AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY

# A Call to Protect Civilian Justice: Beware the Creep of Military Tribunals

**By Anthony F. Renzo**

**February 2008**

# A Call to Protect Civilian Justice: Beware the Creep of Military Tribunals

**Anthony F. Renzo***

## I. Introduction

The Bush Administration has claimed constitutional authority to subject persons detained in the United States to trial by military commission. This claim is as unprecedented in scope as it is lacking in historical support. An examination of constitutional text and English and American history reveals a profound resistance to the encroachment of military tribunals on the jurisdiction of the civilian courts. Stated simply, the Constitution does not permit the government to subject civilians residing within the United States to military jurisdiction, even in wartime, as long as the judicial branch remains operational.[1] Moreover, the Supreme Court recently reaffirmed that the President's power to use military trials in the war against terrorism must be authorized by Congress,[2] and that power, even if authorized, extends only to enemy combatants and does not extend to civilians.[3]

The constitutional principle that governs this issue was established 140 years ago in *Ex parte Milligan*.[4] The essence of the *Milligan* principle is that the Constitution's jury-trial and due process guarantees prohibit the military trial or indefinite military detention of any civilian, whether citizen or alien,[5] held within the jurisdiction of operational civilian courts.[6] Residents of the United States claiming to be civilians can be subjected to indefinite military detention or military trial only if, during wartime, the government can prove to the satisfaction of a civilian court that the resident is not a civilian but is instead an "enemy combatant" subject to military jurisdiction.[7]

---

* Professor of Law, Vermont Law School. This issue brief is adapted from an article entitled *Making a Burlesque of the Constitution: Military Trials of Civilians in the War Against Terrorism*, 31 VT. L. REV. 447 (2007).

[1] *Al Marri v. Wright*, 487 F.3d 160, 174-75 (4th Cir. 2007) (citing this as the central teaching of *Ex parte Milligan*, 71 U.S. 2 (1866), which has been reaffirmed by *Ex parte Quirin*, 317 U.S. 1, 37-38, 45 (1942), and *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 (2004)).

[2] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773-75 (2006).

[3] *Id.* at 2775-76 n.25 (plurality opinion) (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866)).

[4] *Ex parte Milligan*, 71 U.S. 2 (1866).

[5] *Id*. at 123, 127. Although Milligan was a citizen, neither the Fifth nor the Sixth Amendments are limited to citizens. The Fifth applies to "persons" and the Sixth to "the accused." The Sixth Amendment right to a public and speedy trial before an impartial jury in civilian court has long been recognized as extending to resident aliens. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that a resident alien was entitled to Sixth Amendment rights). Likewise, a long line of cases establish that aliens are protected by the due process guarantees of the Fifth Amendment when they "have come within the territory of the United States and developed substantial connections with this country." *United States v.Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *accord Eisentrager v. United States*, 339 U.S. 763, 770-771 (1950); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *Al-Marri v. Wright*, 487 F.3d 160, 174-75 (4th Cir. 2007).

[6] *Ex parte Milligan*, 71 U.S. at 127.

[7] *Hamdi v. Rumsfeld*, 542 U.S. 507, 513-522 (2004); *see also Duncan v. Kohanamoku*, 327 U.S. 304, 307, 313 (1946).

To show "enemy combatant" status, the government must first establish that Congress has declared war, or authorized the President to use military force against an enemy,[8] without which there can be no "enemy combatants." Second, the government must prove[9] that the individual, whether citizen or non-citizen, is (a) a member of the enemy's armed forces; (b) under the command of the enemy's armed forces; or (c) has directly engaged in actual hostilities against the United States within the theater of war (i.e., on the battlefield).[10]

The question whether the executive branch has overstepped the limits of military jurisdiction in a particular case by subjecting a person claiming to be a civilian to indefinite military detention and/or trial presents a constitutional question subject to judicial review.[11] Although Congress has recently authorized the President to detain enemy combatants and try unlawful enemy combatants by military commission, such authorization does not free the executive branch to subject to military jurisdiction any detainee it, or its military tribunals, designate as enemy combatants.[12] This is recognized by Congress itself in the Detainee Treatment Act of 2005 (DTA), which subjects the alien-enemy combatant findings of military tribunals to review by the D.C. Circuit Court of Appeals.[13]

The Constitution places the power to punish a civilian for wrongdoing, including criminal conduct in support of enemy organizations, in the hands of an independent civilian court and jury. Military tribunals, whether military commissions or courts-martial, are made up of members of the armed forces selected by military officials owing their duty of allegiance first and foremost to the President as Commander-in-Chief.[14] 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."[15] The very purpose of the original English common law right to trial by a 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.[16] Hence, "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more importantly, acts as a

---

[8] *See, e.g*., Authorization for Use of Military Force, Pub. L. No. 107-40, Sec. 2(a), 115 Stat. 224 (2001).
[9] In general, the Due Process Clause prohibits the detention of any person prior to judgment of guilt in a criminal trial. *United States v. Salerno*, 481 U.S. 739, 749 (1987). One narrow exception to this general prohibition is when Congress authorizes the President to order the military detention of persons who "qualify as 'enemy combatants'" during time of war. *Hamdi v. Rumsfeld*, 542 U.S. at 516, 522 n.1. To show the general prohibition does not apply, the government has the burden to proffer evidence that the person qualifies for this exceptional treatment as an enemy combatant. *Id.* at 516, 534; *see also, Al Marri v. Wright*, 487 F.3d at 176.
[10] *Ex parte* Quirin, 317 U.S. 1, 30-31, 37, 45-46 (1942); *accord Ex parte Milligan*, 71 U.S. at 120-124; *Duncan v. Kahanamoku*, 327 U.S. 304, 307, 313 (1946); *Al Marri v. Wright,* 487 F.3d at 186-87.
[11] *Duncan v, Kohanamoku*, 327 U.S. at 336 (Stone, C.J., concurring) (quoting *Sterling v. Constantin*, 287 U.S. 378, 401 (1932)); *accord Ex parte Milligan,* 71 U.S. at 119; *Hamdi v. Rumsfeld*, 542 U.S. at 535.
[12] *See supra* notes 3, 7, 9, & 10.
[13] Detainee Treatment Act of 2005, Pub. L. No. 109-148, Sec. 1005(e)(1), 119 Stat. 2739, 2742 (2005).
[14] *Reid v. Covert*, 354 U.S. 1, 36 (1957) (plurality opinion).
[15] *Id.*
[16] *Id*. at 23-27.

deprivation of the right to jury trial."[17] This Issue Brief underscores the importance of guarding against such encroachment, with Parts II, III, and IV tracing the historic importance of civilian courts and the concerns that have arisen over military tribunals, and Parts V, VI, and VII identifying textual and historic problems with the current adjudication approach set forth by the Administration and the Military Commissions Act.

## II. English Common Law Origins

"[T]he pages of English history are filled with the struggle of the common-law courts…against the jurisdiction of military tribunals."[18] 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 time James II assumed the throne in the mid-Seventeenth Century, the new King attempted to retake control of the civilian courts and juries by the use of military tribunals.[19] This 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.[20]

The Glorious Revolution produced the Bill of Rights of 1689, which explicitly protected the right of trial by jury.[21] As a corollary, the Act of Settlement, passed in 1701, provided that judges would no longer serve at the pleasure of the monarch.[22] Hence, by 1701, the right of trial by jury in independent common-law courts, free of the jurisdiction and control of the Crown and its military courts, had been firmly established in English law.[23]

## III. Constitutional Guarantees of Trial by Jury

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. For this reason, the Founders sought to frame a constitution that unequivocally protected the common-law right of trial by jury. The paramount importance of trial by jury to the founders is reflected in the fact that jury trial and habeas corpus were the only specific common-law liberties protected from infringement by the federal government in the body of the Constitution as originally enacted in 1787.[24]

---

[17] *Id* at 21.
[18] *Id* at 24, n44.
[19] CHRISTOPHER HIBBERT, THE STORY OF ENGLAND 144 (1992).
[20] SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 600 (Carl Stephenson & Frederick G. Marcham eds., trans., Gaunt 1997) (1937) (characterizing James II's manipulation of the jury system as providing support for the 1689 Bill of Rights).
[21] *Id.* at 601.
[22] *Id.* at 612.
[23] William Blackstone, 3 Commentaries *350.
[24] *See* U.S. Const. art. III, Sec. 2, Cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury ….")

Many of the Founders, however, were not satisfied that the original Constitution was sufficient by itself to protect these and other individual liberties. Consequently, ratification of the original Constitution was secured only with the understanding that a Bill of Rights would be added, including even more explicit protection for jury-trial rights.[25] Hence, the Bill of Rights protected the rights of due process of law and grand jury indictment in the Fifth Amendment, and guaranteed the right to a "speedy and public trial by an impartial jury" in the Sixth Amendment.[26] The only wartime exception to the enforcement of these rights recognized in the Constitution is in cases arising in the "land and naval forces, or in the Militia, when in actual service in time of War or public danger."[27] The Court has interpreted this language as supporting the general principle 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.[28]

The historical record is clear that the right of trial by jury in an independent 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 straight-forward 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.'"[29]

## IV. 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.[30] On those rare occasions when the President has attempted to extend military-tribunal jurisdiction beyond members of the armed forces, the Court has either struck it down as unconstitutional or found no congressional authorization.[31] Likewise, efforts by Congress to subject civilians to military-tribunal jurisdiction are rare and most often have been invalidated by the courts, whether by narrowly construing purported authorizing legislation[32] or by finding the legislation unconstitutional.[33]

In cases arising during the War of 1812, courts consistently ruled that U.S. citizens were not subject to military trial if not members of the armed forces.[34] It was not until 1847, during the Mexican war, that military-commission trials of civilians were first

---

[25] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 330 (1996).
[26] U.S. Const. amend. V & VI.
[27] This language is found in the Fifth Amendment and was incorporated into the Sixth Amendment by the Supreme Court in *Ex parte Milligan*, 71 U.S. at 123.
[28] *Id.*
[29] *Reid v. Covert*, 354 U.S. at 22.
[30] *See Duncan v. Kahanamoku*, 327 U.S. 304, 319-24 (1946).
[31] *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2786-93 (2006); *Reid v. Covert,* 354 U.S. at 5, 20-21; *Toth v. Quarles,* 350 U.S. 11, 13-14 (1955); *Duncan,* 327 U.S. at 324; *Milligan*, 71 U.S. at 126-31.
[32] *See Ex parte Endo*, 323 U.S. 283, 299-300 (1944); *Duncan*, 327 U.S. at 324.
[33] *Toth*, 350 U.S. at 21-23.
[34] *See, e.g. Smith v. Shaw*, 12 Johns. 257, 257-58 (N.Y. Sup. Ct. 1815).

used.[35] These law-of-war commissions were limited to the battlefield or as a component of the military government installed by the United States in enemy territory following conquest.[36]

A. The Civil War and Reconstruction

In 1863 the Civil War Congress passed the Suspension Act, which ratified President Lincoln's suspension of the writ of habeas corpus. The Suspension Act made clear that citizens detained by the military under emergency orders were nonetheless entitled to be released unless brought before a grand jury within 20 days of arrest and, if indicted, tried by a civilian jury.[37] Notwithstanding the terms of this Act, the military tried (by military commission) and convicted one Lamdin Milligan, a civilian and citizen of Indiana, for conspiring to seize munitions of war stored in arsenals, to liberate Confederate prisoners of war, and to persuade men to resist the draft.[38] The military commission promptly sentenced Milligan to death.

Milligan's petition for habeas corpus was eventually heard by the Supreme Court, which issued a landmark ruling that the military had no jurisdiction to try and sentence Milligan.[39] In *Ex parte Milligan*, a majority of the Court reasoned that the military-commission trial, in addition to violating the terms of the Suspension Act, violated the Constitution 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;[40] and (2) 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," unless they are members of the armed forces or militia.[41] The Court was emphatic that "no usage of war could sanction a military trial for any offense whatever of a citizen in civil life, in nowise connected with the military service. *Congress could grant no such power.*"[42] Under the *Milligan* principle, the war powers of the political branches are limited by the jury-trial guarantees of the Constitution, thus depriving military tribunals of jurisdiction over any civilian protected by the Constitution if the civilian courts are open to try the defendant for his alleged crimes under civilian law.

As during the Civil War itself, the practice during Reconstruction adhered to the constitutional limits established in *Ex Parte Milligan*. Union generals were authorized to

---

[35] *See Hamdan v. Rumsfeld*, 126 S.Ct. at 2773 ("Though foreshadowed in some respects by earlier tribunals like the Board of General officers that General Washington convened to try Major John Andre for spying during the Revolutionary War, the commission "as such" was inaugurated in 1847.")(citing William Winthrop, Military Law and Precedents 832 (rev.2d ed.1920), and G. DAVIS, A TREATISE AN THE MILITARY LAW OF THE UNITED STATES 308 (2d ed.1909).

[36] *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2773, 2775-76 (2006); *see also* William Winthrop, Military Law and Precedents 832-33 (rev. 2d ed. Arno Press 1979) (1920)).

[37] Habeas Corpus Suspension Act, ch. 81, Secs. 1 & 2, 12 Stat. 755, 755 (1863).

[38] *Ex parte Milligan*, 71 U.S. 2, 6-7 (1866).

[39] *Id.*at 121-23, 127.

[40] *Id* at 127.

[41] *Id* at 123, 127.

[42] *Id* at 121-22.

use military commissions to try civilians in the southern states during Reconstruction only as long as the southern state was considered enemy territory being occupied by the Union army.[43] Following the "military government" model, these commissions were the mere extension of the rule of the military commander following conquest.[44] Aware of its constitutional limitations, Congress authorized civilian, not military, jurisdiction once a southern state was readmitted to the Union and could no longer be treated as enemy territory.[45]

B. The Two World Wars

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 courts-martial "enemy sympathizers," and others who sought to remove all sedition cases from the civilian courts to military courts. Attorney General Gregory and President Woodrow Wilson opposed legislation to authorize such trials (the "court-martial bill") as constitutionally invalid.[46] Gregory was quoted as saying: "[I]n this country, military tribunals, whether courts-martial or military commissions, cannot constitutionally be granted jurisdiction to try persons charged with acts or offenses committed outside the field of military operations."[47]

Military commissions were used throughout enemy territory during World War II, both on the battlefield and during occupation.[48] 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.

On those rare occasions during World War II when persons apprehended within the United States were tried by military tribunals, military jurisdiction was approved only for combatant members of the enemy's army.[49] In *Ex parte Quirin*,[50] the Court heard the

---

[43] *See Mechs.' & Traders' Bank v. Union Bank*, 89 U.S. 276, 297 (1874) (the President, during time of war, has the constitutional authority to "establish courts in conquered territor[ies]").

[44] *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"). These laws were applicable to the southern states as conquered "independent" sovereigns following the Civil War. *See, e.g.*, *Daniel v. Hutcheson*, 22 S.W. 933, 936 (Tex. 1893).

[45] *See, e.g.*, Civil Rights Act of 1871, Sec. 3, 17 Stat. 13, 14 (1871).

[46] *See* DAVID M. KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY 80 (1890); *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 by Attorney General Gregory persuaded President Wilson to commute the death sentence of a spy who should have been tried by a civilian court and not a military commission).

[47] 31 Op. Att'y Gen. 356, 361 (1918).

[48] Jody Prescott & Joanne Eldridge, *Military Commissions, Past, Present and Future*, MIL. REV.; Mar./Apr. 2003, at 45-46.

[49] In addition to the Supreme Court cases discussed in the following text of this article, *see Colepaugh v. Looney*, 235 F.2d 429, 430, (10th Cir. 1956) (two members of German army who landed by U-Boat at Hancock Point, Maine were apprehended in New York City and tried by military commission); *In re Territo*, 156 F.2d 142 (9th Cir. 1946) (captured member of Italian army being held in the United States was tried by military tribunal even though he was a United States citizen); *Haupt v. United States,* 330 U.S. 631

habeas petitions of eight members of the German army who were captured in the United States after secretly landing by submarine off the U.S. Atlantic Coast in June, 1942, with orders to sabotage American railroads, bridges, factories and other strategic targets.[51] The eight saboteurs were charged with war crimes (aiding the enemy, attempt to commit sabotage and espionage, etc.) and tried less than one month after capture by a military commission.[52] While the military commission proceedings were underway, the Supreme Court agreed to hear the claims of the petitioners that the military commission lacked jurisdiction, refusing to abstain until the military commission proceedings were completed.[53] Instead, the Court treated the question of military-commission jurisdiction as a justiciable issue that the Court had to resolve before the military commission was allowed to proceed. Following a lengthy oral argument, the Court issued a *per curiam* opinion upholding the military commission's jurisdiction and denying the habeas petitions.[54] The military commission trial then proceeded and all eight of the saboteurs were sentenced to death.[55] In the full opinion that was issued some three months later, the Court ruled that the eight saboteurs were concededly subject to military jurisdiction because they admitted their status as combatant members of the enemy's army.[56] The Court held that this case was not controlled by *Milligan* because Milligan, although conspiring to commit sabotage in aid of the Confederate cause, was not "a part of or associated with the armed forces" of the Confederacy.[57] As Justice Black commented, the opinion in *Quirin* was limited to individuals who were part of the "enemy's war forces" that invade a country from abroad, which leaves "untouched" the Court's earlier opinion in *Milligan*.[58]

A second case arose in Hawaii following the attack on Pearl Harbor. On December 7, immediately following the attack, the Governor of Hawaii declared martial law and suspended the writ of habeas corpus pursuant to a federal statute that mirrored the language of the Suspension Clause.[59] On December 8, pursuant to this authorization, the commanding general replaced a functioning civil court system with military commissions and provost courts, which remained in effect until 1944.[60] During that time, two civilian residents living in Hawaii were tried by military commissions, one for embezzling stock, and the second for assault on two marines.[61] Later, after the writ was restored, these two civilians (White and Duncan) petitioned for release, arguing that the

---

(1947) and *Cramer v. United States*, 325 U.S. 1 (1945) (civilians living in the United States who conspired with Quirin and the other German saboteurs were tried (and convicted) by juries in the civilian courts).
[50] *Ex parte Quirin*, 317 U.S. 1 (1942).
[51] LOUIS FISHER, NAZI SABOTEURS ON TRIAL 1, 25-26 (1st ed. 2003).
[52] *Id*. at 46-54, 61-64.
[53] *Id*. at 91-94
[54] David J. Danelski, *The Saboteur's Case*, 1 J. Sup. Ct. Hist. 61, 71 (1996)
[55] Fisher, *supra,* note 51, at 77.
[56] *Ex parte Quirin*, 317 U.S. at 37, 45-46.
[57] *Id*. at 45.
[58] Fisher, *supra* note 51, at 115 (quoting Memorandum from Justice Black to Chief Justice Stone, Black Papers (Oct. 2, 1942)).
[59] Hawaiian Organic Act, ch. 339, Sec. 67, 31 Stat. 141, 153 (1900) (codified at 48 U.S.C. Sec. 532 (2000)); *see also Duncan v. Kahanamoku,* 327 U.S. 304, 307-08 (1946) (providing factual history).
[60] *Duncan*, 327 U.S. at 308.
[61] *Id*. at 309-311.

military had no jurisdiction to confine or try them because they were civilians entitled to the process due in the Fifth and Sixth Amendments, including trial by jury in a civilian court.[62]

White and Duncan's case went to the Supreme Court, which ruled in *Duncan v. Kahanamoku* that the Governor was not authorized to supplant operational civilian courts with military tribunals.[63] In the process the Court reasoned that even if the Governor's martial law/suspension decision was constitutionally justified, that decision did not eliminate the role of the civilian courts in protecting the Fifth and Sixth Amendment rights of civilians to the civilian judicial process, including trials by juries in civilian courts. Justice Murphy, in his concurring opinion, repeated the language of *Milligan* that "[m]artial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civilian administration."[64] The Court rejected the testimony of military commanders that closing the civilian courts was necessary and independently examined the facts to determine if military trials of these defendants exceeded constitutional and statutory limits, even though Hawaii was characterized by the military as within the theater of war at the time.

## V. The Power of the Political Branches To Authorize the Use of Military Tribunals Does Not Extend to Civilians

As the preceding sections illustrate, even during time of war, the President does not have unilateral constitutional authority under Article II to establish military commissions unless used as war-courts on the battlefield or as part of a military government in occupied enemy territory following conquest.[65] Otherwise, only Congress has the power to establish military courts.[66]

### A. Congress's Article I "War Powers"

Congress's constitutional authority to impose military tribunal jurisdiction under its Article I "war powers"[67] is limited to persons who are members of the armed forces, and when Congress has exceeded this limitation, the Supreme Court has held the offending provision unconstitutional.[68] 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 (UCMJ), which is limited to the United States military armed forces, militia, POWs, and "in time of war,

---

[62] *Id*. at 311.
[63] *Id*. at 324.
[64] *Id*. at 330 (Murphy, J., concurring) (alterations omitted) (quoting *Ex parte Milligan*, 71 U.S. 2, 127 (1866)).
[65] *See Hamdan v. Rumsfeld,* 126 S.Ct. at 2775-76; *see also The Grapeshot*, 76 U.S. 129, 132 (1869); *Mechs.' & Traders' Bank v. Union Bank,* 89 U.S. 276, 296 (1874).
[66] *Hamdan*, 126 S.Ct. at 2775-76, 2788.
[67] U.S. Const. art. I, sec. 8, cls. 11, 12, & 14.
[68] *Toth v. Quarles*, 250 U.S. 11, 21-23 (1955).

persons serving with or accompanying an armed force in the field."[69] The limits on 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 members of the armed forces of the U.S. or its enemies.[70] Moreover, past efforts by the legislative branch to extend the meaning of the UCMJ to authorize courts-martial jurisdiction for civilians have been rejected by the Supreme Court.[71] In one of those cases, *Toth v. Quarles*, the Court struck down as unconstitutional a statute passed by Congress that purported to extend courts-martial jurisdiction to former military personnel charged with offenses committed while they were members of the armed forces.[72] 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.

B. Congress's Power to Suspend the Writ of Habeas Corpus

Even if Congress were to exercise its power under the Suspension Clause[73] to suspend the writ, this simply withdraws jurisdiction from the courts to enforce the legal rights of those in custody; it is unrelated to any underlying rights, including the right of trial by jury. As the Court explained in *Milligan*, 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."[74] Moreover, wrongfully 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.[75]

Since Congress clearly does not have the power to suspend underlying rights by suspending the writ, some argue that Congress and the President together have such constitutional authority when a suspension of the writ is augmented by a declaration of martial law.[76] This theory, however, was explicitly rejected by the Supreme Court in *Milligan*, which, in the process of rejecting military commission jurisdiction, stated: "Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; . . . ." Nearly a century later, in *Duncan*, the Supreme Court reaffirmed

---

[69] 10 U.S.C. Sec. 802(a)(10) (2000). Military jurisdiction over civilians in this context is narrowly limited to those civilians who voluntarily submit to the command of the armed forces in an area of actual fighting during a declared war. *See United States v. Avenette*, 41 C.M.R. 363 (1970); and *Reid v. Covert*, 354 U.S. at 34 n. 61 (1957) (plurality opinion).

[70] *See* Code of 1776, as amended in 1786; the Code of 1806; the Articles of War of 1920, ch. 227, 41 Stat. 759 (1920); and the Uniform Code of Military Justice Act of 1950, ch. 169, 64 Stat. 107 (1950).

[71] *See Reid v. Covert*, 354 U.S. 1, 15-16 (1957) (plurality opinion); *Toth v. Quarles*, 250 U.S. at 21-23.

[72] *Toth*, 250 U.S. at 13-15, 21-22.

[73] U.S. Const. art. 1, sec. 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.").

[74] *Ex parte Milligan*, 71 U.S. 2, 126 (1866).

[75] *Duncan v. Kahanamoku*, 327 U.S. at 309-313.

[76] *See* Winthrop, *supra* note 34, at 828-830 (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.

that when martial law is declared in connection with a suspension of the writ, the scope of martial law cannot extend to the trial and punishment of civilians by military commission unless the hostilities that gave rise to the emergency close the courts.[77]

### C. Congress's Power to Call the Militia to Suppress Insurrections and Repel Invasions

Pursuant to its Art. 1, Sec 8, Cl. 15 militia power, Congress has authorized the President to use the militia (or federal troops) in the event of an insurrection or rebellion that makes it "impractical [for state authorities] to enforce the laws of any state."[78] Similar to the limits on the reach of its war powers, Congress's emergency militia power does not extend to subjecting civilians to trials by military tribunals if the civilian courts are open and functioning.[79] This justiciable limitation on Congress's militia power also extends to the use of militia by a state governor, whether pursuant to state law or the emergency powers of the federal government.[80] Simply, Congress has no constitutional power to authorize the President or a state governor, when responding to a civil disorder or other emergency, to use the militia to replace functioning civilian courts with military tribunals to try and punish civilians.

### D. Congress's Power To Define and Punish Offenses Against the Law of Nations

As a component of the law of nations, the law of war provides a set of rules and principles that govern the treatment of combatants and civilians in wartime. For this reason, the core principle upon which the law of war operates is the distinction between civilians and combatants.[81] This distinction corresponds to the constitutional distinction between persons subject to military jurisdiction (enemy combatants), and those who must be tried in the civilian courts subject to the limitations of Fourth, Fifth, and Sixth Amendments (civilians). With the exception of those who directly participate in hostilities on the battlefield, neither the law of war nor the Constitution recognizes an offense as violating the law of war if the offender is a civilian.[82] The fact that a person engages in conduct forbidden by a law of war (e.g., espionage) does not, by itself, establish that the person is a combatant subject to trial and punishment by military tribunal. As the Court said in *Milligan*, "no usage of war could sanction a military trial…for any offense whatever of a citizen in civil life, in nowise connected to the military service. Congress could grant no such power…"[83] Hence, Congress's power under Art. I, Sec. 8, Cl. 10 to "punish offenses against the law of nations" does not include the power to confer jurisdiction on military tribunals to punish such offenses

---

[77] *Duncan*, 327 U.S. at 324.
[78] 10 U.S.C. Sec. 332. 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. Sec. 332 (a)(A)(i)(ii)&(B) (2000).
[79] *Duncan*, 327 U.S. at 324.
[80] *Id*; *see also Sterling v. Constantin*, 287 U.S. 378, 401 (1932).
[81] *Ex parte* Quirin, 317 U.S. 1, 30-31 (1942).
[82] *Id.* at 37, 46.
[83] *Ex parte Milligan*, 71 U.S. at 121-22.

unless the alleged offender is first determined to be an enemy combatant and not a civilian.

For the most part, the exclusion of civilians from Congress's power to punish law-of-nations offenses has been respected by Congress itself, even during the war against terrorism. 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.[84] For example, in 1996, Congress enacted the War Crimes Act, which assumed that civilians inside or 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.[85] These statutes demonstrate Congress's intent to provide for the prosecution of civilians in civilian court for law-of-war offenses that would be triable by a military commission if committed by an enemy combatant.

## VI. The Law of War Distinction Between the Legal Category of "Enemy Combatant" and that of "Civilian"

If the civilian's rights of jury trial and due process 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 military jurisdiction. To the extent the Supreme Court has addressed this distinction as a constitutional question, the Court has employed a definition of the term combatant that is consistent with the Court's interpretation of the law of war. While "enemy combatants" obviously includes any person fighting against American forces on the battlefield,[86] the Court in *Ex parte Quirin* makes clear that the legal category of enemy combatant outside the battlefield is limited to the enemy's armed forces.[87] Hence, a person lawfully residing in the United States who is not an enemy soldier must be acting under the direction or command of the enemy's army before he forfeits his civilian status, 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 laws of war."[88]

The *Quirin* definition of combatant as limited to members or associates of the enemy's armed forces is consistent with the categories established in the 1949 Geneva Conventions. In those Conventions combatants are defined as "[m]embers of the armed forces of a party to a conflict," which includes "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its

---

[84] *See, e.g.,* 18 U.S.C. Secs. 32; 831; 1201; 1203; 2332a; 2332b; 2339A; 2339B; 2383; 2384; 2390.
[85] 18 U.S.C. Sec. 2441 (2000).
[86] *See Hamdi v. Rumsfeld,* 542 U.S. 507, 522 n.1 (2004) (plurality opinion).
[87] *Ex parte Quirin*, 317 U.S. at 35-36, 45; *accord, Al-Marri v. Wright*, 487 F.3d 160, 186-87 (4th Cir. 2007) ("Neither *Quirin* nor any other precedent even suggests…that individuals with constitutional rights, unaffiliated with the military arm of any enemy government, can be subjected to military jurisdiction and deprived of those rights solely on the basis of their conduct on behalf of an enemy organization.").
[88] *Id.* at 45.

subordinates."[89] In addition, an armed person fighting on the battlefield, whether or not acting in association with the enemy's army, may be treated as a combatant. Civilians are defined as all other persons who do not fall into one of these combatant categories.[90] Hence, those outside the battlefield who indirectly support the enemy's cause or who conspire to assist the enemy in the future are considered civilians, albeit subject to punishment as civilians for violations of domestic law.[91] The crucial difference between direct participation in hostilities 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 on the battlefield: "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."[92]

In sum, the law of war is clear that if a person is not a member of the armed forces of an enemy nation-state, is not acting under the direction or command of the enemy's armed forces, and did not directly participate in hostilities, the person cannot be categorized as a combatant of any kind and is instead to be treated as a civilian. Since the Supreme Court has historically looked to the law of war in defining the reach of military jurisdiction, this distinction also marks the presumptive demarcation between those considered under the Constitution as civilians entitled to the rights of trial by jury in civilian courts and that narrow group of persons who are combatants subject to military jurisdiction and trial.[93]

## VII. The Government's Use of Military Trials or Indefinite Detention Outside The Zone of Combat is Subject to Judicial Review

### A. Whether a Military Tribunal has Jurisdiction is a Constitutional Issue for the Judicial Branch

The Supreme Court in *Ex parte Milligan* held that the scope of a military tribunal's jurisdiction during the Civil War was a justiciable question for the civilian courts even though a state of martial law had been declared.[94] This holding was reaffirmed in the context of World War II in *Duncan v. Kahanamoku*.[95] It was Chief Justice Stone, the author of the Court's opinion in *Quirin*, who emphasized the point in his concurring opinion in *Duncan*: "In the substitution of martial law controls for the

---

[89] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, June 8, 1977, art. 43(2), 1125 U.N.T.S. 4, 23 [hereinafter Additional Protocol I].
[90] *Id*. art. 50.
[91] 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 516, 619 (Yves Sandoz et. al. eds., Tony Langham et. al. trans. 1987); *see also* Brief of Amici Curiae Specialists in the Law of War in Support of Petitioner-Appellant Ali Saleh Kahlah Al-Marri, at 7, *Al-Marri v. Wright*, No. 06-7427 (4th Cir. Nov. 20, 2006).
[92] *Hamdi*, 542 U.S. at 522 (plurality opinion).
[93] *See Ex parte Quirin,* 317 U.S. 1, 27-28 (1942)
[94] *Ex parte Milligan,* 71 U.S. at 124-125.
[95] *Duncan v. Kahanamoku*, 327 U.S. 304, 334-35 (1946) (Murphy, J., concurring).

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.'"[96] 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-courts" standard.[97]

Like the *Milligan* "open-courts" standard, the threshold issue of a detainee's enemy-combatant status in wartime is also subject to review by the judicial branch. This was acknowledged in *Hamdi,* where a majority of the Justices found the enemy combatant status issue to be one reviewable by the civilian courts. Quoting from Justice Murphy's dissent in *Korematsu v. United States*, the *Hamdi* Court accepted the principle that "like other claims conflicting with asserted constitutional rights of the individual, the military claim must subject itself to the judicial process."[98]

*Hamdi* also ruled that a detainee is entitled to challenge his enemy-combatant designation "at a meaningful time."[99] The circuit court in *Hamdan* explicitly acknowledged that the right not to be tried by a military tribunal that has no jurisdiction would be "insufficiently" redressed by "setting aside the judgment after trial and conviction."[100] Likewise, the Supreme Court in *Hamdan* explained that both the petitioner and the 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."[101] While the plurality in *Hamdi* also suggested that the initial enemy combatant determination could be made (presumably before judicial intervention) by "an appropriately authorized and properly constituted military tribunal,"[102] it remains unclear whether 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 where circumstances do not support a presumption of combatancy.[103] In any event, 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 in a separate civil action that challenges the jurisdiction of the military tribunal.[104]

---

[96] *Id*. at 336 (Stone, C.J., concurring) (quoting *Sterling v. Constantin*, 287 U.S. 378, 401 (1932)).
[97] *Duncan*, 327 U.S. at 325-35 (Murphy, J., concurring).
[98] *Hamdi*, 542 U.S. at 535 (plurality opinion).
[99] *Id*. at 533.
[100] *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005).
[101] *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2772 (2006).
[102] *Hamdi,* 542 U.S. at 538.
[103] *Id*. at 542-52 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment)(joined by Ginsburg, J.) and at 554-79 (Scalia, J., dissenting) (joined by Stevens, J.); *see also Rumsfeld v. Padilla,* 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) (joined by Breyer, J., and others).
[104] *Hamdi*, 542 U.S. at 533. Even the Detainee Treatment Act of 2005, which approves the Executive's use of military tribunals outside the battlefield to classify aliens as enemy combatants, also provides for civilian court review of the constitutional sufficiency of such classifications.

B. Whether a Military Tribunal has Jurisdiction Is Subject To Close Judicial Scrutiny

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 should be scrutinized with the utmost care."[105] A review of the leading Supreme Court decisions when the executive branch asserts military jurisdiction over persons claiming to be civilians amply demonstrates that the Court's "utmost care" standard acts as a form of strict or heightened scrutiny entailing an independent review of the factual basis for military jurisdiction.

For example, in *Milligan* the Supreme Court made an independent factual determination that the military trial of Milligan was not necessary because he was a civilian, not a combatant, and the civilian courts were open and functioning.[106] The 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 by the ongoing hostilities or threat of invasion.[107] Hence, even in wartime, the judicial branch will not defer to the judgment of executive branch officials as to the existence of the conditions necessary to the exercise of military jurisdiction unless supported by independent evidence, which civilian courts find constitutionally sufficient.[108]

Likewise, the majority in *Hamdi* did not hesitate to closely scrutinize the factual basis for the Executive's assertions of military necessity in connection with the process to determine whether or not Hamdi was an enemy combatant.[109] The Justices in *Hamdi* explicitly rejected the government's argument that "[r]espect for the 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."[110] Instead, 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 decision-maker.[111]

Consistent with this jurisprudence, even if the initial enemy combatant determination is made by a military tribunal, that determination should be given no more deference by civilian courts than any other unilateral act of the executive branch that results in denying a civilian the jury trial or due process guarantees of the Constitution.

---

[105] *Toth v. Quarles*, 350 U.S. 11, 23 n.22 (1955).
[106] *Ex parte Milligan*, 71 U.S. 2, 121 (1866).
[107] *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946).
[108] *Id.* at 324; *see also Toth*, 350 U.S. at 22-23.
[109] *Hamdi*, 542 U.S. at 525-27 (plurality opinion).
[110] *Id*. at 527.
[111] *Id*. at 532-33.

The issue being reviewed is one involving the limits of military jurisdiction, which will be reviewed by the civilian courts and scrutinized with the "utmost care."[112]

## VIII. Conclusion

Given the 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 or those directly involved in hostilities against American 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 jury. This resistance is anchored in the constitutional principles of *Ex parte Milligan*, rejecting the use of military trials to preempt jury trials in wartime unless the civilian courts are closed by the hostilities.[113] 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.[114] To the contrary, a civilian jury trial must be provided unless it is proven to the satisfaction of the civilian courts that the detainee is not a civilian but instead is either under the command of the enemy's armed forces or engaged in battlefield hostilities against American forces.

This is not simply an academic discussion. The constitutionally unacceptable prospect of civilians being detained and tried by military authorities has become an all-too-real nightmare scenario that many have had to endure over the last seven years. As an example, consider *Al-Marri v. Wright*, a case presently awaiting decision on rehearing in the Fourth Circuit. Al Marri, a civilian arrested at his home in Peoria, Illinois in December 2001, was whisked away from civilian authorities in 2003 when the government presented the federal court with an order signed by President Bush designating Al-Marri as an "enemy combatant." Al Marri was then transferred to military custody, where he has been detained for nearly 5 years awaiting trial by military tribunal even though civil courts and juries were ready, willing and able in 2003 to hear his case and judge his guilt or innocence. A Fourth Circuit panel has properly ruled that the military has no jurisdiction over Al Marri because "the Constitution simply does not provide the President the power to exercise military authority over civilians within the United States."[115] If this ruling is reversed on rehearing, the Supreme Court will be called upon again to stand-up to the executive branch and reassert the historic role of the courts in protecting civilians from military rule.

---

[112] *Toth*, 350 U.S. at 23 n.22 (1955); *see also Al-Marri v. Wright*, 487 F.3d 176-177 (4th Cir. 2007) (Courts must take "particular care" that government allegations demonstrate that a detained individual is not a civilian, especially where government's case rests on "presumptively accurate hearsay.").
[113] *Ex parte Milligan,* 71 U.S, 2, 121 (1866).
[114] *See Reid v. Covert*, 354 U.S. 1, 38-39 (1957).
[115] *Al Marri v. Wright*, 487 F.3d 160, 193 (4th Cir. 2007)(awaiting decision following rehearing en banc).