Ex Parte Vallandigham

68 U.S. 243 (1863)
Decided Jan 1, 1863

DECEMBER TERM, 1863.

The Supreme Court of the United States has no power to review by *certiorari* the proceedings of a military commission ordered by a general officer of the United States Army, commanding a military department.

THIS case arose on the petition of Clement L. Vallandigham for a *certiorari*, to be directed to the Judge Advocate General of the Army of the United States, to send up to this court, for its review, the proceedings of a military commission, by which the said Vallandigham had been tried and sentenced to imprisonment; the facts of the case, as derived from the statement of the learned Justice (WAYNE) who delivered the opinion of the court, having been as follows:

Major-General Burnside, commanding the military department of Ohio, issued a special order, No. 135, on the 21st April, 1863, by which a military commission was appointed to meet at Cincinnati, Ohio, on the 22d of April, or as soon thereafter as practicable, for the trial of such persons as might be brought before it. There was a detail of officers to constitute it, and a judge advocate appointed.

The same general had, previously, on the 13th of April, 1863, issued a general order, No. 38, declaring, for the
244 information of all persons concerned, that thereafter all persons *244 found within his lines who should commit acts for the benefit of the enemies of our country, should be tried as spies or traitors, and if convicted should suffer death; and among other acts prohibited, was the habit of declaring sympathies for the enemy. The order issued by General Burnside declared that persons committing such offences would be at once arrested, with a view to being tried as above stated, or to be sent beyond his lines into the lines of their friends; that it must be distinctly understood that treason, expressed or implied, would not be tolerated in his department.

On the 5th of May, 1863, Vallandigham, a resident of the State of Ohio, and a citizen of the United States, was arrested at his residence and taken to Cincinnati, and there imprisoned. On the following day, he was arraigned before a military commission on a charge of having expressed sympathies for those in arms against the Government of the United States, and for having uttered, in a speech at a public meeting, disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its efforts for the suppression of an unlawful rebellion.

The specification under the charge was, that he, the said Vallandigham, a citizen of Ohio, on the 1st of May, 1863, at Mount Vernon, in Knox County, Ohio, did publicly address a large meeting of persons, and did utter sentiments, in words or to the effect, "that the present war was a wicked, cruel, and unnecessary war, one not waged for the preservation of the Union, but for the purpose of crushing out liberty and to erect a despotism; a war for the freedom of the blacks and the enslavement of the whites; and that if the administration had not wished otherwise, that the war could have been honorably terminated long ago; that peace might have been

honorably made by listening to the proposed intermediation of France; that propositions, by which the Southern States could be won back, and the South guaranteed their rights under the Constitution, had been rejected the day before the late battle of Fredericksburg by Lincoln and his minions, meaning the President of the United
245 States, and those under him in authority. Also charging that the *245 Government of the United States was about to appoint military marshals in every district to restrain the people of their liberties, and to deprive them of their rights and privileges, characterizing General Order No. 38, from headquarters of the Department of the Ohio, as a base usurpation of arbitrary authority, inviting his hearers to resist the same, by saying, the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties, the better; and adding, that he was at all times and upon all occasions resolved to do what he could to defeat the attempts now being made to build up a monarchy upon the ruins of our free government, and asserting that he firmly believed, as he had said six months ago, that the men in power are attempting to establish a despotism in this country, more cruel and oppressive than ever existed before."

The prisoner, on being arraigned, denied the jurisdiction of the military commission, and refused to plead either to the charge or specification. Thereon, the members of the commission, after private consultation, directed the judge advocate to enter a plea of Not Guilty, and to proceed with the trial, with an allowance to the petitioner to call witnesses to rebut the evidence which might be introduced against him to establish the charge. The next day the commission proceeded with the trial. Seven members of it were present, and tried the charge in due form of military law. The prisoner exercised his right to call witnesses, and to cross-examine those who were sworn for the prosecution. At his request he had the aid of counsel, and the court adjourned to enable him to procure it. Three gentlemen of his own choice attended; but for some cause, only known to themselves and their client, they remained in an adjoining room during the trial, without having been introduced before the commission, though it expressly authorized it to be done, saying that it had adjourned to permit the prisoner to obtain their presence. The prisoner was informed by the judge advocate, when he closed his evidence, that no
246 other witnesses would be introduced. He then offered the Hon. S. S *246 Cox as a witness in his behalf. This gentleman was interrogated in chief, without being cross-examined, and it was admitted by the judge advocate, that if three other persons who had been summoned to appear as witnesses for the prisoner had appeared, but who were not in court, that their evidence would have been substantially the same as Mr. Cox had given. Here the accused closed his testimony, and then read to the commission a statement, which, with the other proceedings of the trial, was forwarded to the judge advocate general, and was inserted in the record.

It began with the declaration, that he had been arrested without due process of law, without a warrant from any judicial officer; that he was then in a military prison, and had been served with a charge and specifications, as in a court-martial or military commission; that he was not either in the land or naval forces of the United States, nor in the militia in the actual service of the United States, and, therefore, not triable for any cause by any such court; that he was subject, by the express terms of the Constitution, to arrest only by due process of law or judicial warrant, regularly issued upon affidavit by some officer or court of competent jurisdiction for the trial of citizens; that he was entitled to be tried on an indictment or presentment of a grand jury of such court, to a speedy and public trial, and also by an impartial jury of the State of Ohio, to be confronted with witnesses against him, to have compulsory process for witnesses in his behalf, the assistance of counsel for his defence, by evidence and argument according to the common law and the usages of judicial courts; — all those he demanded as his right as a citizen of the United States, under the Constitution of the United States. He also alleged that the offence of which he is charged is not known to the Constitution of the United States, nor to any law thereof; that they were words spoken to the people of Ohio, in an open and public political meeting,

lawfully and peaceably assembled under the Constitution, and upon full notice; that they were words of criticism upon the policy of the public servants of the people, by which policy it was alleged that the welfare
247 *247 of the country was not promoted. That they were used as an appeal to the people to change that policy, not by force, but by free elections and the ballot-box; that it is not pretended that he counselled disobedience to the Constitution or resistance to the law or lawful authority; that he had never done so, and that beyond this protest he had nothing further to submit.

The judge advocate replied, that so far as the statement called in question the jurisdiction of the commission, that had been decided by the authority convening and ordering the trial, nor had the commission, at any time, been willing to entertain the objection; that as far as any implications or inferences designed or contemplated by the statement of the accused, his rights to counsel and to witnesses for his defence, he had enjoyed the allowance of both, and process for his witnesses, which had been issued; and that as to the facts charged in the specification, they were to be determined by the evidence; — that his criminality was a question peculiarly for the commission, and that he had submitted the case to its consideration. The commission was then cleared for consideration.

The finding and sentence were, that Vallandigham was guilty of the charge and specification, except so much of the latter, "as *that propositions by which the Southern States could be won back and guaranteed in their rights under the Constitution had been rejected the day before the battle of Fredericksburg*, by Lincoln and his minions, meaning the President of the United States, and those under him in authority;" and the words, " *asserting that he firmly believed, as he had asserted six months ago, that the men in power are attempting to establish a despotism in this country more oppressive than ever existed before*." As to those words the prisoner was not guilty; but of the charge he was guilty, and the commission, therefore, sentenced him to be placed in close confinement in some fortress of the United States, to be designated by the commanding officer of this department, there to be kept during the war.

248 The finding and sentence were approved and confirmed *248 by General Burnside, in an order bearing date the 16th of May, 1863, and Fort Warren was designated as the place of imprisonment. On the 19th of May, 1863, the President, in commutation of the sentence, directed Major-General Burnside to send the prisoner, without delay, to the headquarters of General Rosecrans, then in Tennessee, to be by him put beyond our military lines; which order was executed.

In support of the motion for the *certiorari*, and against the jurisdiction of the military commission, it was urged that the latter was prohibited by the act of March 3d 1863, for enrolling and calling out the national forces (§ 30, 12 *Stat. at Large*, 736), as the crimes punishable in it by the sentence of a court-martial or military commission, applied only to persons who are in the military service of the United States, and subject to the articles of war. And also, that by the Constitution itself, § 3, art. 3, all crimes, except in cases of impeachment, were to be tried by juries in the State where the crime had been committed, and when not committed within any State, at such place as Congress may by law have directed; and that the military commission could have no jurisdiction to try the petitioner, as neither the charge against him nor its specifications imputed to him any offence known to the law of the land, and that General Burnside had no authority to enlarge the jurisdiction of a military commission by the General Order No. 38, or otherwise.

Mr. Justice WAYNE, after stating the case, much as precedes, delivered the opinion of the court:

General Burnside acted in the matter as the general commanding the Ohio Department, in conformity with the instructions for the government of the armies of the United States, approved by the President of the United States, and published by the Assistant Adjutant-General, by order of the Secretary of War, on the 24th of April,
249 1863.– *249

– They were prepared by Francis Leiber, LL.D., and were revised by a board of officers, of which Major-General E.A. Hitchcock was president

It is affirmed in these instructions,– that military jurisdiction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war. "Military offences, under the statute, must be tried in the manner therein directed; but military offences, which do not come within the statute, must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local law of each particular county."

– Page 249 § 1, ¶ 13.

In the armies of the United States, the first is exercised by courts-martial, while cases which do not come within the "rules and regulations of war," or the jurisdiction conferred by statute or court-martial, are tried by *military commissions*.

These jurisdictions are applicable, not only to war with foreign nations, but to a rebellion, when a part of a country wages war against its legitimate government, seeking to throw off all allegiance to it, to set up a government of its own.

Our first remark upon *the motion for a certiorari* is, that there is no analogy between the power given by the Constitution and law of the United States to the Supreme Court, and the other inferior courts of the United States, and to the judges of them, to issue such processes, and the prerogative power by which it is done in England. The purposes for which the writ is issued are alike, but there is no similitude in the origin of the power to do it. In England, the Court of King's Bench has a superintendence over all courts of an inferior criminal jurisdiction, and may, by the plenitude of its power, award a certiorari to have any indictment removed and brought before it; and where such certiorari is allowable, it is awarded at the instance of the king, because every indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases. The courts of the United States derive authority to issue such a writ from the Constitution and the legislation of Congress. To place the two sources of the right to issue the writ in obvious contrast, and in application to the
250 motion we are considering *250 for its exercise by this court, we will cite so much of the third article of the Constitution as we think will best illustrate the subject.

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." "The judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls," c.,c., and " *in all cases affecting ambassadors, other ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction*. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." Then Congress passed the act to establish the judicial courts of the United States,– and in the 13th section of it declared that the Supreme Court shall have exclusively all such jurisdiction of suits or

proceedings against ambassadors or other public ministers or their domestics or their domestic servants as a court of law can have or exercise *consistently with the laws of nations*, and original, but not exclusive jurisdiction, of suits brought by ambassadors, or other public ministers, or in which a consul or vice-consul shall be a party. In the same section, the Supreme Court is declared to have appellate jurisdiction in cases hereinafter expressly provided. In this section, it will be perceived that the jurisdiction given, besides that which is mentioned in the preceding part of the section, is an exclusive jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestics or domestic servants, as a court of law can have or exercise consistently with the laws of nations, and original but not exclusive jurisdiction of all suits *brought by ambassadors or other public ministers*, or in which a consul or vice-consul shall be a party, thus
251 guarding them *251 from all other judicial interference, and giving to them the right to prosecute for their own benefit in the courts of the United States. Thus substantially reaffirming the constitutional declaration, that the Supreme Court had original jurisdiction in all cases affecting ambassadors and other public ministers and consuls, and those in which a State shall be a party, and that it shall have appellate jurisdiction in all other cases before mentioned, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

– Page 250 1 Stat. at Large, 73, chap. 20.

The appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the acts of Congress, and must be exercised subject to the exceptions and regulations made by Congress.– In other words, the petition before us we think not to be within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court. It is not in law or equity within the meaning of those terms as used in the 3d article of the Constitution. Nor is a military commission a court within the meaning of the 14th section of the Judiciary Act of 1789. That act is denominated to be one to establish the judicial courts of the United States, and the 14th section declares 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, agreeably to the principles and usages of law. The words in the section, "the before-mentioned" courts, can only have reference to such courts as were established in the preceding part of the act, and excludes the idea that a court of military commission can be one of them.

– Durousseau *v*. The United States, 6 Cranch, 314; Barry *v*. Mercein, 5 Howard, 119; United States *v*. Curry, 6 Id., 113; Forsyth *v*. United States, 9 Id., 571.

Whatever may be the force of Vallandigham's protest, that he was not triable by a court of military commission, it is certain that his petition cannot be brought within the 14th section of the act; and further, that the court
252 cannot, without *252 disregarding its frequent decisions and interpretation of the Constitution in respect to its judicial power, originate a writ of certiorari to review or pronounce any opinion upon the proceedings of a military commission. It was natural, before the sections of the 3d article of the Constitution had been fully considered in connection with the legislation of Congress, giving to the courts of the United States power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which might be necessary for the exercise of their respective jurisdiction, that by some members of the profession it should have been thought, and some of the early judges of the Supreme Court also, that the 14th section of the act of 24th September, 1789, gave to this court a right to originate processes of *habeas corpus ad subjiciendum*, writs of certiorari to review the proceedings of the inferior courts as a matter of original jurisdiction, without being in any way restricted by the constitutional limitation, that in all cases affecting ambassadors, other public

ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. This limitation has always been considered restrictive of any other original jurisdiction. *The rule of construction of the Constitution being, that affirmative words in the Constitution, declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases*.– The nature and extent of the court's appellate jurisdiction and its want of it to issue writs of *habeas corpus ad subjiciendum* have been fully discussed by this court at different times. We do not think it necessary, however, to examine or cite many of them at this time. We will annex a list to this opinion, distinguishing what this court's action has been in cases brought to it by appeal from such applications as have been rejected, when it has been asked that
253 it would act upon the matter as one of original jurisdiction. *253

– Marbury *v*. Madison, 1 Cranch, 137; State of New Jersey *v*. State of New York, 5 Peters, 284; Kendall *v*. The United States, 12 Id., 637; Cohens *v*. Virginia, 6 Wheaton, 264.

In the case *Ex parte Milburn*,– Chief Justice Marshall said, as the jurisdiction of the court is appellate, it must first be shown that it has the power to award a *habeas corpus. In re Kaine*,† the court denied the motion, saying that the court's jurisdiction to award the writ was appellative, and that the case had not been so presented to it, and for the same cause refused to issue a writ of certiorari, which in the course of the argument was prayed for. In *Ex parte Metzger*,‡ it was determined that a writ of certiorari could not be allowed to examine a commitment by a district judge, under the treaty between the United States and France, for the reason that the judge exercised a special authority, and that no provision had been made for the revision of his judgment. So does a court of military commission exercise a special authority. In the case before us, it was urged that the decision in Metzger's case had been made upon the ground that the proceeding of the district judge was not judicial in its character, *but that the proceedings of the military commission* were so; and further, it was said that the ruling in that case had been overruled by a majority of the judges in Raines' case. There is a misapprehension of the report of the latter case, and as to the judicial character of the proceedings of the military commission, we cite what was said by this court in the case of *The United States* v. *Ferreira*.§

– Page 253 9 Peters, 704.

† Page 253 14 Howard, 103.

‡ Page 253 5 Id., 176.

§ Page 253 13 Id., 48

"The powers conferred by Congress upon the district judge and the secretary are judicial in their nature, for judgment and discretion must be exercised by both of them, but it is not judicial in either case, in the sense in which judicial power is granted to the courts of the United States." Nor can it be said that the authority to be exercised by a military commission is judicial in that sense. It involves discretion to examine, to decide and sentence, but there is no original jurisdiction in the Supreme Court to issue a writ of *habeas corpus ad subjiciendum* to review or reverse its proceedings, or the writ of certiorari to revise the proceedings of a
254 military commission. *254

And as to the President's action in such matters, and those acting in them under his authority, we refer to the opinions expressed by this court, in the cases of *Martin* v. *Mott*,– and *Dynes* v. *Hoover*.†

– Page 254 12 Wheaton, pp. 28 to 35, inclusive.

† Page 254 20 Howard, 65.

For the reasons given, our judgment is, that the writ of certiorari prayed for to revise and review the proceedings of the military commission, by which Clement L. Vallandigham was tried, sentenced, and imprisoned, must be denied, and so do we order accordingly.

CERTIORARI REFUSED.

NELSON, J., GRIER, J., and FIELD, J., concurred in the result of this opinion. MILLER, J., was not present at the argument, and took no part.