

# *Ex parte Milligan* and the Detainees at Guantanamo Bay A Legacy Lost

JUSTICE STEVEN H. DAVID

“By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked people or the clamor of an excited people.”

Justice David Davis, *Ex parte Milligan*

**I**magine being the senior partner in a hastily organized law firm, understaffed and under-resourced, exclusively practicing criminal defense. Every one of your cases is brought before the same court, with the same judge and jury. And in all of them, your clients face life sentences or death.

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Justice Steven H. David was appointed to the Indiana Supreme Court in 2010. Prior to that, he served as the Circuit Judge of Boone County, Indiana. He also has nearly thirty years of service in the United States Army's Judge Advocate General's Corps, in positions ranging from trial counsel to military judge. Justice David has a long history with Guantanamo Bay and the issues facing the Military Commissions. In 2003 he was the first Army Reserve Judge mobilized and was a candidate for position of Presiding Judge or Presiding Officer of the originally designed Military Tribunals. No such tribunals occurred and instead, among other duties during his mobilization, he participated in a Detention Operations Mission in Iraq. Following his tour of duty as a Military Judge, he was selected to command the 9<sup>th</sup> Legal Support Organization which provided direct support to the United States Southern Command and Guantanamo Bay, Cuba. In 2006, one year before his selection by the Department of Defense to be the Chief Defense Counsel, he served three weeks in Guantanamo Bay as the interim Staff Judge Advocate. From July of 2007 until August of 2008, he served as the Chief Defense Counsel for the Military Commissions at Guantanamo Bay, Cuba.

Now imagine that the court system in which you defend your clients is brand new, with rules and regulations similar in some ways to those you know, but in other ways injected with strange twists you have never seen before. You find it very hard just to access your client. Because of his remote detention site, you must sometimes travel for five days and then wait hours upon hours. Once you reach him, you find that your client probably speaks no English and has no familiarity with any court system, much less the newly created system in which he finds himself. He has not grown up watching *Law and Order*, *CSI*, or any of the other investigation-and-prosecution shows that populate our media and provide at least a modicum of insight into how the system “works.”

Your client also does not trust you. He may, in fact, despise you—and not just you, but everyone like you. He has been detained for up to five years without access to an attorney, visits from his family, or contact with anyone other than guards and interrogators.

Finally, you must deal with the issue of “national security.” Imagine that “in the interests of national security,” you or your client may not access some evidence. Some of that evidence might be exculpatory, but neither you nor he may know of its existence—much less see it, bolster it, or rebut it. Even the evidence that you do have you must keep to yourself; you are unable to share it with the client who already views you and your system with mistrust. Most awful of all, the judge at this tribunal can admit evidence obtained when the government tortured your client.

In a country founded on the rule of law and blessed with a robust judicial system that encourages transparency and access to the courts, the existence of such a system would seem appalling. And yet that was precisely what I found in 2007, when I was appointed Chief Defense Counsel at Guantanamo Bay, Cuba. I entered a Constitutional no-man’s land of military tribunals and commissions—a veritable black hole of judicial precedent and construction.

Could things have been done differently? Was it necessary to treat the Global War on Terror as unique and so frightening that our government could shrug off the protections found in our Constitution? During my tenure as the chief defense counsel, I often expressed my concern about the legality of the process—as country music tells us, “There ain’t no right way to do the wrong thing.”<sup>1</sup> The approach to the 150th an-

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<sup>1</sup>Toby Keith, “Ain’t No Right Way,” on *White Trash with Money*, CD, 2006. (“Ain’t no right way to do the wrong thing; You can justify, but it’s still black and white; Paint it any shade, but it won’t change; Ain’t no right way, to do the wrong thing.”)

niversary of *Ex parte Milligan* presents an opportunity to recall another path, also blazed during a time of fear and hazard to national security.

On October 5, 1864, at the height of the Civil War, the government of the United States detained Lambdin P. Milligan on charges of treason.<sup>2</sup> Brevet Major-General Alvin P. Hovey, the military commandant of the District of Indiana, ordered that Milligan be held in a military prison.<sup>3</sup> The allegations against Milligan were severe. He stood accused of conspiracy against the United States, providing aid and comfort to rebels, inciting insurrection, disloyal practices, and violations of the laws of war.<sup>4</sup> The government alleged that he was a member of a secretive group, alternatively known as the Order of the American Knights or the Sons of Liberty, that was committed to the overthrow of the United States.<sup>5</sup> Through that organization, it was said, Milligan communicated with Confederate rebels, plotted to seize weapons and munitions from the military, and made plans to free rebel prisoners.<sup>6</sup>

Lambdin Milligan's rebel resumé was thin. He had never served in the army or navy of either the United States or the Confederacy, nor in any militia.<sup>7</sup> In fact, he had never been to any Confederate state at any point during the war.<sup>8</sup> He was a citizen of the state of Indiana and had been so for twenty years.<sup>9</sup> Nevertheless, Milligan faced death by hanging at the direction of a military tribunal because the acts with which he was charged took place "at a period of war and armed rebellion against the authority of the United States."<sup>10</sup> And though those acts took place in Indiana, the government identified the Hoosier state as lying "within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy."<sup>11</sup>

Milligan's trial before a military commission began on October 21, 1864, and ran for several months.<sup>12</sup> He was found guilty on all counts

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

<sup>3</sup>*Id.*

<sup>4</sup>*Id.* at 6-7.

<sup>5</sup>*Id.* at 6.

<sup>6</sup>*Id.* at 6-7.

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

<sup>8</sup>*Id.* at 7.

<sup>9</sup>*Id.* at 7-8.

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

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

<sup>12</sup>*Id.* at 4.

and scheduled to be hanged on May 19, 1865.<sup>13</sup> Though his execution was to be carried out “without delay,”<sup>14</sup> his case was heard before the U.S. Supreme Court during its December 1866 term, brought there by a petition for habeas corpus that challenged the jurisdiction of the military tribunal.<sup>15</sup> In a landmark opinion, the court narrowly rejected the government’s argument that the tribunals were properly constituted and convened against Milligan under the laws of war, as acts of military and national necessity.<sup>16</sup> It rejected a claim that martial law could operate and supersede the civilian court systems and protections guaranteed by the Constitution and Bill of Rights.

The court held instead that applying martial law against a citizen like Milligan “destroys every guarantee of the Constitution,” and cannot coexist with the concept of civil liberty: “the antagonism is irreconcilable; and, in the conflict, one or the other must perish.”<sup>17</sup> At the time of Milligan’s trial, Indiana was a military district, and armies assembled there were deployed elsewhere; there was no “actual and present” threat of invasion or demand of necessity.<sup>18</sup> The courts were open, the civilian administration functioning, and those powers were more than capable of arresting and trying—before a civil tribunal—seditious plotters conspiring treason against the United States.<sup>19</sup> “When the laws can act,” wrote Justice David Davis, “every other mode of punishing supposed crimes is itself an enormous crime.”<sup>20</sup>

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<sup>13</sup>*Id.* at 7.

<sup>14</sup>*Id.* at 108.

<sup>15</sup>As a remarkable example of the gulf between the military tribunal system and the federal courts, the Supreme Court’s opinion makes clear that the Justices are not sure whether Milligan was still alive or already dead. See *id.* at 118 (“But it is said that this case is ended, as the presumption is, that Milligan was hanged in pursuance of the order of the President. Although we have no judicial information on the subject, yet the inference is that he is alive; for otherwise learned counsel would not appear for him and urge this court to decide his case.”).

<sup>16</sup>*Id.* at 121–22.

<sup>17</sup>*Id.* at 124–25.

<sup>18</sup>*Id.* at 126–27.

<sup>19</sup>*Id.* at 127.

<sup>20</sup>*Id.* at 128. Not every instance of martial law is improper. Justice Davis was clear that under certain circumstances—“if, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails” and “there is a necessity to furnish a substitute for the civil authority”—martial law may properly be applied “to preserve the safety of the army and society.” *Id.* at 127. The duration of its appropriateness, however, is limited “until the laws can have their free course.” *Id.*

Justice Davis's words, though aimed at freeing Lambdin Milligan from his sentence, were also cautionary. As he wrote, the nation's Founding Fathers had been no strangers to conflict and war, but they nevertheless "secured in a written constitution every right which the people had wrested from power during a contest of ages."<sup>21</sup> A drumbeat sounding throughout Justice Davis's opinion was that those written protections could not so easily be cast aside.

Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrevocable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.<sup>22</sup>

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They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to free-men.<sup>23</sup>

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This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitu-

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<sup>21</sup>*Id.* at 119.

<sup>22</sup>*Id.* at 120–21.

<sup>23</sup>*Id.* at 125.

tion. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.<sup>24</sup>

Sadly, Justice Davis's cautionary words proved to be somewhat prophetic. In the nearly 150 years since the court's decision, judges have been called upon more than once to answer the question of whether a civil tribunal may be displaced by a military commission. Their decisions have narrowed *Milligan's* reach, restricted its protections, and brought us to where we are today.

In 1942, a number of German citizens—trained as saboteurs by the Nazi regime—snuck into the United States carrying explosives, planning to blow up key military and industrial facilities around the country.<sup>25</sup> They were caught by the FBI and tried by a military commission pursuant to an order of President Franklin D. Roosevelt, given in his capacity as Commander-in-Chief.<sup>26</sup> The commission charged the saboteurs with multiple violations of the law of war.<sup>27</sup> While the trial was ongoing, the defendants filed a petition for a writ of habeas corpus, claiming they had a right to be tried in the civilian court system that was open and fully functional.<sup>28</sup> In *Ex parte Quirin*, the Supreme Court upheld the functioning of the military commission, limiting *Milligan's* holding by noting that Lambdin Milligan had been a citizen of Indiana and had never been a resident of any Confederate state, and thus was not an unlawful belligerent subject to the laws of war.<sup>29</sup>

The German saboteurs, in contrast, were avowed members of an enemy state, who had secretly entered the United States with the intent to launch attacks on military and industrial targets. Because that act constituted an offense under the laws of war, and because military commissions were appropriate to try cases involving such charges—and, most

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

<sup>25</sup>*Ex parte Quirin*, 317 U.S. 1, 7–8 (1942).

<sup>26</sup>*Id.* at 8.

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

<sup>28</sup>*Id.* at 23–24.

<sup>29</sup>*Id.* at 19–20.

particularly, such defendants—the Supreme Court rejected the saboteurs' petition for a writ of habeas corpus.<sup>30</sup> In his opinion, Chief Justice Harlan Stone wrote:

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful 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. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or 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 not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

All eight would-be saboteurs were eventually found guilty by the military tribunals. Two received prison sentences; six were executed.

Four years later, the Supreme Court faced another case in which defendants relied upon *Milligan's* sweeping language.<sup>31</sup> This time, however, the defendants were American citizens—two civilian residents of Hawaii living on the islands following the attack on Pearl Harbor.<sup>32</sup> Harry White was a stockbroker arrested in August 1942 on charges of embezzling stock.<sup>33</sup> Lloyd Duncan was a civilian shipfitter working in a Navy facility who was arrested two years after the Pearl Harbor attack when he got in a fight with two Marines.<sup>34</sup> Both were tried and convicted before military tribunals.<sup>35</sup>

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<sup>30</sup>*Id.* at 20.

<sup>31</sup>*Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

<sup>32</sup>*Id.* at 307.

<sup>33</sup>*Id.* at 310.

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

<sup>35</sup>*Id.* at 310–11. White, in fact, was tried, convicted, and sentenced (to five years in prison) within three days of arrest.

The Supreme Court reversed White's and Duncan's convictions, roundly rejecting the government's argument that Hawaii was an active theater of war, constantly threatened by invasion. To the contrary, Justice Hugo Black wrote, at the time both men committed their crimes, no civilians had been evacuated for fear of imminent invasion; the courts were open and in use for trials (and in fact were summoning jurors and witnesses); and even schools, movie theaters, and bars had reopened.

"People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule," said the court.<sup>36</sup> "In this country that fear has become part of our cultural and political institutions. . . . the founders of this country are not likely to have contemplated complete military dominance within the limits of a Territory made part of this country and not recently taken from an enemy."<sup>37</sup> Rather, Black continued, the drafters of the Constitution had created a system of legislatures filled by open operation of the electorate, and courts in which the accused is judged by a jury of his peers.<sup>38</sup> "Legislatures and courts," he wrote, "are not merely cherished American institutions; they are indispensable to our government. Military tribunals have no such standing."<sup>39</sup> At the same time, the court reiterated that a primary consideration for the use of military courts was the nature of the defendant and the crime, rather than the relative peace and stability of the territory in which those defendants are arrested and tried.<sup>40</sup>

Thus, *Milligan's* strong declaration that the Constitution "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances" has been proven to have limits. It is, in many ways, on the outside of those limits, looking in—in the shadow of our Constitution's protections—that we now find the detainees captured during the war on terror and held at Guantanamo Bay, Cuba. Faced with an ever-evolving

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<sup>36</sup>*Id.* at 319.

<sup>37</sup>*Id.* at 319, 322.

<sup>38</sup>*Id.* 322.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.* at 313–14 ("Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war." (internal citations omitted)).



legal system—one custom-tailored solely to prosecuting their particular charges—their cases highlight the challenge of rejecting *Milligan's* decree.

Consider, for example, the case of Jose Padilla, an American citizen arrested in Chicago in 2002 on suspicion of being connected to the September 11, 2001, terrorist attacks.<sup>41</sup> He was initially held in federal criminal custody on a material witness warrant; after one month, President George W. Bush issued an order designating Padilla as an enemy combatant and ordering him to be detained in military custody.<sup>42</sup> He was then transported to a military brig in Charleston, South Carolina, though he had not been charged with any crime.<sup>43</sup>

Padilla filed a petition for a writ of habeas corpus in the Southern District Court of New York, naming, among others, Secretary of Defense Donald Rumsfeld and the president as respondents, and claiming that the president lacked the authority to detain an American citizen, arrested on American soil, in a military prison.<sup>44</sup> Without reaching the merits of that question, the Supreme Court dismissed Padilla's petition on jurisdictional grounds.<sup>45</sup> Padilla then filed a petition for a writ of habeas corpus in the District of South Carolina, requesting to be released or otherwise charged with a crime.<sup>46</sup> The district court granted the petition, but the U. S. Court of Appeals for the Fourth Circuit reversed on appeal.<sup>47</sup> It was only after Padilla sought Supreme Court review of the Fourth Circuit's reversal that President Bush ordered Padilla's release from military custody and remanded him to civilian authorities to face criminal charges—four years after being detained in a Chicago airport.<sup>48</sup>

Contrast Padilla's case with those of non-U.S. citizens deemed enemy combatants and detained in locations around the world—some on battlefields, some not; none as citizens of a country at war with the United States. The case histories of these defendants—initially held incommuni-

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<sup>41</sup>See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

<sup>42</sup>*Id.* at 431.

<sup>43</sup>*Id.* at 432.

<sup>44</sup>*Id.* at 432–34.

<sup>45</sup>*Id.* at 451.

<sup>46</sup>*Padilla v. Hanft*, 547 U.S. 1062 (2006).

<sup>47</sup>*Id.*

<sup>48</sup>*Id.* Padilla was indicted on criminal terrorism charges and convicted of a single count of conspiracy to murder, kidnap, or maim persons overseas and two counts of providing material support to al Qaeda. *Lebron v. Rumsfeld*, 670 F.3d 540, 545 (4th Cir. 2012).

cado, without access to attorneys—make Padilla’s tale sound like a small claims court trial by comparison.<sup>49</sup>

After September 11, 2001, Congress authorized the president to use “all necessary and appropriate force against those nations, organizations, or persons” whom he believed had committed, aided, or abetted the 9/11 attacks—and to prevent future attacks.<sup>50</sup> In *Hamdi v. Rumsfeld*, decided in June 2004, the Supreme Court acknowledged that this congressional authorization permitted the detention of individuals fighting against the U.S. in Afghanistan, “for the duration of the particular conflict in which they were captured.”<sup>51</sup> This authorization included the detention of U.S. citizens who were properly categorized as enemy combatants,<sup>52</sup> but did not permit “indefinite detention for the purpose of interrogation.”<sup>53</sup>

The court distinguished Hamdi’s detention from that of Lambdin Milligan because Milligan was an Indiana citizen arrested at home while Hamdi, though a U.S. citizen, was detained while under arms fighting alongside the Taliban. The court reasoned that if Milligan had been captured while carrying a rifle with the Army of Northern Virginia his detention would have been found proper.<sup>54</sup> However, the court also held that such military detention was still subject to certain due process demands, so that a citizen detainee might refute his enemy combatant classification—most particularly, the court held that such detainees were entitled to the writ of habeas corpus.<sup>55</sup>

At almost the same time, in its decision in *Rasul v. Bush*, the Supreme Court examined whether the habeas statute “confers a right to judicial review of the legality of executive detention of *aliens* in a territory over which the

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<sup>49</sup>See *Boumediene v. Bush*, 553 U.S. 723 (2008) for a summary of the most significant of these cases, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>50</sup>Public Law No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). This is known by its common title, the Authorization for Use of Military Force, or AUMF.

<sup>51</sup>*Hamdi*, 542 U.S. at 518.

<sup>52</sup>*Id.* at 520.

<sup>53</sup>*Id.* at 521.

<sup>54</sup>*Id.* Justice Antonin Scalia strongly dissented on this point, arguing—together with Justice John Paul Stevens (a rare pairing)—that “where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.” *Id.* at 555 (Scalia, J., dissenting). In his view, no military exigency justified deviation from what he called a “very core of liberty secured by our Anglo-Saxon system of separated powers”—the “freedom from indefinite imprisonment at the will of the Executive.” *Id.* at 554–55.

<sup>55</sup>*Id.* at 536–37.

United States exercises plenary and exclusive jurisdiction.”<sup>56</sup> Without addressing the merits of the detainees’ claims, the court held that “federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.”<sup>57</sup>

In July 2004, and in response to the Supreme Court’s decisions in *Hamdi* and *Rasul*, the Department of Defense set up Combatant Status Review Tribunals (CSRT) to determine whether detainees were properly classified as enemy combatants.<sup>58</sup> Those detainees who were not U.S. citizens were moved to Guantanamo Bay, Cuba, and appeared before a CSRT. After ten months of CSRT hearings, the Department of Defense announced that thirty-eight detainees “no longer met the criteria to be designated as enemy combatants.”<sup>59</sup> The remaining detainees then filed petitions for writs of habeas corpus.<sup>60</sup>

A series of district court cases on the merits of the habeas petitions reached opposite results: one judge found that the detainees had no constitutional rights that could be violated, and a second judge found that they did.<sup>61</sup> While those cases were pending on appeal, Congress passed the Detainee Treatment Act of 2005 (DTA),<sup>62</sup> a portion of which purported to strip federal courts of jurisdiction to hear petitions for writ of habeas corpus filed by alien detainees at Guantanamo Bay.<sup>63</sup> The act also limited judicial review of CSRT determination of enemy combatant status<sup>64</sup> and narrowed appellate review of the final decisions made by

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<sup>56</sup>*Rasul*, 542 U.S. at 476 (emphasis added).

<sup>57</sup>*Id.* at 485. At this point, Justice Scalia now dissented, saying that “Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.” *Id.* at 497–98 (Scalia, J., dissenting).

<sup>58</sup>See *Boumediene*, 553 U.S. at 733.

<sup>59</sup>*Id.* Kathleen T. Rhem, “38 Guantanamo Detainees to Be Freed After Tribunals,” Armed Forces Press Service, March 30, 2005, online at <http://www.defense.gov/news/newsarticle.aspx?id=31063>. 520 remaining detainees were confirmed as enemy combatants. *Id.*

<sup>60</sup>*Boumediene*, 553 U.S. at 733.

<sup>61</sup>*Id.*, 553 U.S. at 734–35.

<sup>62</sup>Public Law No. 109-148, 119 Stat. 2739 (2005).

<sup>63</sup>*Id.* at § 1005(e).

<sup>64</sup>*Id.* at § 1005(e)(2) (vesting in Court of Appeals for District of Columbia Circuit exclusive jurisdiction to determine validity of a CSRT finding, subject to limited scope: that CSRT process was consistent with Department of Defense standards, including rebuttable presumption in favor of Government’s evidence; and, to extent applicable, whether Department of Defense standards are consistent with U.S. Constitution and laws).

military commissions.<sup>65</sup> It was to be effective upon passage and apply immediately to all such cases—including those already pending.<sup>66</sup> Thus, the government sought to end all judicial involvement in the detainees' cases until after those detainees had been tried, convicted, and sentenced by military commissions.

However, in its June 2006 decision in *Hamdan v. Rumsfeld*, the Supreme Court held that such a jurisdiction-ousting statute could not apply to those cases already pending, and declined to yield civilian court authority to the military commission system. It specifically rejected an argument that it should abstain from a largely military field, drawing on language from *Quirin* to say that abstention was inappropriate "in view of the public importance of the questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty."<sup>67</sup> Despite the case's outcome, which upheld the military's authority to singularly detain and try German saboteurs, the *Hamdan* court praised *Quirin* for providing "a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions."<sup>68</sup>

Congress responded with the Military Commissions Act of 2006 (MCA).<sup>69</sup> The legislation again, in more specific terms, attempted to suspend the writ of habeas corpus with respect to petitions from detainees at Guantanamo, including those petitions still actively pending.<sup>70</sup> By law, however, for the legislation to be a proper exercise of Congress's power to suspend the writ of habeas corpus, the MCA and DTA would have to provide adequate substitute procedures.<sup>71</sup>

It was at this point, in *Boumediene v. Bush*, decided in June 2008, that the Supreme Court examined the CSRT process—the process replete with the difficulties I set forth at the beginning of this essay.<sup>72</sup> The court

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<sup>65</sup>*Id.* at § 1005(e)(3) (providing for one appeal as of right, to Court of Appeals for District of Columbia Circuit, only for enemy combatants sentenced to death or imprisonment of ten years or more; all other appeals are discretionary and scope of review is also limited).

<sup>66</sup>*Id.* at § 1005(h).

<sup>67</sup>*Hamdan*, 548 U.S. at 588 (quoting *Quirin*, 317 U.S. at 19).

<sup>68</sup>*Id.* at 588–89 (quoting *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005)).

<sup>69</sup>Public Law No. 109-366, 120 Stat. 2600 (2006).

<sup>70</sup>*Boumediene*, 553 U.S. at 736–37.

<sup>71</sup>*Id.* at 789.

<sup>72</sup>See *id.* at 783–84.

found particularly troubling the detainee's limited means to obtain or present evidence; the absence of assistance of counsel; the limited scope of information—even concerning the charges against him—provided to the detainee; and the marginal ability for the detainee to question or challenge witnesses.<sup>73</sup> Taken together—even with the presumed good faith and due diligence of the government's lawyers—these challenges created a “considerable risk of error in the tribunal's findings of fact. This is a risk inherent in any process that . . . is ‘closed and accusatorial’. . . . And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.”<sup>74</sup>

The system was not made better by the post-hoc involvement of the courts on appellate review. The DTA was silent with respect to whether a detainee could even seek release as a remedy under its limited appellate review.<sup>75</sup> Neither did the act expressly provide detainees the right to challenge the president's authority to detain them indefinitely under the AUMF—the core of the detainees' arguments—or any way for a detainee to present exculpatory evidence not found in the CSRT record.<sup>76</sup>

In sum, *Boumediene* held that the detainees were entitled to petition for a writ of habeas corpus because the procedures outlined in the DTA offered an inadequate substitute.<sup>77</sup> In its conclusion, the *Boumediene* court used language evoking the spirit of Justice Davis in *Milligan*: “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.”<sup>78</sup>

So had we traveled full circle, over the course of almost 150 years, from *Milligan* to *Boumediene*? The short answer is “No.” Despite its lofty language, *Boumediene* did not seek to undo the entire military commission process, nor did it address the merits of the detainees' claims.<sup>79</sup> It even

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

<sup>74</sup>*Id.* at 785.

<sup>75</sup>*Id.* at 787–88.

<sup>76</sup>*Id.* at 788–90.

<sup>77</sup>*Id.* at 795.

<sup>78</sup>*Id.* at 798.

<sup>79</sup>*Id.* at 795–97.

discouraged federal courts from intervening until after the CSRT process occurred.<sup>80</sup>

Have these years of back-and-forth litigation and legislation—during which the detainees were held incommunicado, subject to harsh interrogation techniques and torture—resolved anything? In the years following *Boumediene*, nearly every detainee who filed a habeas petition won his case before the district courts—but all of those victories were then reversed on appeal and the Supreme Court denied certiorari review.<sup>81</sup> Closing the prison entirely and wholly transferring the detainee cases to federal courts has proved to be a politically daunting task—even to an executive administration that campaigned on the promise of doing just that, and even though this is a matter committed almost wholly to executive control.<sup>82</sup>

Why does the detainment camp at Guantanamo Bay remain open in 2013? No one doubts that the Global War on Terror has presented challenges—legal, moral, and military—that stand as unique in our nation's history. But that uniqueness, according to both the *Milligan* and *Boumediene* courts, should not take the war on terror outside the realm of the Constitution's contemplations or protections. Closer inspection also reveals that these prisoners are not really unique. Certainly a few—such as Khalid Sheik Mohammed, mastermind of the 9/11 attacks, and Hambali Ridouan Isomuddin, who organized the 2002 Bali bombings that killed over 200 people—are responsible for some of the most violent and deadly terrorist attacks in human history. A number of other detainees are committed devotees of al Qaeda who, if left to their own devices, would carry out even greater and far more devastating attacks on innocent people around the world. The threats posed by those “worst of the worst” are grave and not to be underestimated or understated.<sup>83</sup>

But what of the rest? Are the threats posed by the majority of Guantanamo Bay detainees—low-order foot soldiers at worst accused of providing material support to al Qaeda—any greater than the threat posed by Lambdin Milligan, who, as a member of a secret group committed to the downfall of the United States, plotted to seize weapons, free Confederate

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<sup>80</sup>*Id.* at 795.

<sup>81</sup>Baher Azmy, “Obama Turns Back the Clock on Guantanamo,” *Washington Post*, August 16, 2012; *Latif v. Obama*, 666 F3d 746 (D.C. Cir. 2011).

<sup>82</sup>“Close Guantanamo Prison,” *New York Times*, November 26, 2012.

<sup>83</sup>See the photo gallery “Guantanamo Bay files: ‘The worst of the worst’ – in pictures,” *The Guardian*, April 25, 2011.

prisoners, and incite insurrection? Do the Guantanamo detainees pose a greater threat than recent domestic terrorists such as Ted Kaczynski or Timothy McVeigh, both of whom received the full Constitutional protections of fair and public trials in civilian courts? What made Jose Padilla and Yaser Hamdi different? None of today's detainees are citizens of a nation at war with the United States, unlike the German saboteurs in *Quirin*, and many were detained not on the field of battle but in places far removed from active combat or military action.

The United States must decide if its war on terror is unique and whether the threat of invasion or attack from al Qaeda is any greater than the threat of Japanese invasion during World War II or the threat from secret antiwar societies during the Civil War. To the extent that a threat does exist to our national security, will that change or are these just "troubled times," as Justice Davis said? Is the United States, in his words, a nation of restive rulers and people seeking "by sharp and decisive measures to accomplish ends deemed just and proper" at the expense of the ideals the Framers—no strangers to high-stakes conflict—first purchased with blood and then enshrined in our Constitution?

I firmly believe that when historians look back on this period, neither the wealth of our great nation, nor our technological advances, nor our military successes or failures will define our legacy. Our time will be judged instead by whether, in a time of national fear and perceived uncertainty, we followed the rule of law, adhered to the fundamental principles protected by our Constitution, and demonstrated to the world that human rights apply to all humans, not just Americans. Did we demonstrate to ourselves that, even in the most difficult times, we practiced what we had been preaching to the world, or did we let fear—and the fear of the rule of law—consume us?

