NATIONAL SECURITY LAW AND THE CONSTITUTION

Editorial Advisors

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NATIONAL SECURITY LAW AND THE CONSTITUTION

SECOND EDITION

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Preface

The basic structure of our casebook has been retained in this new edition. This reflects our commitment to the goal identified in the preface of the first edition, "to offer students insights into the complex process of national security legal practice by focusing on essential legal sources and national security issues touching on the full spectrum of national security powers." The changes we have made, in addition to the necessary task of updating coverage of all subjects to reflect developments since our first publication in August 2016, fall into two broad categories.

The first category is a pedagogical one. This new edition responds to lessons learned from students and teachers who have shared with us their experiences using the first edition. We have expanded the range of different approaches for instructors to explore the topics presented in this book. A principal change has been to exchange our previous commitment to a 14-week/14-chapter casebook for a more flexible approach that allows for a variety of ways to introduce and select topics to cover in a semester of standard length. The chapters that follow those in Part I, which establishes foundations and frameworks on which to build a course on national security law, are independent units that may be selected and organized according to the needs and preferences of the instructor.

The most obvious pedagogical change in Part I is the addition of a new first chapter, "An Introduction to the 'National Security' Constitution." This chapter takes a close look at a slower pace at a single case: *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). This is an important case in its own right, to which reference is made in subsequent chapters. But this first chapter is intended to allow newcomers to the field to acquaint themselves, in an absorbable way, with some of the themes, techniques, institutions, sources of law, and (it must be said) some of the ubiquitous jargon common to the many facets of national security law.

The second category reflects changes in organization, scope, and coverage. First, we welcome Colonel Gary Corn (U.S. Army, Ret.) as our co-author. Professor Corn, now the program director for the Technology, Law and Security Program at American University Washington College of Law, most recently served as the Staff Judge Advocate to U.S. Cyber Command, the capstone to a distinguished career spanning over twenty-seven years as a military lawyer.

Second, existing topics have been reorganized while retaining our focus on the Constitution as "the foundation for the exercise of all national security powers."

Thus, while Part I remains centered on this constitutional framework, and the friction points built into it, coverage has been reconfigured to add a chapter devoted to frictions especially associated with the foreign affairs powers of the Congress and the President. Similarly, a new chapter has been added to Part V that reflects the increasing importance of computer networks as part of the essential infrastructure of—and, therefore, an expanding battlespace in—our society. At the same time, we have endeavored to keep each chapter a manageable length. We have written a casebook, not a treatise, and our choices reflect our aim to provide students with a serious introduction to a difficult subject, one that enlightens but does not overwhelm.

National security law, like all law, is a field defined not only by recognized precedents and seemingly well-anchored guideposts but also by constant flux, with new challenges and twists on old issues. At the time this preface is being written, the world finds itself in the grip of a pandemic that has upended settled expectations of every sort with blinding speed. In the United States, leaders at the local, state, and federal levels finds themselves rediscovering legal powers, reconsidering their limits, and sometimes relearning old lessons from the friction points that characterize our unique federal approach to governance. We are reminded of the variety of guises in which threats to national security can appear. Now, more than ever, an understanding of the question at the heart of national security law—"how the interests of security and liberty are reconciled"—is crucially important.

Geoffrey S. Corn
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August 2020

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Bolivians train anti-air gun on Paraguayan airplane on May 24, 1934. The Chaco War was fought over the Chaco Boreal wilderness. Photograph. Everett Collection Historical/Alamy.

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NATIONAL SECURITY LAW AND THE CONSTITUTION

PART I

THE CONSTITUTIONAL FRAMEWORK

CHAPTER 1

An Introduction to the "National Security" Constitution

Inter arma silent leges is a Latin phrase often attributed to the Roman lawyer and statesman Cicero. Loosely translated, the English equivalent is: "In times of war, the law is silent." In slightly different form, Cicero allegedly spoke these words in defense of a friend accused of murdering a political rival. Although these words were spoken to advance an argument of self-defense, the trial itself took place in highly charged political circumstances. The stakes were high: "the Forum and all the temples in its neighbourhood were occupied by troops."[1]

What does "*inter arma silent leges*" mean in the context of national security law in the United States? As suggested by this very book, which is so full of laws and legal opinions issued in times of war and national security crisis, our law does not actually cease to function. Rather, the questions are more nuanced and sometimes more subtle. *Which* law functions and for what reasons? When, and how, does one *body* of law replace another? How are the rights of individuals affected by threats, real or perceived, to the state? Who interprets these laws? If the interpretor is a judge, what deference should be given to the judgments of non-judicial actors?

These are not easy questions to answer. And the answers themselves do not remain unchanged over time. Oliver Wendell Holmes, Jr. famously declared: "The life of the law has not been logic: it has been experience."[2] He then explained what he meant:

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

1. M.T. Ciceronis, Oratio Pro Tito Annio Milone vii (Cambridge University Press, 1886) (from the introduction by Q. Asconius Pedianus).

2. Oliver Wendell Holmes, Jr., The Common Law 1 (1881).

Judges, like generals and senators, presidents and attorney generals, soldiers and advisers, and lawyers and citizens, are human beings. They are subject to fear, revulsion, and doubt as much as to courage, compassion, and certainty. And the contexts in which their decisions are made often help us to study the choices they make.

With these thoughts in mind, this introductory chapter focuses on a single case, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The lead petitioner in the caption is Yaser Esam Hamdi, who at the time of the events in this case was a twenty-year-old United States citizen living in Afghanistan. The lead respondent is Donald H. Rumsfeld, who at the time was the U.S. Secretary of Defense under President George W. Bush.

This important Supreme Court case will be referenced in several chapters in this book. Its careful study will be rewarded. But it is also a difficult case in which the Justices wrestle over the meaning of two acts of Congress (the 2001 Authorization for the Use of Military Force and the 1971 Non-Detention Act); an executive decision (to detain indefinitely a United States citizen as an enemy combatant captured in Afghanistan); and the meaning of two Supreme Court cases from very different times and contexts in U.S. history (a Civil War era case, *Ex parte Milligan*, and a case from World War II, *Ex parte Quirin*). The case also raises issues concerning international law (the Geneva Convention relative to the Treatment of Prisoners of War).

Unusually, this chapter will intersperse notes and questions *between* the different opinions offered in the case instead of leaving them all for the end. The components of the case are the judgment of the Court accompanied by a plurality opinion by Justice O'Connor joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, a concurring opinion by Justice Souter joined by Justice Ginsburg, a dissenting opinion by Justice Scalia joined by Justice Stevens, and another dissenting opinion by Justice Thomas.

In closing, consider the view expressed by Justice Scalia at the end of his opinion:

> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis — that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.

This book is about exploring the metes and bounds of that thought. Consider the first case:

Hamdi v. Rumsfeld

542 U.S. 507 (2004)

Justice O'Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Kennedy, and Justice Breyer join.

I

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States.

Approximately 3,000 people were killed in those attacks. One week later, in response to these "acts of treacherous violence," Congress passed a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF). Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. The Government asserts that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until a recent transfer to a brig in Charleston, South Carolina. The Government contends that Hamdi is an "enemy combatant," and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted.

In June 2002, Hamdi's father filed the present petition for a writ of habeas corpus, naming as petitioners his son and himself as next friend. The elder Hamdi alleges in the petition that he has had no contact with his son since the Government took custody of him in 2001, and that the Government has held his son "without access to legal counsel or notice of any charges pending against him." Although his habeas petition provides no details with regard to the factual circumstances surrounding his son's capture and detention, Hamdi's father has asserted in documents found elsewhere in the record that his son went to Afghanistan to do "relief work," and that he had been in that country less than two months before September 11, 2001, and could not have received military training. The 20-year-old was traveling on his own for the first time, his father says, and "[b]ecause of his lack of experience, he was trapped in Afghanistan once the military campaign began."

[The] Government filed a response and a motion to dismiss the petition. It attached to its response a declaration from one Michael Mobbs (hereinafter Mobbs Declaration), who identified himself as Special Advisor to the Under Secretary of Defense for Policy. Mobbs indicated that in this position, he has been "substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban)." He expressed his

"familiar[ity]" with Department of Defense and United States military policies and procedures applicable to the detention, control, and transfer of al Qaeda and Taliban personnel, and declared that "[b]ased upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of . . . Hamdi and his detention by U.S. military forces."

Mobbs then set forth what remains the sole evidentiary support that the Government has provided to the courts for Hamdi's detention. The declaration states that Hamdi "traveled to Afghanistan" in July or August 2001, and that he thereafter "affiliated with a Taliban military unit and received weapons training." It asserts that Hamdi "remained with his Taliban unit following the attacks of September 11" and that, during the time when Northern Alliance forces were "engaged in battle with the Taliban," "Hamdi's Taliban unit surrendered" to those forces, after which he "surrender[ed] his Kalishnikov assault rifle" to them. Mobbs states that Hamdi was labeled an enemy combatant "[b]ased upon his interviews and in light of his association with the Taliban." According to the declaration, a series of "U.S. military screening team[s]" determined that Hamdi met "the criteria for enemy combatants," and "[a] subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces, which supports his classification as an enemy combatant."

The District Court found that the Mobbs Declaration fell "far short" of supporting Hamdi's detention. It criticized the generic and hearsay nature of the affidavit, calling it "little more than the government's 'say-so.' " It ordered the Government to turn over numerous materials for *in camera* review[.]

The Government sought to appeal the production order. The Fourth Circuit reversed. It instead stressed that, because it was "undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict," no factual inquiry or evidentiary hearing allowing Hamdi to be heard or to rebut the Government's assertions was necessary or proper.

II

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." [T]he Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was " 'part of or supporting forces hostile to the United States or coalition partners' " in Afghanistan and who " 'engaged in an armed conflict against the United States' " there. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's

alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF.

Our analysis on that point, set forth below, substantially overlaps with our analysis of Hamdi's principal argument for the illegality of his detention. He posits that his detention is forbidden by 18 U.S.C. § 4001(a) [(the Non-Detention Act), which] states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The Government again presses two alternative positions. First, it argues that § 4001(a), in light of its legislative history and its location in Title 18, applies only to "the control of civilian prisons and related detentions," not to military detentions. Second, it maintains that § 4001(a) is satisfied, because Hamdi is being detained "pursuant to an Act of Congress"—the AUMF. Again, because we conclude that the Government's second assertion is correct, we do not address the first. In other words, for the reasons that follow, we conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the AUMF satisfied § 4001(a)'s requirement that a detention be "pursuant to an Act of Congress" (assuming, without deciding, that § 4001(a) applies to military detentions).

There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for [the September 11, 2001] attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

There is no bar to this Nation's holding one of its own citizens as an enemy combatant. In *Ex parte Quirin* (1942), 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. Nor can we see any reason for drawing such a line here. A citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States"[;] such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.

Hamdi objects, nevertheless, that Congress has not authorized the *indefinite* detention to which he is now subject. As the Government concedes, "given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement." If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that

Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.

It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949.

If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

Ex parte Milligan (1866) 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. 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. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.

Moreover, as Justice Scalia acknowledges, the Court in *Quirin* dismissed the language of *Milligan* that the petitioners had suggested prevented them from being subject to military process. *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.

To the extent that Justice Scalia accepts the precedential value of *Quirin*, he argues that it cannot guide our inquiry here because "[i]n *Quirin* it was uncontested that the petitioners were members of enemy forces," while Hamdi challenges his classification as an enemy combatant. But it is unclear why, in the paradigm outlined by Justice Scalia, such a concession should have any relevance. Justice Scalia envisions a system in which the only options are congressional suspension of the writ of habeas corpus or prosecution for treason or some other crime. He does not explain how his historical analysis supports the addition of a third option — detention under some other process after concession of enemy-combatant status — or why a concession should carry any different effect than proof of enemy-combatant status in a proceeding that comports with due process.

Further, Justice Scalia largely ignores the context of this case: a United States citizen captured in a *foreign* combat zone. Justice Scalia refers to only one case involving this factual scenario—a case in which a United States citizen-prisoner of war (a member of the Italian army) from World War II was seized on the battlefield in Sicily and then held in the United States. The court in that case held that the military detention of that United States citizen was lawful.

Justice Scalia can point to no case or other authority for the proposition that those captured on a foreign battlefield (whether detained there or in U.S. territory) cannot be detained outside the criminal process.

Moreover, Justice Scalia presumably would come to a different result if Hamdi had been kept in Afghanistan or even Guantanamo Bay. This creates a perverse incentive. Military authorities faced with the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield will simply keep citizen-detainees abroad. Indeed, the Government transferred Hamdi from Guantanamo Bay to the United States naval brig only after it learned that he might be an American citizen. It is not at all clear why that should make a determinative constitutional difference.

III

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Hamdi argues that he is owed a meaningful and timely hearing and that "extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay" does not comport with the Fifth and Fourteenth Amendments. The Government counters that any more process than was provided below would be both unworkable and "constitutionally intolerable."

First, the Government urges the adoption of the Fourth Circuit's holding below—that because it is "undisputed" that Hamdi's seizure took place in a combat zone, the habeas determination can be made purely as a matter of law, with no further hearing or factfinding necessary. This argument is easily rejected. As the dissenters from the denial of rehearing en banc noted, the circumstances surrounding Hamdi's seizure cannot in any way be characterized as "undisputed," as "those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances."

The Government's second argument requires closer consideration. This is the argument that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government's most extreme rendition of this argument, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict" ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. At

most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential "some evidence" standard. Under this review, a court would assume the accuracy of the Government's articulated basis for Hamdi's detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one.

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law. See, *e.g., Zadvydas v. Davis* (2001).

The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," is the test that we articulated in *Mathews v. Eldridge* (1976). *Mathews* dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." We take each of these steps in turn.

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi's "private interest . . . affected by the official action," is the most elemental of liberty interests — the interest in being free from physical detention by one's own government. Nor is the weight on this side of the *Mathews* scale offset by the circumstances of war or the accusation of treasonous behavior, for it is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection, and at this stage in the *Mathews* calculus, we consider the interest of the *erroneously* detained individual.

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. [T]he law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities.

[W]e believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant.

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored

to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant.

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. [I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. Cf. *Korematsu v. United States* (1944) (Murphy, J., dissenting) ("[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled").

In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown Sheet & Tube* (1952).

Because we conclude that due process demands some system for a citizen-detainee to refute his classification, the proposed "some evidence" standard is inadequate. Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.

Aside from unspecified "screening" processes and military interrogations in which the Government suggests Hamdi could have contested his classification, Hamdi has received no process. An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker.

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.

Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. *See* Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, ch. 1, § 1-6 (1997). In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

IV

Hamdi unquestionably has the right to access to counsel in connection with the proceedings on remand. No further consideration of this issue is necessary at this stage of the case.

* * *

The judgment of the United States Court of Appeals for the Fourth Circuit is vacated, and the case is remanded for further proceedings.

It is so ordered.

NOTES AND QUESTIONS

1. One hundred six days after this judgment on October 11, 2004, Yaser Esam Hamdi was released to his family in Saudi Arabia, where he renounced his U.S. citizenship pursuant to an agreement with the Justice Department. According to a Defense Department press release, "considerations of United States national security did not require his continued detention" but "operational and security considerations" prevented further elaboration. Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST, Oct. 12, 2004. A Department of Justice press release was only slightly more expansive:

> The United States and enemy combatant Yaser Esam Hamdi and his counsel have signed an agreement that allows Hamdi to be released from United States custody and transferred to the Kingdom of Saudi Arabia, where he is a citizen. The agreement requires Hamdi, once he arrives in Saudi Arabia, to renounce any claim he has to U.S. citizenship and to abide by strict travel restrictions.
>
> Mr. Hamdi was taken into the custody of U.S. armed forces after he surrendered as part of a Taliban military unit. Like many other enemy combatants captured and detained by U.S. armed forces in Afghanistan who have been subsequently released, the United States has determined that Mr. Hamdi could be transferred out of United States custody subject to strict conditions that ensure the interests of the United States and our national security. As we have repeatedly

> stated, the United States has no interest in detaining enemy combatants beyond the point that they pose a threat to the U.S. and our allies.[3]

Why didn't the government proceed with the process the *Hamdi* Court deemed necessary for his continued detention?

2. How broadly or narrowly applicable to other cases is the plurality opinion? What is the range of factual circumstances that it covers?
3. What legal authorities does the United States identify as sources of its power to detain Hamdi? What are the implications of accepting one source instead of another?
4. Does this opinion include an argument about the separation of powers? What is its role?
5. The powers and authorities that U.S. officials wield must ultimately be traced to their source in the U.S. Constitution. The constitutional rights possessed by a U.S. citizen constrain how such powers may be used. When such officials act outside the United States, the constitutional source of their power does not change. Do the constitutional rights of citizens also remain the same when asserted abroad? To ask the question in shorthand, does (should) the Constitution "follow the flag"? Is this the wrong case to answer this question, since Hamdi's case was decided after he was brought to the United States?

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Justice SOUTER, with whom Justice GINSBURG joins, concurring in part, dissenting in part, and concurring in the judgment.

[In] this Court [Hamdi] presses the distinct argument that the Government's claim [that he is an "enemy combatant"], even if true, would not implicate any authority for holding him that would satisfy 18 U.S.C. § 4001(a) (Non-Detention Act), which bars imprisonment or detention of a citizen "except pursuant to an Act of Congress."

The threshold issue is how broadly or narrowly to read the Non-Detention Act, the tone of which is severe: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Should the severity of the Act be relieved when the Government's stated factual justification for incommunicado detention is a war on terrorism, so that the Government may be said to act "pursuant" to congressional terms that fall short of explicit authority to imprison individuals? With one possible though important qualification, the answer has to be no.

[The] circumstances in which the Act was adopted point the way to this interpretation. The provision superseded a cold-war statute, the Emergency

3. *Statement of Mark Corallo, Director of Public Affairs, Department of Justice, Regarding Yaser Hamdi*, Sept. 22, 2004.

Detention Act of 1950, which had authorized the Attorney General, in time of emergency, to detain anyone reasonably thought likely to engage in espionage or sabotage. That statute was repealed in 1971 out of fear that it could authorize a repetition of the World War II internment of citizens of Japanese ancestry; Congress meant to preclude another episode like the one described in *Korematsu v. United States* (1944). While Congress might simply have struck the 1950 statute, in considering the repealer the point was made that the existing statute provided some express procedural protection, without which the Executive would seem to be subject to no statutory limits protecting individual liberty. See 117 Cong. Rec. 31544 (1971) (Emergency Detention Act "remains as the only existing barrier against the future exercise of executive power which resulted in" the Japanese internment). It was in these circumstances that a proposed limit on Executive action was expanded to the inclusive scope of § 4001(a) as enacted.

The fact that Congress intended to guard against a repetition of the World War II internments when it repealed the 1950 statute and gave us § 4001(a) provides a powerful reason to think that § 4001(a) was meant to require clear congressional authorization before any citizen can be placed in a cell. It is not merely that the legislative history shows that § 4001(a) was thought necessary in anticipation of times just like the present, in which the safety of the country is threatened. To appreciate what is most significant, one must only recall that the internments of the 1940s were accomplished by Executive action. Although an Act of Congress ratified and confirmed an Executive order authorizing the military to exclude individuals from defined areas and to accommodate those it might remove, the statute said nothing whatever about the detention of those who might be removed; internment camps were creatures of the Executive, and confinement in them rested on assertion of Executive authority. When, therefore, Congress repealed the 1950 Act and adopted § 4001(a) for the purpose of avoiding another *Korematsu*, it intended to preclude reliance on vague congressional authority (for example, providing "accommodations" for those subject to removal) as authority for detention or imprisonment at the discretion of the Executive (maintaining detention camps of American citizens, for example). In requiring that any Executive detention be "pursuant to an Act of Congress," then, Congress necessarily meant to require a congressional enactment that clearly authorized detention or imprisonment.

[T]here is one argument for treating the Force Resolution as sufficiently clear to authorize detention of a citizen consistently with § 4001(a). Assuming the argument to be sound, however, the Government is in no position to claim its advantage.

Because the Force Resolution authorizes the use of military force in acts of war by the United States, the argument goes, it is reasonably clear that the military and its Commander in Chief are authorized to deal with enemy belligerents according to the treaties and customs known collectively as the laws of war. Accordingly, the United States may detain captured enemies, and *Ex parte Quirin* (1942) may perhaps be claimed for the proposition that the American

citizenship of such a captive does not as such limit the Government's power to deal with him under the usages of war. Thus, the Government here repeatedly argues that Hamdi's detention amounts to nothing more than customary detention of a captive taken on the field of battle: if the usages of war are fairly authorized by the Force Resolution, Hamdi's detention is authorized for purposes of § 4001(a).

There is no need, however, to address the merits of such an argument in all possible circumstances. For now it is enough to recognize that the Government's stated legal position in its campaign against the Taliban (among whom Hamdi was allegedly captured) is apparently at odds with its claim here to be acting in accordance with customary law of war and hence to be within the terms of the Force Resolution in its detention of Hamdi. In a statement of its legal position cited in its brief, the Government says that "the Geneva Convention applies to the Taliban detainees." Hamdi presumably is such a detainee, since according to the Government's own account, he was taken bearing arms on the Taliban side of a field of battle in Afghanistan. He would therefore seem to qualify for treatment as a prisoner of war under the Third Geneva Convention, to which the United States is a party.

By holding him incommunicado, however, the Government obviously has not been treating him as a prisoner of war, and in fact the Government claims that no Taliban detainee is entitled to prisoner of war status. This treatment appears to be a violation of the Geneva Convention provision that even in cases of doubt, captives are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." Art. 5. The Government answers that the President's determination that Taliban detainees do not qualify as prisoners of war is conclusive as to Hamdi's status and removes any doubt that would trigger application of the Convention's tribunal requirement. But reliance on this categorical pronouncement to settle doubt is apparently at odds with the military regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, ch. 1, §§ 1-5, 1-6 (1997), adopted to implement the Geneva Convention, and setting out a detailed procedure for a military tribunal to determine an individual's status. One of the types of doubt these tribunals are meant to settle is whether a given individual may be, as Hamdi says he is, an "[i]nnocent civilian who should be immediately returned to his home or released." Thus, there is reason to question whether the United States is acting in accordance with the laws of war it claims as authority.

Whether, or to what degree, the Government is in fact violating the Geneva Convention and is thus acting outside the customary usages of war are not matters I can resolve at this point. What I can say, though, is that the Government has not made out its claim that in detaining Hamdi in the manner described, it is acting in accord with the laws of war authorized to be applied against citizens by the Force Resolution. I conclude accordingly that the Government has failed to support the position that the Force Resolution authorizes the described detention of Hamdi for purposes of § 4001(a).

It is worth adding a further reason for requiring the Government to bear the burden of clearly justifying its claim to be exercising recognized war powers before declaring § 4001(a) satisfied. Thirty-eight days after adopting the Force Resolution, Congress passed the USA PATRIOT ACT; that Act authorized the detention of alien terrorists for no more than seven days in the absence of criminal charges or deportation proceedings. It is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado.

Because I find Hamdi's detention forbidden by § 4001(a) and unauthorized by the Force Resolution, I would not reach any questions of what process he may be due in litigating disputed issues in a proceeding under the habeas statute or prior to the habeas enquiry itself. I would therefore vacate the judgment of the Court of Appeals and remand for proceedings consistent with this view.

Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of eight Members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose. Although I think litigation of Hamdi's status as an enemy combatant is unnecessary, the terms of the plurality's remand will allow Hamdi to offer evidence that he is not an enemy combatant, and he should at the least have the benefit of that opportunity.

It should go without saying that in joining with the plurality to produce a judgment, I do not adopt the plurality's resolution of constitutional issues that I would not reach. It is not that I could disagree with the plurality's determinations (given the plurality's view of the Force Resolution) that someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decisionmaker; nor, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel. On the other hand, I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas.

NOTES AND QUESTIONS

1. Justice Souter seems to perceive the case as best resolved through statutory interpretation, not constitutional interpretation. Why? If Congress had rescinded the Non-Detention Act before adopting the AUMF, would Justice Souter have joined Justice O'Connor's opinion?
2. Justice Souter writes that the legislative history of the Non-Detention Act recognized its need in "times just like the present, in which the safety of the country is threatened." Is military detention of citizens found abroad and alleged to be "enemy combatants" comparable to the detention of citizens under suspicion

because of their racial ancestry? Does Justice Souter's argument depend on the strength of that comparison or is he making a different point?

3. Justice Souter's opinion makes frequent reference to Hamdi's "incommunicado" detention. Would Justice Souter have reached a different conclusion if Hamdi had been given access to his lawyer but nothing else?

Article 4 of the Third Geneva Convention establishes the qualification for prisoner of war status. In order to fall under the scope of Article 4, an individual must be captured in the context of an international (inter-state) armed conflict. Specifically, Article 4 provides, in part:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
>
> . . .

It is common that a detainee's status as a prisoner of war will be obvious, for example, when the detainee is captured in the enemy's uniform with military identification. However, in some situations, it is not clear whether a detainee falls within the scope of Article 4. In response to such uncertainty, Article 5 of the Convention provides:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Article 5 does not indicate the requisite composition or structure of a status determination tribunal. For the U.S. military, Army Regulation 190-8 provides this

flesh to the Article 5 bones. According to this joint service regulation, an Article 5 tribunal shall consist of three commissioned officers, ideally one military police officer, one military intelligence officer, and one judge advocate (a military lawyer). The hearing is non-adversarial, and there is no right to counsel or representation. The sole function of the tribunal is to determine whether a detainee qualifies as a prisoner of war pursuant to Article 4.

United States armed forces began capturing and detaining Taliban and al Qaeda fighters in October of 2001, after the initiation of ground combat operations in Afghanistan. Initially, the conflict was treated as non-international because Afghanistan was considered a failed state. In response to Secretary of State Colin Powell's strong recommendation to reconsider this position, President Bush reversed course. (Excerpts from some of these memos are reproduced in Chapter 2.)

In a memorandum dated February 7, 2002, titled "Humane Treatment of Taliban and al Qaeda Detainees," President Bush concluded that the armed conflict with the Taliban was international in character, thereby bringing the Third Geneva Convention into force. However, in the same memorandum, he also concluded that neither Taliban nor al Qaeda detainees qualified as prisoners of war. Taliban detainees, although captured during an international armed conflict, failed to satisfy the four criteria implicitly applicable to members of regular armed forces. President Bush therefore concluded that there was "no doubt" as to their non–prisoner of war status. As for al Qaeda detainees, the President determined that they were captured during the course of a distinct non-international armed conflict with the United States, and therefore were not even entitled to consideration of whether they qualified as prisoners of war.

Thus, all captives would be detained pursuant to the law of war because of their status as members of enemy belligerent groups engaged in hostilities against the United States, but none would be designated as prisoners of war nor provided a status review tribunal pursuant to Article 5 and Army Regulation 190-8.

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Justice SCALIA, with whom Justice STEVENS joins, dissenting.

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. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the judgment below.

I

When a citizen was deprived of liberty because of alleged criminal conduct, those procedures [deemed necessary as "due process of law"] typically required committal by a magistrate followed by indictment and trial. To be sure, certain types of permissible *non*-criminal detention — that is, those not dependent upon the contention that the citizen had committed a criminal act — did not require the protections of criminal procedure. However, these fell into a limited number of well-recognized exceptions — civil commitment of the mentally ill, for example, and temporary detention in quarantine of the infectious. It is unthinkable that the Executive could render otherwise criminal grounds for detention non-criminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.

These due process rights have historically been vindicated by the writ of habeas corpus.

II

The relevant question, then, is whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoing *by aiding the enemy in wartime.*

Justice O'Connor, writing for a plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and then released. That is probably an accurate description of wartime practice with respect to enemy *aliens.* The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process.

[C]itizens have been charged and tried in Article III courts for acts of war against the United States, even when their noncitizen co-conspirators were not. For example, two American citizens alleged to have participated during World War I in a spying conspiracy on behalf of Germany were tried in federal court. A German member of the same conspiracy was subjected to military process. During World War II, the famous German saboteurs of *Ex parte Quirin* (1942), received military process, but the citizens who associated with them (with the exception of one citizen-saboteur, discussed below) were punished under the criminal process.

The modern treason statute basically tracks the language of the constitutional provision. Other provisions of Title 18 criminalize various acts of warmaking and adherence to the enemy. See, *e.g.*, § 32 (destruction of aircraft or aircraft facilities), § 2332a (use of weapons of mass destruction), § 2332b (acts of terrorism transcending national boundaries), § 2339A (providing material support to terrorists), § 2339B (providing material support to certain terrorist organizations), § 2382 (misprision of treason), § 2383 (rebellion or insurrection), § 2384 (seditious conspiracy), § 2390 (enlistment to serve in armed

hostility against the United States). The only citizen other than Hamdi known to be imprisoned in connection with military hostilities in Afghanistan against the United States *was* subjected to criminal process and convicted upon a guilty plea. See *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (denying motions for dismissal).

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. Our Federal Constitution contains a provision explicitly permitting suspension, but limiting the situations in which it may be invoked. Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I.

III

Of course the extensive historical evidence of criminal convictions and habeas suspensions does not *necessarily* refute the Government's position in this case. When the writ is suspended, the Government is entirely free from judicial oversight. It does not claim such total liberation here, but argues that it need only produce what it calls "some evidence" to satisfy a habeas court that a detained individual is an enemy combatant. Even if suspension of the writ on the one hand, and committal for criminal charges on the other hand, have been the only *traditional* means of dealing with citizens who levied war against their own country, it is theoretically possible that the Constitution does not *require* a choice between these alternatives.

I believe, however, that substantial evidence does refute that possibility. [Justice Scalia here discusses legal writings from 1679 through 1812.]

Further evidence comes from this Court's decision in *Ex parte Milligan.* There, the Court issued the writ to an American citizen who had been tried by military commission for offenses that included conspiring to overthrow the Government, seize munitions, and liberate prisoners of war. The Court rejected in no uncertain terms the Government's assertion that military jurisdiction was proper "under the 'laws and usages of war' ":

> "It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."

Milligan is not exactly this case, of course, since the petitioner was threatened with death, not merely imprisonment. But the reasoning and conclusion of *Milligan* logically cover the present case. The Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the war, it would have no such authority. 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.

Milligan responded to the argument, repeated by the Government in this case, that it is dangerous to leave suspected traitors at large in time of war:

> "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."

Thus, criminal process was viewed as the primary means — and the only means absent congressional action suspending the writ — not only to punish traitors, but to incapacitate them.

The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal.

IV

The Government argues that our more recent jurisprudence ratifies its indefinite imprisonment of a citizen within the territorial jurisdiction of federal courts. It places primary reliance upon *Ex parte Quirin*, a World War II case upholding the trial by military commission of eight German saboteurs, one of whom, Herbert Haupt, was a U.S. citizen. The case was not this Court's finest hour. The Court upheld the commission and denied relief in a brief *per curiam* issued the day after oral argument concluded; a week later the Government carried out the commission's death sentence upon six saboteurs, including Haupt. The Court eventually explained its reasoning in a written opinion issued several months later.

Only three paragraphs of the Court's lengthy opinion dealt with the particular circumstances of Haupt's case. The Government argued that Haupt, like the other petitioners, could be tried by military commission under the laws of war. In agreeing with that contention, *Quirin* purported to interpret the language of *Milligan* quoted above (the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed") in the following manner:

> "Elsewhere in its opinion . . . the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war. . . ."

In my view this seeks to revise *Milligan* rather than describe it. *Milligan* had involved (among other issues) two separate questions: (1) whether the military trial of Milligan was justified by the laws of war, and if not (2) whether the President's suspension of the writ, pursuant to congressional authorization, prevented the issuance of habeas corpus. The Court's categorical language about the law of war's inapplicability to citizens where the courts are open (with no exception mentioned for citizens who were prisoners of war) was contained in its discussion of the first point. The factors pertaining to whether Milligan could reasonably be considered a belligerent and prisoner of war, while mentioned earlier in the opinion, were made relevant and brought to bear in the Court's later discussion, of whether Milligan came within the statutory provision that effectively made an exception to Congress's authorized suspension of the writ for (as the Court described it) "all parties, not prisoners of war, resident in their respective jurisdictions, . . . who were citizens of states in which the administration of the laws in the Federal tribunals was unimpaired." *Milligan* thus understood was in accord with the traditional law of habeas corpus I have described: Though treason often occurred in wartime, there was, absent provision for special treatment in a congressional suspension of the writ, no exception to the right to trial by jury for citizens who could be called "belligerents" or "prisoners of war."

But even if *Quirin* gave a correct description of *Milligan*, or made an irrevocable revision of it, *Quirin* would still not justify denial of the writ here. In *Quirin* it was uncontested that the petitioners were members of enemy forces. They were "*admitted* enemy invaders," (emphasis added), and it was "undisputed" that they had landed in the United States in service of German forces. The specific holding of the Court was only that, "upon the *conceded* facts," the petitioners were "plainly within [the] boundaries" of military jurisdiction (emphasis added).[3] But where those jurisdictional facts are *not* conceded where the petitioner insists that he is *not* a belligerent — *Quirin* left the pre-existing law in place: Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release.

V

It follows from what I have said that Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus. A suspension of the writ could, of course, lay down conditions for continued detention, similar to those

3. The plurality complains that . . . I have identified [only one case] in which "a United States citizen [was] captured in a *foreign* combat zone." Indeed it is; such cases must surely be rare. But given the constitutional tradition I have described, the burden is not upon me to find cases in which the writ was *granted* to citizens in this country *who had been captured on foreign battlefields*; it is upon those who would carve out an exception for such citizens (as the plurality's complaint suggests it would) to find a single case (other than one where enemy status was admitted) in which habeas was *denied.*

that today's opinion prescribes under the Due Process Clause. But there is a world of difference between the people's representatives' determining the need for that suspension (and prescribing the conditions for it), and this Court's doing so.

The plurality finds justification for Hamdi's imprisonment in the Authorization for Use of Military Force. This is not remotely a congressional suspension of the writ, and no one claims that it is. I do not think this statute even authorizes detention of a citizen with the clarity necessary. But even if it did, I would not permit it to overcome Hamdi's entitlement to habeas corpus relief. The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing. If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.

Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections *it* thinks appropriate. It claims authority to engage in this sort of "judicious balancing" from *Mathews v. Eldridge* (1976), a case involving . . . *the withdrawal of disability benefits!* Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.

There is a certain harmony of approach in the plurality's making up for Congress's failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures — an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free. The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.

VI

Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who

are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group; currently we know of only two, Hamdi and Jose Padilla. Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different. Moreover, even within the United States, the accused citizen-enemy combatant may lawfully be detained once prosecution is in progress or in contemplation. See, *e.g., United States v. Salerno* (1987). The Government has been notably successful in securing conviction, and hence long-term custody or execution, of those who have waged war against the state.

I frankly do not know whether these tools are sufficient to meet the Government's security needs, including the need to obtain intelligence through interrogation. It is far beyond my competence, or the Court's competence, to determine that. But it is not beyond Congress's. If the situation demands it, the Executive can ask Congress to authorize suspension of the writ—which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an "invasion," and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court. If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.

* * *

Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.

NOTES AND QUESTIONS

1. As Justice Scalia observes, *Mathews v. Eldridge* was a case concerning the constitutionality of procedures used to terminate the respondent's social security disability benefits. It is a key case in the analysis of procedural due process issues. Can it be transposed to a case concerning military detention in the context of an armed conflict? If the issue is what process is due, should it matter if what is at stake is the property or the liberty of the individual?
2. Does Justice Scalia's opinion include an argument about the separation of powers? How does it differ from any separation of powers concerns raised in Justice O'Connor's plurality opinion?
3. Justice Scalia writes: "Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different." Why? Compare your answer to the answer you gave to question 5 under Justice O'Connor's plurality opinion.
4. How does the identification of different "key" facts trigger different legal conclusions? What *are* the "key" facts in *Hamdi* for purposes of applying *Ex parte Milligan* and/or *Ex parte Quirin*?

5. Now that you have read both Justice O'Connor's and Justice Scalia's views of *Milligan* and *Quirin*, consider each case more closely. As you do so, try to identify the points on which these two Justices disagree. How would you characterize their disagreements? What are their starting assumptions? What are the assumptions from which *you* start in concluding which one is more persuasive?

Ex parte Milligan

Ex parte Milligan, 71 U.S. 2 (1866), is from the Civil War era. Lambdin P. Milligan, in Justice Davis's description, "is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States." (He also happened to be a lawyer.) Chief Justice Chase, concurring in the opinion of the Court, implied but did not say that Milligan was part of a "powerful secret association" known generally as "Copperheads" and organized as the "Order of the Sons of Liberty." This group, "composed of citizens and others, existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government." What no one could claim, however, was that Milligan or his fellow citizens were members of the Confederate Army or its spies or affiliates.

What to do with such types? The commander of the military district of Indiana (an administrative district, not in any way a martial government) ordered Milligan's arrest. Milligan was rousted from his home, found guilty of "certain charges and specifications" before a military commission convened at Indianapolis, and sentenced to be hanged.

But the courts in Indiana were open at the time and, indeed, a grand jury empaneled in Indianapolis had adjourned without handing down any indictment against Milligan. This was an important legal fact. In 1863, Congress had passed "An Act Relating to Habeas Corpus." The law authorized presidential suspension of the writ of habeas corpus "whenever, in his judgment, the public safety may require it." But the law also required that if the military held persons "otherwise than as prisoners of war" who were "citizens of states" where the courts were open and operating, such persons must be identified to the federal court in that jurisdiction. If a grand jury then adjourned without indicting such a person, the court could order his discharge from military confinement. The statute made no mention of any military authority to do more than detain such persons. Other statutes and practices were at best unclear whether someone like Milligan (e.g., not a "prisoner of war" or a spy or a deserter) fit the category of "triable by" military authority as then understood under the customary laws of war.[4]

4. What these were, exactly, was also not certain. Indeed, it fell to a law professor named Francis Lieber to codify such rules for the first time in 1863 in what became known as the "Lieber Code," or more formally, General Orders No. 100, Instructions for the Government of Armies of the United States in the Field.

Milligan argued that the military commission lacked jurisdiction to try him. The government, on the other hand, argued for the sweeping authority of martial law: "[I]n 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, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States."

The Court rejected this argument as going too far: "[T]his is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown." Indiana had been threatened by enemy invasion. But that was all: "On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law." Further, the Court found it "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. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law."

Therefore, the Court issued its famous holding:

> It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. 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, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered.
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> But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

Ex parte Quirin

Ex parte Quirin is from World War II. How it came to be decided shows our system of laws in both its best and worst light. On the one hand, the resolution of the case by the Supreme Court seems like rushed justice. The Court issued a brief per curiam judgment with no opinion to explain its reasons two days after it heard the case. *Ex parte Quirin*, 63 S. Ct. 1 (1942). What the Court termed its "extended opinion" was filed three months later, on October 29, long after most of the defendants had already been executed. *Ex parte Quirin*, 63 S. Ct. 2 (1942). On the other hand, the case only reached the Supreme Court in the first place because the appointed defense counsel, Col. Kenneth C. Royall, defied President Roosevelt's wishes in order to seek judicial review outside the military system hastily set up to convict them.

The case came about because of some rather hapless Nazi saboteurs. After undergoing training in sabotage, four were transported by German submarine across the Atlantic and landed on a Long Island beach in mid-June 1942; four others landed on a beach in Florida.[5] All were almost immediately discovered thanks in large part to the decision of one of their number to turn himself in.[6] On July 2, President Roosevelt ordered the appointment of a military commission to try the men for war crimes, prescribing on the same day the regulations for trial and appeal and denying access to any civil court.

Appointed military counsel for the defendants argued that the commission proceedings deprived the petitioners of their Fifth and Sixth Amendment rights and that the President's order was in conflict with rules established by Congress in its Articles of War. The Court dispensed with both arguments rather quickly. The President had authority "incident to the conduct of war . . . not only to repel and defeat the enemy, but to seize and subject to disciplinary measures" enemy combatants who have violated the law of war. Congress added to that authority its own authorization to use military commissions to do so. In its first substantive nod to *Ex parte Milligan*, the Court acknowledged the possible existence of acts

5. Hapless though they clearly were, the threat they represented is easy to understand. According to Attorney General Biddle, "[e]ach group possessed a substantial supply of TNT and other high explosives and fuses, timing devices and detonators, which, in the hold of a boat or in a locker of the waiting room of a railroad station, set off at a crowded moment would have caused unimaginable damage and loss of life. . . . They carried the layouts of three plants of the Aluminum Company of America, of the Niagara Falls hydroelectric plant, of the New York water supply system, and of a number of key industries." Francis Biddle, In Brief Authority 325 (1962). Recounting the threat, Biddle invoked the "Black Tom" explosion described in Chapter 2 of this casebook. *Id.* at 326-27.

6. An excellent summary treatment of the strange facts of this case is found in Louis Fisher, Military Tribunals and Presidential Power 91-129 (2005). According to his account, the government sought to avoid a criminal trial in part to preserve the public's false impression "that uncanny FBI organizational skills had quickly exposed the plot," not, as was actually the case, the cold-feet confession of one of the would-be saboteurs. But what might seem a decision motivated by an attempt to avoid government embarrassment could still have national security implications: "The government did not want to broadcast how easily German U-boats had reached American shores undetected." *Id.* at 95. Attorney General Biddle, it seems, also worried about the probability of conviction on criminal charges carrying adequately severe penalties available in the civil courts. *Id.*

"not triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan*." *Id.* at 11. But, the Court concluded, such a circumstance was not present.

One of the petitioners, Herbert Haupt, claimed to be a U.S. citizen. (The government argued that he had lost this citizenship either because he "elected to maintain German allegiance and citizenship" or because "by his conduct [he] renounced or abandoned" it. *Id.* at 7.) The Court dismissed the issue in two stages. First, the Court noted:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency that is unlawful because in violation of the law of war. Citizens 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 Hague Convention and the law of war. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.[7]

Second, the Court distinguished Milligan:

> Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the Milligan case, that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." Elsewhere in its opinion, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as — in circumstances found not there to be present and not involved here — martial law might be constitutionally established.
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> The Court's opinion is inapplicable to the case presented by the present record. We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform — an offense against the law of war. 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.[8]

The Court denied the habeas petitions.

Between the Court's brief per curiam placeholder on July 31, and the "extended opinion" filed in late October, all eight petitioners were found guilty by the military

7. *Ex parte Quirin*, 63 S. Ct. 2, 15-16 (1942) (internal citations omitted).
8. *Id.* at 19-20 (internal citations omitted).

commission. Six petitioners, including Haupt, were executed by electric chair. Haupt's parents, who helped him hide for a brief period in Chicago before his capture, were convicted of treason and eventually stripped of their citizenship and deported. The father's protracted experience of the civilian criminal justice system — his first conviction and death sentence was reversed on appeal, see *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943), following which he was retried, convicted, and had his life sentence upheld in *United States v. Haupt*, 152 F.2d 771 (7th Cir. 1945), *aff'd Haupt v. United States*, 330 U.S. 631 (1947) — suggests the process that the son's secret military trial had avoided.

Hamdi v. Rumsfeld

542 U.S. 507 (2004)

Justice THOMAS, dissenting.

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners' habeas challenge should fail, and there is no reason to remand the case.

I

The Founders intended that the President have primary responsibility — along with the necessary power — to protect the national security and to conduct the Nation's foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains.

I acknowledge that the question whether Hamdi's executive detention is lawful is a question properly resolved by the Judicial Branch, though the question comes to the Court with the strongest presumptions in favor of the Government. The plurality agrees that Hamdi's detention is lawful if he is an enemy combatant. But the question whether Hamdi is actually an enemy combatant is of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. That is, although it is appropriate for the Court to determine the judicial question whether the President has the asserted authority, we lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches.

II

Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so [in the AUMF].