In case you did not pick up on this, the next case is *Hamdi v Rumsfeld,* an entirely different case from *Hamdan v Rumsfeld*.

HAMDI v. RUMSFELD

SUPREME COURT OF THE UNITED STATES
542 U.S. 507
June 28, 2004
[6 - 3]

OPINION: Justice O'Connor/Rehnquist/Kennedy/Breyer...At this difficult time in our Nation's history, **we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such.** The United States Court of Appeals...held that petitioner's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label. We now vacate and remand. **We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker**. 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** ("the 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 an American citizen in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child**. By 2001...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.**

Let me see if I understand the call of some for impeachment. The AUMF authorized President George W. Bush to "**use all necessary and appropriate force** against those nations, organizations, or persons **he determines** planned, authorized, committed, or aided the terrorist attacks...**in order to prevent any future acts of...terrorism against the United States...**"

There simply is no question that 518 votes out of 531 (with 12 of those taking "no position" and only 1 "no" vote) had to understand they were giving the President absolute (or near absolute) power. Go back and read the AUMF. Review the vote count. This Resolution had nothing to do with weapons of mass destruction or nuclear threats or Iraq. Many, many members of Congress were either utterly incompetent when they passed the AUMF or they are now utterly fickle for suggesting they didn't mean to give the President that much power. I don't know about you, but I have never lost a game played on Monday morning.

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed the present petition for a **writ of habeas corpus...**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." The petition contends that Hamdi's detention was not legally authorized. **It argues that, "as an American citizen,...Hamdi enjoys the**

full protections of the Constitution" and that Hamdi's detention in the United States without charges, access to an impartial tribunal, or assistance of counsel "violated and continues to violate the 5th and 14th Amendments to the United States Constitution." The habeas petition asks that the court, among other things, (1) appoint counsel for Hamdi; (2) order respondents to cease interrogating him; (3) declare that he is being held in violation of the 5th and 14th Amendments; (4) "to the extent Respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations"; and (5) order that Hamdi be released from his "unlawful custody."...Hamdi's father has asserted...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 "because of his lack of experience, he was trapped in Afghanistan once that military campaign began."

The District Court...appointed the federal public defender as counsel for the petitioners, and ordered that counsel be given access to Hamdi. The United States Court of Appeals...reversed that order, holding that the District Court had failed to extend appropriate deference to the Government's security and intelligence interests. It directed the District Court to consider "the most cautious procedures first" and to conduct a ***deferential inquiry*** into Hamdi's status. It opined that "**if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one.**"

That really should not be much of a surprise to this point, right? Folks captured on the battlefield in the enemy camp holding guns are called "**prisoners** of war."

...The Government filed a...motion to dismiss the petition [and] attached a declaration from one Michael Mobbs who identified himself as Special Advisor to the Under Secretary of Defense for Policy. Mobbs indicated that...[he is] familiar with the facts and circumstances related to the capture of...Hamdi and his detention by U.S. military forces...

[The Mobbs 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 "surrendered his Kalishnikov assault rifle" to them. The Mobbs Declaration also states that, because al Qaeda and the Taliban "were and are hostile forces engaged in armed conflict with the armed forces of the United States, individuals associated with" those groups "were and continue to be enemy combatants." Mobbs states that Hamdi was labeled an enemy combatant "based upon his interviews and in light of his association with the Taliban." According to the declaration, a series of "U. S. military screening teams" determined that Hamdi met "the criteria for enemy combatants" and "a subsequent interview of Hamdi has confirmed that he surrendered and gave his firearm to Northern Alliance forces, which supports his classification as an enemy combatant."...

The District Court found...[the Mobbs Declaration to be] "little more than the government's say-so" [and] ordered the Government to turn over numerous [documents] for ***in camera*** review,... indicating that all of these materials were necessary for "meaningful judicial review" of whether Hamdi's detention was legally authorized and whether Hamdi had received sufficient process to satisfy the Due Process Clause of the Constitution and relevant treaties or military regulations.

> *"In camera":* "in chambers"...a procedure whereby sensitive documents are reviewed in the privacy of the judge's chambers. Sensitive witnesses can also sometimes be interviewed *in camera*.

The Government sought to appeal the production order, and the District Court certified the question of whether the Mobbs Declaration, "standing alone, is sufficient as a matter of law to allow meaningful judicial review of Hamdi's classification as an enemy combatant." **The Fourth Circuit reversed...[and held] 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.** Concluding that the factual averments in the Mobbs Declaration, "**if accurate**," provided a sufficient basis upon which to conclude that the President had constitutionally detained Hamdi pursuant to the President's war powers, it ordered the habeas petition dismissed. **The Fourth Circuit emphasized that the "vital purposes" of the detention of uncharged enemy combatants--preventing those combatants from rejoining the enemy while relieving the military of the burden of litigating the circumstances of wartime captures halfway around the globe--were interests "directly derived from the war powers of Articles I and II."** In that court's view, because "Article III contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II," separation of powers principles prohibited a federal court from "delving further into Hamdi's status and capture." Accordingly, the District Court's more vigorous inquiry "went far beyond the acceptable scope of review."

> The Court is referring to the Constitution's Article I Legislative powers, Article II Executive powers and Article III Judicial powers. Since Article III is wholly lacking in any mention of "war powers" mentioned in Articles I and II, the Fourth Circuit Court of Appeals believed that judicial branch involvement in such matters was meant to be minimal.

On the more global question of whether legal authorization exists for the detention of citizen enemy combatants at all, the Fourth Circuit rejected Hamdi's arguments that *18 U.S.C. §4001(a)* and Article 5 of the Geneva Convention rendered any such detentions unlawful. The court expressed doubt as to Hamdi's argument that *§4001(a)*, which provides that "**no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress**," required express congressional authorization of detentions of this sort. But it held that, in any event, such authorization was found in the post-September 11 **Authorization for Use of Military Force**. Because "capturing and detaining enemy combatants is an inherent part of warfare,"

the court held, "the 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of **any and all hostile forces** arrayed against our troops."...The court likewise rejected Hamdi's Geneva Convention claim, concluding that the convention is not self-executing and that, even if it were, it would not preclude the Executive from detaining Hamdi **until the cessation of hostilities**.

We will be exploring the "not self-executing" language later.

Finally, the Fourth Circuit rejected Hamdi's contention that its legal analyses with regard to the authorization for the detention scheme and the process to which he was constitutionally entitled should be altered by the fact that he is an American citizen detained on American soil.

I'll bet the Fourth Circuit is headed to *Quirin* for support. Remember Mr. Haupt? He did not prevail on a habeas corpus claim. Although he asserted he was an American citizen which the government denied, the Supreme Court said his citizenship was irrelevant.

Relying on *Ex parte Quirin*,[1] the court emphasized that "one who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such." "The privilege of citizenship," the court held, "entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. **At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there**."

Whether you agree with this outcome or not, I don't see how anyone could possibly disagree with the fact that no President in our history would have handled Mr. Hamdi in any other fashion. He was captured on the field of battle amidst the enemy Taliban forces with a Russian gun in tow. He was a prisoner of war. That used to mean, citizen or not, that we could hold him "until hostilities cease." One does not normally turn POWs loose to shoot at us again. I, for one, would be prepared to take the risk that he was hoodwinked into carrying a gun amidst the Taliban forces or that he was an embedded reporter for an ally and, therefore, that he was improperly labeled as a "prisoner of war" over the risk that he is released to kill one of our soldiers. That is called war. It isn't pretty.

[1]Case 2-9 on this website.

Plus, what is this Court going to say? Do we have to fly eyewitnesses (soldiers on the ground in Afghanistan) over here to a courtroom while a war is going on for each and every "prisoner" captured on the battlefield who claims to be a citizen non-combatant? If so, that means a hearing for each and every POW. No one with any common sense ever heard of such a ridiculous concept. It goes without saying that each and every captured enemy combatant will then "claim" "citizenship in the good ole U.S.A." and each and every captured POW will "claim" they were not shooting at us, they were just out turkey hunting and happened to join up with our enemy at the wrong place at the wrong time. It would literally make the implementation of war a farce. Oh, well, let's continue.

...We granted certiorari...and now vacate the judgment below...

Whoops! President Bush, prior to this decision in 2004, your detention of Hamdi was appropriate. This case effectively overrules *Ex parte Quirin*. But, it appears your intentions were valid. Surely this result will not label you as "stomping all over the constitution." A 6-3 decision overruling prior solid case law that favored your position? Never! That would be just a bit off the charts.

...**The Government maintains that no explicit congressional authorization is required [to detain "citizen enemy combatants"] 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.**

I guess we will find out, then, why they reversed the Fourth Circuit soon enough.

...[Hamdi] posits that his detention is forbidden by *18 U.S.C. §4001(a)* which states that "**no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Congress passed *§4001(a)* in 1971 as part of a bill to repeal the Emergency Detention Act of 1950** which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. **Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese internment camps of World War II**...

First, [the Government] 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).

The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 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 those 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, <u>for the duration of the particular conflict in which they were captured</u>, 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.**

The capture and detention of **lawful combatants** and the capture, detention, and trial of **unlawful combatants**, by "universal agreement and practice," are "important incidents of war." *Quirin*.

Is there a 3rd category: "the capture and detention of unlawful combatants"; in other words, must unlawful combatants be "tried" or can they just be detained until hostilities cease?

The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. "Captivity in war is neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war"...He is disarmed and from then on **must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released**."

<u>There is no bar to this Nation's holding one of its own citizens as an enemy combatant</u>. In *Quirin*, one of the detainees, **Haupt**, alleged that he was a naturalized United States citizen. We held that "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 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.**

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "**necessary and appropriate force**," Congress has

clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi objects, nevertheless, that Congress has not authorized the ***indefinite*** detention to which he is now subject.

> Are not all detentions in wartime "indefinite"?
> Can anyone picture a prisoner of war (American, German, Japanese, etc.)
> actually suggesting to his captors that:
> "Hey, you have to let me go – this war is just lasting too long?"

The Government responds that "the detention of enemy combatants during World War II was just as 'indefinite' while that war was being fought." We take Hamdi's objection to be not to the lack of certainty regarding the date on which the conflict will end, but to the **substantial prospect of perpetual detention**. We recognize that the national security underpinnings of the "war on terror," although crucially important, are broad and malleable. As the Government concedes, "given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement." The prospect Hamdi raises is therefore not far-fetched. 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**.

> So what? We do not yet know whether the Court is going to be sympathetic to the "possibility of detainment for life" of enemy combatants. But, it is noted that the United States did not make this war "unconventional." Folks like those who proclaim jihad, are caught shooting at our young men and women, who support cowardly acts of suicide bombing, who do not wear uniforms and are not even a recognized nation made it "unconventional." If they choose to take sides in such an unconventional war and are caught, why should we be sympathetic to such a possibility? They are called "terrorists" because they deal in "terror." Where does it say in the Constitution that because our enemies of "this particular war" may intend to fight for eternity that we, therefore, must return them to the battlefield to have a second chance to kill us? And, how many times must we capture and release? All can agree that the writer of this opinion might change the outcome, were it not for a certain kind of sympathy for the enemy. How else do you read it? I do not apologize for having no sympathy for this enemy and I cannot imagine any past Supreme Court that we have seen in the cases sympathizing with an "indefinite" imprisonment. And I certainly would not want my Commander in Chief to engage in war with such an attitude. No past President has done so.

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 (Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities...unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences)...

Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.

Confused? Is the Court saying that interrogation of a detained **enemy combatant** cannot continue indefinitely? If so, what is the reason? Where is the authority for that proposition? I don't know. They do not say.

Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. 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.

I now know what I fear about this type of language. I can show you any number of past cases stating that "war decisions" are "political decisions" that courts will not get involved with. I shall resist the attempt of the Supreme Court to define for Congress or the Commander in Chief just exactly when "hostilities do, in fact, cease." I do not believe that is the function of the Court. If that is where they are headed, I believe that to be an abuse of power. Such questions should be left to those that started the war; i.e., to Congress.

Ex parte Milligan[2] 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.**

Yes — that is the way I read *Milligan*.

[2]Case 2-7 on this website.

Here the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant. The legal category of enemy combatant has not been elaborated upon in great detail...

Moreover, as Justice Scalia acknowledges, the Court in *Ex parte Quirin* dismissed the language of *Milligan* that the petitioners had suggested prevented them from being subject to military process. Clear in this rejection was a disavowal of the New York State cases cited in *Milligan* on which Justice Scalia relies. Both *Smith v. Shaw* and *M'Connell v. Hampton* were civil suits for false imprisonment. Even accepting that these cases once could have been viewed as standing for the sweeping proposition for which Justice Scalia cites them--that the military does not have authority to try an American citizen accused of spying against his country during wartime--*Quirin* makes undeniably clear that this is not the law today. Haupt, like the citizens in *Smith* and *M'Connell*, was accused of being a spy. **The Court in *Quirin* found him "subject to trial and punishment by a military tribunal" for those acts, and held that his citizenship did not change this result**.

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.

We shall see whether these same authors are reluctant to "brush aside precedent" when we come to the *Rasul* and *Hamdan* cases.

To the extent that Justice Scalia accepts the precedential value of *Quirin*, he argues that it cannot guide our inquiry here because "in *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. To be clear, **our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant; whether that is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point**.

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-POW (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's treatment of that case...suffers from the same defect as does his treatment of *Quirin:* Because Justice Scalia finds the fact of battlefield capture irrelevant, his distinction based on the fact that the petitioner "conceded" enemy combatant status is beside the point. 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.

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 5th and 14th Amendments. The Government counters that any more process than was provided below would be both unworkable and "constitutionally intolerable." Our resolution of this dispute requires a careful examination both of the writ of habeas corpus, which Hamdi now seeks to employ as a mechanism of judicial review, and of the Due Process Clause...

All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States. *U.S. Const., Art. I, §9, cl. 2* ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.") Only in the rarest of circumstances has Congress seen fit to suspend the writ. At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law. All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention...Further, all agree that *28 U.S.C. §2241* and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, *§2243* provides that "the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts" and ***§2246* allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.**

The simple outline of *§2241* makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process. The Government recognizes the basic procedural protections required by the habeas statute, but asks us to hold that...the presentation of the Mobbs Declaration...[was sufficient and suggests two reasons for] its position that

no further process is due.

First, the Government urges...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...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." Further, the "facts" that constitute the alleged concession are insufficient to support Hamdi's detention. Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be "**part of or supporting forces hostile to the United States or coalition partners**" and "**engaged in an armed conflict against the United States**" to justify his detention in the United States for the duration of the relevant conflict. The habeas petition states only that "when seized by the United States Government, Mr. Hamdi resided in Afghanistan." An assertion that one *resided* in a country in which combat operations are taking place is not a concession that one was "*captured* in a zone of active combat operations in a foreign theater of war" and certainly is not a concession that one was "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States." **Accordingly, we reject any argument that Hamdi has made concessions that eliminate any right to further process**.

...[Second, the Government argues that] "respect 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...**where the focus is exclusively on the factual basis supplied by the Executive to support its own determination" (citing *Superintendent, Mass. Correctional Institution at Walpole v. Hill* (explaining that the some evidence standard "does not require" a "weighing of the evidence," but rather calls for assessing "whether there is **any** evidence in the record that could support the conclusion.")) 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. He argues that the Fourth Circuit inappropriately "ceded power to the Executive during wartime to define the conduct for which a citizen may be detained, judge whether that citizen has engaged in the proscribed conduct, and imprison that citizen indefinitely" and that due process demands that he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counter evidence. The District Court, agreeing with Hamdi, apparently believed that the appropriate process would approach the process that accompanies a criminal trial. It therefore disapproved of the hearsay nature of the Mobbs Declaration and

anticipated quite extensive discovery of various military affairs. Anything less, it concluded, would not be "meaningful judicial review."

...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*. *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 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," *Jones v. United States,* and at this stage in the *Mathews* calculus, we consider the interest of the *erroneously* detained individual...The risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real...Moreover, as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat...**We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.**

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. As discussed above, the 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. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them. *Dep't of the Navy v. Egan* (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs"); *Youngstown Sheet & Tube Co. v. Sawyer*[3] (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war").

[3]Case 2-13 on this website.

Important issues, indeed!

The Government also argues...that its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process. In its view, **military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war**...

I wonder how far this Court and subsequent Courts will go. If it ever comes to a full blown trial for each and every POW, we won't have time to fight the war.

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat...But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is **American citizenship**. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that **we must preserve our commitment at home to the principles for which we fight abroad**...*United States v. Robel* ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties...which makes the defense of the Nation worthwhile").

We should all be reluctant to "sanction the subversion of liberty," but to imply that Presidents and past Supreme Courts have never done so in order to preserve a Constitution to defend is to mislead. As far as I can tell, every President sitting in time of war has done what they felt best "TO WIN." The issue of how far one goes "to win" is debatable. But, let's not lie to ourselves in the process. Apparently, the author of this statement didn't know anything about President Lincoln's decisions in the Civil War or numerous similar decisions of WWII.

With due recognition of these competing concerns, we 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. That is, "the risk of erroneous deprivation" of a detainee's liberty interest is unacceptably high under the Government's proposed rule, while some of the "additional or substitute procedural safeguards" suggested by the District Court are unwarranted in light of their limited "probable value" and the burdens they may impose on the military in such cases.

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.**

"Hearsay may need to be accepted" this Court says. Let us see if, in a matter of two short years, they maintain that position in *Hamdan*.

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...Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. **While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war**, and recognize that the scope of that discretion necessarily is wide, it 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...In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a **citizen's** core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator...

No weighty threat to military operations? What if **every** POW claims citizenship and non-combatant status? In WWII, apparently that would have meant over 6,000,000 lawsuits and jury trials. Our military would have been in court (as witnesses) more than on the battlefield. I ask the question because **our enemies will use these cases against us**. Personally, I wouldn't risk one of our own soldiers to protect the "rights" of someone captured holding a gun on a battlefield embedded with the enemy. Errors will always be made in war. I would err on the side of our own young men and women on the front line. So would the Supreme Courts of yesterday.

Because we conclude that due process demands some system for a citizen detainee to refute his classification, the proposed "some evidence" standard is inadequate... Plainly, the "process" Hamdi has received is not that to which he is entitled under the Due Process Clause.

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. 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...As we have discussed, a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return. We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. 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...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.

Are you confused? It appears the Court is saying that a mere affidavit supporting the Government is insufficient when the detainee is a U.S. citizen claiming non-combat status and that he must be given "some" opportunity to prove his case...even during hostilities. But, it seems the Court does not really define it much better than that.

DISSENT: Justice Scalia/Stevens...**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 decision below.

Justice Scalia provides historical perspective for the writ of habeas corpus.
And, his opinion is clearly limited to issues involving detention of a U.S. citizen.

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. Blackstone stated this principle clearly:

> "To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government..."

These words were well known to the Founders. Hamilton quoted from this very passage in The Federalist No. 84. The two ideas central to Blackstone's understanding--due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a **citizen** illegally imprisoned -- found expression in the Constitution's Due Process and Suspension Clauses. See *Amdt. 5*; Art. I, §9, cl. 2.

The gist of the Due Process Clause...was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. When a citizen was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed by indictment and trial...The Due Process Clause...affirms the right of trial according to the process and proceedings of the common law...

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...

[In England,] the struggle between subject and Crown...culminated in the Habeas Corpus Act of 1679, described by Blackstone as a "second *magna charta*, and stable bulwark of our liberties." The Act governed all persons "committed or detained...for any crime." In cases other than felony or treason plainly expressed in the warrant of commitment, the Act required release upon appropriate

sureties (unless the commitment was for a nonbailable offense). Where the commitment was for felony or high treason, the Act did not require immediate release, but instead required the Crown to commence criminal proceedings within a specified time. If the prisoner was not "indicted some Time in the next Term," the judge was "required...to set at Liberty the Prisoner upon Bail" unless the King was unable to produce his witnesses. Able or no, if the prisoner was not brought to trial by the *next* succeeding term, the Act provided that "he shall be discharged from his Imprisonment." English courts sat four terms per year, so the practical effect of this provision was that imprisonment without indictment or trial for felony or high treason...would not exceed approximately three to six months. The writ of habeas corpus was preserved in the Constitution...Art. I, §9, cl. 2. Hamilton lauded "the establishment of the writ of *habeas corpus*" in his Federalist defense as a means to protect against "the practice of arbitrary imprisonments..., one of the favourite and most formidable instruments of tyranny."...

The allegations here, of course, are no ordinary accusations of criminal activity. Hamdi has been imprisoned because the Government believes he participated in the waging of war against the United States. **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**...**Subjects accused of levying war against the King were routinely prosecuted for treason.** The Founders inherited the understanding that a citizen's levying war against the Government was to be punished criminally. The Constitution provides: "Treason against the United States, **shall consist only** in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort"; and establishes a heightened proof requirement (two witnesses) in order to "convict" of that offense. Art. III, §3, cl. 1.

In more recent times, too, citizens 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...During World War II, the famous German saboteurs of *Ex parte Quirin* 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. *Haupt v. United States*; *Cramer v. 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. *United States v. Lindh*.

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: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in **Cases of Rebellion or Invasion** the public Safety may require it." Art. I, §9, cl. 2. Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood...*Ex parte Bollman*.[4]

The Suspension Clause was by design a safety valve, the Constitution's only "express provision for exercise of extraordinary authority because of a crisis." *Youngstown Sheet & Tube Co. v. Sawyer*.[5] Very early in the Nation's history, President Jefferson unsuccessfully sought a suspension of habeas corpus to deal with Aaron Burr's conspiracy to overthrow the Government. During the Civil War, Congress passed its first Act authorizing Executive suspension of the writ of habeas corpus, to the relief of those many who thought President Lincoln's unauthorized proclamations of suspension unconstitutional. Later Presidential proclamations of suspension relied upon the congressional authorization. During Reconstruction, Congress passed the Ku Klux Klan Act, which included a provision authorizing suspension of the writ, invoked by President Grant in quelling a rebellion in nine South Carolina counties...

The text of the 1679 Habeas Corpus Act makes clear that indefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ...**Writings from the founding generation also suggest that, without exception, the only constitutional alternatives are to charge the crime or suspend the writ**...

Two...cases, later cited with approval by this Court in *Ex parte Milligan*, upheld verdicts for false imprisonment against military officers. In *Smith v. Shaw*, the court affirmed an award of damages for detention of a citizen on suspicion that he was, among other things, "an enemy's spy in time of war." The court held that "none of the offences charged against Shaw were cognizable by a court-martial, except that which related to his being a spy; and if he was an American citizen, he could not be charged with such an offence. He might be amenable to the civil authority for treason; but could not be punished, under martial law, as a spy." "If the defendant was justifiable in doing what he did, every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority." Finally, in *M'Connell v. Hampton*, a jury awarded $9,000 for false imprisonment after a military officer confined a citizen on charges of treason; the judges on appeal did not question the verdict but found the damages excessive, in part because "it does not appear that the defendant...knew the plaintiff was a citizen."

President Lincoln, when he purported to suspend habeas corpus without congressional authorization during the Civil War, apparently did not doubt that suspension was required if the prisoner was to be held without criminal trial. In his famous message to Congress on July 4, 1861, he argued only that he could suspend the writ, not that even without suspension, his imprisonment of citizens without criminal trial was permitted.

---

[4]Case 3-2 on this website.

[5]Case 2-13 on this website.

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.**

Does Scalia have it right? Isn't this the *Milligan* case all over again? Can anyone figure out why President Bush is reluctant to try this detainee for treason? What is required to prove treason? It would seem an easy case to prove, would it not? There is one difference from *Milligan* – Hamdi was an enemy combatant – Milligan was not. Hmmm!

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. In the Founders' view, the "blessings of liberty" were threatened by "those military

establishments which must gradually poison its very fountain." The Federalist No. 45. No fewer than 10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime. Many safeguards in the Constitution reflect these concerns. **Congress's authority "to raise and support Armies" was hedged with the proviso that "no Appropriation of Money to that Use shall be for a longer Term than two Years."** *Art. 1, §8, cl. 12*. Except for the actual command of military forces, all authorization for their maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II...A view of the Constitution that gives the Executive authority to use military force rather than the force of law against **citizens on American soil** flies in the face of the mistrust that engendered these provisions.

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, Hans Haupt, was a U.S. citizen. The case was not this Court's finest hour...

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" 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. 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.

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 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 which provides:

> "That the President is authorized to use all **necessary and appropriate force** against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, 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."

This is not remotely a congressional suspension of the writ, and no one claims that it is...The Suspension Clause of the Constitution...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 "weighs the private interest...against the Government's asserted interest" and--just as though writing a new Constitution--comes up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a "neutral" military officer rather than judge and jury. It claims authority to engage in this sort of "judicious balancing" from *Mathews v. Eldridge,* 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.**

Having distorted the Suspension Clause, the plurality finishes up by transmogrifying the Great Writ--disposing of the present habeas petition by remanding for the District Court to "engage in a factfinding process that is both prudent and incremental." "In the absence of the Executive's prior provision of procedures that satisfy due process,...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." This judicial remediation of executive default is unheard of...**It is not the habeas court's function to make illegal detention legal by supplying a process that the Government could have provided, but chose not to. If Hamdi is being imprisoned in violation of the Constitution (because without due process of law), then his habeas petition should be granted; the Executive may then hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or else must release him.**

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.

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. *Johnson v. Eisentrager*.[6] Moreover, even within the United States, the accused citizen-enemy combatant may lawfully be detained once prosecution is in progress or in contemplation...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.**

The Founders well understood the difficult tradeoff between safety and freedom. "Safety from external danger," Hamilton declared,

> "is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free." The Federalist No. 8.

The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it.

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis...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. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.

---

[6]Case 2-12 on this website.

Well, I guess I have to agree that U.S. citizens captured on the battlefield should either be tried for treason or released. The assumption, of course, is that conviction will likely follow. Here, apparently no one denied that Hamdi was a U.S. citizen. The problem arises where all POWs claim citizenship. When that happens, how much "process" is "due" to them?

DISSENT: Justice Thomas...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. The plurality reaches a contrary conclusion by failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs and by using the balancing scheme of *Mathews v. Eldridge*...The plurality utterly fails to account for the Government's compelling interests and for our own institutional inability to weigh competing concerns correctly...

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...

These structural advantages are most important in the national-security and foreign-affairs contexts. "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." The Federalist No. 74. Also for these reasons, John Marshall explained that "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." To this end, the Constitution vests in the President "the executive Power," Art. II, §1, provides that he "shall be Commander in Chief of the" armed forces, §2, and places in him the power to recognize foreign governments, *§3*.

This Court has long recognized these features and has accordingly held that the President has constitutional authority to protect the national security and that this authority carries with it broad discretion... First, with respect to certain decisions relating to national security and foreign affairs, the courts simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld. Second, even if the courts could compel the Executive to produce the necessary information, such decisions are simply not amenable to judicial determination because "they are delicate, complex, and involve large elements of prophecy." Third, the Court in *Chicago & Southern Air Lines* and elsewhere has correctly recognized the primacy of the political branches in the foreign-affairs and national-security contexts...

Finally, and again for the same reasons, **where "the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress, and in such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'"** *Younstown Sheet and Tube* (Justice Jackson, concurring opinion.) That is why the Court has explained, in a case analogous to this one, that "the detention, ordered by the President in the declared exercise of his powers as Commander in Chief

of the Army in time of war and of grave public danger, is not to be set aside by the courts without the clear conviction that it is in conflict with the Constitution or laws of Congress constitutionally enacted." *Ex parte Quirin...*

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."...

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. The Authorization for Use of Military Force (AUMF) authorizes 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" of September 11, 2001...

I...cannot agree with Justice Scalia's conclusion that the Government must choose between using standard criminal processes and suspending the writ. Justice Scalia relies heavily upon *Ex parte Milligan* and three cases decided by New York state courts in the wake of the War of 1812. I admit that *Milligan* supports his position. **But because the Executive Branch there, unlike here, did not follow a specific statutory mechanism provided by Congress, the Court did not need to reach the broader question of Congress' power, and its discussion on this point was arguably dicta, as four Justices believed...**

Accordingly, I conclude that the Government's detention of Hamdi as an enemy combatant does not violate the Constitution. By detaining Hamdi, the President, in the prosecution of a war and authorized by Congress, has acted well within his authority...

Undeniably, Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause. Against this, however, is the Government's overriding interest in protecting the Nation...

CONCURRENCE: Justice Souter/Ginsburg...**The plurality...accepts the Government's position that if Hamdi's designation as an enemy combatant is correct, his detention (at least as to some period) is authorized by an Act of Congress as required by *§4001(a)*, that is, by the Authorization for Use of Military Force. Here, I disagree and respectfully dissent. The Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even on the facts the Government claims. If the Government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released...**

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...

First, the circumstances in which the Act was adopted point the way to this interpretation. **The provision superseded a cold-war statute, the Emergency 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*[7]...

Here is the sad state of affairs. Congress was or should have been aware of the Non-Detention Act when the AUMF was passed. Why on earth didn't they make it clear in the AUMF itself whether or not the AUMF authorized imprisonment or detention? Congress has so much to blame itself for in this fight, yet all they can seem to do is criticize the Executive Branch.

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.

Hard to believe that Justice Souter equates Japanese detention camps in California with a capture on the battlefield in Afghanistan. The statute may have been designed to prevent similar camps, but surely this situation was not contemplated.

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 1940's were accomplished by Executive action...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...**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. For me, it suffices that the Government has failed to justify holding him in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the

[7]Case 2-10 on this website.

laws of war, or a demonstration that *§4001(a)* is unconstitutional. I would therefore vacate the judgment of the Court of Appeals and remand for proceedings consistent with this view...

The laws of war seem to be changing right before our eyes. Stay tuned, you haven't seen anything yet.