethics Journal, 2003

[10] *Ex Parte Merryman* 1861 "US Supreme Court Cases" Justia.com US Supreme Court Center September 30, 2008 http://supreme.justia.com

"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…The President has exercised a power which he does not possess under the Constitution…."[11]

This early case illustrates the arrest and trial of civilians by military authority in Civil War. Many defendants, like Merryman, and Buckner Morris in Ohio in 1864, did not believe that the military could try civilians because it did not have the proper jurisdiction.

The location: Cincinnati, Ohio, in the middle of December 1864. A military commission tried Buckner S. Morris for "conspiring against the US in violation of the laws of war to release military prisoners held by the US" and "Conspiracy to destroy the city of Chicago."[12] At sixty-eight years old, Morris was a well-known and well-liked judge and politician in Illinois.[13] In American Bastile, Marshall vividly describes Judge Morris being wakened at two o'clock in the morning, imprisoned, and then later transferred to Cincinnati for trial before a military commission. To both charges and their specifications, Morris pled "Not Guilty."[14]

In his response to the charges, Morris alleged that the military commission had no jurisdiction over the case for two important reasons. First, Morris and his co-defendants were civilians who were in no way connected to the military, therefore not under the color of military law. Second, he argued that although Congress had passed an act in 1863 allowing the military to try civilians, the military had no jurisdiction over the Northern states, where civilian courts were still in session, untouched by the war. His plea asked that he and his co-defendants be allowed the opportunity to respond to the charges against them in civil court. Morris maintained, "It

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[11] Ibid.
[12] National Archives Old Military Records, Civil War, Record Group 153 "Records of the Judge Advocate General", File MM2185, Washington, D.C., July 23, 2009*
* Henceforth, I will reference materials from the National Archives as "NA: File #"
[13] Marshall, John A., 625
[14] NA: MM2185

cannot be claimed that these courts are a matter of necessity, as the civil courts of the land are open."[15]

In his telling of the events of the trial, Marshall takes care to emphasize the conditions in which Judge Morris stood trial. He writes,

> The trial lasted some four months. During most of this time, *the prisoners were chained in pairs, and were so marched up and down the streets, to and from the Court,* until the public began to complain of such barbarous treatment….The trial did not close until the assassination of President Lincoln, which the Judge Advocate…used with great force against them, charging the prisoners with more or less being the cause thereof. After a confinement of six months they were found *not guilty* and discharged from military custody.[16]

The italics used in this quote are Marshall's, not mine.

Another case in Ohio became one of the most famous incidents of civilian arrest and military trial during the Civil War. This was the case of Clement Vallandigham, a Democratic politician famous for vocal opposition to the Civil War. Vallandigham was charged with violating orders that prohibited committing "acts for the benefit of the enemy…declaring sympathies for the enemy."[17] At a gathering in May 1863, Vallandigham allegedly spoke harshly against the President, the government, and the war. He was taken into custody and brought to trial by military commission.

Marshall goes into extensive detail on this case. He gives a brief biography of Vallandigham, and background on Vallandigham's political career. The narrative then turns to an account of Vallandigham's arrest and military commission. At his trial, Vallandigham argued that the military had no jurisdiction over his case.

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[15] Marshall, John A., 627
[16] Ibid.
[17] *Ex parte Vallandigham* 68 US 243, 1864 "US Supreme Court Cases" Justia.com US Supreme Court Center September 30, 2008 http://supreme.justia.com

Vallandigham appealed his case to the Supreme Court. Although Chief Justice Taney had initially written an opinion opposing the *Merryman* decision in 1861 (Taney wanted to grant a writ of Habeas Corpus to Merryman), the Supreme Court in 1863 did nothing to help Clement Vallandigham. In 1864, Chase had become the new Chief Justice. Chase was an abolitionist more willing to go along with the policies of the Lincoln Administration. Justice Wayne delivered the opinion of the court, declaring that the Constitution did not allow the Supreme Court original jurisdiction of the matter, enumerated in the Constitution.[18] The court cited two sources of military jurisdiction: the statutes and the "common law of war." The court stated that military commissions, not courts-martial, could try non-military offenses, once military authority was established. The court then went on to state that such is the case in a time of rebellion, much like "the present one." The Supreme Court unanimously held that it could not act as an appellate court for military commissions because it did not have the authority.[19] It could be that the Supreme Court did not act in this case because it knew that the executive and legislative branches of government would ignore a ruling in Vallandigham's favor. Nevertheless, two years later, the Court's decision in the *Milligan Case* provided a different result.

Lamdin Milligan, civilian, was arrested by the military in Indiana. In 1866, the Supreme Court, referred to the Fourth, Fifth, and Sixth Amendments to the Constitution, and determined that Milligan's rights had been violated, based on the fact that Milligan was a resident—civilian—*of Indiana, a state that had never opposed or challenged the Federal Government.* [20] Because Indiana had never opposed the Federal government, the state's open Circuit Courts that would have had the power to issue Milligan a writ of Habeas Corpus, should have been allowed

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[18] Ibid.
[19] Ibid.
[20] *Ex Parte Milligan* 71 US 2, 4 Wall. 2, 18 L.Ed. 281, 1866 US LEXIS 861 (1866), "US Supreme Court Cases" Justia.com US Supreme Court Center September 30, 2008 http://supreme.justia.com

to do so.[21] Thus, the military commission that tried Milligan had no real jurisdiction to hear the case in the first place.

It is important to note that this case has never been overruled.[22] Because this case has never been overturned, it can still be used as precedent if a similar fact pattern ever arose.[23] This case has recently been referenced as mandatory authority, or a rule that must be followed, for decisions arising from the detention of suspected "enemy combatants" in the United States military prison in Guantanamo Bay, Cuba.

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[21] Ibid.

[22] A search of Shepard's on LexisNexis has returned a result of 'no negative case history', 'cited' in 476 cases, and 'followed' in 12 cases. This means that the *Milligan case* has not been overturned. The case was first cited in 1871 as a part of the *Legal Tender cases*. Recently, it been cited in the case *Boumedine v. Bush* (55 US__2008. In the *Boumedine case*, the United States Supreme Court determined that the Military Commissions Act of 2006 was an "unconstitutional suspension of habeas corpus" with a 5-4 majority decision.*
**Boumedine v. Bush* (2008), Oyez.org http://oyez.org/cases/2000-2009/2007/2007-06-1195 October 10, 2009

[23] Ex parte Milligan, 71 U.S. 2, 4 Wall. 2, 18 L. Ed. 281, 1866 U.S. LEXIS 861 (1866), Shepard's ® Monday, October 12, 2009, University of Pittsburgh, Barco Law Library

5.0 AMERICA IN THE CIVIL WAR, AMERICA POST- SEPTEMBER 11

Why are military trials of the Civil War era significant to us today? True, Lincoln's suspension of the writ of Habeas Corpus and military commissions ignited controversy during the Civil War. Americans asked how much power the president actually has according to the Constitution. Americans asked who was empowered to suspend the 'Great Writ'—Congress or the President. Americans also questioned whether military commissions could be used to try civilians in all settings. However, the questions and debates did not end in 1866.

Historians today are arguing the same questions and recalling the same arguments made in the 1860s to either attack or defend the Lincoln Administration. Almost immediately after the Civil War, Marshall wrote that he was seeking to preserve the memory in history, "for the purpose of preventing repetition of errors." His tone was highly critical of the Lincoln Administration.[24]

During those troublous times, when civil authority was made subordinate to military power, it seemed to be the object of the government at Washington to appoint agents to execute its edicts, who were ignorant of both civil and military law; who knew not the consequences which would flow from arbitrary and illegal acts; who were brutal in their natures, and who, from this ignorance, brutality, and irresponsibility, would commit the most flagitious wrongs upon innocent citizens, regardless of either law or justice.[25]

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[24] Marshall, John A., xxii
[25] Ibid, 713-714

Some historians support Lincoln's actions, arguing the president was doing everything within his power to keep order in the war-zones and keep peace within the public. Historian Mark E. Neely defends Lincoln's actions. He explains that Lincoln wanted to protect the United States and keep all states under the power of the Constitution. Judge Richard A. Posner agrees with Neely's view of Lincoln's actions. In his article "Security versus Civil Liberties," Posner states that in times of national crisis, civil liberties tend to—and should—take a backseat to security. He advocates a "cost-benefit" analysis, stating that

> [Civil liberties] *should* be curtailed, to the extent that the benefits in greater security outweigh the costs of reduced liberty. All that can reasonably be asked of the responsible legislative and judicial officials is that they weigh the costs as carefully as the benefits.[26]

He then argues that law is able to change and grow depending on the situation and circumstances for which it is needed. Posner argues that Lincoln was correct in choosing to protect the nation over civil liberties. As he puts it, "[Law] is an instrument for promoting social welfare, and as the conditions essential to that welfare change, so it must change."[27]

Other historians believe that Lincoln abused his power as President. Historian James Randall, one of the first historians to study Lincoln's suspension of Habeas Corpus and use of military tribunals, took a more critical view of Lincoln than Neely, arguing that Lincoln's actions overstepped the presidential boundaries outlined in the Constitution. Writer David Greenberg agrees with Randall. Greenberg argues that although the United States was in the midst of an emergency, Lincoln's actions were not the only viable options for national preservation. He notes that there were no controls on those individuals with the power to make arrests, creating a

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[26] Posner, Richard A. "Security versus Civil Liberties" The Atlantic December 2001 www.theatlantic.com December 2, 2008
[27] Ibid

state of near anarchy. He ends his article by calling Lincoln's decisions concerning civil liberties a "sad mistake."[28]

The use of military commissions to try non-military persons has continued up to the present-day. After the events of September 11, 2001, suspected participants and accomplices were detained in the United States at Charleston, South Carolina's brig, and at the military prison at Guantanamo Bay, Cuba. Former President George Bush suspended the writ of Habeas Corpus for these detainees. This prohibited them from challenging their detention and the allegations against them in federal court. President Bush also introduced military commissions as a method of trial.[29]

The debate on the legality of these actions has drawn sharp responses from both sides. Supporters of the Bush Administration's policies have drawn on history. They recall the events of the Civil War—Lincoln's own suspension of Habeas Corpus and use of military commissions. Supporters, such as Judge Frank Williams, Chief Justice of the Rhode Island Supreme Court and member of the review panel for appeals for the military commissions of Guantanamo Bay, recall that during the Civil War, the Supreme Court dismissed appeals calling for the "Great Writ"—the *Milligan* decision did not come about until 1866 when the war was over.[30] Supporters also note that the detainees in these recent instances are neither United States citizens nor (for the most part) on United States soil.

One of the most vocal opponents of the suspension of Habeas Corpus and the use of the military commissions is the American Civil Liberties Union (ACLU). The ACLU argued that the

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[28] Greenberg, David "Lincoln's Crackdown" Slate History Lesson September 12, 2008. http://www.slate.com, November 30, 2001*
*I understand the political and controversial nature of this source. I include it not for the accuracy of the statements, but as an illustration of a modern opposing opinion of Lincoln's suspension of the right to a jury trial.
[29] Williams, Frank J. "Abraham Lincoln and Civil Liberties in Wartime" Lecture #834 The Heritage Foundation. May 5, 2004, September 2008. http://www.heritage.org/Research/NationalSecurity/hl834.cfm
[30] Ibid.

military commissions are not criminal trials with the full rights and protections of due process. The ACLU strongly objected to the procedures of these trials because these trials unfairly permit the admission of evidence that would be excluded during a regular criminal procedure.[31] Opponents of the military commissions and suspension of Habeas Corpus argue that the current situation is identical to the *Milligan Case*. Take this excerpt from a current Supreme Court case, for example:

> Congress authorized the president to use force against 'those nations, organizations, or persons' responsible, which included both the Taliban 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…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.[32]

This quote is from one of the *amicus curiae*, or "friend of the court", briefs filed for one of the current cases before the United States Supreme Court: *Al-Marri v. Spagone*. Current cases dealing with the issue of the rights of detainees include *Hamdi v. Rumsfeld* (2004), *Hamdan v. Rumsfeld* (2006), *Boumedine v. Bush* (2008), and *Al-Marri v. Spagone* (2009).[33] Each of these cases, like the cases of John Merryman, Clement Vallandigham, and Lamdin Milligan challenged the authority of the government—particularly the executive branch—to suspend the right to a jury trial.

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[31] American Civil Liberties Union "Protecting the Rule of Law" September 2008. http://www.aclu.org/safefree/detention/johnadams.html

[32] *Al-Marri v. Spagone* Amicus Curiae Civil War Historians in Support of Petitioner January 28, 2009 (Courtesy of Paul Finkelman, President William McKinley Distinguished Professor of Law and Public Policy and Senior Fellow, Government Law Center Albany Law School, Albany NY) p. 15

[33] In March 2009, the Supreme Court determined at the *Al-Marri* case was moot because Al-Marri was transferred out of military custody and turned over to the custody of the Attorney General.*

*"Al-Marri v. Spagone" The American Civil Liberties Union, "Order Vacating the Lower Court's Judgment and Dismissing the Case as Moot" Posted March 6, 2009. Accessed October 27, 2009. http://www.aclu.org/safefree/detention/38954lgl20090306.html

I bring all of this up simply to show that issues regarding the suspension of civil liberties, particularly the right to a trial by jury, have not yet been put to rest. The existence of current cases before the Supreme Court shows that the Lincoln Administration's actions are still relevant.

6.0 SUSPENDING HABEAS CORPUS

Lincoln's decisions to suspend trial by jury differed by region of the nation. In the South and in the Border States, Lincoln used the military as his judicial system to prosecute guerillas. Lincoln gave military officers control of the occupied areas in the South and in the Border States. Justice by military tribunal did not allow for a jury. Lincoln received the most criticism for the suspension of civil liberties in the North, where civilians that had been denied the right trial by jury did not live in a war-zone. I will explore the viewpoint of those opposed to Lincoln's policies: Democratic Politicians, Civilians, and the Supreme Court.

Shortly after the Civil War began, Lincoln took action against the right to a jury trial by suspending the writ of Habeas Corpus in the summer of 1861. Lincoln's first action came in the form of executive order. [34] It reads:

> The Commanding General of the Army of the United States: You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military, line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of Habeas Corpus for the public safety, you personally, or through the officer in command at the point where resistance occurs, are authorized to suspend that writ. Given under my hand and the seal of the United States, at the city of Washington, this 27th day of April, 1861, and of the Independence of the United States the eighty-fifth. Abraham Lincoln. By the President of the United States: William H. Seward, Secretary of State.[35]

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[34] McPherson, James M, Ordeal By Fire: The Civil War and Reconstruction 3rd ed. McGraw-Hill Humanities, Social Sciences, and World Languages, NY: 2000. 285-286.

[35] Woolley, John T. and Gerhard Peters, *The American Presidency Project*, University of California September 18, 2008 http://www.presidency.ucsb.edu/ws/?pid=69748.

Congress formally supported this policy in a July special session when it allowed the president the power to suspend the writ of Habeas Corpus if he determined that the nation was confronted with rebellion, or a serious threat to the public safety.[36]

Lincoln's executive order enacted a state of martial law and suspended the writ of Habeas Corpus for any Confederate soldiers captured in and around the Washington, DC and Baltimore, Maryland area, as well as any person aiding—or suspected of aiding—the Confederate cause in April 1861.[37] Passed as a security measure, the act stated that if Washington came under attack, the capital would temporarily move to Philadelphia. This order was to protect Philadelphia, Baltimore, and Washington, and the keep the route open for President Lincoln and any potential communiqués. It also added extra security to the capital. According to Neely, "The purpose of the initial suspension of the writ of Habeas Corpus is clear from the circumstances of its issuance: to keep the military reinforcement route to the nation's capital open." The first order that Lincoln passed only suspended the right to a jury trial as an obvious security measure in a limited area.

Congress passed a second Habeas Corpus act in autumn 1862. This act expanded the suspension of Habeas Corpus in the North as a measure of enforcing the newly passed Militia Act. The Militia Act of 1862 gave the President the power to call out the military at his discretion.

> With the fact apparent that a portion of the citizens of the United States, repudiating their allegiance to the Constitution and laws of the Union…it seems that an emergency has arisen where the Executive arm should be clothed with requisite power and authority to preserve the government…and protect the honor of its flag…Under the provisions of this bill, the President

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[36] Randall, James G. Constitutional Problems Under Lincoln- Revised Edition University of Illinois Press 1951. 129.
[37] Neely, 9

can, at his discretion, call into the field every individual in the United States subject to military duty.[38]

The second Habeas Corpus act appeared in print for the first time in the October 11, 1862 edition of *Harper's Weekly* newspaper, under the headline "Domestic Intelligence: A Proclamation."[39] This new act targeted anyone who interfered with the war effort by discouraging the draft or assisting Confederates. This act detailed military arrest for such action without a trial by jury.

> …All persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice affording aid and comfort to the rebels against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts-martial or military commission. Second: That the writ of Habeas Corpus is suspended in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prisons, or other place of confinement, by any military authority, or by the sentence of any court-martial or military commission.[40]

A third Habeas Corpus Act was issued by the Republican-majority congress in 1863. This particular act targeted Northern civilians—citizens living outside of a war-zone. This act acknowledged "a rebellion has existed and is still existing" and that the "public safety does require" that those aiding, abetting, spying, or violating the laws of warfare, could be held and tried without being issued a writ of Habeas Corpus.[41] Lincoln then pronounced that "Habeas Corpus is suspended throughout the United States" and the suspension would continue until the rebellion has passed.[42]

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[38] US Congressional Set 36th Congress, 2nd Session, House of Representatives Report No. 58
[39] "Domestic Intelligence: A Proclamation" Harper's Weekly Newspaper. October 11, 1862. http://www.sonofthesouth.net/leefoundation/civil-war/1862/october/lincoln-writ-habeas-corpus.htm
[40] Ibid.
[41] Woolley
[42] Ibid

What does the Constitution tell us about Habeas Corpus? The exact wording concerning writs of Habeas Corpus can be found in Article I, Section 9, Clause 2 of the Constitution, which states:

> The privilege of the writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion of the public safety may require it.

This clause appears in the passages (Article I, Section 9) that deal essentially with the powers of Congress.

There is no mention within the language of the Constitution of who may specifically suspend the writ of Habeas Corpus in times of emergency. This created a great deal of controversy. The Republicans felt the President had every power to suspend the writ as he saw fit because there was no formal Constitutional specification. The Democrats, however, believed that only Congress had the ability to suspend the writ because the clause appeared in a section of the Constitution that appeared to deal with Congressional power.

7.0 VOCAL DISSENT

The primary arguments against Lincoln's suspension of Habeas Corpus and use of military law to suspend the civil liberty of trial by jury mainly come in the form of Supreme Court dicta and Constitutional argumentation. Much of this argumentation comes from Chief Justice Taney, a Maryland Democrat. In the *Merryman* case, Taney first stated that only the Congress had the power to suspend the writ of Habeas Corpus—not the president. Because the only mention of Habeas Corpus in the Constitution occurs in the article dealing largely with Congress, Taney writes that the matter was one that could only be settled by Congress. According to Taney, Lincoln had no constitutional authority to proclaim a suspension of Habeas Corpus.[43] Taney also recalled that the framers of the Constitution, fearful of kings and powerful executives, attempted to limit executive power.[44] In his view, even the president is bound by the Constitution.

The Vallandigham incident provides another example of public unrest over the suspension of the right to a jury trial, as well as an example of the Democratic Party's perspective on the situation. Democratic Representative Clement Vallandigham from Ohio was arrested by the military for "treason". The arrest of Vallandigham caused uproar in the Democratic Party of Ohio, calling the action "military despotism".[45]

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[43] Ibid.
[44] *Ex Parte Merryman*
[45] McPherson, 377

The most vocal dissent for the suspension of the right to a jury trial came from Northern civilians. These dissenters, mainly members of the Democratic Party, maintained that they were attacked unfairly by Lincoln's policies because military law was forced upon them and their right to a trial by jury was taken away through the suspension of the writ of Habeas Corpus, as Merryman, Morris, and Vallandigham maintained. They were civilians who did not live within a war-zone. The Northern civilians who were arrested claimed that they did not live in a war-zone, therefore, the military did not have jurisdiction over them. In the north, the normal state and federal courts, remained open and functioning, and therefore should have retained jurisdiction.

8.0 "PRESERVE, PROTECT, AND DEFEND"

The arguments presented in defense of the actions of the Lincoln Administration's actions also focused on the Constitution, with special attention to the Habeas Corpus clause and the duties of the office of the executive. Lincoln defended his own actions on two occasions. First, in the special session of Congress, called on July 4, 1861, after the first suspension of Habeas Corpus; the second time, after the Vallandigham incident and riots opposing the draft in New York City. Attorney General Bates also defended Lincoln's actions, citing Supreme Court cases in addition to the Constitution. Bates arguments appeared in an early letter to the House of Representatives following Chief Justice Taney's *Merryman* opinion in 1861.

Lincoln viewed the United States as the center of liberty. If the Union could be preserved, then liberty everywhere could be preserved. Lincoln reasoned that by proclaiming military law and suspending jury trials, the rebellion could be suppressed more quickly. He first expressed this view in his letter to the House of Representatives to be read in the special session of Congress he called for July 4, 1861. This session took place after the first Habeas Corpus Act had been passed. He held that as president, he had an obligation to preserve the Constitution no matter what the cost.[46]

[46] Neely, Mark E. "The Lincoln Administration and Arbitrary Arrests: A Reconsideration" The History Cooperative. 1983. September 12, 2008 http://www.historycooperative.org

…No choice was left but to call out the war power of the Government…for its preservation…This authority has been purposefully exercised but very sparingly. It was not believed that any law was violated. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ [of Habeas Corpus]…the Constitution itself, is silent as to…who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed that the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might have prevented, as was intended in this case, by the rebellion….[47]

In this statement, Lincoln asked the Congress to approve the actions he had taken in the emergency. He asked Congress to consider the weight of the emergency: if even one dissatisfied state were permitted to leave the Union peacefully, there would be no way to stop every state from leaving. Lincoln argued that the Constitution would have no power and as President, he would be breaking his oath to protect the Constitution. This oath can be found in Article 2, Section 1, Clause 8, "The Presidential Oath of Office".

I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my ability, preserve, protect, and defend the Constitution of the United States.

Lincoln defended his actions more publicly in 1863, when he sent two letters of reply to different groups of Democrats in New York and Ohio. In both letters, he emphasized the necessity of his actions.

In the Corning Letter—the reply to the group of New York Democrats led by Erastus Corning—Lincoln addressed a set of proposed resolutions that called for the repeal of the Habeas Corpus acts. This communication occurred just before the famous New York Draft Riots began in response to Lincoln's Conscription Act of 1862. Lincoln defended his suspension of Habeas

[47] Levy, Leonard "Message to Special Session of Congress, 1861" The Political Thought of Abraham Lincoln The American Heritage Series 1967. 180-190

Corpus, the Conscription Act, and his use of military law, calling the measures "preventative in purpose."[48] Lincoln meant to use the suspensions of the right to a jury trial as a way of stopping uprisings before they began and enforcing the new conscription act. He wrote:

> Long experience has shown that armies cannot be maintained unless desertion shall be punished by the severe penalty….Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wiley agitator who induces him to desert? I think that in such case, to silence the agitator, and save the boy, is not only constitutional, but, withal, a great mercy.[49]

Lincoln also addressed the issue of the Vallandigham incident. This letter came from the Ohio Democratic Convention asking for Vallandigham's release. In this letter, Ohio Democrats argued that Vallandigham was arrested for speaking out against the government, a violation of the First Amendment. A speech Vallandigham had given a few days before his arrest called the war "wicked" and "unnecessary."[50] In his letter, Lincoln argued that Vallandigham was not arrested on a free speech issue; rather, he was arrested for interfering with the military by inciting soldiers to desert and men to avoid the draft.[51] He wrote that Vallandigham made his speeches with the intent to "stir up the men against the prosecution of the war.…"[52]

Attorney General Bates sent a letter to the House of Representatives in July of 1861, a response to a letter from the Speaker of the House that asked for an opinion on the legality of the acts and a response to Taney's *Merryman* opinion strongly critical of the Lincoln administration.[53] Bates' response stated, first, that he agreed with Lincoln. One of his arguments

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[48] Neely, "The Lincoln Administration and Arbitrary Arrests: A Reconsideration"
[49] Levy, 255*
*I copied the text as it appears.
[50] Farber, 171
[51] Levy, 264
[52] Ibid
[53] This document was another accidental find on my part, one day while I was searching through the Congressional Serial Set at the library. I have seen this letter published in only one compilation of documents about Constitutional

from the Constitution is very similar to Lincoln's argument found within the Corning Letter concerning the Presidential Oath of Office. Bates pointed out that while other government officials must swear to support the Constitution, only the President must swear to defend it.[54] As a part of this oath, the president has the power to use the military if he deems it necessary, especially "when the existence of the nation is assailed by a great and dangerous insurrection." This would include the power to use the military to arrest spies and other conspirators.[55]

Bates then cited the Supreme Court case of *Luther v. Borden* as an example of a prior emergency when armed force was needed to put down rebellion.[56] In this case, the State of Rhode Island was in the midst of a rebellion in 1841, over whether or not the State should adopt a new State Constitution, rather than continue to a previous one, which limited the franchise to property owners.[57] To put down the rebellion, the state militia was called out. Luther argued that the current government of Rhode Island was not a "republican form of government" as mentioned in the United States Constitution.[58] Bates drew attention to the fact that in *Luther v. Borden*, the court observed that the decision to call out the state militias rested with the president, as only the president could decide what situation required the use of military force.[59] This part of the *Luther v. Borden* decision was based on an act from 1795 that stated:

History, Allen Johnson's 1912 publication Readings in American Constitutional History, but I have never seen it cited in any discussion of the suspension of civil liberties during the civil war.

[54] US Congressional Serial Set, Vol. 1114, Session Vol. 1, 37th Congress, 1st Session, House Executive Document 5, page 6

[55] Ibid

[56] Ibid., 11

[57] *Luther v. Borden* (1849) "US Supreme Court Cases" Justia.com US Supreme Court Center September 30, 2008 http://supreme.justia.com

[58] Ibid.

[59] US Congressional Serial Set,11

…in case of an insurrection in any State against the government…it shall be lawful for the President of the United States…to call forth such number of the militia of any other State or States…as he may judge sufficient to suppress such insurrection.[60]

Bates noted that President Lincoln was acting within the scope of this decision, therefore, within the scope of the law. An insurrection broke out in the Southern states and the President was simply calling forth the militia to put down the rebellion and restore the states to a republican form of government.

Professor Karsten noted Bates' omission of President Lincoln's justification for suspending the writ of Habeas Corpus in the Northern States. It is important to note the context of this letter. In 1861, when Bates wrote this letter, any suspensions of Habeas Corpus were thought to be a necessary part of a military zone protecting the United States capital. This letter does not justify the suspension of the privilege of the writ of Habeas Corpus in the North because the suspension had not yet been issued.

Bates closed his argument with the reminder that these measures to suspend trial by jury were only *temporary* measures designed to save the nation in the hour of crisis. He then called upon the Congress to support President Lincoln's temporary suspensions of the right to a jury trial.

[60] *Luther v. Borden* (1849)

9.0 MILITARY COURT SET-UP AND PROCEDURES

The term "military commission" is defined as "a military court organized in a time of war or suspension of civil power to try offenses by persons (civilians) not subject to court by a court-martial."[61] In addition to suspending the writ of Habeas Corpus, President Lincoln permitted the civilian population to be tried in military courts. Using military commissions differs from suspending the right to a jury trial than suspending the writ of Habeas Corpus. In a Habeas Corpus case, a judge strives to determine whether the detainee's right to due process was violated in his or her detention, instead of determining the guilt of the accused.[62] A military commission trial determines the guilt of a civilian without giving the civilian an opportunity to have a jury of peers present.

The military commission trials have a different courtroom set-up than civilian trials. George B. Davis' A Treatise on the Military Law of the United States dedicated a chapter to the military commissions of the Civil War. He observes that:

> Except in so far as to invest military commissions in a few cases with special jurisdiction and power of punishment, the statute law has failed to define their authority, nor has it made provision in regard to their constitution, composition, or procedure.[63]

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[61] Military commission. Merriam-Webster's Dictionary of Law. Merriam Webster, Inc. October 13, 2009 dictionary.com http://dictionaryreference.com/browse/militarycommission
[62] US Legal Definitions http://definitions.uslegal.com © 2001-2008, September 2008
[63] Davis, George B. "Martial Law" A Treatise on the Military Law of the United States 3rd Ed. 1913 NY: Wiley and Sons, Inc. p. 309

In my research, I did not find direct evidence, such as a piece of legislation that dictated the proper court composition and procedure. Rather, I found that every trial transcript began with the following header: general orders calling the commission into session and the list of officers on the commission. For example, the record of the case of J.B. Dawson, in December, 1863, in Pittsburgh, Pennsylvania, began in the following way:

> Proceedings of a military commission, which convened at Head Quarter Department of the Monongahela, Pittsburgh, Pennsylvania, by virtue of the following special order: Head Quarter Department of the Monongahela, Pittsburgh, Pa., Dec. 15th, 1863. Special Order No. 92. A military commission is hereby appointed to meet at Pittsburgh, Penna, on Wednesday the 11th, inst., or as soon thereafter as practicable for the trial of such persons as may be brought before it.[64]

Following this introduction, which could be changed to fit the time, location, and general order number, a list of the members of the commission was presented under the heading "Detail for the Commission." Because most trials took multiple days to complete, a list of commission members present, with the date and time, is given with a formal header at the beginning of the trial record for that day. Dawson's case took three days.[65]

The set-up of the military commission was quite different from that of a civilian court proceeding. Although there appeared to be no formal statutory rules from above other than the self-imposed one of a professional soldier, the military commissions of the Civil War generally followed the following arrangement: a presiding judge advocate, and a commission of at least three officers. The commission questioned the defendant. Witnesses were produced, sworn,

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[64] NA: MM1204

[65] Dawson was charged with "defrauding the United States government". He pled 'guilty', and was imprisoned in the Western Penitentiary of Pennsylvania. His sentence was approved by President Lincoln (I have a copy of the signature). When the war was over, Dawson petitioned President Johnson for release, although it is unclear whether this was granted.

questioned by the commission, and questioned by the defendant. Evidence was introduced by both sides. Evidence could consist of physical objects or documents. One case, the trial of Henry Sack at Fort Monroe in Virginia, March 1864, contained numerous documents labeled as exhibits.[66] The charges against Sack included "acting as a spy". The union army believed that the letters he carried across military lines contained valuable information. Sack argued that (and the files in the National Archives have shown) the letters were actually of a personal nature, from family and friends, attempts to maintain correspondence despite the war. At the National Archives, the letters are contained in the case file from Henry Sack. A review of the file has shown that the letters were, in fact, of personal nature—letters between cousins, aunts, uncles, siblings, and parents. At the end of the trial, Sack was sentenced to "Death by hanging." This sentence, however, was not Sack's fate. President Lincoln converted the sentence to imprisonment.

As a matter of procedure, each trial was recorded. Multiple transcripts were made for many cases. A copy of each trial's transcript was sent to higher officers so that the findings and sentence could be approved. If the higher officer disapproved of the findings, he would send a letter back to the commanders of the military districts, detailing his reasons for disapproving the findings and instructing the district officers to either release the prisoner or retry the case. For example, Michael Wade, on trial in North Carolina for larceny, was released despite a guilty plea, because of "irregularities within the trial record."[67] The higher officer could also write to his commanding officer, sometimes to the Secretary of War or the President. When a death sentence was recommended, the President reviewed the case and approved the sentence.[68]

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[66] NA: File MM1448
[67] NA: File OO1442
[68] Neely, 41

10.0 THE TRIBULATIONS OF THE RESEARCH

Researching the suspension of civil liberties during the Civil War proved to be a challenging experience. Studies of the suspension of Habeas Corpus or the use of military commissions during Lincoln's presidency suffer from two shortcomings. The first is Lincoln's place as a mythological figure in American History. Many historians are so in awe of Lincoln that they do not say a critical thing about him. These books might state a few words about the suspension of Habeas Corpus, mention the *Merryman Case*, spend another few lines justifying or defending Lincoln and his administration for these actions, and then move on without mention of the use of military commissions or details of the other side of the coin—reasons why the suspension of Habeas Corpus might have been seen as unconstitutional. The second problem is exactly the opposite. Other historians bitterly criticize Lincoln for suspending civil liberties. These historians devote books to tearing down President Lincoln without allowing that he may have felt that the suspension of the right to a jury trial was the *only* thing he could have done to preserve the Union.

There can be no substitute, however, for primary sources. The first source I turned to was the most obvious for any Civil War historian: The War of the Rebellion: The Official Records of the Union and Confederate Armies (also known as the "Official Records" or "OR's") series two,

volume one.[69] This volume contains approximately 100 cases from Missouri, exactly as found at the National Archives in Washington, D.C. I also traveled to the National Archives to get a broader spectrum of cases beyond Missouri.

I was unsure of what to expect when I arrived in D.C. at the National Archives. I was mainly concerned that I would not find many more cases beyond what has already been published from Missouri. I should not have worried. I found quite a few cases and had enough time to read 162 of them (out of 5,278). I did encounter a few unexpected issues to deal with, though. One of the first problems I had to solve was managing my time. I needed to get through as many records as quickly as possible. This problem was aggravated by the fact that the records of courts-martial trials (the military trials of military persons) were mixed with the military commissions (trials of civilians by the military). I had to go over every scrap of paper to distinguish one type of trial from the other. In the "Finding Aids" room, when I made my document requests, I attempted to solve the "time problem" by first requesting as many documents allowed at a time (30) and then by requesting files that I knew contained multiple military commission cases. When the file boxes were brought out, I searched the file I requested, as well as the rest of the files in the box. I also used a spreadsheet to keep track of my data, photocopying cases when necessary. This made note taking a quick, organized, mechanical process.

Another unexpected problem was with the records themselves. Some pages of the records were neatly typed, numbered sheets of paper, most likely transcribed from the original, handwritten version (usually attached) at a later date. Most of the records, however, were bunches of handwritten notes, either tied together, stacked together, folded together, or in some instances, written over the top of a previous note or between the lines of a previous note. I had to

[69] I checked this volume out of the library, and subsequently kept renewing it until I found a copy of my own.

read carefully to sort out what was actually occurring in the trial. There were a few records, however, where a signature or word was just plain illegible. This should be a lesson to us all about the value of neat handwriting.

The last major problem I encountered while working at the Archives was the incompleteness of the historical record. I found that a few cases, such as George Cantril's trial, which had incomplete files.[70] In December of 1864, Cantril was tried by military commission in Cincinnati, Ohio, for allegedly "conspiring against the US in violation of the laws of war to release military prisoners held by the US, and conspiring to destroy the city of Chicago". Cantril was allegedly a part of the same conspiracy that Judge Morris (discussed earlier) was charged with. The record indicates that Cantril pled "not guilty" to both charges. Unfortunately, however, it is unknown exactly what happened to Mr. Cantril because the record simply stops there. It is incomplete. All I can do is to acknowledge the fragmentary nature of the record when relevant.

[70] NA: File # MM2185

11.0 262 CASES

I focused my research on eight main areas: name of the person on trial, year of the trial, location of the trial, charges brought against the accused, how the accused pled to the charges, the commission's verdict, the sentence, and whether the sentence was approved. My batch of cases from the National Archives, combined with the 100 cases from the Official Records, yielded 262 cases to examine.

As mentioned earlier, I was quite pressed for time during my research at the National Archives. With two days cut off for travel to and from Washington, I only had three full days to research. This time constraint affected the way I chose the cases I studied. To choose my cases, I flipped through the finding-aid spreadsheet (roughly eighty pages in length), where every case was listed with its year, location, and file number. I tried to pick the file numbers that seemed to contain the most cases for me to go through at one time—like trying to get the most "bang for my buck."

The files that I requested were brought to me inside of the box that I had requested. With that, I was able to go through the entire box, getting more folders, and therefore more cases, than I had initially requested or expected. This made things move a little faster. I was slowed a bit, however, by the fact that the courts-martial trials are mixed in with the military commissions. For this reason, I needed to read the opening page of every single case, determine whether it was

what I was looking for (that is to say, a military commission), and then either put the case back or keep reading.

I acknowledge that this study is not scientific in nature. I also acknowledge that the organization of the files may have slanted my findings. Each box generally contained files of cases from the same time. However, because cases can last many years, the organization was not exactly chronological. The cases in each box also tended to come from the same state, but again, this was not the rule.

Once I determined that the case was a military commission, I first examined the year that the trial took place. I wanted to find temporal patterns in the trial record. The trials I examined ranged in year from 1861 to 1866. I found six trials that were undated. I found the least amount of trials in 1866—three. This contrasts sharply with the year 1862. I studied 86 cases from 1862. Exactly 30 trials come from the year 1861, and 32 from 1864. The year 1863 had 57, while the year 1865 had 48. In the year 1865, I have only one case before Lincoln's assassination, taking place in March of that year. Maybe the increase in the number of military commissions is a result of, or at least related to, the assassination of President Lincoln and the introduction of President Johnson. It is interesting to note the decline in the number of cases from 1862 through 1864. This contrasts with the increase in the number of cases after Lincoln's death.

I also attempted to determine about how long detainees were held, from time of arrest, to the time of the trial, so that I could find out whether or not civilian defendants, even without a jury, were denied the right to a "speedy trial," as guaranteed in the Sixth Amendment, when the military commissions were used. The trial records, however, did not allow for favorable results. The trial record did not record the arrest date in most cases. The trial records mainly showed the date of the general orders convening the commission, the date that the 'crime' commenced, and

the date of the trial itself. In many cases, the only dates recorded were the date that the commission convened and the date the trial began or continued. The only way to determine accurately the time of arrest, I imagine, would be to compare the trial records to the arrest records.

There are a few trial records, however, such as the case of James Lane, that permit the supposition that the military trial was shortly after the arrest, relatively speaking.[71] Lane, standing trial in Columbia, Missouri, was charged with "aiding the destruction of railroad property". He pled "Guilty" to the charge, and was subsequently sentenced to "death by shooting". Lane was lucky. He received a full pardon, and was released upon taking the oath of allegiance, upon consideration of his age and willingness to confess (a confession is included with his record). The trial record indicated that Lane participated in the destruction of the railroad on December 21, 1861. "February 25, 1862" is the date listed for the trial. Obviously, at some point prior to February 25, 1862, Lane was arrested, meaning that he was in prison for about two months at most, assuming that he was not immediately imprisoned for a period following the trial.

In a further attempt to examine the question of whether or not the military commissions were "speedy" trials, compared to the civilian court system, I examined scholarly studies of civilian criminal trials before and after the civil war. Historian David Bodenhamer writes about the criminal justice system in the state of Indiana prior to the Civil War. He starts his study from the point of indictment, rather than arrest, and so does not indicate an approximate duration from arrest to indictment. He does indicate, however, that the period could be extensive for a number

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[71] The War of The Rebellion: The Official Records of the Union and Confederate Armies Series 2, Volume 1, Ithaca, NY: Cornell University Library 1894 p. 451*
* Hereafter, The War of the Rebellion: The Official Records of the Union and Confederate Armies will be cited as "OR: series 2, vol. 1, p. #"

of reasons, including an inefficient system for assembling a jury.[72] In their book The Roots of Justice: Crime and Punishment in Alameda County, California 1870-1910, Lawrence Friedman and Robert Percival construct a comprehensive picture of the criminal justice system for Alameda County between 1870 and 1910. They explain that the judicial process, from arrest to trial start, took anywhere from three weeks to three months.[73] Assuming that there were no major changes in the trial process before and after the Civil War, it is probable that the right to a 'speedy trial' was not infringed on by use of the military commissions, because it is possible that the time between arrest and the start of the military commission trial was equal to that of a civilian trial.

The cases I studied range across fifteen states: Missouri, Tennessee, Kentucky, Ohio, Pennsylvania, Georgia, Virginia, Arizona, Mississippi, Arkansas, Maryland, Illinois, Texas, North Carolina, and South Carolina. This selection of cases from both the National Archives and Official Records covers states in the South, the North, the Border States, and the West. South Carolina, Kentucky, Tennessee, and Missouri provided the most cases. It is important to keep in mind, however, that I had 100 cases from Missouri alone before I went to the National Archives. I tried not to use files that I knew contained cases from Missouri, as a way of balancing Missouri with the other states. I also have six cases from the National Archives with no listed location of trial. I found 79 cases from Tennessee. I have 15 from Kentucky and 16 from South Carolina. For the South as a whole, I found 130 cases in my selection. This might suggest that half of the military commission trials that took place during the Civil War took place in the South, with the

[72] Bodenhamer, David J. The Pursuit of Justice: Crime and Law in Antebellum Indiana Garland Publishing, Inc., New York and London: 1986, 66

[73] Friedman, Lawrence and Robert Percival The Roots of Justice: Crime and Punishment in Alameda County, California 11870-1910 University of North Carolina Press 1981, p. 167-170

other half split between the North, the Border States, and the West, with the highest number of trials in the Border States.

The large number of cases in the Southern states may simply be explained as a 'side effect' of war. Wherever the army occupied, the military became the ruling authority. Historian Peter Maslowski writes:

> Wherever Union armies advanced, military commissions went with them to hear cases involving both civilians and military orders and regulations. When the local courts were not open, the commission would try cases of civil crimes and offenses normally heard by the local courts.[74]

In my study of different cases, I found 39 different charges brought against the various defendants. Each charge had its own specification, and in some cases, multiple specifications. While the "charge" was the general allegation of wrongdoing that the accused had committed, the "specification" gave the detailed description of how the defendant committed the offense. The case of Francis Walden, tried in June 1863, in Memphis, Tennessee, provides an example of a charge listed with a specification. The transcript of the case reads:

> Charge: Attempting to smuggle goods, contraband of war.
> Specification: In this, that on or about the 1st day of June, 1863, at Memphis, Tennessee, the said Francis M. Walden did unlawfully attempt to take, send carry, and convey a large amount of goods, wares, and merchandise to wit: one pistol and other goods, through and beyond the Federal lines at Memphis, Tennessee, and into territory under rebel and insurrectionary control.[75]

For a defendant to be found 'guilty', the judge advocate general needed to prove each specification of each charge. If the judge advocate general did not find the defendant guilty of

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[74] Maslowski, Peter Treason Must be Made Odious: Military Occupation and Wartime Reconstruction In Nashville, Tennessee 1862-1865 KTO Press: Milwood, NY: 1978, p. 64
[75] NA: NN1040

every specification of the charge, the defendant could not be found guilty of the charge. In one case, the trial of Langston Goode, taking place in 1862 at St. Louis, Missouri, the defendant was released because the judge advocate failed to prove all of the specifications of the charge, resulting in the inability of the court to find Goode guilty.[76]

Finding and sentence disapproved. While the commission evidently intended to convict the accused of charge 2 and its specification it failed to do so definitely.[77]

In March, 1862, Langston Goode was charged with "Violation of the laws of war" and "encouraging rebellion." He pled 'not guilty' to both charges. The court found him guilty, and sentenced him to imprisonment, hard labor, and to have his property confiscated by the Union Army. Goode was ultimately released after taking the oath of allegiance to the Union and paying over a sum of money as bond. The money paid over to the court was held for as assurance that the pledge, usually the oath of allegiance to the Union, would be fulfilled.

In another interesting case Henry Willing was tried by military commission in April of 1862, at Camp Pittsburg Landing, of three counts of aiding rebels, being an accessory to destruction of railroads and bridges, and "being a bad and dangerous man". [78] He pled "not guilty", but was found "guilty" of all charges, except for the first charge, for which he was found "not guilty" of the specification to the charge. Willing was sentenced to death by shooting.

The charges brought against defendants of Civil War military commissions ranged from acts that anyone familiar with a civilian criminal court system would be know of, such as robbery, to acts that might only occur in a time of war, such as "encouraging resistance or inciting

[76] OR: Series 2, Vol. 1, p. 469
[77] Ibid.
[78] OR: Series 2, Vol. 1, p. 480

rebellion". I found that fifteen of the 39 types of charges were already present in the civilian court system. These charges included "assault", "murder", and "prostitution", to name a few. I found seventeen types of charges in my selection of cases that could only be used during wartime, such as "encouraging resistance," "aiding rebels," and "violation of oath of allegiance to the Union." Additional charges dealt with the treatment, use, or possession of property, including sabotage, such as "destroying telegraph lines," "bridge burning," or "smuggling." Charges like these (I found five others for a total of seven), could potentially be brought against a defendant in either war or peace. Some charges were very general in scope, encompassing all of these things, such as "violation of the laws of war." A defendant could be charged with a "violation of the laws of war" for aiding rebels, inciting rebellion, sabotage, or other acts that were not considered proper acts of warfare in accordance with the Laws of War, or laws governing military authority in times of war. Other charges were very specific, such as "selling intoxicating liquors to soldiers."

I studied 262 individual trials of 262 individuals listed in the records at the National Archives. Some defendants had only one charge against them, such as Fredrick Schneider, who in 1865, was charged with "Selling intoxicating liquors to soldiers".[79] Others were charged with multiple crimes, like William Yocum, of Cairo, Illinois, who faced four charges: kidnapping, violation of the laws of war, bribery, and "betraying trust."[80]

When faced with the task of entering a plea, most defendants chose to plead "Not Guilty," even though most were found "Guilty" by the military court. Out of the 368 total charges entered against the 262 individuals, 277 pleas of "Not Guilty" were entered.[81] Take, for example,

[79] NA: OO1321
[80] NA: NN4017
[81] Forty-one of the 368 total listed charges are missing a record of how the defendant pled.

the charge "violation of the laws of war". More people were charged with "violation of the laws of war" than almost any other crime. Of the nearly forty different individuals charged with "violation of the laws of war", thirty-five of them pled "not guilty". All but one of these people, however, were found guilty. The same pattern also holds for charges involving any form of aid or support to Confederate soldiers or sympathizers. Out of forty-two individuals charged with giving some form of aid to Confederate sympathizers or Confederate soldiers, only seven actually pled 'guilty'. In addition to these seven, twenty-six others were found guilty after entering original pleas of "not guilty". Of the 368 charges against the 262 individuals, 228 charges became convictions.[82]

The charges brought against defendants of the military commissions carried different sentences with them. For the most part, except for cases in which death could be a sentence, or was ordered (in which case the higher authorities had to approve the sentence) sentencing was left up to the discretion of the military commission.[83] Sometimes, two people could be found guilty of the exact same charge and still receive different sentences. One instance of treason might carry a sentence of "death by shooting" and another "imprisonment". Crimes of sabotage often carried severe penalties, usually death. Some charges, such as a "violation of the laws of war" carried a sentence of "hard labor" or "fine" of one or more hundreds or thousands of dollars, in addition to imprisonment.[84] In some circumstances, even though the defendant was found "not guilty" and released, the defendant still had to pay over a bond and take what was known as the "oath of allegiance." The officers on the commission administered this oath. This oath, recorded by the commission and signed by the commission and the defendant, stated that

[82] Twelve of the 368 total charges failed to list whether or not the defendant was convicted.
[83] Davis, 313
[84] OR: Series 2, Vol. 1, p. 282-501

the defendant pledged allegiance to the United States and would not take any action that might aid those looking to cause rebellion against the United States. It is important to note that the location of the trial, whether the trial occurred in a military zone of the South or Border States, or a Northern state that was not in rebellion, probably played a role in the findings of the court and how the sentence was administered.

In the records of the military commissions of the Civil War, there are instances in which, upon a conviction and a sentence, the prisoner was released from custody based on some unique circumstance. One fascinating case is that of James Quisenberry, tried in February 1862, in Columbia, Missouri.[85] Quisenberry was arrested and charged with aiding the destruction of railroad property. He pled guilty to this charge. He also issued a statement to the commission. In this statement, he gave some background about himself, stating that he would be eighteen years old in August of that year. He confirms that, yes, he was present when the railroad tracks were torn up, but was taken against his will, at the mercy of older men, whom he thought would have his interests at heart, to an unknown location.[86] The commission sentenced Quisenberry to death by shooting. However, after the trial, a number of officers appealed to higher-ranking officers for a lesser sentence of Quisenberry because of his youth. The officers wrote:

> …the members of the court without exception recommend his case to the commanding general as a fit one in which to exercise clemency and recommend that he be pardoned and released on taking the oath of allegiance and giving bonds for his future good behavior.[87]

Ultimately, this new sentence was approved and carried out.

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[85] OR: Series 2, Vol. 1, p. 449-451
[86] Ibid.
[87] Ibid

One of the most intriguing cases I found while researching at the National Archives was the case of Henry Moul, tried by military commission in May, 1864, in Pittsburgh (then spelled 'Pittsburg'), Pennsylvania.[88] At the archives, this file included one of the most complete case files I found. It included transcripts of the trial, affidavits from witnesses, evidence exhibits, and petitions for mercy from family members. Another interesting point about this file is that it contained a document signed by President Lincoln himself.

Henry Moul, citizen, was arrested and charged with aiding Private Adam Moul, Henry's brother, in desertion from the United States Military (formally, the charge was phrased "aiding the desertion of a union soldier"). Moul argued against the charge by appealing, like so many others, to a lack of jurisdiction. After being found guilty of the charge, he moved for a new trial, but was denied. He was held at the County Jail of Allegheny County. One letter reports that upon visiting Henry in jail, one of the members of the commission and the presiding judge found the defendant "so stupid" that he did not know the cause of his arrest and the charges brought against him.[89] A letter dated a few months later from an examining doctor determined that he had a "dullness of comprehension". The doctor concurred with the prior recommendations that Mr. Moul be extended a full pardon. In the back of the file, on the bottom left of a scrap of paper already cluttered with the handwriting of at least three people, are approximately three lines in thick, jagged cursive writing. President Lincoln wrote, "Sentence remitted" and signed his name. In due course, Henry Moul was released.

Men certainly were not the only people arrested and tried by military commission during the course of the Civil War. Women were also arrested and tried this way. I found fourteen military commission trials of women. Most of these trials took place in Tennessee. About half of

[88] NA: MM1431
[89] Ibid.

the women in these cases were charged with prostitution. The other half were mostly charged with "attempted smuggling," except in three cases. In Nashville, Tennessee, July 1864, Mary Reynolds was found "not guilty" of "being a rebel spy," "treason," and "violations of the laws of war." Ms. Reynolds was released, but "banished to Northern territories."[90] This sentence, banishment, appears to be a common sentence for the women. This does not mean that the officers of the military commissions were afraid to sentence women to harsh punishment. Eliza Stillman, tried in Memphis, Tennessee, in September 1863, was sentenced to "one year of hard labor" upon a finding of "guilty" for "making a false oath."[91]

Historian Peter Maslowski seems to confirm these findings in his book Treason Must be made Odious: Military Occupation and Wartime Reconstruction In Nashville, Tennessee 1862-1865. In this study, Maslowski details the changes that took place during the course of Tennessee's reconstruction. He explains how appointing Andrew Johnson as military governor of Tennessee created a change in the reconstruction environment. He details how Johnson and other military and civilian leaders in Tennessee clashed over the dual goals of winning the war and restoring society.

Maslowski dedicates a whole chapter of his book to the study of what one might call "social wrongs," such as drinking and prostitution. There is a large record of civilians tried by the military for such offenses. Maslowski explains:

[90] NA: NN3275
[91] NA: LL1341

There is no evidence that the army tried to control liquor and prostitution as a moral crusade. Instead, military authorities acted out of self-defense. Drunken and diseased soldiers were of little value to the army….[92]

It is easy to see the great variety in the application of procedures in the military commissions. From who was tried, where the defendants were tried, to the charges brought against each defendant, to how each defendant was sentenced, there seems to be no true rule that was followed. One might say that the juryless military commission trials were unfair because of their lack of predictability and the lack of uniform application of law.

[92] Maslowski, 131

12.0 SHEDDING LIGHT

When Americans think of a trial, one of the key elements that comes to mind is the presence of a jury. The jury trial has been considered one of the foundations of freedom throughout the course of English and American history. Unfortunately, however, this civil liberty has not always been protected.

In the time after the events of September 11, 2001, President Bush issued executive orders to suspend the writ of Habeas Corpus and allow detainees who were arrested and held in military prisons in Iraq and at Guantanamo Bay, Cuba, to be held without a trial indefinitely. In order to understand how one of the most protected civil liberties in America has been suspended in the present, it is crucial to understand how similar events have occurred in the past. It is important to understand the past events because they form the precedent for the present events.

Many historians writing from as far back as the immediate post-Civil War era and as recently as this year have studied the Lincoln Administration's suspension of the civil liberty of a trial by jury. Some, like Daniel Farber, have focused on the Constitutional debate surrounding the use of military trials to try civilians and the suspension of Habeas Corpus. Others, such as Mark E. Neely, have studied the numbers of citizens who were arrested and held in military prisons throughout the course of the war. Writing in the 1880s, John A. Marshall wrote narrative accounts of various Northern citizens, mainly Democrats, who were arrested and tried by the military.

I chose to study an aspect of the suspension of civil liberties that has been overlooked by other historians. I wanted to know the nature of the military trials of civilians, called the military commissions. These trials, conducted similarly to a courts-martial trial, did not permit the civilian defendant to present his or her case before a jury, but rather, a commission, or panel, of military officers. My study of both the 100 cases from the Official Records of the Union and Confederate Armies and 162 cases from the National Archives has created a rough image of how the trial process was conducted, from the time the defendant went before the commission to the verdict, to any post-trial events, such as friends and family of the defendants petitioning the President to reduce the sentence of a loved one.

The 262 cases also showed great variety in the crimes charged against defendants. Most were charged with the generally named crime "violation of the laws of war" or crimes of assisting Confederate soldiers or sympathizers. Other charges were only filed against a few people in my case selection, such as women who were charged with prostitution, or men who were charged with robbery.

I have been studying these 262 cases, the suspension of Habeas Corpus, the use of military commissions, the Civil War, Abraham Lincoln, the Constitution, and many other components of this project for about a year. Throughout this time, I have read dozens of opinions on Lincoln's suspension of Habeas Corpus and his use of military commissions to try civilians. Because of the controversy surrounding these wartime measures, I have tried to conduct and present my study in the most neutral fashion possible. This does not mean, however, that I have not formed an opinion on this matter.

Personally, I believe that the privilege of the writ of Habeas Corpus should not have been suspended in the non-military districts of the Northern States, where the civilian courts were

allowed to remain open. My research of the 262 military commission cases confirms this for me. If the writ of Habeas Corpus were not suspended, military commissions would not have tried civilians. Instead, civilians would have been tried for their offenses in Federal Court in front of a jury. The use of the military commissions was a violation of the Fifth Amendment. In the Fifth Amendment, a distinction is made between military and civilian law. It specifically states that military law applies only "…when in *actual service* in time of war or public danger…."[93] This means that the law of the military cannot apply to civilians, whether a time of war or a time of peace. While I understand that Lincoln and his administration believed that they were doing what was necessary to protect the union, I believe that civil liberties should always be first priority. The founding fathers made sure to include a Bill of Rights to the Constitution so that liberties would always be protected.

In 1866, the Supreme Court sat to decide the case of Lamdin Milligan. The Supreme Court recognized the gravity of the question at hand: "Had this tribunal the legal authority to try and punish this man?"[94] In other words, was the military commission used to try Milligan a legal court? In the opinion, Justice Davis wrote "…it is the birthright of every American citizen when charged with a crime to be tried and punished according to the law."[95] In spite of this, the court does not disagree with the Lincoln Administration's suspension of the writ of Habeas Corpus or the use of military trials in areas "where war really prevails".[96] However, military law cannot have authority over civilians.

I mentioned earlier that the *Milligan case* has not been overruled, according to Shepard's. This is especially important when considering current events. After September 11, 2001,

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[93] Emphasis added
[94] *Ex parte Milligan* 71 US 2 (1866)
[95] Ibid
[96] Ibid

civilians have been detained by the United States Military for supposed connections with terrorist organizations. Under the Bush Administration, the writ of Habeas Corpus was suspended, and detainees, if brought to trial at all, were tried by military commissions. The *Milligan* decision still holds that civilians cannot be tried by military courts where civilian courts are sitting. While the suspension of the right to a trial by jury during the Civil War does not *exactly* match the current suspension of the right to a jury trial, the suspension of this civil liberty during the Civil War is relevant today. *Milligan* is relevant because it provides the foundation that the more recent Supreme Court cases (previously mentioned) relied upon to determine that the Guantanamo Bay detainees: deserve the ability to petition for a writ of Habeas Corpus, are allowed a trial by jury under the United States Constitution, and protection under the Geneva Conventions.

I would have liked to do a study of 262 selected cases from Guantanamo detainees. I then would have gone on to compare the data to my selected cases from the Civil War. It would be interesting to compare the transcripts of the trials, to compare modern military commission proceedings with those of the Civil War era. I also would have liked to compare the charges against the detainees from both eras, as well as case outcomes, the number of detainees who pled "guilty" or "not guilty" to charges, and so on. According to the American Civil Liberties Union's Guantanamo Factsheet (updated November 2008), about 775 people total have been detained since 2002.[97] As of October 31, 2008, 255 people were still in the military prison.[98] Unfortunately, I did not have access to cases from detainees of the Guantanamo Bay military prison beyond the publically accessible opinions of the United States Supreme Court.

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[97] Guantanamo Factsheet, American Civil Liberties Union, November 2008, November 2008. www.aclu.org
[98] Ibid.

Overall, my hope is that this study of selected cases has shed light on an era in American history seldom discussed. By shedding light on this still highly controversial area in a new way, I hope to give a more thorough, unbiased understanding of what actually occurred. From this, it becomes clear that we, even in present times, are still influenced by the events of the Civil War.

The transcripts of the military commissions can give a multi-dimensional illustration of the suspension of the right to a jury trial in the Civil War. Instead of simply understanding that a suspension of the right to a jury trial occurred, or that the arrest records of the time list that X amount of people were arrested on a certain date, the military commission records can help explain how the system operated.

While researching the military commission records, as is often the case in research, I found that I had, and still have, more questions than answers. A number of these questions can be answered using the information I have already collected. A few might require additional research. The military commission records would be the base for each of these ideas.

The first, and maybe most obvious, comparison would involve a comparison of the military commissions authorized by the Union government and those authorized by the Confederate government. In two books, Southern Rights: Political Prisoners and the Myth of Confederate Constitutionalism (1999) and Confederate Bastille: Jefferson Davis and Civil Liberties (1993), Neely again uses the arrest records to study the disruption of the right to a trial by jury.[99] It would be interesting to find military commissions conducted by the Confederate government, and using the same research model as my present study, collect data on these commissions in the same fashion. The two sets could then be compared.

[99] Neely, Mark E. University of Virginia Press, Marquette University Press, respectively.

Additionally, there are a number of different studies that could be completed by comparing civilian trials with the military commissions. First, I would want to compare the civilian criminal court procedures of the mid-1800s with the military commissions. This could be completed through the view of a charge that was common to both courts, for example, robbery. Second, the comparison could extend to modern civilian criminal trials. The civilian and military trials could be compared with the research model I have already designed. The comparison could be expanded, however, to include additional topics, such as "time of crime" and "time of arrest." This new information, in addition to the already recorded "time of trial," could be used to more fully determine whether or not the military commissions of the Civil War respected the right to a "speedy" trial.

One of the most interesting studies comparing the military and civilian courts involves evidence. Both civilian trials, from the Civil War and in the present, and military commissions used evidence. Evidence admission and use in civilian trials today is conducted in accordance to the Federal Rules of Evidence at the federal level, and the individual state Rules of Evidence at the state level courts. What rules, if any, guided evidence procedures for civilian trials during the Civil War? While reading the trial transcripts at the National Archives, I noticed that, in the records of cases that contained evidence, no objections were recorded. What, if any, rules of evidence guided the military commission trials? Were objections made and simply not recorded? Or were no objections made? In modern trials, proper evidence procedure is one of the foundations of a fair trial. Answering these questions can help to determine whether or not the military commissions can be called "fair" trials.

Lastly, the military commission records can be studied alone. The cases can be divided by location. This may reveal patterns that are not visible when the cases are compared across the

board. For example, dividing the cases East-West may show that more people in the East were found guilty of a certain charge than in the West. Or, Charge X was more frequently used in the North. And so on. This type of study may allow for the most variety.

It is my hope that this study of 262 military commission cases from the Civil War has given Civil War historians another tool that future Civil War historians can use to view the disruption of the right to a jury trial under the Lincoln Administration.

APPENDIX A

RESEARCH METHOD

This is a sample from the spreadsheet I used to record the information I found in the military commission records from both the Official Records and the National Archives.

Table 1: Sample of Research Notes/Spreadsheet

Name	Date	Location	Charges	Plea	Verdict	Sentence	Notes
Rodgers, John	8-6-1864	Cincinnati, OH	Violation of Oath of Allegiance	Guilty	Guilty	"To remain within the limits of Greene Co, OH until end of war"	Sentence Approved
Lynch, David	9-19-1864	Pittsburgh, PA	Harboring deserters, Defrauding US govt	Not Guilty, Not Guilty	Not Guilty, Not Guilty	Released	Approved
Bennett, Joseph	10-30-1863	Pilot Knob, MO	Encouraging guerrillas	Not Guilty	Guilty	Banished from state	Sentence Disapproved, prisoner to be released and pay $2,000 fine

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