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## Response

### Canonical Cases and Other Quodlibets: A Response to Professor Fallon

Seth Barrett Tillman\*

In a far ranging 2018 article in *Texas Law Review*,<sup>1</sup> Professor Fallon opines on the scope of the duty of subordinate Executive Branch officers to obey conflicting commands and policies emanating from the President and the federal courts, including the Supreme Court. The subject is not an easy one. It is a question which cannot be answered by turning exclusively to the past practices of executive officers during times of crisis and conflict—i.e., crises in the country and conflict between the branches of the federal government. Nor can it be answered by turning exclusively to the decisions of the courts. Still, those practices and decisions are important starting points for Fallon’s argument. I have some substantial (and long-standing) doubts about Fallon’s discussion of three well-known, if not canonical, cases.<sup>2</sup> My

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\*Lecturer, Maynooth University Department of Law, Ireland. Roinn Dlí Ollscoil Mhá Nuad. My degrees are from the University of Chicago, BA (honors), and Harvard Law School, JD (cum laude). In my 3L year of law school, Professor Fallon was my instructor for federal courts (B+). I thank Professors G. Lawson and L. Solum, who reviewed early drafts of this Article. Be assured: all errors remain mine.

1. See Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEXAS L. REV. 487 (2018).

2. The three cases are: (i) *Merryman*, (ii) *Milligan*, and (iii) *Quirin*. See *infra* notes 3, 11, and 24. Interestingly, in all three cases, the movant sought habeas relief. *Merryman*, unlike the other two cases, was not a Supreme Court case. Although some people believe that it was decided by the Circuit Court for the District of Maryland, my own view is that the Chief Justice merely filed his opinion and order with that court. Rather, *Merryman* was decided by Taney, while on circuit in Maryland, and under special authority granted under the Judiciary Act of 1789. Although decided in public, and while on the bench, it was, in effect, an in-chambers opinion. See A COLLECTION OF IN CHAMBERS OPINIONS BY THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 1400–

goal, then, is to explain why I think Fallon’s discussion of these cases is wrong, and then to suggest what may follow from those errors.

I. *Ex parte Merryman*<sup>3</sup>

Professor Fallon states:

In *Ex parte Merryman*, Lincoln supported Union military officers in defying a writ of habeas corpus, issued by Chief Justice Roger Taney, in the early days of the Civil War. In Lincoln’s view, detaining suspected Confederate sympathizers in the border state of Maryland was a military necessity at a precarious moment in his struggle to save the Union. In defending his action in a subsequent message to Congress, Lincoln gave reasons for thinking that Taney’s ruling was mistaken. He left it to Attorney General Edwin Bates specifically to defend his [(Lincoln’s)] refusal to *enforce a direct judicial order*, largely on the ground that Taney had no jurisdiction to issue the writ under the circumstances.<sup>4</sup>

In *Ex parte Merryman*, Chief Justice Taney issued three orders. Unfortunately, Professor Fallon does not specify which “direct judicial order” it was that President Lincoln (purportedly) refused to enforce. I discuss each of the three orders in turn.

*Merryman I.* John Merryman was seized by the Army on Saturday, May 25, 1861. His counsel presented a habeas petition to the Chief Justice the next day, Sunday, May 26, 1861. Later that day, the Chief Justice issued an ex parte order, *Merryman I*, directing General George Cadwalader, the only named defendant and the Army officer having overall command of the military district including Fort McHenry (where Merryman was detained): (i) to appear before Taney the next day—on Monday, May 27, 1861, at 11:00 A.M.—in a court room in Baltimore; (ii) to explain the legal basis for Merryman’s detention by military authorities; and, (iii) to “produce”<sup>5</sup> (as opposed to “release”) the body of John Merryman at that hearing.<sup>6</sup> The writ

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12 (Cynthia Rapp & Ross E. Davies comps., 2004) (reporting *Merryman*, *infra* note 3), <http://tinyurl.com/judtw8q> [<https://perma.cc/4TRJ-TQ47>].

3. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.).

4. Fallon, *supra* note 1, at 504–05 (footnotes omitted) (emphasis added). Two paragraphs after making this statement, Fallon states: “[t]he judicial decisions that Lincoln’s military defied in *Ex parte Merryman* . . .” *Id.* at 505. Here, Fallon eschews the specific, technical language regarding a “direct judicial order” and “judicial decree” in favor of more nebulous language regarding “judicial decisions.” *Id.* *But cf. id.* at 530 (“Lincoln refused to accept that he must enforce the judicial *decree* [in *Merryman*] . . .” (emphasis added)).

5. *Merryman*, 17 F. Cas. at 145–46.

6. See Seth Barrett Tillman, *Ex parte Merryman: Myth, History, and Scholarship*, 224 MIL. L. REV. 481, 485–88 (2016) [hereinafter Tillman, *Myth, History, and Scholarship*]; see also Seth Barrett Tillman, *Merryman Redux: A Response to Professor John Yoo*, 22 CHAP. L. REV. (forthcoming Mar. 2019) (available on SSRN at <https://ssrn.com/abstract=3213353>)

was served on Cadwalader on May 26, but Cadwalader did not fully comply with the order. In short, Cadwalader did not produce Merryman on May 27, as he was ordered to do. All live in-court proceedings would end on May 28, 1861. There is no evidence that President Lincoln knew of these proceedings until May 30, 1861. So even if Lincoln had been willing to enforce this order, by the time Lincoln knew of the order's existence, it appears that compliance was no longer possible.

*Merryman II.* Because General Cadwalader, the named defendant, failed to produce John Merryman, Chief Justice Taney, on May 27, 1861, directed the United States Marshal to serve an attachment for contempt on Cadwalader. The marshal sought to serve the attachment on the morning of Tuesday, May 28, 1861, at Fort McHenry, but the marshal was not admitted. Why he was not admitted remains a historical mystery. In any event, the marshal left the fort. He reached the courthouse prior to noon on May 28, 1861, and he came without Cadwalader and Merryman.<sup>7</sup> By the terms of the attachment, Cadwalader was directed to appear in court on May 28. Again, all live in-court proceedings would end on that very day. Here too, even if President Lincoln had been willing to enforce this order, by the time he knew of its existence, on May 30, compliance was not feasible.

*Merryman III.* The court's third and final order stated:

I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the [C]ircuit [C]ourt of the United States for the [D]istrict of Maryland, and direct the clerk to transmit a copy, under seal, to the [P]resident of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.<sup>8</sup>

Again, Chief Justice Taney's final judicial order, *Merryman III*, did not command Cadwalader or anyone else to release John Merryman—or to take any other specific action. Instead, Taney's final order meekly directed the Clerk of the Circuit Court for the District of Maryland merely to transmit a

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[<https://perma.cc/65SD-2BDM>]. The reader should note that several paragraphs or substantial parts of paragraphs of this Article were first published in my 2016 *Military Law Review* publication.

7. See Tillman, *Myth, History, and Scholarship*, *supra* note 6, at 490–92.

8. *Merryman*, 17 F. Cas. at 153 (quoting the Take Care Clause) (emphasis added). This is the order as reported in *Federal Cases*. The report of the order in the case's file (storing the original documents) in the Maryland state archives is even more limited than what is reported in *Federal Cases*. See *John Merryman (1824–1881)*, ARCHIVES OF MARYLAND (BIOGRAPHICAL SERIES) (last accessed Dec. 18, 2018), <https://tinyurl.com/ybuh47o4> [<https://perma.cc/SQ7V-2EFU>] (reporting 1 June 1861. Order that opinion be filed and recorded in the Circuit Court of the United States for the District of Maryland, directing the Clerk transmit a copy under seal to the President of the United States).

copy of the proceedings and his (Taney's) opinion to President Lincoln.<sup>9</sup> The express language of the order itself left it to the President to determine the scope of his own response. It is difficult to see how Lincoln could be faulted for refusing to enforce this order.

Again, Professor Fallon faults President Lincoln for "his refusal to enforce a direct judicial order."<sup>10</sup> Fallon is not alone in believing this particular myth about *Merryman*, Lincoln, and Taney, but it always has been and it remains just that—a myth.

## II. *Ex parte Milligan*<sup>11</sup>

Professor Fallon states:

The Lincoln Administration denied the court's jurisdiction in *Ex parte Merryman*, but its position was debatable at best, tendentious at worst. *A federal court had clear authority to issue the writ of habeas corpus unless entitlement to the privilege of the writ was validly suspended.*<sup>12</sup>

The relevant constitutional provision here is the Suspension Clause, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>13</sup> As a textual matter, the clause does not address suspension of the writ (or even the suspension of habeas corpus simpliciter); rather, the clause speaks to suspension of the *privilege*. The two concepts are related, but they are not the same. Professor Fallon presumes that a suspension of the privilege suspends the writ. I cannot say he is alone in believing this.<sup>14</sup> For our purposes here, whether or not the text is sufficiently clear is unimportant,

9. See Tillman, *Myth, History, and Scholarship*, *supra* note 6, at 492.

10. See *supra* text accompanying note 4 (quoting Professor Fallon).

11. 71 U.S. (4 Wall.) 2 (1866) (Davis, J.).

12. Fallon, *supra* note 1, at 505–06 (emphasis added).

13. U.S. CONST. art. I, § 9, cl. 2.

14. See, e.g., *Ex parte Zimmerman*, 132 F.2d 442, 445 (9th Cir. 1942) (Healy, J.) ("It is little to the purpose to attempt here an analysis of distinctions between suspension of the privilege and suspension of the writ."); BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, VOL. 1, PART 3, at 25 (1968) ("One may wonder, nevertheless, whether there is [a] basis for the claimed distinction between suspension of the privilege and suspension of the writ."); Trevor W. Morrison, Hamdi's *Habeas Puzzle: Suspension as Authorization*, 91 CORNELL L. REV. 411, 423 n.73 (2006) ("The text of the Suspension Clause makes clear that it is the 'Privilege of the Writ,' not the writ itself, that may be suspended. . . . Nevertheless, courts and commentators tend to refer colloquially to 'suspending the writ' or 'suspending habeas,' . . ." (citing *Milligan*, 71 U.S. at 130–31)); Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1535 n.3 (2007) ("[S]uspending the writ' and 'suspending habeas' are common shorthands for suspending the privilege of the writ, and I will use them here." (citing *Milligan*, 71 U.S. at 130–31)); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 979 (1998) (asserting that the *Milligan* Court's "distinction [between the privilege and the writ] cuts against the conventional phrase, 'suspension of the writ,' which nonetheless has brevity in its favor").

nor does it matter what could be fairly established as a matter of original public meaning. What matters is simply this—the Supreme Court has addressed this issue.

In *Ex parte Milligan*, a unanimous Supreme Court stated: “The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course . . . .”<sup>15</sup> Professor Fallon’s restatement of the law is not in tension with the Court’s opinion in *Milligan*; it is its antithesis. How can this be? *Milligan* is part of the received case law: it is, I believe, canonical. Fallon discusses *Milligan* in his own papers.<sup>16</sup> Not only does Fallon take a position at odds with *Milligan*, but he does so without giving his readers a courtesy *but see*. Why? Is it because some consider *Milligan*’s phraseology “cryptic”<sup>17</sup>? Perhaps, we might call this doctrinalism by “ink blot.”

It would be unfair for me to turn to other examples without first giving some (reasonably likely) explanation of what it means to suspend the privilege of the writ, as opposed to suspending writ itself. Congress can suspend the writ or the privilege of the writ or both.<sup>18</sup> But a suspension of the privilege of the writ is a far greater power than suspending the writ itself. Indeed, it can be fairly said that suspending the privilege of the writ is a power greater than and substantially unlike any other power granted to Congress by the Constitution.

When a prisoner seeks to test the legality of his detention, he petitions a court for a writ of habeas corpus. The right he seeks to vindicate, even if a constitutional right, is inchoate. Congress has substantial control over this inchoate right because Congress controls the jurisdiction of the lower federal courts.<sup>19</sup> Should the adjudication end, and the prisoner be awarded the writ, in normal circumstances, the jailor will release the prisoner. But when circumstances are not normal, e.g., during a civil war or insurrection, the

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15. *Milligan*, 71 U.S. at 130–31.

16. See, e.g., Fallon, *supra* note 1 *passim* (discussing *Milligan*); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2078–79, 2084 (2007) (same).

17. Note, *Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1265–66 (1970).

18. See U.S. CONST. art. I, § 9, cl. 2.

19. When the writ and/or the privilege of the writ are suspended, federal courts (having general federal question jurisdiction) will still have jurisdiction to determine if the suspension or suspensions themselves are constitutional—unless Congress has validly stripped the federal courts of jurisdiction to do so. The scope of Congress’ power to engage in such jurisdiction stripping is a complex subject, and one well beyond the scope of this Article. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1398 (1953) (“[W]here statutory jurisdiction to issue the writ obtains, but the privilege of it has been suspended in particular circumstances, the Court has declared itself ready to consider the validity of the suspension and, if it is found invalid, of the detention.”); Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 289 (2005). See generally *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254 (2d Cir. 1948) (Chase, J.).

jailer might err, or he might actively choose to resist the writ. At that juncture, round two begins—i.e., a contempt hearing against the jailer. (This two-stage process is substantively similar to what happened in *Merryman*.<sup>20</sup>) In round two, the court does not adjudicate the underlying right, i.e., the prisoner's right to the writ—that was already decided in round one. Here, in round two, the prisoner merely moves into evidence (i.e., the evidentiary privilege of . . .) the writ, which had already been awarded in round one. *A suspension of the privilege of the writ precludes the court from allowing the prisoner (in round two) to move into evidence the writ, which had already been awarded (in round one)*. Of course, where the privilege has been suspended, but not the writ itself, a court might (and, per *Milligan*, must) still issue the writ . . . but enforcement via contempt would not be possible.<sup>21</sup>

In more functional terms, the suspension of the privilege of the writ nullifies (or, at least, suspends *ad interim*) a final judgment of a court. Here what is suspended is not an inchoate or abstract right, but a right that had been finally adjudicated and determined by a properly constituted and competent court with jurisdiction. That is why the Suspension Clause was an absolute necessity to the constitutional text.<sup>22</sup> Given our separation-of-

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20. See *supra* notes 6–7 and accompanying text. You can find the same round-1 and round-2 pattern in the lead eighteenth century foreign case (in the English-speaking world) on the subject of habeas corpus in wartime. See *Wolfe Tone's Case* [1798] 27 How. St. Tr. 613 (K.B.) (Ir.) (Kilwarden, C.J.), <https://tinyurl.com/ycm2lyyx> [<https://perma.cc/AD5P-UJ2S>]; see also *Luther v. Borden*, 48 U.S. (7 How.) 1, 60 (1849) (Woodbury, J., dissenting) (citing *id.* at 625). See generally Eoin O'Mahony, *The Pathology of Democracy with Particular Reference to Personal Liberty Under Flexible and Rigid Constitutions*, 11 J. COMP. LEGIS. & INT'L L. (3d ser.) 96, 101–04 (1929).

21. Compare U.S. CONST. art. I, § 9, cl. 2 (“The *Privilege* of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” (emphasis added)), with MASS. CONST. of 1780, pt. 2, ch. VI, art. VII (“The *privilege and benefit* of the writ of Habeas Corpus shall be enjoyed in this Commonwealth, in the most free, easy, cheap, expeditious and ample manner; and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months.” (emphases added)). See generally JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 149–50, 168 (Boston, Dutton and Wentworth 1832) (Report of Cmt. Rep. H) (mandating that “the suspension shall never operate . . . with respect to any one, who has been liberated on such writ”).

22. Most commentators believe the Constitution's suspension of the “privilege of the writ” language is substantially equivalent to “suspension of the writ” or “suspension of habeas corpus.” See *supra* note 14. Those embracing that position leave several interesting questions unexplained and unresolved. First, the Federal Convention's draft Suspension Clause (like its Massachusetts predecessor) extended to both the “privileges” and “benefit” of the writ. But the draft Suspension Clause's language was debated, and its language evolved. The “benefit” language was dropped, and only the “privilege” language was retained. Perhaps the distinction between “benefit” and “privilege” was meaningful? Likewise, if the “privilege” language had no substantive function, i.e., if suspension of the “privilege of the writ” is coextensive with “suspension of the writ,” then why was not the “privilege” language also dropped (just as the “benefit” language had been dropped), if only to avoid surplusage and prolixity? See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 340–41, 437–38 (Max Farrand ed., 1911) (reproducing the evolving clause and debate). More importantly, does not the common reading of the Suspension Clause offend Chief Justice

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Marshall’s great powers thesis? *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415, 421, 424 (1819) (Marshall, C.J.); *see also* 2 ANNALS OF CONG. 1944, 1949 (1834) (reporting February 2, 1791 statement of Representative Madison: “condemn[ing] the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power”); *cf.* William Baude, *Sharing the Necessary and Proper Clause*, 128 HARV. L. REV. F. 39, 40 (2014) (“It was Representative James Madison who articulated the ‘great powers’ limits to the Necessary and Proper Clause decades before John Marshall mentioned them in *McCulloch v. Maryland*.” (citing James Madison, *Statement on the Grant of the First Charter of the Bank of the United States* (Feb. 2, 1791), in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 39, 43 (M. St. Clair Clarke & D.A. Hall eds., 1832))). Suspension is expressly authorized in the Constitution’s text, but martial law is not. How can commentators in the modern consensus explain that? If suspension were a great power, then does the absence of coordinate language about martial law (an even greater power), mean that Congress has no power to authorize the latter? *See* Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1407 (2013) (“If the President cannot suspend the writ of habeas corpus, he almost certainly lacks the more consequential power to impose martial law.”). And if Congress has the more consequential and greater power to authorize martial law, then what was the whole point of expressly authorizing the lesser power to suspend habeas? These two positions—(i) that Congress has no power to authorize martial law, and (ii) that the congressional powers authorized by the Suspension Clause would otherwise flow from Congress’ power to declare martial law—cannot be easily squared with our history and the Constitution’s text. First, Congress has authorized martial law from time to time and where such authorization has been refused, it has been withheld on pragmatic grounds, not because Congress lacks the competence. Likewise, there is no good reason to put our understanding of the Suspension Clause beyond the ambit of the great powers thesis if another (more likely) understanding of the clause can reconcile the two concepts. *But see* Saikrishna Bangalore Prakash, *The Sweeping Domestic War Powers of Congress*, 113 MICH. L. REV. 1337, 1341 (2015) (“Congress may suspend habeas corpus during an invasion or rebellion not because Article I, Section 9 [Clause 2] implies that there is such a federal power, but because doing so is necessary and proper for implementing federal powers. Similarly, Congress may authorize military trial of civilians or declare martial law during an invasion and rebellion when doing so is necessary and proper for executing federal powers.” (footnote omitted)); *id.* at 1370 n.241 (“Unlike some authors, I do not believe that federal power to suspend habeas corpus somehow implies a power to declare martial law. *E.g.*, J.H.A., *Martial Law*, 9 AM. L. REG. 498, 507–08 (1861) (‘The right to exercise one power [suspension], however, implies the right to exercise the other [martial law].’). A constitution could grant the power to suspend the privilege of the writ without also granting a power to declare martial law. Having said all that, I contend that the power to declare martial law arises from the Necessary and Proper Clause, a provision that likewise authorizes habeas suspensions.”). The position I put forward in the main text of this Article indicates why the Suspension Clause’s “privilege” language is needed. It cannot be reasonably teased out of the Necessary and Proper Clause because suspending a court’s final judgment is not within the power of Congress to grant, even in an emergency—at least it would not be within Congress’ power to authorize absent an express textual grant in the Constitution. Suspension is a coordinate great power or, better, a carve out in favor of Congress against the baseline power of the judiciary to issue final binding judgments—i.e., suspension is a free-standing power of Congress—existing independently of the Congress’ ability to declare martial law. In short, suspension of the “privilege of the writ” is not a lesser power that would otherwise flow from the power to declare to martial law, even assuming that the power to declare martial law otherwise resides with Congress and flows from the Necessary and Proper Clause. I would add that the academic consensus position surrounding the Opinion Clause is also in some substantial tension with Marshall’s great powers thesis. *See, e.g.*, U.S. CONST. art. II, § 2; Akhil Reed Amar, Essay, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 647 (1996) (arguing that the Opinion Clause “was designed to clarify the role of a new and distinctly American idea of a President” (emphasis removed)); Neil Thomas Proto, *The Opinion Clause and Presidential Decision-Making*, 44 MO. L. REV. 185, 203 (1979).

powers structured constitution, although Congress could withdraw the writ in cases not yet adjudicated, Congress—absent the Suspension Clause—could not withdraw the privilege in cases where the writ had already been awarded. That is because the *sine qua non* of independent Article III courts is that their final judgments (at least, after the conclusion of appellate review) are—final.<sup>23</sup>

Professor Fallon and others might not agree with the conjecture I have put forward above; he or they might reject each and every claim made here. But whether my conjectures are correct or not does not get him or them off the (intellectual) hook: they still have to pick up the gauntlet. Our inquiry here is not about obscure and opaque eighteenth century constitutional text, i.e., the Suspension Clause, but about the holding of a canonical unanimous post-bellum prolix Supreme Court decision: *Ex parte Milligan*. Nonoriginalists are permitted to describe eighteenth constitutional text as an “ink blot.” But it is quite another thing to make a similar allowance in regard to a post-bellum Supreme Court opinion. Here, “ink blot” is not a sufficient answer. And if it is not a sufficient answer, why not look for other, better answers—in regard to both *Milligan* and the Suspension Clause’s text?

### III. *Ex parte Quirin*<sup>24</sup>

Professor Fallon states:

During the early part of World War II, President Roosevelt let it be known that he would defy the Supreme Court if the Justices sought to interfere with the military trial and subsequent swift execution of would-be German saboteurs. Even though one of the accused was a U.S. citizen with a more-than-colorable claim of entitlement to be tried in an Article III court, the Justices capitulated. In a breach of ordinary protocol, the Court ruled for the government only a day after hearing arguments in the case, with a brief notation that an opinion would follow. When the opinion came down more than eleven weeks later, it dealt only cryptically and cursorily with the relevance of U.S. citizenship to rights to trial by jury for an alleged criminal offense committed within the United States, in an area in which the civilian

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23. Compare *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (holding that in situations involving cases that have gone to final judgment and concluded appellate review, Congress has no constitutional power to make new statutes giving relief to a party whose action had already been dismissed), with *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 441 (1992) (holding that although Congress cannot direct findings under old law, Congress may amend applicable law even if it affects pending litigation, including affecting outstanding injunctions). See generally *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792).

24. 317 U.S. 1 (1942).



courts remained open, by someone who was not a member of the U.S. armed forces.<sup>25</sup>

Is it really so surprising that at the start of the United States' entrance into a world war there might be a break in "ordinary" protocol applying to mundane civil disputes during peacetime conditions? Perhaps the benchmark ought to be how federal courts expedite matters during war time or other emergencies? In *Merryman*, for example, after two brief hearings and absent any substantial briefing by the parties, Chief Justice Taney ruled from the bench on Tuesday, May 28, 1861, and then filed a written opinion four days later, on Saturday, June 1, 1861.<sup>26</sup> Of course, Taney was acting alone, whereas the *Quirin* Court was a multi-member body. Not surprisingly, it took more time to draft opinions in the latter case, i.e., *Quirin*, than in the former, i.e., *Merryman*. It is not surprising that this order-first and opinion-later pattern also occurred in *Milligan*.<sup>27</sup>

Professor Fallon's more interesting objection to the Court's *Quirin* decision is that it failed to explore the "more-than-colorable claim" that a "U.S. citizen" was entitled to be tried in an Article III court, rather than by military tribunal, when the accusation relates to a "criminal offense committed within the United States, in an area in which the civilian courts remain open." Fallon leaves unexplained the doctrinal or policy basis for this particular objection. There is language in *Merryman* and *Milligan* tying civilian court-access rights (i.e., access to an Article III court) to citizenship. But, in my view, that citizenship-related language springs from the fact that the applicants—in both *Merryman* and *Milligan*—were citizens. In those cases, the court had no reason to distinguish citizens from non-citizens. In other words, where these decisions discuss an applicant's right to access a federal civilian judicial forum, the opinion has a purported textual basis in either the Constitution or a federal statute, but, in fact, the relevant constitutional and statutory provisions relied upon do not distinguish between citizens and non-citizens.

For example, in *Merryman*, Chief Justice Taney started his opinion by explaining:

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25. Fallon, *supra* note 1, at 504–05 (footnotes omitted).

26. See Tillman, *Myth, History, and Scholarship*, *supra* note 6, at 491.

27. See *Military Comm'ns Cases*, 70 U.S. (3 Wall.) 776, 776 (1865) ("These cases, *Ex parte Milligan, &c.*, were disposed of, as is known, on the last day of this term: but the delivery of opinions was necessarily deferred till the next session. On this account, a report, too, is carried over." (emphasis added)); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 106–07 (1866) (Davis, J.) (explaining the procedural posture of *Milligan* in regard to its (prior) orders and its (subsequent) opinions). It appears the *Milligan* opinions were delayed by over eight months. See Martin S. Lederman, *The Law(?) of the Lincoln Assassination*, 118 COLUM. L. REV. 323, 436 (2018) (noting the two relevant dates as April 3, 1866 and December 17, 1866). By contrast, Professor Fallon explains that the delay in *Quirin* was only some eleven weeks.

The application in this case for a writ of habeas corpus is made to me under the 14th section of the judiciary act of 1789 [1 Stat. 81], which renders effectual for the *citizen* the constitutional privilege of the writ of habeas corpus.<sup>28</sup>

However, *contra* Taney (or, better, what may be Fallon’s reading of Taney), the text of Section 14 of the Judiciary Act of 1789 is not tied to citizenship.<sup>29</sup> In short, where Taney’s *Merryman* opinion discussed rights as tied to citizenship, it was only because the particular applicant at hand, i.e., John Merryman, was undoubtedly a citizen.

Here is another example. Chief Justice Taney stated:

The only power, therefore, which the president possesses, where the ‘life, liberty or property’ of a private *citizen* is concerned, is the power and duty prescribed in the third section of the second article, which requires ‘that he shall take care that the laws shall be faithfully executed.’<sup>30</sup>

Here, at issue, is not the Judiciary Act, but the Constitution’s Take Care Clause. Again, textually, the text of the Take Care Clause<sup>31</sup> does not distinguish between citizens and non-citizens. Taney relates the clause to the President’s power over a citizen only because the particular habeas applicant at hand, i.e., John Merryman, was a citizen, not because that specific uncontested fact either limited the President’s powers or expanded the applicant’s rights.

Certainly, subsequent to *Quirin*, we have War-on-Terror opinions tying the trial right to citizenship in a meaningful way. Scalia does just that in his

28. *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (quoting the Judiciary Act of 1789) (emphasis added).

29. See Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81–82 (1789) (“And be it further enacted, That all the before-mentioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, That writs of habeas corpus shall in no case extend to prisoners in [jail], unless where they are in custody, under or by colo[r] of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.”).

30. *Merryman*, 17 F. Cas. at 149 (citing the Take Care Clause) (emphasis added). There is no shortage of further examples. When discussing the specific right to a civilian trial forum, Chief Justice Taney cites to the Sixth Amendment. The latter speaks to the rights of the “accused;” it is not expressly tied to citizenship. *Id.* (citing U.S. CONST. amend. VI). Similar discussion appears in *Milligan*, which cites to the Fourth, Fifth, and Sixth Amendments—none of which expressly links a substantive right (including the right to a civilian trial forum) to one’s status as a citizen. See *Milligan*, 71 U.S. at 119–20, 122–23.

31. See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

*Hamdi* dissent.<sup>32</sup> But it is just a dissent, and it lacks any meaningful support in prior American federal case law, much less in *Quirin* or in pre-*Quirin* case law. Again, Professor Fallon objects to *Quirin* because it does not expound on a citizen's right to a civilian trial forum, but the basis for that objection is difficult to understand.

#### IV. Originalism and Doctrinalism

Now I turn to a more abstract point. The justification for Fallon's (favored form of) judicial supremacism, its normative basis, is related to finality, settlement, and stability. That is achieved when the courts announce fully fleshed out Marshallian *opinions* (not mere judicial *orders* per Lincoln<sup>33</sup>) which "articulate controlling principles."<sup>34</sup> The articulation-of-values vision

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32. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting). Compare *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 37, 42–43 (1955) (Black, J.) (characterizing, post-*Quirin* and absent textual support, the rights of the Fifth and Sixth Amendments in connection with citizenship), with *id.* at 31 (citing *Milligan* for the proposition that "[t]his [case] is not an effort to make a civilian subject to military law, in distinction to martial law" (emphasis added)). In my darker moments, I sometimes ponder what the contours of the civilian court-access right extending to citizens supported by Justice Scalia in *Hamdi* and, perhaps also by Professor Fallon, might look like. In World War II, the United States detained hundreds of thousands of Axis prisoners of war. A great many were guilty of war crimes and a fair number were tried for such crimes. During the war, these prisoners were duty bound to escape and to tie up the resources of the United States and its allies. Would such prisoners have hesitated to assert—even entirely falsely—that they were each and all United States citizens by birth, transported to Axis nations as children by their parents before the war, drafted without their consent, and forced to fight and to commit crimes against their will? Would not their affidavits in support of one another support such claims? And where purported claims to United States citizenship are supported, based merely on oath and affirmation, should such prisoners get a free ticket to the civilian courthouse door? What kept Axis prisoners from making such false claims was not a sense of martial honor common to soldiers of warring nations, but the belief that their enemies were hard men, that their opponents were serious about victory and understood the consequences of defeat, and that the legal system incarcerating them was not run by madmen in judicial garb. Whatever else *Quirin* was, it was a victory for common sense—during war time.

33. See Abraham Lincoln, *First Inaugural Address* (1861), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 579, 585–86 (Roy P. Basler ed., 1969) ("[I]f the policy of the Government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."); see also Abraham Lincoln, *Speech on the Dred Scott Decision at Springfield, Illinois* (1857), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 392 (Don E. Fehrenbacher ed., 1989) ("Judicial decisions have two uses—first, to absolutely determine the case decided, and secondly, to indicate to the public how other similar cases will be decided when they arise. For the latter use, they are called 'precedents' and 'authorities.'"); *id.* at 392–93 (expounding further on the scope of judicial decisions).

34. Fallon, *supra* note 1, at 528. See generally Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 *passim* (1987) (critiquing originalism on multiple grounds).

here is essentially Dworkinian, and might be compared favorably to originalism.

Originalism is bad because the operative constitutional text is opaque and unreasoned, and it is opaque and unreasoned because it is not “prolix.”<sup>35</sup> By contrast, fully fleshed out Marshallian judicial opinions lend themselves to clarity and intellectual development in future cases. Fallon’s judicial supremacism goes by many names. We might call it doctrinalism, i.e., judicial decision-making and opinions determined through the rectification of competing lines of (appellate) precedent based on (purportedly) widely shared norms and policies, or we might call it common law constitutionalism. Whatever we call it, there are a number of hidden assumptions here. What are they? If judicial opinions—their facts, rationales, and dispositions—are in some substantial sense not knowable, i.e., beyond the ken of doctrinalism’s intellectual proponents, or if its proponents steadfastly refuse to put forward what is, in fact, knowable,<sup>36</sup> then doctrinalism is in no way obviously superior to its intellectual alternatives—e.g., civil law-like systems (eschewing any concrete reliance on precedent) or even—originalism. To put it another way, if doctrinalists get the doctrine wrong, if they misstate the law because it is not knowable or because they make it up, then the purported advantages of judicial supremacism put forward by Professor Fallon (and his intellectual predecessors) are a mirage. In those circumstances, doctrinalism would not support rule-of-law values—in those circumstances, doctrinalism is a well-hidden power grab for the rule of men.

In other words, doctrinalism relies on empirical assumptions about the legal world. It is that its high priests actually know what they are talking about—that expertise is possible, that they have that expertise, and that they are willing to deploy that expertise (neutrally). But if cases are essentially unreadable, or if doctrinalism’s proponents refuse to do what they have promised to do and what they must do to make their jurisprudential system virtuous, then we might just as well decide to democratize the interpretive process, and allow the vast unwashed to determine their political fate through elections and by direct reference, not to precedent, but to the text of the Constitution. Nor is it enough for doctrinalists to argue that they mostly get it “right”; rather, they ought to be arguing that they reach the “right” answers systematically in a way that doctrinalism’s would-be intellectual competitors (e.g., originalism) could not and do not. And that takes me back to my critique of Professor Fallon’s exposition of *Merryman*, *Milligan*, and *Quirin*.

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35. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.) (explaining that the Constitution lacks “the prolixity of a legal code”).

36. *Cf.* Fallon, *supra* note 1, at 530 (“The facts of *Merryman* presented numerous complexities that I cannot pause to probe here.”).