THE ESSENTIAL IMPORTANCE OF *EX PARTE MILLIGAN*

ELWOOD EARL SANDERS, JR.*

It would seem to me in light of the decisions in *Hamdi*¹ and *Padilla*,² that a precious and fundamental American liberty is in some peril: The right of an American citizen not to be held

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The plurality first stated:

> There is no bar to this Nation’s holding one of its own citizens as an enemy combatant. In *Quirin*, one of the detainees, Haupt, alleged that he was a naturalized United States citizen. We held that “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.” While Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities.

*Id.* at 2640 (plurality) (internal citations omitted).

The opinion treated *Quirin* as limiting *Milligan* to its facts:

> Ex parte *Milligan* does not undermine our holding about the Government’s authority to seize enemy combatants, as we define that term today. In that case, the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. That fact was central to its conclusion.

*Id.* at 2642 (plurality) (internal citations omitted).

As this article and Justices Scalia and Stevens indicate, the central holding of *Milligan* was not that he was not a prisoner of war but that he was a citizen, the courts were open, and that the Constitution forbid the subjection of a citizen to a military tribunal absent exigent circumstances calling for the suspension of the writ of habeas corpus. *Id.* at 2669-70 (Scalia & Stevens, JJ., dissenting). “But if the law of war cannot be applied to citizens where courts are open, then Hamdi’s imprisonment without criminal trial is no less unlawful than Milligan’s trial by military tribunal.” *Id.* at 2668. “There are times when military exigency renders resort to the traditional criminal process impracticable. English law accommodated such exigencies by allowing legislative suspension of the writ of habeas corpus for brief periods.” *Id.* at 2664.

More disturbing was the plurality’s distinguishing of *Milligan*:

> *Quirin* was a unanimous opinion. It both postdates and clarifies *Milligan*, providing us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances. Brushing aside such precedent—particularly when doing so gives rise to a host of new questions never dealt with by this Court—is unjustified and unwise.

*Id.* at 2643 (plurality).

Even worse was the treatment of *Milligan* by Justice Thomas in the dissent. Justice Thomas actually used the dreaded “o” word: “Finally, *Quirin* overruled *Milligan* to the extent that those cases are inconsistent. Because the Government does not detain Hamdi in order to punish him, as the plurality acknowledges *Milligan* and the New York cases do not control.” *Id.* at 2682 (Thomas, J., dissenting) (internal citations omitted).
by the Executive without proper process, judicial review or counsel, and perhaps be tried by a
military tribunal. Hence, I decided I had to “contend for the faith which was once delivered unto
the saints,”3 and write this article in hope of preserving that liberty. For if the president can, in a
time of indefinite conflict against terrorists, indefinitely detain his opponents as “enemy
combatants” and hold them without trial or counsel, we are headed toward an imperial
despotism.

I respectfully suggest detention is punishment. It would engender fear and silence dissent. I realize that there are situations when
detention is not punishment for various constitutional analyses, however, I stand with Justices Scalia and Stevens: “The very
core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the
will of the Executive.” Id. at 2661 (Scalia & Stevens, JJ., dissenting).

2. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004). The Padilla Court did not reach the merits and required the writ of habeas
corpus to be refiled in South Carolina, where Padilla is being held. Id. at 2734.

3. Jude 1:3 (King James).