No. 05-6396

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSE PADILLA,
Petitioner-Appellee

v.

COMMANDER C.T. HANFT,
USN COMMANDER, CONSOLIDATED NAVAL BRIG,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, ACLU OF SOUTH CAROLINA AND ACLU OF VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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No. 05-6396 Caption: Padilla v. Hanft

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Arthur Eisenberg
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June 14, 2005
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No. 05-6396 Caption: Padilla v. Hanft

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Arthur Eisenberg
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June 14, 2005
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INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution. The ACLU of South Carolina, the ACLU of Virginia and the New York Civil Liberties Union are statewide affiliates of the ACLU. The ACLU and its affiliates have long been devoted to the protection and enhancement of fundamental rights and liberties. They have steadfastly asserted that our nation's fundamental commitment to civil liberties cannot be forsaken even in periods of national crisis. This case, once again, tests that commitment. Invoking the exigencies of national security, the federal government has asserted the right to arrest a United States citizen at a Chicago airport; subsequently to transfer that individual from civilian custody to military custody; and to detain that individual in a military brig indefinitely without criminal charges or trial.

In doing so, the government's behavior raises deeply fundamental questions respecting due process of law and the reach of martial law in the face of our historic constitutional commitment to the supremacy of civilian authority over the military. These are matters that the ACLU and its affiliates seek to address as *amici curiae*.

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure this *amicus* brief is being filed with the consent of the parties.

STATEMENT OF THE CASE

On May 8, 2002, Jose Padilla, who is a United States citizen, flew on a commercial airline from Pakistan, via Switzerland, to Chicago's O'Hare International Airport. When he landed, he was arrested by FBI agents executing a material witness arrest warrant issued by the Chief Judge of the United States District Court for the Southern District of New York. J.A.[1] at 162; *Padilla v. Rumsfeld*, 352 F.3d 695, 699 (2nd Cir. 2003).

Padilla was then transferred to New York by FBI agents and housed in the Metropolitan Correctional Center's maximum security wing, under the control of the Bureau of Prisons and the United States Marshal Service for approximately one month. *Padilla*, 352 F.3d at 700. On Sunday, June 9, 2002, two days before a scheduled conference on Padilla's motion to vacate the material witness arrest warrant, the government informed the District Court, *ex parte*, that the President had issued an order designating Padilla an "enemy combatant" and transferring his custody to the Secretary of Defense. *Id.* The District Court vacated the warrant

[1] Numerical references preceded by "J.A." are to the pagination in the Joint Appendix filed in connection with this appeal.

that day and the Department of Defense, without notice to counsel, immediately seized Padilla and transported him to a high security military brig in South Carolina. Padilla's appointed counsel promptly filed a *habeas corpus* petition on his behalf. *Id.*

On December 4, 2002, after Padilla had already been in military custody for six months, the District Court ordered the government, *inter alia*, to allow Padilla and his counsel to meet, subject to government-imposed conditions. *Padilla v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y. 2002). Rather than comply with this order, the government moved for reconsideration. When the District Court was not persuaded to change its ruling, the government pursued an interlocutory appeal to the United States Court of Appeals for the Second Circuit. *Padilla*, 352 F.3d at 702.

In an opinion dated December 18, 2003, the Second Circuit directed the District Court to issue the writ of *habeas corpus*. The majority found that the President lacked the inherent authority to order Padilla's military detention. In addition, the majority determined that Padilla's detention was barred by 18 U.S.C. § 4001(a), which prohibits the detention of a United States citizen unless authorized by an Act of Congress. The majority then rejected the government's claim that the necessary authorization could be found in either the congressional Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001),

which allows only "necessary and *appropriate* force" (emphasis supplied), or in 10 U.S.C. § 956(5), an appropriations provision that makes no specific reference to "enemy combatants." *Id. Padilla* at 721-724. As a result, the court ruled that Padilla must be released from military custody but that the government could transfer him to civilian authorities to be held for criminal prosecution or, if appropriate, as a material witness. *Id. Padilla* at 724.

The government successfully petitioned the Supreme Court for a writ of *certiorari*. *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2717 (2004). In a decision rendered on June 28, 2004, the Supreme Court held that the District Court in New York lacked jurisdiction to entertain Padilla's *habeas corpus* petition. It therefore ordered a dismissal of the petition without prejudice to refile the case in the U.S. District Court of South Carolina. *Id.*

On July 2, 2004, Padilla's counsel filed a new *habeas corpus* petition in the U.S. District Court for South Carolina. J.A. at 166. And on February 28, 2005, the District Court rendered a decision holding, *inter alia*, that Padilla's detention had not been authorized by Congress and, therefore, violated the Non-Detention Act, 18 U.S.C. § 4001(a). J.A. at 161. This is an appeal from that decision.

SUMMARY OF ARGUMENT

The absence of congressional authorization is sufficient to dispose of this case and affirm the decision below. But even if congressionally authorized, Padilla's detention violates two constitutional principles that neither Congress nor the Executive is free to ignore.

The first principle is so basic that the need to restate it only highlights the radical nature of the government's position in this case: individuals arrested on American soil cannot be imprisoned without due process of law. The rule against arbitrary detention traces back to the Magna Carta. As Justice Cardozo explained in one of the Supreme Court's most important opinions addressing the contours of constitutional liberty: "Fundamental . . . in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (citations omitted). Here, the government has publicly accused Padilla of serious wrongdoing. If the government wishes to detain him on that basis, it must formally charge him and try him and punish him in accordance with law. So far, the government has provided none of these fundamental rights, although Padilla has now been detained for approximately three years.

The second principle, and the focus of this brief, is the supremacy of civilian authority over the military within our constitutional democracy. This principle also has deep historical roots. In listing their grievances against the English Crown, the Founding Fathers expressly criticized conduct "render[ing] the Military independent of and superior to the Civil power." The Declaration of Independence para. 14 (U.S. 1776). Reflecting that grave concern, the Supreme Court held, in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that the government may not subject civilians to military trials, even in wartime, if the civilian courts are open and functioning.

The Government does not and cannot contend that its action in this case has respected those principles. Instead, it claims that the force of *Milligan* has been eclipsed by the Supreme Court decisions in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) and in *Ex parte Quirin*, 317 U.S. 1 (1942); and that *Hamdi* and *Quirin* provide the government with all of the authority it needs to justify Padilla's indefinite military detention.

However, neither *Hamdi* nor *Quirin* supports the Government's position in this case. The plurality opinion in *Hamdi* emphasized that its decision was limited to the facts of that case. And the central fact of the *Hamdi* case was that it involved a foreign battlefield capture. This case does not.

Quirin was similarly a narrow decision. By its express terms, *Quirin's* holding was limited to enemy soldiers who, by stipulation, asserted their status as military personnel but were found to have forfeited their status of lawful combatants by violating the law of war. They were, therefore, subject to military trial and punishment as unlawful combatants.

In distinguishing *Milligan,* the Government's brief in *Quirin* specifically relied on the distinction between soldiers and civilians to justify its assertion of military jurisdiction. Like Milligan, however, Padilla was a civilian when he was arrested as he disembarked, unarmed, at O'Hare Airport; he was a civilian when he was transported to New York City and held in a civilian jail; he was a civilian when his custody was transferred from civilian authority to military custody approximately one month later; and he is a civilian today even as he languishes in a military brig. Furthermore, in contrast to *Quirin,* the government has made clear that it does not regard Padilla as entitled to military status and Padilla has never claimed that status. Under these circumstances, even apart from the fact that the express congressional authorization present in *Quirin* is absent here, *Quirin* does not authorize Padilla's military detention and *Milligan* forbids it.

At bottom, *Milligan*'s insistence upon the predominance of civilian over martial law for those arrested on American soil reaffirmed a core constitutional principle that this Court has repeatedly maintained. It is a principle that erects a

strong presumption against the imposition of martial law in this country. *Quirin* is a narrow and inapplicable exception to that strong presumption. It is *Milligan,* not *Quirin,* that is controlling here. Applying *Milligan* to these facts, it is clear that Padilla's detention is fundamentally at odds with basic values that have defined our nation since its founding.

ARGUMENT

PADILLA'S INDEFINITE DETENTION BY MILITARY AUTHORITIES VIOLATES CORE CONSTITUTIONAL PRINCIPLES.

The "tradition of keeping military power subservient to civilian authority" was strong in the minds of the Framers. *Reid v. Covert*, 354 U.S. 1, 40 (1957) (plurality); *see id.* at 23. They were aware that military leaders had overthrown ancient governments (*id.* at 24) and they were familiar with the events that transpired in seventeenth century England, when "our British ancestors took political action against aggressive military rule." *Duncan v. Kahanamoku*, 327 U.S. 304, 320 (1946).[2] This history led Lord Chief Justice Hale and Sir William Blackstone -- men who strongly influenced the Framers -- to express sharp hostility to any expansion of the military's jurisdiction. *Reid*, 354 U.S. at 26.[3]

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[2] As the Court explained in *Duncan*, "[w]hen James I and Charles I authorized martial law for purposes of speedily punishing all types of crimes committed by civilians the protest led to the historic Petition of Right which in uncompromising terms objected to this arbitrary procedure and prayed that it be stopped and never repeated." 327 U.S. at 320 (footnotes omitted). Further abuse of military authority came under James II, which ultimately led to the ascension of William and Mary, whose rule was conditioned upon adherence to a Bill of Rights that protected the right to jury trial. *Reid,* 354 U.S. at 25-26. More detailed explication of this history is provided in both *Duncan*, 327 U.S. at 319-22, and *Reid*, 354 U.S. at 23-30.

[3] In criticizing the use of courts martial for the prosecution of soldiers' peacetime violations of domestic criminal laws, Blackstone wrote:

Our nation's Founders also experienced military interference with civilian courts, leading to their grievance, set forth in the Declaration of Independence, that the King "ha[d] affected to render the military superior to the civil power." *See Duncan*, 327 U.S. at 320; *See also Reid*, 354 U.S. at 27-29. Distrusting "military justice dispensed by a commander unchecked by the civil power in proceedings so summary as to be lawless," (*Loving v. United States*, 517 U.S. 748, 765 (1996)), they drafted the Constitution to reflect their grave "fear and mistrust of military power" by rendering that power "subordinate to civil authority." *Reid,* 354 U.S. at 29, 30.

The government's willingness now to erode the line between civilian and military authority disregards the wisdom, experience, and intent of the Framers and the commands of the Constitution. Even during the most trying times facing our nation, including a bloody civil war, the Court has held fast to the foundational principle that the military not be allowed to usurp civilian authority and subjugate

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> For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land.

I William Blackstone, Commentaries 413, *quoted in Reid*, 354 U.S. at 26-27; *see also* Matthew Hale, *History and Analysis of the Common Law of England* 40-41 (1st ed. 1713), *quoted in Reid*, 354 U.S. at 27 n.48.

the rule of law. The challenges presently facing our country do not justify turning our back on this important tradition.

A. *Milligan* Stands for the Constitutional Primacy of Civilian Authority.

Milligan, 71 U.S. 2 (1866), arose during the Civil War, when Southern sympathizers in Indiana formed "a powerful secret association, composed of citizens and others . . . under military organization." 71 U.S. at 140 (Chase, C.J., concurring). The government alleged that this group conspired to engage in "insurrection, the liberation of the prisoners of war . . . , the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government." *Id.* Milligan, thought to be a high-ranking member of this paramilitary organization, was arrested by military officers and charged with "conspiracy against the Government of the United States," "affording aid and comfort to rebels against the authority of the United States," "inciting insurrection," "disloyal practices," and "violation of the laws of war." *Id.* at 6-7; *see* William H. Rehnquist, *All the Laws But One* 84 (1998).

Although not a member of either the Union or Confederate army, Milligan was tried, convicted and sentenced to death by a military commission. He then filed a *habeas corpus* petition seeking to be "delivered from military custody and imprisonment, and if found probably guilty of any offence, to be turned over to the

proper tribunal for inquiry and punishment; or, if not found thus probably guilty to be discharged altogether." 71 U.S. at 135 (Chase, C.J., concurring).

Presaging the argument it makes here, the government contended in *Milligan* that the unprecedented times then facing the nation -- when "almost one-half of its citizens undertook . . . to over-throw the government, and where coward sympathizers, not daring to join them, plotted in the security given by the protecting arms of the other half to aid such rebellion and treason" -- both demanded and justified an unprecedented exercise of executive power. *Id.* at 88 (argument of Mr. Butler for the United States). Because the very survival of the nation was at stake, the government argued, the President's powers during the war "must be without limit." *Id.* at 18 ("He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration.").

Despite the government's plea, the Court held that the military lacked jurisdiction to try Milligan and that he was entitled to be discharged. *Id.* at 121-22, 131. The Court rejected the assertion that "in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power . . . to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will* . . . ." *Id.* at 124. The Court cautioned that "[m]artial 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' . . . . 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." *Id.* at 124-25. The majority made clear that the Constitution allowed neither the President nor Congress to authorize the military to assume what was properly a judicial function. *See id.*

As part of its forceful rejection of military jurisdiction over civilians -- even those accused of violating the law of war -- the Court also found that Milligan's trial by military commission violated his right to trial by jury (*id.* at 122), a right that is "not held by sufferance, and cannot be frittered away on any plea of state or political necessity." *Id.* at 123. In the majority's view, even the suspension of the writ of *habeas corpus* did not allow the President or Congress to disturb this constitutionally enshrined safeguard of liberty. *Id.* at 125-126.

Although the Civil War threatened the country's very existence, the Court concluded that wartime anxieties did not justify abandonment of basic constitutional values:

> Th[e Framers] foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law.... The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than

> that any of its provisions can be suspended during any of the great exigencies of government.

Id. at 120-21.

The Court was mindful of the grave threat that Milligan posed during a time when the nation was being torn apart by war, characterizing his conspiracy to "introduce the enemies of the country into peaceful communities" and overthrow the government as an "*enormous crime*" that warranted the law's heaviest penalties. *Id.* at 130. The Court nonetheless found the government's accusations insufficient to justify departure from constitutional precepts. In a manner that responds as forcefully today to the government's claim for detaining Padilla, the *Milligan* Court explained:

> If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Id. at 122. *See also id.* at 127 ("It is difficult to see how the *safety* for the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them.").

In refusing to cede dominion to the military, *Milligan* both affirmed a fundamental constitutional principle and reflected precedent. *See id.* at 128-29 (discussing history and case law supporting the Court's ruling and observing that military arrests and trials during wartime "were uniformly condemned as illegal" by the courts when "our officers made arbitrary arrests and, by military tribunals, tried citizens who were not in the military service"). In both principle and precedent it erects a strong presumption against the imposition of martial law. Neither the passage of time nor subsequent decisions have diminished *Milligan*'s holding. *See infra* Section C. It applies as forcefully today as it did during an unprecedented civil war that took more than 600,000 lives.

B. Neither *Hamdi* nor *Quirin* Supports the Imposition of Military Detention in Padilla's case.

In an effort to avoid the principles of *Milligan*, Respondent relies upon the Supreme Court decisions in *Hamdi v. Rumsfeld,* 124 S.Ct. 2633 (2004), and *Ex Parte Quirin,* 317 U.S. 1 (1942), to support his claim that Padilla may be treated as an "enemy combatant" and detained by the military without charges or trial. Neither *Hamdi* nor *Quirin* supports the government's imposition of martial law in this case.

1. *Hamdi* involved a foreign battlefield capture.

In the *Hamdi* case, the Government alleged that Yasser Hamdi "took up arms with the Taliban during" the conflict in Afghanistan between United States forces and the Taliban and that he was captured on the battlefield with his "Kalashnikov assault rifle" when his Taliban unit surrendered to the Northern Alliance forces. *Hamdi*, 124 S.Ct. at 2636. It was these facts that the government relied upon in designating Hamdi as an "enemy combatant." And it was in the narrow context of "a United States citizen captured in a *foreign* combat zone," *id.* at 2643 (emphasis in original), that the Supreme Court found that the government could detain Hamdi as an "enemy combatant" -- provided these allegations could be sustained in a hearing held "before a neutral decisionmaker." *Id.* at 2642.

In reaching this conclusion, the plurality emphasized that its decision was limited to the narrow factual circumstances presented by the case. *Id.* at 2635. In this regard, the plurality stressed the significance of Hamdi's battlefield capture and distinguished the *Milligan* case on that ground. Justice O'Connor's plurality opinion observed: "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." *Id.* The government vainly tries to fit this case within the facts of *Hamdi*. It asserts that Padilla was "an Al Qaeda affiliate who took up arms against the United States forces on a foreign

battlefield...." Gov't Br. at 15. Putting to one side the fact that this assertion is a stretch that extends well beyond the factual representations of the Rapp Declaration submitted in this case,[4] the government's claim ignores the central factual ingredient of the *Hamdi* case. It ignores the fact that Hamdi was captured on the battlefield and Padilla was not.

The government also disregards this Court's basic justification for the special deference owed to the military in battlefield situations. As this Court explained in earlier proceedings in the *Hamdi* case, the law allows the military to detain combatants captured on the battlefield without criminal prosecution because two "vital" interests coalesce: "[f]irst, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies"; and, "[s]econd, detention in lieu of prosecution may relieve the burden of military commanders litigating the circumstances of a capture halfway around the globe." *Hamdi v. Rumsfield*, 316 F. 3d 450, 465 (4th Cir. 2003). This second interest obviously does not apply in the absence of a battlefield capture. In the end, therefore, the government must argue that the detention of Padilla is supported by

[4] Fairly read, the Rapp Declaration does not describe Padilla as an individual directly engaged in armed conflict with United States forces on the Afghani battlefield. Rather, it conveys the sense that Mr. Padilla found himself in Afghanistan at the commencement of United States combat operations in that country and that he then moved away from the combat by going from Al Qaeda "safehouse to safehouse in an effort to avoid being bombed or captured by U.S. or coalition forces" until he was able to retreat across the border into Pakistan. J.A. at 19-21.

the Supreme Court's decision in *Quirin*. But, as discussed below, *Quirin* cannot carry the weight that the government ascribes to it.

2. *Quirin* is a narrow exception to the strong presumption against the imposition of martial law on American soil.

Quirin involved the military trial of World War II combatants who secretly entered the United States with plans to sabotage military installations. After coming ashore from German submarines as uniformed marines, they buried their uniforms and explosives and slipped into the night. They were quickly arrested after one of the would-be saboteurs, with the support of a second, informed the FBI of the group's plot and helped the authorities locate the others. *See* David J. Danelski, *The Saboteurs' Case*, 1 J. Sup. Ct. Hist. 61, 64-65 (1996).

In short order, the men were charged with violations of the law of war for having discarded their uniforms to engage in sabotage; for giving intelligence to the enemy; for spying; and for conspiracy to commit these offenses. They were tried secretly before a military commission, which found them guilty and imposed sentences of death. In a *habeas corpus* petition, the saboteurs challenged the military commission's authority to try them. But the Court upheld military jurisdiction in that case. *Quirin*, 317 U.S. at 48.

In recognition of the strong presumption against martial law on American soil, the Court's opinion carefully reflects the limitations articulated by Justice Black in a memorandum to Chief Justice Stone:

> In this case I want to go no further than to declare that these particular defendants are subject to the jurisdiction of a military tribunal because of the circumstances and purposes of their entry into this country as part of the enemy's war forces. Such a limitation, it seems to me, would leave the *Milligan* doctrine untouched, but to subject every person in the United States to trial by military tribunals for every violation of every rule of war which has been or may hereafter be adopted . . . might go far to destroy the protections declared by the *Milligan* case.

Danelski, *supra*, at 76 (citation omitted). Accordingly, as Chief Justice Stone explained for the majority: "We hold only that *those particular acts* constitute an offense against the law of war which the Constitution authorizes to be tried by military commission." 317 U.S. at 46 (emphasis added).

Quirin thus carved out a limited sphere in which the military was allowed to try individuals who were indisputably uniformed soldiers as they entered this country for specific, stipulated violations of the law of war pursuant to express congressional authorization. To use *Quirin* to justify the detention in this case would, in effect, rewrite that decision. It would also fatally undermine *Milligan*, a precedent that has for nearly 150 years stood as a bulwark between our

constitutional democracy and the nation we would be if the Executive were indeed vested with the unchecked power it seeks here.

Quirin's holding is confined to individuals who asserted military status[5] and who were, therefore, bound by the law of war and subject to military punishment when they violated its rules. The *Quirin* saboteurs were part of the German armed forces while Germany and the United States were at war. Under the law of war, they were subject to the privileges and responsibilities of "combatants." They were entitled to use lethal force against military targets and, if captured, to be treated as prisoners of war as long as their belligerent conduct comported with the law of war. But when they changed out of uniform to engage in clandestine

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[5] The *Quirin* defendants disembarked from German naval vessels wearing German uniforms and carrying "explosives, fuses and incendiary timing devices" as they entered the United States. (*Quirin*, 317 U.S. at 21-22).

Appellant tries to avoid the import of this fact by asserting, based upon a recently published secondary source that only two of the *Quirin* petitioners "were formally enrolled in the German army." (Gov't Br. at 39,citing Michael Dobbs, Saboteurs: The Nazi Raid on America 204 (2004)). Whether or not more recent scholarship supports the government's position on this matter is besides the point. For purposes of understanding the precedential reach of the *Quirin* case, the question is what was the understanding of the Supreme Court with respect to the *Quirin* petitioners when it decided the *Quirin* case. The answer to this question is that, as presented to the *Quirin* Court, all of the petitioners in that case had assumed the status of soldiers and were "combatants" in the traditional sense of being "members of the armed forces of [a nation state] that is a Party to a conflict" Protocol Additional (I) to the Geneva Conventions of August 12, 1949, Art. 43(2). The understanding of the *Quirin* Court was that they were all soldiers and not civilians.

operations behind U.S. military lines, they violated the law of war and lost their privileged status as "lawful combatants," allowing the government to try them before a military tribunal. Had they not shed their uniforms, they would have been entitled to be treated as prisoners of war.

In an effort to sustain the only possible justification for Padilla's military detention, the government is compelled to claim that Padilla is a combatant, like the *Quirin* saboteurs. But in making that claim, it has not offered any definition of the term that would provide a limiting principle, and it disregards the definition provided by international law. As noted, a 1977 Protocol to the Geneva Conventions defines "combatants" as "[m]embers of the armed forces of a Party to a conflict . . . [who] have the right to participate directly in hostilities." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 43(2).[6] Individuals who meet the requirements for combatant status under this definition have a qualified right to direct violence against other combatants. If, for

[6] The United States chose not to ratify Protocol I, *see* Ronald Reagan, Letter of Transmittal, Treaty Doc. No. 100-2, 100th Cong., 1st Sess., (1987), *reprinted in* 26 I.L.M. 561 (1987), but that fact does not diminish the relevance of this definition as a guiding principle, especially in light of the government's failure to suggest any other limit on the Executive's claim of apparently boundless discretion to designate "enemy combatants" and replace civilian justice with unlimited military detention. Furthermore, the United States has recognized that most of the provisions of Protocol I are binding on the United States as customary international law. *See, e.g.* Dep't of the Army, *Operational Law Handbook* 11 (Col. Tia Johnson ed., 2003).

example, the *Quirin* petitioners had remained in uniform and fired at American military personnel after landing in the United States, they would not have violated the law of war and could not have been prosecuted. The government could not possibly claim that Padilla had a similar right to fire at U.S. military personnel as he disembarked from the plane at O'Hare Airport.

The difference between Padilla and the German saboteurs is further highlighted by the fact that the *Quirin* petitioners, had they been detected as they landed in uniform, could have been shot on sight. *See* Cyrus Bernstein, *The Saboteur Trial: A Case History*, 11 Geo. Wash. L. Rev. 131, 175 (1943) (describing point in *Quirin* argument when "Justice Jackson observed that if the saboteurs had been shot while landing there would not have been murder. Colonel Royall [representing the petitioners] agreed . . . ."). Again, we do not understand the government to be claiming that it was entitled to shoot Padilla as he deplaned at O'Hare Airport.

The government has alleged that Padilla is "associated" with Al Qaeda, that he effectively has engaged in "armed cooperation" with the enemy, and that he conspired to engage in hostile conduct against this country and its people. But the same was said of Milligan, who was accused of conspiring with an army that was at war with the United States, of having engaged in "armed cooperation with the enemy," and of planning various acts of hostility against the United States

including the "liberation ... of prisoners of war" held by the United States Army. These same allegations were insufficient to warrant Milligan's detention by military officials and do not warrant Padilla's military detention on American soil where, as here, the civilian courts are open.

In an effort to bring this case closer to *Quirin,* the government points to the fact that Padilla was allegedly present in Afghanistan when U.S. forces were engaged in combat. That effort is misguided, however, for at least two reasons. First, the government's own affidavits fall far short of establishing that Padilla "took up arms against United States forces on a foreign battlefield" (Gov't Br. at 15). *See* n. 5, *supra.* Second, whatever Padilla may or may not have done in Afghanistan, under international law "[p]ersons who are not members of the armed forces of a Party to a conflict and who are not on the actual field of battle wielding weapons have not traditionally been treated as combatants, lawful or unlawful. Instead, to the extent that they have conspired to engage in violent acts, they have been treated as criminal under the domestic law of the captor." Br. of *Amici Curiae* Practitioners and Specialists in the International Law of War in Support of Respondents, submitted to the Supreme Court in *Rumsfeld v. Padilla*, 03-1027 at 3-4.

Quirin is entirely consistent with this understanding. The *Quirin* petitioners asserted their status as soldiers and, as such, were subject to military jurisdiction.

By contrast, those who were thought to have aided the *Quirin* saboteurs, but who were not part of the German military, were prosecuted as civilians in civilian courts. *United States v. Leiner,* 143 F.2d 298 (2d Cir. 1944); *United States v. Cramer,* 137 F.2d 888 (2d Cir. 1943), *rev'd*, 325 U.S. 1 (1945); *United States v. Haupt,* 136 F.2d 661 (7th Cir. 1943). Now, however, the Government prefers to obscure the distinction between soldiers and civilians that was critical to the *Quirin* Court's decision. 317 U.S. at 45.

Finally, when *Milligan* and *Quirin* are placed within the full context of our constitutional history, they highlight the strong presumption within our legal tradition against martial law. Accordingly, any uncertainty with respect to Padilla's status must be resolved in favor of the predominance of civilian authority over the military.[7]

C. *Milligan's* Holding Has Been Frequently Reaffirmed Since *Quirin.*

By minimizing the significance of *Milligan* and misinterpreting the relevance of *Quirin*, the government has misplaced both decisions in our constitutional history. As applied to detentions on American soil, *Quirin* is easily confined to its facts, and its holding has never been extended by the Supreme

[7] Of course, if Padilla is held to be subject to military detention, he is at the least entitled to the process promised by the Supreme Court in *Hamdi.* Moreover, like all individuals detained by the military, he is entitled to humane treatment guaranteed by the Constitution and international law.

Court. *Milligan*, by contrast, is rooted in principles that predate our nation's founding and that have continued to flourish. Indeed, fifteen years after it decided *Quirin*, the Court characterized *Milligan* as "one of the great landmarks in this Court's history." *Reid v. Covert*, 354 U.S. 1, 30 (1957).

Consistent with the Framer's strong opposition to military usurpation of civilian rule, the Court in modern times has repeatedly confined military jurisdiction within narrow limits. Thus, in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), the Court rejected the government's claim that the Hawaiian Organic Act, which allowed suspension of the writ of habeas corpus and the imposition of martial law, gave "the armed forces power to supplant all civilian laws and to substitute military for judicial trials. . . ." *Id.* at 313. As a consequence, the Court ordered the release of the two petitioners, who had been tried by military tribunals in Hawaii following the attack on Pearl Harbor.[8]

Sharp limitations on military authority continued in *Toth v. Quarles*, 350 U.S. 11 (1955), where the Court held that Congress cannot subject an ex-soldier to

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[8] At the time of the prosecution of one of the petitioners in *Duncan*, the courts were barred from conducting criminal trials by order of the military. 327 U.S. at 308-09. In Duncan's situation, the courts had been allowed to return to their normal functions, but he was nonetheless tried before a military tribunal for having violated a military order "which prohibited assault on military or naval personnel with intent to resist or hinder them in the discharge of their duty." *Id.* at 310-11.

military jurisdiction, even for an offense committed while in service. The Court observed:

> "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.

Id. at 22.

The Court in *Reid v. Covert* again declined to depart from the constitutionally enshrined tradition that military power be subservient to civilian authority. 354 U.S. at 40. Building on *Milligan*, *Duncan*, and *Toth*, the Court held, even in the case of the dependents of military personnel living on military bases, that Congress lacked power under the Constitution to subject civilians to military trial. The Court emphasized that civilian courts, operating in accordance with Article III and the Fifth, Sixth, and Eighth Amendments, are "the normal repositories of power to try persons charged with crimes," whereas "the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction." *Id.* at 21; *see also Toth*, 350 U.S. at 15-17, 22-23 & n.23 (linking the importance of preventing military encroachment to the preservation of the right to trial by jury and related constitutional protections). Thus, in *Reid* the Court held fast to the nation's "deeply rooted and ancient opposition in this country to the extension of military control over civilians." *Id.* at 33

This long history of carefully resisting military encroachment upon the supremacy of civilian authority and the rule of law makes clear that neither the President nor Congress can impose the detention to which Padilla has been subjected. If civilians cannot be subject to military trial, they surely cannot be subject to military detention without trial. The Executive nonetheless claims that its decision to hold Padilla in military custody without charges or trial should be upheld because terrorism presents a threat unlike any other our nation has previously encountered. What is lacking in precedent, it suggests, is made up for by exigency, echoing its decades-past argument that the rule of *Milligan* was "distinctly unsuited to modern warfare conditions where all of the territories of a warring nation may be in combat zones or imminently threatened with long-range attack even while civil courts are operating." *Duncan*, 327 U.S. at 329 (Murphy, J., concurring).

To this, Justice Murphy responded:

> The argument thus advanced is as untenable today as it was when cast in the language of the Plantagenets, the Tudors and the Stuarts. It is a rank appeal to abandon the fate of all our liberties to the reasonableness of the judgment of those who are trained primarily for war. It seeks to justify military usurpation of civilian authority to punish crime without regard to the potency of the Bill of Rights. It deserves repudiation ....
>
> From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in

> this day of atomic warfare or at a future time when some other type of warfare may be devised.

Id. at 329-30; *see Reid*, 354 U.S. at 14; *Milligan*, 71 U.S. at 120-21.

This case raises fundamental questions concerning the meaning of "war" in an age of terrorism and the scope of the President's power to combat what no one denies is a very real threat to the United States and the security of its people. The security of our people, however, depends not only on defending our borders but also on defending the constitutional principles that define us as a nation.

Our system of checks and balances was designed to ensure that individual liberty does not rest on the good faith of government officials, and to place limits on the exercise of government authority. By contrast, the assertion of power by the Executive in this case is virtually boundless. Padilla was arrested at O'Hare Airport by law enforcement agents. He has now been detained by the military for approximately three years on the theory that he is an enemy soldier captured on the battlefield. Fundamental rights can and should depend on more than the manipulation of labels.

This case does not involve the deployment of American forces overseas. It does not involve someone captured abroad while engaged in direct hostilities against our military forces. It does not involve someone whose activities could be privileged under the law of war if performed in uniform. It does not involve someone who is beyond the reach of the American criminal justice system.

Both before and after September 11, the government has indicted and convicted numerous alleged terrorists in the criminal justice system. If the government believes that Padilla was plotting to engage in terrorist acts, the criminal courts remain open and functioning and perfectly capable of adjudicating his guilt. Under *Milligan*, that is where his case belongs.

CONCLUSION

For the reasons stated here, the judgment below should be affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-6396 **Caption:** PADILLA v. HANFT

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I hereby certify that on this 14th day of June 2005, an original and seven (7) copies of the *Amici Curiae* Brief submitted on behalf of Petitioner-Appellee were served on the Court by placing the same in Federal Express overnight mail, postage prepaid to:

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