

# SOLVING THE PUZZLE OF “ENEMY COMBATANT” STATUS

## Supervised Analytic Writing Paper

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*When peace prevails, ... there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion--if the passions of men are aroused and the restraints of law weakened, if not disregarded-- these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution. Ex Parte Milligan<sup>1</sup>*

## INTRODUCTION

In the war on terrorism, the very concept of what is a war and who can be an “enemy” has been expanded to fighting groups and individuals as well as nation states and their populations. Terrorism is a vague concept that focuses on the actions of a person, and the war on terrorism is really a war on acts of terrorism, which is a tactic rather than a movement or entity. Particular actions combined with certain intentions equal terrorism. In this environment, the President is claiming the power to designate any person on the planet an enemy combatant. The Administration claims that this designation places that person in a category with the least amount of rights in human history, where military jurisdiction is assumed and the civilian courts, laws and treaties, and even our Bill of Rights are thought to have no force whatsoever. Actions that had previously made a person a criminal suspect, in possible violation of laws against terrorism or other crimes, now can trigger this designation, which skips normal criminal

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<sup>1</sup> 71 U.S. 2, 123 (1866).

charges, indictment, and trial to place a person in that category of the unlawful enemy who has no rights.

This is precisely the same two-track, action-focused legal system that Lincoln imposed on the North during the Civil War. The Supreme Court, in *Ex Parte Milligan*, found Lincoln's system of indefinite detention and tribunals unconstitutional when applied to civilians. Like Lincoln's version, the current emergency detention and trial system being constructed by the Bush Administration is not in keeping with our constitutional principles of supremacy of the civilian over the military. The Bush Administration is relying almost entirely on *Ex Parte Quirin*, 317 U.S. 1 (1942), which misreads *Milligan* entirely and focuses on what acts the person has committed, not the category the person belongs to.

This erroneous reading of *Milligan* and of the Constitution has lain unused until now. Now this action based analysis of who is the enemy has meshed with a desire to wage war on terrorism. The result is a modern version of Lincoln's martial law, but now there is not even a distinct enemy, like the rebellious South, whom one can avoid associating with or acting on behalf of.

We must stop ourselves from accepting both this concept of war and of who can be the enemy. The two combined spell disaster. To avoid that disaster, we need to follow our Constitution's narrow definition of war and the enemy. We need to discard *Quirin*'s erroneous reading of *Milligan*, and return to *Milligan*'s clear rule on the separation of military and civilian jurisdiction. If we do not, we will be waging war on ourselves and our Constitution. This paper will show how we got to where we are, why

this status is so dangerous to our freedoms and way of life, and how we can apply our Constitution properly to get us back on an even keel.

## THE FIRST U.S. WAR ON INTERNATIONAL TERRORISM

There is currently a sentiment in the United States that the world changed on September 11, 2001 and we face a new, unprecedented kind of war, against an enemy that fights in small cells, can easily infiltrate into our society and may have access to weapons of mass destruction. The claim that this is unprecedented is not entirely accurate. In the Civil War, the U.S. faced outside enemies from the rebellious South who could easily infiltrate across porous borders into the North, blending in with the civilian population to wreak havoc with the support of Northern rebel cells and thousands of sympathizers. Among the many schemes to spread rebellion and destruction in the North was a plan for a Confederate officer to sneak into New York City and set the city afire.<sup>2</sup> Another was a plot to spread yellow fever in New York and Philadelphia by smuggling in infected goods.<sup>3</sup> That particular biological warfare attack, if carried out, could easily have killed far more than died on September 11, 2001. Another scheme involved the destruction of Croton Dam, or the poisoning of the water in that reservoir, which supplied drinking water to New York City.<sup>4</sup> All of those plans targeted the civilian population of the North and would certainly be considered mass scale terrorism today, as well as total warfare on a civilian population.

With the Civil War, a rebellion had turned into a war as the breakaway states formed themselves into a separate nation, with their own constitution, legislature,

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<sup>2</sup> *Ex Parte Quirin*, 317 U.S. at 13, n.10 (noting that “On January 17, 1865, Robert C. Kennedy, a Captain of the Confederate Army, who was shown to have attempted, while in disguise, to set fire to the City of New York, and to have been seen in disguise in various parts of New York State, was convicted on charges of acting as a spy and violation of the law of war ‘in undertaking to carry on irregular and unlawful warfare.’”).

<sup>3</sup> WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 151 (Alfred A. Knopf, Inc. 1998).

<sup>4</sup> *Id.*

president, army, navy, and money. The South became a de-facto enemy nation with which the U.S. was at war, with the North and South taking and exchanging prisoners of war per the laws of war.<sup>5</sup> The Southern population, though they had all been U.S. citizens and residents, became the equivalent of an enemy alien population.<sup>6</sup> In this anomalous environment it is perhaps understandable that Lincoln and his advisors came to see all Northern sympathizers and would-be rebels to be just as much “the enemy” as Southern soldiers, spies, or saboteurs who crossed the Union lines. Lincoln’s response to the Rebellion included: an executive suspension of habeas corpus in a Maryland on the brink of secession that threatened to cut Washington D.C. off from the rest of the North<sup>7</sup>; a blockade of the South and seizure of suspect shipping<sup>8</sup>; the closing of the mails to Democratic newspapers sympathetic to the South<sup>9</sup>; the institution of a national draft<sup>10</sup>; seizure of property of those suspected of aiding rebels<sup>11</sup>; and even the arrest and military detention of Northern civilians the Lincoln Administration considered dangerous rebel sympathizers and threats to the war effort.<sup>12</sup> After the suspension of habeas corpus without dire political consequences, subsequent infringements of civil liberties became easier for Lincoln.<sup>13</sup>

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<sup>5</sup> MARK E. NEELY, JR. *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 136 (Oxford University Press, 1991).

<sup>6</sup> *Id.* at 9 (noting that “Lincoln never bothered to suspend the writ in any other Confederate state [aside from Florida at the outset] or any other Union-held area of a Confederate state ... Lincoln behaved as though the Southerners who seceded had thereby abdicated their civil liberties under the U.S. Constitution. The lack of public protest may indicate that other Americans thought the same way”).

<sup>7</sup> *Id.* at 10.

<sup>8</sup> *Id.* at 139.

<sup>9</sup> REHNQUIST, at 47 (describing how the Postmaster General ordered the New York postmaster to exclude from the mails five newspapers which were almost entirely dependent on the mail for distribution).

<sup>10</sup> NEELY, *supra* note 5, at 64.

<sup>11</sup> *Id.* at 34.

<sup>12</sup> *Id.* at 14-23.

<sup>13</sup> *Id.* at 10.

All of these were unprecedented actions that tore down the constitutional wall of separation between military and civilian law and authority and between war on foreign enemies and the quelling of merely domestic rebellions, which prior to the Civil War had never been considered war.<sup>14</sup> At its very worst, this degenerated into an order by a military commander, John C. Fremont, to execute Missourians (Missouri being a loyal state) “found in arms against the United States.”<sup>15</sup> Lincoln opposed the use of such executions “without first having my approbation or consent.”<sup>16</sup> Mark E. Neely Jr. notes that:

What Lincoln tacitly permitted Fremont to do was almost as remarkable as what he disallowed. Lincoln did not question Fremont’s imposition of martial law. He did not object to the principle of execution of civilian prisoners by the military in a loyal state; he insisted only on his prerogative to review the cases first.<sup>17</sup>

There were also incidents of torture of civilians mistakenly accused of being deserters from the Union Army. Some of the innocent men swept up were British subjects.<sup>18</sup> Mark E. Neely observes, “it had become a usual and customary way of handling certain kinds of prisoners. Had the Civil War continued longer ... such practices might well have increased.”<sup>19</sup> In keeping with this expanded notion of the “enemy” and what actions were acts of war, On September 24, 1862, Lincoln issued a

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<sup>14</sup> See *infra* note 57 and accompanying text.

<sup>15</sup> NEELY, *supra* note 5, at 34.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 110 (describing prisoners handcuffed and suspended by the wrists as well as the use of a water torture method using high pressure hoses). Neely notes that “it seems clear from the testimony in the water-torture cases that government detectives or provost marshals were eager to arrest as bounty jumpers any man of draft age holding substantial cash and boarding a train.” *Id.* at 131. It is difficult to know just how many innocent men were detained for such suspicions as “most such arrests resulted in confinement for eight days in a post guard house, and few such cases generated prison records available to historians today.” *Id.* at 132.

<sup>19</sup> *Id.* 112.

proclamation, making official the already nation-wide use of military tribunals in the North. Lincoln ordered:

That during the existing insurrection, and as a necessary means for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to 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 now, or hereafter during the Rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court martial or military commission.<sup>20</sup>

This order applied to a far broader category than actual combatants. During the Civil War, more than 13, 535 Northern civilians were arrested by the military<sup>21</sup> and at least 4,271 of these were tried before military tribunals.<sup>22</sup> Typical charges were vague accusations of violating the laws and customs of war. In one such case, a man was found guilty of violations of the laws of war for letting rebels lurk in his neighborhood without reporting them<sup>23</sup> but in many others Northern civilians were accused of harboring rebels or engaging in guerilla warfare.<sup>24</sup> Cases in which civilians were given the death sentence by military commissions were reviewed by Lincoln's office, along with all other military court death sentences.<sup>25</sup>

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<sup>20</sup> Ex Parte Milligan, 71 U.S. 2, 15 (1866). The government argued that "This was an exercise of his sovereignty in carrying on war, which is vested by the Constitution in the President." *Id.*

<sup>21</sup> NEELY, *supra* note 5, at 116.

<sup>22</sup> *Id.* at 129.

<sup>23</sup> *Id.* at 171.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 166 (noting that Lincoln reviewed civilian cases personally when he could and tended toward leniency).

### *Ex Parte Milligan*

It is against this backdrop of an extraordinary expansion of the military power into civilian life that the 1866 Supreme Court case *Ex Parte Milligan*<sup>26</sup> was decided. The Civil War had cost an estimated 600,000 lives and did indeed threaten the very survival of the Union. And yet, after it was over the Supreme Court corrected the excesses of Lincoln's response by striking down the use of military courts to try Northern civilians and military detention of such civilians in excess of the twenty days allowed under the congressional habeas suspension statute. The *Milligan* case is a Supreme Court rarity: a decision on wartime powers issued after the end of a war, with the Court explicitly conscious that it is righting the constitutional ship of state after a storm. The U.S. government had charged Mr. Milligan with "Conspiracy against the Government of the United States; 'Affording aid and comfort to rebels against the authority of the United States; 'Inciting Insurrection; 'Disloyal practices; and 'Violation of the laws of war."<sup>27</sup>

The government asserted that he had committed the acts of:

[J]oining and aiding, at different times, ... a secret society known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government and duly constituted authorities of the United States; holding communication with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate prisoners of war, &c.; resisting the draft, &c.; . . . 'at a period of war and armed rebellion against the authority of the United States, ... In Indiana, a State within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy.'<sup>28</sup>

The government did not try to argue that Mr. Milligan was in fact a member of the Confederate army or a Southern resident, and yet the government argued that the laws of war still applied to him and that "[a] military commission derives its powers and

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<sup>26</sup> 71 U.S. 2 (1866).

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.*



authority wholly from martial law; and by that law and by military authority only are its proceedings to be judged or reviewed.”<sup>29</sup> Then it stated that while the traditional use of martial law was over occupied enemy aliens, “not offences against military law by soldiers and sailors, and not breaches of the common laws of war belligerents,” Congress had endeavored, by legislation, to “extend the sphere of that jurisdiction over certain offenders who were beyond what might be supposed to be the limit of actual military occupation.”<sup>30</sup> However, the government asserted that such was not relevant since “as has been seen, military commissions do not thus derive their authority. Neither is their jurisdiction confined to the classes of offences therein enumerated.”<sup>31</sup> Rather, the President had an independent power, as commander-in-chief, to extend the jurisdiction of such commissions by his proclamation of September 24th, 1862 as “an exercise of his sovereignty in carrying on war, which is vested by the Constitution in the President.”<sup>32</sup> Then, the government countered Milligan’s claim that he could not acquire belligerent status because he was a Northern resident and not in the military by asserting that:

[N]either residence nor propinquity to the field of actual hostilities is the test to determine who is or who is not subject to martial law, even in a time of foreign war, and certainly not in a time of civil insurrection. The commander-in-chief has full power to make an effectual use of his forces. He must, therefore, have power to arrest and punish one who arms men to join the enemy in the field against him; one who holds correspondence with that enemy; one who is an officer of an armed force organized to oppose him; one who is preparing to seize arsenals and release prisoners of war taken in battle and confined within his military lines.<sup>33</sup>

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<sup>29</sup> *Id.* at 14. The government elaborated: “The officer executing martial law is at the same time supreme legislator, supreme judge, and supreme executive. As necessity makes his will the law, he only can define and declare it; and whether or not it is infringed, and of the extent of the infraction, he alone can judge; and his sole order punishes or acquits the alleged offender.” *Id.*

<sup>30</sup> *Id.* at 15.

<sup>31</sup> *Id.*

<sup>32</sup> *Ex Parte Milligan*, 71 U.S. 2, 16 (1866).

<sup>33</sup> *Id.* at 17.

Further, it was claimed that once war commenced, the President alone was “the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration.”<sup>34</sup> The U.S. argued that the Fourth, Fifth, and Sixth amendments to the Constitution did not constrain the actions of the government in times of war, because:

These, in truth, are all peace provisions of the Constitution and, like all other conventional and legislative laws and enactments, are silent amidst arms, and when the safety of the people becomes the supreme law. By the Constitution, as originally adopted, no limitations were put upon the war-making and war-conducting powers of Congress and the President.<sup>35</sup>

Note that the actions of Lincoln had not instituted a complete martial law such as replaced the civilian courts entirely.<sup>36</sup> The great majority of trials for crimes in the North were still by jury in civilian courts. Rather, there was an asserted power to remove people from the civilian system and place them into military jurisdiction upon the discretion of the President and his officers. It would be more accurate to take the government’s statement as meaning the laws and Bill of Rights are silent for certain people and for certain actions. The government then argued that:

Finally, if the military tribunal has no jurisdiction, the petitioner may be held as a prisoner of war, aiding with arms the enemies of the United States, and held, under the authority of the United States, until the war terminates, then to be handed over by the military to the civil authorities, to be tried for his crimes under the acts of Congress, and before the courts which he has selected.<sup>37</sup>

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<sup>34</sup> *Id.* at 18.

<sup>35</sup> *Id.* The government added the claim that “after discussion, and after the attention of the country was called to the subject, no other limitation by subsequent amendment has been made, except by the Third Article, which prescribes that ‘no soldier shall be quartered in any house in time of peace without consent of the owner, or in *time of war*, except in a manner prescribed by law.’ This, then, is the only expressed constitutional restraint upon the President as to the manner of carrying on war.” *Id.*

*But See* discussion of war powers, *infra* notes 62-63 and accompanying text.

<sup>36</sup> Such a complete martial law would come to Hawaii during World War II. *See infra* note 109 and accompanying text.

<sup>37</sup> *Ex Parte Milligan*, 71 U.S. 2, 20 (1866).

The government claimed that “[t]he petitioner was as much a prisoner of war as if he had been taken in action with arms in his hands.”<sup>38</sup> Thus, the government was claiming a power to use military jurisdiction for both trial and detention.

In response, the Court did not minimize Mr. Milligan’s alleged crimes.<sup>39</sup> The Court nonetheless emphatically rejected all of the government’s arguments as erroneous attempts to circumvent the plain meaning of the Constitution and Bill of Rights:

[E]ven these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men [who wrote the Constitution] foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. 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.<sup>40</sup>

The Court then ruled that the military had no jurisdiction over Mr. Milligan:

[N]o usage of war could sanction a military trial ...for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan

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<sup>38</sup> *Id.* at 21.

<sup>39</sup> *Id.* at 130 (“Open resistance to the measures deemed necessary to subdue a great rebellion, by those who enjoy the protection of government, and have not the excuse even of prejudice of section to plead in their favor, is wicked; but that resistance becomes an *enormous crime* when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States. Conspiracies like these, at such a juncture, are extremely perilous; and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law, as an example to deter others from similar criminal conduct”).

<sup>40</sup> *Id.* at 120.

was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.<sup>41</sup>

The Court made it clear that military law and military courts had no jurisdiction whatsoever over civilians in civil life, nor could the military simply hold Milligan as a prisoner of war.<sup>42</sup> Instead, the Court enforced the congressional habeas statute's limit of twenty days detention without indictment by requiring Milligan's release.<sup>43</sup> The *Milligan* majority held that while Congress could suspend habeas corpus, thus enabling executive detentions without indictment or trial, Congress could not authorize military trials for civilians where the civilian courts were still open.<sup>44</sup> Military courts could have jurisdiction over civilians only when the insurrection or invasion was real, not just threatened, and so severe that it actually closed the civilian courts and such had not been the case in Indiana.<sup>45</sup> Here, the *Milligan* majority gives us three key questions for determining whether a person is subject to military law. The first question is whether or not the person is in the U.S. military. The next question is whether or not the person is a resident of an enemy state.<sup>46</sup> The third is whether or not the person is a member of the enemy armed forces (thus a prisoner of war if in custody). A possible fourth question is whether or not the person is a citizen of the U.S., though in the context of the Civil War,

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* ("it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion").

<sup>43</sup> *Ex Parte Milligan*, 71 U.S. 2, 131 (1866).

<sup>44</sup> *Id.* at 126.

<sup>45</sup> *Id.* at 127. Nor had such happened throughout the North during the nation-wide martial law.

<sup>46</sup> This applies to conquered enemy nations as well. Even after the *Milligan* decision, during Reconstruction, the people of the South was treated like the enemy population of a conquered nation, with military government and trial by military tribunals. See NEELY, *supra* note 5, at 178. Such tribunals finally came to a halt when the last Southern state was finally reintegrated into the Union. *Id.* Until then, the South was arguably still an enemy population, subject to military rule, like Iraq at the present moment.

<sup>46</sup> Nor was this the case throughout the North, where a nation-wide martial law had been in effect.

this should likely be read as meaning loyal “resident” who was not a citizen of a rebellious state. It is important to keep in mind that the South was being treated as a foreign enemy state for purposes of prosecuting this war. It was only in this peculiar context that a U.S. citizen or resident could be treated as an enemy alien.

The four concurring justices agreed with the majority on its two special exceptions for military jurisdiction over U.S. soldiers and the enemy, and they agreed that Mr. Milligan was not subject to military jurisdiction in the case at hand, but the concurring justices were not willing to close off the civilian category entirely to congressional authorization for the use of military tribunals. The minority wanted to rule narrowly, finding that Congress had not authorized the use of military tribunals on civilians in this instance, but could do so in the future “within districts or localities where ordinary law no longer adequately secures public safety and private rights.”<sup>47</sup> The minority also wanted to leave room for use of this power by the President “when the action of Congress cannot be invited, and in the case of justifying or excusing peril.”<sup>48</sup> We will see subsequent expressions of that same sentiment, as well as additional attempts to use military jurisdiction over civilians. But first, what follows is a brief description of the Constitutional framework for dealing with national emergencies.

## **A CONSTITUTIONAL NATIONAL SECURITY SYSTEM**

As the Constitution is the highest law of the land, we should look there first to determine the proper system for dealing with defense against any threat.<sup>49</sup> The Constitution

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<sup>47</sup> *Ex Parte Milligan*, 71 U.S. 2, 142 (1866).

<sup>48</sup> *Id.*

<sup>49</sup> As the counsel for Mr. Milligan noted: “That instrument, framed with the greatest deliberation, after thirteen years' experience of war and peace, should be accepted as the authentic and final expression of the

contains two parallel emergency defense systems, one internal and one external. The internal system is made up of the habeas suspension clause, the militia clause, and the treason clause. The external system is made up of the declare war clause, the power to make rules for capture, regulation of armed services, define and punish violations of the laws of nations and piracy, and the power to make treaties.<sup>50</sup>

### **The Internal National Emergency System**

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>51</sup>

Suspension of the writ allows the detention of civilians without charge and without the requirement of securing grand jury indictments. Only Congress can suspend the great writ and only when there is an actual invasion or rebellion.<sup>52</sup> In addition, Congress can set limits on the scope, extent, and duration of the suspension as it did in the Civil War habeas statute noted in *Milligan*. Per that statute, the government could hold a person no longer than twenty days before having to release the detainee unless a grand jury had indicted him. Such an indictment would trigger a normal criminal prosecution.

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public judgment, regarding that form and scope of government, and those guarantees of private rights, which legal science, political philosophy, and the experience of previous times had taught as the safest and most perfect. All attempts to explain it away, or to evade or pervert it, should be discountenanced and resisted. Beyond the line of such an argument, everything else ought, in strictness, to be superfluous.” *Id.* at 30.

<sup>50</sup> All of these powers are given to Congress, to be enacted by statute. The executive branch cannot make law and can only enforce the laws and treaties duly enacted. In addition, these laws and treaties must comply with the Constitution. If they do not, they are null and void.

<sup>51</sup> U.S. CONST. art. I, § 9.

<sup>52</sup> ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA. FIVE VOLUMES, VOL. 1, NOTE A 359 (The Lawbook Exchange, Ltd. 1996) (1803) (“if the privilege of the writ of habeas corpus should be suspended by Congress, when there was neither an invasion, nor a rebellion in the United States ... the act of suspension ... being contrary to the express terms of the Constitution, would be void.”).

The second great emergency clause in the Constitution is Article I, Section 8, empowering Congress to “Provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” The Militia Clause provides for the use of military force to suppress an insurrection and repel an invasion. One example is President Washington’s use of the militia to suppress the Whisky Rebellion in Eastern Pennsylvania. Together, the Habeas Suspension Clause and the Militia Clause provide an immediate response to the emergencies of rebellions and invasions. It should be noted that the Habeas Suspension Clause does not trigger the use of military trials, as the *Milligan* Court affirmed. There is no enumeration whatsoever in the Constitution of any power to use military tribunals on civilians in any emergency, not even during an invasion or insurrection.<sup>53</sup> Even during the American Revolution, General George Washington did not try civilians in military courts.<sup>54</sup> The only legal remedy contemplated for rebellious and traitorous U.S. citizens and resident aliens<sup>55</sup> is the Treason Clause of Article III, Section 3, which is the third provision in the Constitution meant to deal with internal emergencies:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two witnesses to the same overt Act, or on confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.<sup>56</sup>

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<sup>53</sup> The *Milligan* Court found that such military courts could be used on civilians when there was no other law, but this is an inferred power that is nowhere enumerated. Nor is it clear that such a power is at all necessary. With a suspension of the writ of habeas corpus, or even without one in extremis, a commander could still simply detain persons until such time as the courts reopened. There is no pressing need for trial.

<sup>54</sup> NEELY, *supra* note 5, at 121.

<sup>55</sup> TUCKER, *supra* note 52, VOL. V, *Note B. Concerning Treason* 31 (“here it seems to be clear that every person whatsoever, owing allegiance to the United States, may commit treason against them. This includes *all* citizens ... and also all *aliens residing* within the United States, and being under their protection.”) (emphasis in original).

<sup>56</sup> U.S. Const. Art. III, Sec. 3.

This is the only clause in the Constitution that defines such a capitol crime, and spells out the required evidence standard in the text itself. In all of the cases of levying war against the U.S. prior to the Civil War, from disloyal Tories, to the Whiskey Rebellion, to Aaron Burr's attempt to raise an army of 7,000 men, to the John Brown's assault on the arsenal at Harper's Ferry, the trials were all for the crime of treason, in civilian court, and by jury.<sup>57</sup> Contrary to the dicta in *Ex Parte Quirin*, the Treason Clause was not intended to be a mere statute, which the government could use if it wishes or simply ignore while using military courts instead.<sup>58</sup> To the contrary, The Treason Clause was meant to serve as a bar on any attempts to place a citizen at risk of losing his or her life because of suspicions of being disloyal and giving aid and comfort to the enemy without meeting the overt act requirement and the evidentiary and procedural guarantees of the Clause. Even the principle emergency clause in the Bill of Rights, the Exception Clause in the Fifth Amendment, does not mention the rebels in a rebellion being excluded, but only the militia called up to suppress the rebellion.<sup>59</sup>

These are the only constitutional clauses that explicitly address such internal emergencies, and they reflect the Founding generation's suspicion of military law, standing armies, and powerful executives.<sup>60</sup> Accordingly, none of these powers are listed in Article II. Only Congress can trigger the use of military force and detention against

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<sup>57</sup> See *Republica v. Carlisle*, 1 Dall. 35 (Pa. 1778); *Republica v. Chapman*, 1 Dall. 53 (Pa. 1781) (Revolutionary war treason cases); *U.S. v. Mitchell* [Case No. 15,788] (the Whiskey Rebellion); *United States v. Burr*, 25 Fed. Cas. 55, no. 14,693 (C.C.D. Va. 1807) (Aaron Burr tried for treason for attempt to raise an Army of men against the U.S.).

<sup>58</sup> 317 U.S. 1, at 38 (1942).

<sup>59</sup> U.S. CONST. amend. V, cl. 2. The members of the militia themselves are only subject to military discipline during such a call up for a real rebellion or invasion. Otherwise, they too are immune from military jurisdiction.

<sup>60</sup> As the *Milligan* Court noted, the Founders knew the "extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages." *Ex Parte Milligan*, 71 U.S. 2, 119 (1866).



residents of the United States. Further, the Treason Clause's placement in Article III served to deny even a pretext for congressional or executive attempts to redefine that crime.<sup>61</sup> This internal emergency powers system was meant to work in conjunction with an external counterpart which shares its fundamental principles of civilian control of the military, congressional initiation and control, specific application, and the requirement that the Executive act only under law—both statutes and treaties.

### **The External National Emergency System**

Article I, Section 8 gives Congress the power:

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; ...To make rules for the government and regulation of the land and naval forces.

A congressional declaration of war is the zenith of war powers, triggering foreign affairs counter-parts to all three of the internal emergency clauses. The power to detain alien enemy soldiers and civilians is a counterpart to the suspension of habeas corpus. The external use of military force in war is a counterpart to the internal use of force in the militia clause. The application of U.S. military courts to enemy regular and irregular combatants is a counterpart to our system of disciplining our own armed forces and militia. Military courts can also operate on an occupied enemy alien population, as the Milligan Court, and the subsequent occupation of the South, made clear. There is no external counterpart to treason as an enemy alien owes his allegiance to his nation, not

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<sup>61</sup> However, criminal laws since, such as the Espionage Act, essentially circumvent the Treason Clause's requirement of two witnesses to the overt act, while punishing with death the crime of aiding and abetting the enemy, which is a sub-category of treason. Such laws tend to nullify the Treason Clause. *See infra* note 144 (discussion of the Rosenberg spy case).

ours. Further, he has an immunity from prosecution for killing U.S. troops so long as he obeys the laws of war, while a U.S. resident can never have such an immunity for doing the same since making war against his own country is always unlawful.

Short of an officially declared war, Congress can authorize imperfect, or limited, war. An example of this is the quasi-war with France in the early 1800s. This was a limited war, with the limits set by Congress, and the President authorized to act only within those limits.<sup>62</sup> The only independent power of war the President was deemed to have was the ability to repel invasions and defend against sudden attack.<sup>63</sup> This is the external-affairs equivalent of a militia call up without a habeas suspension. The use of force is authorized, but there is no grant of plenary military jurisdiction to detain people or hold military trials except in extremis.<sup>64</sup>

The military has used force on groups and individuals, but the simple use of force does not equal war. As an example, the U.S. Coast Guard and the U.S. Navy use force to interdict vessels on the high seas that are carrying illegal immigrants or smuggling drugs. If U.S. personnel face resistance, they can use deadly force, but once they capture the boat and passengers, such are turned over to civilian law enforcement as soon as is practical for any criminal prosecutions or eventual return to their country of origin.<sup>65</sup>

This is the system of emergency measures our Constitution provides to handle internal

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<sup>62</sup> EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 94-95 (the Pennsylvania State University Press 1991).

<sup>63</sup> Records of the Federal Convention [1:19; Madison, 29 May], in THE FOUNDERS' CONSTITUTION, Vol. 3, at 92 (Phillip B. Kurland & Ralph Lerner eds., 1987). In one memorable example, Thomas Jefferson ordered his naval captains to use only defensive force in the wars with the Barbary Powers (1801-1805), even to the point of releasing a captured vessel and its crew, until he received authorization from Congress to "go beyond the line of defense." KEYNES, *supra* note 62, at 38-39.

<sup>64</sup> While military detention and even trial might be, of necessity, used on an immediate battlefield, the primary goal in imperfect war is to interdict, seize material, and apprehend.

<sup>65</sup> Another example of this is the detention of persons by the National Guard during a riot, such as the 1992 Los Angeles riots. While the courts in the immediate vicinity of the riots certainly were closed, detained rioters or looting suspects were not tried by military courts.

and external threats. It is this constitutional system that the *Milligan* Court reaffirmed and restored after its violation by Lincoln. We now turn to some historic examples of attempts to extend military jurisdiction onto civilians and how the foundation was laid for the most recent attempt to do so in the modern “war” on international terrorism.

## **ANTECEDENTS AND PRECEDENTS: ATTEMPTS AND SUCCESSES IN EXPANSION OF MILITARY JURISDICTION**

### **A Modest Proposal**

After the Civil War, the next great national emergency came during World War I. While military tribunals were not used on civilians during the Great War, they were suggested. An assistant attorney general in the Wilson Administration proposed a strategy for circumventing the *Milligan* decision to allow for the trial of civilians by military tribunals:

[Assistant attorney general] Charles Warren ... testified in the United States Congress before the Committee on Military Affairs in 1917 that the *Milligan* case was irrelevant to World War I. He assured the committeemen that certain classes of civilians could be subjected to military trials by calling the defendants “war spies” under Congress’s constitutional power “to make rules for the government and regulation of the land and naval forces” ... [later], he proposed to the Senate Military Affairs Committee a court-martial bill permitting military trials and capital punishment for persons interfering with the war effort.<sup>66</sup>

President Wilson rejected this suggestion. Instead, he used congressional statutes, such as the Espionage Act and the Sedition Act, in civilian courts.<sup>67</sup> Warren’s suggestion to label civilians “war spies” to bring them within the orbit of the military law, though

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<sup>66</sup> NEELY, *supra* note 5, at 183.

<sup>67</sup> *Id.* (e.g. Espionage Act of 1917 18 U.S.C. §793, 794).

rejected at the time, is a precursor to the modern use of the label “enemy combatant” to effect the same end.<sup>68</sup> However, Warren’s idea was focused on the power of Congress to make rules for the military that he thought could be expanded to reach civilians, not on a claimed independent power of the Executive.<sup>69</sup> This legal argument lay dormant until 1957 when it was resurrected by the government in *Reid v. Covert*.<sup>70</sup> There, the government argued that a civilian woman, accused of killing her U.S. military officer husband on a military base in England, could be tried by courts-martial because the wives of soldiers affect the function of the military. The *Covert* Court rejected that argument in very strong terms, and, like the *Milligan* court, recounted the historic battle to preserve the line between the civilian and the military law. The *Covert* Court found that whatever her crimes, because she was a civilian, the wife of the officer must be tried before a jury with the full protections of the Bill of Rights. Thus, this particular path to an expansion of military jurisdiction was finally closed off.

Because Wilson rejected the military tribunal path suggested by Warren, and used civilian law instead, the harms done with cases such as *Schenk v. United States*<sup>71</sup> could be rectified by subsequent peacetime case law that strengthened First Amendment jurisprudence. The same might not have been the case with the use of military tribunals if, once peace was restored, such tribunals were not found unconstitutional in another

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<sup>68</sup> This is not meant to imply that the current Administration has read this particular suggestion and then followed the long dormant advice of Mr. Warren. The Administration’s legal counsel are likely just pursuing the logical path of least resistance in navigating the case law, just as Mr. Warren had done.

<sup>69</sup> *Id.* This was based on a rare and exceptional use of military courts for civilians that had historically included only a limited number of civilian employees of the military and a few isolated instances of camp followers during an actual military campaign. *Id.* at 167 (noting how this category had been expanded during the Civil War and then contracted again afterward, but never for such an end as Warren suggested).

<sup>70</sup> 354 U.S. 1 (1957).

<sup>71</sup> 249 U.S. 47 (1919). It was in *Schenk* that Justice Holmes first articulated his “clear and present danger” test. Though the Court unanimously upheld this conviction under the Espionage Act of a man who merely passed out leaflets against the war, Holmes’ test would be strengthened in a later line of cases.

post-war case akin to *Milligan*. Such wartime precedents, beyond the reach of normal peacetime case law, can sit unchallenged until the next crisis. That is precisely what happened with *Ex Parte Quirin*.<sup>72</sup>

### ***Ex Parte Quirin: Expansion of Executive Power Over Enemies***

*Ex Parte Quirin*,<sup>73</sup> involved enemy soldiers who, but for one who claimed U.S. citizenship, were clearly within the second category of exceptional military jurisdiction recognized by the Court in *Milligan*, that of the enemy. As such, the decision could have been fairly straight-forward, simply holding that these German saboteurs, in contrast to Mr. Milligan, were members of the military of an enemy nation and therefore subject to military jurisdiction. The *Quirin* Court could have followed *Milligan* in stating that the Bill of Rights does not apply to such enemy soldiers, just as it does not apply to U.S. soldiers who are on trial.<sup>74</sup> The Court could also have stated that a person cannot violate the laws of war unless he is a party to them, and he is a party to them only if he is a member of the armed forces of one of the nations at war with each other as these enemy soldiers clearly were, or an enemy alien spy.<sup>75</sup> Even with the one saboteur who claimed U.S. citizenship, the *Quirin* Court could have simply argued that he was a German soldier, and so it did not matter that he was a citizen, because, as a soldier, he would still have been triable before a military court if he were in the U.S. military rather than that of Germany. This would still have been in error, as will be shown, but at least this would have placed the focus where it belonged, on categories of persons rather than actions.

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<sup>72</sup> 317 U.S. 1 (1942).

<sup>73</sup> *Id.*

<sup>74</sup> *Ex Parte Milligan*, 71 U.S. 2, 18 (1866).

<sup>75</sup> *Quirin*, 317 U.S. 1, at 28 (noting a long list of spying cases, all of which involve enemy aliens).

But the *Quirin* decision was not at all clear. It displays considerable confusion and carelessness regarding the reasoning in *Milligan* and the construction of the Constitution on this simple question of the separation between civilian and military jurisdiction and U.S. residents and alien enemies. There is a sense of schizophrenia in the Court's language with it most often focusing on what *actions* are violations of the laws of war, rather than on what *persons* are subject to military jurisdiction, while glossing over the fact that all the cited case law involves enemy aliens.<sup>76</sup> The Court states that:

Congress ...has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war his invoked that law.<sup>77</sup>

The *Quirin* Court, still focusing on acts, reads *Milligan* as being about whether the Bill of Rights applied to trials for certain acts considered offenses against the laws of war:

We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex Parte Milligan*, supra. But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.<sup>78</sup>

This reading of *Milligan* is wildly incorrect. The government had charged Mr. Milligan with "Conspiracy against the Government of the United States;" 'Affording aid and

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<sup>76</sup> Except for the one case dating from the occupation of the South that the decision cites as support for its finding that the citizen, Haupt, can be tried by tribunal. There is also some reference to Civil War cases that are pre-*Milligan* and thus of questionable utility.

<sup>77</sup> *Id.*

<sup>78</sup> *Ex Parte Quirin*, 317 U.S. 1, 29 (1942).

comfort to rebels against the authority of the United States;' 'Inciting Insurrection;' 'Disloyal practices;' and 'Violation of the laws of war.'"<sup>79</sup> Milligan was accused of plotting to "overthrow the government, holding communication with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate prisoners of war ... at a time of war."<sup>80</sup> Several of these actions would be triable by the laws of war, if one were a soldier.<sup>81</sup> Regardless, the *Milligan* case did not turn on whether certain *acts* were recognized as violations of the laws of war or were constitutionally triable only by a jury, but on whether Milligan was a *person* subject to military jurisdiction, as the Court noted:

The controlling question in the case is this ... had the military commission mentioned in [Milligan's petition] *jurisdiction*, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the *legal* power and authority to try and punish this man?<sup>82</sup>

The controlling question was whether or not Milligan belonged to one of the two categories of persons who could be subject to military jurisdiction. The Court found that he did not. Once that was established, what the laws of war said, what acts under the laws of war were triable by military tribunal rather than by jury, or what acts Milligan had committed, were irrelevant. The focus was on jurisdiction over the person, not over his actions. The *Milligan* Court made this very clear:

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<sup>79</sup> Ex Parte Milligan 71 U.S. 2, 6 (1866).

<sup>80</sup> *Id.* at 7.

<sup>81</sup> The current Administration would certainly consider a person who did any of these acts to be an enemy combatant.

<sup>82</sup> *Milligan*, 71 U.S. at 118.

[I]t is said that the jurisdiction is complete under the 'laws and usages of war.' It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power.<sup>83</sup>

Milligan was a citizen of a loyal state, not one of the rebellious states that had seceded and made war on the U.S. Contrary to the assertions of the *Quirin* Court, the *Milligan* Court did not find Mr. Milligan to have been charged with violations of the laws of war that are “of that class of offenses constitutionally triable only by a jury.”<sup>84</sup> To the contrary, the *Milligan* Court rejected any suggestions that Milligan could be tried for *any act* other than before a jury:

[U]ntil recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*--one of the most valuable in a free country--is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service.<sup>85</sup>

For the *Milligan* Court, all that mattered was whether or not Mr. Milligan was in the military. The *Milligan* Court made that utterly clear when it noted that:

Every one connected with these [military] branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *All other persons*, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held

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<sup>83</sup> *Id.* at 122.

<sup>84</sup> *Quirin*, 317 U.S. at 29.

<sup>85</sup> *Ex Parte Milligan* 71 U.S. 2, 123 (1866). Recall also that the *Milligan* Court had required the release of Mr. Milligan, per the habeas statute, thus rejecting the government’s argument that it could still hold Milligan as a prisoner of war even if the military tribunal was unconstitutional. Thus, there is no independent power for a President to detain civilians, even without trial by tribunal, unless Congress suspends the writ of habeas corpus.



by sufferance, and cannot be frittered away on any plea of state or political necessity.<sup>86</sup>

This focus on the category of persons is further confirmed by recalling the point of difference in the minority concurrence. The disagreement was not about the exclusion of some specific acts from the reach of military jurisdiction. The concurrence disagreed with the majority's categorical exclusion of the entire civilian population from the reach of military jurisdiction wherever the courts are open, rather than allowing for emergency exceptions.<sup>87</sup> The *Milligan* majority held that there could be no military trial for any offense *whatever* of a citizen in civil life unless the courts were closed.<sup>88</sup> Hence, a civilian could not be treated as a belligerent for purposes of military jurisdiction no matter what he did, not even for attempting to spark an armed revolt in support of the Southern cause and free Southern prisoners of war.

Expanding on this misreading, the *Quirin* decision makes many erroneous and unnecessary justifications for why each of the protections of the Bill of Rights do not apply in military trials for certain acts in violation of the laws of war, such as the crime of not wearing a uniform.<sup>89</sup> Any analysis that follows this focus on acts will lead to a

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<sup>86</sup> *Id.* We should also keep in mind that the Southern states, in addition to placing themselves in the political equivalent of an enemy nation by seceding, were also surely not states where the federal courts were still open – hence the martial law imposed on the conquered Southern states during Reconstruction. However, it is the status of enemy states – as states that were at war with the United States, that put the Southern states and their residents in the position of “enemies” that would otherwise only apply to foreign nations and their residents.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 127.

<sup>89</sup> *Ex Parte Quirin*, 317 U.S. 1, 18 (1942). The *Quirin* Court reads each protection in the Bill of Rights so narrowly as to not provide a jury trial for prosecution of *any* crime (however serious) that was not in existence at the time of the Founding and normally tried by jury at the common law. This was also the case with the Court's analysis of the Treason Clause and why it did not matter if one of the men was a citizen. The case law citations are confusing, as they indiscriminately lump together: military trials for military personnel; those conducted against foreign civilian spies; trials of civilians for violations of the laws of nations, and also the laws of war, but all those with jury trials in civilian courts; and finally, with a string of citations from tribunals held during the Civil War, and in the occupied South, all of which are either voided by *Milligan* or in compliance with it because held in the occupied South. Space limitations do not allow for an exhaustive analysis of the very improper and misleading case citations that are made throughout *Quirin*.

muddled understanding of the Constitution.<sup>90</sup> It is not clear if this was simple error, or if the *Quirin* Court was attempting to leave the door open to a possible future expansion of military jurisdiction if such were required in the war effort. This is a plausible explanation, especially when we consider that this was October, 1942, during the Japanese-American internment, with the same Court that would give us *Hirabayashi*<sup>91</sup> in the summer of 1943 and *Korematsu*<sup>92</sup> in 1944. In addition, at that time Hawaii was under martial law and American citizens and residents, who were not even in any military, U.S. or foreign, and who were also not even enemies of any kind at all, were being tried by military tribunals and sentenced to years of hard labor. This was being done even though there was no real invasion, in direct violation of *Milligan*.<sup>93</sup> The Court certainly knew this. While Hawaii was a territory, the Court may still have been concerned about its decision in *Quirin* affecting the ability to use tribunals and thus impair the defense of the Hawaiian Islands and Pearl Harbor. Another probable reason for this focus on acts becomes evident when Roosevelt's tribunal order is analyzed:

[T]he President declared that 'all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States ...and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals'.<sup>94</sup>

This proclamation contained language that could reach a far broader range of persons than just enemy soldiers, such as the possible persons who might "act under the direction

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<sup>90</sup> The entire Court in *Milligan* understood the issue to be about general military jurisdiction over civilians, and differed on when such jurisdiction could be used. *Milligan*, 71 U.S. 2 (1866).

<sup>91</sup> 320 U.S. 81 (1943).

<sup>92</sup> 323 U.S. 214 (1944).

<sup>93</sup> Martial law in Hawaii lasted from shortly after the attack in Dec. 1941 until October 1944. See *infra* note 108 and accompanying text.

<sup>94</sup> LOUIS FISHER, *MILITARY TRIBUNALS* 7 (Novinka Books 2003) (hereinafter *FISHER, MILITARY TRIBUNALS*).

of any such nation.” The actions listed include espionage, which was already covered by the Espionage Act. It is also implicit in the text, which speaks of those who “are charged,” that such persons may be removed from civilian courts, per this order, and transferred to military courts. The President made it known that he would not turn the saboteurs over to any civilian court, telling his Attorney General, Francis Biddle, “I won’t give them up ... I won’t hand them over to any United States marshal armed with a writ of habeas corpus. Understand?”<sup>95</sup> Roosevelt was likely to have the same view on anyone else he might apply the order to in the future. The Supreme Court was writing a decision justifying the trial by tribunal of eight men, six of whom were already dead by that time, with the Court having no idea just what procedure was used.<sup>96</sup> The Court was dealing with a wartime president, who had appointed most of its members, acting in what the Court itself regarded as a time of grave emergency, and per a tribunal order containing broad language.<sup>97</sup>

All these considerations would explain why the Court insisted on ruling that the citizenship of one of the Germans, Haupt, was irrelevant. Haupt claimed to have become a naturalized citizen when, as a child, his parents brought him to the U.S. where they were naturalized. The government had been prepared to argue that Haupt had relinquished his citizenship, but the Court said that was beside the point since his

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<sup>95</sup> *Id.* Roosevelt did not want this case to go to the civilian courts. First, there was concern about being able to secure criminal convictions, as the evidence of actual criminal actions was scant. Second, there was a concern that the sentences in a criminal trial would not be tough enough. Roosevelt wanted the death penalty, not thirty years in prison. Finally, a civilian trial would likely expose the fact that the F.B.I. did not crack the case as had been widely reported in the media. One of the German saboteurs had turned himself in and exposed the others. Roosevelt preferred that the world, especially Hitler, have the impression that the F.B.I. was so efficient that it had caught all of the German agents in a matter of days.

<sup>96</sup> It is also possible that just the oddities of the tribunal itself were enough for the Court to want to justify it on as many grounds as possible because it could not know exactly what had been critical to conviction and it certainly could not leave in doubt the six executions that had already occurred. See FISHER, MILITARY TRIBUNALS *supra* note 94 at 6-8.

<sup>97</sup> The background of the *Quirin* case displays such questionable motivations and methods as to cast doubt on its legitimacy as binding precedent on any point of law.

citizenship does not exempt him from the consequences of his actions that made his belligerency unlawful. As it turns out, Haupt was very likely not a citizen at all, per the Nationality Act of 1940<sup>98</sup> whereby a national lost citizenship if they served in the armed forces of a foreign nation without permission from the U.S.<sup>99</sup> At that time, “such actions, when performed voluntarily, would automatically result in the loss of U.S. nationality.”<sup>100</sup> It seems that Haupt had automatically lost his status as a U.S. national when he served in the armed forces of Germany and agreed to go on the mission, and the Court did not even need to address his citizenship which did not really exist.<sup>101</sup> At the least, the Court could have called for a determination of that status before it ruled on whether or not something that may have no longer existed mattered in the case before it. Instead of arguing that he was no longer a citizen, and was thus an enemy alien, the Court ruled that he could be both a citizen and an enemy. This was the creation of a whole new category of persons: the enemy citizen to whom the laws of war could apply along with enemy aliens. It is telling and perhaps even prophetic that the one case the *Quirin* Court

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<sup>98</sup> Ch. 876, 54 Stat. 1137.

<sup>99</sup> The relevant subsections of Chapter IV Loss of Nationality, states: Sec. 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by ...

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or  
(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; ...

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction.

*Id.* at 1168.

<sup>100</sup> THOMAS A. ALEINIKOFF, DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 886 (West Publishing Co. 1985). This act was amended in 1952, but was in effect as written in 1942. The 1952 amendments did not change the automatic loss of nationality, but did add a “non-rebuttable presumption of voluntariness for each of the statute’s expatriating acts when performed by a national of a foreign state, who had been physically present in such state for at least ten years.” *Id.* This suggests that Haupt may have been able to rebut a government claim that he had automatically lost his citizenship by serving in the German military. However, he would have needed to show coercion. Later case law changed the standard to require the government to prove voluntary action “by clear, unequivocal and convincing evidence.” *Id.* See *Gonzales v. Landon*, 350 U.S. 920 (1955).

<sup>101</sup> Such automatic expatriation by actions may be unconstitutional and at least presents troubling due process questions. The coupling of loss by act of serving in a foreign military and loss by act of treason is also troubling. Even if the Court followed the Act, Haupt could have been judged to not be a citizen and then executed as a war criminal without a trial for treason even by the terms of the Act.

cites in support of this assertion, *Gates v. Goodloe*, is one that dates from the military occupation of the conquered South after the Civil War.<sup>102</sup>

Recall that the only reason a U.S. citizen or resident of the South could be considered the equivalent of an alien enemy was because of the peculiar situation of the Civil War where U.S. citizens and their states had broken away and formed what amounted to another country. The men ruled to be subject to military jurisdiction in the case the Court cited, *Gates v. Goodloe*, were members of an occupied enemy population. Prior to that unique occurrence, all U.S. residents who made war against their own country were simply traitorous or rebellious Americans, not enemy. They were subject to trial for treason, not for violations of the laws of war. Because Milligan was not a citizen or resident of a break-away state, the *Milligan* Court said:

If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?<sup>103</sup>

The same was true for Haupt. As a citizen, the very act of serving in the army of a nation at war with the U.S. was an illegal act of treason. Haupt could not be a legal combatant because he could not be engaged in legal acts of hostility against his own country. He was also not an alien and therefore could not be an enemy at all under the laws of war. He was a traitor. From 1785 on, the Enemy Alien Act had defined an enemy alien as a person who owed allegiance to a nation with which the U.S. was at war. There was no enemy resident or enemy citizen statute. Recall the conception of war as being against a

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<sup>102</sup> *Gates v. Goodloe*, 101 U.S. 612, 615, 617, 618, 25 L.Ed. 895.

<sup>103</sup> *Milligan*, 71 U.S. 2 at 122.

foreign state. The U.S. cannot declare war on itself. Nor can it wage war on its own people. Americans cannot be legal enemies of the U.S. for purposes of war.

The *Quirin* decision, though its facts concerned those eight saboteurs, was really about far more. This was the beginning of a break down in the long-standing wall between foreign and domestic, and between alien and citizen or resident. With this wall broken down, the Treason Clause does not matter. The Bill of Rights does not matter. All that matters is whether a person can be considered an enemy. While the saboteurs were soldiers, there is nothing in the *Quirin* decision stating that such was a prerequisite. To the contrary, it cites several spy cases, as well as the case about the two civilians in the South. This expansion of both who can be an enemy and who can be in violation of the law of war laid the groundwork for a far broader application of both ideas. One aspect of this, the concept of enemy citizens and residents, was being applied on a mass scale with the Japanese Internment, and with the *Hirabayashi* case, the narrowing of *Milligan* would become more pronounced and explicit.

### **World War II: Japanese-American Internment and Martial Law in Hawaii**

The lack of a clear line of demarcation of who can be an “enemy” is precisely what led to the internment of the Japanese-Americans. The same logic displayed in *Quirin*, that a U.S. citizen or resident can be regarded as an enemy, outside of the protection of the Bill of Rights, was used to justify what is now regarded as the most infamous violation of rights since slavery and the genocide of the Native-Americans. The exclusion of Japanese-American civilians from the West Coast, and their confinement in internment camps, was not done with an overt application of martial law and trial by military courts. Rather, this internment of civilians was a hybrid of de-facto

executive habeas suspension, military jurisdiction for removal and detention, and enforcement via congressional statute. Those who violated an exclusion or relocation order were prosecuted in civilian courts.<sup>104</sup> In this way, the internment could be distinguished from the application of military law to civilians that the *Milligan* case struck down. This artful distinguishing of *Milligan* is evident in *Hirabayashi v. United States*, 320 U.S. 81 (1943), where the Court said:

[W]e are immediately concerned with the question whether it is within the constitutional power of the national government, through the joint action of Congress and the Executive, to impose this restriction as an emergency war measure. The exercise of that power here involves no question of martial law or trial by military tribunal. Cf. *Ex parte Milligan*, 4 Wall. 2; *Ex parte Quirin*, supra. Appellant has been tried and convicted in the civil courts and has been subjected to penalties prescribed by Congress for the acts committed.<sup>105</sup>

This was an interesting take on *Milligan*. For the first time, *Milligan* was characterized as being about martial law while *Quirin* was seen as being about tribunals. Of course, *Milligan* had been about both. It had also been about treating people as prisoners of war. In fact, *Milligan* is about treating people as enemies of any kind. While Roosevelt had, even after Pearl Harbor, followed the constitutional requirement to ask Congress for a declaration of war against Japan, he did not ask for a suspension of habeas corpus before he proclaimed that the Japanese-Americans could be rounded up and placed into what amounted to prisoner of war or civilian detainee camps. The President, acting in his capacity as commander-in-chief, simply issued an executive order, E.O 6066. Roosevelt was treating the Japanese-Americans as though they were the enemy. To be precise, he was treating them as an occupied enemy alien population. At all times the Japanese-

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<sup>104</sup> The actions of the current Administrations in detaining Jose Padilla have also been likened to an illegal suspension of the writ of habeas corpus. See Consented-To Brief of Amici Curiae Hon. John J. Gibbons, et al. at 11, *Padilla v. Rumsfeld*, 352 F.3d 695 (2<sup>nd</sup> Cir. 2003) (03-2235 (L) 03-2438(Con.)).

<sup>105</sup> *Hirabayashi*, 320 U.S. at 93.

Americans were under military rule. It was the military commander of the West Coast, General DeWitt, who made the determination, per Roosevelt's executive order, to remove the Japanese-Americans from their homes and send them to military internment camps for the duration of the war.<sup>106</sup> The mere fact that Mr. Hirabayashi was tried before a jury, for the misdemeanor offense of violating the exclusion order, did not change the extraordinary martial law nature of his subsequent internment. But the Supreme Court focused on the narrow issue of the appeal of the misdemeanor conviction to avoid *Milligan*, while still evoking the broadest national emergency powers language to justify the actual internment. Because it focused so narrowly, the Court did not apply the broader principle of *Milligan*: that military jurisdiction, for detention or trial of any kind, cannot be used in the face of a merely threatened insurrection or invasion.<sup>107</sup> If the military commander of the West Coast had been required to meet that standard before excluding and interning over an 112,000 Japanese-Americans, the internment would likely never have happened.<sup>108</sup>

### **Duncan**

While Japanese-Americans were being rounded up en mass and sent to concentration camps, martial law was being imposed on the Hawaiian Islands in the wake of the December 7, 1941 attack on the U.S. fleet at Pearl Harbor by the Imperial Japanese Navy.

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<sup>106</sup> Fred Korematsu v. United States, 584 F.Supp. 1406, 1409 (N.D. Cal. 1984).

<sup>107</sup> This standard can even be read as a requirement of the Article I, Sec. 9 Habeas Suspension Clause itself, which does not use the word threatened.

<sup>108</sup> The *Hirabayashi* Court also forgot, or ignored, the *Milligan* Court's warning on martial law: "If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules." *Milligan*, at 124. This is precisely what had happened to Japanese-Americans.



The Hawaii military commander and his officers presided over the Islands in the clearest example of absolute military rule since the Reconstruction of the South after the Civil War. Under this martial law, common criminals in Hawaii were tried by military commission. After the war, the Supreme Court, in *Duncan v. Kahanamoku*,<sup>109</sup> ruled this martial law to be unconstitutional. Echoing one of the principles expressed in *Milligan*, which the Court had unfortunately given short shrift in the Japanese internment cases, the *Duncan* Court ruled that there could be no martial law where there was not an actual invasion. *Duncan* serves as a confirmation of that line between civilian and military jurisdiction and is a barrier to any attempts to repeat such total martial law over an area.

### **Seeking Covert Methods of Expanding Military Jurisdiction**

All of the overt methods of applying military jurisdiction to civilians have been foreclosed by legal decisions or have fallen into disrepute. An overt proclamation of martial law and trial by tribunals would be an obvious repeat of what both Lincoln and the Hawaiian commander had done, running directly into the *Milligan* and *Duncan* decisions. A congressional suspension of the writ of habeas corpus, while constitutional, is very likely politically unsustainable.<sup>110</sup> The infamy of Lincoln's unilateral use of habeas suspension has deterred subsequent presidents from attempting the same. If a president instead tried to use an overt form of detention without trial but also without habeas suspension, as Roosevelt did with the Japanese-American internment, he would

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<sup>109</sup> 327 U.S. 304 (1946).

<sup>110</sup> Recently, during a discussion of the Padilla case with a prominent federal appeals court judge, I expressed the opinion that suspension of habeas corpus is the only constitutional emergency detention remedy. The judge responded by saying, "but that would never pass in Congress. It's just not practical." Instead, the judge supports the President being able to declare people enemy combatants.

risk evoking the specter of *Korematsu*.<sup>111</sup> Nor could a modern president follow in the footsteps of Woodrow Wilson, who relied exclusively on congressional statutes and court orders to suppress seditious speech and arrest people for interfering with the draft. The civil liberties case law inhibiting such statutes has developed considerably since then. In fact, even the due process revolution of the 1960s is an obstruction, with landmark decisions such as *Miranda v. Arizona*<sup>112</sup> directly constraining the ability to detain and interrogate freely within the confines of the normal criminal law.<sup>113</sup> A modern president would have to strike a new, indirect path. This is what the current Administration has done by crafting a method that reclassifies targeted individuals as the legal equivalent of enemy, lawful or not, and then asserts a claimed plenary power to detain and try them, thus getting around the *Milligan* hurdle against applying martial law to civilians when the courts are open.

The heart of the modern method is the holding in *Quirin* that the President can order military tribunals for unlawful combatants. The argument is that if the President has an independent power to establish and use tribunals on those he finds to be unlawful enemies, then it follows that he also has an independent power to detain them, and he is unrestrained by any statute or treaty because such people are outside the law. *Quirin*, a case about actual German soldiers in a declared war, is now being applied to a war on terrorism that is as conceptually vague as the war on drugs, or perhaps the Cold War against world communism.<sup>114</sup>

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<sup>111</sup> This would be especially dangerous to attempt if there were any hint of it being based on race, national origin, or religion. Both society and the law are now vastly more sensitive to such classifications.

<sup>112</sup> 384 U.S. 436 (1966).

<sup>113</sup> Such a capacity to interrogate at length, using pressure tactics, without interference from legal counsel, is considered a vital tool in the war on terrorism.

<sup>114</sup> Many American communists were accused of aiding the enemy. The most famous case is that of Julius and Ethel Rosenberg, who were convicted in 1950 of violating the Espionage Act of 1917 18 U.S.C. §793,

## THE EXPANSION OF THE TERMS “WAR” AND “ENEMY.”

The characterization of the global struggle against terrorism as a war comes very easily to a nation that is accustomed to waging “war” on poverty, illiteracy, crime, and drugs.<sup>115</sup>

Criminals and drug dealers, in particular, have been characterized as the “enemy.”<sup>116</sup> It certainly seems reasonable to use these terms in this effort against terrorism as well.

But the term “war” has a particular legal meaning in our Constitution that triggers the exceptional application of military jurisdiction and force against the enemy in war. War has traditionally been between nation-states or between a nation-state and an insurgent enemy whose goal is ultimate control of that nation-state.<sup>117</sup> Wars can be fought by regular (nation-state) or irregular (non-state) military forces in the field.<sup>118</sup> An example of an irregular military force, with territorial goals, was the Vietcong. The recent wars in Afghanistan and Iraq were fought, at first, against the Taliban and Iraqi armies, but are now being fought against insurgents who have territorial ambitions.<sup>119</sup> This asserted war on terrorism is the first war the United States has waged against opponents who are non-state actors with extraterritorial goals. U.S. Army War College Professor Jeffrey Record, in his study on the war on terrorism, observed that terrorist organizations, such as al Qaeda, are:

[T]rans-state organizations that are pursuing nonterritorial ends. As such, and given their secretive, cellular, dispersed, and decentralized “order of battle,” they are not subject to conventional military destruction. Indeed, the key to their defeat

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794, for conspiracy to transmit defense documents to a foreign state. 10 F.R.D. 521 (S.D.N.Y. 1950). The Rosenbergs were both executed by electric chair after losing an appeal to the Second Circuit. 195 F.2d 583 (C.A.2 1952). See *infra* note 139 and accompanying text.

<sup>115</sup> Jeffrey Record, *Bounding the Global War on Terrorism*, 2 (Strategic Studies Institute, U.S. Army War College 2003) available at <http://www.carlisle.army.mil/ssi/bios/jrecord.html>.

<sup>116</sup>The term “enemy” is also freely used to describe political, business, and personal rivals.

<sup>117</sup> Record, *supra* note 115, at 3.

<sup>118</sup> *Id.*

<sup>119</sup> Another example of irregular forces fighting against regular forces for control of a country is the American Revolution.

lies in the realms of intelligence and police work, with military forces playing an important but nonetheless supporting role. Beyond the military destruction of al-Qaeda's training and planning base in Afghanistan, good intelligence—and luck—has formed the basis of virtually every other U.S. success against al-Qaeda. Intelligence-based arrests and assassinations, not divisions destroyed or ships sunk, are the cutting edge of successful counter terrorism. If there is an analogy to the GWOT [Global War On Terrorism], it is the international war on illicit narcotics. But these “wars” on terrorism and drugs are not really wars.<sup>120</sup>

When the power of a president to kill, detain, and try enemy soldiers is combined with a pronounced expansion of who can be in that enemy category, that power will then reach people which the *Milligan* Court, enforcing our Constitution's design, would have considered civilians beyond military jurisdiction. The asserted military jurisdiction in the *Quirin* decision is being expanded to swallow the *Milligan* decision entirely, resulting in its de-facto reversal. Just as President Lincoln could order the detention and trial by tribunal of anyone he suspected of being a threat in the war against the Rebellion,<sup>121</sup> President Bush can now order the detention and trial by tribunal of anyone he suspects of being a threat in the war on terrorism. Whether this power is called an application of military law to civilians, or an application of military law to the enemy, the practical difference is negligible, if this expansion goes unchallenged.

One indication of this is the contrast between President Roosevelt's tribunal order and President Bush's detention and tribunal order. Roosevelt's military tribunal proclamation applied to “All persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any

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<sup>120</sup> Record, *supra* note 115, at 3-4.

<sup>121</sup> Lincoln enjoyed the de-facto power to do this for the entire war, prior to this power being ruled unconstitutional by the *Milligan* Court after Lincoln's death.

such nation.”<sup>122</sup> The Roosevelt order was issued in a declared war against a specific enemy nation-state and was focused on that nation and those who act under its direction. Roosevelt’s order was primarily retrospective, looking back to eight admitted German military saboteurs, to facilitate their trial by tribunal.<sup>123</sup> In Contrast, Bush’s tribunal order is prospective and covers an estimated 18 million people in the United States.<sup>124</sup> The Bush order was issued to facilitate a “war” on terrorism recognized by a very broad congressional Use of Force Resolution, which stated that:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>125</sup>

This resolution has been construed by the Administration, and by the courts, as being the equivalent of a declaration of war on terrorism, triggering the full spectrum of presidential powers in war.<sup>126</sup> But this power is now to be used against “organizations, or persons,” as well as against nation-states, in an unprecedented expansion of the concept of war. President Bush’s order is entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” In keeping with this expanded view of war, the order applies to:

[A]ny individual who is not a United States citizen with respect to whom I determine from time to time in writing that: (1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization

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<sup>122</sup> FISHER, MILITARY TRIBUNALS, *supra* note 94, at 7.

<sup>123</sup> LOUIS FISHER, NAZI SABOTEURS ON TRIAL 160 (University Press of Kansas 2003).

<sup>124</sup> *Id.*

<sup>125</sup> Available at: [http://www.yourcongress.com/ViewArticle.asp?article\\_id=1779](http://www.yourcongress.com/ViewArticle.asp?article_id=1779)

<sup>126</sup> *Id.* The joint resolution itself supports that construction. Subsection (b) reads: War Powers Resolution Requirements-(1) SPECIFIC STATUTORY AUTHORIZATION- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and (2) it is in the interest of the United States that such individual be subject to this order.<sup>127</sup>

Just as Roosevelt's order could apply to a far broader segment of the population than just enemy soldier saboteurs, the Bush order goes far beyond members of al Qaeda to cover any immigrant who happens to aid or abet an international terrorist or who knowingly harbors one.<sup>128</sup> And that terrorist does not even have to be a member of al Qaeda. The Administration is not constrained by this order, as the President can simply amend it to cover more actions and also citizens as well as non-citizens.<sup>129</sup> Nonetheless, it is an official order authorizing detention and trial at this time, and provides an indication of what actions can trigger such an application of "enemy combatant" status and military jurisdiction. Though modeled on Roosevelt's order, Bush's tribunal order is strikingly similar to President Lincoln's military tribunal proclamation. If we substitute the phrase "war on terror" in place of "insurrection," the word "terrorist" for "rebel," and the phrase "law of war" for "martial law" in the Lincoln order, it could serve the current Administration's policy well:

D]uring the existing [war on terrorism] ... all [terrorists], and ... their aiders and abettors within the United States, ... and all persons ... affording aid and comfort

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<sup>127</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001). Available at: <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>

<sup>128</sup> Another problem is that, in contrast to the act of harboring, there is no mens rea requirement for three of the acts listed in (ii): engaging in, aiding or abetting. An innocent immigrant who loans money or gives a ride to someone who later turns out to be a terrorist would be subject to military tribunal.

<sup>129</sup> The order applies to non-U.S. citizens only, but the detentions of Jose Padilla and Yasir Hamdi demonstrate that the Administration is not limiting itself to detaining only non-citizens even if they are in no way members of an actual foreign military force, as is clearly the case with Padilla.

to [terrorists] against the authority of the United States, shall be subject to [the law of war] and liable to trial and punishment by Courts Martial or Military Commission.

The only offenses that would have to be left out of a modern version of the Lincoln order would be those having to do with overt speech, such as discouraging enlistments, and the vague “disloyal practices.” Otherwise, they are virtually indistinguishable as the same actions could make a person subject to military trial under either order.

Consider the likely outcome if Mr. Milligan were alive today, in Indiana, doing exactly the same things he had done during the Civil War, but now part of an organization of Muslim U.S. citizens and residents rather than an organization of Southern sympathizers. If this group were plotting to free al Qaeda prisoners detained in Indiana and overthrow the state government in support of the war aims of al Qaeda, Milligan would be subject to Bush’s designation as an enemy combatant.

The distinction between Bush’s broad and vague enemy based system and Lincoln’s martial-law-over-all based system disappears as it becomes impossible to tell the difference in practice. Why the Lincoln order is unconstitutional, per *Milligan*, while the Bush order is constitutional, per *Quirin*, is reduced to a game of semantics. When a president can define for himself who is an enemy, he gains the power to act as if the government had actually prevailed in *Milligan*. Rather than the Bill of Rights not applying in wartime, as the government argued in *Milligan*, the civilians can be removed from under the protection of the Bill of Rights by redefining them as soldiers. With this ability to reclassify people, there really is no limit to whom the President can subject to military detention and trial under his powers as Commander-in-Chief, in wartime.

Unless the *Quirin* decision did in fact entirely overturn *Milligan*, the current use of the “enemy combatant” designation is unconstitutional when applied to people who, like Milligan, are not alien members of an enemy nation’s armed forces or residents of that enemy nation-state. If this status, as used by the Bush Administration, is constitutional, then it is difficult to determine what use of military jurisdiction, if any, would be unconstitutional under the Bill of Rights and the *Milligan* decision. Perhaps the military commander in Hawaii could have avoided the negative *Duncan* decision by simply declaring people such as defendants Duncan and White to be enemy combatants instead of overtly closing the courts. Mr. Duncan had fought with two Marine guards. Attacking U.S. soldiers while not wearing a uniform could be considered unlawful belligerency. Mr. White, the stockbroker, could have been designated as an enemy combatant for supporting terrorists with his stock violations. This brings us to two very important observations about this conception of “enemy combatant” status: one does not have to be a *combatant* of any kind to be an enemy combatant, and the focus is not on whether one fits into the category of a combatant, but on whether some action, even if non-violent, can be construed as a violation of the laws of war.

### **Enemy Combatant Status is a Misnomer**

This status is not just about actual combatants. Lincoln never used the term “enemy combatant” and his martial law was not focused only on those who made war on the U.S. – not just on belligerents. It was a parallel to treason and included those accused of simply aiding and abetting the enemy. One of the most famous examples from that time was the plight of Dr. Mudd, who was a healer, not a fighter. His crime was obeying his



Hippocratic oath by treating injured people. Dr. Mudd was never accused of *being* a combatant. He was accused of *aiding* a combatant. Dr. Mudd was arrested, charged and convicted before a military commission, the Hunter Commission, of aiding and abetting as an accessory after the fact the conspiracy to kill President Abraham Lincoln and other government officials. Dr. Mudd had protested his innocence and had also argued that the military commission had no jurisdiction over him and that the trial before a military commission violated his constitutional right to a trial by jury in a civilian court, but this argument was rejected by the commission, Attorney General James Speed, and Judge Thomas Jefferson Boynton of the United States District Court for the Southern District of Florida.<sup>130</sup> Later, Dr. Mudd was pardoned by President Johnson for saving scores of lives during a Yellow Fever outbreak while he was imprisoned.<sup>131</sup>

In the late 1990s, Dr. Mudd's grandson, also a doctor, petitioned the Army Board for Correction of Military Records (the "ABCMR"), to amend his grandfather's records and clear his name by ruling that he had been innocent and that the military commission had no jurisdiction over his grandfather. After a hearing, the Board found that it was not authorized to consider the actual innocence or guilt of Dr. Mudd, but it unanimously concluded that the commission did not have jurisdiction to try him and recommended that his conviction be set aside. The Assistant Secretary of the Army denied the Board's recommendation, and the case came before the D.C. District Court.

The March 2001 District Court decision by Judge Paul L. Friedman, coming as it did just a few months prior to the attacks on the World Trade Center and the Pentagon, provides a very illuminating pre 9-11 expose on all of the issues that now swirl around

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<sup>130</sup> See *Mudd v. Caldera*, 134 F.Supp.2d 138, 140 (D.D.C. 2001) (summarizing the history of the conviction and later pardon of Dr. Mudd).

<sup>131</sup> *Id.*

the use of enemy combatant status, or any uses of military jurisdiction on citizens who are not in the military. As such, it is worth quoting at length:

At the hearing before the ABCMR, Dr. Richard Mudd presented the testimony of Dr. Jan Horbaly, an expert on court martial jurisdiction. Dr. Horbaly testified that there were four types of military jurisdiction, two of which were arguably relevant: "martial law" jurisdiction and "law of war" jurisdiction. Mudd v. Caldera, 26 F.Supp. 2d at 21. According to Dr. Horbaly, the Commission could not have been exercising martial law jurisdiction because the military only has martial law jurisdiction if the civilian courts are closed, which was not the case here. *Id.* Dr. Horbaly also testified that he did not believe the Commission had law of war jurisdiction because such jurisdiction only exists (1) when the civilian courts are closed and an American civilian is charged with treason, or (2) when a state of war exists and a non-citizen "belligerent" is accused of violating the accepted rules of war. *Id.* at 122. There is no dispute that the civilian courts were open. Dr. Horbaly testified that the Commission therefore could only have had law of war jurisdiction if there was still a state of war and if Dr. Mudd was a non-citizen belligerent and was charged with violating the accepted rules of war. *Id.* He concluded that because Dr. Mudd was a citizen of the United States and a citizen of Maryland, a state that had not seceded from the Union and was never at war with the Union, Dr. Mudd should not have been subject to "law of war" jurisdiction and tried before a military tribunal. *Id.* The ABCMR agreed. While Assistant Secretary Lister appeared to agree with Dr. Horbaly and the ABCMR that the Hunter Commission did not have martial law jurisdiction, she rejected the view of the ABCMR that there was no law of war jurisdiction. *Id.*<sup>132</sup>

Dr. Horbaly's analysis of military jurisdiction tracks that of the *Milligan* Court.<sup>133</sup> The focus is on category of persons, not actions. It did not matter what Dr. Mudd had done. What mattered was who he was. Mudd was not in the military, and was not a non-citizen belligerent because he was a citizen of a loyal state, not a resident of one of the states that had seceded and waged war against the U.S. The Army Board for Correction of Military Records agreed with this assessment, but the Assistant Secretary of the Army did not:

Assistant Secretary Henry ...turned to two decisions of the United States Supreme Court, *Ex parte Milligan*, 71 U.S. 2, 4 Wall. 2, 18 L.Ed 281 (1866), the case primarily relied upon by the ABCMR, and the later decision of the Court in *Ex*

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<sup>132</sup> *Id.* at 141.

<sup>133</sup> The reader should know that this author's analysis of the Constitution, the *Milligan* and *Quirin* cases, and of the entire topic of enemy combatant status were complete prior to reading the 2001 *Mudd* decision. The arguments in this decision merely provide confirmation of that analysis.

*parte Quirin*, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942). He found that *Quirin*, a decision that dealt with "law of war" jurisdiction, was more relevant than *Milligan* ... [the Assistant Secretary stated] "I do not agree with [Dr. Horbaly's] opinion and interpretation of Ex Parte Quirin that citizens of the United States cannot be tried by a military commission when the civilian courts are in operation." *Id.* at 2, 4 Wall. 2. Assistant Secretary Henry concluded that regardless of these facts a military tribunal has jurisdiction to try "civilian belligerents for law of war and military violations." *Id.* He found that "Dr. Mudd's citizenship in the State of Maryland is not dispositive of the issue of whether the military tribunal had jurisdiction because Dr. Mudd was charged with acting as an enemy belligerent by aiding and abetting those who have violated the laws and customs of war."<sup>134</sup>

The District Court agreed with the Army. The District Court stated that:

Reading *Milligan* and *Quirin* together, this Court therefore concludes that if Dr. Samuel Mudd was charged with a law of war violation, it was permissible for him to be tried before a military commission even though he was a United States and a Maryland citizen and the civilian courts were open at the time of his trial.

Both the Secretary of the Army and the District Court erred by following the *Quirin*

Court's misreading of *Milligan* and echoed the *Hirabayashi* Court's definition of

*Milligan* as a decision about martial law and *Quirin* as a decision about the laws of war.

The *Milligan* decision was about simple martial law, such as in the *Duncan* case. It most

emphatically was about the laws of war. Mr. Milligan had been accused of violating the

laws of war, for committing military crimes. Like Mudd, he was accused of operating in

a military zone (In Mudd's case, Washington D.C. was characterized as still being under

a form of martial law). But the *Milligan* Court found that the laws of war simply did not

apply to Mr. Milligan, whatever he may have done. The same was true for Mudd. We

can see in the opinions of the Assistant Secretary of the Army and the D.C. District Court

that the real focus is on the actions, not the category of persons. The D.C. District Court

made clear just how open the scope of acts that can be seen as violations of the laws of

war really are:

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<sup>134</sup> *Id.* at 142.

The final question then is whether Dr. Samuel Mudd was in fact charged with a violation of the "law of war"? As Dr. Horbaly testified: "It is really a wide open field as to what is a violation of the law of war." Admin. Record at 246. And in *Quirin*, the Supreme Court found it unnecessary "to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war." *Ex parte Quirin*, 317 U.S. at 45-46, 63 S.Ct. 2. It was enough that the facts presented there "were plainly within those boundaries..." *Id.*<sup>135</sup>

If someone like Dr. Mudd, a person who had not carried a weapon or taken part in any violence whatsoever, who did nothing more than give aid to another person who was a suspected combatant, can be accused of violating a law of war, then that accusation can be levied against anyone, whether they take part in violence or not. This view has not been explicitly expressed by the government in the *Hamdi* or *Padilla* cases, and the government has not cited to the *Mudd* case, but the Bush Administration's characterization of what triggers the status and who is subject to the military detention and tribunal order makes it clear. Like the Army and court in the March, 2001 *Mudd* case, the Administration is also reading *Milligan* and *Quirin* together and concluding that what matters is whether a person's suspected actions can be characterized as violations of the laws of war, and such can include non-violent actions of mere support by people who are not combatants at all.

The very same people who were tried in civilian courts for aiding and abetting the *Quirin* saboteurs could now be considered "enemy combatants" and placed under military jurisdiction.<sup>136</sup> At that time it mattered a great deal that they were obviously not in the German army. Today, that would not stop their military detention and trial. If Dr. Mudd was an unlawful combatant for his actions aiding a combatant, then surely those who aided the Nazi saboteurs were also combatants for their actions aiding those

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<sup>135</sup> *Id.*, at 146.

<sup>136</sup> *Haupt v. United States*, 330 U.S. 631 (1947); *Cramer v. United States*, 325 U.S. 1 (1945).

combatants. The same would hold true for all who have been tried for espionage, treason, and terrorism in the federal courts throughout American history.

### **An Example From The Second American War On Terrorism**

An instructive parallel to the current war on terrorism is the Cold War against communism. This was, after the Civil War, America's second war against international terrorism.<sup>137</sup> In the sentencing statement for the 1950 trial of Julius and Ethel Rosenberg, District Judge Kaufman said:

Citizens of this country who betray their fellow-countrymen can be under none of the delusions about the benignity of Soviet power that they might have been prior to World War II. The nature of Russian terrorism is now self-evident. Idealism as a rational dissolves.<sup>138</sup>

The Rosenbergs were convicted of conspiracy to pass nuclear weapons secrets to the Soviets. The characterization of their crime by Judge Kaufman closely parallels the characterization of the crime of aiding terrorists today:

I consider your crime worse than murder ... I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason.<sup>139</sup>

During the red scare of the 1950s, the Cold War was seen as a struggle for the very survival of the nation against a well organized, trans-national communist enemy, directed by the Communist International, but made up of thousands of minions who did its

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<sup>137</sup> Recall that in the Civil War, the North had to combat Southern spies, saboteurs, and terrorists who crossed the lines of the Union Army in disguise, just as a foreign enemy would have to do.

<sup>138</sup> 10 F.R.D. 521 (S.D.N.Y 1950). Sentencing Statement. *Available at* [http://www.law.umkc.edu/faculty/projects/ftrials/rosenb/ROS\\_CT1.HTM](http://www.law.umkc.edu/faculty/projects/ftrials/rosenb/ROS_CT1.HTM)

<sup>139</sup> *Id.*

bidding. Unlike al Qaeda, the Soviet Union did, eventually, have the power to destroy the United States. If enemy combatant status is constitutional in the war on international terrorism, then it seems that it would also have been constitutional in the Cold War against international communism. If Dr. Mudd was an enemy (or unlawful) combatant because he aided and abetted Booth, and if a legal resident is subject to military detention and trial for aiding and abetting terrorism per Bush's tribunal order, then the Rosenbergs were surely enemy combatants because of their aiding and abetting the communist plot to destroy America. An order issued by President Truman would have had to differ from President Bush's only in slight details to fight a war on international communism rather than international terrorism, focusing on:

[A]ny individual who .. I determine from time to time in writing ... (i) is or was a member of the organization known as [the Communist International]; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international [communism], or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals ...

The Second Circuit, reviewing the Rosenberg's convictions, described their membership in the American Communist Party as providing an essential element in establishing their guilt by linking them to the International and Soviet Union:

The government had to prove that the Communist Party was tied to Soviet causes in order to make membership in it meaningful as evidence of motive or intent to aid Russia...To that end, the government put Elizabeth Bentley on the stand. She testified that the American Communist Party was part of, and subject to, the Communist International; that the Party received orders from Russia to propagandize, spy, and sabotage; and that Party members were bound to go along with those orders under threat of expulsion...[S]he supplied the missing link connecting the Communist Party with the Soviet Union, and making Communist Party membership probative of motive or intent to aid Russia.<sup>140</sup>

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<sup>140</sup> 195 F.2d 583, 595-96 (2<sup>nd</sup> Cir. 1952).

In an enemy combatant hearing, Bentley could have submitted a two-page declaration, perhaps entitled the “Bentley Declaration,” asserting this link rather than having to testify to a judge and jury. A “some evidence” standard would have been easily met, designating the Rosenbergs enemy combatants.<sup>141</sup>

A trial for espionage also required evidence of information gathering or transfer. But in a review of enemy combatant status, the mere membership would have been enough, as would travel to the Soviet Union or Cuba, or even just general support for the goals of communism. While not enough evidence for a conviction in a criminal trial, such things are *some* evidence in an enemy combatant hearing. The prospect of such hearings being conducted by the House Un-American Activities Committee and Joseph McCarthy brings into sharp focus the tremendous risks of abuse. If enemy combatant status, even for citizens, is so clearly authorized under our Constitution, then why was it not used in the war on communism? The Second Circuit even cited the *Quirin* case to rebut the Rosenberg’s defense that they should have been tried for treason.<sup>142</sup> Far from

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<sup>141</sup> As the Second Circuit noted: “Evidence was introduced to the effect (1) that the defendants expressed a preference for the Russian social and economic organization over ours, and (2) that the defendants were members of the Communist Party. The defendants say this evidence was incompetent to show they would commit espionage for Russia, and that it improperly inflamed the jury against them. We think the evidence possessed relevance. An American’s devotion to another country’s welfare cannot of course constitute proof that he has spied for that other country. But the jurors may reasonably infer that he is more likely to spy for it than other Americans not similarly devoted.” *Id.* at 595.

<sup>142</sup> The Rosenbergs argued that the use of the Espionage Act against them was unconstitutional since it punished them with death for what was essentially treason without meeting the requirement of two witnesses to the overt act. At sentencing, the District Judge even described their act as treason (“who knows but that millions more of innocent people may pay the price of your treason”). Yet, the Second Circuit ruled against them, reading the Treason Clause much as the *Quirin* Court had: as being just an optional method of prosecution for the same offense, which could be ignored while using another law, in this case the Espionage Act, instead. The Second Circuit even cited *Quirin*: “In the *Quirin* case, the absence of uniform was an additional element, essential to Haupt’s non-treason offense although irrelevant to his treason; in the Rosenbergs’ case, an essential element of treason, giving aid to an ‘enemy,’ is irrelevant to the espionage offense.” *Id.* at 611. This was a questionable erosion of procedure for a crime that is really treason, adhering to the enemy and giving them aid and comfort, but this pales when compared to the low level of process they would have received in an enemy combatant hearing.

being “clearly settled,” the current conception of enemy combatant status is a very troubling doctrine that the courts do not seem to be able to understand or reconcile with.

### **THE JUDICIAL RESPONSE TO DATE**

When judges begin their analysis of the use of enemy combatant status without questioning this unprecedented expansion of the definition of war and the enemy, or the validity of the very concept of unlawful combatants, they tend to rule as if trying to oversee a military determination of who is a combatant, and whether they are lawful or not, on an actual traditional battlefield. Judges then struggle to find a role for themselves in this “battlefield” process, and wind up giving the deference due to a commander on a battlefield to a president in D.C. or to a Department of Defense employee in Virginia. And this deference is given to determinations of enemy status for people who are no longer, or never were, in a war-zone and without questioning if they fit into the possible enemy category at all.

#### **The Proper Threshold Question of Category**

The threshold question courts should ask is not whether the person before the court *is* a combatant. The threshold question should be *can* this person even be a combatant at all for purposes of military detention or trial. That question should be asked in the context of whether this is even a war, whether this person fits in a category that can *ever* be an enemy of any kind, and then whether this person can be an enemy in *this* war.<sup>143</sup> Only after the court has gone through that process of determining if the person before it can

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<sup>143</sup> District Court Judge Doumar’s questioning of whether this is even a war is a good example of what a judge should do.



even possibly be a combatant should the court then turn to the question of whether the person is one. The first question of whether the person can be an enemy must come first because if the answer is no, then the government has no claim at all to using military jurisdiction, and must use the criminal law process, regardless of what the person has done. If there are, as I contend, entire categories of people who cannot be subjected to military jurisdiction for any action, such people are due the full protections of the criminal law process. There is no point in holding any hearing on their combatant status. A judge just needs to know if they are in a category of persons that can be subject to military jurisdiction at all. At the most, the judge should hold a hearing to determine that relatively simple question of category, during which a person could easily show that they were a U.S. citizen or legal resident, or a national of an ally nation, for example.<sup>144</sup>

For the judge to skip right to the question of whether the person is a combatant is to expose people who are not even in the possible enemy category to a process that is below that of full criminal due process, thus exposing them to a deprivation of life or liberty (exactly what being treated like an enemy brings) without the safeguards they are guaranteed under the Constitution.

### **A Pattern of Undue Deference**

So far, courts and even legal scholars have put the cart before the horse and have displayed their unquestioning acceptance of the Bush Administration's assertions that anyone can be the enemy in this global and total "war" on terrorism. The latest example

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<sup>144</sup> See *infra* note 173 and accompanying text, for a discussion of threshold hearings and why only nationals of designated enemy nations or perhaps people found in certain well defined geographical areas should be placed in the possible enemy category at all. All others should be, upon a showing of where they are from, placed in the criminal justice system if there are going to be any further proceedings against them. We do have to treat some people as suspected enemy, but not the whole planet.

of this tendency to accept the new definitions of war and enemies is the Second Circuit

*Padilla* decision where the court said:

[W]hether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts. "Certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region." Because we have no authority to do so, we do not address the government's underlying assumption that an undeclared war exists between al Qaeda and the United States[internal citations omitted].<sup>145</sup>

The court thus exhibits the remarkably expanded deference to the Executive that is a troubling characteristic in times of emergency.<sup>146</sup> Just who can be an enemy to which the laws of war apply is not something the Second Circuit addresses. The focus is on whether 18 U.S.C. § 4001(a) gives congressional authorization.

The Fourth Circuit took this deference to its logical conclusion in their *Hamdi* decision, by refusing to scrutinize the Department of Defense's findings that Hamdi was an enemy combatant beyond requiring a showing that the President had "some evidence." The court ruled that a memo from a Department of Defense employee satisfied that standard and refused to allow Mr. Hamdi to present any evidence of his own. Granted, the *Hamdi* case was concerning someone captured in Afghanistan, but that should not warrant a refusal to hear counter-evidence. There are any number of reasons for a non-Afghani person to be in Afghanistan other than to fight or aid terrorists, such as working as a journalist or an aid worker.

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<sup>145</sup> *Padilla v. Rumsfeld* 352 F.3d 695, 712 (2<sup>nd</sup> Cir. 2003).

<sup>146</sup> The Second Circuit did challenge the legality of *Padilla's* detention in the face of 18U.S.C. §4001(a), which the court read to prohibit detention of U.S. citizens without congressional authorization. However, this decision is in danger of being overruled by the Supreme Court if the Court applies an equivalent deference to the question of whether or not Congress have authorization in its Use of Force Resolution. Further, this decision by the Second Circuit does nothing whatsoever to prevent detention or trial by tribunal of people who are not citizens.

However, even if the court had reviewed evidence from Hamdi, and then made the determination itself, the same deference that drove the court's acceptance of the determination by the Department of Defense would also likely drive its own determination of status.

### **A Some Evidence Standard?**

A look at the decision by District Judge Mulkasey, in the first *Padilla* decision, can give some insight into what kind of process such a hearing might provide. Like the Fourth Circuit, Judge Mulkasey presumes that there can be a war against non-state actors for purposes of triggering military court jurisdiction and that a U.S. citizen can be an “enemy” in that war. By doing so, he automatically places anyone so designated in the same category as a national of an enemy state who is taken into custody in a war-zone and presumes such people have no constitutional due process rights. In contrast to the Fourth Circuit, Judge Mulkasey did at least order that the detainee, Jose Padilla, be allowed access to counsel, under the All Writs Act (not under the Sixth Amendment), in order to challenge the government's assignment of the status to him. Judge Mulkasey also stated an intention to hold a hearing on the status. But Mulkasey indicated that he would use the government's own suggestion of a minimal “some evidence” standard of review to determine “that Padilla's detention is not arbitrary, and that, because his detention is not arbitrary, the President is exercising a power vouchsafed to him by the Constitution.”<sup>147</sup> Judge Mulkasey did not elaborate on what would be the standard for arbitrariness, but if his characterizations of the use of the some evidence standard in case

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<sup>147</sup> *Padilla*, 243 F. Supp. 2d 42, 56.

law is any indication, it will be very low. In fact, Judge Mukasey said of those administrative law precedents:

These cases, which dealt with evaluation of evidence gathered in the relatively accessible setting of a prison, cannot be applied mechanically to evaluation of evidence gathered in the chaotic and less accessible setting of a distant battlefield.<sup>148</sup>

By refusing to recognize the detention of Padilla as rising to the level of a deprivation of liberty as countenanced in the Fourth, Fifth, or Sixth Amendments, Judge Mukasey had reduced the hearing he would grant to the level of an administrative review of an Executive decision. Additionally, he suggested that he was willing to adjust that low standard even further to accommodate the practical limitations on the Executive's ability to gather evidence in the field. In a criminal prosecution, if the government cannot amass sufficient evidence, whatever may be the cause, it will not prevail and a court will not lower the standard of proof to accommodate it. Here, the government will apparently get a standard adjusted to fit its evidence gathering capacity. While having to counter the "some evidence" presented against him, Padilla may have been denied access to the classified sections of that evidence, making it difficult to challenge. In addition, depending on how much evidence the judge would have considered enough, Padilla might have been required to show that the government had no evidence in order to show that it did not have some evidence. This is what a judge is inclined to do when he or she makes the threshold determination that the person before the bench has no rights under the Bill of Rights except perhaps "whatever process is due" – with that tending to be the same process one would get in a tax assessment dispute or traffic ticket hearing.

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<sup>148</sup> *Id.*

## **A Two (Or Three) Legal Track System**

The Administration is claiming that the President has an inherit power, as commander in chief, to designate any person as an enemy combatant. Once designated, the Administration claims a right to apply its choice of military administrative detention, military tribunals, or criminal law to terrorist suspects. This means it is possible that a person could be tried in a civilian court for violation of federal statutes against terrorism, then, whatever the result, designated an enemy combatant and tried by a military tribunal for violation of the laws of war, and then perhaps tried again in civilian court for treason if a U.S. resident. This person could then, even if found innocent in all of those proceedings, be held as a combatant detainee (such as a prisoner of war) for the duration of the war on terror because that person is still considered a combatant per the President's designation.<sup>149</sup> Because that initial determination was done by the President alone, with no judicial proceeding whatsoever, whether military or civilian, that detainee status remains affixed to the person until the President removes it.

But even if a judge, such as Mulkasey, were to hold a hearing on the initial determination of combatant status, using a some evidence standard, this is still a system with a very low threshold for deprivation of liberty that is extremely susceptible to mistake even if all participants are conscientious. This danger becomes clear when we consider one innocent man who almost certainly would have lost a "some evidence" hearing. Abdallah Higazy, an Egyptian student in the U.S. on a student visa, happened to

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<sup>149</sup> John Walker Lindh, captured while serving with the Taliban, was charged with violating federal statutes. Jose Padilla, "captured" at the Chicago O' Hare airport, is being held by the U.S. military as an enemy combatant. Suspected 20<sup>th</sup> 9-11 hijacker Zacharias Mousoui, a French foreign national, is currently being tried in federal court on terrorism charges. Shoe bomber Richard Reed was charged with a federal offense for his attempted act of terrorism.

be staying in a hotel room overlooking the World Trade Center on 9-11. After the attack, a hotel employee claimed to have found an aviation radio in Higazy's room, and Higazy was taken into custody by the F.B.I. as a dangerous terrorist suspect. He was not allowed to speak to his lawyer, and after approximately 25 days in jail, he was finally brought before a judge with the charge of lying to F.B.I. agents during an investigation. At that time, another hotel guest, a private pilot who had been staying in a room one floor below Higazy, came forward to say that he had left the radio in his room. What the judge thought was "a very strong case" fell apart. The New York Times reported that:

His lawyer [Mr. Dunn] said that during one interview session with F.B.I. agents, Mr. Higazy was subjected to "unrelenting pressure," under which he may have made confused or false statements about the radio. In Federal District Court ...[assistant United States attorney] Himmelfarb said Mr. Higazy had admitted that the radio was his and had told agents three different versions of how he had acquired it. Mr. Dunn said he had been excluded from that interview, and Mr. Higazy said he was unsure what he told the agents.

Had Mr. Higazy been designated an enemy combatant and turned over to the Department of Defense, a hearing using a some evidence standard likely would have resulted in his being given over to the military to be detained for the duration of the war on terrorism or dealt with under harsh military tribunal justice. If the civilian pilot had not shown up to claim his radio, it would have been Higazy's word against that of the F.B.I. agents and the hotel employee at a some-evidence hearing. Their assertions and the radio itself would have constituted "some evidence." Higazy was a young Muslim male here on a student visa. His own erroneous, and very likely coerced, statements of admission that the radio was his would have been accepted by a judge as more likely true than not, given the circumstances. Even the inconsistencies of how he "acquired" the radio likely increased suspicion rather than causing doubt in the judge's mind. While not enough

evidence to secure a conviction in a criminal trial, all of this together would very likely have been enough in a some-evidence hearing on enemy combatant status. This evidence could also have sealed Mr. Higazy's fate before a subsequent military tribunal,<sup>150</sup> resulting in the false conviction and execution of an innocent man that might have never come to light.<sup>151</sup> This is just one example of how an entirely innocent man could have so easily lost his freedom or his life under such a legal regime.

Under our Constitution, the existence of some evidence is just the beginning of the process that can result in a loss of freedom, not the end of it. The accused enjoys a presumption of innocence. He has a right to confront and cross-examine any prosecution evidence and witnesses. Exculpatory evidence must be disclosed to the defense. The defendant has a right to speak on his own behalf or to be silent. He can present his own witnesses. He has a right to a lawyer to argue his case and he has a right to a jury who will watch everything, deliberate, and then delivers a verdict. The jury is told that a guilty verdict requires that they be certain beyond a reasonable doubt. Only after all of this process can a civilian in the U.S. lose his or her freedom (unless they plead guilty). It only takes one juror to hang the jury, forcing the prosecution to start over or drop the charges. And even if the defendant is found guilty, a judge can still throw out a conviction based on insufficient evidence (as well as dismiss the case at any time for the same reason). Such a high value is put on freedom that our system is slanted toward the defense. It does not seek to balance the defense and the prosecution. It intentionally

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<sup>150</sup> Since he is not a U.S. citizen, he would have been eligible for military trial under Bush's tribunal order.

<sup>151</sup> Since Higazy was an immigrant, he would have been subject to the President's tribunal and detention order. It is fortunate for him that his brush with the U.S. government happened so early on, before the concept of enemy combatant status was fully developed.

over-protects the accused, even if guilty. Our system is not about truth seeking, it is about power limiting and liberty preserving.

The “enemy combatant” track is nearly the antithesis of that constitutional criminal law system. There is not a single clause in the Constitution that the detainee can point to that will secure procedure. He gets none of the rights of the accused just listed. He gets only what process a judge is willing to give, if he ever sees one. It is a system where the military can seize anyone off the streets on the basis of accusations or circumstantial evidence, and then have to show, at most, what would usually only constitute probable cause to get an arrest or search warrant to *begin* the criminal process. That is a recipe for injustice.<sup>152</sup>

As troubling as that scenario is, perhaps even more disturbing is the apparent option the government has to avoid any kind of hearing altogether by merely threatening criminal defendants with removal to military jurisdiction as leverage to induce plea-bargains. This tactic was first insinuated in the John Walker Lindh case, where Lindh pled guilty to weapons charges and to aiding the Taliban. In the plea agreement, the U.S. promised not to designate Lindh an enemy combatant, though it claimed a right to, so long as he did not violate the agreement.

This tactic moved from possibility to functional reality in the case of six young Muslim men from Lackawanna, N.Y., who were facing charges under federal terrorism statutes for allegedly having trained in Afghanistan and Pakistan with al Qaeda. Though the defendants’ attorneys were initially confident that the government’s case was very

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<sup>152</sup> This is also, unfortunately, often all the evidence a prosecutor needs to pressure a defendant into pleading away all of the above mentioned rights. But at least the defendant has a choice of whether to risk a public trial before a jury. The enemy combatant designee does not get that choice.



weak and worth fighting at trial, the government exerted unusual pressure to plead guilty, as the Washington Post reported:

The federal government implicitly threatened to toss the defendants into a secret military prison without trial, where they could languish indefinitely without access to courts or lawyers. That prospect terrified the men. They accepted prison terms of 6 1/2 to 9 years.

"We had to worry about the defendants being whisked out of the courtroom and declared enemy combatants if the case started going well for us," said attorney Patrick J. Brown, who defended one of the accused. "So we just ran up the white flag and folded. Most of us wish we'd never been associated with this case."

The Lackawanna case illustrates how the post-Sept. 11, 2001, legal landscape tilts heavily toward the prosecution, government critics contend. Future defendants in terror cases could face the same choice: Plead guilty or face the possibility of indefinite imprisonment or even the death penalty.<sup>153</sup>

The government was able to secure long prison sentences by the mere threat of enemy combatant status, without even having to face a some-evidence review before a judge. The same could have been done to Mr. Higazy. Even if there was an established and actively used some-evidence standard, defendants would still likely plead guilty rather than risk a judge ruling against them and turning them over to the military where they would be at risk of an almost certain conviction and execution by tribunal.

Enemy combatant status gives law enforcement and prosecutors a power to coerce suspects they have not had since before *Miranda v. Arizona*.<sup>154</sup> Such coerced plea-bargains amount to imprisonment by decree as there is no examination of the evidence at all by an Article III judge before the person is imprisoned and the accused does not even have the option of risking a trial. The defendant can plead or be transformed into an enemy combatant. There really is no choice but guilty.

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<sup>153</sup> Michael Powell, *No Choice but Guilty: Lackawanna Case Highlights Legal Tilt*, WASHINGTON POST, July 29, 2003 Page A01.

<sup>154</sup> 384 U.S. 436 (1966).

Also troubling is the possibility that a criminal case, deemed weak precisely because the police did not comply with *Miranda*, could now be turned into a sure conviction by threatening enemy combatant designation. Even if there was a hearing, the *Miranda* rule itself would have no bearing whatsoever on such a determination, if we accept the logic that the Fifth Amendment does not apply to such cases. Thus, the government could coerce confessions, as it did with Mr. Higazy, and then use those as “some evidence” in the enemy combatant hearing. One additional permutation is that once any of these defendants had been designated an enemy combatant, anyone who gave them aid or assistance of any kind, prior to or during the actions deemed to have triggered the status, could themselves be subject to such detention and trial under Bush’s detention and trial order or be coerced into a plea bargain. The same could then be done to anyone who aided and abetted *them*.<sup>155</sup> Such a legal system truly is “like something out of Kafka.”<sup>156</sup>

To be more precise, it is like something out of the Third Reich. This is not meant to minimize the real differences between our system and that of the Weimar Republic. Our judges, at least in peacetime, do a fair job. And we do still have a written constitution that is far, far stronger than the flawed Weimar Constitution.<sup>157</sup> But we should study the pathology of the death of constitutional law in Germany to avoid the same fate. Professor Fritz Stern describes the Germans’ descent into a legal hell as the Nazis instituted their own special two-track legal system:

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<sup>155</sup> The degree of probability of such a scenario is of little import. Our legal system is one of principles and possibilities, not just likelihood or actual results. That this near limitless tool of government power to circumvent criminal procedure and due process has, so far, been little used is no rebuttal. We do not rely on political checks alone to protect our rights.

<sup>156</sup> See Owen Fiss, first year Yale Law School procedure class film on jury nullification.

<sup>157</sup> One of the most infamous features of the Weimar Constitution that helped Hitler seize power was its Article 48, which allowed for constitutional rule by decree. This was in essence a constitution suspension clause built in to their constitution. It had been used several times before during emergencies, and then been rescinded. But this time, the republic did not survive.

During the weeks when the Nazi regime was establishing itself, there was a nearly total absence of protest against the revocation of what would be considered basic civil rights. Gradually there came into being--and this is why I mentioned the concentration camps--a kind of dual-state existence. There was a normalcy in judicial proceedings concerning what one might call normal criminal cases. Then there were the cases of political justice and so-called political crimes, of which more and more were given into the hands of special courts over which the Gestapo and the SS had control. In this dual system, the most normal achievements of civilized life such as habeas corpus quickly became unknown. Once, of course, you were in the concentration camp or in prison for political reasons (or later for racial reasons), there was no recourse at all.<sup>158</sup>

The above quote was a 1995 description of the Nazi legal system, long predating 9-11, that describes a two track legal system. With the post 9-11 use of enemy combatant status, material witness warrants, long and secret detention of immigrants, and an executive order calling for the establishment of military tribunals for suspected terrorists, the United States is at this very moment developing its own two track legal system that separates “normal” criminal cases from the political crime of terrorism.

One of the few German judges who actually resisted the Nazis, Judge Kreyszig, sent a letter of complaint to the president of the Prussian Supreme Court in which he complained about the "terrible doctrine" that "placed beyond the reach of law" concentration camps and mental institutions. Our own legal doctrines are now doing precisely the same thing, starting first with non criminal commitment of sexual predators into mental institutions for “treatment” at the end of their prison sentences and extending to the legal black hole for those labeled “enemy combatants.” Professor Stern described how the Nazis used the law as a cover and as a weapon in their rise to power:

One of the important things to remember about the Third Reich and its context: Throughout--and especially in the first two years after they came to power--the Nazis tried to maintain facades of normalcy and legality, *facades that allowed*

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<sup>158</sup> Symposium, *Nazis in the Courtroom: Lessons From the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France*, Brooklyn Law Review, 1123, 1133 (Winter 1995).

*judges and attorneys to make their compromises and become complicitous.*  
There were a couple of stages by which this was done.

First, the Weimar Constitution was used perversely to subvert its own principles. The Reichstag fire in February 1933, a month after Hitler came to power, gave the Nazis the opportunity to create, by so-called constitutional means, emergency decrees that the octogenarian president signed, as he had to. For all practical purposes, these decrees abrogated all civil rights, never to be restored.

The Enabling Act of March 1933 gave the existing cabinet four years of decree power, an act consistent with the constitution. Also in March 1933, the first concentration camps were established. Next, in April 1933, the infamous decree on the "restoration" of the professional civil service removed political opponents (so-called non-Aryans and others) from most civil-service positions. This decree obviously targeted judges; some lawyers were also disbarred. That the judges and other civil servants accepted this first violation of the principle of the constitution and allowed the exclusion of their Jewish colleagues without a collective protest or significant individual protest was a tremendous encouragement to the regime, *which in the beginning was still uncertain of how far it could go* (emphasis added).<sup>159</sup>

When considering potential dangers during times of emergency, we should watch not just for lawlessness, but for "lawful" violations of our Constitution and our rights – laws and legal doctrines that either intentionally or unintentionally pave the way for more erosions.

### **A Possible Statutory Limitation on Enemy Combatant Detention**

Both Jose Padilla's counsel and the Second Circuit cite the legislative history of 18 U.S.C. §4001(a), with the court construing that statute to prevent the detention without trial of U.S. citizens. The government denies this reading of 4001(a), arguing that it is only a limitation on the Attorney General as a civilian law enforcement officer, not on the President in his capacity as commander-in-chief.<sup>160</sup> In support of this contention, the

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<sup>159</sup> *Id.* at 132-33.

<sup>160</sup> The government also argues, in the alternative, that the joint resolution authorizing force was also an implicit authorization to detain and thus satisfies §4001(a). The government stands a good chance of prevailing on this point if it can convince the Supreme Court that this is a political question which Congress can clarify, if it desires. The Court could read subsequent Congressional silence as a demonstration of

government presents its own quotations drawn from legislative history, resulting in a battle of quotations from committee hearings and House floor speeches.

However, something that has apparently gone unnoticed by counsel for both sides as well as the courts is the fact that the U.S. government itself has, in the past, read §4001(a) as prohibiting just such an action by the President. In the case of *Fred Korematsu v. United States*, 584 F.Supp. 1406 (N.D.Cal. 1984), Mr. Korematsu petitioned the district court that had convicted him of violating the exclusion order in 1942 to now vacate that conviction. The district court did so, granting Mr. Korematsu's petition for a writ of *coram nobis*. What is remarkable is that the government, eager to avoid an exposition of the sordid details of the internment, had filed its own motion to dismiss. The court described that motion:

The government has ... eagerly moved to dismiss without acknowledging any specific reasons for dismissal other than that "there is no further usefulness to be served by conviction under a statute which has been soundly repudiated." (R.T. 13:20-22, November 10, 1983). In support of this statement, the government points out that in 1971, legislation was adopted requiring congressional action before an Executive Order such as Executive Order 9066 can ever be issued again.<sup>161</sup>

By the U.S. government's own admission in its motion to the district court, 18 U.S.C. §4001(a) did in fact bar just such a detention of American citizens by the President, unless Congress gave its authorization. Such a prior admission may not be considered binding, but it is certainly some evidence that the government knows very well that §4001(a) constrains the President from detaining citizens. This motion can serve to assist construction of that statute by the Supreme Court when it reviews the *Padilla* case on certiorari.

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acquiescence (if there has not been even a Sense of Congress resolution on §4001(a) by the time the Court begins consideration of the case).

<sup>161</sup> 584 F.Supp. 1406, 1413 (N.D.Cal. 1984).

Still, even if the Supreme Court finds for Jose Padilla on that question, such a ruling would do nothing whatsoever for the estimated 20 million people in the U.S. who are not citizens. Nor would it provide any protection against arbitrary detention to the billions around the world who are also vulnerable to President Bush's detention and trial order. That order stands unscathed by §4001(a) in any case. In light of the history of §4001(a), which invariably evokes the memory of the Japanese-American internments, it is bitterly ironic that this statute would not have helped the third of those detainees who were not citizens. This statute was itself citizen-centric, as is the current focus on it as the only barrier to enemy combatant status detentions.<sup>162</sup> But there is an additional problem with 4001(a). The statute itself is very likely unconstitutional and simply codifies and legitimates a series of violations of constitutional rights.

### **4001(a) Itself Is A Possible Constitutional Violation**

The passage of congressional legislation is no cure to constitutional violations. In support of Roosevelt's internment of Japanese-Americans, Congress passed enabling legislation in the form of the statutes punishing violations of the exclusion orders. It was under these statutes that *Hirabayashi*, *Korematsu*, and *Endo* were prosecuted. The courts since have assumed that detention is constitutional if the Administration attains congressional approval. This is incorrect. The internment of the Japanese-Americans was unconstitutional not just because it was so overtly racist, but also because it went against the *Milligan* Court's holding that the government could not hold Mr. Milligan as a prisoner of war. Recall that the government in *Milligan* had argued that even if it could

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<sup>162</sup> It is also likely that enforcement of § 4001(a) would not stop the government from trying Padilla before a military tribunal, and thus continuing to detain him incident to that trial.

not try Mr. Milligan by tribunal, it could hold him as a prisoner of war for the duration of the conflict. The Court rejected that contention and enforced a congressional statute that had to do with civilian habeas suspension, not whether or not Congress was approving detaining people as prisoners of war. It is incorrect to read *Milligan* as either approving of such authorization or being simply silent on the subject. Roosevelt was treating Americans as enemy aliens or enemy prisoners of war with no constitutional basis for doing so. Outside of habeas suspension, the Constitution forbids detention of anyone who is not a resident of a nation with which we are in a declared war.

If the Supreme Court rules that Bush must get congressional authorization, that just means the Bill of Rights has been reduced to the level of a mere statute, that can be repealed by another statute giving authorization to detain and making the courts complicit in its violation. There is, in fact, a bill waiting in committee right now, HR 1029, that would satisfy the requirements of 4001(a) and give the President full authorization to treat U.S. citizens as enemy combatants. That bill is sponsored by representatives Schiff and Frank, two Democrats, but will surely be swept up and passed by the Republicans if need be. The Democrats sponsored the bill as a way to show that Congress is capable of acting under 4001(a) and that at least some house Members do not agree that the President already has authorization. However, HR 1029 essentially codifies the President's current perspective on his powers, except that it grants a right to counsel and vaguely calls for the Administration to set up some manner of a scheme of determination of status. It calls for judicial review of determinations, but does not set any evidentiary standards. This is a very weak bill, even if we accept the premise of the due process rights of the people being reduced to the level of statutes.

### **How Such Authorization Under 4001(a) Differs From Habeas Suspension**

Not all detentions are created equal. There is a real difference between a habeas suspension by Congress that is done according to statute and military or quasi-military detention. Habeas suspension denies access to the courts altogether. A radical measure intended for times of actual invasion or rebellion, this is truly a draconian denial of process and hence liberty. I would not have supported this clause if I had been at the Convention, preferring that the actual heat of battle, which closed a court, be the only justification for such detention, which would end when the battle ended and the court could reopen—essentially what the Milligan Court ruled about military trial of civilians. This requires no suspension clause. But at least habeas suspension preserves the integrity of the courts and the Bill of Rights, which are still intact though unavailable while habeas is suspended during an actual invasion or rebellion. Thus, there is no involvement of the courts in a watering down of the Bill of Rights that can be normalized and made permanent. With habeas suspension, it is one or the other – there is either full access to the courts who must enforce the full Bill of Rights, or no access to courts at all –rather than some perpetual twilight zone in the middle, which is what we are now in danger of slipping into. In addition, a court would still have the power to rule a suspension unconstitutional by finding that there is no invasion to justify it and a court could still enforce time limits set by Congress, as the *Milligan* Court did.

With “enemy combatant” status, the courts would be accepting it as an ongoing power of the President, even when we are not being invaded. The courts would become part of the system by sustaining these detentions as “constitutional” using some



administrative standard, such as “some evidence” which is below and outside of the Bill of Rights, in any habeas challenges or in any designation review hearings Congress deems to allow the courts to take part in. In other words, if the Supreme Court sustains this claim of power, no court in the land could strike its use down as a violation of the Bill of Rights since those provisions would no longer apply, or even limit it to an actual invasion. The habeas suspension clause limits a suspension to cases of rebellion or invasion. Enemy combatant designation would have no such constitutional limit, and even if we read it to be a wartime power only, the definition of war has been so weakened that it could be in effect from here forward in a perpetual war against terrorism. Rather than a detainee being temporarily denied access to courts which are eager to hear his case and protect his liberty with the still intact shield of the Bill of Rights, and who can still give access by finding no invasion, here a detainee would be processed through courts which had been stripped of the ability to use the Bill of Rights to protect the detainee and had in fact joined his tormenters as part of the machine of detention, military trial, and execution.

What we have in 4001(a) is yet another example of Congress attempting to reign in unconstitutional actions by the executive by passing legislation that is itself a violation of the Constitution. This is similar to the War Powers Act, which delegates to the President a power to take the nation to war without a declaration of war in the hopes of constraining to some degree what was feared would otherwise be a completely unrestrained executive war-making power. The underlying premise there was that a declaration of war is an anachronism, and Congress must assert some kind of role in what would otherwise now be a plenary power of the executive. Here, the underlying premise

is that U.S. citizens and residents can be treated like the “enemy” and stripped of the protections of the Bill of Rights, and Congress needs to legislate to create some “reasonable” limits. This only makes Congress and the courts party to the violation of the Constitution, it does not cure that violation. If the Court and Congress say yes to this power, exactly what will they be saying yes to?

### **What Can Be Done To The “Enemy”**

The Japanese-American detainees appear to have been treated as well as any prisoners of war. They were not tried by tribunal and executed like the saboteurs in *Quirin*. Nor were they charged with espionage or treason like those who aided the German saboteurs. They were simply held. But they were not in the Japanese Army, and they were not residents of Japan. Still, all of them were treated as if they were and this has rightly been seen as a gross violation of their rights, with the U.S. government paying substantial reparations. It is often too easy to rationalize such detention as not being a violation of rights, especially when compared to trial by tribunal and execution. When we accept the notion of P.O.W. status and civilian detainee status, we are inevitably accepting a set-aside of rights for some, whether it is mass detentions or the individualized version whereby a Abdallah Higazy is falsely imprisoned.

Another problem with this status is that, even if the U.S. were to treat all suspected terrorists as *lawful* combatants, they would still be treated as combatants. Something often overlooked in discussions of this claimed power is that during war, the “enemy” can be shot on sight. There is no requirement that the enemy soldier or partisan actually be an imminent threat to anyone or even be armed. All “enemy” personnel - the

supply clerk, the mechanic, the cook, the secretary at headquarters, - are fair targets since they are part of the military machine. Transferring these practices of war to the current struggle against terrorism would mean that anyone, from any country –including the U.S. – can be an “enemy,” whether the U.S. has declared war on their nation or not; that the entire planet, including all the U.S. is the battlefield; and any human being in the world, including any U.S. citizen, can not only be detained, but can be targeted by the military and killed outright if the President thinks they might be a terrorist, whether or not they are armed. Those are military rules of engagement. This is in contrast to the rules of engagement of civilian law enforcement where a police officer has a duty to take a suspect into custody for possible criminal proceedings and can only use lethal force if his life or the life of another is in danger. The officer cannot shoot a suspect on sight just because he is a suspect while a soldier can shoot enemy personnel on sight just because they are enemy personnel.

Military rules of engagement have been a disaster in our history, from the Wounded Knee Massacre to the destruction of the Bonus Marchers’ tent city in D.C., to the Kent State Massacre, to the Philadelphia M.O.V.E. bombing, to Ruby Ridge, to the Branch Dividian tragedy in Waco, Texas. We can imagine what would have happened if this expanded notion of the enemy had been used not only in the Cold War but also in the turmoil of the 60s, and 70s when the war protesters were accused of hurting the war effort.<sup>163</sup>

In the war on terror, what would otherwise trigger the status of criminal suspect can now trigger the status of enemy and then trigger a shooting. Under military rules of

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<sup>163</sup> There are several radio talk show hosts, such as Michael Savage, who have repeatedly called for protesters against the war in Iraq to be tried for treason.

engagement, Padilla could simply have been shot in the head in O' Hare International Airport or anywhere else he was spotted. A concrete example of this is the Predator-drone strike on the carload of suspected al Qaeda in Yemen. We were not at war with Yemen and that strike was not carried out on a battlefield. It was simply a matter of convenience for the government, which deemed it impractical to use law enforcement methods to apprehend the men.<sup>164</sup> Since the entire world is the battle-zone in the war on terrorism, the President could technically order a missile fired at a combatant wherever he is, even in the U.S.<sup>165</sup>

Also, as Judge Mukasey noted, unlawful combatants can be summarily executed even after surrendering. He describes how, after World War II, some Nazi SS soldiers were on trial for war crimes because they had executed some captured Eastern Europe partisans. Those SS troopers were acquitted because the partisans' insignia, a red star, had not been large enough to be read at a distance, and thus they were considered unlawful combatants under the laws of war. It was not a war crime to summarily execute them.<sup>166</sup> Judge Mukasey did point out that, at least among the "civilized world," such "Draconian measures have not prevailed."<sup>167</sup> But if we accept the legal reasoning of the Administration, and the courts, there are no constitutional or legal constraints on such action.

Further, since this status can be applied to those who are not really even combatants, this means that those who are only suspected of aiding and abetting terrorists

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<sup>164</sup> Since there is no requirement to attempt apprehension, the U.S. was under no obligation to send in a Special Operations team to attempt a capture (though these units train constantly for just such operations).

<sup>165</sup> Robert Schlesinger, *U.S. war on terror expands*, THE BOSTON GLOBE, Nov. 9, 2002. The Administration stated that it was not known that one of the targets was a U.S. citizen, but also made it clear that his citizenship was irrelevant, as the citizen could have been killed anyway.

<sup>166</sup> *Padilla*, 233 F. Supp. 2d 564, 592.

<sup>167</sup> *Id.*

can be shot on sight too. In none of these scenarios would there be an opportunity for a judge to consider a some-evidence standard for a designation because the designated person would be dead. This is the most incongruous but factual reality of this status.

### **Other Practical and Logical Problems**

The asserted criteria for being a lawful combatant who is protected by the Geneva Conventions is that the person:

- a) Belongs to a recognizable command structure where officers have responsibility for their men.
- b) Wears a uniform or clear unit insignia, recognizable from a distance.
- c) Bears Arms openly.
- d) Obeys the laws of war (in their treatment of enemy personnel and civilian non-combatants).

A violation of any one of these requirements for prisoner of war status makes a combatant unlawful. Of course, as we all go about our daily business, very few of us meet any of those criteria. We don't belong to a recognizable command structure, we don't wear a uniform or clear insignia designating our unit, we don't bear arms openly (with thousands or even millions of Americans carrying concealed handguns with or without permits), and we don't even know the laws of war, let alone obey them. Hence, we are all technically in violation of the laws of war and potential enemy combatants.

While this seems absurd, it is a fact that the only thing that keeps our daily activities from making us *unlawful* combatants is whether or not we are combatants at all and, according to the Administration, all it takes for any of us to become combatants is for the President to designate us as such. Once considered combatants of any kind, we are all automatically unlawful because of our civilian, non-military ways.

How could a person who may be so designated conform to the laws of war? How would that person know they are a combatant who then needs to obey the laws of war? a trial for violation of a law of war, even in civilian courts, will allow for punishment for a crime (unlawful belligerency) the elements of which the person could not have known he had to avoid committing unless there was sufficient clarity and notice for him to know that he was a combatant and thus subject to the laws of war. So even with some form of criminal procedure applied, this is a problem of notice of the law and mens rea. How can he avoid violation of the laws of war? Must he carry arms openly rather than concealed, wear a uniform, be in a recognizable command structure, and target only military personnel? Yes, if this person is actually targeting any American, he is very likely to be violating federal laws against terrorism or supporting terrorism as well, but whether he is nor not, how will he know if he needs to attempt to comply with the laws of war?

All of these problems point to a need to set clear lines of demarcation between civilian and military, between law enforcement and war, and between criminals and real enemy combatants. Only then does it make sense to talk about what to do with people who actually do fall under the category of military enemies.

## **APPLYING THE CONSTITUTIONAL MODEL TO THE STRUGGLE AGAINST INTERNATIONAL TERRORISM**

The solution to the puzzling Gordian Knot of enemy combatant status is simply to follow the Constitution. The first step is to deny any claim by the President to an independent, inherit and plenary power to make war. This claimed power has been expanded to now mean that the President can determine that a person's particular actions, as interpreted by

the President and his advisors alone, are acts of war, initiating the “battle” in which the President can then detain and try that individual as if he were a commander in Afghanistan. In contrast to that view of war, this model application begins with a declared war between nation-states and moves down in degree of severity through imperfect, undeclared, but authorized war; immediate-self defense; military assistance to enforce the laws; and law enforcement over criminal terrorist gangs and individuals.

### **The Constitution Should Follow the Flag**

The purpose of our Constitution and Bill of Rights is to attain the goals of our Declaration of Independence, which recognized universal human rights and universal principles of justice. As such, we should read the Bill of Rights broadly as protecting *all* people, abroad as well as at home, against abuse by our government.<sup>168</sup> Ours is a government of limited, enumerated power, not plenary power. This is implicit in our having a written constitution, but is also made clear by the Ninth and Tenth Amendments in the Bill of Rights. The very purpose of the Bill of Rights, according to its preamble, was to prevent misconstruction of the powers granted the government and to provide further security for the rights of the people. Our national government has no powers other than those within the Constitution. If the government derives all of its just powers from that Constitution, how can it be that this same government has authority or power to act anywhere in the world free from that constitution’s constraints? The Constitution *must* follow the flag, because the flag exists only under the Constitution. In addition,

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<sup>168</sup> The Bill of Rights was originally intended to only constrain the actions of the federal government. It has since been applied to the states via the Fourteenth Amendment. It seems odd to expand its protections to cover all people within the U.S., even against the smallest unit of municipal government, but to insist that the Bill of Rights should not constrain the federal government as it extends its power across the Globe.

both the Declaration and the Bill of Rights declare the rights of either all men or persons. We can update the Declaration by changing that to all people, and we can recognize what the text of the Bill of Rights says and assume those who wrote it, meant it. Below, we will consider what to do about the enemy in time of war, but first, let us consider what to do about the resident alien, regarded as a trusted friend and guest, when that alien is transformed into an “enemy” during wartime.

### **Resident Aliens or Enemy Aliens?**

We have already seen that under our Constitution, U.S. citizens cannot be treated as the enemy in war. I believe that also applies to any legal resident, since such a resident owes a degree of loyalty to our country and is treated under our system of laws as the very near equivalent to a citizen. The Constitution does allow for the declaration of war, and it allows for the treatment of the residents of that nation, at least, as enemies. The Enemy Alien Act appears to permit at least the deportation of resident aliens, and even their detention incidental to such deportation. But we just cannot ignore the inclusive language of the Bill of Rights. The rights protecting clauses in the Constitution and Bill of Rights speak of the procedural rights of *persons*, not citizens, and we exclude residents at peril of violating our Founding documents of the Declaration and the Constitution itself. St. George Tucker, in his notes on treason, stated that:

[H]ere it seems to be clear that every person whatsoever, owing allegiance to the United States, may commit treason against them. This includes *all* citizens ... and also all *aliens residing* within the United States, and being under their protection.<sup>169</sup>

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<sup>169</sup> See *supra*, note 55 and accompanying text.



If Tucker was correct, then a resident alien *person* can be guilty of treason because they owe allegiance, and they owe allegiance because they reside here and are under the protection of the United States. Tucker equates resident aliens with citizens when it comes to the crime of treason. Recall that treason against the United States:

shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

Note that the Treason Clause says nothing about citizens. It speaks of persons.

Apparently, citizenship is not an absolute requirement for either a duty of loyalty or the capacity to breach it by committing treason. This supports Tucker's view that whenever a resident alien makes war against the United States, or gives aid and comfort to their enemies he is committing treason. Since the Treason Clause not only makes a person susceptible to a charge of treason but also grants that person specific procedural protections, those constitutional protections attach so long as the person owes the loyalty and cannot be stripped from them. What counts is the residency and the benefits of the protection of the United States, and it would seem that before a resident could be considered an enemy alien for purposes of military jurisdiction, that resident would have to be placed outside the United States and outside its protection.

Perhaps only the deportation of legal residents, who had become enemy aliens after a declaration of war, would be constitutional, not any detention not incidental to deportation. Deportation would sever the ties that bind us with them, removing their obligation to be loyal, because they would no longer be residents who benefited from our protection, and removing our constitutional obligation to treat them on an equal footing

with other residents and citizens. Deportation would thereafter put them on an equal footing with their countrymen, who do not owe any loyalty to the U.S. since they do not benefit from it. Prior to deportation, residents would enjoy the full protection of the Bill of Rights for anything they did against us. After deportation, they could be treated like an enemy, along with the rest of the residents of the enemy nation. This might be the purpose of the Enemy Alien Act, and if that act is confined to only detaining a resident alien only so long as it took to deport them after a declaration of war, it may be constitutional. I do not have a conclusive answer to this question at this time, but this seems to me a consistent and constitutional answer that preserves our Bill of Rights as a universal shield *except* for non-U.S. resident aliens of an enemy nation.

In any case, without a declaration of war by Congress, which clearly defines who is the enemy, no resident should be treated any different than any citizen. After such a declaration, we should limit enemy status to only those residents who are nationals of the nation we have declared war on. In fact, we should see a declaration of war as a carving out of one particular population from all the people of the earth to be excepted, like our military and the enemy military, from the protections of the Bill of Rights. Every other person on this planet should be protected by the Bill of Rights unless on an actual field of battle (where the commander can detain them out of military necessity, ala martial law). This ability to limit the scope of the jurisdiction of the military is an overlooked feature of a formal declaration of war. This serves as the foreign affairs equivalent to the domestic habeas suspension clause and confines that extraordinary power to that targeted body of people. War is, at best, a controlled mass violation of human rights. In war, a President has broad power to detain, kill, try, and punish. Our wars have always been

conducted against particular states, not amorphous groups of people or individuals.<sup>170</sup> In the interest of the universal human rights recognized in our Declaration of Independence, we should keep it that way.

### **Using a Proper Some-Evidence Standard to Determine Status**

Once a war is declared, the clearest way to keep the use of military detention and trial confined to that designated enemy population is to use a reverse some-evidence standard. Rather than triggering a designation of “enemy” for any person in the world, this some evidence standard would trigger a designation of non-enemy to separate them from the residents of an enemy nation in a declared war. A detained person, or a next friend, would only have to present some evidence that he or she is not a national or resident of the enemy nation. If some evidence is presented, the detainee must be placed in the civilian criminal justice system and charged with a crime, deported (if in the U.S.), or released.

Examples of some-evidence would be drivers-licenses, passports, or birth certificates showing that a detainee is a national or resident of a nation other than the enemy nation. Confirmation from their claimed government could be sought to reduce the chances of fraud. In the case of Hamdi, whatever information the government had about his citizenship that caused them to transfer him to the U.S. would likely have met this some-evidence standard, securing his transfer to the civilian system. The same would apply to people like Lindh or Padilla, wherever captured, to show that they are not Afghans in the war on Afghanistan, even if they admitted fighting for the enemy in

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<sup>170</sup> This also puts people on notice of who to avoid aiding and abetting, and what country it would be prudent to avoid traveling to.

Afghanistan, as did Lindh. It is not just U.S. citizens who could secure removal from military jurisdiction using this standard. Many of the detainees at Camp X-Ray in Guantanamo are not Afghan nationals and would either be turned over to U.S. law enforcement, turned over to their own countries for trial, or released, even if they too were fighting for the Taliban.<sup>171</sup> This determination would center on identity, not on the actions of the person. This may seem counter-intuitive and even discriminatory. But this application keeps the jurisdiction of the military, and the resultant loss of freedom and even life, confined to the population of that designated enemy nation. This is just a change in jurisdiction and applicable law and procedure, not a release from custody. It does not prevent punishment under U.S. law for plotting or carrying out acts of violence.

Also, a person who has violated the law of his home country by fighting can be prosecuted. People like Hamdi, Lindh, or even Padilla can still be tried for treason and executed, if desired. This is precisely what has always been done with people in the military and those in civilian life even in peacetime. One man is under military jurisdiction because he is a soldier. The other man is not under military jurisdiction because he is not a soldier. If both men commit the exact same act, say assaulting a supervisor, the military man gets a courts martial under the UCMJ and the civilian gets an assault charge in the local state court. One gets military procedure and the other gets our normal criminal law procedure under the Bill of Rights. We would no more think of removing the soldier to civilian court for beating his commander than we would think of moving the civilian to a military trial for punching his abusive boss in the nose. The men have done the same thing, but they fit in different legal systems. Even if they both did

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<sup>171</sup> Both England and Australia have petitioned the U.S. to release their detained nationals for just this end. Those governments want their citizens returned to face trial at home.

the same act because they were accomplices – say holding up a liquor store, they would not both face the same process. The military man would be susceptible to both a civilian trial (because committing a crime off base against a civilian) and then military discipline, but the civilian would not face a tribunal. In that situation, there can be a two-track system, but only for the soldier. Even if we reverse the hypo, and have a civilian commit a crime against a soldier on base, that civilian still does not face a military trial. That is what the 1957 *Reid v. Covert* case made clear.<sup>172</sup> Not even the wife of a military officer, who murders her husband on a U.S. base overseas, can be tried by a military tribunal. She is not in the military. Such a categorical perspective has always been used, and it makes perfect sense. It provides the ability to have the military system of discipline and punishment that is necessary for a well-functioning military while preserving the freedom of those not in the military. It also allows for the detention and trial of the enemy in time of war without subjecting everyone and anyone to that military discipline. Indiscriminate use of enemy status is both like drafting everyone in the world and declaring war on everyone in the world. With the system I am proposing, the military jurisdiction would be properly contained with the emphasis on protecting liberty, not to maximize security. This is in perfect harmony with the design of our Constitution, which has already struck the balance between those two needs.

This combination of a particular declaration of war on a nation-state with the use of military jurisdiction and trial confined to just that population, with all others able to easily show cause to exempt them, allows us to fight terrorism, and perhaps even wage war on states that facilitate it, while also avoiding the modern equivalent of Lincoln's

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<sup>172</sup> 77 S.Ct. 1222 U.S. (1957). The Court affirmed the historic struggle to keep military law from intruding on the civilian courts and the rights of civilians under the Constitution and like the Milligan Court, stressed the Constitution's clear separation of civilian and military life.

action-based martial law on a world scale. The lessons of the recent disclosures of abuse in Iraq (substantiating rumors of systematic abuse elsewhere), only clarify and stress the vital importance of narrowly confining and then closely monitoring our military's use of detention and military interrogation. As for the concerns that this model will unduly hamstring our war effort, there has been no greater harm to that effort, no greater cause for Iraqis to join in rebellion, and no greater recruitment tool for al Qaeda, than the leaked photos of sexual abuse, beatings, and even murder in Iraq.<sup>173</sup> Violation of rights will happen under any standards that are lower than our Bill of Rights. Every year the State Department issues a list of those abuses from around the world. The wider the scope of such low standards, the more likely it is to devolve into torture and other human rights abuse. In the war on terrorism, such violations just create more terrorists (and people fighting in justified rebellion) far faster than the U.S. military can kill them.<sup>174</sup>

### **Choice of Court and Procedure for Status Hearings**

Like any determination of status, this hearing to decide whether or not to strip the military of jurisdiction should be done in accordance with due process minimums (for the military claim), and it is here that our own standards from analogous proceedings, as well as international law standards, would come in. The major change would be the required use of this claimant favoring, some-evidence standard. Following the *Milligan* principle, so long as a civilian court is open, that civilian court must be used. But even if one is not

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<sup>173</sup> Those photos finally provided graphic evidence of what has been going on throughout the war on terror, with such torture and even murder already occurring in Afghanistan and at secret CIA detention facilities throughout the world

<sup>174</sup> We should reflect on what we Americans would do if a foreign army occupied our nation, if even for initially good intentions, and then began to kill, torture, and imprison indiscriminately. The troubles facing the U.S. Army and Marines in Iraq would be like a Sunday walk in the park compared to the hell this nation would become for such occupiers. To get a picture of it, just imagine the IRA at its strongest and then multiply its numbers to several hundred thousand fighters, at least.

open in the battle-zone, an initial showing of some-evidence to the military commander should trigger a removal of the case to the nearest civilian court, which would then make a more formal determination of non-combatant status (using that same reverse some evidence standard). This would weed out any false I.D.s that a terrorist might use to initially fool a military commander in the field. Once removed from the field of battle, there is more time and better resources for the F.B.I. or State Department to investigate the claim. This removal to civilian custody is not a tremendous problem with modern air travel. In addition, an on-site or very nearby civilian court could be realized, even in a place like Afghanistan or Iraq. A magistrate judge, appointed by the U.S. Court of Appeals for the Armed Forces, could travel with the Army for that express purpose. In any case, it must be a civilian judge, not in the chain of command under the President, who makes the official decision of whether or not to remove someone from military jurisdiction. Such a court must be one established by Congress, via statute, as the Constitution demands. The President has no independent power to establish his own Article II courts. Such determinations should be subject to appeal to the Court of Appeals of the Armed Forces, or any Article III court, just as was done with Hamdi and Padilla, and ultimately to the Supreme Court.

This could result in the occasional enemy alien being removed from military custody, but they would then risk facing criminal charges in the U.S. or whatever country they claimed. One objection to this system would be the increased difficulty of criminal conviction for those who are transferred. Certainly the difficulty of collecting evidence and witness testimony is increased. But the bombers of the U.S.S. Cole were tried successfully in civilian courts, as were those who bombed the U.S. embassies in Africa,

and the Pan Am flight over Lockerbie, Scotland. Just as conspiracy is used against drug dealers, and was used against communists such as the Rosenberg's in the 1950s, so too can it be used against terrorists. Conspiracy's easily met standards of proof make convictions very likely if there is any credible evidence at all. It is highly unlikely that a jury will acquit such a person. This supposed danger is a red herring. Now let us consider what should be done with those who actually are the enemy.

### **Treatment and Trial of Actual Enemy Aliens**

#### ***The Constitution as a "Geneva Convention"***

So much attention is now paid to parsing the words of the Geneva Conventions, that we tend to forget that they are just treaties, which are on a level with congressional statutes. They are certainly important treaties, and have nearly risen to the level of jus cogens, but they are still not the highest law of the land. We should not forget that we have a constitution, and it has important things to say about how the enemy can be treated.

In a declared war on a clearly designated enemy state, the President would have the power to detain both the military personnel of that nation and the civilian residents. The civilians could be removed from the battle and, if necessary, detained to keep them from joining the enemy forces or aiding them. For the civilians, this declaration of war functions as the foreign affairs equivalent of our domestic habeas suspension. If Congress can authorize such detention here at home, it can do so abroad (with important modifications to reflect the lack of representation that I will show below). A suspension of habeas here at home does not give the government the right to do anything other than detain people, and does not release it from the responsibility of treating detainees



humanely. This is so because a habeas suspension merely suspends the ability to challenge a detention in court. It does not suspend the Bill of Rights limitations on cruel and unusual punishments or the requirement that there be a trial in civilian court before any punishment of any kind can be dealt out. In fact, because the Bill of Rights came after the habeas suspension clause, we should read the Bill of Rights as a further limitation on such detention power. Recall that there is an exception clause in the Bill of Rights for military jurisdiction that was meant to preserve it against abrogation by the later Bill of Rights. There is no such exception to preserve habeas suspension. I am not arguing that the Bill of Rights wiped out the power to suspend habeas corpus, but that for any rights provision that would *not* wipe out that detention ability if enforced, that clause should still be in effect. Our Bill of Rights guarantees against cruel and unusual punishment, deprivation of life, etc. would still govern. Preventive detention is the goal of a habeas suspension, not the facilitation of maximally efficient interrogation, or expedited trial and execution. Hence, habeas suspension does not authorize torture, execution, starvation, or any other inhumane treatment.

If no such powers are granted to government by our Constitution, and they are also forbidden by the Bill of Rights, they do not materialize out of the ether during a habeas suspension. Nor do such powers suddenly attach to a government employee while he flies out of U.S. airspace. We can place habeas suspension and prisoner of war status on a rough parallel if this model is followed. We can imagine what a court would do if, during a habeas suspension, the court had judicial knowledge that the government was torturing people or executing them en mass. Would the court be powerless to enforce the constitutional limits on government power or would the court grant injunctive relief?

That court could enforce the Eight Amendment to stop the torture and even the Due Process Clause to stop the executions, just as that court could order an end to the entire suspension of habeas corpus if it ruled that there was not a real invasion or rebellion (just as the *Duncan* Court found that there had not been an actual invasion in Hawaii that justified martial law).

This observation of how our habeas suspension is supposed to work can show us a constitutional standard for treatment even where there is no codified law or treaty, or when such have been circumvented. Even if the Administration were to prevail in court, and all of the international treaties protecting detainees were read narrowly as providing no cause of action to those held over-seas, this would only place us in the foreign affairs version of a domestic habeas suspension scenario.

By applying the same thought processes to the government's actions abroad, we could ensure that prisoners of war and civilians would be treated humanely during detention, even if the President were to unilaterally withdraw from the Geneva Conventions entirely. While a habeas suspension is always a loss of liberty, the detentions should be considered a form of temporary incapacitation rather than punishment. As far as is possible, the person's physical condition upon release should be the same as when taken into custody. The fair treatment standards in our prisons could serve as a model for these detentions.

As soon as is practicable after the fighting has ceased, the civilian courts of that nation should be reopened. Only when the courts of an occupied nation are closed by the fighting or the change of regimes should the military courts have jurisdiction over non-combatants. In Iraq, new civilian courts are now being created, and should take over as

soon as possible. Now that there is at least a budding government in Kabul, those Guantanamo detainees who are Afghans should be returned to that nation to face trial or be released by their own government. There has to be some line drawn for how long the U.S. can detain someone in the war on terror even after the government of his country has been replaced and new courts are opened. In past wars, when the conquered nation was restored, we did not continue to hold prisoners of war for the duration of the war on war, holding them until such time as there is no more war. Likewise, we should not hold people captured in the Afghan campaign just because there are still terrorists in Bali. If the men who are being held at Guantanamo and elsewhere are truly dangerous criminals, then we should turn them over to their own government's for trial, so long as those governments are on friendly terms and are not supporting terrorists. If that government is not on friendly terms, or if there is no government, then we can try them in our own military courts according to the same procedure our own soldiers would get.

With our own Constitution providing a floor, the Geneva Convention would provide additional rules for the treatment of detainees, and procedural safeguards for determination of status and trials for any crimes that did fall under military jurisdiction. Additionally, a treaty like the Geneva Convention can guarantee access to intermediaries and human rights organizations such as the International Red Cross. The first step toward their full enforcement is to correct an anomalous and archaic executive tribunal power created in *Quirin*, that stands in the way.

## Congressionally Established Inferior Tribunals and the Law of War

The same criticisms that applied to Roosevelt's tribunal are now being levied against President Bush's proposed tribunals, which have the same problems of being created by executive fiat entirely within the executive branch, according to whatever procedure the President wants to set up, and with no independent review. A person tried by such tribunals would have no one to appeal to but President Bush himself. The Roosevelt Administration had responded to criticisms of its *Quirin* tribunal by using more regular established military trial procedures in its second, far less well-known trial of two additional saboteurs who came ashore in 1944. In that second trial, Roosevelt did not select the panel or any of the legal counsel. A military officer selected the members of the tribunal and the prosecution and defense. The results were sent to the Judge Advocate General for review.<sup>175</sup>

Currently, President Bush is not even replicating those revised Roosevelt Administration procedures, but is modeling his tribunal almost exactly on the earlier *Quirin* tribunal. The fairness and constitutionality of this tribunal has even been questioned by some of the U.S. military lawyers appointed to defend those Guantanamo detainees who have been designated for trial. One U.S. Marine lawyer representing a detainee considers the tribunal fundamentally unfair and rigged to guarantee a conviction and execution. Along with four other military lawyers, he has petitioned the Supreme Court to review the use of these tribunals.<sup>176</sup> The Constitution gives Congress alone the

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<sup>175</sup> FISHER, MILITARY TRIBUNALS, *supra* note 94, at 59.

<sup>176</sup> John Mintz, *Lawyer Criticizes Rules for Tribunals: Trials Won't Be Fair, Military Attorney Says*, WASHINGTON POST, January 22, 2004, at A3  
Available at <http://www.washingtonpost.com/wp-dyn/articles/A36877-2004Jan21.html>

power to “constitute Tribunals inferior to the Supreme Court,” to “make rules concerning captures on land and water,” and to “make rules for the government and regulation of the land and naval forces.”<sup>177</sup> Independent executive branch military tribunals are not established by Congress, nor are they inferior to the Supreme Court. They are independent and insular executive courts, with the President the only reviewing power. Such courts are unconstitutional, as Congress cannot delegate or authorize the creation of courts that Congress itself could not create.

Whatever constitutionally questionable power President Roosevelt had to establish executive tribunals during World War II, both the U.S. military court system and the international human rights law and treaty systems have advanced considerably since *Quirin*. In 1950, Congress consolidated all the previous rules for governing the armed forces and codified them in the detailed Universal Code of Military Justice (“UCMJ”).<sup>178</sup> Within the UCMJ, Congress provided for military courts-martial and created the United States Court of Appeals for the Armed Forces.<sup>179</sup> These courts-martial were used in thousands of hearings and trials for enemies in Vietnam, including the Vietcong, to determine status as required by the Geneva Convention and to prosecute war crimes.<sup>180</sup> These are the proper courts to try any war detainee who could not present

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<sup>177</sup> Article I, Section 8.

<sup>178</sup> Pub. L. No. 81-506, 64 Stat. 107, 149 (1950).

<sup>179</sup> The court’s official website is available at <http://www.armfor.uscourts.gov/>

<sup>180</sup>In the Vietnam War, “captured North Vietnamese Army and Vietcong fighters were accorded POW status upon capture. ‘Irregulars’ were divided into three groups: guerrillas, self-defense force, and secret self-defense force. Members of these groups could qualify for POW status if captured in regular combat, but were denied such status if caught in an act of ‘terrorism, sabotage or spying.’ Those not treated as POWs were treated as civil defendants, and were accorded the substantive and procedural protections of the [Fourth Geneva Convention]. This approach met with the approval of the ICRC.” Jennifer Elsea, “Treatment of ‘Battlefield Detainees’ in the War on Terrorism,” *Congressional Research Service Report for Congress*, RL31367, April 11, 2002, p. 29.

some evidence that he was not an enemy alien, and is accused of violating the law of war. Such courts-martial are within the existing military law system and a defendant can appeal a decision to the civilian judges on the United States Court of Appeals for the Armed Forces and then to the U.S. Supreme Court if it grants certiorari.

Article 2 of the UCMJ makes it applicable to “persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States.”<sup>181</sup> This would cover the base at Guantanamo Bay and might even cover our bases in Afghanistan and even Iraq since Iraqi oil is supposed to pay for the reconstruction of Iraq by reimbursing the U.S. at some point. This payment means that the bases there as being “acquired for the use of the United States.” Every detainee on such bases should be treated according to the requirements of the UCMJ.

Even aside from what the UCMJ has to say about its own jurisdiction, the clearest constitutional path is to try enemy fighters in the same courts and by the same procedures use on our own soldiers. Providing enemy soldiers and militia the same procedures we give our own can hardly be unconstitutional. Enemy aliens challenging their combatant designation would receive a hearing before a standard courts-martial with the right to appeal to the Court of Appeals for the Armed Forces, and then to the Supreme Court. Admitted enemy combatants who were not charged for any crimes would be detained for the duration of the war against that nation, according to congressionally enacted rules for

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<sup>181</sup> UCMJ art. 2(a)(12), 10 U.S.C. § 802 (a)(12).

capture, such as the Geneva Conventions. Note that all we have not yet even discussed the requirements of the Geneva Conventions. All of the above protections of detainees apply even without the Conventions.

### **The Geneva Conventions As Habeas Suspension Statutes**

Just as the use of executive tribunals like F.D.R. used are now superceded by the UCMJ, the 1949 Geneva Conventions and a long list of treaties that the United States has ratified against inhumane treatment and specifying minimum due process rights have filled in any gaps in protections for human rights in wartime that might have existed at the time of *Quirin*. If a declaration of war is a foreign affairs habeas suspension, then the Geneva Conventions serves as a foreign affairs counterpart to a congressional habeas suspension statute, such as the one enacted during the Civil War. Like that statute, the Geneva Conventions regulate and limit emergency preventive detentions, though it concerns prisoners of war and civilian detainees. Just as the habeas suspension in the Civil War did not give Lincoln carte blanche to detain as long as he desired or to set up his own court system, the Geneva Conventions also occupy the legal landscape and constrain a President's detention actions.

In a civilian habeas suspension, the President must use civilian courts if he wants to detain longer than the statute's limits or if he wants to punish. In war, he must use the established military courts, not his own. The Geneva Conventions serve as stand-by habeas suspension statutes, triggered into action by war. If we consider enforcement of the Conventions as part of the rules and regulations for the armed forces, then a competent tribunal would be within that system. If we see Geneva as being a federal law different than such rules for the armed forces, then a competent tribunal would have to be

an Article III court. Regardless of what constitutes a competent tribunal, there must be an assignment of some protected status for those held as the enemy. The International Committee of the Red Cross has said that the “general principle” of the Geneva Conventions is that:

Every person in enemy hands must have some status under international law; he is either a prisoner of war...covered by the Third Convention, a civilian covered by the Fourth Convention, or...a member of the medical personnel of the armed forces covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.<sup>182</sup>

The same is true for the general principles of our Constitution and laws. We do not see gaps in the protections of the Constitution through which people can fall into a legal black hole (least wise not until the current claims regarding enemy combatant status).

### **Additional Treaties and Conventions**

In addition to signing the Geneva Conventions, the United States has signed a series of treaties and conventions which effectively wipe out the category of unlawful combatant as it was understood in *Quirin*. As the U.S. State Department itself acknowledged:

In addition to the Convention Against Torture, the United States is party to a number of treaties concerning the protection of human rights. In 1992, the United States adhered to the International Covenant on Civil and Political Rights, Article 7 of which sets forth the basic protection of all against torture and other cruel, inhuman or degrading treatment or punishment.<sup>183</sup>

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<sup>182</sup> International Committee of the Red Cross, Commentary to article 4 of the Convention (IV) Relative to the Protection of Civilians Person in Time of War, Geneva, August 12, 1949.

<sup>183</sup> U.S. Department of State Initial Report of the United States of America to the UN Committee Against Torture (1999) Available at

[http://www.state.gov/www/global/human\\_rights/torture\\_geninfo.html](http://www.state.gov/www/global/human_rights/torture_geninfo.html)



There are several other treaties that the U.S. has not ratified, though many other countries have. According to the International Humanitarian Law Research Initiative, the U.S., along with Iraq, has not ratified Protocol 1 of the 1949 Geneva Conventions, which:

[E]xpands and reaffirms the protection of civilians in armed conflict and constraints on the means and methods of warfare. However, the U.S. is a signatory to Protocol I and *has recognized many of its aspects as part of customary international law, applicable to all State parties to armed conflict.* (emphasis added).<sup>184</sup>

One of the main goals of Protocol I was to extend protection to certain irregular and militia forces, such as were increasingly common in wars of liberation in former colonies. Another advancement in human rights law is the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, ratified in 1988 which states, in part:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.\* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.<sup>185</sup>

The US is not a signatory, but this charter is a strong indication of what the world standard of human rights for detainees is. It begins by stating that “These principles apply for the protection of *all persons* under *any form of detention* or imprisonment” (emphasis added). Among the rights recognized are:

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<sup>184</sup> 1987 speech of Michael Matheson of U.S. State Department. Available at <http://www.ihlresearch.org/iraq/feature.php?a=7>

<sup>185</sup> \* “The term ‘cruel, inhuman or degrading treatment or punishment’ should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time” Adopted by General Assembly resolution 43/173 of 9 December 1988. Available at [http://193.194.138.190/html/menu3/b/h\\_comp36.htm](http://193.194.138.190/html/menu3/b/h_comp36.htm)

*Principle 10*

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

*Principle 11*

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.
2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.
3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.<sup>186</sup>

The Universal Declaration of Human Rights, Article 6, states that “[e]veryone has the right to recognition everywhere as a person before the law.” And Article 7, made it clear that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”<sup>187</sup> Thus, the Administration’s claims to be merely applying international law to these “unlawful combatant” detainees, by denying them any rights whatsoever per the antiquated *Quirin* decision, is in error. In fact, it is counter to the stated views of the United States itself when reviewing the actions of other nations who also claim to be acting out of national security concerns. The U.S. still routinely criticizes other nations for identical practices of preventive detention and denial of due process. The State Department’s 2001 Human Rights Reports cite a few such abuses that the U.S. roundly condemns:

Arbitrary detention, torture, and extra judicial killings remained common tools of political and religious repression. Public security forces all too frequently tortured detainees in China, Indonesia, Kenya, Burma, Uzbekistan, Mexico, and many other countries. In Turkey torture remained a serious problem...In Burma arbitrary detention remained a constant threat to civil liberty...The protections of

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<sup>186</sup> *Id.*

<sup>187</sup> Available at <http://www.unhcr.ch/udhr/lang/eng.htm>

due process and of timely and fair public trials continued to be unavailable in many countries.<sup>188</sup>

From the above, we can see a clear picture of constitutional and statutory requirements of humane treatment, adjudication in an established court according to established procedure, and clear prohibitions against torture. Enemy (unlawful) combatant status, as understood by the Bush Administration, has never really existed under our Constitution, and even if it had, it has been wiped out by the passage of the UCMJ, the Geneva Conventions, and all of the other treaties and conventions we have signed or ratified. There is no legal black hole.

### **SUMMARY**

The President has the constitutional authority to wage full war, with the full panoply of military power to use force, detain, and conduct military trials for violations of the laws of war, but only when Congress has declared war on another nation state. It is only in the context of such a declared war on a foreign nation that any person on this planet outside of our own military should be considered to be outside the protections of our Bill of Rights, which does follow the flag. In no case can a U.S. citizen or legal resident be treated like an enemy. Our Constitution and its Bill of Rights is structured to keep a sharp separation between civilian and military legal jurisdictions and to prevent the dominance of the military over the civilian and the destruction of our civil liberties and constitutional procedural protections. Congress cannot declare war on the U.S. nor can the U.S. wage war against its own people. When there is a declared war, the only way

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<sup>188</sup> Available at <http://www.state.gov/g/drl/rls/hrrpt/2001/>

legal resident aliens can be treated as the enemy is to first deport them, releasing them to their home nation as civilians who are not military targets. Only if they then join in action against the U.S. would they be considered combatants. The President can call forth the militia (essentially the National Guard at this time) to use force against citizens and resident aliens to suppress a rebellion or repel an invasion, but has no power to subject them to military trial unless they are members of the military. The constitutional detention power for citizens and residents lies only in habeas suspension during a real invasion or rebellion and the only trial remedy when such people levy war on their own country or aid its enemies is treason. For all other offenses, the person must be tried in an Article III court for violation of standing statutes. Short of a declared war, Congress may authorize imperfect war, which grants authority to use military force, but not long-term military detention or trial. People captured must be handled according to the Congressionally created rules for capture, but all prosecutions have to be in Article III courts with the full protections of the Bill of Rights. At any time, the President can use force to defend against immediate attack, interdict, stop, and capture. Thus, planes can be shot down, ships sunk, etc. when we are under imminent attack. But after capturing any persons involved in the attack or the plan to attack, such persons must be turned over to civilian law enforcement. In all of the above actions except full declared war, the President is constrained by our Bill of Rights and all of the treaties and conventions we have ratified. Each of these should be read as being actionable.

When there is a declared war, any person captured who can show some evidence that they are not of the designated enemy population must be removed from military jurisdiction. When a person cannot show such evidence, and the government has good

cause to believe that person is among the enemy, such person is entitled to fair and humane treatment under the treaties we have signed and per our Constitution. Those enemy detainees also have a right to challenge that designation in first, the military courts under the UCMJ and then in the civilian courts on appeal. Article III courts have the discretionary capacity to intervene and conduct an independent hearing on that status whenever any detainee or next friend challenges it, and upon submission of some evidence, that court can remove the person from military jurisdiction.

## CONCLUSION

Our Constitution provides a cohesive system that preserves our form of government, our Bill of Rights, and provides protection for all the people of the world against abuse by the U.S. government, while allowing the use of military force to protect ourselves. This force can be used in support of law enforcement, and in the rare instance of war against another nation, this system allows for military jurisdiction over a very well defined population for the duration of that war. This is a constitutional legal and military structure for the fight against international terrorism. This is the system that has always been there. The balance between liberty and security has already been struck in our Constitution. We should abide by it. Where it has been warped and damaged by erroneous and expedient decisions by courts in the past, such as with the *Korematsu* and *Quirin* decisions, the Supreme Court should look into its own clear over-reliance on executive assertions of necessity and power and set the record straight. The Supreme Court should follow the lead of the 1984 *Korematsu* district court when it said:

[T]he court is not powerless to correct its own records where a fraud has been worked upon it or where manifest injustice has been done.<sup>189</sup>

The district court decision reversing Mr. Korematsu's conviction, suggests one possible way that the Supreme Court can look back, in a time of calm and hindsight, and rectify its decisions made in times of duress. It can thus correct its own errors and any frauds that have been worked upon it. As such, it should actively grant standing for victims of such abuse, such as Fred Korematsu, or their survivors, as in the case of Dr. Mudd, to appeal for reconsideration of those decisions. This would go a long way toward preventing such cases from lying around like a loaded weapon – a perpetual threat to our liberties – to be picked up by the next overzealous, overconfident, and willful president.

Most importantly, all of us – the citizens, teachers, lawyers, and judges, should look beyond wartime decisions and take our Constitution's design and purpose seriously. Only if we return to the obvious first principles of our Constitution, and pay attention to the lessons of history, rather than trying to read the tea leaves of *Quirin*, can we make sense of the puzzle of enemy combatant status. Only then can we fight terrorism without our liberties dying a death of a thousand self-inflicted wounds. If we do not correct the course we are on, we will be doomed to repeat the mistakes of the past. The Constitution is indeed not a suicide pact, but this is so because it is not suicide to follow it. It is, however, suicide not to.

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<sup>189</sup> Fred Korematsu v. United States, 584 F.Supp. 1406 (N.D.Cal. 1984).