YOO TO OPR: LAW IS "LARGELY IRRELEVANT"

(Mary has graciously tutored many of us here about the significance of the Civil War case, Ex parte Milligan, to contemporary debates about detention (see also here and here and here). So when I saw that John Yoo had written an article trying to explain why he's been ignoring Milligan all these years, I asked Mary to rip the article to shreds. She does not disappoint.)

The hugely relevant (at least, in the context of a completed but unreleased Office of Professional Responsibility investigation) John Yoo has taken to the heavily trafficked pages of the Chapman Law Review to pursue his personal war – on law. In his piece titled, *Lincoln and Habeas: Of Merryman, Milligan, and McCardle* Yoo utilizes the resources of Boalt Hall and Chapman to finally find and discuss the Civil War case of *Ex parte Milligan*; a case which managed to elude Yoo during his time spent writing memos for the Office of Legal Counsel. Yoo chooses the cases of *Ex Parte Merryman* and *Ex Parte McCardle* to bookend his claims of the "irrelevance" of Milligan, and of law in general, during times of war.

Before we even get to that discussion, though, here's a heads up.

A few facts and at least one important contemporaneous case – *Ex parte Yerger* – are as mysteriously missing from Yoo's law review article as *Milligan* was from his OLC opinions. On the other hand, when your central argument is that case law means nothing, perhaps it is no flaw to fail to include relevant and contemporaneous case law.

Yoo's argument (to OPR, the Supreme Court, state bars, and courts where claims against him for his role in torture are now pending) goes pretty much like this: Lincoln didn't always follow the letter of the law and he "got away" with it. Ich

bin ein Lincoln.

In essence Yoo claims that, when the courts try to impose law on the Executive branch, both the President and Congress will respond by disenfranchising and enfeebling the courts, so if courts know what is good for them, they'll butt out. He uses the cases of *Merryman*, *Milligan* and *McCardle* to reach this remarkable deduction, starting with *Merryman*.

Lt. John Merryman was a member of the militia in a Union state, Maryland. Maryland was teetering on the brink of going over to the Confederacy. Merryman (did I mention he was a member of the Maryland militia) was actually recruiting for the Confederacy and was involved in burning railroad bridges to try to help isolate DC from the North. At about the same time as Lincoln suspended *habeas* in Maryland, Merryman was placed under military arrest.

Then-Supreme Court Chief Justice Taney (from Maryland and a friend of Merryman's father) was acting as a Circuit Judge while the Supreme Court was not in session and Merryman's *habeas* application came to Taney. Taney ruled that *habeas* had not been properly suspended by Congress and that militiaman Merryman should be released from military custody.

Yoo points out that Lincoln did not release Merryman (without mentioning that because of the judicial intervention, rather than hanging Merryman went on to become the State Treasurer for Maryland in 1870 – a relevant result for him at least) and notes that Lincoln continued for about 2 years to detain persons under a revocation of *habeas* that had not been formalized by Congress.

He is correct, in so far as he goes.

After the *Merryman* order from Taney, Lincoln's Attorney General, Bates, issued an opinion that, with Congress silent on *habeas* rights, the President could suspend *habeas* in times of turmoil for the public safety.

Meanwhile, Congress jousted for a couple of years trying to decide what to do and in early 1863 they gave Lincoln and his officials indemnity for their detentions to date, but at a very significant cost to Lincoln and executive power. Far from siding with Lincoln's decision to ignore the courts, Congress formalized the military detentions only with extensive caveats and powers granted to the courts to intervene in such detentions.
As described here ("Judicial Impotency: The Empowerment of Federal Judiciary During Reconstruction").

> In passing The Habeas Corpus Act of 1863, Congress built into the act safeguards to protect against possible abuses of authority. Section 2 of the act required that a list of all those arrested under military or civilian authority would have their names forwarded to federal judges within the district of the arrest. A grand jury was to assemble and indict the detainee. If the grand jury failed to bring back an indictment, the person would be released immediately. To ensure the safety of the judicial process, federal judges were given the power under this act of Congress to supervise the indictment process. If any lower court failed to release the detainee, having not obtained an indictment, federal judges were empowered to try and convict any officer refusing to follow the law under this Act.

Without going into a history of federal court access (or lack thereof) in the early days of this nation, suffice to say that the Habeas Act of 1863 empowered federal courts to act in cases where they had previously been barred from action. So despite the immunity Congress gave to Lincoln's officials for past acts, Taney basically won the day over Lincoln on this front. Congress agreed with the courts that

there must be grand jury indictments to justify continued detentions.

Congress not only provided for judicial review and broadened federal court jurisdiction, but also specifically empowered the courts to punish a federal officer who defied an order to release, such as the one Taney gave and Lincoln ignored.

So while Yoo argues that this huge expansion of judicial power and jurisdiction is a "win" for the Executive, because the initial detentions were ultimately given ratification and immunity by Congress, he moves on to *Milligan*.

Milligan involved an Indiana man, in Union loyal Indiana, who was not a member of the military and who was accused by the military of being a member of the Sons of Liberty, a group of "terrorists" who plotted all kinds of evil. Indiana was, at that time, under a form of martial law, although courts were open and operating. Milligan was seized and his home invaded, etc. all without warrant and he was brought to be tried before a military commission which ordered that he be hung. Lincoln flinched, though, when a *habeas* petition was filed for Milligan and no sentence was carried out during the pendency of the case. On appeal, the Supreme Court ruled that war does not, while courts are open and operating, suspend the Constitution and the protections of the Bill of Rights (including the Fourth Amendment) still attach (and unlike *habeas*, even Congress cannot suspend such rights). The court then held that a man who was—while allegedly a spy and combatant—never a member of a military force, could not constitutionally be tried by a military commission while the civilian courts were open and operating.

Yoo begins his discussion of *Milligan*, inexplicably, with the following:

> *Milligan* took place in the midst of inter-branch strife over Reconstruction. The issues were complex, and centrally

> involved the Constitution. If the Confederacy were considered an enemy nation, the laws of war permitted recaptured territory to be subject to occupation by Union military authorities

Well, yeah — that was an important issue in the Reconstruction (as we will see with *McCardle*) but Milligan arose during the war, not Reconstruction (although by the time the appeal reached the Supreme Court Reconstruction had begun) and Indiana had never been a part of the Confederacy to invoke the claims that it was a "recaptured" territory. Like some of Yoo's other claims (including that *Milligan* provably irrelevant because it failed to prevent the Supreme Court's decision in *Korematsu*), the conflation of the *McCardle* issues of recaptured territory with the actual facts of *Milligan* can make for a difficult read, but only if you're paying attention. And given Yoo's simple conclusion — that when your President disagrees with the Supreme Court, there's no reason to pay attention to case law — you may have abandoned that effort by now.

In any event, while Yoo manages to find time to discuss "Democrat" secret societies and their evils, he doesn't have much time to spend with the Supreme Court's ultimate decision in *Milligan*—that he could not be tried by a military commission. Instead, Yoo skips very quickly over to his new lodestar, *Ex parte McCardle*.

McCardle was a Reconstruction era case and did include some of the issues that Yoo misleadingly leads off with in his *Milligan* discussion. After the Confederate surrender and Lincoln's assassination, President Johnson and Congress (which was at that time run by the "Radical Republicans") had a number of skirmishes over how the re-entry to the Union of the seceding states should be handled. Johnson wanted to let them, pretty much as if nothing had happened. Congress wanted to insure that the states had to take certain steps, including new state

constitutions, which would protect the rights of the freed slaves in those states.

Something even the Radical Republicans realized, but Yoo glosses over, was that the institution that most needed to be strengthened after the Civil War to accomplish Congressional goals was the federal court system. So while the interim step Congress utilized involved martial law during Reconstruction, the goal they were attempting to reach included changes to national and state constitutions that provided for the ability of all citizens of the United States to freely access the Federal courts and empowered those courts to issue orders requiring state and federal Executive branch officers to comply.

McCardle was a publisher who had been trying to incite further rebellion in Mississippi during Reconstruction. Unlike Indiana in *Milligan*, Mississippi had no open and operating recognized courts, as the government of the secession government of the states had been declared outlawed. Mississippi's government was in limbo, pending the state constitutional changes being required by Congress and other matters. Federal legislation put Mississippi (and other areas) under military rule in the interim. However, as with the Habeas Act of 1863, there was an act, the Habeas Act of 1867, which gave courts the ability to review, among other things, the military detentions.

It's a bit complex, but *McCardle* filed for *habeas* relief only under the Habeas Act of 1867, with the powers it gave to courts (both the federal circuit courts and the Supreme Court). The Supreme Court on review determined that it could hear McCardle's case, asserting that it had that power under the Habeas Act of 1867 which McCardle invoked. However, while *McCardle* was pending at the Supreme Court, Congress began impeachment proceedings against President Johnson. Those impeachment proceedings required the presence of the Supreme Court Chief Justice and so the *McCardle* decision was delayed.

During that delay, Congress amended the Habeas

Act of 1867 to remove the Supreme Court review under that particular legislation (court review in the federal circuit courts was kept, however). This became known as the McCardle repealer. As a result, the court, when back in session, decided that it no longer had jurisdiction to rule on McCardle's petition, which had been brought solely under the Habeas Act of 1867.

OK – now for the Supreme Court sleight of hand.

The court went on, in *dicta*, to say, "oh by the way, you know, we also have *habeas* powers in connection with our appellate powers, not that anyone thought to bring their petition to us under those powers instead of the Habeas Act."

Yoo stops at the *McCardle* case, and crows that Congress – which by means of the Habeas Acts of 1863 and 1867 and by the Fourteenth Amendment had wildly expanded the jurisdiction and powers of the judiciary – crippled the courts through the McCardle repealer. It's certainly clear from the dismal picture he paints of the Supreme Court, post-McCardle, that it would never be an institution that could—oh say—during a war, enforce a subpoena to a President to turn over confidential material about a crime originating out of the White House. Yoo's certainly proven his point; *i.e.,* that with *McCardle*, the Supreme Court had been forced to capitulate and had become, "largely irrelevant."

Or did he?

After reading *McCardle*, you might ask, "Gee, wonder if anyone made that appellate powers argument the court hinted it wanted to see?" Luckily for Yoo's conclusion to his article, Chapman law review articles aren't subject to the same candor to the tribunal issues as a brief, or he might have felt compelled to mention the follow up case to *McCardle – Ex parte Yerger*

In Yerger, a man was taken into military detention, accused of murder. He sought *habeas* relief to the federal circuit court. When the

lower court refused him, he appealed to the Supreme Court claiming that while the Court's power under the Habeas Act had been limited, under the Judiciary Act of 1789, the Court had an alternative ability to grant *habeas* under its appellate review powers. So what did Congress and the Presidency do when the post-*McCardle* irrelevant Court agreed with such claim and took the case?

Before the Court could hold hearing on the merits of the *habeas* petition, the Attorney General worked out a deal with Yerger and his lawyers and quickly mooted the case rather than have the court order release after it had assumed jurisdiction.

Meanwhile, both the Executive and Congress were learning the costs of battling against the rule of law. Lincoln was viewing with alarm martial law run amok in Missouri – where even his entreaties as President and commander in chief were unable to initially roll back the military rule and 20,000 civilians were being evicted from their homes on mere suspicions that some of them might have given succor to rebels.

> In the fall of 1864, after he had won re-election, Lincoln appealed to the general in control of [Missouri] to repeal martial law.

The General in charge – Grenville Dodge – basically told Lincoln to go suck eggs. He was busy supporting the agenda of the Republicans in Missouri government and they liked having an army to back up whatever they wanted done. Horrifyingly, to Lincoln, even the Missouri Governor thought keeping martial law in place was a great idea. Lincoln's ultimate decision—taken shortly before his assassination—to send General Pope and the army in to displace—rather than impose—martial law, was an eye opener.

> In March 1865, a newspaper correspondent in St. Louis reported that many

> Republicans in Missouri—not just the state's leaders—had come to admire the efficiency of martial law: "So far from being unpopular, it is believed that a large portion of our loyal people are willing to see a provision incorporated in the charter of the city, requiring six months of martial law to be imposed . . . every five years to clean up all the little cases of outraged justice, loose indictments, public corruption and private peculation, which the ordinary courts cannot reach."

While Lincoln watched his Presidency subjugated to a self-perpetuating martial law force in Missouri, Congress was dealing with fallout from the states in connection with the attempts to disenfranchise the Supreme Court and by 1885, Congress was forced to repeal the McCardle repealer.

In light of the overlooked facts and cases, you might be tempted to wonder if it is Yoo that has become "irrelevant" rather than the Supreme Court. However, Yoo's biggest supporters for his conclusion are probably found among the men ordered released, but still imprisoned by President Obama at GITMO. To them, cases ranging from *Rashul* to *Boumediene* have been largely irrelevant to their lives and continued detention.

While the GITMO detainees agree with Yoo's determination that our courts and laws mean almost nothing when aligned against the power of the Presidency, there is still one source that has not spoken: the courts themselves. Whatever the outcome of the OPR investigation, the courts are ultimately going to decide for themselves, with respect to Mr. Yoo and his former colleagues at least, whether the judiciary—and law in general—are indeed "irrelevant" to lawyers who work for the President.