

Sec. 8—Powers of Congress

Cls. 11, 12, 13, and 14—War; Military Establishment

tion of interests of loyal citizens, merely created a municipal forfeiture and did not override or displace the law of prize. It decided, therefore, that when a vessel was liable to condemnation under either law, the government was at liberty to proceed under the most stringent rules of international law, with the result that the citizen would be deprived of the benefit of the protective provisions of the statute.¹⁶²⁸ Similarly, when Cuban ports were blockaded during the Spanish-American War, the Court held, over the vigorous dissent of three of its members, that the rule of international law exempting unarmed fishing vessels from capture was applicable in the absence of any treaty provision, or other public act of the government in relation to the subject.¹⁶²⁹

The Constitution at Home in Wartime

Personal Liberty.—"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."¹⁶³⁰

Ex parte Milligan, from which these words are quoted, is justly deemed one of the great cases undergirding civil liberty in this country in times of war or other great crisis. The Court held that, except in areas in which armed hostilities have made enforcement of civil law impossible, constitutional rights may not be suspended and civilians subjected to the vagaries of military justice. Yet the words were uttered after the cessation of hostilities, and the Justices themselves recognized that with the end of the shooting there arose the greater likelihood that constitutional rights could be and would be observed and that the Court would require the observance.¹⁶³¹ This pattern recurs with each critical period.

¹⁶²⁸ *The Hampton*, 72 U.S. (5 Wall.) 372, 376 (1867).

¹⁶²⁹ *The Paquete Habana*, 175 U.S. 677, 700, 711 (1900).

¹⁶³⁰ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866).

¹⁶³¹ "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which were happily termi-