

# MAKING A BURLESQUE OF THE CONSTITUTION: MILITARY TRIALS OF CIVILIANS IN THE WAR AGAINST TERRORISM

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The institution of the jury . . . places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government . . . . He who punishes the criminal is . . . the real master of society. . . . All the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury.

Alexis de Tocqueville, *Democracy in America*<sup>1</sup>

## INTRODUCTION

James Thompson was born in Denver, Colorado in 1966. At the age of five he moved with his family to Seattle, Washington. As a young adult, Thompson changed his name to Earnest James Ujaama and converted to Islam. He was recognized for his work with gangs and troubled youth by the City of Seattle, which awarded him the key to the City. Washington State lawmakers declared June 10, 1994 “James Ujaama Day.”<sup>2</sup> In addition to his community service, Ujaama authored three books on youth entrepreneurship.<sup>3</sup> On July 22, 2002, Ujaama was arrested by federal agents at his aunt’s house in Denver.<sup>4</sup> He was imprisoned without judicial process for several months in Virginia and was later charged with various offenses, including aiding terrorist organizations.<sup>5</sup>

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1. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282–83 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1987) (1835).

2. Kelli Arena, *Seattle Man Indicted on Terror Charges*, CNN.COM/LAWCENTER, Sept. 3, 2002, <http://archives.cnn.com/2002/LAW/08/28/ujaama.indictment/index.html>.

3. *Id.*

4. U.S. Citizen Charged with Helping Al-Qaida, THE DENVER CHANNEL.COM, Aug. 28, 2002, <http://www.thedenverchannel.com/news/1638167/detail.html>.

5. Press Release, Dep’t of Justice, Earnest James Ujaama Sentenced for Conspiring to Supply Goods and Services to the Taliban (Feb. 13, 2004), *available at* [http://www.usdoj.gov/opa/pr/2004/February/04\\_crm\\_086.htm](http://www.usdoj.gov/opa/pr/2004/February/04_crm_086.htm).

Like Ujaama, Ali al-Marri was arrested in the United States on December 12, 2001 as part of the investigation into the September 11 attacks.<sup>6</sup> Al-Marri, a Qatari national lawfully residing in Peoria, Illinois, was indicted and charged as a civilian in the Federal District Court for the Southern District of New York with offenses related to aiding terrorist organizations.<sup>7</sup> The case was transferred back to Peoria and scheduled for trial beginning on July 21, 2003.<sup>8</sup> On June 18, al-Marri moved to suppress evidence allegedly obtained in violation of the Fourth Amendment, and an evidentiary hearing was set for July 2.<sup>9</sup> On June 23, the government presented the court with an order signed by President Bush designating al-Marri as an enemy combatant and dismissed the indictment.<sup>10</sup> Al-Marri was then transferred to military custody, where he has been detained for over three years awaiting trial by military commission.<sup>11</sup>

The Bush Administration has claimed constitutional authority to subject persons detained in the United States, including U.S. citizens, such as Ujaama, and legal-alien residents of the United States, such as al-Marri, to trial by military commission if the executive branch decides that the detainee is an “unlawful enemy combatant” who has violated the law of war.<sup>12</sup> On June 29, 2006, in *Hamdan v. Rumsfeld*, the Supreme Court held that the Authorization for Use of Military Force (AUMF), passed by Congress in the wake of the September 11 terrorist attacks, impliedly authorized the President to create military commissions for enemy combatants “in appropriate circumstances” and subject to the limitations of

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6. *Al-Marri v. Commander S.L. Wright*, 443 F. Supp. 2d 774, 776 (D.S.C. 2006) (mem.).

7. *Id.*

8. Brief for Former Senior Justice Dept. Officials as Amici Curiae Supporting Petitioners-Appellants and Supporting Reversal at 5, *Ali Saleh Kahlah Al-Marri v. Wright*, No. 06-7427 (4th Cir. Nov. 20, 2006).

9. *Al-Marri*, 443 F. Supp. 2d at 776.

10. *Id.*

11. *Id.* at 777.

12. *See infra* Part V. Although Ujaama’s case ended without a trial to determine his guilt or innocence, the Bush Administration would have the constitutional prerogative to subject any citizen to a military trial without accountability to the judicial or legislative branches if its expansive view of inherent executive authority were accepted. *See* Brief in Response to Petition for Writ of Habeas Corpus at 35, *Al-Marri v. Wright*, No. 06-7427 (4th Cir. Sept. 9, 2004) (asserting that “[t]he President has inherent authority to detain enemy combatants under his Commander-in-Chief Powers under Article II, §§ 2–3 of the Constitution”). Moreover, in the case of al-Marri, the Administration claims that, in addition to its inherent constitutional authority, Congress, in the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, has awarded the executive branch unchecked power to subject aliens to military jurisdiction, including detention and trial by military commission, without accountability to the judicial branch. Press Release, White House, Executive Order Trial of Alien Unlawful Combatants by Military Commission (Feb. 14, 2007) available at <http://www.whitehouse.gov/news/releases/2007/02/print/20070214-5.html>.

Articles 21 and 36 of the Uniform Code of Military Justice (UCMJ).<sup>13</sup> Although the Court in *Hamdan* declined to make a specific ruling as to whether the President has the inherent Article II authority in the absence of action by Congress to convene law-of-war military commissions, the majority nonetheless stated that “authority [to establish military commissions,] if it exists, can derive only from the powers granted jointly to the President and Congress in time of war.”<sup>14</sup> The *Hamdan* majority recognized that the issue of military-commission trials raises “important questions about the balance of powers in our constitutional structure,”<sup>15</sup> and Justice Kennedy in his concurring opinion cited “the risk that offenses will be defined, prosecuted, and adjudicated by [the Executive] without independent review.”<sup>16</sup>

In addition to addressing the balance of power between Congress and the President, the Court in *Hamdan* reaffirmed that Congress’s power to create military tribunals, including military commissions, is subject to constitutional limitations.<sup>17</sup> The baseline constitutional limitation that governs this issue was drawn 140 years ago in the Supreme Court’s landmark decision *Ex parte Milligan*.<sup>18</sup> *Milligan* and its progeny established that the Constitution’s jury-trial guarantees prohibit the military trial of a detainee apprehended within the jurisdictional reach of operational Article III civilian courts unless, during wartime or other national emergency, the government convinces those same civilian courts that the

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13. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774–75 (2006) (plurality opinion). The Court in *Hamdan* ruled that the military commissions established in the Bush Military Order violated Article 21’s requirement that such commissions “adopt[] the structure and procedure of courts-martial” in order to satisfy the incorporated Geneva Convention standard that a military tribunal be a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Id.* at 2803 (Kennedy, J., concurring) (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1)(d), Aug. 12, 1949, 6 U.S.T. 3318, 95 U.N.T.S. 135) [hereinafter Common Article 3]. The Court also found the Bush commissions to violate Article 36(b)’s requirement that military commissions adhere to the same procedures as court-martial proceedings unless the Executive shows procedural parity to be “impracticable.” *Id.* at 2790–91 (plurality opinion). Following the Supreme Court’s decision in *Hamdan*, Congress passed the Military Commissions Act of 2006, which exempts military commissions established under that Act from the limitations of Articles 21 and 36(b). Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4(a), §§ 821, 836, 120 Stat 2600, 2631 (2006) (to be codified at 10 U.S.C. §§ 821, 836).

14. *Hamdan*, 126 S. Ct. at 2773 (citing *Ex parte Quirin*, 317 U.S. 1, 26–29 (1942); *In re Yamashita*, 327 U.S. 1, 11 (1946)).

15. *Id.* at 2759.

16. *Id.* at 2800 (Kennedy, J., concurring).

17. *Id.* at 2775–76 n.25 (plurality opinion) (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866)). According to Justice Kennedy, Congress’s power to determine the necessity for military courts is subject to the constitutional limitations of *Milligan*. *Id.* at 2804 (Kennedy, J., concurring).

18. *Milligan*, 71 U.S. at 127.

detainee is not a civilian but an enemy combatant.<sup>19</sup> To show enemy-combatant status, the government must prove that the prisoner is a member of, or acting under the command of, the enemy's armed forces.<sup>20</sup> Hence, if the detainee is a civilian, that detainee-civilian is entitled to a trial by jury in a civilian court in the absence of a complete breakdown of the institutions of civil government rendering the civilian courts unable to function.<sup>21</sup> On the other hand, a detainee found to be an enemy combatant is subject to military jurisdiction, including the trial of any alleged criminal offense by military tribunal.<sup>22</sup> This Article will demonstrate that a military commission convened in areas where Article III courts are open and functioning has no jurisdiction to try a detainee unless the civilian courts have determined that the detainee is properly classified as an enemy combatant and not as a civilian.

Part I of this Article provides a short overview of the well-settled constitutional principles that govern military trials of civilians. Part II traces the origins of the Constitution's jury-trial guarantees. Part III provides a brief history of the use of military tribunals in America since its founding. Part IV explains why Congress does not have the power under the Constitution to authorize military tribunals to try civilians during war or other national emergency. Part V explores the law-of-war distinction between the legal categories of "enemy combatant" and "civilian." Finally, Part VI demonstrates that the government's use of military commissions in the war against terrorism is subject to judicial review to ensure that Article III and Sixth-Amendment rights of trial by jury have not been infringed.<sup>23</sup>

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19. See discussion *infra* Parts I, V, VI.

20. See discussion *infra* Part V. Although the issue has not been definitively resolved by the Supreme Court, the plurality in *Hamdi v. Rumsfeld* suggests that a civilian who directly participates in the hostilities (actual fighting) has no constitutional defense to trial by military commission. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 (2004) (plurality opinion) (distinguishing *Milligan's* holding on this basis); see also discussion *infra* Part IV.

21. *Milligan*, 71 U.S. at 127; see also discussion *infra* Parts I, III, IV.

22. See discussion *infra* Parts II, IV. As used in this Article, the terms "courts-martial" and "court-martial" describe a military tribunal that is required by the Uniform Code of Military Justice to conform in all respects to the procedural rules established by Congress for trial and post-conviction review. "Military commission" describes a military tribunal created by the executive branch, whether unilaterally or with the approval of Congress, which does not have the structure or independence of a court-martial tribunal. The term "military tribunal" is a more general reference to any trial conducted by military authorities, and depending on the context, may refer to a court-martial proceeding, a military commission proceeding, or both.

23. This Article assumes the United States is currently in a state of armed conflict to which the laws of war apply, and that the enemy "party" to the conflict is the Taliban, which at the time the hostilities were commenced represented the government of Afghanistan. Armed forces associated with the Taliban include members of al-Qaeda. The United States is also at war in Iraq. These wars are often referred to as parts of a larger war against terrorism, although many experts have pointed out that war cannot be declared on a tactic (i.e. terrorism). E.g., Jennifer Moore, *Practicing What We Preach*:

## I. OVERVIEW

On November 13, 2001, in response to the terrorist attacks of September 11, President Bush issued an Executive Order (Military Order) providing for the detention and military-commission trial of present and former members of al-Qaeda, including those whom the President determines have “engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor,” and those who have “knowingly harbored” such individuals.<sup>24</sup> Aliens within the scope of the Military Order are subject to detention and trial by military commission under § 4(a) of the Military Order.<sup>25</sup> In the Military Commissions Act of 2006 (MCA), Congress empowers the President to create military commissions for what it calls “unlawful enemy combatant” aliens, broadly expanding the scope of military-commission jurisdiction beyond Taliban and al-Qaeda forces.<sup>26</sup>

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*Humane Treatment for Detainees in the War on Terror*, 34 DENVER J. INT’L L. & POL’Y 33, 36 n.5 (2006) (quoting retired U.S. Army General William Odum). Whether the armed forces of the enemy in this war extend to other armed organizations or countries is beyond the scope of this Article.

24. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001) [hereinafter Military Order]. In its entirety section 2(a)(1) of the Military Order provides:

The term “individual subject to this order” shall mean any 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 known as al Qaeda;
  - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threatened 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 . . . .

*Id.*

25. *Id.*

26. Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3(a)(1), § 948(a)(1)–(a)(2), 120 Stat. 2600, 2601 (2006) (to be codified at 10 U.S.C. § 948a). The definition of “unlawful enemy combatant” subject to trial by military commission under the MCA could be read to extend the reach of military commissions to civilians who are not acting under the command of Taliban or al-Qaeda forces. Compare *id.* § 3(a)(1), § 948a(1) (defining unlawful enemy combatant), and *id.* § 3(a)(1), § 948a(2) (defining lawful enemy combatant), with Memorandum from the Deputy Sec’y of Def., Paul Wolfowitz, to the Sec’y of the Navy on Establishing Combatant Status Review Tribunals, para. a (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040770review.pdf> [hereinafter Order of July 7, 2004] (defining enemy combatant for the purposes of the Order Establishing Combatant Status Review Tribunals), and Memorandum from the Deputy Sec’y of Def. to the Sec’y of the Military Depts., Chairman of the Joint Chiefs of Staff, and Under Sec’y of Def. for Policy on the Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, enclosure 1, para. b (July 14, 2006), <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf> [hereinafter Order of July 14, 2006] (defining enemy combatant for the purposes of the Combatant Status Review Tribunal

Even though both the Military Order and the MCA are limited to aliens, the Administration has nonetheless claimed the President has constitutional authority as Commander-in-Chief to subject U.S. citizens to military-tribunal jurisdiction if the executive branch determines that they are enemy combatants. For example, in the cases of Yaser Hamdi and Jose Padilla,<sup>27</sup> both U.S. citizens, the President claimed the constitutional

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Process); *see also* discussion *infra* Parts V, VI.

27. In both *Rumsfeld v. Padilla* and *Hamdi v. Rumsfeld*, the executive branch claimed both inherent constitutional authority as well as authority under Congress's Authorization for Use of Military Force (AUMF). *Rumsfeld v. Padilla*, 542 U.S. 426, 431 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–17 (2004); *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541). With respect to Jose Padilla, the President made the following written "determination" on June 9, 2002:

Based on the information available to me from all sources, REDACTED

In accordance with the Constitution and consistent with the laws of the United States, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40);

I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that:

- (1) Jose Padilla, who is under the control of the Department of Justice and who is a U.S. citizen, is, and at the time he entered the United States in May 2002 was, an enemy combatant;
- (2) Mr. Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;
- (3) Mr. Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;
- (4) Mr. Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens;
- (5) Mr. Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens;
- (6) it is in the interest of the United States that the Secretary of Defense detain Mr. Padilla as an enemy combatant; and
- (7) it is REDACTED consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant.

Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant.

Memorandum from President George W. Bush to the Sec'y of Def. (June 9, 2002), <http://www.cnss.org/padillapresord.pdf>.

In November 2005, after detaining Padilla for over three years, the Administration announced its intention to transfer Padilla from military to civilian custody to stand trial in federal district court in Florida on conspiracy charges pursuant to a grand-jury indictment. *Padilla v. Hanft*, 126 S. Ct. 1649, 1650 (2006). The conspiracy charges related to the support of terrorist activities overseas and did not include a planned terrorist attack in the U.S. Press Release, Dep't of Justice, Jose Padilla Charged with Conspiracy to Murder Individuals Overseas, Providing Material Support to Terrorists

authority to subject these citizens to the jurisdiction of military authorities because these individuals were, in his opinion, enemy combatants who violated the law of war.<sup>28</sup> Moreover, the executive branch argues that this power extends to using military courts under the control of the President, generally referred to as “military commissions,” to determine the validity of the President’s enemy-combatant classification should it be challenged.<sup>29</sup>

The Bush Administration has claimed that the President’s legal authority to subject U.S. citizens to military trials can be found in any one, or a combination of, the following: (1) the President’s inherent Article II power as Commander-in-Chief,<sup>30</sup> (2) the Authorization for the Use of Military Force Joint Resolution (AUMF) enacted by Congress on September 14, 2001 and signed into law by the President on September 18, 2001;<sup>31</sup> and (3) the language of Articles 21 and 36 of the Uniform Code of Military Justice (UCMJ), which generally authorize the use of military commissions for members of the armed services who violate the law of

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(Nov. 22, 2005) (on file with *Vermont Law Review*), available at [http://www.usdoj.gov/opa/pr/2005/November/05\\_crm\\_624.html](http://www.usdoj.gov/opa/pr/2005/November/05_crm_624.html). Nonetheless, the Administration continues to insist that it has the constitutional authority to subject citizen-detainees like Padilla to trial by military commission if it designates the detainee as an enemy combatant. See *Padilla v. Hanft*, 423 F.3d 386, 389 (2005) (“[I]t is . . . consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as enemy combatant.”); see also discussion *infra* Parts II, IV, V, VI.

28. Although the President’s “determination” with respect to Padilla referred to Padilla as an “enemy combatant,” the government claimed that Padilla, like Hamdi, was not only an enemy combatant, but an “unlawful” enemy combatant. Brief for the Respondents in Opposition at 29, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696). The government argued in *Hamdi* that “[t]he President has conclusively determined that al Qaeda and Taliban detainees, such as Hamdi, are unlawful combatants and, as such, are not prisoners of war under the [Geneva Convention].” *Id.*

29. Although four Justices in *Hamdi v. Rumsfeld* did not foreclose the use of military tribunals as “neutral decision-makers” supplying the first step of the process due for determining enemy-combatant status of someone captured on the battlefield, a close reading of the various opinions in that case suggests that Justices Scalia, Stevens, Souter, Ginsburg, and perhaps Breyer would find such a regime unconstitutional, at least for U.S. citizens not captured on the battlefield. See *Hamdi*, 542 U.S. at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (Ginsburg, J. joining); *id.* at 577 (Scalia, J., dissenting) (Stevens, J. joining) (“[S]uspension is limited by the Constitution to cases of rebellion or invasion.”); see also discussion *infra* Parts IV, VI.

30. See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”).

31. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (2000)). The AUMF states:

That the 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.

*Id.*

war.<sup>32</sup> To justify military-commission trials of aliens, in addition to the aforementioned list, the executive branch will now point to the Military Commissions Act of 2006.<sup>33</sup>

Most accept James Madison's benchmark definition of tyranny as found in *The Federalist*: "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>34</sup> Obviously, the three-branch

32. Article 21 of the UCMJ (as amended by the Military Commissions Act of 2006) states that: The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals. This section does not apply to a military commission established under chapter 47A of this title.

Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4, § 821, 120 Stat. 2600, 2631 (2006) (to be codified at 10 U.S.C. § 821) (originally enacted as Articles of War of 1920, ch. 227, art. 21, 41 Stat. 759, 790 (1920), *repealed by* Uniform Code of Military Justice Act of 1950, ch. 169, 64 Stat. 107 (1950)).

Article 36 of the UCMJ (as amended by the Military Commissions Act of 2006) states:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not[, except as provided in chapter 47A of this title,] be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable, except insofar as applicable to military commissions established under chapter 47A of this title.

Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4, § 836, 120 Stat. 2600, 2631 (2006) (to be codified at 10 U.S.C. § 836) (originally enacted as Articles of War of 1920, ch. 227, art. 38, 41 Stat. 759, 794 (1920), *repealed by* Uniform Code of Military Justice Act of 1950, ch. 169, 64 Stat. 107 (1950)).

33. Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (2006) (to be codified at scattered sections of 10 U.S.C.).

34. THE FEDERALIST NO. 47, 324 (James Madison) (Jacob E. Cooke, ed. 1961). Some commentators have rushed to justify the Bush Military Order on grounds that the President can establish military commissions to try those persons he deems are enemy combatants under his constitutional authority as commander-in-chief whether or not authorized by Congress. See, e.g., Roberto Iraola, *Military Tribunals, Terrorists, and the Constitution*, 33 N.M. L. REV. 95, 111 (2003) ("[S]upporters of President Bush's [military] order maintain that because the President's power to establish military commissions arises from the authority vested in him by the Constitution as Commander in Chief, under the present circumstances, no act of Congress is legally necessary to support the establishment of such commissions."); see also *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 7 (2001) (statement of Sen. Orrin G. Hatch) "[M]ilitary tribunals can be—and have been—established without further congressional authorization. Because the President's power to establish military commissions arises out of his constitutional authority as Commander-in-Chief, an act of Congress is unnecessary. Presidents

checking structure of the Constitution reflects Madison's thesis, and certain respected constitutional scholars who have examined the Bush Military Order have denounced it as constitutionally unsupportable, at least in the absence of congressional authorization.<sup>35</sup> Without congressional sanction, this Military Order does "not comport with our Constitution's structure," which was "designed in large measure to secure individual rights by resisting the centralization of unchecked power" in the executive branch.<sup>36</sup> This view appears to have the support of the Supreme Court, which in *Hamdan v. Rumsfeld* suggested that the authority to establish military commissions was jointly held in time of war by Congress and the executive branch, and is not a power the Executive can exercise unilaterally.<sup>37</sup>

Assuming congressional sanction is a precondition to the Executive's

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have used this authority to establish military commissions throughout our Nation's history . . . ." *Id.*

This position is at odds with both Supreme Court case law and constitutional history, as discussed elsewhere in this Article. See *infra* Parts III, IV. The weakness of Iraola's argument, in particular, is his over-reliance on language from *Madsen v. Kinsella*. See Iraola, at 103 n.54 (quoting *Madsen v. Kinsella*, 343 U.S. 341, 345 n.8 (1951)) ("[M]ilitary commissions have become adopted as authorized tribunals in times of war"); *id.* at 107 n.83 ("Indeed, the authority of the executive in time of war to establish and prescribe the jurisdiction and procedures governing military commissions 'has been recognized, even after peace has been declared, pending complete establishment of civil government.'") (quoting *Madsen*, 343 U.S. at 348 n.12). The Supreme Court has limited the scope of *Madsen* to "trials in enemy territory which had been conquered and held by force of arms and which was being governed at the time by our military forces." *Reid v. Covert*, 354 U.S. 1, 35 n.63 (1957) (plurality opinion); accord *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2776 n.26 (2006). This power is derived from the battlefield "war-court" origins of military commissions and has no applicability whatsoever to trials in U.S. territory with a functioning civilian court system. See discussion *infra* Part III.

35. Neal K. Katyal & Lawrence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L. J. 1259, 1308–09 (2002). Additionally, the Court in *Ex parte Endo* expressed that wartime measures should be interpreted by all branches of the federal government with the greatest "accommodation between [citizens'] liberties and the exigencies of war." *Ex parte Endo*, 323 U.S. 283, 300 (1944); see also Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1949 (2003) (arguing that in *Endo*, Justice Douglas's majority opinion expresses a sense of "judicial obedience to constitutional obligation" when interpreting "statutes and executive orders"); accord *Coleman v. Tennessee*, 97 U.S. 509, 514 (1878) (stating that absent "clear and direct language" courts are not to construe congressional language as permitting military "interference" with the "regular administration of justice in the civil courts"); *Raymond v. Thomas*, 91 U.S. 712, 7116 (1875) ("It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires."); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804) (imposing damage liability upon a naval commander for executing a presidential order that exceeded its original congressional authorization).

36. Katyal & Tribe, *supra* note 35, at 1309.

37. *Hamdan*, 126 S. Ct. at 2773–74. The Court majority declined to decide, however, whether in extraordinary circumstances of "controlling necessity" the President has the inherent Article II power to convene military commissions if Congress has not acted. See *id.* at 2774 (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139–40) (1866) (Chase, C.J., concurring in the result). In any event, any such authority would be limited by the Bill of Rights: "The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." *Reid v. Covert*, 354 U.S. 1, 17 (1957).

creation and use of military commissions, how specific Congress must be in showing its intent to so authorize varies depending on whether the matter was addressed by preexisting legislation.<sup>38</sup> For example, the Court in *Hamdan* assumed that the general language of the AUMF was sufficient to authorize the President to use military commissions, although not sufficiently specific to override the statutory restrictions on the use of those commissions found in Articles 21 and 36(b) of the UCMJ.<sup>39</sup> This is similar

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38. The Supreme Court's requirement of a showing of clear congressional intent to authorize restrictions on individual liberty in wartime does not necessarily require explicit reference to the specific liberty being restricted. The "clear and unmistakable" intent of Congress can be "implied" by the legislation if the implied powers are narrowly confined to the "precise purpose" of the program. *Endo*, 323 U.S. at 300. Based on such an implication, the Court in *Hamdan v. Rumsfeld* assumed that the AUMF impliedly authorized the President to convene military commissions for alien unlawful enemy combatants captured on a foreign battlefield within the limitations set by Congress in the UCMJ. *Hamdan*, 126 S. Ct. at 2774–75. Likewise, the Court in *Hamdi v. Rumsfeld* found that the AUMF impliedly authorized the military commission trial of citizen unlawful enemy combatants directly participating in hostilities on the battlefield. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–17 (2004).

39. *Hamdan*, 126 S. Ct. at 2775, 2793. On this point, *Hamdan* seems to reject the views of some scholars that greater specificity is required for Congress to authorize the use of military commissions. See, e.g., Katyal & Tribe, *supra* note 35, at 1308.

President Bush has claimed the power to create and operate a system for adjudicating guilt and dispensing justice through military tribunals without explicit congressional authorization—threatening to establish a precedent that future presidents may seek to invoke to circumvent the need for legislative involvement in other unilaterally defined emergencies.

*Id.* However, this argument was accepted in *Hamdi* by Justices Souter and Ginsburg who found no language in the AUMF that supported the military detention of American citizens on U.S. soil even if they were members of the armed forces of a nation at war with the U.S. captured on a foreign battlefield. See *Hamdi*, 542 U.S. at 547 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[The AUMF] never so much as uses the word detention, and there is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit.

*Id.* The two circuit courts that have addressed the military "detention" issue as it applies to citizens arrested in the United States have come to different conclusions. The Second Circuit in the first round of the *Padilla* litigation held that the AUMF did not specifically authorize military detention of American citizens captured on American soil. *Padilla v. Rumsfeld*, 352 F.3d 695, 699, 724 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426, 455 (2004). On the second round, after *Padilla* was forced to refile his habeas petition in South Carolina and won in the district court, a panel of the Fourth Circuit, in an opinion by Judge Luttig, reversed and found that the AUMF did authorize the military detention of *Padilla*, reasoning that the non-battlefield location of his arrest did not distinguish his case from that of *Yaser Hamdi*. *Padilla v. Hanft*, 423 F.3d 386, 394, 397 (4th Cir. 2005). The narrow factual basis for the *Hanft* opinion was emphasized by the panel in a post-judgment order denying the government's request to transfer *Padilla* to civilian custody. *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005) (denying motion to transfer petitioner), *rev'd*, 126 S. Ct. 978 (2006) (mem.). In the opinion accompanying the order, the panel explained that its ruling was limited to "persons who have associated with enemy forces abroad, taken up arms on behalf of such forces, and thereafter entered into this country with the avowed purpose of prosecuting the war against America on her own soil . . ." *Id.* at 587. The order itself was reversed

to the Court's approach to military detention in *Hamdi v. Rumsfeld*, where a majority of Justices treated 18 U.S.C. § 4001(a), which prohibits the imprisonment or detention of any citizen "except pursuant to an act of Congress,"<sup>40</sup> as requiring specific language that Congress intended to permit the Executive to subject citizens to military detention.<sup>41</sup>

Even detention that satisfies § 4001(a), however, does not free the executive branch to subject any detainee it unilaterally designates as an "enemy combatant" to military jurisdiction.<sup>42</sup> This was recognized by Congress itself in the Detainee Treatment Act of 2005 (DTA), which subjects the enemy-combatant findings of military tribunals to review by civilian courts.<sup>43</sup> Judicial scrutiny is essential to protect civilians from

by the Supreme Court on January 4, 2006, and Padilla's transfer to civilian custody was allowed to proceed. *Hanft v. Padilla*, 126 S. Ct. 978, 978 (2006) (mem.).

40. 18 U.S.C. § 4001(a) (2000). The full text reads: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

41. The *Hamdi* plurality explained that it was assuming, without deciding, that 18 U.S.C. § 4001(a) applied to military detentions. *Hamdi*, 542 U.S. at 517 (plurality opinion). In fact the evidence that § 4001(a) applies to all detention by the United States, including military detentions, is overwhelming. See *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) ("[T]he plain language of § 4001(a) proscrib[es] detention of any kind . . .") (emphasis in original); see also Stephen I. Vladeck, *A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen "Enemy Combatants"*, 112 Yale L.J. 961 (2003) [hereinafter Vladeck, *Small Problem of Precedent*] (demonstrating that § 4001(a) was intended as a limitation on the President's power to use the military to detain U.S. citizens).

42. While it is true that the principle objective of not permitting all powers of government to be exercised by one branch alone was to protect individual liberty, it does not necessarily follow that all actions undertaken by the President with congressional approval are, therefore, constitutional. This reasoning would eliminate the critical role of the judicial branch in protecting individual rights from majority tyranny, which the structure of the Constitution was also designed to prevent. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) ("[T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of popular will as expressed in legislative majorities . . ."); see also THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("For I agree that there is no liberty, if the power of judging be not separated from the legislative and executive powers.") (internal quotation marks omitted); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 9 (1956) (stating that at the constitutional convention and in *The Federalist* "the danger of majority tyranny appears to be a source of acute fear"). Moreover, both *Reid v. Covert*, 354 U.S. 1 (1957) and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), refute the notion that the combined "war" powers of the two political branches may trench on individual liberties without review by the judicial branch. See *Reid v. Covert*, 354 U.S. 1, 21 (1957) ("Every extension of military jurisdiction is an encroachment on the jurisdiction of civil courts, and, more important, acts as a deprivation of the right to jury trial and other constitutional protections."); *Duncan*, 327 U.S. 304, 317 (1946) ("[M]ilitary trials of civilians charged with crime, especially when not made subject to judicial review, are so obviously contrary to our political traditions and our institution of jury trials in courts of law . . ."); see also discussion *infra* Part IV.

43. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2742 (2005), amended in part by Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 1120 Stat. 2600, 2635-36 (2006) (providing for the United States Court of Appeals for the District of Columbia to determine the validity of any decision by a military tribunal—referred to as a Combatant Status Review Tribunal—that a detainee is an enemy combatant). In addition, section 3(a)(1) of the Military

being wrongfully classified as enemy combatants and subjected to military jurisdiction for potentially long-term detention as well as trial and punishment.<sup>44</sup> The constitutional guarantee of trial by jury in a civilian court would be at the whim of military expediency if the executive branch, by the unilateral act of designation, were allowed to conclusively reject a detainee's claim of civilian status. For the same reason, the Constitution does not permit the Executive to circumvent the checking function of the judicial branch by using its military tribunals to conclusively determine the pivotal question of whether a detainee claiming to be a civilian is, instead, an enemy combatant.<sup>45</sup> To the contrary, the Supreme Court has ruled on more than one occasion that "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case," are constitutional questions for the civilian courts and cannot be conclusively resolved by the executive or legislative branches.<sup>46</sup>

When discussing the constitutional indispensability of the role of the civilian courts, it is critical to separate arrest and temporary detention on the

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Commissions Act of 2006 provides for Supreme Court review by writ of certiorari of D.C. Circuit Court rulings on whether the decisions of military commissions are consistent with "the Constitution and laws of the United States." Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2622 (2006) (to be codified at 10 U.S.C. § 950(g)); *see also* discussion *infra* Part VI.

44. *See* discussion *infra* Part VI. The Supreme Court has repeatedly ruled that the boundaries of military jurisdiction are constitutional questions for the judicial branch. *See infra* notes 46 & 465. When the jurisdictional question takes the form of distinguishing between a civilian and an enemy combatant (or belligerent), the Court's constitutional reasoning has been guided by its interpretation of the law of war, which classifies all persons as civilians unless they are part of, or associated with, the armed forces of the enemy. *Ex parte Quirin*, 317 U.S. 1, 27–28, 45 (1942). *See also infra* Part V. The Court has been careful to emphasize, however, that the threshold question of which individuals are entitled to trial by a civilian jury presents a constitutional issue under the Sixth Amendment and Article III, and cannot be removed from the scope of judicial review by the Executive's interpretation of the law of war. To the contrary, a law-of-war interpretation that is inconsistent with the constitutional minimum "can never be applied to citizens [in civilian life] where the courts are open and their process unobstructed." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121–22 (1866).

45. The Supreme Court invalidated the judgment of military commissions that citizens apprehended during war were not civilians entitled to trial by a civilian jury in both *Milligan*, 71 U.S. at 123, and *Duncan*, 327 U.S. at 318, 324. The Supreme Court had no reason to revisit this issue in either *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759 (2006) (noting that Hamdan did not contest military jurisdiction), or *Ex parte Quirin*, 317 U.S. 1, 20–21 (1942) (explaining that the defendants conceded they were members of the German army disguised as civilians who had entered the country surreptitiously for purposes of sabotage). *See* discussion *infra* Part V.

46. *See, e.g.,* *Sterling v. Constantin*, 287 U.S. 378, 400–01 (1932) (stating that the Executive's military discretion is a judicial question); *see also* *Scheuer v. Rhodes*, 416 U.S. 232, 250 (1974) (providing that the Executive's declaration of emergency is not given conclusive weight); *Toth v. Quarles*, 350 U.S. 11, 13–14 (1955) (finding that Congress could not subject ex-military servicemen to military tribunals under their constitutional authority to control military affairs); *Milligan*, 71 U.S. at 121–22 (finding that the right to jury trial extends "where the courts are open and their process unobstructed."); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134 (1851) (asserting judicial authority over illegal seizure of property during military emergency); *see also* discussion *infra* Part VI.A.

one hand, and military trials on the other. Our constitutional traditions support the use of emergency powers by the political branches to authorize the arrest and short-term detention of civilians without having to show cause to the civilian courts,<sup>47</sup> but there is no corresponding tradition of allowing government to deny civilians the right of trial by jury in open civilian courts because of threatened invasion or wartime necessity.<sup>48</sup> The core purpose of the right to a trial by jury is to prevent the usurpation of the power to punish by the government, whether acting through Congress, the President, or both.<sup>49</sup> To try and punish a civilian goes beyond the necessity of temporary, short-term detention to protect the public safety from imminent harm. Trial and punishment entail more serious, long-term consequences, both direct and collateral, including in many cases a potential sentence of death.<sup>50</sup> In fact, it was the belief of the Founders, supported by

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47. See *infra* notes 283, 301 and 318. Of course, the executive branch's emergency detention power, even if authorized by Congress, must be exercised in individual cases subject to constitutional limitations and judicial review. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 532–35 (2004) (plurality opinion) (outlining the minimum procedures necessary to ensure proper safeguarding of “a citizen’s core rights to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator”). For example, the duration of the emergency detention is constitutionally limited to the duration of the emergency itself, and if the emergency is a war, detention may last no longer than active hostilities. See *id.* at 520–21 (“It is a clearly established principle of the law of war that detention may last no longer than active hostilities.”); Note, *The Exercise of Emergency Powers*, 85 HARV. L. REV. 1284, 1296 (1972) [hereinafter *Emergency Powers*] (discussing the limitation of emergency powers).

48. See *Duncan*, 327 U.S. at 322 (suggesting lesser constitutional justification is required for the “military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war”) (citing *Moyer v. Peabody*, 212 U.S. 78 (1909); see also *Milligan*, 71 U.S. at 125–26.

Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law . . . .

*Id.*

49. See *id.* at 316–24 (“[M]ilitary trials of civilians charged with crime . . . are so obviously contrary to our political traditions and our institution of jury trials in courts of law . . . .”); *Milligan*, 71 U.S. at 120–24 (explaining that Congress has no power to sanction a military trial of a citizen in civilian life). The common-law right protecting liberty by jury trial is explicitly protected in two places in the U.S. Constitution: Article III, Section 2, Clause 3; and the Sixth Amendment. It has also been deemed a fundamental right applicable to the states by incorporation into the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The common-law right of trial by jury originated as a check on arbitrary treatment by the Crown and its non-independent judges. *Id.* at 152. This right was also considered a cornerstone of the Magna Carta, preventing arbitrary punishment by Parliament. *Id.* at 151; see *infra* Part II.A. Indeed, the Supreme Court has recognized that the Bill of Rights forbids “the Executive or . . . the Executive and the Senate combined” from subjecting civilians to military trials. *Reid v. Covert*, 354 U.S. 1, 17 (1957) (plurality opinion).

50. The Military Order states that individuals may be punished in accordance with the penalties provided, including “life imprisonment or death.” Military Order, *supra* note 24, at 57,834. The

English common-law history, that the power to impose criminal punishment is also the power to control society.<sup>51</sup> Hence, the Constitution places that ultimate power to punish in the hands of a civilian jury, not in the hands of military or other governmental officials whose loyalty is to their commander. Military tribunals, whether military commissions or courts-martial, are made up of members of the armed forces selected by military officials owing their duty and allegiance first and foremost to the President as Commander-in-Chief.<sup>52</sup> By their very nature they are the antithesis of a civilian jury in a civilian court with an independent Article III judge presiding. The Supreme Court has recognized that members of a military tribunal “do not and cannot have the independence of jurors drawn from the general public or of civilian judges.”<sup>53</sup> Indeed, the very purpose of the original common-law right to trial by civilian jury was to protect against the oppression of the King’s use of military courts and judges who owed their loyalty to the King.<sup>54</sup> As the Supreme Court has recognized: “Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial . . . .”<sup>55</sup>

Mindful of the historical importance of the jury’s role in protecting civilians from military trial and punishment, the Supreme Court has interpreted the Constitution as barring military trials of civilians in the absence of a complete breakdown of the institutions of civil government rendering the civilian courts unable to function.<sup>56</sup> This right of trial by jury

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Military Commission Act of 2006 permits the death penalty where “expressly authorized under this chapter or the law of war for an offense of which the accused has been found guilty . . . .” Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3(a)(1), § 949m(b)(1)(A), 120 Stat. 2600, 2616 (to be codified at 10 U.S.C. § 949m(b)(1)(A)). Most military commission trials end with a sentence of death. See, e.g., *In re Yamashita*, 327 U.S. 1, 5 (1946) (noting that Yamashita was “sentenced to death by hanging” after a military commission found him guilty of the offense of violating the law of war); *Quirin*, 317 U.S. at 42–44 n.14 (citing several cases in which military tribunals sentenced individuals to death); *Milligan*, 71 U.S. at 7 (“Milligan was found guilty on all the charges, and sentenced to suffer death by hanging . . . .”). Even the Court in *Hamdan* recognized that military commissions grew from “[t]he need to dispense swift justice, often in the form of execution,” to enemy combatants captured on the battlefield. *Hamdan*, 126 S. Ct. at 2782. Indeed, the history of extending military commission trials outside the battlefield is replete with examples of their use by the executive branch and its military agents to provide the façade of a “trial” to justify imposing a death sentence. See Michal R. Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 472 (2002) [hereinafter Belknap, *Putrid Pedigree*] (describing Attorney General Biddle’s preference for military commissions because they had the power to impose the death penalty).

51. TOCQUEVILLE, *supra* note 1, at 282–83.

52. *Reid v. Covert*, 354 U.S. 1, 36 (1957) (plurality opinion).

53. *Id.*

54. *Id.* at 23–27. See discussion *infra* Part II.A.

55. *Reid*, 354 U.S. at 21.

56. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121–24, 127 (1866). Because the Supreme Court

in open, civilian courts may not be replaced by military trials even if Congress declares war or suspends the writ of habeas corpus.<sup>57</sup> Moreover, it is the constitutional responsibility of the civilian courts to invalidate the improper use of military tribunals outside the battlefield,<sup>58</sup> and to provide

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has developed constitutional distinctions between “civilian” and “combatant” with reference to the law of war, this Article will address law-of-war standards that are relevant to these constitutional issues. This Article does not address, however, whether military-commission trials conducted in the wake of September 11, either before or after the passage of the Military Commissions Act of 2006, violate the International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1996, or Common Article 3 of the Geneva Conventions. For commentary on whether the Administration’s use of military commissions prior to passage of the Military Commissions Act of 2006 violated the ICCPR, to which the United States is a party, see, for example, Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L. L. 345, 351–52 (2002) (“While the ICCPR does not impose a categorical bar on military trials of civilians, certain aspects of fair trial rights are functionally nonderogable.”). See also Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT’L. L. 337, 339 (2002) (“By omitting . . . guarantees [of procedural rights], the Military Order violates binding U.S. treaty commitments under both the ICCPR and the Third Geneva Convention.”).

57. See *Milligan*, 71 U.S. at 125–27 (“[The Constitution] does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law . . .”); *Duncan v. Kahanamoku*, 327 U.S. 304, 318–19, 324 (1946) (concluding that the establishment of martial law in Hawaii “was not intended to authorize the supplanting of courts by military tribunals”); see also discussion *infra* Parts IV.A–B.

58. Entitlement to constitutional guarantees of trial by jury for American citizen-civilians “outside the battlefield” refers to the sovereign territory of the United States, as well as foreign lands not within the zone of combat. A plurality of the Supreme Court in *Covert* suggested that the Sixth Amendment and Article III rights of trial by jury extend to any effort anywhere in the world by the United States government to try civilian citizens for criminal offenses. *Reid v. Covert*, 354 U.S. 1, 12 (1957). The Court in *Covert* explained that “[t]he exigencies which have required military rule on the battlefield are not present in areas where no conflict exists. Military trial of civilians ‘in the field’ is an extraordinary jurisdiction and should not be expanded at the expense of the Bill of Rights.” *Id.* at 34. In later cases the Supreme Court appears to have narrowed the categorical statement of the *Covert* plurality on this point, adopting the approach of Justice Harlan’s concurring opinion in *Covert* that the extension of any specific constitutional safeguard beyond United States sovereign territory depends upon a determination of what process is due a defendant “in the particular circumstances of a particular case.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990) (quoting *Covert*, 354 U.S. at 75 (Harlan, J., concurring)). As Justice Harlan explained, “[t]he proposition is, of course, not that the Constitution does not apply overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place.” *Covert*, 354 U.S. at 74. Harlan derived from this proposition a rule of law that the Constitution does not apply if adherence to a specific guarantee is “altogether impractical and anomalous.” *Id.*; see also *Verdugo-Urquidez*, 494 U.S. at 277–78 (Kennedy, J., concurring) (applying Harlan’s analysis to a search of a foreign home of a non-resident alien).

The exercise of specific guarantees of trial by jury in a foreign country would be “altogether impractical and anomalous” if there were no access to open civilian courts. *Milligan*, 71 U.S. at 121, 127. Although it is possible in a particular case for foreign policy considerations to make a jury trial in a foreign country “impractical and anomalous” despite the existence of open civilian courts, such circumstances would be rare. Indeed, given the ready availability of air transportation to the United States from any place on the globe, any citizen-civilian arrested in a foreign country by the American government could quite easily be transported back to the United States for trial in an Article III court. Hence, as a general rule, trials of citizen-civilians “outside the battlefield” would be governed by constitutional jury trial guarantees in all locations inside and outside the United States where civilian courts are open and operational, or where it was not unduly burdensome to move the detainee to a place

appropriate remedies in the event a civilian is subjected to a military trial in place of a civilian jury trial.<sup>59</sup>

## II. THE RIGHT TO TRIAL BY JURY IN CIVILIAN COURT

### A. English Common Law Origins

As the Supreme Court has recognized, “the pages of English history

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where civilian courts are accessible.

Entitlement to constitutional guarantees of trial by jury for alien-civilians “outside the battlefield” refers to aliens who lawfully enter and reside in the sovereign territory of the United States. *See* *Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that a resident alien was entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment protects resident aliens within the territorial jurisdiction of the United States). This was reaffirmed in *Verdugo-Urquidez*, 494 U.S. at 271 (holding that “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”). An exception to the general rule is recognized for the alien inhabitants of unincorporated territorial possessions of the United States, which are treated as conquered nations under the control of Congress pursuant to Article IV, Section 3 of the Constitution. *See* *Downes v. Bidwell*, 182 U.S. 244, 282 (1901) (noting that the annexation of distant territories requires congressional action appropriate to the circumstances). Even here, however, the power vested in Congress is limited by certain “fundamental constitutional rights,” *Verdugo-Urquidez*, 494 U.S. at 268, at least where not inconsistent with “wholly dissimilar traditions and institutions.” *Id.* at 278 (Kennedy, J., concurring) (citing *Dorr v. United States*, 195 U.S. 148 (1904)); *Balzac v. People of Porto Rico*, 258 U.S. 298, 312–13 (1922)). Since the Supreme Court has now unequivocally ruled that the constitutional right to trial by jury is “fundamental,” *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), alien inhabitants of these territories have the right to a jury trial unless it can be shown that civilian jury trials are not suited to the conditions and institutions of the indigenous culture. *Dorr*, 195 U.S. at 145. In any event, this narrow exception does not extend to territories once formally incorporated into the Union, where constitutional rights fully apply to alien residents. *See* *Rasmussen v. United States*, 197 U.S. 516, 520–21 (1905) (recognizing the applicability of Sixth Amendment jury trial rights in the territory of Alaska because it had been incorporated by Congress into the Union). On the other hand, aliens are not entitled to certain constitutional rights outside the sovereign territory of the United States, including rights under the Fourth Amendment, *Verdugo-Urquidez*, 494 U.S. at 273–74, and the Fifth Amendment, *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950). The reasoning of *Verdugo-Urquidez* and *Eisentrager* has been interpreted to exclude the application of all constitutional rights to aliens who are without property or voluntary presence in the United States. *See* *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir. 2007) (“Precedent in this court and the United States Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States.”). For these reasons, as a general rule, trials of alien-civilians “outside the battlefield” would be governed by constitutional jury trial guarantees if held within the territorial jurisdiction of the United States unless civilian courts were not operational or, in the case of unincorporated territories, were not inconsistent with “wholly dissimilar” indigenous institutions or traditions. No form of constitutional jury trial guarantees would extend, however, to trials of alien-civilians held “outside the battlefield” if those trials are held in foreign countries outside the territorial jurisdiction of the United States and the alien does not have a substantial and voluntary connection to the United States.

59. *See* *Milligan*, 71 U.S. at 131 (ordering Milligan discharged from custody); *Duncan*, 327 U.S. at 324 (ordering both prisoners released from custody); *see also* *Milligan v. Hovey*, 17 F. Cas. 380, 383 (C.C.D. Ind. 1871) (awarding money damages); *see also* discussion *infra* Parts III, VI.

are filled with the struggle of the common-law courts . . . against the jurisdiction of military tribunals.”<sup>60</sup> Prior to the Norman conquest of 1066, although trial by ordeal was the typical means of resolving disputes,<sup>61</sup> sworn witnesses represented the community stake in the trial both by “undertak[ing] the duty of prosecution” and by voicing a decidedly local assessment of the factual basis of the case.<sup>62</sup> By 1166, the reforms of King Henry II helped speed the abolition of trial by ordeal by replacing these private baronial “trials” with crown-sanctioned inquests that included the participation of bodies of neighbors “sworn to tell the truth.”<sup>63</sup> Very soon after this, the “inquest” expanded to include a greater variety of proceedings involving any form of civil dispute.<sup>64</sup>

By the early 1200s, during the reign of King John, the barons’ continued defiance of the jurisdiction of the King’s courts precipitated a crisis. The barons began insisting that the King agree to limit the courts’ power to deprive the barons of their property and freedom. Stephen Langton, the Archbishop of Canterbury, supported English barons in their ongoing struggle against King John, and Langton eventually persuaded the King to sign the Magna Carta as a last resort to avoid civil war.<sup>65</sup> The Magna Carta was later reissued (and amended) twice, and it was the 1225 version that subsequent monarchs used.<sup>66</sup> The Magna Carta provided, in part, that “[n]o freeman shall be captured or imprisoned . . . or outlawed or exiled or in anyway destroyed, . . . except by the lawful judgment of his peers or by law of the land.”<sup>67</sup>

During the thirteenth and early fourteenth centuries, the Crown’s courts, forced to adhere to the Magna Carta, often used juries to decide cases involving private rights. In the process, most people came to believe that juries were the most effective means of impartially resolving disputes, as well as protecting individuals from abuses of power. As a result, trial by

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60. *Covert*, 354 U.S. at 24 n.44.

61. Also known as trial by combat, trial by ordeal consisted of a hand-to-hand fight between the disputants, the belief being that God would intervene on behalf of the just participant. Nobles, women, and children were usually represented by substitute fighters. JOHN LINGARD, *THE HISTORY OF ENGLAND FROM THE FIRST INVASION BY THE ROMANS TO THE ACCESSION OF WILLIAM AND MARY IN 1688* 219–23 (1902).

62. WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 175 (James Cornford ed., The Univ. of Chi. Press 1979) (1874–78).

63. *THE FORMS OF ACTION AT COMMON LAW* 14–15 (A.H. Chaytor & W.J. Whittaker eds., Cambridge Univ. Press 1985) (1909).

64. *Id.*

65. CHRISTOPHER HIBBERT, *THE STORY OF ENGLAND* 68–69 (1992).

66. *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* 115 n.1 (Carl Stephenson & Frederick G. Marcham eds., trans., Gaunt 1997) (1937).

67. *Id.* at 121.

jury became “the normal mode of trying disputed questions of fact.”<sup>68</sup> By 1355, during the reign of Edward III, it was declared by Parliament that no man could be taken, imprisoned, or put to death without being “brought to answer by due process of law,” an essential part of which consisted of his right to trial by a jury of his peers under the Magna Carta.<sup>69</sup>

Beginning with the reign of Henry VII in 1487, Parliament and the King began a two-hundred year struggle for power, with both sides attempting to use or control juries to their advantage. James I came to power in 1603, asserting the need for a monarch with powers that extended to silencing the voices of Parliament and the courts. He warned that the seventeenth century was a dangerous time for England, and he insisted on an unchecked prerogative anchored in the divine right of kings.<sup>70</sup> James was opposed by Sir Edward Coke, the Chief Justice and former attorney general of England under Queen Elizabeth.<sup>71</sup> Coke believed James I was crossing the bounds of royal authority and argued in the Privy Council that “the King cannot create any offence by his prohibition or proclamation, which was not an offence before . . . .”<sup>72</sup> Coke was adamant that the King did not possess the constitutional power to create special courts and “repeatedly opposed James’ attempts to withdraw cases from the courts and decide them by himself or by special commissions.”<sup>73</sup>

By 1625, when Charles I inherited this power struggle from his father, James I, Coke had become the leader of Parliament’s opposition to the

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68. HIBBERT, *supra* note 65, at 62; THE FORMS OF ACTIONS AT COMMON LAW, *supra* note 63, at 40.

69. SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 66, at 451. *See also* MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 33 (1971) (“[N]o Man shall be . . . imprisoned by any Suggestion, unless it be by Indictment or Presentment of lawful Men, or by Process at Common Law.”); WILLIAM BLACKSTONE, 1 COMMENTARIES \*130–31 (citing the Magna Carta and subsequent proclamations, including the Petition of Right).

70. *See* JOHN NEVILLE FIGGIS, THE DIVINE RIGHT OF KINGS 136 (Harper & Row 1965) (1896) (“[A] theory of kingship [had developed], more uncompromising, narrow, and absolutist than had yet been prevalent in England.”). The work of Jean Bodin was referred to by supporters of the King to justify a view of the King’s power that was absolute and “free from any conditions.” Kevin Ryan, *Lex Et Ratio: Coke, the Rule of Law, and Executive Power*, VT. B.J., Spring 2005, at 9, 11, 16 n.30 (citing EDWARD S. CORWIN, THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 42 (1955)).

71. Ryan, *supra* note 70, at 12.

72. *Id.* (quoting 12 COKE’S REPORTS 75).

73. Ryan, *supra* note 70, at 12. According to Ryan: “It has forever been the inclination of holders of executive power to lock away perceived evildoers and enemies, especially those thought guilty of the most severe crimes against the state, and not worry about . . . rights and legal procedures.” *Id.* *See also* CATHERINE DRINKLE BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 490 (1956) (“When a man is committed, it is easy to find causes against him. Cause found after commitment, this is fearful!”).

Stuarts' authoritarian policies.<sup>74</sup> When confronted with the Petition of Right promoted by Coke and passed by Parliament in 1628,<sup>75</sup> Charles relented to its conditions in hopes of receiving continued funding from Parliament.<sup>76</sup> The Petition enumerated certain rights which were protected from encroachment by the King, including freedom from the various forms of martial law that included military trials.<sup>77</sup> It was not long, however, until Charles dishonored the Petition of Right, and in 1629 the King began ruling the country through the Privy Council and the Star Chamber, where examination of suspects and statements of witnesses were taken in secret without the involvement of members of the community.<sup>78</sup> Doing so allowed Charles I to suppress any objections to his rule as sedition. In 1641, Parliament pushed back and dissolved the Court of the Star Chamber with an "Act Abolishing Arbitrary Courts."<sup>79</sup> The same Parliament then passed the Militia Ordinance, which proposed to transfer power, including the power of trial and punishment, from the Crown to Parliament.<sup>80</sup> Charles I responded with a proclamation refusing to sign these enactments, and this led to the outbreak of civil war in 1642.

Following nearly seven years of civil war, from the rule of Oliver Cromwell through the reign of Charles II, there were efforts to restore the power of the monarchy. These efforts included attempts by the King to control the process of trial and punishment by retaliating against jurors who opposed the King's agenda, including the famous case of William Penn.<sup>81</sup> Charles II imprisoned a man by the name of Bushell who, acting as a juror, acquitted the famous William Penn on charges of riotous assembly.<sup>82</sup> The legality of this imprisonment came before the King's Bench through a habeas corpus proceeding, wherein Chief Justice Vaughan acquitted Bushell and in the process confirmed the independence and indispensability of the right of trial by jury.<sup>83</sup> This ruling was supported throughout England and established the precedent that jurors were not subject to retaliation by the King for exercising their independent judgment to acquit a defendant, notwithstanding the King's claim that the defendant was a

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74. Ryan, *supra* note 70, at 12.

75. STEPHEN D. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621-1628, 10, 224 (1979).

76. HIBBERT, *supra* note 65, at 127.

77. Petition of Right, ¶¶ IV, VII, X(5).

78. HIBBERT, *supra* note 65, at 127-28.

79. SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 66, at 479-80.

80. *Id.* at 486-87.

81. *Id.* at 577-79.

82. *Id.* at 577 n.1.

83. *Id.*

danger to the security of the nation.<sup>84</sup>

Even though the right of trial by jury was officially recognized by the courts as a limitation on the power of the King by the mid-seventeenth century, when James II later assumed the throne, he attempted to retake control of the civilian courts and juries by the use of military tribunals.<sup>85</sup> These usurpations of the right to trial by jury met with widespread and deep-seated resistance, with opponents listing James II's efforts to circumvent the right of trial by jury in civilian courts as one of the grievances that led to the Glorious Revolution in 1688.<sup>86</sup>

The Glorious Revolution produced the Bill of Rights of 1689 and established a constitutional monarchy with powers limited by Parliament.<sup>87</sup> In 1690 King William, with Mary at his side, accepted the Bill of Rights which, among other things, protected the right of trial by jury.<sup>88</sup> To emphasize the importance of both judicial independence and the right of trial by jury, the Act of Settlement was passed by Parliament in 1701 and accepted by William and Mary.<sup>89</sup> This Act, among other things, provided that judges would no longer serve at the pleasure of the monarch.<sup>90</sup> Hence, by 1701, the right of trial by jury in independent common-law courts, free of the jurisdiction and control of the Crown, had been firmly established in English law. Blackstone, in his *Commentaries*, is most explicit in identifying the right of trial by jury as the centerpiece of English liberty:

[The establishment of jury trial] was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it. In [the] *magna carta* it is more than once insisted on as the principal bulwark of our liberties.<sup>91</sup>

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84. *Id.* at 579.

85. HIBBERT, *supra* note 65, at 144.

86. See SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 66, at 600 (characterizing James II's manipulation of the jury system as providing support for the 1689 Bill of Rights).

87. HIBBERT, *supra* note 65, at 144.

88. SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 66, at 601.

89. *Id.* at 610–12.

90. *Id.* at 612.

91. WILLIAM BLACKSTONE, 3 COMMENTARIES \*350. Blackstone underscored the point with reference to “a celebrated French writer, who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England, in time must perish, should have recollected that Rome, Sparta, and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.” *Id.* at 379. See also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 924 (Carolina Acad. Press 1987) (1833) (“The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people.”).

Blackstone concludes “[o]ur law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown.”<sup>92</sup>

*B. The Original Public Meaning of Constitutional Guarantees of Trial by Jury*<sup>93</sup>

Experiences in the American colonies served to reinforce the English common-law history that found it necessary to guarantee a right of trial by jury to protect civilians from the abuses of executive power, especially during time of war. James Madison argued against the “executive aggrandizement” of federal power for which “war is in fact the true nurse.”<sup>94</sup> It was the willingness of the public to glorify the military in a time of war that Madison considered the “only serious risk to liberty in America.”<sup>95</sup> For Madison and many Americans of the founding generation, it was not the terror, it was the march of empire unleashed in response to the terror, which was the greatest threat to liberty at home.<sup>96</sup>

Embraced within this general fear of military usurpation of civil liberties, Madison and many Founders were determined to prevent the government from subjecting civilians to military tribunals.<sup>97</sup> Indeed, one of the specific grievances against the “king of Great Britain” listed in the Declaration of Independence was “depriving us, in many cases, of the benefits of trial by jury.”<sup>98</sup> In addition, the Declaration cites the King for obstructing the administration of justice by “refusing his assent to laws for establishing judiciary powers,” and for “render[ing] the military, independent of, and superior to, the civil power.”<sup>99</sup>

Given the history of despotism in Europe and their own experiences in

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92. WILLIAM BLACKSTONE, 4 COMMENTARIES \*349.

93. See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999) (defending the need to look at the original public meaning given the text of the Constitution at the time of the founding, rather than attempting to discern the original intentions of the Founders by inquiring into the often hidden and conflicting subjective intentions of different individuals living at the time of the founding).

94. Emma Rothschild, *Empire Beware!*, N.Y. REV. BOOKS, Mar. 25, 2004, at 37.

95. *Id.* at 38.

96. *Id.* at 37–38.

97. *Id.* at 38. The Founders’ fears proved prophetic in relation to Napoleon’s military adventurism launched on fears of foreign invasion in the 1790s. In *De l’esprit de le l’usurpation*, Benjamin Constant wrote that Napoleon’s most repressive imperial policy was the introduction of military commissions and special courts to try “all persons suspected of favoring the enemy, of providing intelligence to him.” *Id.*

98. THE DECLARATION OF INDEPENDENCE paras. 2, 19 (U.S. 1776).

99. *Id.* at paras. 9, 13.

the colonies, the Founders sought to frame a constitution that unequivocally protected the common-law right of trial by jury, especially in times of war, when the liberty of citizens was most threatened. The paramount importance of trial by jury to the Founders is apparent from the fact that trial by jury, together with the writ of habeas, were the only specific common-law liberties protected from impingement by the federal government in the body of the Constitution as originally passed in 1787.<sup>100</sup> The Founders' elevation of the common-law right of trial by jury to preeminent constitutional status was foreshadowed by the Declaration of Rights adopted by nine colonies in 1765, which provided that "trial by jury is the inherent and invaluable right of every British subject in these colonies."<sup>101</sup>

Efforts to place a special constitutional emphasis on the common-law right of trial by jury reflected the general agreement among the revolutionary generation that this right, above all others, was essential to the preservation of liberty.<sup>102</sup> This was reflected in the constitutions adopted by the original states that formed the Union, each of which explicitly protected the right to jury trial.<sup>103</sup> Likewise, the debates in the state conventions on ratification of the federal Constitution were replete with passionate speeches on the overriding importance of the right of trial by jury to the preservation of liberty.<sup>104</sup>

Many of the Founders, however, were not satisfied that the original Constitution was sufficient by itself to protect the full range of individual

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100. See U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."). The original Constitution also protected more general privileges and immunities of citizens. U.S. CONST. art. IV, § 2, cl. 1. The only other individual rights mentioned in the initial framework of the Constitution were restrictions on the lawmaking power of state governments, i.e., Bill of Attainder, ex post facto law, or law impairing the obligation of contract. U.S. CONST. art. I, § 10, cl. 1.

101. The Declaration of Rights of the Stamp Act Congress para. 7 (1765); *Toth v. Quarles*, 350 U.S. 11, 16 n.9 (1955) (internal citations omitted).

102. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 293-94 (1996) (arguing that even though a "cluster of other rights regulating bail, search and seizure, [and] habeas corpus" also provided security against arbitrary state action, it was trial by jury that was "the great institutional barrier" to tyranny). According to Joseph Story, the "great object of a trial by jury in criminal cases is[] to guard against a spirit of oppression and tyranny on the part of rulers . . ." STORY, *supra* note 91, § 924.

103. *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968); *Reid v. Covert*, 354 U.S. 1, 29 n.53 (1957).

104. Consider Patrick Henry's remarks to the Virginia State Convention responding to arguments that the right of jury trial should be left to the discretion of the legislature to modify should the circumstances, such as rebellion, warrant it: "Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off. They may call any thing rebellion, and deprive you of a fair trial by an impartial jury of your neighbors. . . . [Trial by jury] is gone unless you preserve it now." THE COMPLETE BILL OF RIGHTS § 12.2.2.6h, at 438 (Neil H. Cogan ed., 1997).

liberties, including trial by jury. Consequently, the ratification of the original Constitution was secured only with the understanding that an explicit Bill of Rights would be added.<sup>105</sup> Among the Founders, the drive to amend the Constitution by adding a declaration of rights was led by Madison and Jefferson, and uppermost in their minds was providing additional and even more explicit protection for jury-trial rights.<sup>106</sup>

Those who opposed adding a declaration of specific rights to the Constitution, such as Hamilton, argued that the most important rights, including trial by jury, were already protected and that a Bill of Rights was unnecessary.<sup>107</sup> These arguments, however, were rejected on the belief that a Bill of Rights, as interpreted and applied in individual cases by the judicial branch, was needed to protect fundamental rights from the passions of the political process and from the possibility that future interpretations would expand the scope of the powers of both the executive and legislative branches.<sup>108</sup> As Joseph Story commented, placement of the right to jury trial in the Bill of Rights was seen as a guard against any “extravagant or undue extention” of reserved powers if “construed to extend . . . to certain

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105. See RAKOVE, *supra* note 102, at 330 (describing Madison’s intuition in recognizing that the addition of the Bill of Rights would be a “decisive factor in the politics of the amendment process”).

106. See THE COMPLETE BILL OF RIGHTS, *supra* note 104, § 12.2.5.2 (quoting Letter from Thomas Jefferson to Alexander Donald (Feb. 7, 1788)); *id.* § 12.2.5.5 (quoting Letter from James Madison to George Eve, (Jan. 2, 1789)). In addition, because the right to trial by jury was considered meaningless if the government could detain a person indefinitely without trial, the right needed a “speedy” trial component. Likewise, if the government could subject a person to a secret trial, there was no effective means of ensuring that it was a fair trial by an “impartial jury” of his peers; hence, the “speedy” trial must also be a “public” one. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”). As Katyal and Tribe put it: “Whenever and wherever the Constitution is applicable, it generally requires: (1) trial by jury; (2) that the jury trial be a speedy and public one . . .” Katyal & Tribe, *supra* note 35, at 1261 n.7.

107. THE FEDERALIST No. 84, at 576–80 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). See also STORY, *supra* note 91, §§ 977–978 (“[A] bill of rights was in its nature more adapted to a monarchy, than to a government, professedly founded upon the will of the people . . .”).

108. STORY, *supra* note 91, §§ 979–981 (“[A] bill of rights is important, and may often be indispensable, whenever it operates, as a qualification upon powers, actually granted by the people to the government.”). Some have argued that the Constitution’s entire structure creates a “rights-protecting asymmetry” which requires the concurrence of all three branches before government may decisively alter anyone’s legal rights. In other words, each branch should be given the power to block a change that alters the baseline of individual liberty. Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 136869 (2001); Katyal & Tribe, *supra* note 35, at 1268–69 n.41. That the right of jury trial was seen as the keystone in protecting liberty from overreaching by the political branches was reflected in the state ratifying conventions which preceded the debates in the First Congress. New York, for example, proposed “[t]hat the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate.” THE COMPLETE BILL OF RIGHTS, *supra* note 104, § 7.1.2.3 (quoting the New York Ratification Debate, July 26, 1788). A Massachusetts representative noted that the only constitutional check on Congress’s control over the criminal process was “that the trial is to be by a jury.” *Id.* § 7.2.2.1.a (quoting the Massachusetts Ratification Debate, Jan. 30, 1788).

classes of cases, which did not at first appear to be within them.”<sup>109</sup>

Since it was the war power that the Founders feared was most likely to be misused to usurp the jury trial right, they were determined to immunize the civil-justice system from the reach of the war powers of the political branches. Thus, in addition to their efforts to create an overall constitutional structure that protected this right from all overreaching by government, the First Congress specified in the Fifth Amendment that the only wartime exception to the right of grand jury indictment was in cases arising in the “land or naval forces, or in the Militia, when in actual service in time of War or public danger.”<sup>110</sup> The Supreme Court has since read this same limited exception into the Sixth Amendment’s guarantee of trial by jury and carefully yet clearly interpreted this language, according to its original meaning, as yet more evidence that the political branches have no constitutional authority to subject civilians who are not members of the armed forces to military trials in place of civilian jury trials.<sup>111</sup>

In short, the right of trial by jury in a civilian court was understood by the founding generation as a repudiation of the jurisdiction of military tribunals to try civilians in wartime. This original meaning was captured in simple and straightforward language by the Supreme Court in *Reid v. Covert*: “[M]ilitary trial of civilians is inconsistent with both the ‘letter and spirit of the Constitution.’”<sup>112</sup>

### III. MILITARY COMMISSIONS: A BRIEF HISTORY

There has been a consistent effort throughout American history to protect civilians from the use of military tribunals even when the nation was at war and threatened with invasion.<sup>113</sup> On those rare occasions when the President has attempted to extend military-tribunal jurisdiction beyond its application to members of the U.S. or enemy armed forces, the Court has

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109. STORY, *supra* note 91, § 981. When the drafting history of the Sixth Amendment is examined, it demonstrates a deliberate effort by the First Congress to immunize the right of trial by jury from being superseded or modified by the war powers of the political branches. See THE COMPLETE BILL OF RIGHTS, *supra* note 104, § 7.1.1.13.c, .d; see also U.S. CONST. amend VI (protecting the right of jury trial in “all criminal prosecutions”).

110. U.S. CONST. amend. V.

111. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); see also *Ex parte Quirin*, 317 U.S. 1, 40 (1942) (concluding that “§ 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission”).

112. *Reid v. Covert*, 354 U.S. 1, 22 (1957) (plurality opinion).

113. See *Duncan v. Kahanamoku*, 327 U.S. 304, 319–24 (1946) (listing examples in support of the propositions that “[p]eople of many ages and countries have feared and unflinchingly opposed . . . subordination of executive, legislative and judicial authorities to complete military rule” and that “[i]n this country that fear has become part of our cultural and political institutions”).

either struck it down as unconstitutional or found no congressional authorization.<sup>114</sup> Likewise, efforts by Congress to subject civilians to military-tribunal jurisdiction are rare and in most cases have been invalidated by the courts, whether by narrowly construing purported authorizing legislation<sup>115</sup> or by finding the legislation unconstitutional.<sup>116</sup> The hostility of the American legal system to subjecting civilians to military trials is clearly reflected in the historical record.<sup>117</sup>

In the aftermath of the War of 1812, courts consistently ruled that even during time of war, citizens of the United States who were not in the military service were not amenable to military trial. In *Smith v. Shaw*, the military detained Shaw and charged him with treason and being a spy for inciting insurrection and aiding the enemy during the war between Great Britain and the United States.<sup>118</sup> Shaw then brought suit alleging “assault and battery, and false imprisonment.”<sup>119</sup> The New York Supreme Court of Judicature refused to recognize a defense of military necessity and stated:

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114. See *Covert*, 354 U.S. at 5, 20–21 (holding that defendants “could not constitutionally be tried by military authorities” because congressional power to authorize military tribunals is limited to those serving in the military); *Toth v. Quarles*, 350 U.S. 11, 13–14 (1955) (finding the 1950 Amendments to the Uniform Code of Military Justice, which authorized certain courts-martial for civilians, to be unconstitutional); *Duncan*, 327 U.S. at 324 (declaring that “martial law” as used in the Organic Act “was not intended to authorize the supplanting of courts by military tribunals”); *Milligan*, 71 U.S. at 126–31 (holding unconstitutional Milligan’s trial and punishment by a military tribunal acting with the authority of the President where Milligan was neither in the military nor a prisoner of war, and where there was no “actual and present invasion”).

115. See *Ex parte Endo*, 323 U.S. 283, 299–300 (1944) (noting that the Court has “favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality[.]” construing an Act of Congress and two Executive Orders relating to “the exclusion of persons from prescribed military areas [in light of their objective to protect] the war effort against espionage and sabotage”); see also *Coleman v. Tennessee*, 97 U.S. 509, 513–14 (1878) (refusing to interpret a congressional act as granting exclusive jurisdiction to military tribunals for cases involving certain criminal acts by military personnel); *Duncan*, 327 U.S. at 324 (narrowly construing the phrase “martial law” in the Organic Act, reasoning that “while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the [Hawaiian] Islands against actual or threatened rebellion or invasion, [it] was not intended to authorize the supplanting of courts by military tribunals”).

116. *Toth*, 350 U.S. at 21–23.

117. See *Duncan*, 327 U.S. at 319–23 (detailing events wherein the military was used to support, rather than “supplant,” civilian courts). A comprehensive history of military trials of those claiming civilian status is beyond the scope of this Article. Others have written extensively and in great detail on the subject. See, e.g., Belknap, *Putrid Pedigree*, *supra* note 50, at 480 (recounting several military trials of individuals claiming civilian status, finding them “badly flawed,” and concluding such trials ought not be used in the “war on terrorism”); Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 14, 27 (1990) (discussing the trials by military commission of 392 Dakota men for “killings committed in warfare”).

118. *Smith v. Shaw*, 12 Johns. 257, 257–58 (N.Y. Sup. Ct. 1815).

119. *Id.* at 257.

None of the offences charged against *Shaw* were cognizable by a court-martial, except that which related to his being a spy; and if he was an *American* citizen, he could not be charged with such an offence. He might be amenable to the civil authority for treason; but could not be punished, under martial law, as a spy. . . .

. . . If the defendant[, a military official,] was justifiable in doing what he did, every citizen of the *United States* would, in time of war, be equally exposed to a like exercise of military power and authority. It was not pretended, on the argument, that if the plaintiff was a citizen he was amenable to a court-martial for any of the offences alleged against him. And the defendant could certainly have no legal right to detain him to try that question before a court-martial.<sup>120</sup>

It was not until 1847, during the Mexican War, that military-commission trials of civilians were first used, both on the battlefield and in occupied enemy territory as part of a military government.<sup>121</sup> General Winfield Scott, after invading central Mexico, declared martial law and subjected Mexican civilians as well as American soldiers to trial by military commission for serious criminal offenses such as theft, robbery, assault, and murder.<sup>122</sup> A separate military commission, called a council of war, tried Mexican civilians for offenses against the law of war, but was seldom

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120. *Id.* at 265. It is important to note that at the time of the *Shaw* opinion, Congress had provided that spies should be triable by courts-martial or military commission. Act of Apr. 10, 1806, ch. 20, § 2, 2 Stat. 359, 371. This language was virtually identical to Article 82 of the 1920 Articles of War and, in turn, reenacted in 1950 as Article 106 of the UCMJ. Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 4, § 906, 120 Stat. 2600, 2631 (2006) (to be codified at 10 U.S.C. § 906) (originally enacted as Articles of War of 1920, ch. 227, art. 82, 41 Stat. 759, 804 (1920), *reenacted by* Uniform Code of Military Justice Act of 1950, art. 106, ch. 169, 64 Stat. 107, 138 (1950)). As the Supreme Court of Judicature of New York has indicated, this section did not apply to American citizens. *Cf. M'Connell v. Hampden*, 12 Johns. 234, 238 (N.Y. Sup. Ct. 1815) (holding that plaintiff was entitled to false imprisonment damages for being tried by courts-martial because he was a citizen).

121. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006) (“As commander of occupied Mexican territory, and having available to him no other tribunal, General Winfield Scott that year ordered the establishment of . . . ‘military commissions’ to try ordinary crimes committed in the occupied territory . . .”) (quoting WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 832 (rev. 2d ed. Arno Press 1979) (1920)); Chomsky, *supra* note 117, at 63–64 (explaining that the army first used military commissions during the Mexican War and only in occupied, hostile territory where martial law had been declared).

122. Chomsky, *supra* note 117, at 63; *see also* WINTHROP, *supra* note 121, at 832 (“The acts thus made punishable by military commission were mainly criminal offences of the class cognizable by the civil courts in time of peace.”); Belknap, *Putrid Pedigree*, *supra* note 50, at 448 (listing the crimes General Scott empowered military commissions to punish).

used.<sup>123</sup> Trying civilians by military commission was therefore limited at its inception to a foreign battlefield or as a component of a military government which replaced the civilian criminal courts in occupied, enemy territory following conquest.<sup>124</sup>

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123. See WINTHROP, *supra* note 121, at 832–33 (observing that trials by council-of-war military commissions “were few”).

124. See *Hamdan*, 126 S. Ct. at 2775–76 (discussing the three primary instances in which commissions have been used and their inherent limitations). The Court in *Hamdan* interpreted the UCMJ as imposing certain jurisdictional limits on these incident-to-war military commissions. *Id.* at 2777 (citing WINTHROP, *supra* note 121, at 836–42). These limits included a restriction on their use to try only “[i]ndividuals of the enemy’s army who have been guilty of illegitimate warfare or other offences in violation of the laws of war.” *Id.* (quoting WINTHROP, *supra* note 121, at 838) (alteration in original). This “law-of-war” limit has been used by the Supreme Court in prior cases as the core component of the constitutional boundary between military-tribunal jurisdiction and civilian jury-trial jurisdiction. *Id.*; see also discussion *infra* Parts II.A.3, V, VI. To the extent that Congress, in its definition of “unlawful enemy combatant” in the Military Commissions Act of 2006, has attempted to extend military-commission jurisdiction to those who are not under the command of the enemy’s army, that portion of the Act transgresses the constitutional line and is not merely a change in legislative policy. Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3(a)(1), § 948a, 120 Stat. 2600, 2601 (to be codified at 10 U.S.C. §948a); see also discussion *infra* Part V. In any event, at least prior to the passage of the Military Commissions Act of 2006, Congress had consistently adhered to law-of-war limitations on military commissions, and *Hamdan* was correct to interpret the UCMJ accordingly. The history of the Articles of War demonstrates the point. The first American Articles of War were enacted by the second Continental Congress in 1775. WINTHROP, *supra* note 121, at 21. Eleven years later, the amendments of 1786 addressed the composition of court-martial tribunals and other issues of military justice. WINTHROP, *supra* note 121, at 22–23, 972–75. The Code of 1776, as amended in 1786, was continued in force through the adoption of the Constitution until it became apparent that this Code, modeled on the British Monarchy, did not fit the needs of a republic. *Id.* The result was the Code of 1806, which superseded all previous Articles of War. See Act of Apr. 10, 1806, ch. 20, § 3, 2 Stat. 359, 371–72 (declaring the previous rules governing the armies of the United States “void”); see also WINTHROP, *supra* note 121, at 23 (noting that the 1806 Articles “superseded all other enactments on the same subjects” and “were adopted by Congress mainly for the reason that the changed form of government rendered desirable a complete revision of the code”). The Code of 1806 consisted of 101 articles that applied *only* to U.S. or enemy armed forces. §§ 1–2, 2 Stat. at 359–71. The only mention of trial by military commission at the time was in a separate provision providing for the punishment of spies. See *id.* § 2 (providing that “in time of war, all persons . . . who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court martial”). The Code of 1806 remained in effect for over 100 years until replaced by the Articles of War of 1920. See Articles of War of 1920, ch. 227, § 52, 41 Stat. 759, 787 (superseding all prior provisions “in so far as they are inconsistent with this Act”), *repealed by* Uniform Code of Military Justice Act of 1950, ch. 169, 64 Stat. 107. Hence, except for a separate statute relating to spies in the theater of war, the Code in effect from 1806 to 1920 provided for trial of members of the armed forces only by courts-martial governed by the procedures set forth by Congress in the Code itself. To the extent that military commissions had been used in the Mexican War, and later in the Civil War, to try enemy combatants for offenses other than spying, their use was unrecognized and unrestricted by the Code of 1806. This, of course, does not imply that the Executive’s use of these commissions in those wars was within his inherent powers as Commander in Chief under Article II, but it does show that Congress’s passage of Article 15 and 38 of the 1920 Articles of War (currently Articles 21 and 36 of the UCMJ), see *supra* note 32, was intended to limit the Executive’s use of such commissions to the law of war and to the procedures established by Congress for courts-martial. See, e.g., *Hamdan*, 126 S. Ct. at 2774, 2786 (“The UCMJ conditions the

A. *The Civil War and Its Aftermath*

On September 24, 1862, President Lincoln suspended the writ of habeas corpus and “subject[ed] to martial law” not only insurgent enemies in the rebel states, but also “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.”<sup>125</sup> This was preceded by the proclamation of May 10, 1861, in which the President “authorized the commander of the Union forces in Florida[, considered belligerent territory,] to suspend there the writ of *habeas corpus*, if he found it necessary.”<sup>126</sup>

Because the Supreme Court had cast doubt on the President’s power to suspend the writ without congressional authorization,<sup>127</sup> Lincoln sought, and the Civil War Congress passed, the Habeas Corpus Suspension Act (Suspension Act) of March 3, 1863, specifically vesting in the President authority “whenever in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ . . . in any case throughout the United States, or any part thereof.”<sup>128</sup> This was the first time in the nation’s history that Congress had suspended the writ, and Congress made it clear in the Suspension Act that the writ was suspended only for the purpose of allowing the military to arrest and temporarily detain citizens without showing cause in the civilian courts.<sup>129</sup> More importantly, the Suspension Act specifically provided that, within twenty days of arrest or “as soon as may be practicable,” the government was required to furnish to

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President’s use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the ‘rules and precepts of the law of nations.’”) (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

125. Proclamation No. 1 (Sept. 24, 1862), *reprinted in* 13 Stat. 730 (1866).

126. WINTHROP, *supra* note 121, at 828 (internal quotation marks omitted).

127. *See Ex parte Merryman*, 17 F. Cas. 144, 151–52 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9487) (holding that power to suspend the writ was “a legislative function pertaining to Congress alone”).

128. Habeas Corpus Suspension Act, ch. 81, § 1, 12 Stat. 755, 755 (1863).

129. *Id.*

[N]o military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ, so long as suspension by the President shall remain in force, and said rebellion shall continue.

*Id.*

the civilian judges of the circuit and district courts a list of names of those civilians arrested who were citizens of loyal states where the administration of the laws in the federal courts remained unimpaired.<sup>130</sup> The judge had a duty to discharge from custody any citizen on the list who was not indicted during the following session of the grand jury.<sup>131</sup> Indeed, the Suspension Act was intended “to secure the trial of all offences” of civilian citizens, including offenses against the law of war, by civilian courts in states where the civilian courts “were not interrupted in the regular exercise of their functions.”<sup>132</sup> Under the Suspension Act, a prisoner arrested by order of the President was allowed to petition a civilian court for release upon proof he was a citizen of a non-Confederate state; that he was not a prisoner of war (i.e. that he was a civilian); and that the grand jury had met without indicting him.<sup>133</sup> Hence, although Congress and the President had agreed that the Civil War required a suspension of the writ of habeas corpus in 1863, Congress recognized that civilian citizens were entitled, nonetheless, to jury trials in civilian courts.

By making it clear that a suspension of the writ did not allow the government to replace civilian jury trials with military trials, the Civil War Congress was acting consistent with the traditional constitutional limitations on its suspension authority under Article I, Section 9, Clause 2 (Suspension Clause).<sup>134</sup> Simply, while the Suspension Clause gives Congress the power to authorize the Executive to arrest and detain without judicial review for the duration of the hostilities,<sup>135</sup> it does not invite Congress to set aside all civil liberties and replace a functioning Article III

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130. *Id.* § 2.

131. *Id.*

132. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 136 (1866) (Chase, C.J., concurring).

133. *See id.* at 116 (describing the requirements to be met before the court “had the right to entertain his petition and determine the lawfulness of his imprisonment”).

134. *See* discussion *infra* Part IV.B. For other examples of Congress exercising its power to override certain Fourth Amendment limitations in time of war or national emergency, but not attempting to extend its emergency power to subject civilians to military trials, see the Alien Enemies Act § 1, 50 U.S.C. § 21 (2000), which authorizes the President, during time of war, to detain enemy alien civilians residing within the United States; and see also 50 U.S.C. § 1829 (2000), which authorizes “physical searches without a court order” for fifteen days “following a declaration of war by the Congress.” *Id.* Moreover, at the outset of an emergency, the President may have unilateral authority under the Commander-in-Chief Clause to exercise the same temporary detention power, but only until Congress has time to address the matter. *See* *The Prize Cases*, 67 U.S. (2 Black) 635, 690 (1862) (explaining that the Framers of the Constitution granted the President the power to protect “the peace and integrity of the Union in case of an insurrection at home or invasion from abroad . . . in the recess of Congress, and until that body could be assembled”); U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”).

135. *See* discussion *infra* Part IV.B.

civilian court system with military tribunals.<sup>136</sup>

During the remainder of the Civil War years, various commanders issued a range of orders declaring some form of martial law, and with it suspension of the writ, in certain states or territories, some of which established military commissions to try civilians.<sup>137</sup> Most of these

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136. Whether by suspending the writ or the exercise of its other Article I powers, Congress cannot use the existence of war or an emergency to override the Sixth Amendment right to a jury trial, or to eliminate the power of the judiciary to provide remedies for violations of this right in functioning civilian courts. *Milligan*, 71 U.S. at 121–22; see also discussion *infra* Part IV. Arguments on behalf of Milligan, filed by his attorney, James Garfield, who later became President of the United States, also cited the Louisiana case of *Johnson v. Duncan*, 3 Mart. (o.s.) 520 (La. 1812). *Milligan*, 71 U.S. at 52–53 (argument for the petitioner). *Johnson* and other authorities show the willingness of the courts to provide a remedy after the writ has been restored for violations of a citizen’s right of trial by jury during the period of suspension. See, e.g., *Milligan v. Hovey*, 17 F. Cas. 380 (C.C.D. Ind. 1871) (No. 9605) (explaining to the jury that damages could be awarded if defendants, who were “members of the military commission that tried and convicted [the plaintiff],” were found guilty of “arrest, imprisonment, [and] trespass” against the plaintiff); see also discussion *infra* Part IV.B.

137. It is important to note that many of the “martial law” declarations during the Civil War did not attempt to subject civilians who committed offenses to military commissions. For example, General R.C. Shenck declared martial law in Baltimore and Western Maryland in June 1863, due to the presence of rebel forces, but made clear that “[a]ll the courts . . . of State, county and city authority, are to continue in the discharge of their duties as in times of peace.” WINTHROP, *supra* note 121, at 825. Likewise, in Kansas, in 1862 and again in 1864, General Price declared in anticipation of an invasion, but made clear that “the functions of the civil authorities will not be disturbed nor the proceedings or processes of the courts interrupted.” *Id.* at 826. Also, in 1862, General Wright, head of the Department of the Pacific, ordered the arrest and detention—but not the trial—by military authorities of persons “aiding and abetting the rebellion,” and further ordered such persons not to be released until they swore out “an oath of allegiance” to the Union. *Id.* at 827. And in July 1863, martial law was declared in Kentucky to enable the military to guarantee that the election would not be disrupted. *Id.* at 826. This order specified that military control did not extend to “civil authority” or “civil courts.” *Id.* In general, although the military adhered to the Suspension Act’s restrictions on military trials of citizens, Union officers were not called to account for occasional violations of the Act because Judge Advocate General Holt questioned the application of the Act to citizens arrested and tried by the military. J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 167 (Peter Smith rev. ed. 1963) (1951). Of course, Holt’s opinion was later rejected by the Supreme Court in *Ex parte Milligan*, 71 U.S. at 121–22; see also discussion *infra* Part III.A.3.

Other martial law declarations during the Civil War that included the use of military commission trials of civilians were in Confederate states or locations in the theater of war, and were used as part of establishing a military government in occupied belligerent territory. For example, General Ben Butler subjected all civilians to trial by military commission for all crimes except petty offenses when Union forces occupied New Orleans in 1862. WINTHROP, *supra* note 121, at 824–25. General Butler’s use of military commissions in New Orleans generated two Supreme Court cases decided after the Civil War ended. In the first, *The Grapeshot*, the Court held that “[t]he duty of the National government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as commander-in-chief . . .” *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132 (1869). Later, in *Mechanics’ & Traders’ Bank v. Union Bank*, the Court held “that the power to establish military authority courts . . . in portions of insurgent States occupied by the National Forces, is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conquerors.” *Mechs.’ & Traders’ Bank v. Union Bank*, 89 U.S. (22 Wall.) 276, 296 (1874). This meant that General Butler was “invested with all the powers of making war, except so far as they were denied

declarations respected the limitations imposed by the Suspension Act, and military trials were confined to the battlefield, those captured on the battlefield, or as part of the military government occupying Confederate states as enemy territory.<sup>138</sup> In the exceptional cases where military commissions were improperly used in non-Confederate states to try persons outside the battlefield, the commissions were widely viewed by the public and the press as unconstitutional instruments of tyranny.<sup>139</sup>

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to him by the commander in chief, and among these powers, as we have seen, was that of establishing courts in conquered territory." *Id.* at 297.

138. *See supra* note 137 and accompany text.

139. When military commissions were used in loyal states during the Civil War, most military commanders adopted the structure and procedures of courts-martial as established by Congress. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2788 (2006) ("[T]o protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial."); WINTHROP, *supra* note 121, at 835 n.81 ("[M]ilitary commissions are constituted and composed, and their proceedings are conducted, similarly to general courts-martial."). There were, however, occasions during the Civil War years when military commissions were used by military commanders outside the battlefield without adhering to the established procedures of courts-martial. The use of such commissions unrestrained by the limitations established by Congress for court-martial proceedings invariably led to injustice. A tragic example was the brief war between the Santee Sioux (Dakota) and white settlers in southwestern Minnesota in 1862. Chomsky, *supra* note 117, at 13. Despite the fact that "the Dakota were a sovereign nation at war with the United States," the nearly 400 Dakota men captured during the war were not treated as prisoners of war or civilians but were instead tried by a military commission for various offenses. *Id.* at 13–15. Reflecting the prejudicial tone of General Sibley's announcement beforehand that the guilty "would be executed immediately," the commission failed to carefully consider the evidence of individual guilt, and historical records clearly show that the "confessions" of individual Dakota lacked reliability due to misinterpretation, "cultural misunderstanding," and possibly incorrect translation. *Id.* at 23, 46–50. *But see* ISAAC V.D. HEARD, HISTORY OF THE SIOUX WAR AND MASSACRES OF 1862 AND 1863 254–71 (1864) (defending the Dakota trials from the perspective of a participant). The military commission also "ignored mitigating evidence that particular [Indian] defendants had acted to protect victims of attack from being raped or killed." Chomsky, *supra* note 117, at 50 & n.223. Members of the commission were soldiers who wanted to punish the Dakota, against whom many of them had fought. *See id.* at 55 (concluding that it would have been "inconceivable" for the men to have "open minds"). Trials started as soon as hostilities ended when emotions were high and concerns over the possibility of additional fighting persisted. *Id.* One of the five commission members, William Marshall, admitted that "his mind was not in a condition to give the[] men a fair trial." *Id.* at 55 & n.264 (citation omitted). As a result, of the 323 Dakota found guilty, 303 were given the death penalty. *Id.* at 28. These trials were so obviously unfair that President Lincoln commuted the death sentences of 264 Dakota despite passionate pleas and even threats of retaliation by Union officers and Minnesota Governor Ramsey if the executions were not carried out. *See id.* at 29–33 (describing Lincoln's review of the trials and the reactions of those in Minnesota who were intimately involved).

General Sibley soon "staged another spectacular [military] trial" of two Dakota who, after running off to Canada, were apprehended and returned to the U.S. in violation of international law by men under Sibley's command. DEE BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST 64 (30th anniversary ed., 2001). Of course, both received death sentences. *Id.* The St. Paul *Pioneer* remarked that "it would have been more creditable if some tangible evidence of their guilt had been obtained . . . no white man, tried before a jury of his peers, would be executed upon the testimony thus produced." *Id.* (omission in original).

John F. Lee, Judge Advocate General shortly before the U.S.-Dakota War, advised the

### 1. The Military-Commission Trial of Clement Vallandigham

As a Democratic congressman from Ohio, Clement L. Vallandigham had been one of the most persistent critics of the Lincoln administration's war policy.<sup>140</sup> He openly called for an end to the Civil War, condemned the military draft, and opposed the abolition of slavery.<sup>141</sup> When Vallandigham's district was redrawn in 1862, he lost his seat in Congress.<sup>142</sup> In 1863 he sought his party's nomination for governor of Ohio.<sup>143</sup>

On April 13, 1863, General Burnside, Commanding General of the Department of Ohio, issued General Order No. 38, which, among other things, subjected to arrest persons "declaring sympathies for the enemy."<sup>144</sup> This, and similar orders by Union generals in other states, led "Democrats [to] fear[] that all political opposition to Lincoln administration war policy . . . was under attack."<sup>145</sup> Union General Halleck, Governor Morton of Indiana, and even pro-war Democratic newspapers decried Union officers who assumed "powers which do not belong to them" and "whose conduct was 'inciting party passions and political animosity.'"<sup>146</sup>

On Burnside's orders, military agents monitored a speech Vallandigham was scheduled to make at a political rally in Mount Vernon, Ohio on May 1, 1863.<sup>147</sup> Four days later, soldiers arrested Vallandigham, and "[h]is trial by a military commission" started on May 6, 1863.<sup>148</sup>

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Secretary of War "that military commissions had no legitimacy." Chomsky, *supra* note 117, at 66–67. However, Lee's successor, former Secretary of War Joseph Holt, was gung-ho for military commissions and misrepresented their history in a letter to Secretary of War Stanton on September 8, 1862, claiming that "[t]hese 'commissions' . . . have existed too long in the service, and [are] too essential to its wants and emergencies, to be now ignored. Long and uninterrupted usage has made them as it were part and parcel of the common military law." *Id.* at 67 (alteration and omission in original). This, as discussed elsewhere in this Article, was simply not true. Usage dated back only to the Mexican War some fifteen years earlier, and that use was mostly in occupied territory as part of establishing a military government. See discussion *supra* Part III.

140. Belknap, *Putrid Pedigree*, *supra* note 50, at 454.

141. *Id.*

142. *Id.*

143. Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 113 (1998).

144. *Id.* at 119; CLEMENT L. VALLANDIGHAM, THE TRIAL OF THE HON. CLEMENT L. VALLANDIGHAM, BY A MILITARY COMMISSION 7 (Rickey & Carroll 1863) (reproducing Order No. 38 in full).

145. Curtis, *supra* note 143, at 119.

146. *Id.* at 119–20; see also Craig D. Tenney, Major General A.E. Burnside and the First Amendment: A Case Study of Civil War Freedom of Expression (June 1977) (Ph.D. dissertation, Indiana University), reprinted in University Microfilms International, Dissertation Information Service, at 186–87 (1992) (referring specifically to Union General Halleck's thoughts regarding this conflict).

147. Curtis, *supra* note 143, at 121.

148. *Id.* at 121; see also FRANK L. KLEMENT, THE LIMITS OF DISSENT: CLEMENT L.

Vallandigham was charged with violating General Order No. 38 by: (1) declaring his opposition to the war; (2) characterizing General Order No. 38 as a “base usurpation of arbitrary authority;” and (3) inviting his audience to speak out against the Order.<sup>149</sup>

During the trial, Vallandigham challenged the jurisdiction of the military commission and asserted that he was entitled to a “speedy and public trial by an impartial jury” and other rights guaranteed by the Sixth Amendment.<sup>150</sup> The commission rejected this challenge to its jurisdiction, and on May 16, 1863, found Vallandigham guilty and “sentenced [him] to close confinement for the duration of the war.”<sup>151</sup> On May 19, 1863, President Lincoln commuted the sentence of confinement and instead banished Vallandigham “beyond our military lines.”<sup>152</sup> On February 15, 1864, the Supreme Court dismissed Vallandigham’s petition to review the military-commission proceedings on technical grounds, stating that “[w]hatever may be the force of Vallandigham’s protest, . . . he was not triable by a court of military commission.”<sup>153</sup>

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VALLANDIGHAM & THE CIVIL WAR 165–66 (1970) (describing the opening day of trial).

149. VALLANDIGHAM, *supra* note 144, at 11. He declared the war “a wicked, cruel, and unnecessary war . . . a war for the purpose of crushing out liberty and erecting a despotism, . . . a war for the freedom of the blacks and the enslavement of the whites.” Curtis, *supra* note 143, at 121–22. Referring to Order 38, he also urged people not to “submit to such restrictions upon their liberties.” *Id.* at 122.

150. Curtis, *supra* note 143, at 124–25.

151. *Id.* at 131.

152. VALLANDIGHAM, *supra* note 144, at 34. See also Curtis, *supra* note 143, at 131 (“President Lincoln changed Vallandigham’s punishment to banishment to the Confederacy and ordered that Vallandigham be put ‘beyond our military lines.’”). “Massive protests” followed Vallandigham’s arrest on May 5, 1863; “[e]ven many Republicans were critical.” *Id.* Notwithstanding the firestorm, in early June 1863, “Burnside issued Order No. 84 suppressing publication of the *Chicago Times* newspaper.” *Id.* at 132. Following the Emancipation Proclamation, the editor had denounced the war as a “John Brown raid on an extended scale.” *Id.* The newspaper had also opposed Vallandigham’s arrest. *Id.* A federal district court issued a restraining order forbidding the suppression, but Burnside disregarded the court order and sent soldiers to “enter the *Times*’ office, and destroy[] recently printed papers.” *Id.* at 132–33. More protests followed, and U.S. Supreme Court Justice David Davis sent an urgent telegram to President Lincoln urging revocation of the order. Craig D. Tenney, *To Suppress or Not to Suppress: Abraham Lincoln and the Chicago Times*, 27 CIV. WAR HIST. 248, 255 (1981). Lincoln responded by revoking the order, allowing the *Chicago Times* to resume publication. *The Revocation*, CHI. TRIB., June 5, 1863, at 1.

153. *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 251 (1864). The bizarre ruling of the district court denying Vallandigham’s petition for writ of habeas corpus was never appealed. See *Ex parte* Vallandigham, 28 F. Cas. 874, 924 (C.C.S.D. Ohio 1863) (No. 16,816) (ruling that the court “had neither the time nor strength for a more elaborate consideration of the questions involved” and adding that it was “somewhat reluctant to authorize a process, knowing it would not be respected, and that the court is powerless to enforce obedience”); Curtis, *supra* note 143, at 136 n.170 (noting that Vallandigham “might have fared better” if he had “sought review from denial of his habeas petition” in the district court). Instead, Vallandigham made a direct appeal to the Supreme Court from the military commission verdict. *Vallandigham*, 68 U.S. at 243. The Court held that it did not have jurisdiction to

In his diary, Gideon Welles, Lincoln's Secretary of the Navy, described the assertion of military power over Vallandigham as "arbitrary and injudicious" and wrote that "the constitutional rights of the parties injured are undoubtedly infringed upon."<sup>154</sup>

## 2. The Lincoln Assassination Conspiracy Trial

On May 1, 1865, following the death of John Wilkes Booth and the capture of the other conspirators, President Andrew Johnson resolved to try the eight civilians charged in the plot by military commission.<sup>155</sup> Secretary of the Navy Welles believed the accused should be tried by the civilian courts in Washington, DC, and former Attorney General Edward Bates quite correctly considered that a military trial was unconstitutional.<sup>156</sup> Bates believed the accused were civilians with no ties to any military effort by the Confederate government, a view supported by many historians.<sup>157</sup> Nevertheless, at the insistence of Secretary of War Stanton and Judge Advocate General Holt, Attorney General Speed endorsed the use of a military commission on the theory that Washington, D.C. was a war zone, threatened with imminent invasion, and under martial law.<sup>158</sup> In any event, Speed believed that a civilian trial was impossible for law of war offenses that were not at that time crimes under the domestic criminal code.<sup>159</sup>

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review the case on a writ of certiorari, and the denial of the application for a writ of habeas corpus had not been properly appealed to the Court of Appeals. *Id.* at 251–52.

154. GIDEON WELLES, *THE DIARY OF GIDEON WELLES* 321 (Howard K. Beale ed., W.W. Norton & Co. 1960) (1911).

155. Belknap, *Putrid Pedigree*, *supra* note 50, at 463. Two of those charged, Michael O'Laughlin and Samuel Arnold, had returned to their homes in Baltimore by the time Booth decided to murder, rather than kidnap, Lincoln. *Id.* Edman Spangler was a stagehand at Ford's Theater who briefly held Booth's horse outside the theater. *Id.* Dr. Samuel Mudd knew of the kidnapping plot, but not of the murder plot, and set Booth's broken leg while Booth was a fugitive. *Id.*; *see also* EDWARD STEERS, JR., *BLOOD ON THE MOON: THE ASSASSINATION OF ABRAHAM LINCOLN* 83, 84–88, 110, 112, 113–14, 137–39, 144–45 (2001) (recounting the exploits of Booth and others charged in the plot to murder Lincoln).

156. Belknap, *Putrid Pedigree*, *supra* note 50, at 463–64 (citing STEERS, *supra* note 155, at 212).

157. STEERS, *supra* note 155, at 213.

158. Belknap, *Putrid Pedigree*, *supra* note 50, at 463–64.

159. STEERS, *supra* note 155, at 213; *see also* Belknap, *Putrid Pedigree*, *supra* note 50, at 464 (describing Speed's opposition to civilian trials, such that "not only could" the offenses in question "be tried by a military commission, but must be"). Although Steers agrees with Speed, Speed's argument is not persuasive. STEERS, *supra* note 155, at 213. There was no conduct by any of the conspirators in connection with the assassination that would not have been a violation of the civilian criminal code. The executive branch cannot defeat the right of trial by jury and impose military jurisdiction on civilians merely by characterizing conduct that constitutes a civilian crime as a violation of the international common law of war. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121–22 (1866) (holding that "the laws and usages of war . . . can never be applied to citizens in states which have upheld the authority of the

During the trial, the commission rejected the claims of several of the defendants that the Constitution assured them a trial by jury,<sup>160</sup> and this decision was not appealable to the civilian courts.<sup>161</sup> The commission trial itself, untethered from the procedures established for civilian courts or even for courts-martial, was marred by the misconduct of government officials and the false testimony of government witnesses.<sup>162</sup> The misconduct included the government refusing to disclose Booth's diary, which by depicting the plot as a kidnapping, not a murder, would have seriously weakened the case for murder against several of the defendants.<sup>163</sup>

The case of Dr. Samuel Mudd,<sup>164</sup> one of the defendants convicted by the Hunter Commission and sentenced to prison, has a life of its own and underscores the military's lack of jurisdiction in the Lincoln conspiracy trial.<sup>165</sup> In 1990, Mudd's grandson, Dr. Richard Mudd, filed an appeal with the Army Board for Correction of Military Records (ABCMR) claiming the record should be corrected to show the illegality of the military tribunal that tried him.<sup>166</sup> The ABCMR found the "interest[s] of justice" necessitated an exception to the three-year statute of limitations and, in a recommendation to the Secretary of the Army, found that Samuel Mudd's trial by a military commission violated his right to trial by jury under the authority of *Ex parte*

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government, and where the courts are open and their process unobstructed") (quotations omitted); see also *infra* Part IV.D. In any event, Speed's argument would surely fail today, where the federal civilian criminal code comprehensively and specifically covers the offenses of terrorism, sabotage, spying, hostage taking, and murder of the President. See, e.g., 18 U.S.C. § 1203 (2000) (hostage taking); § 1201 (aircraft sabotage and kidnapping act); § 831 (theft of nuclear materials); § 2441 (war crimes); § 2331 (terrorism). See also discussion *infra* Part IV.D.

160. See Chomsky, *supra* note 117, at 67–68 n.342 (describing the defendants' arguments).

161. STEERS, *supra* note 155, at 213; Belknap, *Putrid Pedigree*, *supra* note 50, at 464.

162. See STEERS, *supra* note 155, at 224–25 (describing investigations into the veracity of the witnesses' testimony, and concluding that "all three witnesses appeared to have lied"); Belknap, *Putrid Pedigree*, *supra* note 50, at 465 (stating that the military officers serving on the commission had no previous experience as judges or attorneys, and that all of the witnesses the government called perjured themselves). One of the witnesses, Sanford Conover, was later convicted of perjury and sentenced to ten years. See GUY M. MOORE, *THE CASE OF MRS. SURRETT: HER CONTROVERSIAL TRIAL AND EXECUTION FOR CONSPIRACY IN THE LINCOLN ASSASSINATION* 32–33 (1954) (describing Conover's testimony as "a tissue of lies").

163. See WILLIAM HANCHETT, *THE LINCOLN MURDER CONSPIRACIES* 85 (1983) (arguing that the reputations of Stanton, Holt, and Special Judge Advocate Bingham were permanently damaged once the public became aware that Booth's diary showed the plot was to kidnap the President and that Booth decided to kill only at the last moment).

164. *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9899).

165. Mudd's appeal was pending in the U.S. Supreme Court when he was pardoned. The pardon proclamation cast doubt on the degree of Mudd's guilt and cited Mudd's work in prison during a yellow fever epidemic. Eric Longley, *The Military Records of Dr. Samuel Mudd*, *ECLECTICA MAG.*, Apr./May 2001, <http://www.eclectica.org/v5n2/longley.html>.

166. *Id.*

*Milligan*.<sup>167</sup>

### 3. Milligan's Trial by Military Commission

In 1864, Lamdin P. Milligan, a civilian and citizen of Indiana, was tried by military commission. An anti-war Democrat, Milligan, like Vallandigham, was pro-South and opposed the policies of the Lincoln administration.<sup>168</sup> Milligan belonged to an organization of pro-Southern sympathizers known as the "Sons of Liberty."<sup>169</sup> On October 5, 1864, Milligan was arrested at his home by a military posse under the direction of Major General Hovey, military commandant of the District of Indiana.<sup>170</sup>

Milligan was held in a military prison until October 21, 1864, when he was placed on trial before a military commission at Indianapolis.<sup>171</sup> He was charged with: "(1) Conspiracy against the Government of the United States; (2) Affording aid and comfort to rebels against the authority of the United States; (3) Inciting insurrection; (4) Disloyal practices; and (5) Violation of the laws of war."<sup>172</sup> It was alleged that Milligan committed

167. *Id.* However, the ABCMR unnecessarily decided the constitutional point, because, in any event, Mudd's military commission trial was clearly a violation of the Habeas Corpus Suspension Act of 1863. *Id.* That Act, which also supported the rule in *Milligan*, required that a prisoner be released upon showing he (1) was a citizen of a non-Confederate state; (2) was not a prisoner of war; and (3) had not been indicted by a grand jury after it met. Habeas Corpus Suspension Act of Mar. 3, 1863, § 2, 14 Stat. 755, 755 (1863). As the Chief Justice stated in his concurring opinion in *Milligan*, the provisions of the 1863 Act "obviously contemplate no other trial or sentence than that of a civil court." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 136 (1866) (Chase, C.J., concurring). See discussion *supra* Part III.A.

On February 2, 1996, the Secretary of the Army rejected these recommendations of the ABCMR. Longley, *supra* note 165. Without commenting on the underlying issue, the Secretary offered that:

the appropriate time to make that challenge [to the Hunter Commission's jurisdiction] was 130 years ago within the confines of our judicial system. This was attempted by Dr. Mudd and he lost. His appeal of Judge Boynton's decision to the U.S. Supreme Court was not heard because of [Dr. Mudd's] pardon. At that time he decided not to judicially challenge the jurisdiction again. For the sake of the law and history, his descendants must live with the ramifications of his decision.

*Id.* Dr. Richard Mudd's subsequent legal challenge to the Army's decision was eventually rejected by the D.C. Circuit Court of Appeals, which held that because Dr. Samuel Mudd "was not a 'member or former member of the armed forces,'" the petition should be dismissed as "not within the 'zone of interests' protected or regulated by the statute" providing for correction of military records. *Mudd v. White*, 309 F.3d 819, 824 (D.C. Cir. 2002) (quoting 10 U.S.C. § 1552(g) (2000)).

168. See Belknap, *Putrid Pedigree*, *supra* note 50, at 457 n.167 (stating that Milligan believed the Lincoln Administration was a danger to civil liberties, and at one point said that Lincoln should be impeached if he continued to engage in arbitrary arrests) (internal citations omitted).

169. Belknap, *Putrid Pedigree*, *supra* note 50, at 457.

170. *Id.* at 458.

171. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 107 (1866).

172. *Id.* at 6.

these violations by his membership in the Sons of Liberty with the purpose of overthrowing the government of the United States.<sup>173</sup> In particular, Milligan was charged with conspiring to seize munitions of war stored in the arsenals, to liberate prisoners of war, and to persuade men to resist the draft during wartime.<sup>174</sup> It was also alleged that these conspiratorial acts occurred within Indiana, which was in the theater of military operations and which had been constantly under the threat of invasion by the enemy.<sup>175</sup>

The military-commission trial ended with convictions of Milligan and his co-defendants, and the commission promptly sentenced Milligan (and all co-defendants but one) to death.<sup>176</sup> Milligan's petition for a writ of habeas corpus was eventually heard by the U.S. Supreme Court in 1866. In its landmark ruling, *Ex parte Milligan*, the Court held that the military commission had no jurisdiction to try Milligan because: (1) Milligan was a civilian living in a place that was not a "theatre of active military operations, where war really prevails" even though it was threatened with invasion;<sup>177</sup> and (2) that except for members of the armed services or militia, all citizens of states where "the courts are open, and in the proper and unobstructed exercise of their jurisdiction," if charged with a crime are "guaranteed the inestimable privilege of trial by jury" which, in turn, constitutionally limits the power of the political branches to impose martial law.<sup>178</sup> The Court was emphatic that "no usage of war could sanction a military trial [in a state where the courts were open] for any offence whatever of a citizen in civil life, in nowise connected with the military service. *Congress could grant no such power . . .*"<sup>179</sup> The Court made special mention of Congress's power under the Suspension Clause to temporarily suspend the writ of habeas corpus in a great crisis but noted that this power is limited to releasing the government from its obligation of producing a person arrested in answer to a writ: "The Constitution goes no further. It does not say after a writ of *habeas corpus* is denied a citizen, that

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173. *Id.*

174. *Id.* at 6–7.

175. *Id.* at 140.

176. *See* Belknap, *Putrid Pedigree*, *supra* note 50, at 459 (recounting that those convicted with Milligan were Stephen Horsey, Andrew Humphrey, and Dr. Samuel Bowles). Evidently, Humphrey was the only one spared the death penalty. *Id.* at 459 n.181.

177. *Milligan*, 71 U.S. at 127.

178. *Id.* at 123, 127.

179. *Id.* at 121–22 (emphasis added). Although the Court made clear that the constitutional boundary could not be lowered by the law of war, the Court nonetheless noted that the law of war supported its conclusion that Milligan was not subject to military jurisdiction. *See id.* at 131 (holding that Milligan, who was "a citizen of Indiana, not in the military or naval service," was not subject to military jurisdiction).

he shall be tried otherwise than by the course of the common law . . . .”<sup>180</sup>  
 The *Milligan* Court saw the Constitution as reflecting the “lessons of history . . . that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong.”<sup>181</sup>

Underlying the *Milligan* opinion was the premise that the right of trial by jury “is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service.”<sup>182</sup> Given the fundamental and inalienable nature of the jury trial right, it follows that a wartime declaration of martial rule that subjects civilians to military tribunals is constitutionally permissible only if “in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law.”<sup>183</sup> Under the *Milligan* principle, if the civilian courts are closed “on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for civil authority, thus overthrown, to preserve the safety of the army and society; and . . . no power is left but the military . . . .”<sup>184</sup>

The *Milligan* Court thus limited the use of military commissions in cases of civilian citizens to circumstances not unlike those prevailing when

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180. *Id.* at 126. The Court stressed that the safeguards of the Constitution cannot be disturbed by the President, Congress, or the Judiciary, “except the one concerning the writ of *habeas corpus*.” *Id.* at 125.

181. *Id.* at 126.

182. *Id.* at 123.

183. *Id.* at 127.

184. *Id.* The constitutional differences between the four concurring Justices and the majority on this point are narrower than some commentators have suggested. See, e.g., Katyal & Tribe, *supra* note 35, at 1279 (“The Court’s broad statement that ‘it was not in the power of Congress to authorize’ military tribunals in places where civilian law was functioning, was, of course, dictum on the facts of *Milligan*, and it prompted sharp disagreement by four Justices . . . .”) (quoting *Milligan*, 71 U.S. at 136 (Chase, C.J., concurring)); WINTHROP, *supra* note 121, at 818 (“[T]he dictum of the majority was influenced by a confusing of martial law proper with that *military government* which exists only at a time and on the theatre of war, and which was clearly distinguished from martial law by the Chief Justice, in the dissenting opinion . . . .”). To the contrary, the concurring opinion does not support an unchecked congressional power to create military commissions for American citizens who are not members of the armed forces. Instead, the concurring opinion makes clear that any congressional authority to use military trials would be constitutionally confined to (1) the existence of a war; and (2) a locality that had been invaded or is imminently threatened with invasion. *Milligan*, 71 U.S. at 140 (Chase, C.J., concurring). In any event, even such a geographically-limited extension of Congress’s power to authorize military trials in wartime, as urged by the minority in *Milligan*, was later rejected by the Supreme Court in *Duncan v. Kahanamoku*, where the Court stated: “We note first that at the time the alleged offenses were committed the dangers apprehended by the military were not sufficiently imminent to cause them to require civilians to evacuate the area or even to evacuate any of the buildings necessary to carry on the business of the courts.” *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946). In other words, if the hostilities do not close the courts, military trials are impermissible even in an area that has been invaded and is under threat of re-invasion in time of war.

the military occupies enemy territory and must govern the territory because the civilian authorities are no longer operational.<sup>185</sup> The narrow exception to the right to trial by jury that emerges from the *Milligan* case is based on the necessity of providing some institutional mechanism to determine the guilt or innocence of detainees charged with criminal offenses in the absence of a functioning civilian court system. The *Milligan* Court rejected the proposition that the existence of a state of war, in and of itself, entrusts the political branches with the constitutional authority to subject civilian citizens to military commissions on a claim of military necessity when the civilian courts are open and can try the defendant for his alleged crimes according to the common law.<sup>186</sup> In fact, as noted above, the same constitutional principle was recognized by the Civil War Congress when it passed the Suspension Act of 1863, which suspended the writ but limited the military to grand jury indictments and jury trials in civilian courts for those citizens seized and detained under emergency orders.<sup>187</sup>

Based on these constitutional principles, as well as the language of the Suspension Act of 1863, the Court in *Milligan* unanimously agreed that the writ should be granted and ordered Milligan's release. Following his release Milligan brought a civil suit against the members of the military commission and the commander who ordered his arrest. Ironically, a civilian court jury subsequently found the military defendants liable to Milligan for false imprisonment.<sup>188</sup>

#### 4. Reconstruction

The use of military commissions to try civilians in the southern states during Reconstruction was, for the most part, consistent with the common law tradition of permitting the use of such commissions in the occupied land of a conquered sovereign.<sup>189</sup> Following the "military government"

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185. *Milligan*, 71 U.S. at 121, 127 (majority opinion).

186. *Id.* at 122.

187. Habeas Corpus Act of March 3, 1863, ch. 81, 12 Stat. 755 (1863). See also discussion *supra* Part III.A. The Court was unanimous that Milligan's trial before a military commission violated the Suspension Act and that he was entitled to be released from custody. As the Chief Justice said in his concurring opinion: "Indeed, the act seems to have been framed on purpose to secure the trial of all offences of citizens by civil tribunals, in states where these tribunals were not interrupted in the regular exercise of their functions." *Milligan*, 71 U.S. at 136 (Chase, C.J., concurring).

188. *Milligan v. Hovey*, 17 F. Cas. 380, 380-83 (C.C.D. Ind. 1871) (No. 9605).

189. The President, as Commander in Chief, has the constitutional authority during time of war to "establish[] courts in conquered territor[ies]." *Mechs.' & Traders' Bank v. Union Bank*, 89 U.S. (22 Wall.) 276, 297 (1874). For example, Captain Henry Wirz, commandant of the Confederacy's POW camp at Andersonville, Georgia, was tried by a military commission for murdering thirteen prisoners and for being responsible for conditions that led to the deaths of some 13,000. Belknap, *Putrid Pedigree*, *supra* note 50, at 449 n.100. The military-commission trial of Wirz was constitutionally

model, these commissions were the mere extension of the rule of the military commander following conquest.<sup>190</sup>

The first of the Reconstruction Acts, enacted on March 2, 1867, specifically authorized a commanding officer to use military commissions in the rebel states if the commander considered it necessary.<sup>191</sup> This authorization was based on the express finding that “no legal State governments or adequate protection for life or property now exists in the rebel states,” and that this authorization would become inoperative when the “people of said rebel States shall be by law admitted to representation in the Congress” following the Congress’s approval of a new state constitution.<sup>192</sup>

Aware of its constitutional limitations, Congress was careful to limit the use of military commissions under Reconstruction legislation to offenses committed after its passage and to depriving military commissions of jurisdiction once the state was readmitted to representation in Congress.<sup>193</sup> In addition, the President and Union commanders generally confined the actual use of military commissions under these Acts to areas “where civil courts were not functioning or were perceived by commanders as not administering justice impartially.”<sup>194</sup> Nonetheless, the law of war

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appropriate because Wirz was (1) a member of the enemy’s army and (2) was tried in occupied enemy territory (Georgia) before the rebellion officially ended on April 2, 1866. *See id.* at 468 n.258 (observing that at the time of Wirz’s trial by military commission, President Johnson had not yet declared an end to hostilities in the confederate South).

190. *See* *Santiago v. Nogueras*, 214 U.S. 260, 265 (1909) (ruling that the authority to govern ceded territory is “found in the laws applicable to conquest and cession”).

191. The Act of March 2, 1867, § 3, provided that “when in [the assigned officer’s] judgment it may be necessary for the trial of offenders, he shall have the power to organize military commissions or tribunals for that purpose.” Act of Mar. 2, 1867, § 3, 14 Stat. 428, 428 (1867). Notwithstanding this categorical language, many courts felt constitutionally obligated after *Ex parte Milligan* to strictly construe when and where those Acts applied, rejecting the jurisdiction of military tribunals over alleged offenses committed after the hostilities had ceased in areas with functioning civilian courts. *In re* *Murphy*, 17 F. Cas. 1030, 103132 (C.C.D. Mo. 1867) (No. 9,947); *In re* *Egan*, 8 F. Cas. 367, 368 (C.C.N.D.N.Y. 1866) (No. 4,303); *United States v. Commandant of Fort Delaware*, 25 F. Cas. 590, 590–91 (D. Del. 1866) (No.14,842). In line with these cases, Attorney General Stanbery issued an opinion strictly construing this Act with respect to military authority over civilians and opined that even in the rebel states, military jurisdiction did not extend to the exercise of civil government and was not to interfere with the course of civilian justice except in cases of extreme emergency. 12 Op. Att’y Gen. 182, 184–86 (1867). In response to the limitations imposed by the narrow reading of these Acts, on July 19, Congress enacted a supplementary statute that explicitly gave district commanders the full power and discretion to remove and appoint civilian officers in the rebel states and mandated that these states were to be “subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress.” Supplementary Act of July 19, 1867, §§ 1–2, 15 Stat. 14, 14 (1867).

192. Act of March 2, 1867, §§ 1, 6, 14 Stat. 428, 429 (1867).

193. WINTHROP, *supra* note 121, at 854.

194. Jody Prescott & Joanne Eldridge, *Military Commissions, Past, Present and Future*, MIL. REV., Mar./Apr. 2003, at 42, 44, *available at*

and conquest, reflected in the Reconstruction Acts, permitted Union military commanders to replace functioning civilian courts in rebel states with military courts at their discretion,<sup>195</sup> and on occasion military trials were used despite functioning civilian courts. In upholding the constitutionality of these Reconstruction Acts, the Texas Supreme Court stated in *Daniel v. Hutcheson*:

The power of the United States Government to impose such a rule upon the state must be recognized as fully, under the facts existing, as though Texas had theretofore been an independent sovereignty, having no relation to the United States than that usually sustained by one independent nation to another.<sup>196</sup>

Once the southern states were readmitted to the Union and could no longer be treated as enemy territory, Congress was careful not to attempt to assert military jurisdiction or military rule even in the face of organized opposition to the enforcement of the civil rights laws. As one example, the Civil Rights Act of 1871 authorized the President to use the militia and armed forces of the United States if necessary to suppress insurrections, but instructed the President to deliver up those arrested to the “marshal of the proper district, to be dealt with according to law.”<sup>197</sup>

#### A. Military Commissions from 1870 Through 1940

Following the end of Reconstruction in 1870, the constitutional tradition represented by the *Milligan* principle was widely accepted, and civilians apprehended in the United States were tried in civilian courts even

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<http://usacac.leavenworth.army.mil/CAC/milrev/download/English/MarApr03/Prescott.pdf>.

195. See *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132–33 (1869) (referencing the establishment of provisional governments in occupied territories). In *United States v. Reiter*, the court held that Louisiana was to be treated as enemy territory occupied by a foreign army, and by laws of conquest (i.e., “the law of nations”) the civilian courts could be replaced by a “provisional” (military) court as an act of the conqueror to govern the occupied territory. *United States v. Reiter*, 27 F. Cas. 768, 769 (Provisional Ct. La. 1865) (No. 16,146).

196. *Daniel v. Hutcheson*, 22 S.W. 933, 936 (Tex. 1893). See *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) (refusing to enjoin President Johnson’s enforcement of the Acts on a finding that the Court lacked “jurisdiction of a bill to enjoin the President in the performance of his official duties”); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1867) (declining to answer whether the Reconstruction Acts unconstitutionally infringed Georgia’s sovereignty after a determination that the question was political and therefore outside the Court’s jurisdiction). In *Gates v. Johnson County*, the Texas Supreme Court recognized the “binding force” of the Reconstruction Acts and observed that the orders issued by the military commander “had the force and validity of law.” 36 Tex. 144, 145–46 (1871).

197. Civil Rights Act of 1871, § 3, 17 Stat. 13, 14 (1871). The Civil Rights Act was the origin of 42 U.S.C. § 1983 (2000) and 42 U.S.C. § 1985(3) (2000).

when circumstances justified the use of military forces to keep order. For example, in 1892, at the Coeur d'Alene mines of Shoshone County, Idaho, the President ordered members of the armed forces to support the civilian authorities in responding to labor riots.<sup>198</sup> Even though troops were ordered to temporarily detain citizens without trial, military authorities did not attempt to interfere with the jurisdiction of the civilian courts, nor did they resort to the use of military tribunals to try and punish civilians charged with offenses related to the rioting.<sup>199</sup>

Much like the earlier Coeur d'Alene incident, military troops were used by state governors on a number of occasions in the early 1900s to suppress civil disorders in connection with labor strife and civil unrest. In most instances, martial law was declared by the governor and military troops were given the authority to arrest and detain civilians in aid of local law enforcement, but not to try and punish those apprehended.<sup>200</sup> Exceptions occurred in West Virginia in 1913, and in Nebraska in 1922, where several civilians were tried and convicted before military commissions during periods of declared martial law. When the jurisdiction of the military commissions was challenged, district court judges refused to review the

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198. *Duncan v. Kahanamoku*, 327 U.S. 304, 321 (1946).

199. This constitutional tradition was acknowledged by the Supreme Court in *Duncan*, 327 U.S. at 321–22. The use of military troops to quell civil disorders has generally been viewed both by the President and Congress as limited to aiding, not replacing, civilian authorities, with persons taken into custody by military authorities being turned over to the civilian courts for trial and punishment. *See* 10 U.S.C. § 332 (2000) (authorizing the President to utilize armed forces to quell domestic insurrections); *see also* Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 25, 1957) (calling upon the National Guard to enforce the racial integration orders of the U.S. District Court for the Eastern District of Arkansas); Exec. Order No. 11,053, 27 Fed. Reg. 9693 (Oct. 2, 1962) (same, Southern District of Mississippi); Exec. Order No. 11,111, 28 Fed. Reg. 5709 (June 12, 1963) (same, Northern District of Alabama); Exec. Order No. 11,118, 28 Fed. Reg. 9863 (Sept. 11, 1963) (same, regarding “any orders” issued by a U.S. District Court in Alabama). Restricting the use of military troops to aid in the enforcement of the law by civilian authorities and forbidding the use of military power to supplant civil authority have not only a long constitutional history, but a statutory tradition as well. *See, e.g.*, Habeas Corpus Act of Mar. 3, 1863, § 2, 14 Stat. 755, 755 (1863) (requiring military commanders to present lists of prisoners to civilian courts for review by grand jury); Posse Comitatus Act, 18 U.S.C. § 1385 (2000) (prohibiting use of military troops in civil enforcement except as authorized by congressional act or the Constitution). *See generally* The University of Colorado Law Revision Center, *A Comprehensive Study of the Use of Military Troops in Civil Disorders with Proposals for Legislative Reform*, 43 U. COLO. L. REV. 399, 402 (1971) (discussing the use of military force during civil disorders and offering statutory reforms).

200. The United States Supreme Court ruled in *Moyer v. Peabody* that the temporary arrest and detention of civilians by military forces upon a state governor’s declaration of martial law in response to a civil disorder did not violate rights guaranteed by the Fourteenth Amendment. *Moyer v. Peabody*, 212 U.S. 78, 85–86 (1909). The *Moyer* opinion was based on the premise that the governor’s declaration that a state of martial law existed was conclusive of the fact and not reviewable by the courts. *Id.* at 84–85. This dubious proposition was overruled in *Sterling v. Constantin*, 287 U.S. 378, 401 (1932). *See infra* Part IV.C. In any event, the Supreme Court in *Moyer* found it acceptable that the plaintiff, who was ordered arrested and detained as the leader of the outbreak, was discharged to the civilian authorities to be dealt with according to law once the unrest had subsided. *Moyer*, 212 U.S. at 84–85.

constitutionality of these military trials on the theory that a governor's martial law declaration was conclusive of the fact and not reviewable by the courts.<sup>201</sup> The reasoning of these anomalous district court opinions was flatly rejected by the Supreme Court a decade later in *Sterling v. Constantin*:

What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. . . . The assertion that such action [overriding the orders of the civilian courts with executive military commands] can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law has no support in the decisions of this Court.<sup>202</sup>

The *Sterling* Court rejected the argument that all actions taken pursuant to a declaration of martial law were immune from judicial review, refusing to defer to the governor's martial law declaration when the issue was whether the *Milligan* open-courts principle had been violated. The *Sterling* Court quoted *Milligan* to the effect that “[c]ivil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.”<sup>203</sup> In the end, the *Sterling* Court recognized the Governor's power to declare a state of insurrection and to bring military force to aid civilian authorities, but limited the Governor's use of that power to maintaining “the federal court in the exercise of its jurisdiction and not to attempt to override it.”<sup>204</sup>

Trying civilians accused of provoking a crisis before juries in civilian courts was the common practice not only in the context of domestic civil disorders, but also during World War I. *Milligan's* constitutional ban on the use of military tribunals to replace civilian jury trials was honored despite the cries of some who wanted to court-martial “enemy sympathizers”<sup>205</sup> and others who wanted to remove all sedition cases from

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201. United States *ex rel.* Seymour v. Fischer, 280 F. 208, 210 (D. Neb. 1922); *Ex parte* Jones, 77 S.E. 1029, 1033 (W. Va. 1913); State *ex rel.* Mays v. Brown, 77 S.E. 243, 244 (W. Va. 1912).

202. *Sterling*, 287 U.S. at 401–02. In later cases the Supreme Court has reaffirmed that *Sterling* “knocked out the prop” on which *Jones*, *Mays*, and *Fischer* were based. Duncan, 327 U.S. at 321, n.18 (quoting *Sterling*, 287 U.S. at 401); *accord* Scheuer v. Rhodes, 416 U.S. 232, 250 (1974) (concluding that the Executive's declaration of emergency is not conclusive).

203. *Sterling*, 287 U.S. at 403 (quoting *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 124–25 (1866)).

204. *Id.* at 404.

205. See, e.g., Henry A. Forster, *Are Native-American Enemy Sympathizers Subject to Court-Martial?*, 85 CENT. L. J. 132, 132–34 (1917) (“[I]t may not be possible to win the war without court-martialling [sic] all enemy spies and some enemy sympathizers.”).

the civilian courts to military courts.<sup>206</sup> Attorney General Gregory and President Woodrow Wilson opposed legislation to authorize such trials (the “court-martial bill”) as constitutionally invalid.<sup>207</sup> Gregory put the matter in simple and straightforward terms: “[I]n this country, military tribunals, whether courts-martial or military commissions, can not constitutionally be granted jurisdiction to try persons charged with acts or offences committed outside the field of military operations.”<sup>208</sup>

### C. Military Commissions in World War II

Military commissions, sitting as military tribunals unrestricted by the rules and procedures established by Congress for court-martial proceedings in the Articles of War, were used throughout enemy territory during World War II, both on the battlefield and during occupation.<sup>209</sup> As in the Civil War and during Reconstruction, these “war courts” were generally used by military commanders on the battlefield to try battlefield captives and clearly fell outside the reach of constitutional jury trial guarantees extended to civilians.<sup>210</sup> In the rare instances when individuals apprehended outside enemy territory were tried by military commissions, the results were either

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206. See H.C. PETERSON & GILBERT C. FITE, *OPPONENTS OF WAR, 1917-1918* 216 (1957) (referring to “extreme nationalists” who “became highly enthusiastic in trying to take sedition cases out of the civil courts”).

207. See DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* 80 (1980) (describing the bill as “constitutionally dubious”). Indeed, President Wilson went so far as to commute the death sentence imposed by a military commission on an alien enemy spy who was caught trying sneak into the United States from Mexico. Belknap, *Putrid Pedigree*, *supra* note 50, at 470. The spy was tried and sentenced by a military commission. *Id.* Like the German saboteurs who were tried by a military commission during World War II, see discussion *infra* Part III.C.1, the spy was a German soldier wearing civilian clothes when captured. *Id.* Evidently, Attorney General Gregory advised President Wilson that the spy should have been tried by a civilian court, and the President commuted his death sentence. *Id.* at 470–71. See also Andrew Curry, *Liberty and Justice: Military Tribunals in America: A Controversial Tool with a Storied Past*, U.S. NEWS & WORLD REP., Dec. 10, 2001, at 52, 53 (asserting that an opinion from Gregory persuaded President Wilson to commute the death sentence).

208. 31 Op. Att’y Gen. 356, 361 (1918). Of course, the “field of military operations” extended both to the battlefield and to occupied enemy territory following conquest (the military government model). For example, military commissions had jurisdiction to try cases in Cuba during occupation following the Spanish-American War. Prescott & Eldridge, *supra* note 194, at 45. Use of military commissions as part of a military government in occupied enemy territory following conquest occurred in Puerto Rico until 1900, and in the Philippines until 1902, when provisional governments in those countries were replaced by civilian governments. See *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 145–47 (1913) (Puerto Rico); *Santiago v. Nogueras*, 214 U.S. 260, 265 (1909) (same); *Kepner v. United States*, 195 U.S. 100 (1904) (Philippines).

209. Prescott & Eldridge, *supra* note 194, at 45–46.

210. See *The Grapeshot*, 76 U.S. (9 Wall.) 129, 133 (1869) (expressing “no doubt that the Provisional Court of Louisiana was properly established”); *Mechs.’ & Traders’ Bank v. Union Bank*, 89 U.S. (22 Wall.) 276, 297 (1874) (affirming that General Butler did have the right “to appoint a judge to try civil cases, notwithstanding the provisions of the Constitution”).

the unconstitutional denials of jury trial rights to civilians or, in the case of enemy combatants, proceedings marred by an obvious lack of fundamental fairness.

### 1. The Case of the German Saboteurs

In June, 1942, eight members of the German army secretly landed by submarine off the U.S. Atlantic Coast with orders to sabotage American railroads, bridges, factories, and other strategic targets.<sup>211</sup> Due to a conspicuous trail of identifying information deliberately left for U.S. authorities by one of the saboteurs, Ernest Burger, the Coast Guard immediately found boxes on the beach containing explosive devices, detonators, and fuses.<sup>212</sup> In addition, another one of the saboteurs, George Dasch, traveled to Washington, D.C. and confessed the entire scheme to the FBI.<sup>213</sup> Using the information handed to them by Burger and Dasch, the FBI quickly and easily apprehended all eight saboteurs.<sup>214</sup>

On July 3, 1942, President Roosevelt issued an order appointing a seven-man military commission to try the saboteurs,<sup>215</sup> and on the same day issued Proclamation 2561 declaring:

[A]ll 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 . . . through coastal or boundary defenses, 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>216</sup>

On July 2, 1942, the eight saboteurs were charged with (1) violating the law of war; (2) violating Article 81 of the 1920 Articles of War (aiding the enemy); (3) violating Article 82 of the 1920 Articles of War (acting as a spy); and (4) conspiracy to commit the offenses alleged in charges 1, 2, and 3.<sup>217</sup>

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211. LOUIS FISHER, NAZI SABOTEURS ON TRIAL 1, 25–26 (1st ed. 2003).

212. *Id.* at 28–32.

213. *Id.* at 32–34.

214. *Id.* at 38–40.

215. Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 2, 1942).

216. Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942); *see also Ex parte Quirin*, 317 U.S. 1, 22–23 (1942) (citing Proclamation No. 2561).

217. *Ex parte Quirin*, 317 U.S. 1, 23 (1942). In 1920 Congress adopted new Articles of War to replace the Code of 1806. Articles of War of 1920, ch. 227, sec. 52, 41 Stat. 759, 787 (1920) (repealed).

The military-commission trial of the eight saboteurs commenced on July 8, 1942.<sup>218</sup> Before the commission was sworn in, defense counsel objected on grounds that the commission was “unconstitutional and invalid” by virtue of *Ex parte Milligan* and the 1920 Articles of War.<sup>219</sup> For the

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1950). The 1920 Articles of War remained in effect through the end of World War II before being replaced by the Uniform Code of Military Justice in 1950. *See* Uniform Code of Military Justice Act of 1950, ch. 169, 64 Stat. 107, 107–08 (1950) (establishing the Uniform Code of Military Justice in order to “unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard”) (codified as amended at 10 U.S.C. §§ 801–947 (2000)). By 1920, as discussed previously in this Article, law-of-war military commissions had been used, with the acquiescence of Congress and the constitutional approval of the Supreme Court, most often in occupied enemy territory or in the theater of war during the Mexican War, the Civil War, and the Spanish-American War. *See supra* Part III.A. With respect to civilians, Congress clearly had “occupied enemy territory” and “theater of war” limitations in mind when it provided in Article 15 that the Articles of War did not deprive military commissions of jurisdiction to try offenses against the law of war. *See* Art. 15, 41 Stat. at 790 (“The provisions of these articles . . . shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.”). Judge Advocate General Crowder, who was responsible for drafting the Articles of War that Congress eventually adopted, explained to Congress that Article 15 “saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of [military] court that happens to be convenient.” S. REP. No. 64-130, at 40 (1916); *see also* FISHER, *supra* note 211, at 133 (noting that “it was not the intent in legislating on courts-martial to exclude trials by military commissions”). This focus on the battlefield origins of law-of-war military commissions was also used by the Supreme Court in *Hamdan v. Rumsfeld* to support its reading of Article 21 of the UCMJ, which was previously Article 15 of the 1920 Articles of War. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777 (2006) (plurality opinion) (citing WINTHROP, *supra* note 121, at 836–37) (delineating the jurisdictional constraints on military commissions within the “theatre of war”).

In addition to Article 15, military commissions are mentioned only in Article 81 and 82 of the 1920 Articles of War, which refer to spying and espionage respectively. Arts. 81–82, 41 Stat. at 804. Article 81 provides that “[w]hosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money . . . or knowingly harbors or protects . . . or gives intelligence to the enemy . . . shall suffer death or such other punishment as a court-martial or military commission may direct.” Art. 81, 41 Stat. at 804. Article 82 provides that “[a]ny person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission.” Art. 82, 41 Stat. at 804.

218. *Quirin*, 317 U.S. at 23.

219. FISHER, *supra* note 211, at 56. The order establishing the military commission clearly violated the Articles of War in several respects. First, it freed the commission to admit evidence that was inadmissible under the Articles. *See* Exec. Order No. 9185, 7 Fed. Reg. 5103, 5103 (July 2, 1942) (“Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man.”); FISHER, *supra* note 211, at 52 (“The power to make such rules freed the commission from procedures enacted by Congress . . .”) (internal quotation marks omitted). The order also stated that two-thirds of the commission members present could convict and sentence a man to death even though the Articles required a unanimous vote for the death penalty. 7 Fed. Reg. at 5103; FISHER, *supra* note 211, at 53. In addition, Roosevelt’s order directed that the trial record be transmitted “directly to me for my action thereon,” with the President as final reviewing authority, a departure from Articles 46 and 50½. 7 Fed. Reg. 5103; FISHER, *supra* note 211, at 53. Under these

most part the Articles of War applied to members of the U.S. Armed Forces and militia and provided for military jurisdiction to punish infractions in the form of court-martial proceedings. These court-martial proceedings were governed by a set of procedures established by Congress in the Articles of War and designed to achieve fairness within the boundaries of a military system of justice.<sup>220</sup> To that end, Article 38 made clear that the President's rulemaking authority over military commissions was limited to "nothing contrary to or inconsistent with these articles."<sup>221</sup>

On July 28, defense counsel proceeded to file a petition for writ of habeas corpus with the federal district court.<sup>222</sup> The court dismissed the petition that same night, ruling that under the President's proclamation the petitioners could not "seek any remedy . . . in the courts of the United States."<sup>223</sup>

In a special session of the Supreme Court convened at noon on July 29, 1942, the parties began nine hours of oral argument that ended on July 30.<sup>224</sup> Although the Court refused to abstain and treated the question of military-commission jurisdiction as a justiciable issue that the Court must resolve before the military commission was allowed to proceed, it did not issue a stay to allow itself sufficient time to consider the weighty issues involved.<sup>225</sup> Instead, the Court rushed to issue a *per curiam* opinion on July 31, 1942, announcing its judgment in advance of a full opinion.<sup>226</sup> That ruling upheld the military commission's jurisdiction and denied the petitioners' motions for leave to file petitions for writs of habeas corpus.<sup>227</sup>

The Supreme Court's unseemly rush to judgment in *Quirin* was in no small measure the result of *ex parte* arm twisting by President Roosevelt, who told Attorney General Biddle he would not hand over the saboteurs "to any United States marshal armed with a writ of habeas corpus."<sup>228</sup>

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articles any conviction or sentence by a military court was reviewed from within the military system, such as by the Judge Advocate General's office. Arts. 46, 50½, 41 Stat. at 796-99; FISHER, *supra* note 211, at 53.

220. For example, Articles 4 through 6 governed the composition of court-martial members. Arts. 4-6, 41 Stat. at 788. Articles 17 through 37 provided for specific procedures which court-martial proceedings were required to follow, including rights to obtain the testimony of witnesses. Arts. 17-37, 41 Stat. at 790-94. Finally, Articles 39 and 40 limited the number and times of prosecutions. Arts. 39-40, 41 Stat. at 794-95.

221. Art. 38, 41 Stat. at 794.

222. David J. Danelski, *The Saboteur's Case*, 1 J. SUP. CT. HIST. 61, 68 (1996).

223. *Ex parte Quirin*, 47 F. Supp. 431, 431 (D.D.C. 1942). See generally Danelski, *supra* note 222, at 68 (describing the trial and the ensuing political maneuvering).

224. Danelski, *supra* note 222, at 69, 71.

225. *Id.* at 71.

226. *Id.*

227. *Ex parte Quirin*, 317 U.S. 1, 18-19 (1942).

228. Belknap, *Putrid Pedigree*, *supra* note 50, at 476 (quoting Danelski, *supra* note 222, at 68).

According to most accounts, Biddle apparently communicated this information to Justice Roberts, and when the Court discussed the case in conference, Roberts told the other justices that Biddle feared the President would execute the saboteurs regardless of what the Court did.<sup>229</sup> It was reported that Chief Justice Stone reacted with alarm at the prospect of such a confrontation.<sup>230</sup>

On August 1, 1942, the military-commission proceedings ended, and on August 3—as expected—the members of the commission found all eight men guilty and sentenced all eight to death.<sup>231</sup> On August 4, after receiving the record of the commission proceedings, President Roosevelt, having discussed the matter with a number of close advisors including J. Edgar Hoover, ordered six of the prisoners to be electrocuted at noon on August 8, 1942.<sup>232</sup> The death sentences of Dasch and Burger were commuted; Dasch

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229. Danelski, *supra* note 222, at 69.

230. Belknap, *Putrid Pedigree*, *supra* note 50, at 476 (quoting Danelski, *supra* note 222, at 69). What was unknown at the time were the improper and unethical activities of Justice Frankfurter, who was secretly advising Secretary of War Stimson to try the German saboteurs by a military commission composed entirely of soldiers. See Danelski, *supra* note 222, at 69 (stating that a month prior to the pre-oral argument conference in the case, Justice Frankfurter had encouraged Secretary Stimson to use the military commission and advised him of its composition). To make matters worse, following his advice and encouragement relating to military commissions, he also moved to disqualify Justice Frank Murphy from sitting on the case because he feared Murphy, a true strict constructionist and civil libertarian, would not be afraid to find the military commission proceedings in violation of the Articles of War. Belknap, *Putrid Pedigree*, *supra* note 50, at 475 n.320. Frankfurter argued that Murphy's position as an officer in the Army Reserve was a conflict of interest. *Id.* at 475–76. Murphy agreed to step aside, unaware of Frankfurter's own conflicts. *Id.* at 475 n.320; see also Danelski, *supra* note 222, at 69 (quoting Justice Murphy as stating to Justice Frankfurter, at the time of Justice Murphy's disqualification, that “[i]f candid truth is to be withheld among Brethren of the Supreme Court I would indeed despair of the world”) (citation omitted). Moreover, Frankfurter did not even try to hide his lack of objectivity from the remaining seven justices during the Court's subsequent struggle to write an opinion. He wrote and distributed to his colleagues on the Court what he called “FF's Soliloquy,” which was intended to discourage any Justice who might consider writing a separate opinion by suggesting that patriots placed national unity above constitutional concerns in wartime. See Michael Belknap, *Frankfurter and the Nazi Saboteurs*, SUP. CT. HIST. SOC'Y. Y.B. 68–71 (1982) [hereinafter “Belknap, Frankfurter”] (discussing Frankfurter's soliloquy and presenting it in full); see also FISHER, *supra* note 211, at 117–21 (relating Frankfurter's discomfort with the *Quirin* decision).

231. FISHER, *supra* note 211, at 77.

232. *Id.* at 77–79. On November 29, 1944, two more German saboteurs landed by U-Boat at Hancock Point, Maine, with a mission to purchase short wave radios and transmit military intelligence to Germany. *Id.* at 138–39. Both men—Colepaugh and Gimpel—were apprehended in New York City that December, and both were tried by military commission and sentenced to death. *Id.* at 139–43. Before the executions were carried out, the war ended, and President Truman commuted their death sentences to life imprisonment. *Id.* at 144. Colepaugh petitioned for writ of habeas corpus challenging the jurisdiction of the military tribunal. *Colepaugh v. Looney*, 235 F.2d 429, 430 (10th Cir. 1956). The writ was denied by the Tenth Circuit, which found *Quirin* controlling. *Id.* at 433. Like the defendants in *Quirin*, the petitioners were acting for the German Reich, secretly landed by German submarine on the Atlantic coast of the United States, and concealed their identity as combatants by wearing civilian dress and carrying forged credentials. *Id.* at 432.

to thirty years imprisonment, and Burger to life imprisonment.<sup>233</sup>

Having made a hasty decision, the Court was now forced to make “an agonizing effort to justify a *fait accompli*.”<sup>234</sup> Indeed, in the opinion that was finally issued in October 1942, the Justices were practically “compelled . . . to cover-up or excuse the President’s departures” from the required procedures of the Articles of War.<sup>235</sup> On the jurisdictional point, however, the Court’s opinion in *Quirin* was on more solid footing. Here the Court held (1) that unlawful combatants, regardless of citizenship, can be tried by military commission for violations of the law of war without violating the Fifth or Sixth Amendments;<sup>236</sup> (2) that the eight saboteurs were admittedly unlawful combatants because they were members of the enemy army who passed surreptitiously from enemy territory into the United States by discarding their uniforms and concealing their identity;<sup>237</sup> and (3) this case was not controlled by *Milligan* because Milligan, although conspiring to commit sabotage in aid of the Confederate cause, remained a civilian and was not “a part of or associated with the armed forces” of the Confederacy.<sup>238</sup> Simply, the eight saboteurs were concededly subject to military jurisdiction because they admitted their status as combatant

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233. FISHER, *supra* note 211, at 79; *see also* 2 *Surviving Nazis Remain in Capital*, N.Y. TIMES, Aug. 10, 1942, at 3 (discussing the terms of the two saboteurs’ sentences).

234. Danelski, *supra* note 222, at 61 (emphasis omitted).

235. Alpheus Thomas Mason, *Inter Arma Silent Leges: Chief Justice Stone’s Views*, 69 HARV. L. REV. 806, 826 (1956). *See also* Belknap, *Putrid Pedigree*, *supra* note 50, at 477 (concluding that *Quirin* was an exercise in judicial fiat). As Justice Scalia said in *Hamdi*, the Court’s decision in *Quirin* was “not the court’s finest hour.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 569–70 (2004) (Scalia, J., dissenting) (joined by Stevens, J.). Even Justice Frankfurter was later to admit that the Court’s decision in *Quirin* was “not a happy precedent.” FISHER, *supra* note 211, at 171 (internal citation omitted). According to some scholars, the *Quirin* decision as precedent should be treated with the same disfavor as *Korematsu v. United States*, 323 U.S. 214 (1944). *See, e.g.*, FISHER, *supra* note 211, at 127 (characterizing the two cases as “stark evidence of a court forfeiting its reputation as the guardian of constitutional rights”).

236. *Ex parte Quirin*, 317 U.S. 1, 45 (1942).

237. The Court in *Quirin* found the defendants to be unlawful combatants because they were “agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries . . .” *Id.* at 37. The Court accepted this interpretation of unlawful combatant as based in the law of war, which Congress had incorporated into Article 15 of the 1920 Articles of War. *Id.* at 35–36. While the Court clearly held that the Fifth and Sixth Amendments did not prevent the military trial of unlawful combatants as so defined, it acknowledged that this category did not extend to those who are not “a part of or associated with the armed forces of the enemy.” *Id.* at 45–46 (referring to *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118, 121, 122, & 131 (1866)).

238. *Quirin*, 317 U.S. at 45. The constitutional importance of the distinction between enemy combatants and civilians that commit the same or similar underlying criminal offenses is underscored by the fact that all of the saboteurs’ confederates living in the United States—both citizens and aliens—were charged and tried in civilian courts (fourteen in all). *See, e.g.*, *Haupt v. United States*, 330 U.S. 631 (1947) (father of saboteur); *Cramer v. United States*, 325 U.S. 1 (1945) (associate of saboteur); *see generally* FISHER, *supra* note 211, at 80–84 (discussing the arrests and trials of the saboteurs’ confederates). *See infra* at Part IV.D.

members of the enemy army.<sup>239</sup> For these reasons, the *Quirin* Court did not disturb the *Milligan* principle that a civilian—even one who commits war-related crimes—is entitled to trial by jury in a civilian court and the military has no jurisdiction under the Constitution to subject such an individual to trial by military tribunal. As Justice Black commented, the opinion in *Quirin* was limited to individuals who were part of the “enemy’s war forces” that invaded the country from abroad, which leaves “untouched” the Court’s earlier opinion in *Milligan*.<sup>240</sup>

## 2. Martial Law in Hawaii

Civilians within the territorial jurisdiction of the United States were subjected to military-commission trials during World War II only in Hawaii. On December 7, 1941, immediately following the Japanese air attack on Pearl Harbor, the Governor of Hawaii placed the Territory of Hawaii under martial law and suspended the writ of habeas corpus pursuant to a federal statute known as the Organic Act.<sup>241</sup> Section 67 of this Act authorized the Governor to take this action “in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it . . . until communication can be had with the President and his decision thereon made known.”<sup>242</sup>

The Governor’s proclamation also authorized the commanding general during the emergency “to exercise all the powers normally exercised by the Governor and by the judicial officers and employees of the Territory.”<sup>243</sup> On December 8, pursuant to this authorization, the commanding general replaced a functioning civilian-court system with a system of military commissions and provost courts.<sup>244</sup> This military court system was not subject to the rules of evidence or the same rules of procedure as the civilian courts; was not limited to the penalties or procedures authorized by Congress for courts-martial; and the orders of the military tribunals were

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239. *Quirin*, 317 U.S. at 45–46. The Supreme Court in *Hamdan v. Rumsfeld* referred to the saboteurs in *Quirin* as “admitted enemy combatants.” *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2782 (2006).

240. FISHER, *supra* note 211, at 115 (quoting Memorandum from Justice Black to Chief Justice Stone, Black Papers (Oct. 2, 1942)).

241. Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 141, 153 (1900) (codified at 48 U.S.C. § 532) (2000); *see also* *Duncan v. Kahanamoku*, 327 U.S. 304, 307–08 (1946) (providing factual history).

242. § 67, 31 Stat. at 153. President Roosevelt concurred with the Governor’s action by radio on December 8, 1941. *Duncan*, 327 U.S. at 308. n2.

243. *Duncan*, 327 U.S. at 308 (internal quotation marks omitted).

244. *Id.* at 308.

not subject to direct appellate review.<sup>245</sup>

This military court system remained in place until 1944.<sup>246</sup> During that time, two civilians living in Hawaii, White and Duncan, were arrested by military police, charged with criminal offenses, and subjected to trial by military tribunals pursuant to the Governor's proclamation.<sup>247</sup> In August, 1942, White was convicted and sentenced to imprisonment by a military commission for embezzling stock, and in February, 1944, Duncan was convicted and sentenced to imprisonment by a military tribunal for assault on two marines during a brawl in the naval yard at Honolulu.<sup>248</sup> Later in 1944, after civilian-court jurisdiction had been restored, both White and Duncan challenged the jurisdiction of these military tribunals by filing petitions for writs of habeas corpus in the federal district court for Hawaii.<sup>249</sup> The district court found in each case that the civilian courts had been open and "able to function but for the military orders closing them," and the military tribunals, therefore, had no jurisdiction over petitioners.<sup>250</sup> The case went to the Supreme Court, which ruled in *Duncan v. Kahanamoku* that the Organic Act did not authorize the Governor or the President to supplant the civilian courts with military tribunals.<sup>251</sup> While the decision was technically one of statutory interpretation, the Court was clear that it was interpreting the general language of the Organic Act in a manner consistent with underlying constitutional principles.<sup>252</sup>

The Court in *Duncan* began by rejecting the notion that the term "martial law" necessarily meant replacing a functioning civilian judicial-system with military tribunals.<sup>253</sup> In the process of developing the constitutional backdrop to its interpretation of the Organic Act, the Court in *Duncan* also rejected the reasoning of earlier state and lower federal court cases that had found the constitutional validity of military-commission trials of civilians to be conclusively established by the Governor's determination

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245. *Id.* at 308–09.

246. *See id.* at 312 n.5 (noting that the writ was restored and martial law terminated in 1944).

247. *Id.* at 309–11.

248. *Id.*

249. *Id.* at 311.

250. *Id.* at 311–12.

251. *Id.* at 324.

252. *See id.* at 314–19 ("But when the Organic Act is read as a whole and in the light of its legislative history it becomes clear that Congress did not intend the Constitution to have a limited application to Hawaii.").

253. *Id.* at 315–16. The Court was faced with the argument that Congress had enacted the Organic Act following a Hawaiian Supreme Court decision that interpreted a provision in the Hawaii Constitution, similar in all salient respects to the Organic Act, as permitting the Governor to create military tribunals. *Id.* at 316. The government argued that "[w]hen Congress passed the Organic Act it simply enacted the applicable language of the Hawaiian Constitution and with it the interpretation of that language by the Hawaiian Supreme Court." *Id.*

of necessity.<sup>254</sup> Relying on *Sterling v. Constantin*,<sup>255</sup> the Court reiterated that whether the use of military tribunals exceeded the limits of the Constitution “and whether or not [those limits] have been overstepped in a particular case . . . are judicial questions.”<sup>256</sup> Simply put, in the absence of explicit language to the contrary, the Court would not interpret the Organic Act in a manner that was inconsistent with constitutional limitations on the use of military tribunals.<sup>257</sup>

It is clear from a reading of the full opinion, including concurrences and dissents, that the Court in *Duncan* was focused on the fundamental principles of *Milligan* as the moving force behind its interpretation of the Organic Act. For Justice Murphy it was “obvious . . . that these trials were forbidden by the Bill of Rights of the Constitution of the United States.”<sup>258</sup> Murphy reiterated the controlling rule of *Milligan* and stated that “[o]nly when a foreign invasion or civil war actually closes the courts and renders it impossible for them to administer criminal justice can martial law validly be invoked to suspend their functions.”<sup>259</sup>

The Court in *Duncan*, as reflected in Justice Murphy’s concurrence, assumed that the threat to Hawaii was real and that a general declaration of martial law was justified.<sup>260</sup> Admiral Nimitz and General Richardson testified that “Hawaii was in [a] theatre of war from December 7, 1941, through the period in question,” and that there was an imminent danger of invasion in the nature of commando raids and submarine attack.<sup>261</sup> More specifically, Richardson testified that Duncan’s trial by military tribunal was necessary “to uphold the authority of military sentries charged with important military duties,” and White’s military tribunal was at a time (August 1942) when the initially successful Japanese military offensive continued.<sup>262</sup> Even though this clearly qualified as an emergency situation, Justice Murphy repeated the language from *Milligan* that “[m]artial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes

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254. *Id.* at 321 n.18.

255. *Sterling v. Constantin*, 287 U.S. 378 (1932).

256. *Duncan*, 327 U.S. at 321 n.18.

257. *Id.* at 317–19. The Court said “military trials of civilians charged with crime . . . are so obviously contrary to our political traditions and our institution of jury trials in courts of law, that the tenuous circumstance offered by the Government can hardly suffice to persuade us that Congress was willing to enact a Hawaiian Supreme Court decision permitting such a radical departure from our steadfast beliefs.” *Id.* at 317.

258. *Id.* at 325 (Murphy, J., concurring).

259. *Id.* at 325–26.

260. *Id.* at 329–30.

261. *Id.*

262. *Id.* at 339 n.1 (Burton, J., dissenting).

the civilian administration.”<sup>263</sup> In effect the Court was rejecting the testimony of military commanders that closing the civilian courts was necessary and independently examining the facts to determine if constitutional limits had been exceeded. Stone pointed out that “executive action is not proof of its own necessity, and the military’s judgment here is not conclusive that every action taken pursuant to the declaration of martial law was justified by the exigency.”<sup>264</sup>

The Court’s ruling in *Duncan* reaffirmed that neither a Governor nor the President has the authority to subject civilians to military tribunals as a war measure if the civilian-court system remains functioning.<sup>265</sup> This was so even though Hawaii, having been attacked and remaining the target of future attacks, could be said to be within the theater of the war.<sup>266</sup>

### 3. Other Uses of Military Commissions in World War II

Military commissions were used to try Japanese military personnel accused of war crimes in China and other specific outposts, as well as in

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263. *Id.* at 330 (Murphy, J., concurring) (alterations omitted) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866)).

264. *Duncan*, 327 U.S. at 336 (Stone, C.J., concurring).

265. Although neither *Ex parte Quirin*, 317 U.S. 1 (1942), nor *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), presented the Court with the issue of whether the President could act to establish military tribunals for unlawful combatants in the absence of congressional authorization, the Court held in *Milligan* that the President could not unilaterally order the military trial of civilians, even for alleged violations of the law of war. *Milligan*, 71 U.S. at 121–22. As the Court made clear, if an emergency requires it, Congress can authorize the President to use the military to temporarily detain citizens by suspending the writ of habeas corpus, but this power does not extend to trials by military tribunals unless the civilian courts are closed. *Id.* at 125–27; see also FISHER, *supra* note 211, at 165 (discussing other limitations on the use of military tribunals).

266. *Duncan*, 327 U.S. at 329–30 (Murphy, J., concurring). In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court rejected a similar “theater of war” argument made by President Truman to justify his order to take possession of, and operate, most of the nation’s steel mills to avoid a labor stoppage during the Korean War. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583–84 (1952) The Court refused to find Truman’s actions justified by military necessity as Commander in Chief on the basis of expanding the definition of “theater of war” beyond the battlefield to include American soil during the Korean War. *Id.* at 587. This is similar to the meaning of “theater of war” for purposes of military tribunal jurisdiction. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777 (2006) (plurality opinion) (noting Winthrop’s treatment on jurisdiction of military tribunals, defining “theatre of war” to include areas “within the field of the command of the convening commander”) (quoting WINTHROP, *supra* note 121, at 836). Law-of-war military commissions originated on the battlefield where actual fighting was taking place. *Id.* at 2776. For Winthrop, the theater of war was a jurisdictional limitation on the use of law-of-war military commissions and could not be expanded outside the battlefield unless it was an area where the civilian courts were not operational. WINTHROP, *supra* note 121, at 836; see also *Hamdan*, 126 S. Ct. at 2777 n.29 (quoting WINTHROP, *supra* note 121, at 836) (referring to Winthrop’s characterization of military commission proceedings held “where the civil courts are open and available” as “*coram non iudice*”).

occupied Japan.<sup>267</sup> The most important of these was the military-commission trial of General Tomoyuki Yamashita, former commander of the Japanese forces in the Philippines.<sup>268</sup> Yamashita was charged with failure to control troops under his command who committed “brutal atrocities” against prisoners of war (POWs) and civilians.<sup>269</sup> The charge allegedly constituted a war crime even though he was not charged with committing, ordering, or having knowledge of the commission of any atrocity.<sup>270</sup> Although Yamashita was concededly an enemy combatant

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267. Prescott & Eldridge, *supra* note 194, at 46.

268. *Id.*

269. *In re Yamashita*, 327 U.S. 1, 13–14 (1946).

270. *Id.* at 34 (Murphy, J., dissenting). Justice Murphy directed a good portion of his passionate dissent to attacking the majority for finding that such a vague charge gave the defendant proper notice that his conduct was prohibited by the law of war. *Id.* at 36. In Murphy’s opinion, the charge lacked any objective standards and was “clearly without precedent in international law or in the annals of recorded military history.” *Id.* at 40. Murphy complained that the Court majority, by allowing Yamashita to be convicted and sentenced without fair notice, was establishing a precedent that invited “victorious nation[s] to sit in judgment upon the military strategy and actions of the defeated enemy and to use its conclusions to determine the criminal liability of an enemy commander.” *Id.* at 35–36. Justice Rutledge dissented because Yamashita’s trial was transferred to a military commission operating outside the restrictions of the Articles of War. *Id.* at 47, 61 (Rutledge, J., dissenting). In Rutledge’s opinion, a military commission, like a court-martial proceeding, was bound by the Articles of War even when an enemy combatant was charged with violating the law of war. *Id.* at 62–63. Rutledge was also of the view that the Articles of War incorporated Article 63 of the 1929 Geneva Convention, which in Yamashita’s case required that he be tried by the same court-martial rules that govern U.S. armed forces. *Id.* at 72–74; *see also* Steven B. Ives, Jr., *Vengeance Did Not Deliver Justice*, WASH. POST, Dec. 30, 2001 at B2 (noting that Justice Rutledge’s dissent “rehearsed with great specificity the tribunal’s failure to provide a fair trial and rebutted the theory on which Yamashita was tried”).

The logic of the dissents in *Yamashita* was embraced by the plurality in *Hamdan v. Rumsfeld*, which found that a law-of-war offense, if not defined by treaty or statute, must be established by “plain and unambiguous” precedent, which must satisfy a “high standard” of clarity. *Hamdan*, 126 S. Ct. at 2780. Even more importantly, a majority of the Court in *Hamdan* accepted the basic thesis of the dissents in *Yamashita* that the Articles of War incorporated the structural requirements for military commissions imposed by the international law of war, including Common Article 3 of the Geneva Conventions. *Hamdan*, 126 S. Ct. at 2774–75, 2786, 2793. It remains to be seen if these “structural requirements” of Common Article 3 are violated in the Military Commission Act of 2006, which declares military commissions under the Act to be “regularly constituted” courts within the meaning of Common Article 3. Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3(a)(1), § 948b(f), 120 Stat. 2600, 2602 (2006) (to be codified at 10 U.S.C. § 948b(f)). The MCA also prohibits unlawful combatants from invoking the Geneva Conventions as a source of rights, sec. 3(a)(1), § 948b(g), 120 Stat. at 2602§, and forbids courts of the United States from using a foreign or international source of law as the basis for interpreting Article 129 of the Third Geneva Convention, which requires the United States to provide effective penal sanctions for grave breaches of Common Article 3. *Id.*, secs. 6(a)(1)–(a)(2), 120 Stat. at 2632. Congress may not, however, bar the assertion of Geneva Conventions-based claims unless Congress abrogates or supersedes the Conventions, which have the status of treaties under Article VI of the Constitution and 28 U.S.C. § 2241(c)(3). *See* 28 U.S.C. § 2241(c)(3) (2000) (“The writ of habeas corpus shall not extend to a prisoner unless . . . he is in custody in violation of the Constitution or laws or *treaties* of the United States . . .”) (emphasis added). Courts have refused to construe statutes as abrogating treaties absent a clear statement from Congress of its intent to do so. *Cook v. United States*, 288 U.S. 102, 120 (1933). *See also* *Trans World Airlines, Inc. v. Franklin Mint Corp.*,

subject to military jurisdiction, he was arraigned and tried as an unlawful combatant before a five-person military commission because he was charged with violations of the law of war.<sup>271</sup> Yamashita was convicted by the commission and sentenced to death by hanging.<sup>272</sup>

After Yamashita's habeas petition was denied by the Philippine Supreme Court, the U.S. Supreme Court granted his petition for certiorari and agreed to consider his separate petition for habeas corpus and prohibition.<sup>273</sup> In *In re Yamashita*, the Court affirmed the jurisdiction of the

466 U.S. 243, 251–53 (1984) (holding that repeal of the Par Value Modification Act cannot be construed as terminating the United States' duty to abide by the Warsaw Convention); *Washington v. Wash. State Commercial Passenger*, 443 U.S. 658, 690 (1979) (“Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . .”). There is no such clear statement in the MCA. To the contrary, the statutory language reaffirms Congress's intent to implement U.S. obligations under the Conventions. *See, e.g.*, sec. 6(a)(1), 120 Stat. at 2632 (“The acts enumerated in subsection (d) of Section 2441 of title 18, United States Code . . . constitute violations of Common Article 3 of the Geneva Conventions prohibited by United States law.”).

271. *Yamashita*, 327 U.S. at 5. Under the Military Commissions Act of 2006, Yamashita, as a uniformed commander of the Japanese Army, would be considered a lawful enemy combatant even if he committed offenses in violation of the law of war. *See* sec. 3(a)(1), § 948a(2), 120 Stat. at 2601 (defining lawful enemy combatant as a person who is “a member of the regular forces of a State party engaged in hostilities against the United States”). As such, he would be entitled to trial by court-martial, not military commission. *See id.* sec. 3(a)(1), § 948d(b), 120 Stat. at 2603 (“Courts-martial established under [chapter 47 of title 10] shall have jurisdiction to try a lawful enemy combatant for any offense made punishable by this chapter.”).

272. *Yamashita*, 327 U.S. at 5.

273. *Id.* at 4. Although Congress had provided jurisdiction for U.S. Supreme Court review of the decisions of the Philippine Supreme Court, 28 U.S.C. § 349, Act of Feb. 13, 1925, ch. 229, § 7, 43 Stat. 936, 940 (codified as amended at 28 U.S.C. § 349 (1946)), *repealed by* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 992, 100, others tried by military commission outside the territorial jurisdiction of Article III courts during World War II had no right to petition the federal courts for any relief whatsoever. As an example, the Court refused to hear the petitions for writ of habeas corpus filed by Eisentrager and twenty other German nationals who were convicted by a U.S. military commission in China on charges of aiding the Japanese after Germany had surrendered. *Johnson v. Eisentrager*, 339 U.S. 763, 765–68, 785 (1950). Following their convictions they were transferred to Germany to serve their sentences at Landsberg Prison, a prison administered by the U.S. military. *Id.* While at Landsberg they filed habeas petitions that were eventually heard by the U.S. Supreme Court. *Id.* The Court denied the petitions because petitioners were prisoners of war, captured and tried outside the United States for violations of the law of war. *Id.* However, the application of *Eisentrager* to the jurisdictional scope of statutory habeas corpus was modified and limited in *Rasul v. Bush*, where the Court held that 28 U.S.C. § 2241 no longer excludes petitioners who are held in custody outside territory over which the United States is sovereign but over which the United States exercises “complete jurisdiction and control.” *Rasul v. Bush*, 542 U.S. 466, 479–82 (2004). Nonetheless, the refusal of the *Eisentrager* court to extend the constitutional right to common law habeas corpus to aliens outside the sovereign territory of the United States, including non-sovereign territory over which the United States exercises exclusive jurisdiction and control (e.g., Guantanamo Bay) has been cited as controlling by the majority in *Boumediene v. Bush*, 476 F.3d 981, 990 (D.C. Cir. 2007), and by the district court on remand in *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 17–18 (D.D.C. 2006). Hence, according to *Boumediene* and *Hamdan*, alien detainees at Guantanamo Bay have no common law right to habeas corpus protected by the Suspension Clause.

military commission but made clear at the outset of its opinion that the case did *not* involve “the power of military commissions to try civilians.”<sup>274</sup> Instead, relying on Article 15 of the Articles of War, the Court reiterated its ruling in *Ex parte Quirin* that Congress had sanctioned military-commission trials of members of the enemy’s army for violations of the law of war.<sup>275</sup>

Given that Yamashita was a conceded member of the Japanese army, the jurisdictional issue in *Yamashita* was not the exercise of military-tribunal jurisdiction in place of civilian courts, but whether the military-commission trial was subject to Fifth Amendment due process limitations or the procedural rights established by Congress for court-martial proceedings in the Articles of War.<sup>276</sup> The majority in *Yamashita* rejected any right to procedural or statutory due process in military-commission proceedings and found the jurisdiction of the military commission proper because Yamashita was charged with violating the law of war.<sup>277</sup>

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274. *Yamashita*, 327 U.S. at 9.

275. *Id.* at 19–20. The Court found the charge against Yamashita to constitute a violation of the law of war, relying on the very general language on command responsibility contained in several treaties. *Id.* at 15–17. In the process, the Court explained that it was the nature of the charge, not whether there was evidence to support it, that gave the military commission (as opposed to a court-martial) its jurisdiction under the law of war. *Id.* at 17 n.4 (“We do not weigh the evidence. We merely hold that the charge sufficiently states a violation against the law of war . . .”).

276. *Id.* at 13–14. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the procedures governing military commissions have historically been the same as the procedures established for courts-martial. 126 S. Ct. 2749, 2788 (2006) (citing WINTHROP, *supra* note 121, at 835 n.81). Exceptions to this “procedural parity,” including the *Yamashita* case, were narrowed after World War II when Congress (1) adopted the UCMJ and expanded the category of persons subject to its reach to include POWs in custody of the armed forces, Art. 2(a)(9), 10 U.S.C. § 802(a)(9) (2000); and (2) added Article 36(b), which required the President to show that procedural uniformity was “impracticable.” 10 U.S.C. § 836(b); *Hamdan*, 126 S. Ct. at 2790–91. Although Congress has now decided, in the Military Commissions Act of 2006, to eliminate entirely military-commission jurisdiction over enemy officers who violate the law of war, where military commissions have jurisdiction under the MCA, Congress appears to have broken with the tradition of presumptive procedural parity by investing broad discretion in the Secretary of Defense to make exceptions to the rules and procedures governing court-martial proceedings. The MCA specifically approves exceptions to court-martial rules limiting the admissibility of statements of the accused obtained by coercion or compulsory self-incrimination and to rules limiting the admissibility of hearsay evidence. Sec. 3(a)(1), § 949a(b)(2), 120 Stat. at 2608–09.

277. *Yamashita*, 327 U.S. at 10–11. In *Hamdan*, a plurality of the Court interpreted Winthrop’s fourth precondition to the use of law-of-war military commissions (that the person charged violate a “recognized law of war”) as requiring that the charging documents specify details of the act(s) alleged to have violated the law of war and, in addition, specify the “circumstances conferring jurisdiction.” 126 S. Ct. at 2777 (citing WINTHROP, *supra* note 121, at 842).

IV. CONGRESS DOES NOT HAVE THE CONSTITUTIONAL AUTHORITY TO  
EXTEND MILITARY TRIBUNAL JURISDICTION TO CIVILIANS IN THE WAR  
AGAINST TERRORISM

A. Congress's "War" Powers Under Art. I, § 8, Cl. 14 "to make Rules for the Government and Regulation of the land and naval Forces;" Art. I, § 8, Cl. 11 to "declare war . . . and make Rules concerning Captures on Land and Water;" and Art. I, § 8, Cl. 12 to "raise and support Armies"

Subject to very narrow exceptions involving the battlefield or occupied enemy territory,<sup>278</sup> Congress's powers to impose military tribunal jurisdiction under Clauses 11, 12, and 14 of Article I, § 8 are limited to persons who are members of the armed forces, and when Congress has exceeded this limitation, the Supreme Court has held the offending provisions unconstitutional.<sup>279</sup> For the most part, this constitutional limitation has been respected by Congress when enacting legislation under its war powers. For example, civilians detained within the territorial jurisdiction of the United States are not persons "subject to military law" under the Uniform Code of Military Justice, which is limited to the U.S. military armed forces, militia, POWs, and "[i]n time of war, persons serving with or accompanying an armed force in the field."<sup>280</sup> The limits on

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278. See discussion *supra* Part III & *infra* Part V.

279. *Toth v. Quarles*, 250 U.S. 11, 21–23 (1955). In *Toth*, the Court held that Congress could not, under Article 3(a) of the Uniform Code of Military Justice, subject former members of the armed services (now civilians) to courts-martial for offenses allegedly committed while they were members of the armed services. *Id.* The Court construed Congress's Article I war powers as limited to persons who are actually members of the military to avoid encroaching on the rights of civilians to jury trials in civilian courts. *Id.* at 13–15.

280. 10 U.S.C. § 802(a)(10) (2000) (providing that civilians "accompanying . . . an armed force in the field" can be subject to courts-martial only if war has been formally declared by Congress); see also *United States v. Avenette*, 41 C.M.R. 363 (1970) (finding civilian employee of army contractor not subject to court-martial because war not declared by Congress in Vietnam); *Zamora v. Woodson*, 42 C.M.R. 5 (1970) (limiting the phrase "in time of war" as "a war formally defined by Congress"). Moreover, the Supreme Court has made it clear that "in the field means in an area of actual fighting." *Reid v. Covert*, 354 U.S. 1, 34 n.61 (1957) (plurality opinion) (quotation omitted). Hence, while this body of law brings a narrow group of citizen-civilians within military tribunal jurisdiction, the jurisdiction is carefully limited to those civilians who voluntarily submit to the command of the armed forces in an area of actual fighting during a declared war.

UCMJ Articles 18 and 21, like Article 15 of the Articles of War, recognize the concurrent jurisdiction of military commissions (and tribunals) to try and punish offenses against the law of war. UCMJ Article 104 corresponds with Article of War 81 and provides for military commission trials for those aiding the enemy. Likewise, UCMJ Article 106 corresponds with Article of War 82 and authorizes trial by military tribunal for spies. See discussion *supra* note 120. For the text of Articles of War 15, 81, and 82, see *supra* note 217. Current Articles 104 and 106, to avoid constitutional invalidation, must be interpreted to apply only to combatants in time of war and cannot be read as

military jurisdiction in the UCMJ reflect the history of Articles of War legislation since the founding; Congress has consistently limited trial and punishment by military tribunal to the military itself.<sup>281</sup>

Congress, of course, may empower the President to take certain emergency measures involving civilians following a formal declaration of war, such as authorizing physical searches of civilians without a court order to acquire foreign intelligence information for a period not to exceed fifteen days following the declaration,<sup>282</sup> and, upon public proclamation, to detain all enemy alien civilians over the age of thirteen who reside within the United States and are not naturalized citizens.<sup>283</sup> However, in none of these

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applying to the acts of civilians within the territorial jurisdiction of the United States unless the civilian courts are closed and unable to function, as required by the *Milligan* line of cases. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866); *see also* *Duncan v. Kahanamoku*, 327 U.S. 304, 317–24 (1946) (discussing the historical use of military troops to support, rather than supplant, civilian courts). In any event, the Military Commissions Act of 2006 amends Articles 104 and 106, making them inapplicable to military commissions established under that Act. Sec. 4(a)(2), 120 Stat. at 2631. Moreover, the MCA, which codifies a number of law-of-war offenses, including spying and aiding the enemy, makes all of those law-of-war offenses applicable only to unlawful enemy combatants as defined in that Act. Sec. 3(a)(1), § 950p950w, 120 Stat. at 2624–31. For a more complete discussion of the MCA’s definition of unlawful combatant, *see infra* Part V.

281. *See* discussion *supra* Part III. If the Military Commissions Act of 2006 is interpreted as departing from this tradition by extending the definition of “unlawful enemy combatant” to include private civilians who are not under the command of the enemy’s army outside the battlefield, sec. 3(a)(1), §§ 948a(1)–(2), 120 Stat. 2601, such an extension of military tribunal jurisdiction would violate Sixth Amendment and Article III guarantees of the right to trial by jury. *See supra* Parts I & III and *infra* Part V.

282. 50 U.S.C. § 1829 (2000).

283. Alien Enemy Act, 50 U.S.C. § 21 (2000); *see generally* J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1408 (1992) (providing background and asserting that “the Alien Enemy Act represents a significant curtailment of the civil liberties of certain persons residing in the United States”). The Act, which applies only to citizens of nation-states at war with the United States, was first used by Madison in the War of 1812. *Id.* at 1412. It was not used during the Mexican War, nor during the Spanish-American War. *Id.* Wilson used it in World War I, and Roosevelt in World War II. *Id.* However, even if Congress has the power to subject alien civilians to temporary military detention at the outset of a war, neither Congress nor the President have the constitutional authority, even in wartime, to subject civilians to indefinite detention. *See* *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005) (noting that the power to detain may last no longer than the duration of active hostilities). Moreover, at some point the length of detention can no longer be considered limited, or temporary, and instead becomes a form of punishment. *Id.* at 201. Examples would be the detention of American civilian-citizens of Japanese descent in World War II and perhaps the current detainees at Guantanamo Bay. Of course, to the extent that the detainees at Guantanamo, like Hamdi, are shown to be enemy combatants captured on the battlefield, they can be detained until the end of hostilities. However, even for combatants, the plurality in *Hamdi* made clear that this period of detention was not to be measured by the potentially indefinite duration of a global war on terror, but by the hostilities in Afghanistan. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (“Certainly, we agree that indefinite detention for purposes of interrogation is not authorized.”). For civilians, anything more than a short, temporary detention (e.g., two and a half months as in *Moyer v. Peabody*, 212 U.S. 78, 82 (1909)) could be considered punishment and, hence, a violation of the *Milligan* principle, which not only forbids trial by military tribunal, but requires that punishment be imposed only by a civilian court bound

measures did Congress attempt to authorize the use of military trials in place of jury trials for civilians.<sup>284</sup>

Moreover, past efforts by the executive branch to extend the meaning of the UCMJ to authorize court-martial jurisdiction for civilians have been rejected by the Supreme Court. In *Reid v. Covert*, the Court ruled that a court-martial proceeding had no jurisdiction over civilian dependents of armed services personnel outside the continental limits of the United States.<sup>285</sup> The plurality, strictly construing Congress's war powers in light of the Constitution's jury trial guarantees, limited the reach of UCMJ Article 2 (11) (currently 2 (10)) to members of the armed services only.<sup>286</sup>

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by Article III and Sixth Amendment rights of trial by jury. See *Emergency Powers*, *supra* note 47, at 1332–33 (noting that *Milligan* forbade military punishment of civilians where the courts were open and functioning).

284. The only time Congress has ever specifically authorized the use of military tribunals in the United States to try civilians notwithstanding the existence of a functioning civilian justice system was in the post-Civil War Reconstruction Acts, which imposed a military government on the rebel states as occupied enemy territory until such time as each state was readmitted to the Union. See discussion *supra* Part III.A.4. The constitutionality of using military commissions to try civilians under the Reconstruction Acts was upheld in a series of Supreme Court cases as being within the Article I war powers of Congress as well as the President's Article II power as Commander-in-Chief to employ the military to defeat the enemy. See *supra* Part III.A.4; see also WINTHROP, *supra* note 121, at 851–52 (providing synopses of the cases).

In World War II, many aliens were detained for three years or more without being afforded deportation hearings. The length of such incarceration, without the filing of criminal charges or deportation, is tantamount to being tried and punished for one's status without a jury trial in civilian court. *Sidak*, *supra* note 283, at 1424. The Supreme Court has ruled that the Alien Enemy Act authorizes the President, once war has been formally declared by Congress, to exercise a judicially-unreviewable power to detain enemy aliens until the war is formally terminated, either by presidential proclamation or peace treaty, ratified by the Senate. *Ludecke v. Watkins*, 335 U.S. 160, 167–69 (1948). A cessation of hostilities or de facto peace does not terminate the President's power to detain under the Act. *Id.* Hence, a German alien incarcerated under this Act in 1942 was not released until 1951, when the declared war with Germany was formally terminated. *United States ex rel Jaeger v. Carusi*, 342 U.S. 347, 347–48 (1952) (per curiam).

285. *Reid v. Covert*, 354 U.S. 1, 15–16 (1957) (plurality opinion).

286. *Id.* at 19–21. Article 2 of the UCMJ makes the following “persons . . . subject to this chapter”: (1) “[m]embers of a regular component of the armed forces”; (2) “[c]adets, aviation cadets, and midshipmen”; (3) “[m]embers of a reserve component while on inactive-duty training”; (4) & (5) “[r]etired members of a regular . . . or reserved component”; (6) “[m]embers of the Fleet Reserve and the Fleet Marine Corps Reserve”; (7) “[p]ersons in custody of the armed forces serving a sentence imposed by a court-martial”; (8) “[m]embers of . . . organizations, when assigned to and serving with the armed forces”; (9) “[p]risoners of war in custody of the armed forces”; (10) “[i]n time of war, persons serving with or accompanying an armed force in the field”; and (11) & (12), which refer to geographic variations for persons covered under (10). 10 U.S.C. § 802 (2000). The *Covert* Court, in defining the limits of Congress's war powers in the process of interpreting Article 2, reiterated that the “Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were ‘necessary and proper’ for the regulation of the ‘land and naval Forces.’” *Covert*, 354 U.S. at 30. This constitutional limitation would apply with equal force to “enemy combatants . . . who violate the law of war,” a category added as paragraph 13 of UCMJ Article 2 by the Military Commission Acts of 2006.

In the process, the *Covert* plurality characterized *Milligan* as “one of the great landmarks in this country’s history”<sup>287</sup> and ruled that the war powers of Congress were limited by the right of trial by jury, which was explicitly recognized in both the original structure of the Constitution as well as the Bill of Rights.<sup>288</sup> The plurality in *Covert* explained at some length why military tribunals, whether formal court-martial proceedings or military commissions established by the executive branch, “cannot have the independence of jurors drawn from the general public or of civilian judges.”<sup>289</sup> According to *Covert*, the military tribunal is appointed by a military officer, and the officers who sit in judgment are in the executive chain of command and subject to “command influence.”<sup>290</sup> The Court also noted that military tribunals can never be constituted to comply with constitutional guarantees essential to a fair trial of civilians because the military by necessity “emphasizes the iron hand of discipline more than [*sic*] it does the even scales of justice.”<sup>291</sup>

The *Covert* plurality acknowledged that, in certain very limited circumstances, Congress’s war powers extend to the use of law-of-war military commissions to try civilians.<sup>292</sup> These exceptions are: (1) in occupied enemy territory as part of a military government;<sup>293</sup> and (2) in the theater of war.<sup>294</sup> The theater of war, for purposes of this exception, is narrowly defined and does not include territory within the jurisdiction of operating civilian courts, even if the area is threatened with hostilities and

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Sec. 4(a)(1), 120 Stat. at 2631.

287. *Covert*, 354 U.S. at 30.

288. *Id.* at 9–10, 29–30; *see also supra* Part II.B. The Supreme Court has stated that “by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to the Magna Carta.” *Duncan v. Louisiana*, 391 U.S. 145, 150 (1968). In *Duncan v. Louisiana*, the Court also noted that the Stamp Act Congress in 1765 passed a resolution deeming the right of trial by jury “the inherent and invaluable right of every British subject in these colonies.” *Id.* at 152. The laws of every state today, and of those original thirteen at the time of the adoption of the Constitution, protected the right to trial by jury in criminal cases. *Id.* at 154. In order to protect the liberties of citizens from unchecked power, the founding generation “insiste[d] upon community participation in the determination of guilt or innocence.” *Id.* at 156; *see also* discussion *supra* Parts II.A–B.

289. *Covert*, 354 U.S. at 36.

290. *Id.* *See also* examples discussed in this Article *supra*, including the military commission in the Dakota War Trial, note 139; the Hunter Commission in the Lincoln assassination conspiracy case, Part III.A.2; and the military commission trial of the German saboteurs in World War II, Part III.B.1.

291. *Covert*, 354 U.S. at 38.

292. *Id.* at 33.

293. *Id.* at 34 n.60.

294. *Id.* at 33. The *Covert* exceptions to the constitutional rule against military tribunal jurisdiction over civilians track the limitations on the use of military commissions under the law of war. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786–93 (2006) (discussing the UCMJ and the incorporated limits of international law).

otherwise subject to martial rule by the military.<sup>295</sup> In order to minimize any ambiguity on the point, the Court in *Covert* went out of its way to clarify that “in the field” for purposes of subjecting civilians to military tribunal meant an “area of actual fighting.”<sup>296</sup> Beyond these narrow

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295. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 126–27 (1866); see also *Duncan v. Kahanamoku*, 327 U.S. 304, 313–14 (1946) (distinguishing Hawaii from “occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function”). This view is disputed by Winthrop, who claims that Congress has the constitutional power to authorize the President to declare martial law and thereby subject civilians to military commissions by virtue of Congress’s power under Article I, Section 9, Clause 2 (Suspension Clause); Article I, Section 8, Clause 15 (Power to Suppress Insurrections and Repel Invasions); and in the event of threatened invasion when the laws cannot otherwise be duly enforced. WINTHROP, *supra* note 121, at 818. Winthrop also suggests that the President has the power to proclaim martial law pursuant to Article II, Section 2, Clause 1 (Commander in Chief) & 3 (take Care the Laws be faithfully executed). *Id.* Winthrop’s opinion, however, is admittedly contrary to the Supreme Court’s opinion in *Milligan*. In fact Winthrop explicitly *concedes* that he is disagreeing with the majority opinion in *Milligan*, and then proceeds to justify his own dissenting view. WINTHROP, *supra* note 121, at 817–18. Hence, unlike his commentary on other aspects of military law, his opinion that an unreviewable declaration of martial law justifies the use of military commissions at the will of the Executive is a dissenting view. Moreover, Winthrop’s opinion on this point has never been accepted by the Supreme Court. To the contrary, *Milligan* was reaffirmed by the Supreme Court in a number of recent cases, including *Hamdan v. Rumsfeld*, 126 S. Ct. at 2775–76 n.25. The Court’s 1946 opinion in *Duncan v. Kahanamoku* built its entire analysis on the basic principle of *Milligan* that a declaration of martial law by the executive branch, even if authorized by Congress, cannot constitutionally subject a civilian to a military trial unless the civilian courts in the area of the emergency are closed and unable to function. *Duncan*, 327 U.S. at 313–14. Winthrop, on the other hand, states that martial law (including military-tribunal jurisdiction over civilians) can be “declared in places threatened with invasion or subject to incursions by the enemy.” WINTHROP, *supra* note 121, at 818 n.3. Here again, the Supreme Court has explicitly rejected Winthrop’s view. The Court in *Duncan*, applying constitutional limits, refused to interpret the Governor’s martial-law declaration (approved by Congress and the President) as authorizing the use of military tribunals for civilians during a declared war even in territory concededly threatened with invasion when the hostilities had not closed the civilian courts. *Duncan*, 327 U.S. at 313; see also *id.* at 330 (Murphy, J., concurring) (“From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights.”).

The same unwillingness to accept the constitutional principle enunciated by the Supreme Court in *Milligan* also undermines the credibility of the article written by Daniel A. Reznick & Jonathan F. Potter, *Military Tribunals, The Constitution, and the UCMJ*, 2002 FED. CTS. L. REV. 3 (2002), available at <http://www.fclr.org>. Reznick and Potter disagree with the *Milligan* principle, and they attempt to attack the majority opinion as consisting of the “rhetoric” of a “bare majority” of the Court. *Id.* § C-1. This assertion ignores the fact that *Milligan* has never been overruled and has been not only reaffirmed, but celebrated by the Supreme Court in recent decisions. *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 530–31 (2004) (plurality opinion) (citing *Milligan* for the proposition that “an unchecked system of detention carries the potential to become a means for oppression and abuse”).

296. *Covert*, 354 U.S. at 34–35 n.61 (citing, *inter alia*, GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 478–79 (3d ed. 1915)). The Court in *Covert* was emphatic on this point: “The exigencies which have required military rule on the battlefield are not present in areas where no conflict exists. Military trial of civilians ‘in the field’ is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights.” *Id.* at 35. This limitation was reaffirmed in *Hamdan v. Rumsfeld*, where a plurality recognized that the law of war itself permitted military-commission jurisdiction only when the alleged offense was committed within the “theatre of war.” *Hamdan*, 126 S. Ct. at 2777 (citing WINTHROP, *supra* note 121, at 836).

exceptions, the existence of a state of war, whether declared or not, did not excuse the political branches from their obligation to comply with the Article III and Sixth Amendment rights of civilians to jury trials.<sup>297</sup> Indeed, in *Toth v. Quarles*, a case decided two years prior to *Covert*, the Court struck down as unconstitutional 50 U.S.C. § 553(a), which purported to extend court-martial jurisdiction to former military personnel—now civilians—charged with offenses committed while members of the armed forces.<sup>298</sup> In *Toth* the Court made clear that Congress’s Article I war powers, even when supplemented by the Necessary and Proper Clause, were limited by the Sixth Amendment right to trial by jury.<sup>299</sup>

Finally, it cannot be convincingly argued that the war against terrorism justifies a new jurisprudence of enlarged presidential and/or congressional war power.<sup>300</sup> To the contrary, the view that the unique characteristics of the war against terrorism require a narrowing of the scope of individual liberty protected by the Constitution was rejected by the Court in *Hamdi*.<sup>301</sup> According to *Hamdi*, “even the war power does not remove constitutional limitations safeguarding essential liberties.”<sup>302</sup>

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297. *Covert*, 354 U.S. at 35. Congress’s war power is not unlimited: “[T]he phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.” *United States v. Robel*, 389 U.S. 258, 263 (1967). *Robel* held that a statute prohibiting members of certain Communist-action organizations from working at defense facilities exceeded congressional war power and impermissibly infringed associational rights. *Id.* at 262.

298. *Toth v. Quarles*, 350 U.S. 11, 13–14 (1955).

299. *Id.* at 14–15, 21–22. The Court found that Article I, Section 8, Clause 14 does not “empower Congress to deprive people of trials under Bill of Rights safeguards” and refused to infer such power from the Necessary and Proper Clause. *Id.* at 21–22.

300. For a more complete discussion of this issue, see *infra* Part IV.D.

301. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). Few would disagree that the President has some inherent Article II power to respond to an attack or other grave danger to the country with temporary emergency measures, including summary detention of civilians, at least until such time as Congress can act. See *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (deferring to the President’s classification of “belligerents” when confronting “an insurrection, . . . armed hostile resistance, [or] a civil war of . . . alarming proportions”). Justice Souter’s separate opinion in *Hamdi*, joined by Justice Ginsburg, made the point: “in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people (though I doubt there is any want of statutory authority).” *Hamdi*, 542 U.S. at 552 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (citation omitted). Again, there was no suggestion that this inherent Article II power extended to military trials of civilians. To the contrary, the Court in *Toth* explicitly ruled that “this assertion of military authority over civilians cannot rest on the President’s power as commander-in-chief.” *Toth*, 350 U.S. at 14 (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 124–27 (1866)).

302. *Hamdi*, 542 U.S. at 536 (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934)).

B. Congress's Power Under Art. I, § 9, Cl. 2 to Suspend the Writ of Habeas Corpus<sup>303</sup>

Even if Congress cannot use its war powers under Article I to extend military tribunal jurisdiction to civilians tried outside the battlefield or occupied enemy territory, does Congress (and, by delegation, the President) have such power if Congress acts to suspend the writ of habeas corpus?<sup>304</sup>

The view that Congress has such constitutional power is based on the premise that the Suspension Clause is the only “express provision [in the Constitution] for exercise of extraordinary authority because of a crisis.”<sup>305</sup>

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303. See U.S. CONST. art. 1, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

304. It is settled that the power to authorize the suspension of the writ of habeas corpus is committed to Congress as an Article I power, and the President has no independent constitutional authority to suspend the writ. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (“If at any time the public safety should require the suspension of the powers vested . . . in the courts of the United States, it is for the legislature to say so.”); *Ex parte Merryman*, 17 F. Cas. 144, 151–52 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9,487) (rejecting Lincoln’s unauthorized suspension); see also Stephen Vladeck, *The Detention Power*, 22 YALE L. & POL’Y REV. 153, 160 (2004) (discussing Chief Justice Marshall’s view on Congress’s power to suspend the writ of habeas corpus); STORY, *supra* note 91, at § 1342 (stating that Congress has the exclusive power to suspend the writ). Although suspension of the writ is a power entrusted solely to Congress, any attempt to suspend in the complete absence of a rebellion or invasion would violate the Suspension Clause itself. See discussion *infra* at Part VI.A. In any event, before Congress can exercise its power under the Suspension Clause, the Supreme Court requires that Congress employ “specific and unambiguous statutory directives to effect a repeal” of habeas jurisdiction. *INS v. St. Cyr*, 533 U.S. 289, 299 (2001) (“Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction . . . .”); see also *id.* at 327 (Scalia, J., dissenting) (describing the *St. Cyr* test as “a super clear statement” rule “unparalleled in any other area of our jurisprudence”); cf. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764 (2006) (stating that it is to be presumed that Congress did not intend to suspend the writ “absent an unmistakably clear statement to the contrary”). For example, in the Militia Acts of 1795, Congress authorized the President to call forth a militia whenever the United States has been invaded or is in “imminent danger of invasion.” Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424 (codified as amended at 10 U.S.C. § 332 (2000)). By later amendments, the Militia Act of 1795 is now considered the source of the President’s authority to use federal troops to suppress insurrections. See Act of July 29, 1861, ch. 25, § 1, 12 Stat. 281, 281 (expanding the President’s authority to call forth the federal armed forces). Even though this authority was characterized in one case as congressional authorization for the President to impose a form of martial law, see *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849) (“By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President.”), the Militia Act was found not sufficiently specific to support Lincoln’s suspension of the writ in 1861. *Merryman*, 17 F. Cas. at 151–52.

305. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring). Congress has authorized a suspension of the writ only four times in the nation’s history. The first time was the Suspension Act of 1863, which, while ratifying the President’s decision to suspend the writ for purposes of temporary detention during the Civil War, explicitly limited the period of detention and required the military to transfer custody to civilian authorities for grand jury indictment and trial in civilian court if not released. See Act of Mar. 3, 1863, ch. 81, §§ 1–3, 12 Stat. 755, 755–56 (outlining the President’s authority to suspend the writ while clarifying that prisoners must be released or turned over to civilian courts under some circumstances); see also discussion *supra* Part III.A. The

Under this theory, if during a “rebellion or invasion” the writ is suspended, the courts are not only without jurisdiction to review any emergency military measures,<sup>306</sup> the jurisdiction of military tribunals would also be extended by the suspension to cover civilians, thereby extinguishing Sixth Amendment and Article III rights of civilians to a jury trial.<sup>307</sup>

Reliance on the Suspension Clause alone to support an extension of military tribunal jurisdiction is clearly inconsistent with the nature of the Clause itself. It is the common law right to the writ that is protected by the Suspension Clause.<sup>308</sup> The Suspension Clause, unlike the Sixth Amendment, does not create independent constitutional rights, but rather acts to limit the power of Congress to suspend the writ. The core purpose of the writ at common law was to afford both citizens and aliens a right to have the courts “[review] the legality of Executive detention.”<sup>309</sup> The writ

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Act provided that “during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof.” § 1, 12 Stat. at 755–56.

Congress authorized the President to suspend the writ under limited circumstances involving insurrection in the Klu Klux Klan Act of 1871. Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 13, 15. This Act was passed during Reconstruction and was invoked once by President Grant in suppressing a rebellion in nine South Carolina counties. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 563 (2004) (Scalia, J., dissenting) (explaining the presidential invocation of the Klu Klux Klan Act of 1871 during Reconstruction to quell a rebellion in South Carolina). The Philippine Organic Act of 1902 authorized the Governor to suspend the writ in cases of rebellion, insurrection, or invasion. Philippine Organic Act of 1902, ch. 1369, § 5, 32 Stat. 691, 692. Likewise, the Hawaiian Organic Act of 1900 allowed the Governor of Hawaii to suspend the writ in cases of rebellion or invasion. Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 141, 153. *See Duncan v. Kahanamouku*, 327 U.S. 304, 324 (1946) (interpreting the Hawaiian Organic Act as not authorizing the military trial of two civilians in the aftermath of the attack on Pearl Harbor); *see also* discussion *supra*, Part III.C.2.

In 1868, Congress also repealed the appellate jurisdiction of the Supreme Court to hear appeals of decisions of the Circuit Courts on writs of habeas corpus. Act of Mar. 27, 1868, § 2, 15 Stat. 44, 44. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) (discussing the power of Congress to qualify the appellate jurisdiction of the Supreme Court). It is important to note that the Act of 1868 was passed during Reconstruction, and its constitutional validity was upheld in the context of a petition by a civilian living in a rebel state, Mississippi, which was considered enemy occupied territory prior to readmission to the Union. *See* discussion *supra*, Part III.A.4.

306. It is also an act of suspension under the Suspension Clause for Congress to remove all jurisdiction to issue the writ. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (rejecting congressional attempt to limit appellate review of pardoned acts of rebellion); *accord Boumediene v. Bush*, 476 F.3d 981, 1000 (D.C. Cir. 2007) (Rogers, J., dissenting) (citing *Klein*).

307. *See WINTHROP*, *supra* note 121, at 820, 830 (stating that a suspension of the writ of habeas corpus is substantially a form of martial law which renders all offenses and persons triable by a military commission at the discretion of the military commander).

308. The Supreme Court has recognized that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’” *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (citing *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)).

309. *Rasul*, 542 U.S. at 474 (majority opinion) (quoting *St. Cyr*, 533 U.S. at 301); *see also Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869) (“The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom.”); *Ex parte Watkins*, 28 U.S. 193,

itself is only a means of compelling the appearance of an individual before the court to give the court jurisdiction to question the underlying cause of the detainee's custody.<sup>310</sup> To suspend the writ essentially withdraws the jurisdiction of the court to issue the writ, and is simply unrelated to any underlying rights, including the right to trial by jury. As the Court explained in *Milligan*, the Constitution "does not say [that] after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law."<sup>311</sup> Moreover, subjecting a civilian to trial by military tribunal during the time the writ is suspended can be reviewed by the courts once the writ is restored by Congress.<sup>312</sup> This is exactly what happened in *Duncan*, where the Court exercised judicial review of the jurisdictional propriety of the military-commission trials of Duncan and White after the writ was restored in October, 1944, even though the military trials took place when the writ was suspended.<sup>313</sup>

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202 (1830) (discussing the writ as a reaction against arbitrary imprisonment by English authorities).

310. See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 25, 29–30 (1980) (explaining ways in which the writ of habeas corpus was used to secure presence and release of prisoners). See also R. J. SHARPE, THE LAW OF HABEAS CORPUS 1–4 (2d ed. 1989) (explaining that the writ was initially used as a mechanism for securing a defendant's presence in court and only later becoming a basis for determining the lawfulness of imprisonment); BADSHAH K. MIAN, ENGLISH HABEAS CORPUS: LAW, HISTORY, AND POLITICS 18–21 (1984) (discussing the writ's history as a mechanism for asserting jurisdiction).

311. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 126 (1866). The "lessons of history informed [the Framers] that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable." *Id.* The Military Commissions Act of 2006 purports to strip the courts of habeas corpus jurisdiction to hear or consider claims of alien detainees of the United States. Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7(a), § 2241(e)(1)–(2), 120 Stat. 2600, 2635–36 (2006) (to be codified at 28 U.S.C. § 2241(e)(1)–(2)). This does not appear to be an attempt to suspend the writ. On each of the four past occasions when Congress has suspended the writ, it has made specific reference to a state of "Rebellion" or "Invasion," and each suspension was limited in duration. See discussion *supra* note 305. In the MCA, Congress made no findings that a rebellion or invasion was occurring at the time, nor is there a time limitation on its jurisdiction-stripping provisions. *Boumediene*, 476 F.3d at 1007 (Rogers, J., dissenting); *Hamdan*, 464 F. Supp. 2d at 14–15. In any event, the MCA makes no attempt to deprive alien civilian detainees of their rights under the Sixth Amendment and Article III to be tried by civilian court juries. See sec. 3(a)(1), § 948d(a) (limiting military-commission jurisdiction under the Act to "alien unlawful enemy combatants"). On the other hand, if other sections of the MCA are interpreted as prohibiting the civilian courts from protecting alien civilian detainees from the jurisdiction of military commissions, those portions of the MCA violate the jury trial guarantees of the Sixth Amendment and Article III. See discussion *infra* at Part VI.

312. Each of the four occasions in the nation's history when Congress has suspended the writ involved a temporally limited suspension that corresponded with an ongoing rebellion or invasion. See discussion *supra* note 305.

313. *Duncan v. Kahanamoku*, 327 U.S. 304, 309–13 (1946). Obviously, such after-the-fact review will not result in a meaningful remedy if a sentence of death imposed by a military commission has been carried out before the writ is restored. Likewise, a civilian wrongfully tried and sentenced by a military tribunal may be released from custody by order of a civilian court once the writ is restored, but that does not vindicate the violation of the right for the period of wrongful imprisonment. In either

event, the violation of the Sixth Amendment right of trial by jury in a civilian court could be redressed by a *Bivens* damage action brought against the individual federal officials responsible for the military trial. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971) (inferring from the Constitution the right to a private damage action to redress violations of the Fourth Amendment). As the Court said in *Bivens*, “it is . . . settled that where legal rights have been invaded . . . federal courts may use any available remedy to make good the wrong done.” *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). *Bivens* has been extended to Fifth Amendment violations in *Davis v. Passman*, 442 U.S. 228, 229–30 (1979), and to Sixth Amendment violations in *Wounded Knee Legal Defense/Offense Comm. v. FBI*, 507 F.2d 1281, 1284 (8th Cir. 1974) and *Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 161–62 (D.D.C. 1976). In addition, the First Amendment forbids the government from punishing an individual for mere membership in, or support of, particular organizations, unless there is a showing that the individual “specifically intended to further the organization’s unlawful goals.” *United States v. Hammoud*, 381 F.3d 316, 328 (4th Cir. 2004); see also *Healy v. James*, 408 U.S. 169, 181 (1972) (stating that the right of “individuals to associate to further their personal beliefs” is implicitly recognized in the freedoms explicitly protected by the First Amendment); *Elfbrandt v. Russell*, 384 U.S. 11, 15–16 (1966) (clarifying that the government must show that a member of an organization has a specific intent to further the unlawful aims of that organization before punishment is appropriate). To the extent the detainee’s military commission trial is based on innocent membership, association, or support of organizations or groups labeled as terrorist, the detainee may have a private damage action under *Bivens*. See *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982) (assuming a private claim may be inferred under the First Amendment); *Gibson v. United States*, 781 F.2d 1334, 1341–42 (9th Cir. 1986) (holding that FBI agents acted with the impermissible motive of curbing Plaintiff’s protected speech, giving rise to a *Bivens*-type action directly under the First Amendment); *Dellums v. Powell*, 566 F.2d 167, 194–95 (D.C. Cir. 1977) (inferring a private *Bivens* damage remedy for First Amendment violations).

Neither the Detainee Treatment Act of 2005 (DTA) nor the Military Commissions Act of 2006 (MCA) precludes a *Bivens* action by a civilian, whether citizen or non-citizen, to vindicate the violation of the Sixth Amendment right of trial by jury. DTA section 1004(a) provides officers, agents, and employees of the United States with an affirmative defense to an alien detainee’s suit if they “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.” Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1004(a), 119 Stat. 2739, 2740 (2005) (to be codified at 42 U.S.C. § 2000dd-1). This defense is merely a restatement of the “qualified immunity” defense already available to federal officials in *Bivens* damage actions. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (“We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”). While § 1005(e)(1) appears to narrow the class of aliens who can bring civil actions to those determined not to be enemy combatants who are no longer in military custody, this jurisdiction-stripping provision is limited to actions “relating to any aspect of the detention.” Detainee Treatment Act of 2005, Pub. L. No. 109-148, sec. 1005(e)(1), § 2241(e)(2), 119 Stat. 2739 (2005), amended in part by Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7(a), 120 Stat. 2600, 2635–36 (2006). It appears Congress intended to limit the scope of this language to the conditions of detention and was not targeting actions to redress wrongful enemy-combatant determinations of those who remain in military custody.

MCA sec. 3(a)(1), which strips the courts of jurisdiction to hear any claim “relating to the prosecution, trial, or judgment of a military commission under this chapter,” does not include the rulings of Combatant Status Review Tribunals under the DTA and does not extend to enemy-combatant determinations that trigger military tribunal jurisdiction. Sec. 3(a)(1), § 950j. Likewise, sec. 7(a), while stripping the courts of jurisdiction to hear any actions concerning “detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States,” does not preclude the civilian courts from hearing actions challenging the jurisdiction of the military tribunal. *Id.* at sec. 7(a), § 2241(e). In any event, sec. 7(a) applies only to an alien who has been “properly detained as an

Since the contention that Congress has the inherent power to suspend underlying rights by suspending the writ has no textual or historical support, claims that Congress can extend military jurisdiction over civilians by suspending the writ are augmented by reference to a declaration of martial law, which has often accompanied a suspension of the writ.<sup>314</sup> This theory, however, was explicitly rejected by the Supreme Court in *Milligan*, where martial law had been declared in connection with the suspension of the writ of habeas corpus.<sup>315</sup> The Court, in no uncertain terms, rejected the argument that a declaration of martial law by a military commander or the President includes the extension of military-commission jurisdiction over civilians.<sup>316</sup> As the Court put it: “Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.”<sup>317</sup>

Nearly a century later, in *Duncan v. Kahanamoku*, the Supreme Court reaffirmed the *Milligan* principle that when martial law is declared in connection with a suspension of the writ, the scope of martial law is traditionally limited to permitting the arrest and temporary detention of civilians without judicial recourse and does not extend to trial and punishment by military commission unless the hostilities that give rise to

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enemy combatant” and does not extend to the enemy-combatant determination itself. *Id.* A narrow reading of these jurisdiction-stripping provisions is consistent with the district court decision in *Milligan’s* damage lawsuit that was brought following the Supreme Court decision invalidating the jurisdiction of the military tribunal. *See Milligan v. Hovey*, 17 F. Cas. 380, 381 (C.C.D. Ind. 1871) (No. 9,605) (ruling that subsequent acts passed by Congress to indemnify government officials for wrongful detention during the Civil War could not act as a defense to liability for a military trial forbidden by the Constitution). Similar damage suits for false imprisonment were successfully pursued by civilians tried by military tribunals for offenses outside their jurisdiction during the War of 1812. *See Shaw v. Smith*, 12 Johns. 257, 258, 264–67 (N.Y. Sup. Ct. 1815) (affirming jury award for plaintiff’s false imprisonment claim against military officials); *M’Connell v. Hampton*, 12 Johns. 234, 234–35, 238 (N.Y. Sup. Ct. 1815) (affirming civilian plaintiff’s entitlement to damages for false imprisonment against a military officer).

314. *See WINTHROP, supra* note 121, at 828–30 (stating that the power to declare martial law is “closely connected” to the power to suspend the writ of habeas corpus). According to Winthrop, “[m]artial law, lawfully declared, creates an exception to the general rule of exclusive subjection to the civil jurisdiction, and renders offenses against the laws of war, as well as those of a civil character, triable . . . by military tribunals.” *Id.* at 830.

315. *Milligan*, 71 U.S. at 114–15, 124.

316. *Id.* at 124–25.

317. *Id.* The Court also observed:

Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the ‘military independent of and superior to the civil power’—the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence.

*Id.* at 124.

the emergency close the courts.<sup>318</sup>

*C. Congress's Power Under Art. I, § 8, Cl. 15 "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"*

The militia power under Clause 15 traditionally includes the power to declare martial law and to authorize temporary detentions in domestic emergencies and civil disorders that threaten to overwhelm state law enforcement.<sup>319</sup> Although the use of federal troops or militia as a domestic police force is prohibited by the Posse Comitatus Act,<sup>320</sup> the current version

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318. *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946). *Milligan's* refusal to extend military commission jurisdiction to civilians notwithstanding a declaration of martial law during the Civil War was reaffirmed in the context of the war against terrorism in *Hamdan v. Rumsfeld*, which recognized the "limitations on, these commissions" set forth in *Milligan*. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2775 n.25 (2006). In his concurring opinion, Justice Kennedy cited *Milligan* for the proposition that Congress has the power to determine the necessity for military courts "[s]ubject to constitutional limitations." *Id.* at 2804 (Kennedy, J., concurring). As in *Milligan*, the Court in *Duncan* did not invalidate the declaration of martial law, and it did not deny Congress's power to suspend the writ in an area of the country that was under invasion (although the writ had been restored by the time the two civilians had filed their petitions). *Duncan*, 327 U.S. at 311, 312 n.5, 313–14. In these circumstances the Court had no hesitation in recognizing the power of the military pursuant to a suspension of the writ and/or martial law declaration to "arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war." *Id.* at 314. The Court in *Duncan* cited the line of cases represented by *Moyer v. Peabody*, 212 U.S. 78 (1909), as supporting this distinction between temporary military detention, which martial law includes, and military trials of civilians, which martial law cannot constitutionally include as long as the civilian courts are functioning. *Duncan*, 327 U.S. at 314 n.10; see *Sterling v. Constantin*, 287 U.S. 378, 399–402 (1932) (recognizing the Executive's authority to temporarily quell civil disorder by declaring martial law, but noting that the exercise of this authority cannot substitute for the judicial process when the courts are "open and functioning").

319. Some have argued that, in the absence of a suspension of the writ, this Clause is the sole source of emergency power to detain civilians without cause and that the President cannot exercise temporary military detention authority unless authorized by Congress. See Vladeck, *Small Problem of Precedent*, *supra* note 41, at 963 (explaining that any detention must be "legislatively authorized"); see also Katyal & Tribe, *supra* note 35, at 1279–80 ("This general principle of *Milligan* . . . leaves the President little unilateral freedom to craft an order to detain people on his own suspicion for indefinite warehousing or trial at his pleasure in a system of military justice."). Justice Souter, in his separate opinion in *Hamdi*, suggests that "in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive" may have the constitutional power to act without congressional authorization to temporarily detain citizens without cause if there is reason to fear such citizens are an "imminent threat to the safety of the Nation and its people." *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (joined by Ginsburg, J.). There is no suggestion in Justice Souter's opinion, however, that these emergency powers of the President would also extend to the use of military tribunals to try and punish persons temporarily detained by the Executive.

320. Posse Comitatus Act, ch. 264, 20 Stat. 152 (1878) (codified as amended at 18 U.S.C. § 1385 (2000)). The Posse Comitatus Act prevents the misuse of the military as a domestic police force, but does not interfere with the use of the military in appropriate national security activities. See Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief*

of the Militia Act of 1785 (enacted in part pursuant to Congress's Clause 15 power), gives the President the power to use federal troops or militia in the event of an insurrection or rebellion that makes it "impracticable [for state authorities] to enforce the laws of the United States in any state."<sup>321</sup> In the 1950s and 60s, the Militia Act was used by Presidents Eisenhower and Kennedy to authorize the use of military troops to enforce the orders of civilian courts to racially integrate schools in Arkansas, Mississippi, and Alabama.<sup>322</sup> Other occasions for the use of military troops in civil disorders pursuant to a variety of congressional acts have been, in effect, an imposition of martial law entailing the arrest and detention of civilians by military personnel.<sup>323</sup>

Similar to the limits on the reach of its war powers, Congress's emergency-detention power under Clause 15 does not authorize Congress to extend its military tribunal jurisdiction if the civilian courts are open and functioning, as described in *Milligan*. For a short time following the Supreme Court's 1909 decision in *Moyer v. Peabody*,<sup>324</sup> there were isolated lower court cases suggesting that civilians subjected to trial by military tribunal upon a governor's declaration of martial law could not raise the

*and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 88 (2003) (placing the Posse Comitatus Act within a broad category of laws that both authorize and limit the use of the military to enforce domestic security).

321. Congress has also authorized the President to use the armed forces within the United States in the event of major public emergencies when the states are incapable of maintaining order, including a "terrorist attack or incident." 10 U.S.C. § 332 (a)(A)(i)(ii) & (B) (2000).

322. Exec. Order 10,730, 22 Fed. Reg. 7628 (Sept. 24, 1957); Exec. Order 11,053, 27 Fed. Reg. 9681 (Sept. 30, 1962); Exec. Order 11,111, 28 Fed. Reg. 9709 (June 11, 1963).

323. See 33 U.S.C. § 3 (2000) (authorizing the Secretary of the Army to impose regulations upon certain waterways used for military target practice and making intentional violation of such regulations a misdemeanor offense); Espionage Act of 1917, ch. 30, §§ 1, 4, 40 Stat. 217, 220 (codified as amended at 50 U.S.C. § 191 (2000 & Supp. III 2003)) (providing for military enforcement of regulations regarding the "anchorage and movement of any vessel"); 14 U.S.C. § 91 (2000) (ensuring "the safety or security of any United States naval vessel in [navigable] waters"); 49 U.S.C. § 324 (2000 & Supp. III 2003) (authorizing the use of military forces to "carry out the duties and powers of the Secretary [of Transportation] related to the regulation and protection of air traffic"); 10 U.S.C. §§ 371–378 (2000 & Supp. IV 2004) (detailing the extent to which military equipment, personnel, and intelligence may be provided to assist civilian law enforcement agencies). For a detailed discussion of how each of these acts relate to military involvement in civilian law enforcement, see Felicetti & Luce, *supra* note 320, at 114–62.

324. 212 U.S. 78 (1909). Justice Scalia, in his dissenting opinion in *Hamdi*, limits the reach of *Moyer* to the doctrine of qualified immunity, whereby military officials who act in good faith to quell an insurrection or disorder will not be subject to damage liability in the courts. *Hamdi v. Rumsfeld*, 542 U.S. 507, 572 n.4 (2004) (Scalia, J., dissenting) (joined by Stevens, J.). Justice Scalia's narrow interpretation of *Moyer* is supported by the Supreme Court's post-*Moyer* decision in *Sterling v. Constantin*, 287 U.S. 378, 399–402 (1932). In any event, *Moyer*'s reference to the unreviewable power of the Governor to use the militia to quell a civil disorder or insurrection did not extend to military trials of civilians. *Moyer*, 212 U.S. at 83 (stating that the plaintiff was detained until he could be discharged with safety "to the civil authorities to be dealt with according to the law").

*Milligan* challenge to military jurisdiction because the governor's declaration was a political act not reviewable by the courts.<sup>325</sup> This effort to circumvent *Milligan* was corrected in *Sterling v. Constantin*, where the Court held that the limits of military jurisdiction, whether pursuant to emergency powers of state or federal government, were judicial questions.<sup>326</sup> Later, in *Duncan v. Kahanamoku*, the Court reaffirmed *Sterling* and explained that a martial law declaration by a state governor, even though approved by the President and authorized by Congress, could not be interpreted as subjecting civilians within the territorial jurisdiction of the United States to military tribunals unless the civilian courts were closed by hostilities and unable to function, as required by *Milligan*.<sup>327</sup>

In sum, Congress's Clause 15 power to use the militia to "execute the Laws" is also limited by the Constitution's jury trial guarantees, and Congress cannot authorize either the President or a state governor to use the militia to replace functioning civilian courts with military tribunals to try and punish civilians detained in the process of responding to a civil disorder or other emergency.

*D. Congress's Power Under Art. I, § 8, Cl. 10 "To Define . . . and Punish Offences Against the Law of Nations"*

Clause 10 is often cited as the source of congressional power to

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325. See, e.g., *United States ex rel. Seymour v. Fischer*, 280 F. 208, 210 (D. Neb. 1922) ("When a state of war or insurrection exists, and the Governor has legally called into action the military forces of the state, the will of the commander becomes the controlling authority in the occupied territory, so far as he chooses to exert it, subject to the laws and usages of war."); *United States ex rel. McMaster v. Wolters*, 268 F. 69, 71 (S.D. Tex. 1920) ("The question as to whether there is riot, or insurrection, or breach of the peace, or danger thereof, is one solely for the decision of the Governor. The courts will not interfere with his discretion in that, and will not inquire as to whether or not the facts justify the Governor."); *Ex parte Jones*, 77 S.E. 1029, 1045 (W. Va. 1913) ("On this question authority is meager, for the obvious reason that it is a political one, not subject to judicial review; the courts everywhere holding a declaration of a state of war by competent authority to be conclusive of the fact.").

326. *Sterling*, 287 U.S. at 401. See discussion *supra* at Part III.A.4.

327. *Duncan v. Kahanamoku*, 327 U.S. 304, 319–24 & n.18 (1946). In fact the Court in *Duncan* cited with approval the dissent of Justice Woodbury in *Luther v. Borden*, 48 U.S. (7 Haw.) 1, 48 (1849). *Duncan*, 327 U.S. at 320 n.15, 321 n.16. The meaning of Woodbury's dissent is clear: the state's martial law emergency power used to put down an armed insurrection with state or federal militia, even if augmented by Congress's political question power to guarantee a republican form of government, is not beyond judicially enforced constitutional limits in certain respects (e.g. right to jury trial), even though other constitutional limits (e.g. cause for seizure) may be subject to temporary suspension if the emergency necessitates it. See *id.* at 319–24 (discussing, *inter alia*, the Whiskey Rebellion of 1794 and quoting the President as telling his commanding general that "the judge cannot be controlled in his functions"). Under the *Milligan-Sterling-Duncan* line of cases, the Court has established as a matter of law that trial of civilians by military tribunal is not necessary if the civilian courts are open and functioning. See discussion *supra* Part III.C.2.

authorize military-commission trials to punish offenses against the “Law of Nations.”<sup>328</sup> Since punishable offenses against the law of nations will be defined by the law of war, the scope of Congress’s power to punish under Clause 10 will be informed, if not governed, by law-of-war rules and principles.<sup>329</sup> Congress relied on the law of war when authorizing military commissions in the UCMJ and referred to the law of war throughout the Military Commissions Act of 2006 as defining the Act’s scope and purpose.<sup>330</sup>

As a component of the law of nations, the law of war, among other things, provides a set of rules that govern the treatment of soldiers and civilians in wartime.<sup>331</sup> Although the content of the law of war derives from both treaties and customary international law, most of the law of war is now contained in treaties.<sup>332</sup> The most important treaties with respect to the law of war are the four 1949 Geneva Conventions.<sup>333</sup> In addition to

328. *E.g.*, *In re Yamashita*, 327 U.S. 1, 7 (1945) (quoting U.S. CONST. art. I, § 8, cl. 10); *Ex parte Quirin*, 317 U.S. 1, 29 (1942). Congress is also given the power in Article I, Section 8, Clause 9 “To constitute Tribunals inferior to the supreme Court.” This provision has been interpreted by the Supreme Court as one that “plainly relates to the ‘inferior Courts’ provided for in Article III, Section 1; it has never been relied on for establishment of any other tribunals.” *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962).

329. *Ex parte Quirin*, 317 U.S. 1, 27–28 (1942) (“[T]his Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.”). *See also In re Yamashita*, 327 U.S. 1, 16 (1946) (noting that the law of war is part of the law of nations); *The Prize Cases*, 67 U.S. (2 Black) 635, 667 (1863) (“The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war.”); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (applying “the general laws of war” to disputes arising during a congressionally-authorized act of hostility).

330. *See* 10 U.S.C. §§ 821, 836 (2000) (comprising Articles 21 and 36(a) of the UCMJ, the texts of which are set forth *supra* note 32); *see also* Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3(a)(1), § 948b(a), 120 Stat. 2600, 2602 (2006) (to be codified at 10 U.S.C. § 948b(a)) (“This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for *violations of the law of war . . .*”) (emphasis added). There is a provision of the MCA that prohibits reliance on foreign or international sources of law, but this applies only to the application of 18 U.S.C. § 2441(d), addressing “Common Article 3 violations,” and thus is not relevant to the issues of military trials of civilians. *See id.* § 6(a)(2), 120 Stat. 2632 (“No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of section . . . 2441.”).

331. *See* DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, chs. 3–5 (July 18, 1956), available at <http://www.afsc.army.mil/gc/files/FM27-10.pdf> [hereinafter FM 27-10] (addressing the rules regarding prisoners of war, the wounded and sick, and civilians).

332. *Id.* ch. 1, § I, para. 4, at 4.

333. The First Geneva Convention governs the treatment of wounded and sick soldiers. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. The Second Geneva Convention governs the treatment of sailors. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85. The

treaties, the law of war is also found in the rules derived from the actual practice of nations developed gradually over time, usually referred to as customary international law.<sup>334</sup> Sometimes the law of war contained in a treaty that has not been ratified becomes binding, nonetheless, as customary international law. For example, although Additional Protocols I and II to the Geneva Conventions of 1949<sup>335</sup> have not been ratified by the United States, most of the provisions of these Protocols are now recognized as customary international law by the United States.<sup>336</sup> Moreover, while the Geneva Conventions are concerned mostly with international armed conflicts between two or more nation-states, Common Article 3 applies to armed conflicts “not of an international character.”<sup>337</sup> This has been

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Third Geneva Convention governs prisoners of war. Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. Finally, the Fourth Geneva Convention governs the treatment of civilians. Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. These treaties have been ratified by 194 nations, including the United States, Afghanistan, and Iraq. In addition to the Geneva Conventions, another law-of-war source is a series of treaties dating from 1899 typically referred to as the “Hague Conventions,” which include rules that restrict military organizations to attacking only targets of military value. See Convention (IV) Respecting the Laws and Customs of War on Land art. 25, Oct. 18, 1907, 36 Stat. 2277, 2302, 1910 WL 19348 (prohibiting attack on undefended civilian targets).

334. Brief of Amici Curiae Specialists in the Law of War in Support of Petitioner-Appellant Ali Saleh Kahlah Al-Marri and Reversal at 7, *Saleh Kahlah Al-Harri v. Wright*, No. 06-7427 (4th Cir. Nov. 20 2006) [hereinafter Specialists Brief]; see FM 27-10, *supra* note 331, ch. 1, § I, para. 6, at 6:

Even though individual States may not be parties to or otherwise strictly bound by [the Hague Convention No. IV of 18 October 1907, Respecting the Laws and Customs of War on Land] and [the Geneva Convention Relative to the Treatment of Prisoners of War of 27 July 1929], the former convention and the general principles of the latter have been held to be declaratory of the customary law of war, to which all States are subject.

See also *The Paquete Habana*, 175 U.S. 677, 711 (1900) (treating the “law of the sea” as a “universal obligation” that has become generally accepted over time and which cannot be superseded by one nation’s laws).

335. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, June 8, 1977, 1125 U.N.T.S. 4 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, June 8, 1977, 1125 U.N.T.S. 610 [hereinafter Additional Protocol II].

336. INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCHOOL, U.S. ARMY, LAW OF WAR WORKSHOP DESKBOOK sec. B.II.C.3(c)(2), at B-5, III.C.2(a), at B-11 (2006) [hereinafter LAW OF WAR DESKBOOK], available at [www.jagcnet.army.mil/tjagsa](http://www.jagcnet.army.mil/tjagsa); see Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L. L. & POL’Y 419, 420 (1987) (stating that the United States “consider[s] itself legally bound by the rules contained in Protocol I only to the extent that they reflect customary international law”).

337. Specialists Brief, *supra* note 334, at 10. Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 3116, 75 U.N.T.S. 31, 32.

interpreted by the Supreme Court in *Hamdan* to include armed conflicts between the United States and private terrorist organizations.<sup>338</sup>

One of the fundamental principles of the law of war is the distinction between combatants and civilians.<sup>339</sup> The Commentary to the Fourth Geneva Convention states: “Every person in enemy hands . . . is either a prisoner of war . . . [or] a civilian . . . . *There is no intermediate status . . . .*”<sup>340</sup> This interpretation of the law of war is accepted by the U.S. Army, which acknowledges that persons not qualifying as prisoners of war under the Third Geneva Convention should be regarded as civilians.<sup>341</sup> Combatants can be attacked or otherwise targeted with lethal force wherever they are found, unless disarmed or trying to surrender.<sup>342</sup> Civilians, on the other hand, are protected from armed attack, as long as they do not directly participate in hostilities.<sup>343</sup>

The United States Supreme Court has interpreted the law of war as also drawing a distinction between lawful and unlawful combatants.<sup>344</sup> All combatants are subject to military jurisdiction and detention as prisoners of war; however, combatants who engage in acts that violate the rules of warfare are considered unlawful enemy combatants, and are also subject to trial and punishment by military commission for violations of the law of war.<sup>345</sup> This distinction was recognized by the Court in *Hamdi*: “The

338. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796 (2006) (deciding that Common Article 3 of the Geneva Conventions applies to armed conflicts across nation-state boundaries that are not between nation-states themselves).

339. *Ex parte Quirin*, 317 U.S. 1, 30–31 (1942) (“By universal agreement and practice, the law of war draws a distinction between the armed forces and [civilians] . . . .”); see also CLAUDE PILLOUD ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 586 (Yves Sandoz et al. eds., Tony Langham et al. trans. 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS] (“[T]he principle of protection and of distinction forms the basis of the entire regulation of war . . . .”).

340. INT’L COMM. OF THE RED CROSS, COMMENTARY TO THE IV GENEVA CONVENTION 51 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY TO THE IV GENEVA CONVENTION]; see also Additional Protocol I, *supra* note 335, art. 50, 1125 U.N.T.S. at 26 (“In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”); Third Geneva Convention, *supra* note 333, art. 4(A), 6 U.S.T. at 3320 (defining categories of prisoners of war).

341. See LAW OF WAR DESKBOOK, *supra* note 336, at G-6 (noting that the U.S. has never rejected the “negative” definition of civilian contained in article 50 of Additional Protocol I).

342. See Specialists Brief, *supra* note 334, at 14. See also Additional Protocol I, *supra* note 335, arts. 48, 52(2), 1125 U.N.T.S. at 25, 27 (prohibiting attacks on non-military targets).

343. See Additional Protocol I, *supra* note 335, art. 51(2), 1125 U.N.T.S. at 26 (prohibiting acts of “terror among the civilian population”); Additional Protocol II, *supra* note 335, art. 13(2), 1125 U.N.T.S. at 615 (prohibiting acts of “terror among the civilian population”).

344. See *Quirin*, 317 U.S. at 30–31 (stating that “the law of war draws a distinction . . . between those who are lawful and unlawful combatants”).

345. See *id.* at 31 (citing international law authorities for the assertion that “[u]nlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful”).

capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”<sup>346</sup> Likewise, in *Quirin*, the Supreme Court found that the defendants, as “agents of enemy armies” on a mission of sabotage who discarded their uniforms to go in disguise as civilians, were unlawful enemy combatants under the law of war and thereby subject to trial by military commission.<sup>347</sup> Accordingly, “punishing” offenses against the law of nations, such as acts of terrorism, torture, or the like, is defined by the law of war as limited to enemy combatants. Congress, therefore, has no power derived from the law of war to punish civilians for such offenses.<sup>348</sup>

Even if the law of war could be interpreted to permit the use of military trials to punish civilians for law-of-war offenses, Congress’s power under Clause 10 cannot extend to civilians without violating constitutional guarantees of trial by jury.<sup>349</sup> Before the Court in *Quirin* concluded that Congress had acted within the scope of its power under Clause 10, it made an independent determination that the specific facts supporting the law of war “enemy combatant” designation were sufficient to make the defendants non-civilians for purposes of Article III and Sixth Amendment jury-trial rights.<sup>350</sup> As the Court said in *Quirin*: “[T]here are acts regarded by . . . some writers on international law, as offenses against the law of war which would not be triable by military tribunal here . . . because they are of that class of offenses constitutionally triable only by a jury.”<sup>351</sup> The constitutional standard, in other words, may be informed by the law of war, but is not controlled by it. As the Court said in *Milligan*, “no 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 . . . .”<sup>352</sup>

Likewise, the fact that a person engages in conduct forbidden by a law of war does not, by itself, establish that the person is a combatant subject to punishment by military commission. *Milligan* was a civilian for purposes of the Constitution even though he was a guerilla, charged with conspiring

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346. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting *Quirin*, 317 U.S. at 28, 30) (alteration in original).

347. *Quirin*, 317 U.S. at 37, 46.

348. The one exception to this may be civilians who directly participate in the hostilities. Under the law of war such civilians forfeit their civilian status and become combatants, at least during the time of their direct participation. See discussion *infra* Part V.

349. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 122–23 (1866).

350. *Quirin*, 317 U.S. at 29, 36–37.

351. *Id.* at 29 (referring, by example, to the circumstances of *Milligan*).

352. *Milligan*, 71 U.S. at 121–22.

to overthrow the government, seize munitions, and arrange for the escape of prisoners of war.<sup>353</sup> These could be characterized as offenses that violate the law of war if committed by a combatant, but not, under the Constitution, if committed by a civilian.<sup>354</sup> The Supreme Court has “rejected in no uncertain terms the Government’s assertion that military jurisdiction [of civilians] was proper [simply by alleging violations] ‘under the laws and usages of war.’”<sup>355</sup> With the possible exception of those who directly participate in hostilities on the battlefield, the Constitution simply does not recognize an offense as violating the law of war if the offender is a civilian. In *Duncan v. Kahanamoku*, military tribunals were rejected because Duncan and White were civilians, not because their offenses were unrelated to the war effort.<sup>356</sup> Indeed, Duncan was charged with violating a military order which prohibited an “assault on military . . . personnel with the intent to hinder them in the discharge of their duty.”<sup>357</sup> This crime allegedly occurred at a time when, in Hawaii, there was a present danger of invasion by “commando raids or submarine attacks.”<sup>358</sup> That offense, under those circumstances, could have been characterized as interference with the war effort, and if committed by an enemy combatant, may have been a violation of the law of war. Nonetheless, like Milligan, it was Duncan’s status as a civilian, not the nature of his offense, which entitled him to trial by jury in a civilian court and protected him from trial by military tribunal.

Hence, Congress’s power to punish law-of-nations offenses under Clause 10 does not include the power to confer jurisdiction on military tribunals unless the alleged offender is first determined to be an enemy combatant and not a civilian. To the extent the Court in *Quirin* found trial by military tribunal to be within the scope of Congress’s Clause 10 power, it was predicated on the defendants’ concession that they were enemy combatants who were charged with violating the law of war.<sup>359</sup> Had they instead been civilians, Article III and Sixth Amendment rights of trial by jury would have deprived the military commission of jurisdiction regardless of the characterization of their alleged offenses.<sup>360</sup>

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353. *Id.* at 6–7 (statement of the case).

354. *Id.* at 116.

355. *Hamdi v. Rumsfeld*, 542 U.S. 507, 567 (2004) (Scalia, J., dissenting) (joined by Stevens, J.) (quoting *Milligan*, 71 U.S. at 121). Justice Scalia equated Milligan with Hamdi because both were U.S. citizens detained within the territorial jurisdiction of U.S. courts, rejecting as irrelevant the fact that Hamdi was captured on a foreign battlefield. *Id.* at 560–61, 567–68.

356. *Duncan v. Kahanamoku*, 327 U.S. 304, 307, 315–16 (1946).

357. *Id.* at 310–11.

358. *Id.* at 329 (Murphy, J., concurring).

359. *Ex parte Quirin*, 317 U.S. 1, 20–22 (1942).

360. *Milligan*, 71 U.S. at 121–22. Like the saboteurs in *Quirin*, Milligan was charged with conspiring to commit sabotage to aid the Confederate (enemy) cause, but because he was not acting

For the most part, the exclusion of civilians from Congress's Clause 10 power has been respected by Congress itself, even during the war against terrorism.<sup>361</sup> Instead of seeking to expand the jurisdiction of military tribunals to include civilians, Congress has looked to the civilian courts to try and punish civilians who commit war- and terrorism-related criminal offenses, including 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities); § 1201 (aircraft sabotage and kidnapping); § 1203 (hostage taking); § 831 (theft of nuclear materials); § 2332a (use of weapons of mass destruction); § 2332b (acts of terrorism transcending national boundaries); § 2339A (providing material support to terrorists); § 2339B (providing material support to certain terrorist organizations); § 2383 (rebellion or insurrection); § 2384 (seditious conspiracy); § 2390 (enlistment to serve in armed hostility against the United States); and 50 U.S.C. § 1705(b)

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under the command of the enemy army, he was a civilian entitled to be tried by a civilian jury. *Id.* at 131. Obviously, had Milligan been a spy acting under the command of the Confederacy, he would by definition have been treated as a combatant, not as a civilian. Winthrop, for example, *assumes* that persons punishable by military commission as "spies" in violation of the law of war are "persons in the military service of the enemy." WINTHROP, *supra* note 121, at 838. The same is true of the Court in *Quirin*, which referred to the history of trying alien spies "without uniform" in time of war by military tribunal as outside the protections of the Sixth Amendment and Article III. *Quirin*, 317 U.S. at 30–31. For this reason, Article 106 of the UCMJ, which authorizes military-commission trials for "spies," must be construed as limited to enemy combatants and cannot be extended to civilians, even for acts that could be characterized as spying or espionage. See 10 U.S.C. § 906 (2000) ("Any person who in a time of war is found lurking as a spy or acting as a spy . . . shall be tried by a general court-martial or by a military commission . . ."). Committed by civilians, those acts would constitute violations of domestic law that must be tried in the civilian courts. Although the *Milligan* principle applies to alien and citizen civilians alike, its application to offenses such as spying or espionage is more widely accepted for citizens than for aliens. Citizenship seems to confer a presumption that the alleged spy is not acting under the command of an enemy army and is, therefore, a civilian entitled under the Constitution to a civilian jury trial. See, e.g., *United States v. Fricke*, 259 F. 673, 674 (S.D.N.Y. 1919) (trying citizen charged with treason during time of war by civilian jury trial); *United States v. Robinson*, 259 F. 685, 685 (S.D.N.Y. 1919) (trying citizen with treason for "conveying messages, oral or in invisible ink" to "agents and representatives of the German government" during war). Moreover, acts of treason by citizens traditionally are tried in the civilian courts by civilian juries. See U.S. CONST. art. III, § 3, cl. 1 ("No Person shall be convicted of Treason unless on the Testimony of two Witness to the same overt Act, or on Confession in open Court."). Nonetheless, as the *Quirin* Court made clear, it is not citizenship but the lack of membership in or association with the enemy's army that determines the reach of constitutional jury trial guarantees, and with it the boundaries of military tribunal jurisdiction. *Quirin*, 317 U.S. at 37–38.

361. The one exception may be the Military Commissions Act of 2006, which enlarges the definition of alien unlawful enemy combatant subject to trial by military commission to potentially include aliens not acting under the command of the enemy's army. See Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3(a)(1), § 948a(1), 120 Stat. 2600, 2601 (to be codified at 10 U.S.C. § 948a(1)) (defining unlawful enemy combatants to include any "person who has engaged in hostilities . . . against the United States . . ."). To the extent this Act authorizes military-commission trials of alien civilians who allegedly commit one or more of the listed law-of-war offenses, it exceeds Congress's power, including its power under Clause 10, and violates Sixth Amendment and Article III jury trial rights. For a more complete discussion, see *infra* Part V.

(criminalizing violations of 31 C.F.R. § 595.204, which prohibits the “making or receiving of any contribution of funds, goods, or services” to terrorists). In addition, in 1996 Congress enacted the War Crimes Act, which assumed that civilians inside or even outside the United States who commit “war crimes” as set forth in the statute should be tried and punished by functioning U.S. civilian courts.<sup>362</sup> These statutes demonstrate Congress’s intent to provide for the prosecution of civilians in civilian courts for offenses which would also violate the law of war, if committed by an enemy combatant.

Moreover, any suggestion that Congress’s Clause 10 power should be enlarged to respond to the realities of modern warfare is not supported by historical precedent. For example, in contrast to the eight saboteurs in *Quirin* who were acting in the service of the German armed forces and were tried by military commission as unlawful enemy combatants, all fourteen civilians living in the United States who conspired with the saboteurs and participated in the sabotage plot were tried and convicted in civilian courts for various criminal offenses ranging from treason to trading with the enemy.<sup>363</sup> Nor is expansion of military tribunal jurisdiction necessary to defend the country in the age of terrorism. From 1993 to 2001, the U.S. Attorney for the Southern District of New York “successfully prosecuted twenty-six jihad conspirators, in six major trials and some minor [trials],” all in civilian federal courts.<sup>364</sup> These include seventeen alien civilians convicted of planning and executing the 1993 bombing of the World Trade Center, conspiring to bomb U.S. commercial airlines in Southeast Asia, and engaging in a seditious conspiracy “to wage a war of urban terrorism against the United States and forcibly to oppose its authority.”<sup>365</sup> Numerous alien civilians have been prosecuted in the civilian courts for terrorism-related offenses, including members of al-Qaeda and those

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362. 18 U.S.C. § 2441 (2000). The Military Commissions Act of 2006 codifies a number of parallel law-of-war crimes within the jurisdiction of military commissions, but only if the person charged is first determined to be an alien unlawful enemy combatant. See Military Commissions Act of 2006, sec. 3(a)(1), §§ 948c, 950v, 120 Stat. 2600, 2625 (setting forth the authority of the military commissions over unlawful enemy combatants and defining the crimes triable by those commissions).

363. *E.g.*, *Haupt v. United States*, 330 U.S. 631 (1947), *affirming* *United States v. Haupt*, 152 F.2d 771 (7th Cir. 1945); *Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1945); see also newspaper accounts of civilian court proceedings cited in FISHER, *supra* note 211, at 80–85.

364. Koh, *supra* note 56, at 337 n.6 (2002) (quoting Bill Keller, *Trials and Tribulations*, N.Y. TIMES, Dec. 15, 2001, at A31).

365. *United States v. Rahman*, 189 F.3d 88, 103–04 (2d Cir. 1999) (per curiam); see also *United States v. Yousef*, 327 F.3d 56, 77–78 (2d Cir. 2003) (affirming the convictions of individuals conspiring to bomb commercial airlines and participating in the 1993 World Trade Center bombing); *United States v. Salameh*, 152 F.3d 88, 107, 161 (2d Cir. 1998) (affirming convictions for individuals involved in these same crimes).

conspiring with members of al-Qaeda, leading to guilty pleas and lengthy prison sentences.<sup>366</sup> Likewise, U.S. citizen John Lindh, apprehended on the battlefield in Afghanistan, but claiming to be a civilian, was charged in civilian court with assisting al-Qaeda and carrying explosives, to which he pled guilty and received a twenty-year sentence.<sup>367</sup> Even Zacarias Moussaoui, a member of al-Qaeda, was charged in federal court in Virginia with six counts of conspiring to commit acts of international terrorism in connection with the September 11 attacks.<sup>368</sup>

This historical record demonstrates that Congress has invested the civilian courts and civilian juries with the responsibility of trying civilians for a wide range of war and national security related offenses, including conduct that would violate the law of war if committed by an enemy combatant. This is consistent with the law of war's distinction between civilians and combatants, as well as the constitutional limitations on Congress's Clause 10 power, which confine the use of military trials to "enemy combatants" when punishing offenses against the law of nations.<sup>369</sup>

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366. See, e.g., *United States v. Faris*, 162 F. App'x 199, 200 (4th Cir. 2005) (unpublished per curiam opinion) (affirming the sentence of an individual who pled guilty to crimes involving material support to a terrorist organization); *United States v. Reid*, 369 F.3d 619, 619–20 (1st Cir. 2004) (describing Richard Reid's self-proclaimed allegiance to Osama bin Laden following his guilty plea and sentencing for eight terrorism-related offenses).

367. *United States v. Lindh*, 227 F. Supp. 2d 565, 566, 573 (E.D. Va. 2002).

368. *United States v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004). Moussaoui was sentenced to life in prison. Jerry Markon & Timothy Dwyer, *Jurors Reject Death Penalty for Moussaoui*, WASH. POST, May 4, 2006, at A1; see also Koh, *supra* note 56, at 337 & n.1 (citing Brooke A. Masters, *Invoking Allah, Terror Suspect Enters No Plea: U.S. Judge in Alexandria Schedules October Trial*, WASH. POST, Jan. 3, 2002, at A1) (noting that Moussaoui pled not guilty to these counts). Also, as discussed *supra* notes 27 & 39, Jose Padilla, the citizen enemy combatant arrested in the U.S., was transferred by the Administration from military detention to civilian authorities in Florida where he was indicted on charges of conspiring to commit terrorist acts in other countries. This further attests to the capability of the civilian courts to try civilians charged with crimes related to terrorism. But see Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 330–32 (2002), for an opposing opinion, arguing that civilian courts are not equipped to try terrorism suspects because: (1) classified information needed to prosecute would be compromised in proceedings open to the public; (2) eye witnesses are unavailable; and (3) security is problematic. Each of these arguments is persuasively refuted by Koh, who points out: (1) under the Classified Information Procedures Act (CIPA), 18 U.S.C. app. 696 § 1 (2000), "U.S. prosecutors have regularly used special pretrial procedures in [terrorist] cases to protect classified information," even though the trials were otherwise open; (2) convictions in terrorism cases, as in all criminal cases, are often successfully prosecuted on the basis of circumstantial evidence; and (3) many terrorism cases have been prosecuted in various civilian courts without incident. Koh, *supra* note 56, at 337 n.6, 344 n.35.

369. *Ex parte Quirin*, 317 U.S. 1, 30–31 (1942); see also WINTHROP, *supra* note 121, at 838 (discussing "the application of the laws of war to enemies in arms").

V. THE LAW OF WAR DISTINCTION BETWEEN THE LEGAL CATEGORY OF  
“ENEMY COMBATANT” AND THAT OF “CIVILIAN”

A. Law of War Boundaries

If the civilian’s Article III and Sixth Amendment rights of jury trial in a civilian court are to be meaningfully protected in wartime, there must be a bright line drawn to protect civilians from being wrongly characterized as enemy combatants subject to the jurisdiction of military tribunals.<sup>370</sup> Moreover, the category of enemy combatant must be defined as specifically and narrowly as possible to guard against the government’s misuse of imprecise distinctions to encroach on the jurisdiction of the civilian courts and increase the scope of the military’s authority over civilian affairs.<sup>371</sup> As previously discussed, this constitutionally fundamental distinction between combatants and civilians borrows from the more general principle at the heart of the law of war, which is concerned with preventing the intentional targeting of civilians in wartime.<sup>372</sup>

To the extent that the Supreme Court has addressed this distinction as a constitutional question, the Court has employed an understanding of the term “combatant” that in most respects is consistent with the Court’s understanding of the law of war. In *Ex parte Quirin*, the Court limited the enemy-combatant (belligerent) category for purposes of trial by military commission to persons who are “part of or associated with the armed forces of the enemy” and “agents of enemy armies.”<sup>373</sup> The reason that battlefield

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370. See Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1716, 1757–67 (1998) (describing the importance of clear statements when government action crowds the constitutional line).

371. See *Reid v. Covert*, 354 U.S. 1, 23–24 (1957) (plurality opinion) (“The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds.”).

372. See Fourth Geneva Convention, *supra* note 333, art. 4, (requiring humane treatment of “[p]ersons taking no active part in the hostilities”); Additional Protocol I, *supra* note 335, art. 50 (defining civilians as anyone who is not a member of the armed forces or an organized military group belonging to a party to the conflict); see LAW OF WAR DESKBOOK, *supra* note 336, at G-6 (accepting definition of civilian contained in article 50 of Additional Protocol I). Under the law of war, every person captured is either a prisoner of war covered by the Third Geneva Convention, or a civilian covered by the Fourth Geneva Convention. COMMENTARY TO THE IV GENEVA CONVENTION, *supra* note 340, at 51. See *supra* Part IV.D.

373. *Quirin*, 317 U.S. at 37, 45–46. *Quirin*’s distinction between enemy combatant and civilian was reaffirmed in *Duncan v. Kahanamoku*, where the Court very simply proclaimed both White and Duncan to be “civilians” because they were “not connected with the armed forces.” *Duncan v. Kahanamoku*, 327 U.S. 304, 307 (1946). The Court in *Duncan* explained that the defendants’ civilian status removed the case from the scope of “the well-established power of the military to exercise jurisdiction over . . . enemy belligerents.” *Id.* at 313. The Court in *Hamdan* cited the fact that Hamdan

captures are presumed to be enemy combatants is the likelihood that any person engaged in hostilities in the zone of combat is a member or agent of the enemy's army.<sup>374</sup> The captive who challenges this presumption has the burden of proving that despite the place of his capture he was not an enemy combatant.<sup>375</sup>

The ability of the legal system to properly identify an enemy combatant is relatively simple in the case of a soldier fighting for the enemy captured on the battlefield.<sup>376</sup> *Quirin* makes clear, however, that the legal category of enemy combatant is not limited to enemy forces captured on the battlefield even though battlefield capture may be the best evidence of combatant status. Instead, the definition turns on the person's links to the enemy's army.<sup>377</sup> This suggests that a person who is not an enemy soldier must be shown to be acting under the direction or command of the enemy's army before he forfeits his status as a civilian and, with it, his rights as a civilian, including the right of trial by jury in a civilian court. As the *Quirin* Court explained, "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war."<sup>378</sup>

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had been determined to be an enemy combatant by a Combatant Status Review Tribunal convened pursuant to the military (DOD) Order of July 7, 2004, which defined an "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761 & n.1 (2006). For a discussion of the DOD Order of July 7, 2004, see *infra* Part V.B. The *Hamdan* Court had no reason to address the sufficiency or constitutionality of the definition of "enemy combatant" as contained in this DOD Order because the definition was not contested.

374. See *Hamdan*, 126 S. Ct. at 2775–76 (noting that one historical use of military commissions was "to determine, typically on the battlefield itself, whether the defendant has violated the law of war"); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 (2004) (plurality opinion) ("Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different."); see also *supra* Part IV.D.

375. See *Hamdi*, 542 U.S. at 534 ("[T]he Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.").

376. Without deciding the constitutional limits of the legal category of "enemy combatant," the Court in *Hamdi* had little trouble in concluding that Hamdi presumably fit the definition because he was "carrying a weapon against American troops on a foreign battlefield." *Id.* at 522 n.1.

377. Even a U.S. citizen can be treated as an enemy combatant if acting as an agent of the enemy's army. The Court in *Hamdi* made clear that "a citizen, no less than an alien," if an enemy combatant, can be subject to military trial. *Id.* at 519. See also *Quirin*, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.").

378. *Quirin*, 317 U.S. at 45. In this one narrow respect, *Quirin* can be seen as modifying *Milligan*, which included more open-ended language that "[a]ll other persons" (citizens of loyal states who are not members of the armed forces) are guaranteed the right of trial by jury. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866). On the other hand, *Quirin* could be read as limiting its definition of enemy combatant to those members of the enemy army who invade the United States from abroad,

When viewed in its entirety, the *Quirin* definition of enemy combatant as limited to members or associates of the enemy's army is generally supported by the Geneva Conventions.<sup>379</sup> The Additional Protocol I to the Geneva Conventions of 1949, relating to the protection of victims of international armed conflicts, defines combatants as "[m]embers of the armed forces of a Party to a conflict."<sup>380</sup> This includes "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates."<sup>381</sup> Civilians, on the other hand, are defined as all other persons who do not fall into one of these combatant categories.<sup>382</sup>

A captured enemy combatant, not being a civilian, can be detained by military authorities until the hostilities have ended.<sup>383</sup> In addition, if the combatant violates the law of war, such a combatant is considered an "unlawful enemy combatant" and is subject to trial and punishment by a military tribunal for the law-of-war offense.<sup>384</sup> What constitutes a violation of the law of war is, of course, defined by the law of war itself. Beyond substantive law-of-war offenses such as torture or targeting civilians, the Court in *Quirin* also recognized that members of the enemy armed forces who do not wear uniforms and conceal their identity, such as spies and saboteurs, are acting in violation of the law of war.<sup>385</sup> Likewise, civilians who *directly* participate in the fighting are in violation of the law of war and may be tried by military tribunals as unlawful enemy combatants for such conduct.<sup>386</sup> This narrow exception to civilian immunity from military jurisdiction appears to view an armed civilian on the battlefield assisting the enemy's army as the equivalent of a combatant acting under the military

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*Quirin*, 317 U.S. at 35–36, which would be consistent with *Milligan*'s definition of civilians as those who are inhabitants of loyal states who are not in the military or naval service of the United States or the enemy. *Milligan*, 71 U.S. at 118, 123.

379. Although the 1949 Geneva Conventions were not ratified until after the *Quirin* decision, the *Quirin* court's use of the term "unlawful combatants" or "belligerents" refers to the same category of persons that the 1949 Geneva Conventions label as unlawful combatants.

380. Additional Protocol I, *supra* note 335, art. 43(2), 1125 U.N.T.S. at 23. Although the United States has not ratified Additional Protocol I, it may follow the Protocols "to the extent that they reflect customary international law." Matheson, *supra* note 336, at 420.

381. Additional Protocol I, *supra* note 335, art. 43(1), 1125 U.N.T.S. at 23.

382. *Id.* art. 50.

383. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520–21 (2004) (plurality opinion).

384. *Ex parte Quirin*, 317 U.S. 1, 31 (1942); *see also supra* notes 344–45.

385. *See id.* (stating that an enemy combatant who "without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed . . . to be offenders against the law of war subject to trial and punishment by military tribunals").

386. Additional Protocol I, *supra* note 335, art. 51(3), 1125 U.N.T.S. at 26 ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."); *accord* Additional Protocol II, *supra* note 335, art. 13(3), 1125 U.N.T.S. at 65.

command of the enemy on the battlefield but concealing his identity as a combatant by not wearing a uniform.<sup>387</sup> In any event, civilians must be directly participating in the hostilities to violate the law of war. Civilians outside the battlefield who *indirectly* support the enemy's cause or who conspire to assist the enemy in the future do not violate the law of war and do not forfeit their civilian status.<sup>388</sup>

For example, under the law of war, Hamdi, as a civilian, could be treated as an "unlawful enemy combatant" while carrying and using an assault rifle against American forces on a battlefield.<sup>389</sup> On the other hand, civilians outside the battlefield who provide support or assistance to the enemy, if not acting under the command of the enemy army, are not subject to immediate attack as enemy combatants.<sup>390</sup> The crucial difference between direct participation on the battlefield and indirect aid and assistance outside the battlefield was recognized by the Court in *Hamdi*, which distinguished *Milligan* by virtue of the fact that Milligan had not directly participated in the fighting: "Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different."<sup>391</sup>

As discussed above, the law of war is clear that if a person is not a member of the armed forces of a nation state, is not acting under the command of the armed forces, and did not directly participate in hostilities, the person cannot be categorized as a combatant of any kind and is instead treated as a civilian.<sup>392</sup> Since the Supreme Court has historically and

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387. *Hamdi*, 542 U.S. at 522 (plurality opinion). This distinction is supported to a limited extent by Winthrop, who limits the category of persons subject to incident-to-war military commissions to "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offense in violation of the laws of war." WINTHROP, *supra* note 121, at 838. He further describes these individuals as being "in the military service of the enemy." *Id.*

388. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 339, at 619 ("There should be a clear distinction between direct participation in hostilities and participation in the war effort. . . . [M]any activities of the nation contribute to the conduct of hostilities, directly or indirectly . . .").

389. *Hamdi*, 542 U.S. at 513, 522 n.1.

390. See *supra* note 388.

391. *Hamdi*, 542 U.S. at 522 (plurality opinion). Direct participation would include hijacking an airplane with the intent to use it as a weapon, or traveling to the battlefield with the intent to participate in armed combat or act as a suicide bomber. See Specialists Brief, *supra* note 334, at 19. Acts of indirect participation, on the other hand, such as providing financial support for the enemy's cause, knowingly funding organizations that support the enemy, or planning with others to assist the enemy in future combat operations, would not violate the law of war. See COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 339, at 516 (noting that "[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place"). These indirect participants, of course, could be prosecuted in the civilian courts for any violation of U.S. domestic criminal statutes.

392. See *supra* notes 377–91. This is consistent with the constitutional boundary established in

consistently looked to the law of war in defining the reach of military jurisdiction, this distinction also marks the presumptive constitutional demarcation between those considered as civilians entitled to the rights of trial by jury and that narrow group of persons who are combatants subject to military jurisdiction and trial.<sup>393</sup>

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*Milligan*. Although accused of conspiring “to seize munitions of war stored in the arsenals” and “liberate prisoners of war,” a military commission had no jurisdiction to try Milligan because he was not a member or agent of the Confederate army and had not “directly” participated in hostilities. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6–7 (1866) (statement of the case).

393. See *Ex parte Quirin*, 317 U.S. 1, 27–28 (1942) (“From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.”). Relying on the *Quirin* and *Hamdi* definitions of enemy combatant, the Federal District Court for the District of South Carolina granted the petition of Jose Padilla for a writ of habeas corpus, ruling that Padilla, a U.S. citizen captured inside the United States, was a civilian and not an enemy combatant within the implied authorization of the AUMF. *Padilla v. Hanft*, 389 F. Supp. 2d 678, 686, 688–89 (D.S.C. 2005), *rev’d*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006) (mem.). Reversing that decision, the Fourth Circuit ruled that Padilla qualified as an “enemy combatant” under the definition in *Hamdi*. *Padilla*, 423 F.3d at 391–92. The appeals panel listed the stipulated facts, including that Padilla was trained in Pakistan by al-Qaeda to travel to the United States and use explosives as part of a terror war against the U.S., and was armed and present in a foreign combat zone during the conflict between U.S. forces and the Taliban in Afghanistan. *Id.* at 389–90. According to an opinion written by Judge Michael Luttig (since retired), Padilla had all the characteristics of Hamdi, except Hamdi was arrested on a foreign battlefield. *Id.* at 391–92. Luttig concluded that the *Hamdi* opinion did not exclude those captured on American soil from the scope of the implied combatant detention authorization of the AUMF. *Id.* at 392. Luttig’s opinion asserts that the plurality in *Hamdi* did not mention the locus of capture in framing the “narrow question presented.” *Id.* at 393. This conclusion is disingenuous at best. The Supreme Court in *Hamdi* explicitly and repeatedly confines its definition of what the AUMF authorizes to “capture on a foreign battlefield.” *Hamdi*, 542 U.S. at 523–24 (plurality opinion).

The Fourth Circuit opinion also fails to acknowledge the Supreme Court’s nearly unanimous opinion in *Hamdi* that the President’s power to detain pursuant to the AUMF was circumscribed by other constitutional limitations enforced by the civilian courts. See *Padilla*, 423 F.3d at 394 n.4 (“Padilla’s argument [that the locus of capture should be relevant to the AUMF’s authority] confuses the scope of the President’s power to detain enemy combatants under the AUMF with the process for establishing that a detainee is in fact an enemy combatant.”); see also discussion *supra* Part III. The weakness of the Fourth Circuit’s reasoning becomes even more apparent when its opinion is compared to the opinion of Judges Pooler and Parker in the Second Circuit’s earlier decision on the merits in the same case. See *Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003), *rev’d*, 542 U.S. 426 (2004) (holding that the “President does not have the power under Article II to detain an American citizen as an enemy combatant if the citizen was seized on American soil outside a zone of combat”). In any event, it now appears the Administration itself agrees that the Second Circuit’s opinion is more in line with Supreme Court precedent; on November 22, 2005, only days before the government’s deadline to file its brief in opposition to the petition filed by Padilla, the Administration announced that Jose Padilla would be released from military custody and tried for a variety of terrorism-related charges in the United States District Court. In effect, the government gave up its long running battle to subject Padilla either to indefinite military detention or to military trial, at least in part to make it more difficult for the Supreme Court to address the issue. See discussion *supra* note 27. In fact, the Administration’s transfer of Padilla to civilian custody succeeded in convincing the Supreme Court to deny certiorari on grounds that the jurisdictional issues raised by Padilla were now moot. *Padilla v. Hanft*, 126 S. Ct. 1649, 1650 (2006) (mem.). Even so, Justice Kennedy’s opinion accompanying the order, joined by the Chief Justice

*B. Definitions in the Military Order, the DOD Orders, and the Military Commissions Act*

In response to the terrorist attacks of September 11, 2001, the government has authorized the military detention of both citizens and non-citizens as enemy combatants, but it has defined the term only in relation to non-citizens (aliens). The executive branch did this initially in the Military Order of November 13, 2001,<sup>394</sup> and subsequently for Guantanamo detainees in the DOD Orders of July 7, 2004, and July 14, 2006, creating the Combatant Status Review Tribunal (CSRT).<sup>395</sup> The Military Order extends in part to past and present members of al-Qaeda that “engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore” that are intended to cause injury to the United States or its citizens.<sup>396</sup> The Military Order also includes anyone, whether or not a member of al-Qaeda, who has “knowingly harbored” such persons.<sup>397</sup>

The definition contained in both DOD Orders states:

[T]he term “enemy combatant” shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>398</sup>

Taken together, these executive branch definitions, at least for the purpose of military tribunal jurisdiction, must be interpreted narrowly in order to avoid exceeding the limitations of the law of war and the Constitution. Even conceding that al-Qaeda and associated forces refers to an armed force associated with the Taliban, under the Military Order’s

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and Justice Stevens, indicates no reluctance on the part of the Court to recognize the jurisdiction of the civilian courts to review the constitutional propriety of military proceedings. The opinion states that, in the event the government seeks to transfer Padilla back to military custody, “the District Court, as well as other courts of competent jurisdiction, should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised. Padilla, moreover, retains the option of seeking a writ of habeas corpus in this Court.” *Id.*

394. See Military Order, *supra* note 24, at 57,834.

395. Order of July 7, 2004, *supra* note 26; Order of July 14, 2006, *supra* note 26.

396. Military Order, *supra* note 24, at 57,834.

397. *Id.*

398. Order of July 7, 2004, *supra* note 26, para. a; Order of July 14, *supra* note 26, para. b. This definition was referenced by the Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761 n.1 (2006). The Court in *Hamdan*, however, did not address the legal sufficiency of the Order because Hamdan did not contest military jurisdiction. 126 S. Ct. at 2759; see also discussion *supra* notes 45 & 373.

definition of enemy combatant, a person who “harbors” a member of al-Qaeda may not be a member himself and may not be acting under the command of the Taliban or al-Qaeda. Such a person would not qualify under the law of war as an enemy combatant, and constitutional restrictions on military jurisdiction preclude trial by military tribunal.<sup>399</sup> Likewise, the scope of the “supporting” language in the DOD Orders’ definition of enemy combatant must be limited to direct participation in hostilities unless the person is acting under the command of the Taliban or al-Qaeda.<sup>400</sup> Finally, as noted earlier, persons who directly support hostilities will be treated as combatants if involved in actual fighting on the battlefield, but they retain their civilian status under the law of war for acts in support of the enemy’s cause outside the battlefield.<sup>401</sup>

Although these executive branch definitions of enemy combatant remain in effect, Congress adopted its own definition of the particular enemy combatants who are subject to military-commission trial in the Military Commissions Act of 2006.<sup>402</sup> The MCA characterizes those

399. See discussion *supra* notes 339–43.

400. It is troubling that the definition of enemy combatant in the DOD Orders ends with the sentence: “This includes any person who has committed a belligerent act or has directly supported hostilities in aid of the enemy armed forces.” Order of July 7, 2004, *supra* note 26; Order of July 14, 2006, *supra* note 26. Given other language in the Orders that defines enemy combatant as an individual supporting Taliban or al-Qaeda forces, the use of the word “includes” in the last sentence suggests that the definition of enemy combatant extends to those who have “never committed a belligerent act or who never directly supported hostilities” against the United States. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005), *vacated & dismissed*, *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007). In response to hypotheticals posed at a pre-trial hearing by the district court in the *Guantanamo Detainee Cases*, counsel for the government responded by arguing that the executive branch has the authority to detain as an enemy combatant “a little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] [sic] really is a front to finance al-Qaeda activities,” as well as “a person who teaches English to the son of an al-Qaeda member.” *Id.* The district court explained that such an interpretation of the DOD Order creating the CSRT “is significantly broader than the definition considered in *Hamdi*” because it applies to any “individual who was part of or supporting Taliban or al Qaeda forces, or associated forces or that are engaged in hostilities against the United States or its coalition partners.” *Id.* at 475 (quoting Order of July 7, 2004, *supra* note 26, para. a).

Even though the district court in the *Guantanamo Detainee Cases* did not reach the issue of the facial constitutionality of the enemy-combatant definition in the DOD Orders, it did find the definition to have been applied in an overly broad fashion to a number of detainees based upon the facts alleged. For example, one detainee, Murat Kurnaz, was being held “possibly for life—solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself. Such detention, even if found to be authorized by the AUMF, would be a violation of due process.” *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 476.

401. See discussion *supra* notes 386–92.

402. Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3(a)(1), § 948a(1)–(2), 120 Stat. 2600, 2601 (2006) (to be codified at 10 U.S.C. § 948a(1)–(2)) [hereinafter MCA]. In pertinent part, sec. 3(a)(1) defines enemy combatants as follows:

(1) UNLAWFUL ENEMY COMBATANT.—(A) The term ‘unlawful enemy

persons subject to the Act as “alien unlawful enemy combatants,” and exempts from its scope “lawful enemy combatants.”<sup>403</sup> In § 948a(2)(B) the MCA, consistent with the law of war, defines “unlawful enemy combatant” to include members of the enemy army who go in disguise.<sup>404</sup> However, the category of “unlawful enemy combatant” is also defined under § 948a(1)(A)(i) to include “a person who has engaged in hostilities.”<sup>405</sup> Unless the word “person” in (1)(A)(i) is interpreted as limited to members or associates of the enemy’s army, the MCA could be applied to civilians protected from military tribunal jurisdiction under the law of war.<sup>406</sup> Even

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combatant’ means—

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

....

(2) LAWFUL ENEMY COMBATANT.—The term ‘lawful enemy combatant’ means a person who is—

(A) a member of the regular forces of a State party engaged in hostilities against the United States;

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

*Id.*

403. *Id.* sec. 3(a)(1), § 948d(a)–(b). This section gives military commissions jurisdiction to try law-of-war offenses listed in the Act when committed by alien unlawful enemy combatants and explicitly denies military commission jurisdiction over lawful enemy combatants. *Id.* The Act is silent as to the authority of military commissions over unlawful enemy combatants who are citizens of the United States.

404. *Id.* § 948a(2)(B).

405. *Id.* § 948(1)(A)(i).

406. The only principled constitutional defense of such an interpretation of § 948a is to argue that the constitutional rule derived from *Milligan* and *Kahanamoku* is limited to U.S. citizens and does not apply to alien civilians. It appears, for example, that Justice Scalia limits the constitutional protections of *Milligan* to “citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 577 (2004) (Scalia, J., dissenting). It is difficult to understand, however, how such a distinction between citizens and non-citizens can survive the Court’s ruling in *Quirin*, which unanimously made the combatant determination turn on the distinction between civilians and members of the enemy’s armed forces, while explicitly rejecting the relevance of citizenship. *Ex parte Quirin*, 317 U.S. 1, 37 (1942) (“Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”). In any event, nothing in the plurality opinion in *Hamdi* indicates that citizen-detainees are entitled to greater due process protections than are non-citizens. In general, the alien is afforded “the same constitutional protections of due process that we

if the Supreme Court is prepared to approve the treatment of civilians engaged in active hostilities as combatants subject to military-commission trials, that narrow exception is limited by the law of war to direct participation on the battlefield and does not extend to other actions that are hostile to the United States that take place outside the zone of combat.<sup>407</sup> It would also contravene law-of-war and constitutional limitations to interpret the definitional language in the MCA as extending the scope of “unlawful enemy combatant” to aliens who provide financial or other assistance or support to enemy armed forces outside the battlefield.<sup>408</sup> In the final analysis, any effort by the government to use the enemy-combatant definitions contained in the executive branch Orders or the MCA to extend combatant status to non-members of enemy armed forces who are not acting under the command of the enemy army and are not directly participating in hostilities on the battlefield would be inconsistent with the fundamental law-of-war distinction between civilians and combatants.<sup>409</sup> In addition, the executive branch cannot use overbroad definitions of enemy combatant, even if authorized by Congress, to justify military trials of such

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accord citizens.” *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970).

407. *See supra* notes 386–92. Of course, civilians outside the battlefield can commit crimes related to the war, including providing material support for the enemy, but these crimes must be prosecuted in civilian courts with civilian juries. *See* discussion *supra* Part IV.D. A further complication is injected into the threshold definition of unlawful enemy combatant by the language in MCA sec. 3(a)(1), which identifies as a law-of-war offense providing “material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism,” and “provid[ing] material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism.” MCA, sec. 3(a)(1), § 950v(b)(25)(A). This section incorporates the definition of “material support or resources” from 18 U.S.C. § 2339A(b), which defines the term to mean “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation, except medicine or religious materials.” 18 U.S.C. § 2339A(b) (Supp. IV 2005). Even though this clearly includes those providing indirect support to terrorist organizations, the offense can be committed only by an “alien unlawful enemy combatant” as separately defined in § 948a since it is triggered only if a person is otherwise “subject to this chapter.” MCA, sec. 3(a)(1), § 948c. Assuming that Congress did not intend to violate the jury trial rights of civilians, and assuming that the language of § 948a permits a narrow reading consistent with law-of-war and constitutional limitations, the persons covered by § 948a will be limited to (1) members of the armed forces of the Taliban and associate forces, including al-Qaeda, (2) those acting under the command of these enemy armed forces, and (3) perhaps civilians directly participating in the fighting against U.S. forces. *See, e.g., Duncan v. Kahanamoku*, 317 U.S. 304, 319–24 (1946) (interpreting an act of Congress in a manner consistent with the jury trial guarantees of the Constitution and against an extension of military tribunal jurisdiction).

408. *See* discussion *supra* notes 386–92. If possible, however, the Court should interpret the MCA as limited to combatants under the law of war. “[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

409. *See* discussion *supra* notes 386–92.

civilians without encroaching on the jurisdiction of the civilian courts and violating jury trial rights guaranteed by the Sixth Amendment and Article III.<sup>410</sup>

## VI. THE GOVERNMENT'S USE OF MILITARY COMMISSIONS IS SUBJECT TO JUDICIAL REVIEW

### A. *Whether a Military Commission Has Jurisdiction Is a Constitutional Issue for the Judicial Branch*

In *Ex parte Milligan* the Supreme Court flatly stated: “[i]f there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings.”<sup>411</sup> The Court in *Milligan* held that the scope of a military commission’s jurisdiction during the Civil War was a justiciable question for the civilian courts even though a state of martial law had been declared.<sup>412</sup> The *Milligan* holding was reaffirmed in the context of World War II in *Duncan v. Kahanamoku*.<sup>413</sup> In *Duncan* the Court refused to defer to the explicit testimony of Admiral Nimitz and other military commanders that trials of civilians by military tribunals were necessary in Hawaii following Pearl Harbor because “invasion by submarine commando raiders and espionage parties was imminent and constantly impending.”<sup>414</sup> The Court in *Duncan* responded to this testimony with a de novo finding that “the dangers apprehended by the military were not sufficiently imminent to cause them to require civilians to evacuate the area or even to evacuate any of the buildings necessary to carry on the business of the courts.”<sup>415</sup> Indeed, it was Chief Justice Stone, the author of the Court’s opinion in *Quirin*, who emphasized the point in his concurring opinion in *Duncan*:

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410. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121–22 (1866) (holding that when courts are open, the Constitution does not permit a military trial for an offense “of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power.”).

411. *Id.* at 119. The Court in *Milligan* went on to say: “[I]f society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards [trial by jury] need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws.” *Id.* at 124.

412. See *id.* at 124–25 (rejecting the proposition “that in a time of war the commander of an armed force . . . has the power . . . to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*”).

413. See *Duncan v. Kahanamoku*, 327 U.S. 304, 334–35 (1946) (“To retreat from [the *Milligan*] rule is to open the door to rampant militarism and the glorification of war, which have destroyed so many nations in history.”) (Murphy, J., concurring).

414. *Id.* at 339 n.1 (Burton, J., dissenting).

415. *Id.* at 313 (majority opinion).

But executive action is not proof of its own necessity, and the military's judgment here is not conclusive that every action taken pursuant to the declaration of martial law was justified by the exigency. In the substitution of martial law controls for the ordinary civil processes, "what are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."<sup>416</sup>

Since a declaration of martial law in wartime does not oust the civilian courts from their role in protecting the rights of civilians to jury trials in functioning civilian courts, it follows that the role of the judicial branch in protecting the jury trial rights of individual civilians is not preempted because the government's actions are pursuant to its Article I war powers.<sup>417</sup> The Court in *Duncan* explained that whether the military trial of a civilian during wartime was "necessary" remained a jurisdictional question for the civilian courts under the *Milligan* "open-court" standard.<sup>418</sup>

Like *Milligan's* open-courts standard, the threshold issue of the detainee's enemy-combatant status is also subject to review by the judicial branch. This was acknowledged in *Hamdi*, where eight Justices found the enemy-combatant status issue to be one reviewable by the civilian courts. *Hamdi* stressed that "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated

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416. *Id.* at 336 (Stone, C.J., concurring) (quoting *Sterling v. Constantin*, 287 U.S. 378, 401 (1932)).

417. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 535–36 (2004) (plurality opinion) ("[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances."). *See also* discussion *supra* Part IV.

418. *Duncan*, 327 U.S. at 325–35 (Murphy, J., concurring). Assuming the jurisdiction-stripping provisions of the DTA and MCA do not violate the Suspension Clause, even without habeas corpus, Congress has preserved the ultimate authority of the judicial branch in protecting alien civilians from military trials. Although the DTA limits appeals by aliens challenging the enemy-combatant status findings of military tribunals (CSRTs) to the United States Court of Appeals for the D.C. Circuit, that review includes the issue of whether the "standards and procedures" used to make that determination are "consistent with the Constitution and laws of the United States." Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2742, *amended in part by* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36. Moreover, even though the MCA makes an "alien unlawful enemy combatant" finding by a CSRT "dispositive for purposes of jurisdiction for trial by military commission under this chapter," it provides for an appeal of the military commission proceedings to the United States Court of Appeals for the District of Columbia Circuit and a review by writ of certiorari in the United States Supreme Court. Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 3(a)(1), §§ 948(c), 948d(c), 950g(a), 950g(d), 120 Stat. 2600, 2603, 2622 (to be codified at 10 U.S.C. §§ 948(c), 948d(c), 950g(a), 950g(d)). Since the "dispositive" language appears to be limited to the consideration of a jurisdictional challenge by the military commission itself, nothing prevents the Supreme Court from considering a *de novo* challenge to the jurisdiction of the military commission on appeal, as it must do with all jurisdictional questions. *Id.* § 948d(c).

roles of reviewing and resolving claims like those presented here.”<sup>419</sup> A majority of the Court viewed the issue of Hamdi’s status as an enemy combatant as a judicial question involving the limits of military jurisdiction. Quoting from Justice Murphy’s dissent in *Korematsu v. United States*,<sup>420</sup> a majority in *Hamdi* accepted the principle that “[L]ike other claims conflicting with asserted constitutional rights of the individual, the military claim must subject itself to the judicial process.”<sup>421</sup>

Of course, as long as there has been no suspension of the writ of habeas corpus, all persons within the jurisdictional reach of Article II courts, including aliens,<sup>422</sup> are entitled to a civilian court challenge to their detention by the Executive.<sup>423</sup> Thus, regardless of a decision by the executive branch, including the Executive’s military tribunals, that a detainee is an enemy combatant, civilian court review of that constitutional

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419. *Hamdi*, 542 U.S. at 535. The Court in *Hamdi* also noted that the “permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.” *Id.* at 522 n.1 (emphasis added).

420. *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting).

421. *Hamdi*, 542 U.S. at 535.

422. In addition to the issue of whether the alien is an enemy combatant, even a conceded enemy alien may have been entitled to habeas relief at common law if his detention was not authorized by applicable regulations. In an unreported opinion, Chief Justice Marshall granted an enemy alien’s habeas petition and ordered him released. See Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG 2D 39, 39 (2005) (discussing the “unreported decision of Chief Justice John Marshall on circuit in 1813, releasing an enemy alien from executive detention”).

423. See *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (“At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.”). The common law writ protected by the Suspension Clause is available to all persons, including aliens detained within the United States or any territory outside the zone of combat under its exclusive and complete control even if not considered part of the sovereign realm. See *Rasul v. Bush*, 542 U.S. 466, 481–82 (2004) (“At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained . . . where ordinary writs did not run, and all other dominions under the sovereign’s control.”). This language in *Rasul* was brushed aside as dicta by a divided panel in the D.C. Circuit, which ruled two to one that aliens residing outside the sovereign territory of the United States traditionally have been barred from habeas corpus in wartime unless they can show connections to the United States beyond involuntary detention by our government. See *Boumediene v. Bush*, 476 F.3d 981, 990 (D.C. Cir. 2007) (“[H]abeas corpus would not have been available in 1789 to aliens without presence or property within the United States.”). But see discussion *infra* note 453 (noting that dicta in Supreme Court opinions must generally be treated as authoritative). The *Boumediene* majority’s distinction between sovereign territory and non-incorporated territory over which the sovereign exercises control is similar to the distinction made by Justice Scalia in his *Rasul* dissent. See *Rasul*, 542 U.S. at 502–05 & 505 n.5 (Scalia, J., dissenting) (emphasizing the absence of “a single case holding that aliens held outside the territory of the sovereign were within reach of the writ”). On remand of the *Hamdan* case, the district court agreed with this argument and ruled that because Hamdan’s only connection to the United States was his lengthy detention at Guantanamo, a facility outside the sovereign realm, he did not have a constitutional or common law entitlement to habeas corpus. *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 19 (D.D.C. 2006) (mem.).

and jurisdictional decision would be within the scope of the courts' obligation under habeas to determine whether the detention has a valid legal basis.<sup>424</sup> Moreover, a person imprisoned without judicial process is entitled to a broader and more searching inquiry under habeas than a person making a collateral attack on his conviction following criminal judicial proceedings.<sup>425</sup> As the Court said in *Hamdi*, habeas allows a detainee "to present his own factual case to rebut the Government's return" to the petition requesting issuance of the writ.<sup>426</sup> Thus, a person detained without judicial process by the Executive is entitled to make a full presentation of the relevant facts to the habeas court,<sup>427</sup> including extrinsic evidence that was not previously considered by executive branch officials or its military tribunals.<sup>428</sup> At a minimum, petitioners are entitled to controvert the government's contention that they are alien enemy combatants.<sup>429</sup> Indeed,

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424. The modern writ of habeas corpus is a procedure for the court to obtain jurisdiction over the custodian of the prisoner in order to determine if there is any legal cause for the detention. *See Rumsfeld v. Padilla*, 542 U.S. 426, 434–35 (2004) ("[T]he default rule is that the proper respondent is the warden of the facility where the prisoner is being held . . ."); *see also* DUKER, *supra* note 310, at 25 (illustrating that the writ was historically issued to the sheriff charged with holding the prisoner). Moreover, the writ is available to test all issues related to the legality of detention and is not limited to constitutional error. *See St. Cyr*, 533 U.S. at 301 n.14 ("[W]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention."); *see also Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 135 (1807) (opinion of Marshall, C.J.) ("It is therefore the opinion of a majority of the court, that in the case of Samuel Swartwout there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason."). As Alexander Hamilton stated in Federalist No. 84: "[T]he practice of arbitrary imprisonments have been in all ages [among] the favourite and most formidable instruments of tyranny[.]" and habeas corpus is the "remedy for this fatal evil." THE FEDERALIST No. 84, at 577 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

425. *See, e.g., Jackson v. Virginia*, 443 U.S. 307, 323 (1979) ("A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as is any judgment affirming a criminal conviction.")

426. *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion).

427. *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

428. The Supreme Court has ruled that the common law writ protected by the Suspension Clause is "at the absolute minimum . . . the writ 'as it existed in 1789.'" *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)). It was clear during the latter half of the eighteenth century and early nineteenth century that the court would consider affidavits and exhibits submitted by a habeas petitioner challenging the factual assertions in the Executive's return. *See Goldswain's Case*, (1778) 96 Eng. Rep. 711, 711–12 (C.P.) (granting habeas relief based upon Goldswain's affidavit); *Good's Case*, (1760) 96 Eng. Rep. 137, 137 (K.B.) (granting habeas relief based on an affidavit asserting that Good was "impressed to serve" on a military vessel against his will); *State v. Clark*, 2 Del. Cas. 578, 578–80 (Del. Ch. 1820) (considering habeas petitioner's affidavit).

429. *See, e.g., Lockington's Case*, Bright (N.P. 269, 298–99) (Pa. 1813) (noting that the writ would issue if an alien "applicant can make an affidavit in the first instance that he is not an enemy alien"); *Case of the Hottentot Venus*, (1810) 104 Eng. Rep. 344, 344–45 (K.B.) (requiring testimony of an alien to determine whether she was involuntarily detained); *Case of Three Spanish Sailors*, (1779) 96 Eng. Rep. 775, 775 (C.P.) (examining the alien petitioners' affidavits supporting their claim for release); *R v. Schiever*, (1759) 97 Eng. Rep. 551, 551 (K.B.) (considering an affidavit of the habeas applicant and

in reviewing Milligan's conviction by a military commission, the Court evaluated the "facts stated in Milligan's petition, and the exhibits filed" to support his petition in arriving at its decision that the military commission had no jurisdiction.<sup>430</sup> Simply put, a habeas court must determine independently whether a military detainee is an enemy combatant "both in fact and in law."<sup>431</sup>

In addition to a review of the facts by a civilian court, the remedy if the habeas writ is granted includes a release from custody. The Supreme Court has made clear that "the great object of [the writ] is the liberation of those who may be imprisoned without sufficient cause."<sup>432</sup> Should the habeas court find that the detention is without legal cause, it "can only direct [the detainee] to be discharged."<sup>433</sup> Hence, a hearing on a writ of habeas corpus allows a civilian court to consider both the factual and the legal basis for designating a person detained by the military as an enemy combatant and empowers a civilian court to order the detainee's release from military custody if it finds the detainee to be a civilian.

Access to the writ also provides those imprisoned by the Executive with the means to challenge the jurisdiction of the military tribunal prior to trial. This would satisfy *Hamdi*'s requirement that a detainee is entitled to challenge his enemy-combatant designation "at a meaningful time."<sup>434</sup> The circuit court in *Hamdan* explicitly acknowledged that the right not to be tried by a tribunal that has no jurisdiction would be "insufficiently" redressed by "setting aside the judgment after trial and conviction,"<sup>435</sup> and the Supreme Court in *Hamdan* explained that both the petitioner and the

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the supporting testimony of another witness).

430. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118 (1866).

431. See SHARPE, *supra* note 310, at 66, 116 (discussing circumstances where courts have considered questions of fact in habeas review).

432. *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830). "[T]he traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). See WILLIAM BLACKSTONE, 1 COMMENTARIES \*131-33 (stating that upon demand of the Writ, the court determines whether the "cause of his commitment be just," and if not, the prisoner may be released from custody).

433. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807). At common law, the habeas court would not remand the case to the Executive to correct the illegal basis for the imprisonment (assuming it was procedural); it would simply order the prisoner's release. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting) ("If Hamdi is being imprisoned in violation of the Constitution (because without due process of law), then his habeas petition should be granted; the Executive may then hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or else must release him.").

434. *Hamdi*, 542 U.S. at 533 (plurality opinion) (internal citation omitted).

435. *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005). The court recognized *Ex parte Quirin*, 317 U.S. 1 (1942), as providing "a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." *Hamdan*, 415 F.3d at 36.

government have “a compelling interest in knowing in advance whether [the petitioner] may be tried by a military commission that arguably is without any basis in law.”<sup>436</sup> Accordingly, in November 2005, the United States District Court for the District of Columbia, on a writ of habeas corpus, issued an injunction staying all military-commission proceedings in the case of Guantanamo Bay detainee David Hicks, citing to the D.C. Circuit Court ruling in *Hamdan* that it is “within the province of a district court to determine whether a military commission has jurisdiction over a particular individual *prior* to that individual’s adjudication by a military commission.”<sup>437</sup>

In addition to deciding whether a military commission has jurisdiction to try a person claiming to be a civilian, an examination of the legal basis for the detention also calls upon the civilian courts to review the procedures for the initial designation of enemy combatant status to ensure compliance with procedural due process rights.<sup>438</sup> The Court in *Hamdi* held that a citizen-detainee, even in wartime, is entitled under the Fifth Amendment to (1) “notice of the factual basis for his classification”; (2) “a fair opportunity to rebut the Government’s factual assertions”; and (3) “a neutral decisionmaker”.<sup>439</sup> These procedural rights are basic and straightforward if the neutral decisionmaker is a civilian court that would “pay proper heed both to the matters of national security . . . and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.”<sup>440</sup>

The plurality in *Hamdi*, however, also suggested that due process might be satisfied by “an appropriately authorized and properly constituted military tribunal.”<sup>441</sup> Based on this language from *Hamdi*, the Department

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436. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2772 (2006). Although the Court rejected the government’s argument that *Schlesinger v. Councilman* requires courts to abstain from interfering with ongoing military proceedings, *see* 420 U.S. 738, 758 (1975) (refusing to interfere with a lawful military trial until “all available military remedies have been exhausted”), it did indicate that “abstention may be appropriate” for “military commissions convened on the battlefield.” *Hamdan*, 126 S. Ct. at 2772.

437. *Hicks v. Bush*, 397 F. Supp. 2d 36, 41 (D.D.C. 2005). The district court ruled that “because jurisdictional authority is requisite for legal proceedings before any tribunal, [Hicks faced] irreparable injury absent an injunction against Respondents’ continuation of military commission proceedings.” *Id.* at 42.

438. *Hamdi*, 542 U.S. at 524 (2004) (plurality opinion) (“Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status.”).

439. *Id.* at 533 (citation omitted). The *Hamdi* plurality explained that “even the war power does not remove constitutional limitations safeguarding essential liberties,” and the “Great Writ of habeas corpus allows the Judicial Branch to” serve “as an important judicial check on the Executive’s discretion in the realm of detentions.” *Hamdi*, 542 U.S. at 536 (citation omitted).

440. *Id.* at 538–39.

441. *Id.* at 538. The plurality in *Hamdi* supported this suggestion by analogizing such a tribunal

of Defense has now issued two Orders establishing Combatant Status Review Tribunals (CSRTs) to adjudicate the enemy-combatant status of alien detainees at Guantanamo Bay.<sup>442</sup> According to DOD rules, if the

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to tribunals convened under Article 5 of the Third Geneva Convention to determine “prisoner-of-war status.” *Id.* (citing U.S. DEP’T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 1-6 (1 Oct. 1997)). The analogy is not apt. Article 5 of the Third Geneva Convention provides for tribunals that operate in the combat zone. *See* Third Geneva Convention, *supra* note 333, art. 5 (providing for tribunals to determine the status of a person who “[has] committed a belligerent act and [has] fallen into the hands of the enemy”). This differs significantly from tribunals convened outside the battlefield at locations with operational Article III courts far removed from the exigencies of war.

442. Order of July 7, 2004, *supra* note 26, at 1 (using language similar to *Hamdi*, describing “a [CSRT] process to determine, in a fact-based proceeding, whether the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation”); Order of July 14, 2006, *supra* note 26, at 1 (stating in language similar to *Hamdi* that “all detainees shall be notified of the opportunity to contest designation as an enemy combatant . . . , of the opportunity to consult with and be assisted by a personal representative . . . , and of the right to seek a writ of habeas corpus in the courts of the United States”). The Order of July 7, 2004 is explicitly limited to foreign nationals (aliens), and this limitation is presumably incorporated into the Order of July 14, 2006, although the 2006 Order is not by its own terms limited to aliens. *Compare* Order of July 7, 2004, *supra* note 26, at 1 (“This Order applies only to foreign nationals held as enemy combatants . . . .”), *with* Order of July 14, 2006, *supra* note 26, at 1 (incorporating by reference the 2004 Order but not explicitly limiting its scope to foreign nationals).

Under these DOD Orders, CSRT tribunals consist of three military officers who review a detainee’s enemy-combatant designation. Order of July 7, 2004, *supra* note 26, at 1. In these “non-adversarial” hearings, the government’s evidence is presumed accurate and genuine, and the government need only sustain its designation by a “preponderance of the evidence.” *Id.* Encl. (1) at 1. The detainee has no access to classified evidence relied on by the government, and the detainee has no subpoena power. *See id.* Encl. (1) at 4 (“The Personal Representative may share the unclassified portion of the Government Information with the detainee.”); *see also id.* Encl. (1) at 1, 6 (noting that the detainee may call “reasonable available . . . witnesses,” but that a witness who declines to attend “shall not be considered reasonably available”). Further, the Order of July 7, 2004 allows the tribunal to consider hearsay evidence. *Id.* Encl. (1) at 6. The DTA itself allows CSRTs to consider statements of detainees or witnesses that have been coerced. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(b), 119 Stat. 2739, 2741. Appeal is first to the Director, CSRT, a civilian employee of the Department of Defense. *See id.* § 1005(a)(2) (stating that the person “designated . . . to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board . . . shall be a civilian officer of the Department of Defense”). Appeals to the civilian courts are limited to the United States Court of Appeals for the District of Columbia Circuit, which has exclusive jurisdiction to decide if the CSRT decision was “consistent with the standards and procedures” specified by the Department of Defense and “whether the use of such standards and procedures . . . was consistent with the Constitution and laws of the United States.” *Id.* § 1005(e)(2), *amended in part* by Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36. The government has taken the position that the DTA limits the court to a review of the “record before the CSRT” to determine whether the CSRT decision “is supported by substantial evidence” and “does not authorize fact finding by any court in any . . . circumstances.” Response in Opposition to Motion to Compel at 14–15, *Bismullah v. Rumsfeld*, D.C. Cir. 2006 (No. 06-1197). While the actual response is sealed and therefore no one can view it, it is frequently referred to in the petitioners’ briefs as representing the government’s statements on the issue. *See, e.g.,* Supplemental Brief of Petitioners Regarding Military Commissions Act of 2006 at 7–22, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2006) (No.05-5062), *available at* [http://www.pegc.us/archive/Boumediene\\_v\\_Bush/CAD\\_boumediene\\_supp\\_20061101.pdf](http://www.pegc.us/archive/Boumediene_v_Bush/CAD_boumediene_supp_20061101.pdf).

enemy-combatant designation is affirmed by the CSRT, the detainee can then be tried on the underlying charge before a separate military commission.<sup>443</sup>

An initial enemy-combatant determination by a military tribunal presents fewer potential constitutional problems if the detainee retains access to the writ of habeas corpus, which requires a civilian court to make an independent review of the facts and the law to test the legality of military detention.<sup>444</sup> In the famous *Bushell's Case*, the court evaluated the underlying evidence and made a judgment “grounded upon our own inferences and understandings, and not upon [a court controlled by the King].”<sup>445</sup> This ruling reflects the Habeas Corpus Act of 1640, passed by Parliament for the purpose of preventing the courts from deferring to internal decisionmaking bodies under the King’s control, and requiring instead an independent judicial examination of the basis for the detention.<sup>446</sup> As Justice Holmes put it: “[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to [other] proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.”<sup>447</sup>

While habeas clearly remains available for citizens, the Military Commissions Act of 2006 purports to strip the courts of habeas jurisdiction to review the enemy-combatant status of aliens, and the Detainee Treatment Act of 2005 replaces habeas with a limited and exclusive appeal from CSRTs to the D.C. Circuit Court of Appeals.<sup>448</sup> There is no clear statement

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Furthermore, *Bismullah* was stayed pending the D.C. Circuit opinion in *Boumediene*. See [http://www.pegc.us/archive/Bismullah\\_v\\_Rumsfeld/order\\_20061215.pdf](http://www.pegc.us/archive/Bismullah_v_Rumsfeld/order_20061215.pdf).

443. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761 (2006) (noting that after *Hamdan* was determined to be an “enemy combatant,” commission proceedings commenced); see also DOD Order of July 14, 2006, *supra* note 26.

444. See *supra* notes 427–31 and accompanying text.

445. *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1007 (C.P.).

446. See SHARPE, *supra* note 310, at 7–16 (describing how English courts independently examined the basis of detentions by the King).

447. *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

448. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2742, amended in part by Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36. The DTA provides that “the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.” *Id.* The MCA, under § 7(a), provides that:

[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Military Commissions Act of 2006, Pub. L. No. 109-366, sec. 7(a), § 2241(e)(1), 120 Stat. 2600, 2636

in the MCA, however, that Congress intended to exercise its power under the Suspension Clause,<sup>449</sup> and even if it did, a valid suspension of the writ could not be supported.<sup>450</sup> Hence, the Suspension Clause is violated by the habeas-stripping provision in the MCA unless the substitute remedial procedure provided by Congress in the DTA is “commensurate” in scope to habeas and is neither “inadequate [n]or ineffective to test the legality” of imprisonment.<sup>451</sup> As interpreted by the government, the narrow and deferential judicial remedy which remains available to alien detainees under the DTA simply cannot be reasonably considered as “commensurate with habeas corpus relief.”<sup>452</sup> For this reason, it is unlikely the habeas-stripping

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(to be codified at 28 U.S.C. § 2241(e)(1)).

449. See *supra* text accompanying note 304 (discussing the “super clear statement” rule that must be satisfied to show congressional intent to exercise its power under the Suspension Clause. Congress did not use “suspension” language in the MCA and made no findings of the existence of a “rebellion” or “invasion,” as it had done on each of the four occasions in the past when it has exercised its power under the Suspension Clause). See *supra* text accompanying note 305 (describing Congress’s four prior suspensions of the writ); see also *Boumediene v. Bush*, 476 F.3d 981, 1007 (D.C. Cir. 2007) (Rogers, J., dissenting) (concluding that “[t]he MCA contains neither of these hallmarks of suspension”).

450. Congress may not suspend access to the common law writ except in cases of “rebellion” or “invasion,” neither one of which were “occurring at the time the MCA was enacted.” *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 16 (D.D.C. 2006) (mem.); see also *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95–96 (1868) (the Suspension Clause “absolutely prohibits the suspension of the writ, except under extraordinary exigencies”). Moreover, the judicial branch clearly has the constitutional authority to invalidate a statute that violates the Suspension Clause, as it does any act of the legislature “repugnant to the constitution.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *In re Barry*, 42 F. 113, 122 (C.C.S.D. N.Y. 1844), *error dismissed sub nom. Barry v. Mercein*, 46 U.S. (8 How.) 103 (1847) (holding that the writ of habeas corpus imposes on the judiciary the “authority, to decide whether the exigency demanded by the constitution exists to sanction the act” of suspension).

451. *Swain v. Pressley*, 430 U.S. 372, 381, 384 (1977); see also *INS v. St. Cyr*, 533 U.S. 289, 305 (2001) (stating that “a serious Suspension Clause issue would be presented” if jurisdiction had been stripped with “no adequate substitute”).

452. *Pressley*, 430 U.S. at 384. Under section 1005(e)(2), the DTA limits the judicial remedies of detained aliens to one appeal to the D.C. Circuit Court of Appeals following a enemy-combatant determination by a Combatant Status Review Tribunal. § 1005(e)(2), 119 Stat. at 2741–42. The scope of review is narrowly focused on whether the CSRT determination was “consistent with the standards and procedures” established in the DOD Orders establishing the CSRTs, and whether the “use of such standards and procedures . . . is consistent with the Constitution and laws of the United States.” *Id.* Although a CSRT enemy-combatant determination is considered “dispositive” under the MCA for purposes of military commission jurisdiction, sec.3(a)(1), § 948d(c), 120 Stat. at 2603, the MCA permits a final review of the military commission proceedings in the United States Supreme Court on writ of certiorari, sec. 3(a)(1), § 950g(d), 120 Stat. at 2662. It is arguable that a detainee convicted by a military commission under the MCA is not barred from raising the jurisdictional question *de novo* in the Supreme Court even if the issue was previously raised in the D.C. Circuit Court of Appeals on an appeal of the CSRT determination. See Robert M. Chesney, *Beyond Article III Courts: Military Tribunals, Status Review Tribunals, and Immigration Courts*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 27, 43 (2006) (“It does not appear . . . that the MCA entirely precludes courts from reviewing the legality of the procedures used in [the CSRT and military commission] processes . . .”). In any event, according to the government’s interpretation of the limited judicial remedy provided by the DTA, the MCA does not

provision of the MCA will pass muster under the Suspension Clause.<sup>453</sup>

In addition to the procedures governing civilian court review, the CSRT procedures themselves do not appear to comply with the due process requirements of *Hamdi*. The CSRT procedures deprive detainees of rights to legal counsel, to any meaningful opportunity to rebut the government's evidence, and to exclude evidence obtained by coercion.<sup>454</sup> In addition, by

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permit the civilian courts to engage in any fact-finding nor to consider any extrinsic evidence to controvert the evidence listed by the government in the record; the MCA requires that the CSRT record assembled by the government be given the "strongest presumption of regularity," accompanied by a highly deferential standard that merely looks for "sufficient evidence" to support the finding; the MCA allows the government to withhold access to classified information that forms the factual basis for the CSRT enemy-combatant determination; and the MCA denies the civilian courts the authority to order the detainee's release should they find the detainee to be a civilian and not subject to military jurisdiction. See discussion *supra* note 442. As so interpreted, this judicial remedy does not satisfy the core protections of the writ of habeas corpus and does not provide an adequate or effective substitute "to test the legality of [the] detention." *Pressley*, 430 U.S. at 381. In addition, neither the DTA nor the MCA contains a savings clause, which allows resort to the habeas corpus remedy if the judicial remedy provided is "inadequate or ineffective to test the legality of [the] detention." See *id.* (finding that 28 U.S.C. § 2255 did not violate the Suspension Clause in part because it contained a savings clause); see also *United States v. Hayman*, 342 U.S. 205, 223 (1952) ("In a case where the Section 2255 procedure is shown to be 'inadequate or ineffective,' the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing. Under such circumstances, we do not reach constitutional questions.") (internal citations omitted).

453. The courts can avoid the Suspension Clause issue with respect to the alien Guantanamo detainees if they conclude that Guantanamo Bay is beyond the reach of the original common law writ of habeas corpus. See *Boumediene*, 476 F.3d at 990–91 ("[W]e are convinced that the writ in 1789 would not have been available to aliens held at an overseas military base leased from a foreign government."); see also *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 18 (D.D.C. 2006) (mem.) ("Presence within the exclusive jurisdiction and control of the United States was enough for the Court to conclude in *Rasul* that the broad scope of the habeas statute covered Guantanamo Bay detainees, but the detention facility lies outside the sovereign realm, and only U.S. citizens in such locations may claim entitlement to a constitutionally guaranteed writ."). Such a position, however, ignores binding Supreme Court language to the contrary in *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (stating that the "[a]pplication of the habeas corpus statute to persons detained at the [Guantanamo] base is consistent with the historical reach of the writ of habeas corpus"). It is a well settled principle that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Sierra Club v. EPA.*, 322 F.3d 718, 724 (D.C. Cir. 2003) (quoting *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997)); accord *Boumediene v. Bush*, 127 S. Ct. 1478, 1479 (2007) (order denying certiorari) (Breyer, J., dissenting, joined by Souter, J. & Ginsburg, J.) ("[P]etitioners plausibly argue that the lower court's reasoning is contrary to this Court's precedent") (citing *Rasul*, 542 U.S. at 481). Cf. *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring in judgment) ("Guantanamo Bay is in every practical respect a United States territory.")

454. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468–78 (D.D.C. 2005), vacated & dismissed, *Boumediene*, 476 F.3d at 994.

[T]he CSRT's extensive reliance on classified information in its resolution of 'enemy combatant' status, the detainees' inability to review that information, and the prohibition of assistance by counsel jointly deprive the detainees of sufficient notice of the factual bases for their detention and deny them a fair opportunity to challenge their incarceration.

*Guantanamo Detainee Cases*, 355 F. Supp. 2d at 472.

appearing to adjudicate the facts and the law in each case in advance of the hearing “through multiple levels of review by military officers and officials of the Department of Defense,”<sup>455</sup> the CSRTs cannot be considered a neutral decisionmaker for due-process purposes.<sup>456</sup>

Even if these procedural defects were corrected, however, there remains the issue of whether the use of executive branch military tribunals to separate enemy combatants from civilians is inherently incompatible with the civilian courts’ constitutional obligation to protect the jury trial rights of civilians from the encroachment of military tribunals. Is it reasonable to expect that the military officers who make up these tribunals can be “neutral” in reviewing the factual conclusions and policy judgments of their superiors?<sup>457</sup> Despite the suggestion by the *Hamdi* plurality that the use of military tribunals as the initial forum for making these determinations may be acceptable, when the various opinions in *Hamdi* are reconciled, it is doubtful that a majority of the Court would be willing to uphold the use of military tribunals to determine the enemy-combatant status of citizen-detainees seized outside the battlefield. Justices Souter and Ginsburg explicitly rejected the use of military tribunals to decide the enemy-combatant status of any detainee,<sup>458</sup> and Justices Scalia and Stevens categorically rejected any military detention or trial of an American citizen, whether combatant or civilian, at least in the absence of a suspension of the writ.<sup>459</sup>

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455. Order of July 14, 2006, *supra* note 26, Encl. (1) at 1. The DOD Implementation Order of July 14, 2006, para. b, makes clear that the CSRT process is “non-adversarial” and that “[e]ach detainee whose status will be reviewed by a Tribunal has previously been determined . . . .” *Id.* The absence of a record developed after an “adversarial proceeding” would deprive the detainee of due process unless the detainee has access to habeas relief that includes a de novo examination of the facts and the consideration of evidence that challenges the government’s return. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (plurality opinion) (finding “inadequate” the “‘some evidence’ standard” as applied to “a habeas petitioner [who] has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive’s factual assertions before a neutral decisionmaker”).

456. *See Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (defining the test for a neutral decisionmaker as “whether ‘a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it’”) (alteration in original) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959), *cert. denied*, 361 U.S. 896 (1959)). This, of course, assumes that rights of due process extend to alien detainees held at a location (Guantanamo Bay) within the exclusive control of the United States even though outside its sovereign territory. *See discussion supra* note 58.

457. Government officials have admitted that many of the detainees at Guantanamo are not enemy combatants. Brigadier General Jay Hood, the Commander, conceded that “[s]ometimes, we just didn’t get the right folks.” Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, WALL ST. J., Jan. 26, 2005, at A1.

458. *Hamdi*, 542 U.S. at 549–52 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (joined by Ginsburg, J.).

459. *Id.* at 554–79 (Scalia, J., dissenting) (joined by Stevens, J.). Indeed, Justice Scalia scolded

Moreover, the plurality's acceptance of properly constituted military tribunals to adjudicate enemy-combatant status was in the limited context of identifying enemy combatants as authorized by the AUMF. This narrow definition was limited to those who are "part of or supporting [the] forces hostile to the United States . . . in Afghanistan" and who carry "a weapon against American troops on a foreign battlefield."<sup>460</sup> The history of the law of war as well as the use of law-of-war military commissions supports the presumption that those persons engaged in hostilities against U.S. forces on a foreign battlefield, whether citizens or aliens, are enemy combatants and subject to military jurisdiction, including trial of any offense by military tribunal.<sup>461</sup> Given such an across-the-board presumption, entrusting the enemy-combatant-status determination to military tribunals for those captured on the battlefield is not likely to result in the improper exercise of military jurisdiction. On the other hand, with respect to those captured outside the combat zone, the presumption, if any, is that the person apprehended is a not a combatant, but a civilian, and the risk of improperly subjecting civilians to military trials is far greater. This common sense distinction seems to have the ear of Justice Breyer, a member of the *Hamdi* plurality, who viewed the situation quite differently when the detainee was an individual seized in the United States, where a general presumption of enemy-combatant status could not be supported.<sup>462</sup> Indeed, when the government argued in *Hamdi* that the Executive alone has authority to define the category of enemy combatant, the plurality, in rejecting that

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the majority for not recognizing the significance of the jurisdictional difference between the citizen saboteurs in *Quirin*, who did not contest their status as enemy combatants, and *Hamdi*, who denied that he was an enemy combatant. *Id.* at 571–72.

460. *Id.* at 516, 522 n.1 (plurality opinion).

461. See discussion *supra* Parts IV.D., V.

462. In *Rumsfeld v. Padilla*, which involved the military detention of a citizen arrested in the United States, Justice Breyer joined the dissenters in commenting:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber.

*Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting).

That the Supreme Court would be more skeptical of the use of military commissions to determine enemy-combatant status of persons captured in the United States is also supported by its refusal in *Hamdan* to abstain from intervening in incomplete military-commission proceedings at Guantanamo Bay, which was not considered a foreign battlefield. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769–72 (2006). The Court rejected the application of the military-abstention doctrine when the detainee was challenging the jurisdiction of the military proceedings being conducted outside the battlefield. *Hamdan*, 126 S. Ct. at 2771–72 (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942)). In *Quirin* the defendants were captured in the United States, and the military commission proceedings were not taking place on a foreign battlefield. *Quirin*, 317 U.S. at 21. See discussion *supra* Part III.C.1.

position, stated that the “permissible bounds of the category will be *defined by the lower courts* as subsequent cases are presented to them.”<sup>463</sup>

In any event, even if the Court majority were eventually to rule that a properly constituted military tribunal could provide a fundamentally fair and sufficiently independent forum for determining the enemy-combatant status of those captured outside the battlefield, the decisions of any such military tribunal would be subject to review and scrutiny by the civilian courts, either on direct appeal, by habeas corpus, or, upon a valid suspension of the writ, in a civil action once the writ is restored.<sup>464</sup> Hence, the question of the limits of military jurisdiction, whether in the form of distinguishing between civilians and enemy combatants or deciding if the civilian courts remain open and operational, would remain, in the final analysis, questions for the civilian courts.<sup>465</sup>

*B. The Need for Close Judicial Scrutiny of the Jurisdictional Boundaries of Military Commission Proceedings Convened Outside the Battlefield or Occupied Enemy Territory*

When a decision by the executive branch to subject a detainee to trial by military tribunal is challenged, civilian courts are faced with developing a standard of review. This standard would encompass both the initial decision to categorize a person as an enemy combatant and, in the event the

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463. *Hamdi*, 542 U.S. at 522 n.1 (plurality opinion) (emphasis added).

464. *Id.* at 533 (“[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”); see also discussion *supra* Part IV.B.

465. See *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) (“What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”). *Sterling* was cited with approval by the plurality in *Hamdi*, 542 U.S. at 535. Reinforcing this same point, the Court in *Duncan v. Kahanamoku*, 327 U.S. 304, 320–21, notes 15 & 17, cited with approval the dissent in *Luther v. Borden* 48 U.S. (7 How.) 1, 48, 63, 77–81 (1849) (Woodbury, J., dissenting), which reasoned that civilians abused by the military, even though properly called-upon by the governor to quell a civil disorder, have resort to the courts for redress. By adopting the dissent in *Luther*, the Court in *Duncan* embraced Justice Woodbury’s language that “whenever [military powers] are carried beyond what the exigency demands, even in cases where some may be lawful, the sufferer is always allowed to resort, as here, to the judicial tribunals for redress.” *Luther*, 48 U.S. at 87. More recently, eight Justices in *Hamdi* rejected Justice Thomas’s attempt to resuscitate the majority opinion in *Luther* as support for his theory that the Executive’s actions pursuant to a declaration of martial law are not subject to judicial review. Compare *Hamdi*, 542 U.S. at 590–91 (Thomas, J., dissenting) (“The Court clearly contemplated that the President has authority to detain as he deemed necessary, and such detentions evidently comported with the Due Process Clause as long as the President correctly decided to call forth the militia, a question the Court said it could not review.”), with *id.* at 509 (plurality opinion) (“[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”).

person is deemed a civilian, any decision that trial by military tribunal is necessary under the *Milligan* standard.

As the plurality pointed out in *Hamdi*, a standard of review is different from a standard of proof.<sup>466</sup> However, the plurality in *Hamdi* did not directly address the standard of review for an enemy-combatant designation hearing.<sup>467</sup> Nonetheless, the *Hamdi* plurality rejected the government's argument that judicial inquiry was limited to whether there was legal authority for the "broader detention scheme,"<sup>468</sup> explaining that the importance of the constitutional rights at stake required a particularized assessment of the facts alleged by the detaining power.<sup>469</sup> This suggests a form of strict scrutiny review that is generally supported in the case law. In *Korematsu v. United States*, the Court made clear that, even in time of a declared war, it would review all legal restrictions which would curtail the civil rights of a single racial group with "the most rigid scrutiny."<sup>470</sup> Although the *Korematsu* decision has been roundly criticized, that criticism has been directed not at its recognition of rigid scrutiny as a standard of review, but for its lenient, even deferential, interpretation of that standard. The mistake of *Korematsu* was allowing the government to assert wartime necessity to justify curtailing constitutional liberties without independent scrutiny by the Court of the facts and circumstances supporting that assertion.<sup>471</sup> Indeed, as we have now learned, the key facts asserted by General DeWitt to support his claim of necessity in *Korematsu*, ship-to-shore signaling and radio transmissions, were deliberately falsified.<sup>472</sup> Had the Supreme Court applied a true strict scrutiny standard of review to the factual record, the Court might have discovered that General DeWitt's

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466. *Hamdi*, 542 U.S. at 537 (plurality opinion). In *Hamdi*, the plurality made clear that any fact finding hearing to determine whether a detainee is an enemy combatant must permit the detainee to challenge the Executive's factual assertions, and those assertions must constitute "credible evidence" that the detainee "meets the enemy combatant criteria." *Id.* at 533–34, 537. Although the plurality did not define the degree of certainty which the evidence must meet (e.g., beyond a reasonable doubt, clear and convincing, etc.), the plurality did approve a burden-shifting formula for those captured on the battlefield that shifts the burden to the detainee once the government has "put forth credible evidence" of enemy-combatant status. *Id.* at 534.

467. *Id.* at 516.

468. *Id.* at 527.

469. *See id.* at 532–35 (holding that due process requires, at a minimum, the ability to challenge the Executive's factual assertions against the detainee).

470. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

471. *See* discussion *supra* Part II.

472. *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). The district court granted *Korematsu's* petition for writ of *coram nobis* on the grounds that the government had deliberately omitted material facts and had provided misleading information in documents filed with the Supreme Court. *Id.* The district court also found that the government's false representations regarding ship-to-shore signaling and radio transmissions were critical to the Supreme Court's finding in *Korematsu* that the Executive Order satisfied the requisite standard of "necessity." *Id.* at 1417.

claim of necessity was not factually supported and indeed had been shaped by “race prejudice, war hysteria and a failure of political leadership.”<sup>473</sup>

As strict scrutiny jurisprudence has evolved since *Korematsu*, there is now broad support for a de novo, independent examination of the factual record by the reviewing court as an indispensable component. For example, in reviewing race-based classifications in the affirmative action context, the Court has closely scrutinized the factual record to determine if the asserted state interest in remedying past discrimination is “necessary” as claimed by the government.<sup>474</sup> Such a non-deferential review of the factual record has been a consistent feature of strict scrutiny whenever suspect-class equal protection rights have been at stake.<sup>475</sup>

Likewise, in the area of First Amendment freedom of expression and dissent, the Court has developed a speech-protective jurisprudence that requires de novo review of claims by government that infringements are necessary to protect the national security or the war effort. The principle component of this judicial review is an examination of the factual record without deference to the government decisionmaker. Instead, courts make a de novo, independent determination as to whether the government’s claim of imminent danger is supported in the record.<sup>476</sup> Indeed, the core issue in the long struggle to make the guarantees of the First Amendment meaningful in times of crisis has been less about where the line between

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473. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 18 (1982). The Commission was established by Act of Congress in 1980 for the purpose of reviewing Executive Order No. 9066 and the detention and relocation programs during World War II. *Id.* at 1. As the Commission reported in 1983, “[t]oday the decision in *Korematsu* lies overruled in the court of history.” *Korematsu v. United States*, 584 F. Supp. at 1420 (quoting the Commission). The failure of the *Korematsu* Court to properly scrutinize the record led the *Hamdi* plurality to cite with approval from Justice Murphy’s dissenting opinion, wherein Justice Murphy was able to “demonstrate readily and elaborately that DeWitt was much more preoccupied with drawing conclusions from racial stereotypes than with pursuing a military analysis.” Gudridge, *supra* note 35, at 1941; *see Hamdi v. Rumsfeld*, 542 U.S. at 535 (citing Murphy’s *Korematsu* dissent for the proposition that military matters can be subject to judicial processes).

474. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 205–06 (1995) (concerning a dispute over two sub-contractors’ bids for a state highway project focusing upon racially conscious factors in the decisionmaking process); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477–78 (1989) (plurality opinion) (addressing a dispute concerning a city contractor denied a thirty-percent reduction in his expenses because the contractor did not qualify as a minority business enterprise).

475. *See, e.g., Johnson v. California*, 543 U.S. 499, 505 (2005) (noting that the Court has “insisted on strict scrutiny in every [race-based] context”); *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966) (“[T]his Court can conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races in all Alabama penal facilities.”), *aff’d*, *Lee v. Washington*, 390 U.S. 333 (1968).

476. *See Brandenburg v. Ohio*, 395 U.S. 444, 445–49 (1969) (engaging in de novo review to invalidate Ohio’s Criminal Syndicalism Act).

“speech” and “action” should be drawn, and more about how closely the judicial branch would review the speech-restrictive decisions of the political branches. The Supreme Court eventually rejected the earlier jurisprudence that deferred to the political branches’ factual conclusions of dangerousness.<sup>477</sup> Instead, while accepting the view that extraordinary circumstances may on rare occasions warrant restrictions on speech that incites violence, the Court nonetheless exercised its power of judicial review to make its own independent factual determination of whether those circumstances were present.<sup>478</sup>

The undue restrictions on constitutional liberties represented by *Korematsu* and the early First Amendment cases were, at least in part, the product of the Supreme Court’s failure to exercise a standard of judicial review that closely and independently scrutinized the factual basis for the decisions of government officials to determine if those decisions satisfied the substantive legal standards that protect the civil liberties of individual citizens. Importantly, the Court’s response in both the free speech and equal protection context has been to move away from deferring to the government’s assertions of necessity in individual cases even in the context of war and national security. This has meant a rejection of general theories of necessity, requiring instead that government factually justify its decisions on an individual basis.<sup>479</sup> This requirement alone would have dismantled the removal order in *Korematsu* and required the government to make

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477. See, e.g., *Dennis v. United States*, 341 U.S. 494, 539–41 (1951) (Frankfurter, J., concurring) (discussing the Court’s then-traditional deference to legislative findings in the free-speech context); *Gitlow v. New York*, 268 U.S. 652, 658, 668–69 (1925) (deferring to state legislature in upholding conviction of socialist who wrote and circulated manifesto advocating “revolutionary mass action”); *Schenck v. United States*, 249 U.S. 47, 52–53 (1919) (upholding conviction of defendant who organized and circulated printed material in an attempt to obstruct military recruitment); *Debs v. United States*, 249 U.S. 211, 216–17 (1919) (upholding conviction of socialist who spoke out publicly against war); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (upholding conviction of defendant who distributed circulars in order to encourage a strike at ammunition facilities).

478. See *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (per curiam) (making independent judicial determinations that defendant’s language did not rise to the level of a crime); *Brandenburg*, 395 U.S. at 447 (“[C]onstitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”); *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., joined by Holmes, J., concurring) (“[W]here a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity.”); see also John F. Wirenius, *The Road to Brandenburg: A Look at the Evolving Understanding of the First Amendment*, 43 *DRAKE L. REV.* 1, 36–42 (1994) (criticizing decisions prior to *Brandenburg* that present a “loss of clarity that is a prerequisite for criminal laws” and defer extensively to legislative controls over speech).

479. See *Gratz v. Bollinger*, 539 U.S. 244, 270–75 (2003) (emphasizing the need for individualized determinations with regard to students when employing race as a factor in university admissions).

individualized determinations. In addition, all forms of heightened scrutiny now require as a necessary component that the burden of proof be on the government to factually demonstrate that the substantive standard of necessity has been met.<sup>480</sup> Hence, infringements on fundamental constitutional rights are presumably invalid, and the government has the burden to show specific facts that support the existence of extraordinary circumstances justifying an infringement in any individual case.<sup>481</sup>

These two critical components of strict scrutiny jurisprudence—an independent examination of the factual record with the burden to show necessity on the government—have also been hallmarks of the Supreme Court’s approach to reviewing detainee’s claims that they are civilians entitled to trial by jury. In *Toth v. Quarles* the Court observed that “[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”<sup>482</sup> Indeed, a review of the leading Supreme Court decisions when the executive branch asserts military jurisdiction over civilians amply demonstrates that the Court’s “utmost care” standard acts as a form of strict or heightened scrutiny and invariably entails an independent review of the factual basis for assertions of necessity by executive branch officials and military commanders.

As previously discussed, in *Milligan* the Supreme Court made an independent factual determination that the military trial of Milligan was not necessary because the civilian courts were open and functioning.<sup>483</sup> The Court held that the only factual circumstance that necessitates subjecting civilians to military jurisdiction is if, in the zone of actual combat, the civilian courts are closed by the hostilities, and there is no choice but to use military tribunals.<sup>484</sup> By defining the constitutional standard with such factual specificity, the Supreme Court has made independent proof of that specific fact, not the conclusions or beliefs of government officials, the focus of the Court’s constitutional inquiry.<sup>485</sup>

This same fact-specific inquiry was used in *Duncan*, where the Court independently examined the record and rejected the military commander’s assessment of necessity, finding no evidence that the courts had been closed

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480. *Johnson v. California*, 543 U.S. 499, 505 (2005); *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

481. *Id.*

482. *Toth v. Quarles*, 350 U.S. 11, 23 n.22 (1955).

483. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866).

484. *Id.* at 123.

485. *Id.* at 127.

by the ongoing hostilities or threat of invasion.<sup>486</sup> In *Duncan* the Court rejected the military commander's assertion that the emergency made it necessary to use military tribunals because Hawaii was a combat zone threatened with invasion.<sup>487</sup> The Court also rejected the military's claim that it was necessary to subject criminal judicial proceedings in civilian courts to the control and authority of the military commander to insure immediate and prompt enforcement of military security regulations.<sup>488</sup> Hence, in the context of subjecting civilians to military trials, the executive branch cannot define necessity as anything less than the closure of the civilian courts, and the judicial branch will not defer to the judgment of executive branch officials as to the existence of this condition unless supported by independent evidence, which civilian courts find constitutionally sufficient.<sup>489</sup>

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486. *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946). *Duncan* clearly rejects the claims of some commentators that the significance and reasonableness of military orders are not susceptible to judicial oversight. See, e.g., Christopher Schroeder, *Military Commissions and the War on Terrorism*, 29 LITIGATION 28, 74 (2002) (arguing that courts are not the "optimal institution for resolving the tension between maintaining civil liberties and maintaining national security in times of danger"). This "expertise" argument, as a general matter, has also been roundly rejected by the Supreme Court, either explicitly or implicitly, in a number of decisions. See, e.g., *Reid v. Covert*, 354 U.S. 1, 40 (1957) (plurality opinion) (stating that "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon" and rejecting the military's characterization of the encroachment as "slight" and "reasonable in light of the uniqueness of the times") (internal quotation marks omitted); *Sterling v. Constantin*, 287 U.S. 378, 400–04 (1932) (plurality opinion) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 531–32, 536 (2004) (rejecting the government's contention that "military officers who are . . . waging battle would be unnecessarily and dangerously distracted by litigation . . . and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war"); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769–72 (2006) (rejecting military efficiency as adequate reason to abstain from judgment).

487. *Duncan*, 327 U.S. at 324.

488. See *id.* at 339 n.1 (Burton, J., dissenting) (summarizing the testimony of Admiral Nimitz and Lieutenant General Richardson that Hawaii in 1944 was still within the theater of war). Likewise, in *Toth*, the Court reiterated that "considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury." *Toth v. Quarles*, 350 U.S. 11, 22–23 (1955).

489. The use of a heightened standard of scrutiny to protect the right of jury trial was also used to review decisions of a state Governor to replace civilian courts with military tribunals in *Sterling v. Constantin*, where the Court closely examined the record and made an independent fact determination that the courts were open and functioning. *Sterling*, 287 U.S. at 402. In the process, the Court refused to defer to the assertion of the Governor that the use of military tribunals in place of civilian courts was necessary to quell an insurrection. *Id.* at 400–02. In *Sterling*, however, the Court's review was more deferential than it was later in *Duncan*, *Toth*, and *Covert*. In *Sterling*, the Court's review was limited to whether there was a "direct relation" between the emergency and the use of military jurisdiction by the Governor. *Id.* at 400. The *Sterling* standard of review has been criticized as not sufficiently strict, especially in the case of unauthorized executive action at the state level, which is often made abruptly, without an informed and deliberate legislative choice. *Emergency Powers*, *supra* note 47, at 1298–99.

Likewise, a majority of the Court in *Hamdi* did not hesitate to closely scrutinize the Executive's assertions of military necessity in connection with the process to determine whether or not Hamdi was an enemy combatant.<sup>490</sup> The Justices in *Hamdi* soundly rejected the government's argument that "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict ought to eliminate entirely any individual process."<sup>491</sup> Instead, citing cases such as *United States v. Robel*,<sup>492</sup> the Court proceeded to establish due process procedures that give each individual detainee the right to contest his classification as an enemy combatant before a neutral decisionmaker.<sup>493</sup> This approach is itself a form of heightened scrutiny which rejects the Executive's claim that wartime security requires that all those captured on the battlefield be conclusively classified as enemy combatants.<sup>494</sup> In other words, the Executive's categorical position is overbroad, and overbreadth inquiry is an essential feature of strict scrutiny review.<sup>495</sup>

Moreover, as discussed earlier in this Article, the constitutional importance of the civilian courts making a careful and independent examination of the factual basis for an enemy-combatant determination by the executive branch mirrors the historical scope of habeas corpus review of detainee challenges to military jurisdiction.<sup>496</sup> When considering a petition

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If the more recent cases are carefully canvassed, however, it is clear that the Court has moved away from *Sterling* and now employs an "utmost care" standard of review, which has developed into a rule that the use of military trials for civilians is not "necessary" if the Court determines that the civilian courts remain open and functioning. *See, e.g., Toth*, 330 U.S. at 23 n.22 ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."). Put another way, the use of civilian courts with jury trial rights for civilians is, as a matter of law, the least restrictive alternative, and "utmost care" scrutiny requires the government to carry a burden of proof that the civilian courts have been closed by the hostilities. *See id.* at 22–23 (requiring Congress to restrict use of trial by court martial to "the least possible power adequate to the end proposed") (internal quotation marks omitted).

490. *Hamdi*, 542 U.S. at 525–27.

491. *Id.* at 527.

492. *United States v. Robel*, 389 U.S. 258 (1967).

493. *Hamdi*, 542 U.S. at 532–33.

494. *Id.* at 531–32.

495. *See, e.g., Robel*, 389 U.S. at 262 ("It is precisely because [§ 5(a)(1)(D) of the Subversive Activities Control Act] sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment."); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (suggesting that good moral character of state teachers could be determined without requiring them to list every organization to which they belonged or regularly contributed). Presumably, the Court would likewise reject similar assertions that the war against terrorism necessitates that all those of Middle-Eastern or Arabic heritage be classified as enemy combatants.

496. *See* discussion *supra* Part VI.A.

for writ of habeas corpus, the Supreme Court has not hesitated to independently scrutinize the factual basis for executive detentions which courts have not previously reviewed for cause, including a consideration of any facts submitted by the petitioner to rebut the government's return.<sup>497</sup> Simply put, if the executive branch or its military courts classify a civilian lawfully residing in the United States as an enemy combatant, the only opportunity for the judicial branch to protect that wrongly classified civilian's right to a jury trial in civilian court will be its review of the validity of the enemy-combatant status designation itself.<sup>498</sup>

In the final analysis, even if a majority of the Court were to approve the Executive's use of military tribunals to make the threshold enemy-combatant determination of persons captured outside the battlefield who claim to be civilians, the obvious potential impact of such a determination on the constitutional right to trial by jury would require the judicial branch to strictly review the conclusions of these tribunals.<sup>499</sup> In such circumstances, a military tribunal's enemy-combatant determination should be given no more deference by civilian courts than any other unilateral act of the executive branch which has the effect of denying a detainee the jury trial guarantees of the Constitution. Indeed, a review of the enemy-combatant determination of a military tribunal should be treated no differently than the civilian court's *de novo*, independent review of the military tribunal proceedings in *Milligan* and *Duncan*, both of which involved a review of a military tribunal's threshold determination that it had jurisdiction to subject U.S. citizens to a military trial. In both situations the issue being reviewed was one involving the limits of military jurisdiction, and the Supreme Court did not hesitate to closely scrutinize the findings of these military tribunals in order to prevent deprivation of an individual civilian's right to trial by jury. Hence, any executive branch effort, whether by mere presidential designation or through a military tribunal proceeding,

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497. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion) (holding that habeas allows a detainee to present his own factual case to rebut the government's return); *Harris v. Nelson*, 394 U.S. 256, 298 (1969) (holding that a person detained without judicial process is entitled to make full presentation of the relevant facts to habeas court); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118 (1866) (evaluating "the facts stated in Milligan's petition, and exhibits filed").

498. See discussion *supra* Parts V & VI.A.

499. This threshold enemy-combatant status hearing would not be subject to the limitations on civilian court review which apply to regular court-martial (or military commission) proceedings, where military jurisdiction is not at issue. See *Burns v. Wilson*, 346 U.S. 137, 142-44 (1953) (discussing limitations). The enemy-combatant status hearing, to the contrary, is by definition addressing only the issue of whether military jurisdiction exists or not, which is ultimately an issue for the civilian courts. *Reid v. Covert*, 354 U.S. 1, 21 (1957) (plurality opinion); see also *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) (holding that the allowable limits of military jurisdiction are judicial questions); *Milligan*, 71 U.S. at 118 (treating the question of military jurisdiction as a justiciable issue).

to subject detainees held outside the battlefield to military trials, will be subject to a de novo review of the factual record by the civilian courts, where the jurisdiction of the military tribunal will be scrutinized with “the utmost care.”<sup>500</sup>

#### CONCLUSION

That military trials were inherently incompatible with civilian justice was the historical experience in both England and the American colonies.<sup>501</sup> Acutely aware of this historical lesson, the Founders were determined to protect the right to a jury trial in an independent civilian court against the Executive’s claim of military necessity in time of war or threatened invasion.<sup>502</sup> Hence, the jury trial right was explicitly protected from infringement in both the original structure of the Constitution and in the Bill of Rights.<sup>503</sup> As the Supreme Court has repeatedly recognized, the military trial of a civilian is “inconsistent with both the letter and the spirit of the [C]onstitution.”<sup>504</sup> While the Founders acknowledged that the defense of the nation from foreign enemies necessitated the establishment of a military, they warned that the military as an institution would invariably threaten liberty if not “confined within its essential bounds.”<sup>505</sup> As Madison cautioned in *The Federalist* No. 41: “[T]he liberties of Rome proved the final victim to her military triumphs, and . . . the liberties of Europe . . . have with few exceptions been the price of her military establishments.”<sup>506</sup>

Given this combination of constitutional text and tradition, it is not surprising that every attempt by the executive branch to extend the use of military tribunals beyond members of the armed forces has been resisted by the judicial branch as a potential encroachment on the jurisdiction of the civilian courts and a deprivation of the constitutional guarantees of trial by

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500. *Toth v. Quarles*, 350 U.S. 11, 23 n.22 (1955).

501. As the Supreme Court has explained, military tribunals “have always been subject to varying degrees of ‘command influence[.]’” and “[i]n essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command.” *Covert*, 354 U.S. at 36. As such, “the members of a [military tribunal] in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges.” *Id.* Moreover, “[i]n the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual.” *Id.* at 39.

502. See discussion *supra* Part II.B.

503. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI; see also discussion *supra* Part II.B.

504. *Covert*, 354 U.S. at 22 (internal quotation marks omitted).

505. *Id.* at 24.

506. THE FEDERALIST NO. 41, at 271 (James Madison) (Jacob E. Cooke ed., 1961).

jury.<sup>507</sup> This resistance is anchored in the constitutional principles of *Ex parte Milligan*, rejecting the use of military commissions to preempt jury trials in wartime unless the civilian courts have been closed by the hostilities.<sup>508</sup> Moreover, the executive branch cannot evade this constitutional firewall by setting up its own military court system to make unreviewable decisions that a detainee is not a civilian entitled to the protections of the Constitution.<sup>509</sup> To the contrary, a civilian jury trial must be provided unless it is proven, ultimately to the satisfaction of the civilian courts, that the detainee is not a civilian but instead a member of, or acting in association with, the enemy's armed forces.

Resort to military-commission trials by the executive branch in the wake of September 11, as well as the jurisdiction-stripping provisions of the Military Commissions Act of 2006, threaten to erode this clearly established constitutional standard by eliminating the checking function of civilian courts and juries.<sup>510</sup> Such a departure from the safeguards of our Constitution is said to be necessary because of the unique difficulties of fighting a war against international terrorism. The premise of this claim, however, was soundly rejected by the Supreme Court in *Hamdi v. Rumsfeld*.<sup>511</sup> In *Hamdi* the Court vigorously reasserted the continued viability of the separation of powers and the necessity of judicial review in the context of the war against terrorism. In the words of the *Hamdi* Court: “[w]e have long since made clear that a state of war is not a blank check for

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507. See discussion *supra* Parts I, IV.

508. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866).

509. As the Supreme Court said in *Covert*:

If the president can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive, and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers.

*Covert*, 354 U.S. at 38–39.

510. In addition to Madison's classic definition of tyranny, in *The Federalist* No. 47, as the accumulation of all governmental powers in one branch, Hamilton also recognized the threat to liberty should the judicial power be usurped by either of the political branches. In *The Federalist* No. 78, Hamilton said: “liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments[.]” *THE FEDERALIST* NO. 78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), at 523. Hamilton believed “[t]he complete independence of the courts of justice is peculiarly essential in a limited constitution[.]” and constitutional limitations “can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.” *Id.* at 524.

511. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (“[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in [wartime] circumstances.”).

the President when it comes to the rights of the Nation's citizens.”<sup>512</sup>

As demonstrated throughout this Article, the unchecked use of military tribunals to categorize, try, and punish persons apprehended in the name of the war against terrorism threatens the jury trial rights of all civilians residing in the United States, including “the Nation's citizens.” To prevent the usurpation of jury trial rights by military commissions, the bench and the bar must steadfastly apply and enforce the explicit trial by jury guarantees of the Sixth Amendment and Article III notwithstanding the climate of fear and retaliation spawned by acts of terrorism. To do less would surely make a burlesque of the Constitution.

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512. *Id.* at 536.