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# Hamdi v. Rumsfeld: Judicious Balancing at the Intersection of the Executive's Power to Detain and the Citizen-Detainee's Right to Due Process

James B. Anderson

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# *HAMDI V. RUMSFELD*: JUDICIOUS BALANCING AT THE INTERSECTION OF THE EXECUTIVE'S POWER TO DETAIN AND THE CITIZEN-DETAINEE'S RIGHT TO DUE PROCESS

Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

## I. INTRODUCTION

In *Hamdi v. Rumsfeld*,[1] the United States Supreme Court held that a citizen detained by the Government as an enemy combatant is entitled under due process to a meaningful opportunity to contest the facts underlying his detention before a neutral decision-maker.[2] The Supreme Court examined whether the Executive possessed the power to indefinitely detain United States citizens captured abroad in the midst of the War on Terror and labeled "enemy combatants" without a hearing.[3] In finding that such a citizen-detainee was entitled to some form of impartial hearing pursuant to the Due Process Clause, the Court vacated and remanded the Fourth Circuit's decision allowing detention based on an extremely limited showing of evidence.[4]

This Note examines the four opinions in *Hamdi* and concludes that while the outcome of the case was correct, the plurality opinion authored by Justice O'Connor was inadequate, because the outlook for citizens detained in conjunction with the War on Terror in the future remains extremely murky and ambiguous. The Court failed to address several difficult issues raised by its holding. First, the Court declined to precisely define the term "enemy combatant." While the plurality opinion successfully established that the President was authorized to detain a citizen if it was sufficiently clear that he was in fact an enemy combatant, the opinion failed to precisely define the term. Second, the plurality opinion erroneously employed the

[1] 124 S. Ct. 2633 (2004) (plurality opinion).
[2] *Id.* at 2635 (plurality opinion).
[3] *Id.* at 2637-38 (plurality opinion).
[4] *Id.* (plurality opinion).

*Mathews* balancing test to weigh the citizen's right to a due process hearing against the Government's interest in prosecuting a war unfettered by extraneous litigation.[5] This approach failed to recognize that a citizen's baseline right to a hearing may not be balanced away. Third, the Court declined to establish a clear set of procedures that must be followed prior to and during the hearing before the neutral decision-maker. Finally, it remains unclear whether a military tribunal will suffice for the required neutral decision-maker, a possibility that the plurality opinion mentioned but did not discuss.[6] Alternatively, the concept of a new federal terrorism court with built-in intelligence protections emerges as the better option for the role of the neutral decision-maker.

## II. BACKGROUND

### A. WARTIME DETENTION AND MILITARY TRIBUNALS PRIOR TO *HAMDI*—FROM THE CIVIL WAR TO WORLD WAR II

In the Civil War case *Ex parte Milligan*, a United States citizen was detained in a military prison and put on trial before a military tribunal on charges that he aided a Confederate military organization and conspired to obtain weapons and free Confederate prisoners.[7] Milligan was sentenced to death by the military tribunal for violating the laws of war.[8] He then filed a habeas corpus petition, alleging that the military tribunal was without jurisdiction to try him.[9] The Court, in establishing the open courts rule, held that Congress did not have the power to create military tribunals when state courts were open and available.[10] Thus, Milligan had been denied his right to a jury trial guaranteed by the Sixth Amendment.[11]

The Court reached a very different result when it next addressed wartime detention and the use of military tribunals more than seventy-five years later during World War II in *Ex parte Quirin*.[12] In *Quirin*, eight Nazi saboteurs, one of whom, Hans Haupt, was a United States citizen, were detained after they were captured in 1942 by the Federal Bureau of Investigation upon entering the United States from Germany with

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[5] *Id.* at 2646 (plurality opinion) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
[6] *Id.* at 2651 (plurality opinion).
[7] 71 U.S. (1 Wall.) 2, 6-7 (1866).
[8] *Id.* at 7.
[9] *Id.*
[10] *Id.* at 121-22.
[11] *Id.* at 122.
[12] 317 U.S. 1 (1942).

explosives and orders to sabotage United States military facilities.[13] The eight were tried before a military commission, which had been appointed by the President roughly three weeks after the Nazi saboteurs had been captured.[14] The Nazis, including Haupt, attempted to stop the trial before the military commission by filing habeas corpus petitions in federal district court.[15] They contended that because the federal courts were open and functioning normally, the President may not deny them the due process of a jury trial by ordering that they be tried by a military tribunal.[16]

The Supreme Court unanimously ruled against the detainees, finding that the President was constitutionally and statutorily authorized to subject the eight men to a trial before a military commission rather than a domestic federal court.[17] The Court stressed the distinction between lawful and unlawful combatants: "Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[18] For example, unlawful combatants include the spy and the "enemy combatant," who wages war without a uniform contrary to the laws of war.[19] Furthermore, the fact that the enemy combatant was a United States citizen, as in Haupt's case, does not excuse him from punishment at the hands of a military tribunal.[20]

While not explicitly overruling *Ex parte Milligan*, the *Quirin* Court declined to follow the open courts rule.[21] The Court found that the rule was inapplicable to the *Quirin* case because Milligan was not an enemy belligerent since he was not "a part of or associated with the armed forces of the enemy," whereas Haupt was an unlawful combatant, subject to penalties imposed by a military tribunal.[22]

The Ninth Circuit addressed the habeas corpus petition of a United States citizen captured on the battlefield in Sicily and detained as a prisoner

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[13] *Id.* at 20-22.

[14] *Id.* at 22-23.

[15] *Id.* at 23-24.

[16] *Id.*

[17] *Id.* at 25-30.

[18] *Id.* at 31.

[19] *Id.*

[20] *Id.* at 37. "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." *Id.* at 37-38.

[21] *Id.* at 45-46.

[22] *Id.* at 45.

of war during World War II in *In re Territo*.[23] Gaetano Territo was a United States citizen by birth who moved to Italy at the age of five.[24] In 1943, he served with the Italian Army while Italy and the United States were at war.[25] Territo was captured by United States forces and detained as a prisoner of war in the United States.[26] In his habeas action, Territo claimed that his detention was illegal because he was an American citizen.[27] The district court concluded that neither Territo's United States citizenship nor his contention that he was a non-combat member of the Italian army diminished the legality of his detention by the United States military as a prisoner of war.[28] In affirming the district court's dismissal of the habeas petition, the Ninth Circuit broadly construed the term "prisoner of war" and found that "all persons who are active in opposing an army in war may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war."[29] The court stated that the ultimate goal of capture and detention of enemies in wartime is "to prevent the captured individual from serving the enemy."[30]

## B. STATUTORY AUTHORIZATION FOR THE DETENTION OF UNITED STATES CITIZENS IN WARTIME

### *1. The Non-Detention Act, 18 U.S.C. § 4001(a)*

18 U.S.C. § 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[31] The legislative history of this statute[32] reveals that its purpose was to repeal the Emergency Detention Act of 1950,[33] which "established procedures for the apprehension and detention, during internal security emergencies, of individuals deemed likely to engage in espionage or sabotage."[34] In 1971, Congress was concerned that the Emergency Detention Act would allow a recurrence of the round up and internment of

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[23] 156 F.2d 142 (1946).
[24] *Id.* at 143.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 142.
[28] *Id.* at 144.
[29] *Id.* at 145.
[30] *Id.*
[31] 18 U.S.C. § 4001(a) (2000).
[32] H.R. Rep. No. 92-116, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435.
[33] 50 U.S.C. § 811, *repealed by* Pub. L. No. 92-128, § 2(a), 85 Stat. 348 (1971).
[34] H.R. Rep. No. 92-116, at 2.

American citizens of Japanese ancestry that occurred during World War II.[35]

### 2. *Authorization for Use of Military Force*

One week after the attacks of September 11, 2001 by the al Qaeda terrorist network, Congress passed the Authorization for Use of Military Force ("AUMF").[36] The AUMF authorized 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.[37]

## C. THE CITIZEN'S CONSTITUTIONAL RIGHT TO DUE PROCESS

### 1. *The Due Process Clause*

The Due Process Clause of the Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[38] The Clause originated in the English Magna Carta and, at its core, was "intended to secure the individual from the arbitrary exercise of the powers of Government, unrestrained by the established principles of private right and distributive justice."[39] Simply stated, the Due Process Clause "gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws."[40]

### 2. *The* Mathews *Balancing Test*

The Supreme Court established a new analytical framework for recognizing an individual's constitutionally guaranteed right to procedural due process in *Mathews v. Eldridge*.[41] In *Mathews*, the plaintiff's social security disability benefits were terminated by the Secretary of Health, Education, and Welfare without a pre-termination hearing.[42] The plaintiff

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[35] *Id.*; *see* Korematsu v. United States, 324 U.S. 885 (1945).

[36] Pub. L. No. 107-40, 115 Stat. 224 (2001).

[37] *Id.* at 224.

[38] U.S. CONST. amend. V.

[39] Bank of Columbia v. Okely, 17 U.S. (1 Wheat.) 235, 244 (1819).

[40] Duncan v. Louisiana, 391 U.S. 145, 169 (1968).

[41] 424 U.S. 319 (1976).

[42] *Id.* at 324.

sued the agency, alleging that the Due Process Clause required an evidentiary hearing prior to the termination of benefits.[43] The Court quoted the "truism" that "due process is flexible and calls for such procedural protections as the particular situation demands."[44] The Court then set forth three factors that must be balanced in order to determine the level of process due in any given case:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[45]

In striking the appropriate due process balance, the Court found that the individual was not due a pre-termination evidentiary hearing because the administrative burdens on the Government would outweigh the countervailing benefits to the individual.[46]

## III. FACTS AND PROCEDURAL HISTORY

In late 2001, Yaser Esam Hamdi, an American citizen by birth, was seized by Northern Alliance forces in Afghanistan.[47] Hamdi was later turned over to the United States military, which interrogated him before transferring him to the United States Naval Base at Guantanamo Bay, Cuba, then to Norfolk, Virginia, and finally to a naval brig in Charleston, South Carolina.[48] Based on the initial interrogation of Hamdi and the circumstances of his capture, the military concluded that Hamdi was an enemy combatant.[49] With respect to those individuals captured during hostilities in Afghanistan, the term "enemy combatant" was defined as an individual who "was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States."[50]

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[43] *Id.* at 325.

[44] *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[45] *Id.* at 335.

[46] *Id.* at 348-49.

[47] Brief for Respondents at 4, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696).

[48] Brief for Petitioner at 5-6, *Hamdi* (No. 03-6696).

[49] Brief for Respondents at 4, *Hamdi* (No. 03-6696).

[50] Dep't of Defense, *Fact Sheet: Guantanamo Detainees* (2004), *available at* http://www.defenselink.mil/news/Feb2004/d20040220det.pdf (last visited Apr. 9, 2005).

On June 11, 2002, Hamdi's father filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 with the United States District Court for the Eastern District of Virginia.[51] The petition alleged that the Government had detained Hamdi without charging him with any crime and without allowing him access to legal counsel, thus violating his rights under the Fifth and Fourteenth Amendments.[52] The district court ordered that a federal public defender be assigned and given unmonitored access to Hamdi.[53]

The Government appealed the order, and on July 12, 2002, the Fourth Circuit reversed.[54] The Fourth Circuit found that the district court had not afforded the Government the appropriate amount of deference to its intelligence gathering or national security concerns in a time of ongoing military hostilities abroad.[55] The appellate court remanded the case and instructed the district court to "consider the most cautious procedures first" in conducting a deferential inquiry into Hamdi's enemy combatant status.[56]

On remand, the Government filed a motion to dismiss Hamdi's habeas petition on July 25, 2002, attaching the two-page sworn declaration of Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy ("Mobbs Declaration").[57] Mobbs indicated his close involvement with the detention of enemy combatants fighting with the al Qaeda terrorists and his familiarity with the facts of Hamdi's capture and detention.[58] Mobbs alleged that Hamdi traveled to Afghanistan in July or August 2001, affiliated with a Taliban military unit where he received weapons training, and remained with his Taliban unit until his unit surrendered to the Northern Alliance in late 2001.[59] According to Mobbs, a United States interrogation team interviewed Hamdi, who identified himself as a Saudi citizen born in the United States and admitted to entering Afghanistan to train and fight with the Taliban.[60] Thus, based on his association with the Taliban and the fact that he had a firearm in his possession at the time of his

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[51] Brief for Petitioner at 7, *Hamdi* (No. 03-6696).

[52] Petition for Writ of Habeas Corpus at 5-6, Hamdi v. Rumsfeld, (E.D. Va. June 11, 2002) (No. 2:02cv439).

[53] Order, Hamdi v. Rumsfeld, (E.D. Va. Jun. 11, 2002) (No. 2:02cv439), *available at* http://notablecases.vaed.uscourts.gov/2:02-cv-00439/docs/69794/0.pdf.

[54] Hamdi v. Rumsfeld, 296 F.3d 278, 284 (4th Cir. 2002).

[55] *Id.* at 282.

[56] *Id.* at 284.

[57] Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus at Exhibit 1, Hamdi v. Rumsfeld, (E.D. Va. Jul. 25, 2002) (No. 2:02cv439), *available at* http://notablecases.vaed.uscourts.gov/2:02-cv-00439/docs/69820/0.pdf.

[58] *Id.*

[59] *Id.*

[60] *Id.*

capture, the United States military considered Hamdi an enemy combatant.[61]

Upon examining the Mobbs Declaration, the district court found that it fell "far short," standing alone, of justifying Hamdi's detention because it raised "more questions than it answer[ed]" and was "little more than the Government's 'say-so' regarding the validity of Hamdi's classification as an enemy combatant."[62] The court ordered the Government to produce, for *in camera* review, copies of Hamdi's statements, notes taken during Hamdi's interviews, the identities of Hamdi's interrogators, and other information regarding Hamdi's capture, detention, and enemy-combatant label.[63] The court found that even though the Executive was entitled to deference regarding military designations of individuals, the courts had a role in reviewing those designations when they infringed on the freedom of American citizens.[64]

The Government appealed the district court's production order and, in January 2003, the Fourth Circuit reversed, remanding the case with directions to dismiss Hamdi's petition for writ of habeas corpus.[65] Finding that it was "undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict," the court held that the Mobbs Declaration was sufficient to constitutionally support Hamdi's detention in light of the Executive's war powers, and further factual inquiry was unnecessary or improper.[66] Pursuant to the separation of powers principle, the judicial branch does have a duty to protect individual liberties in peacetime and wartime, and "[t]he detention of United States citizens must be subject to judicial review."[67] But the court proceeded to note two "vital purposes" served by the detention of uncharged enemy combatants: (1) it prevents the individual from rejoining the enemy and continuing to fight, and (2) it "may relieve the burden on military commanders of litigating the circumstances of a capture halfway around the globe."[68] The Fourth Circuit determined that the "deferential posture" with which the judicial branch must engage actions taken by the executive branch in wartime results in the need, here, to take the Mobbs Declaration at face value, rather than delve into the

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[61] *Id.*

[62] Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 533-35 (E.D. Va. 2002).

[63] *Id.* at 528; *see also* Order, Hamdi v. Rumsfeld, (E.D. Va. Jul. 31, 2002) (No. 2:02cv439), *available at* http://notablecases.vaed.uscourts.gov/2:02-cv-00439/docs/69829/0.pdf.

[64] *Hamdi*, 243 F. Supp. 2d at 532.

[65] Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003).

[66] *Id.*

[67] *Id.* at 464.

[68] *Id.* at 465.

individual facts and circumstances of Hamdi's capture, detention, and status.[69]

Hamdi also argued that the Government lacked the legal authorization to detain citizen enemy combatants, and thus, pursuant to 18 U.S.C. § 4001(a) and Article 5 of the Geneva Convention, such detentions were unlawful.[70] With regard to 18 U.S.C. § 4001(a), the Fourth Circuit rejected Hamdi's contention because the Authorization for Use of Military Force (AUMF) satisfied 18 U.S.C. § 4001(a)'s requirement that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[71] In short, "the 'necessary and appropriate force' referenced in the [AUMF] necessarily includes the capture and detention of any and all hostile forces arrayed against [U.S.] troops."[72] As to Article 5 of the Geneva Convention, which requires a "competent tribunal" to formally determine whether an individual is an enemy combatant, the Fourth Circuit ruled that the provision is not "self-executing," and even if it were, there were serious questions as to whether it would apply to Hamdi's case.[73]

The Fourth Circuit denied a rehearing en banc by a vote of eight-to-two.[74] Hamdi then filed a petition for certiorari with the United States Supreme Court, which was granted.[75] Some time after the grant of certiorari, Hamdi was allowed to meet for consultations with court-appointed counsel several times, including unmonitored visits.[76]

## IV. SUMMARY OF OPINIONS

### A. JUSTICE O'CONNOR'S PLURALITY OPINION

The Supreme Court vacated and remanded the Fourth Circuit's decision, holding that Hamdi was entitled to contest his status as an enemy combatant before a neutral decision-maker.[77] Writing for the plurality, Justice O'Connor[78] concluded that, while Congress had authorized the

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[69] *Id.* at 474.

[70] *Id.* at 467.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 468-69.

[74] Hamdi v. Rumsfeld, 337 F.3d 335 (4th Cir. 2003).

[75] Hamdi v. Rumsfeld, 540 U.S. 1099 (2004).

[76] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2652 (2004) (plurality opinion).

[77] *Id.* at 2635 (plurality opinion).

[78] Justice O'Connor's plurality was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer.

detention of enemy combatants, due process demanded that Hamdi be given a meaningful opportunity to challenge the facts of his capture and enemy-combatant label, by virtue of his United States citizenship.[79]

The Court first examined the question of whether the detention of a United States citizen who fits the definition of "enemy combatant" was authorized.[80] Since Hamdi was detained pursuant to the AUMF, the requirement that an individual is being detained pursuant to "an Act of Congress," per 18 U.S.C. § 4001(a), is satisfied.[81] Thus, the AUMF was "explicit authorization" for the President to detain enemy combatants because such detention for the duration of the particular conflict was a fundamental and accepted incident to war in keeping with the necessary and appropriate force Congress had authorized the President to use.[82] Hamdi also argued that the AUMF did not authorize the indefinite detention he faced.[83] While agreeing with Hamdi's argument that his detention may not continue after active hostilities have ended, and with Hamdi's assertion that his detention could last for the duration of his lifetime due to the character of the War on Terror, the Court relied on the fact that, at the time of the opinion, active combat operations in Afghanistan were ongoing.[84] The plurality opinion declared that its holding that the AUMF authorized detention of an enemy combatant only applied "once it is sufficiently clear that the individual is, in fact, an enemy combatant."[85]

Next, the Court analyzed the level of constitutional due process owed to a United States citizen, like Hamdi, who challenges the Government's determination that he is an enemy combatant.[86] The Government argued that the production of the Mobbs Declaration to the court deciding Hamdi's habeas petition completed its required factual basis supporting detention.[87] Specifically, the Government asserted that the judicial branch's review of its labeling a citizen as an enemy combatant should not extend beyond the deferential "some evidence" standard.[88] On the other hand, Hamdi argued

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[79] *Hamdi*, 124 S. Ct. at 2635 (plurality opinion).

[80] *Id.* at 2639 (plurality opinion).

[81] *Id.* at 2639-40 (plurality opinion).

[82] *Id.* (plurality opinion).

[83] *Id.* at 2641 (plurality opinion).

[84] *Id.* at 2641-42 (plurality opinion).

[85] *Id.* at 2643 (plurality opinion).

[86] *Id.* (plurality opinion).

[87] *Id.* at 2644 (plurality opinion).

[88] *Id.* at 2645 (plurality opinion) (citing Superintendent, Mass. Corr. Inst., Walpole v. Hill, 472 U.S. 445, 455-57 (1985)) (finding that the "some evidence" standard "does not require" a "weighing of the evidence," but instead calls for determining "whether there is any evidence in the record that could support the conclusion").

that due process mandated that he be afforded the opportunity to challenge the Mobbs Declaration with counter evidence at a hearing before a neutral tribunal.[89] The Court employed a balancing test, first established in *Mathews v. Eldridge*,[90] to weigh these competing interests.[91] Hamdi's private interest consisted of his interest in freedom from erroneous detention by the Government, while the Government's interests included both the goal of preventing the enemy combatant from rejoining the enemy and the freedom from the distraction of litigating military actions halfway around the globe.[92] In "[s]triking the proper constitutional balance," the Court held that citizen-detainees such as Hamdi must receive "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker."[93]

Since Hamdi had not had any meaningful chance to challenge his alleged status as an enemy combatant, the Court concluded that he had essentially received no process.[94] Per the Court, the military interrogation of a detainee, "however effective as an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker."[95] The Court went on to offer three additional contours to the type of proceeding it expected in light of both the demands of the Constitution and the special circumstances of a case such as Hamdi's.[96] For example, hearsay offered by the Government may be acceptable as the most reliable available evidence.[97] Also, a rebuttable presumption in favor of the Government's evidence may be tolerable.[98] Lastly, an "appropriately authorized and properly constituted military tribunal" could possibly conduct such a hearing.[99]

Finally, the Court discussed the Government's contention that separation of powers principles drastically limited the role of the judicial

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[89] *Id.* at 2645-46 (plurality opinion).

[90] 424 U.S. 319 (1976).

[91] *Hamdi*, 124 S. Ct. at 2646 (plurality opinion). According to the *Mathews* test, "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." *Id.* (quoting *Mathews*, 424 U.S. at 335).

[92] *Id.* at 2647-48 (plurality opinion).

[93] *Id.* at 2648 (plurality opinion).

[94] *Id.* at 2651 (plurality opinion).

[95] *Id.* (plurality opinion).

[96] *Id.* at 2649 (plurality opinion).

[97] *Id.* (plurality opinion).

[98] *Id.* (plurality opinion).

[99] *Id.* at 2651 (plurality opinion).

branch in a case implicating the President's war powers.[100] In rejecting this claim, the Court relied on precedent stating that wartime does not mean that the President possesses a "blank check" in dealing with citizens' rights.[101] While the war power is a "power to wage war successfully . . . constitutional limitations safeguarding essential liberties" must remain in place during wartime.[102] In short, "it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government simply because the Executive opposes making available such a challenge."[103] Thus, the Court rejected the "some evidence" standard set forth by the Government because it would deprive the alleged enemy combatant the chance to refute the Government's charges, thereby vesting a great deal of power in the executive branch.[104]

B. JUSTICE SOUTER'S CONCURRING OPINION

In a concurring opinion, Justice Souter[105] disagreed with the plurality's finding that the detention of a citizen designated as an enemy combatant was legally authorized.[106] Justice Souter maintained that 18 U.S.C. § 4001(a), requiring that detention by the executive branch must be "pursuant to an Act of Congress," must be read broadly to require explicit authorization, based on legislative intent and the circumstances under which Section 4001(a) was adopted.[107] The purpose of the AUMF was to authorize the use of armies and weapons, and does not even contain the word "detention."[108] The statute cannot fairly be read to authorize the detention of United States citizens, and, therefore, the stringent requirement of Section 4001(a) was not satisfied.[109]

Justice Souter also pointed out that under the Geneva Convention individuals seized on the battlefield in Afghanistan appear to qualify for

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[100] *Id.* at 2650 (plurality opinion).

[101] *Id.* (plurality opinion) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).

[102] *Id.* (plurality opinion) (quoting Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398, 426 (1934)).

[103] *Id.* (plurality opinion).

[104] *Id.* at 2651 (plurality opinion).

[105] Justice Souter's concurrence was joined by Justice Ginsburg; Justice Souter concurred in part, dissented in part, and concurred in the judgment.

[106] *Hamdi*, 124 S. Ct. at 2653 (Souter, J., concurring).

[107] *Id.* at 2653-55 (Souter, J., concurring) (quoting 18 U.S.C. § 4001(a) (2000)).

[108] *Id.* at 2657 (Souter, J., concurring).

[109] *Id.* at 2659 (Souter, J., concurring).

prisoner-of-war treatment.[110] However, Hamdi had not been treated as such, since he has been held incommunicado.[111] Furthermore, the United States military's own regulations, implementing the Geneva Convention with regard to captured individuals, provide for a military tribunal in order to determine an individual's status.[112]

### C. JUSTICE SCALIA'S DISSENTING OPINION

Writing in dissent, Justice Scalia concluded that the Government possessed only two options when seeking to detain a United States citizen: (1) it could charge the citizen-detainee with a crime or (2) Congress could suspend the writ of habeas corpus.[113] Justice Scalia began by pointing out that at the "very core of liberty" is the "freedom from indefinite imprisonment at the will of the Executive."[114] The Constitution recognizes due process as "the right secured," and habeas corpus as the "instrument by which due process [may] be insisted upon by a citizen illegally imprisoned . . . ."[115] While conceding that the allegations against Hamdi were not ordinary criminal accusations, the issue in Hamdi's detention remained whether "there is a different, special procedure for imprisonment of a citizen accused of wrongdoing *by aiding the enemy in wartime*."[116] An examination of the Constitution and of history led Justice Scalia to determine that there was no third way beyond the Government's two existing options.[117]

Justice Scalia argued that treason was understood by the Framers of the Constitution as subject to criminal punishment.[118] According to Justice Scalia, the criminal process was the exclusive means, absent Congressional suspension of the writ of habeas corpus, "not only to punish traitors, but to incapacitate them" because of the Framers' "general mistrust of military power permanently at the Executive's disposal."[119] He pointed out the fact that John Phillip Walker Lindh, the only other United States citizen, besides

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[110] *Id.* at 2658 (Souter, J., concurring).

[111] *Id.* (Souter, J., concurring).

[112] *Id.* (Souter, J., concurring) (citing Army Reg. 190-8 §§ 1-5, 1-6 (1997)).

[113] *Id.* at 2660 (Scalia, J., dissenting).

[114] *Id.* at 2661 (Scalia, J., dissenting).

[115] *Id.* (Scalia, J., dissenting).

[116] *Id.* at 2663 (Scalia, J., dissenting).

[117] *Id.* at 2671 (Scalia, J., dissenting).

[118] *Id.* at 2663 (Scalia, J., dissenting); *see* U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

[119] *Hamdi*, 124 S. Ct. at 2668 (Scalia, J., dissenting).

Hamdi, to be captured in Afghanistan and accused of fighting alongside al Qaeda against the United States, was subjected to the criminal process.[120]

Next, Justice Scalia indicated that the Constitution's Suspension Clause strictly limits the situations under which the writ of habeas corpus may be suspended by Congress.[121] In *Ex parte Milligan*, the Court rejected the Government's attempt to assert military jurisdiction when the courts were open.[122] Justice Scalia proceeded to apply the "open courts rule," notwithstanding the Court's language in *Ex parte Quirin*,[123] to Hamdi's detention, finding it "not less unlawful than Milligan's trial by military tribunal."[124] He concluded his opinion by dismissing Justice O'Connor's *Mathews* analysis, because its "judicious balancing" wrongly increased the power of the Court, and rejecting her three "unheard-of" proposals for satisfying due process, deriding them as "constitutional improvisation."[125]

### D. JUSTICE THOMAS'S DISSENTING OPINION

The dissenting opinion of Justice Thomas focused on separation of powers arguments to assert that Hamdi's detention fell "squarely" within the constitutional war powers of the federal Government, and the Court lacked the "expertise and capacity to second-guess that decision."[126] Justice Thomas explained that "no governmental interest is more compelling than the security of the Nation," and that the Founders vested in the President the responsibility and the power to protect the national security.[127] The President, as Commander in Chief of the military, often receives and acts upon intelligence that is properly held secret, and, thus, the Courts cannot, and should not, compel the information or second-guess the President's actions regarding national security.[128] While the legality of Hamdi's

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[120] *Id.* at 2664 (Scalia, J., dissenting); *see* United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002) (Lindh was convicted upon a guilty plea).

[121] *Hamdi*, 124 S. Ct. at 2665 (Scalia, J., dissenting) (quoting 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.").

[122] *Id.* at 2667 (Scalia, J., dissenting) (citing *Ex parte Milligan*, 71 U.S. (1 Wall.) 2, 121 (1866)).

[123] Justice Scalia distinguished the facts of *Hamdi* from *Quirin* by pointing out that in *Quirin*, "it was uncontested that the petitioners were members of enemy forces." *Id.* at 2670 (Scalia, J., dissenting).

[124] *Id.* at 2668 (Scalia, J., dissenting).

[125] *Id.* at 2672 (Scalia, J., dissenting).

[126] *Id.* at 2674 (Thomas, J., dissenting).

[127] *Id.* at 2675 (Thomas, J., dissenting).

[128] *Id.* at 2676 (Thomas, J., dissenting) (citing Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

detention is a matter for the Court to decide, the legality hinges on whether Hamdi is actually an enemy combatant, and the answer to that question is properly in the executive branch's province and properly withheld from the Court's review.[129] With regard to Hamdi's Fifth Amendment claim, "due process of law depends on the circumstances," and, in Hamdi's case, "requires nothing more than a good-faith executive determination" of his enemy combatant status, since the President is acting within the war power and Congressional authorization.[130] Finally, Justice Thomas disagreed with Justice O'Connor's use of the *Mathews* balancing test and stated that even if it was proper, it was misapplied because the Government's interest in protecting the nation was grossly undervalued.[131]

## V. ANALYSIS

The Court in *Hamdi* failed to decide several important issues that bear directly upon how lower courts will decide the fates of citizen-detainees in the future. While the Court correctly reasoned that the President was authorized to detain United States citizens captured abroad in conjunction with the War on Terror, that authorization and authority is premised upon sufficient proof that the citizen was indeed an enemy combatant. Yet, the Court refused to precisely define what acts shall constitute actions of an enemy combatant in the future. The plurality was wrong to rely on the *Mathews* balancing test, because the test was conceived to deal with due process hearings regarding property interests in the field of administrative law and was not designed nor intended to possess the capability to deny citizens' liberty interests without a hearing. Rather, the citizen naturally possesses a baseline right to a hearing regarding the facts underlying his status when facing indefinite confinement. Furthermore, the alterations to the normal due process protections provided a citizen facing imprisonment were, while not extreme, questionable in light of the need for a fundamentally fair and meaningful hearing and utterly unsupported by precedent or reasoning in the opinion. Finally, the Court failed to address the precise nature of the neutral decision-maker that will preside over future hearings whose goal is to determine whether a citizen is an enemy combatant. While Justice O'Connor mentioned the possibility of using military tribunals, a new federal terrorism court may better guarantee fairness to the citizen while ensuring the protection of sensitive intelligence and security.

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[129] *Id.* at 2678 (Thomas, J., dissenting).

[130] *Id.* at 2680-81 (Thomas, J., dissenting).

[131] *Id.* at 2683-84 (Thomas, J., dissenting).

## A. WARTIME DETENTION BY THE EXECUTIVE OF UNITED STATES CITIZENS CAPTURED OUTSIDE THE UNITED STATES AS ENEMY COMBATANTS WAS AUTHORIZED

### *1. The AUMF Authorized the President to Detain Enemy Combatants Captured in Afghanistan*

Before examining the issue of how best to determine whether a United States citizen is indeed an enemy combatant, the threshold question is whether the President possessed the authority to detain such citizen-enemy combatants. Hamdi's detention put into conflict two perennial constitutional principles: the President's war powers pursuant to Article II and the citizen's right to due process prior to the loss of liberty pursuant to the Fifth Amendment.[132] The first step in the analysis must be to determine whether the President was authorized to detain anyone, citizen or non-citizen, in conjunction with the military campaign in Afghanistan. The Court's plurality opinion declined to address whether, as the Government argued, the President has plenary authority to detain whomever he deems necessary pursuant to Article II.[133] Justice Thomas agreed with the Government's view, arguing that "the President has constitutional authority to protect the national security and . . . this authority carries with it broad discretion," but he was alone in this view.[134] In examining the President's authority when acting with or without Congress, Justice Thomas alluded to the test set forth by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.[135] The plurality opinion and Justice Thomas's dissent both correctly argued that the AUMF constituted Congress' implied authorization for the President to detain those individuals fighting for or with the Taliban. Justice O'Connor asserted that the AUMF language authorizing the President to use "all necessary and appropriate force" against those associated with the attacks of September 11, 2001, must be read to imply the power to detain those people captured in the course of fighting against members of the Taliban, as a fundamental

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[132] *Id.* at 2646 (plurality opinion).

[133] *Id.* at 2639 (plurality opinion).

[134] *Id.* at 2675 (Thomas, J., dissenting).

[135] 343 U.S. 579, 636-38 (1952) (Jackson, J., concurring). *Youngstown* involved the President's authority under his "emergency power" to seize private steel companies facing a labor strike during the Korean War. *Id.* at 582-83. In his concurring opinion, Justice Jackson set forth a test which recognized three broad categories of Presidential action in light of action or inaction by Congress. The President's power is at its maximum when he acts in conjunction with Congressional authority; his power is at its weakest when he acts contrary to will of Congress; and his power is in a "zone of twilight" when he acts in the absence of Congressional action. *Id.* at 636-38 (Jackson, J., concurring).

incident to war.[136] In Justice Jackson's framework from *Youngstown,* the President acted with implied congressional approval to detain opposition fighters in Afghanistan, and, therefore, he was acting with maximum authority.[137]

### *2. The President was Authorized to Detain United States Citizens as Enemy Combatants because the AUMF Satisfied the Requirements of 18 U.S.C. § 4001(a)*

Having established that the President was authorized to detain individuals fighting against the United States military in Afghanistan, the next necessary step of the analysis is to determine whether the President's power included the authority to detain enemy combatants who also happened to be United States citizens. The provision contained in 18 U.S.C. § 4001(a) that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress" was the substance of Justice Souter's opinion.[138] Justice Souter argued that since the Non-Detention Statute must be read broadly due to legislative intent and since the AUMF did not even mention the word "detention," the AUMF cannot be read to have satisfied the requirements of 18 U.S.C. § 4001(a) with regard to the detention of citizen-enemy combatants.[139] However, the plurality opinion set forth the better view, that, in light of the President's constitutionally-based war powers of Article II, 18 U.S.C. § 4001(a) was indeed satisfied by the AUMF, which served as the necessary "Act of Congress."

### *3. The Court has Previously Held that Individuals may be Detained as Enemy Combatants Despite Their United States Citizenship*

The proposition that even United States citizens may be detained in wartime when the citizen is actively fighting for or with the enemy is also supported by precedent. The case *In re Territo* presented facts nearly identical to *Hamdi.*[140] The Ninth Circuit found that whether Territo was or was not a United States citizen was "immaterial" to the legality of the detention as a prisoner of war because all persons, regardless of their

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[136] *Hamdi*, 124 S. Ct. at 2640 (plurality opinion).

[137] *See Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (asserting that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate").

[138] *Hamdi*, 124 S. Ct. at 2653 (Souter, J., concurring in part and dissenting in part).

[139] *Id.* at 2653 (Souter, J., concurring in part and dissenting in part).

[140] *In re* Territo, 156 F.2d 142, 142-43 (1946).

citizenship, who oppose an army during a war and are captured by that army, may be detained as prisoners of war.[141] The plurality opinion in *Hamdi* used the *Territo* case to support the Court's holding and to rebut Justice Scalia's claim that, when dealing with a United States citizen, the Government's only options are to suspend the writ of habeas corpus or to charge the citizen with a crime and prosecute him under the criminal justice system.[142] Similarly, in *Ex parte Quirin*, the Court found that Haupt, one of the Nazi saboteurs captured as he attempted to invade the United States, who happened to be an American citizen, was nonetheless "subject to trial and punishment by [a] military tribunal[]" for his actions, despite his United States citizenship.[143] Thus, based on precedent, it is clear that citizens and non-citizens alike may be held by the Government if they are enemy combatants.

### *4. The Precise Definition of the Term "Enemy Combatant" Bears Directly on the President's Authority to Detain*

While the President was authorized by Congress through the AUMF to detain enemy combatants, including enemy combatants who are also United States citizens, one issue that remains is the definition of the term "enemy combatant." The plurality in *Hamdi* held that his detention was authorized only if it was "sufficiently clear" that he was an enemy combatant.[144] Thus, a clear definition of what conduct warrants an enemy combatant label is necessary in order to determine whether the President was authorized to detain individuals so labeled. In *Hamdi*, the Government argued that an enemy combatant is an individual captured in Afghanistan who "was part of or supporting forces hostile to the United States or coalition partners, and [who] engaged in an armed conflict against the United States."[145] The Fourth Circuit defined the term much more broadly as "persons captured during wartime."[146] Subsequent to the *Hamdi* decision, the Department of Defense defined "enemy combatant" as an "individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This

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[141] *Id.* at 144-45.

[142] *Hamdi*, 124 S. Ct. at 2643 (plurality opinion).

[143] *Ex parte* Quirin, 317 U.S. 1, 31, 37-38 (1942).

[144] *Hamdi*, 124 S. Ct. at 2643 (plurality opinion).

[145] Brief for Respondents at 3, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696) (quoting Dep't of Defense, *Fact Sheet: Guantanamo Detainees*, *available at* http://www.defenselink.mil/news/Feb2004/d20040220det.pdf (last visited Apr. 9, 2005)).

[146] Hamdi v. Rumsfeld, 316 F.3d 450, 463 n.3 (2003).

includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[147]

According to a report by the American Bar Association Task Force on Treatment of Enemy Combatants, the term "enemy combatant" is not a term of art possessing a long-established meaning.[148] The term "enemy combatant" appears to have originated in *Ex Parte Quirin*.[149] The Court in *Quirin* differentiated between lawful and unlawful combatants and provided as an example of an unlawful combatant "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property . . . ."[150] The practical importance of the distinction is that lawful combatants that are captured and detained are prisoners of war.[151] Prisoners of war are subject to the Geneva Convention, which provides that they are not to be prosecuted or punished for the military acts they committed during war.[152] On the other hand, unlawful combatants captured and detained may be put on trial and punished before military tribunals for the acts that made their combat unlawful.[153]

Assuming that the term "enemy combatant" is synonymous with the term "unlawful combatant," it appears as though the line between lawful combatants and enemy combatants cannot always be easily drawn. The Court's opinion in *Quirin* suggests that the largest factor in the labeling of the Nazi saboteurs as "enemy combatants" was the fact that they entered the territory of the United States in secret, without wearing uniforms.[154] In Hamdi's case, the Government and the plurality opinion used the term "enemy combatant" to include all those who fight for or with terrorist organizations against United States military forces, rather than within a regular military structure of a recognized country.[155] The plurality opinion

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[147] Memorandum for the Secretary of the Navy, regarding the Department of Defense Order Establishing Combatant Status Review Tribunal, July 7, 2004, (on file with the author and, *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf) [hereinafter Department of Defense Order]. This order states that it only applies to foreign nationals held as enemy combatants at Guantanamo, but it sheds light on the definition of the term. *Id.*

[148] Neal R. Sonnett et al., *American Bar Association Task Force on Treatment of Enemy Combatants: Preliminary Report*, 7 (Aug. 8, 2002), *available at* http://www.abanet.org/leadership/enemy_combatants.pdf.

[149] *Ex parte* Quirin, 317 U.S. 1, 31 (1942).

[150] *Id.*

[151] *Id.*

[152] Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, 82 (Aug.12, 1949), *available at* http://www.unhchr.ch/html/menu3/b/91.htm.

[153] *Quirin*, 317 U.S. at 31.

[154] *Id.*

[155] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion).

failed to further define the term "enemy combatant" beyond the Government's definition of the term provided in its brief, which appears to be specific to the war against al Qaeda in Afghanistan.[156] The Supreme Court effectively left it up to the lower federal courts to define the contours of the enemy combatant label. Congress should engage in the discussion of how precisely to define the term "enemy combatant" in the age of the global war on terrorism in order to further bolster the President's authority to detain such individuals. Ideally, Congress would precisely define the term "enemy combatant" based, in part, on input from the executive branch, and the courts would fulfill their role in applying those established criteria to each individual case.

Finally, it remains perplexing why the Government pursued such drastically different courses of action against the two United States citizens captured on the battlefield in Afghanistan: Yaser Esam Hamdi and John Phillip Walker Lindh. Lindh was subjected to the United States criminal justice system, charged with various violations of anti-terrorism laws in federal district court.[157] Hamdi was held incommunicado without formal charges.[158] It is likely that the choice between detaining true citizen-enemy combatants indefinitely or subjecting the individual to the criminal process is well within the President's war powers umbrella authority. Yet, a formalized procedure, developed by either the executive branch or Congress, outlining precisely how future citizen-enemy combatants captured abroad in the global war on terror will be treated is overdue. Such a code would give the Government increased legitimacy at this difficult intersection between the President's wartime power and the individual's due process right.

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[156] *Id.*

[157] United States v. Lindh, 212 F. Supp. 2d 541, 547 (2002). The allegations against Lindh by the Government were similar to those against Hamdi. *Id.* at 545-47. The Government alleged that Lindh traveled from the United States to Pakistan where he attended a military training camp and later fought with al Qaeda in Afghanistan. *Id.* at 545-46. Lindh was captured by the Northern Alliance in November 2001 and was later transported back to the United States where he faced a ten count criminal indictment in federal district court. *Id.* at 546-47.

[158] *Hamdi*, 124 S. Ct. at 2636 (plurality opinion).

## B. JUSTICE O'CONNOR'S USE OF THE *MATHEWS* BALANCING TEST WAS IMPROPER

### *1. Charting an Intermediate Road between the District Court and the Fourth Circuit*

*Hamdi* implicates two central constitutional principles which are in direct conflict on the facts of this case: the Executive's war power derived from Article II and the citizen's right to procedural due process prior to the loss of liberty guaranteed by the Fifth Amendment.[159] Justice O'Connor described the dilemma as "the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right."[160] Justice O'Connor resorted to a judicious balancing test established in *Mathews v. Eldridge*.[161] Under the *Mathews* test, the "private interest that will be affected by the official action" is weighed against the Government's interest "including the function involved" plus the Government's increased burden if it were to provide the additional process to the individual.[162] Thus, in Hamdi's case, his private interest was his liberty interest in not being erroneously detained by the Government while the Government's interest included successfully prosecuting a war on terrorism through detaining enemy combatants without the distraction of litigation halfway around the globe.[163]

The balancing analysis led Justice O'Connor to chart a middle course between the district court's pro-Hamdi decision and the Fourth Circuit's pro-government decision.[164] The district court essentially called for an extensive production of documents and records by the Government and a due process hearing on par with a normal habeas corpus proceeding, a ruling that the Fourth Circuit struck down as not appropriate in light of deference owed to the Government's national security and intelligence imperatives.[165] The Fourth Circuit found that the military interrogation had been sufficient process for Hamdi, and he was due no further review or a hearing.[166] Justice O'Connor split the difference by finding that the district court's view did not defer to the Government's interests enough, while the

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[159] *Id.* at 2646 (plurality opinion).

[160] *Id.* (plurality opinion).

[161] *Id.* (plurality opinion) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[162] *Id.* (plurality opinion) (quoting *Mathews*, 424 U.S. at 335).

[163] *Id.* at 2646-48 (plurality opinion).

[164] *Id.* at 2648 (plurality opinion).

[165] *Id.* at 2637-38 (plurality opinion).

[166] *Id.* at 2638 (plurality opinion).

Fourth Circuit's opinion did not afford the citizen-detainee's interest sufficient weight.[167]

### 2. *The Impropriety of the* Mathews *Balancing Test*

Certainly, the Supreme Court sometimes chooses a unique course not previously espoused by the parties or the lower courts, but Justice O'Connor's use of the *Mathews* balancing test to arrive at such a middle road was incorrect. *Mathews v. Eldridge* was a case involving the termination of disability benefits.[168] In *Mathews*, the Court balanced the individual's property right in the continued receipt of disability benefits against the Government's interest in not incurring the additional cost and hassle of providing pre-termination hearings to benefit recipients.[169] In *Medina v. California*, the Supreme Court reviewed the origins of the *Mathews* balancing test and expressed grave doubts about its applicability to the criminal law arena.[170] The test was conceived to deal with due process claims arising in the context of administrative law and the property interests inherent in the provision of Government benefits.[171] However, in subsequent years, the *Mathews* balancing test has been utilized as a more general approach for examining due process claims and has been applied in a variety of factual circumstances.[172] For example, the test was applied by the Court in a case assessing the nature of the process due a natural parent in a parental rights termination proceeding.[173] Similarly, the test was invoked in a case involving the indefinite commitment of an allegedly mentally ill individual.[174] Yet, the *Mathews* test has been used by the Court in cases involving due process claims in the context of criminal law cases only twice, and both times, the Court asserts, the test was not clearly essential to the results reached in either case.[175] In fact, only two years prior to the *Hamdi* decision, Chief Justice Rehnquist, who voted with the plurality in *Hamdi*, flatly stated that the Court has "never viewed *Mathews*

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[167] *Id.* at 2648 (plurality opinion).

[168] 424 U.S. 319, 335 (1976).

[169] *Id.*

[170] 505 U.S. 437, 444-45 (1992).

[171] *Id.* at 444.

[172] *Id.*

[173] *Id.* (citing Santosky v. Kramer, 455 U.S. 745, 754 (1982)).

[174] *Id.* (citing Addington v. Texas, 441 U.S. 418, 425-27 (1979)).

[175] *Id.*; *see* Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (utilizing the *Mathews* test to decide whether a psychiatrist must be provided to an indigent capital defendant who has made his sanity an issue prior to trial); United States v. Raddatz, 447 U.S. 667, 677 (1980) (applying the *Mathews* test to the issue of whether federal magistrates may make findings and recommendations on motions to suppress evidence).

as announcing an all-embracing test for deciding due process claims."[176] Thus, while the *Mathews* balancing scheme may have merit in the realm of Government benefits implicating the denial of property rights, the test is simply inapplicable to a right-to-liberty case such as *Hamdi* that involves the essence of two of the most significant constitutional checks and balances: the war power versus due process.

Moreover, it appears practically impossible to adequately measure such fundamental and amorphous concepts against one another without minimizing the importance of one at the expense of the other. Such a balancing test may be amenable to more finite property rights cases involving welfare benefits or social security disability benefits. However, the right to liberty must be recognized as a more transcendent right existing on a higher plane than property rights and, therefore, incapable of being balanced by an artificial and abstract test. The likely outcome of such judicious balancing is that the judicial branch will improperly delegate additional power to itself under the guise of mechanically weighing competing interests. As Justice Thomas correctly pointed out, the danger is that the Court could "balance[] away" either individual rights or governmental powers guaranteed under the Constitution as the Court sees fit, thus upsetting the principle of the separation of powers among the three coequal branches.[177]

Professors Martin Redish and Lawrence Marshall have taken issue with the Supreme Court's movement away from notions of due process that reflect the English common law or modern notions of fairness and toward the current balancing scheme used to determine how much process is due.[178] The Supreme Court has drifted away from a recognition of the general values protected by the Due Process Clause, namely fairness, in favor of a flexible model applied on a case-by-case basis potentially inconsistent with the purposes of the Clause and the intent of the Framers.[179] While a certain degree of flexibility is "both necessary and advisable," the Court must hold fast to certain core elements of due process.[180] Redish and Marshall argue that "it is likely that the Court's balancing test, lacking any minimum floor of procedural protection will generally find in favor of the governmental interest."[181] Indeed, "the

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[176] Dusenbery v. United States, 534 U.S. 161, 168 (2002).

[177] *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2674 (2004) (Thomas, J., dissenting).

[178] Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 468 (1986).

[179] *Id.* at 456.

[180] *Id.*

[181] *Id.* at 473.

indeterminacy of the *Mathews*' balancing test threatens to undermine wholly the viability of the guarantee [of due process]."[182] Chief among these core elements of due process must be the existence of an independent adjudicator.[183]

To be clear, Justice O'Connor did indeed use the *Mathews* test to secure, rather than deny, Hamdi's right to a hearing before a neutral decision-maker.[184] Yet, it seems entirely plausible that if Justice O'Connor had simply weighted the competing interests differently, by crediting the Government's interest more substantially, for example, Hamdi might have been denied his right to due process altogether. The argument against the use of the *Mathews* balancing test, espoused by Redish and Marshall, was reflected in Justice Scalia's opinion.[185] While some may argue that during exigencies of war "*inter arma silent leges*,"[186] Justice Scalia argued that the Constitution was "designed precisely to confront war" through certain safeguards and democratic principles, such as the Due Process Clause and the writ of habeas corpus.[187] Therefore, rather than employing any sort of balancing test, the Court should instead look to the nature of the interest implicated in order to determine whether due process should automatically apply. The more that due process is viewed as an elastic concept conceivably balanced away by the Court, the greater the risk that the Justices would be able to impose their own wills over the outcome of a case, rather than strictly interpreting the Constitution. Applying this analysis to *Hamdi*, the Court should have clearly established that the liberty interest involved was so paramount that meaningful due process should attach to any effort by the Government to indefinitely incarcerate a United States citizen. Rather than employing the *Mathews* test, the better view would be to recognize the indomitable right of a United States citizen to an impartial hearing that can never be balanced away by the Government's interest, as envisioned by the Due Process Clause.

### C. JUSTICE O'CONNOR'S ALTERATIONS TO NORMAL DUE PROCESS WERE UNSUPPORTED AND ARBITRARY AND MAY THREATEN FAIRNESS

Having established, by way of the *Mathews* balancing test, that Hamdi was entitled to more process than he received in order to rebut his

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[182] *Id.* at 474.

[183] *Id.* at 477.

[184] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2648 (2004) (plurality opinion).

[185] *Id.* at 2672 (Scalia, J., dissenting).

[186] "In times of war the laws are silent."

[187] *Hamdi*, 124 S. Ct. at 2674 (Scalia, J., dissenting).

classification as an enemy combatant, Justice O'Connor next turned to the qualities of the mandated due process hearing. At a minimum, the citizen-detainee must receive two things: (1) "notice of the factual basis for his classification" as an enemy combatant and (2) "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[188] However, Justice O'Connor suggested two significant limits upon the evidentiary requirements of such a due process hearing.[189] First, Justice O'Connor set forth the notion that hearsay "may need to be accepted as the most reliable available evidence from the Government in such a proceeding."[190] Second, Justice O'Connor stated that 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," would not offend the Constitution.[191] Specifically, once the Government sets out "credible evidence that the habeas petitioner meets the enemy-combatant criteria," the burden could then shift to that petitioner to produce "more persuasive evidence" that he is not an enemy combatant.[192] Justice O'Connor argued that under this burden-shifting proposal, the individual's liberty interest is served because the "errant tourist, embedded journalist, or local aid worker has a chance to prove military error," while the Government's asserted interest in prosecuting a war is counterbalanced on the other side of the equation.[193] Thus, the plurality opinion returns to the *Mathews* test, couching its analysis in terms of judicious balancing.[194]

These two arbitrary suggestions are mentioned together in a single, short paragraph near the end of the opinion and are clearly dicta.[195] The notions of suspending normal hearsay rules and reversing the normal burden of proof are completely unsupported by caselaw, statutes, or legal reasoning in the plurality opinion. But their impact on future citizen-detainees seeking to rebut their enemy combatant label may be vast. The burden shifting scheme is the more drastic and unwise of Justice O'Connor's two ideas. The conception that the Government must establish guilt beyond a reasonable doubt remains a pillar of due process in the criminal justice arena, because it reduces the risk of erroneous convictions based on factual errors, thereby contributing to the legitimacy and the

[188] *Id.* at 2648 (plurality opinion).
[189] *Id.* at 2649 (plurality opinion).
[190] *Id.* (plurality opinion).
[191] *Id.* (plurality opinion).
[192] *Id.* (plurality opinion).
[193] *Id.* (plurality opinion).
[194] *Id.* (plurality opinion).
[195] *Id.* (plurality opinion).

"moral force of the criminal law."[196] Justice Frankfurter declared that "[i]t is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'"[197] While it is important to note that the guilt beyond a reasonable doubt standard is tied to the criminal justice system and that Hamdi was detained outside of that system militarily, the core purpose of that standard is equally applicable in Hamdi's case: the Government must meet a high burden of proof in order to minimize the risk of error prior to the deprivation of the individual's liberty interest. Thus, the idea of shifting that burden of proof off of the Government and onto the accused stands in stark contrast to the notion of fairness and accuracy which due process was designed to protect.

Justice O'Connor's holding in *Hamdi* spoke of the citizen-detainee's "fair opportunity to rebut the Government's factual assertions."[198] Likewise, it is "fundamental" that the citizen's right to an opportunity to be heard be granted in a "meaningful manner."[199] It is true that under Justice O'Connor's conception of this hearing, the citizen is entitled to an attorney and to notice of the facts underlying his detention by the Government. Yet the hearing appears to be neither fair nor meaningful if the most basic attributes of our justice system are drastically altered. The danger is that, conceivably, the Government might not have to offer any more information than the alleged facts listed in the Mobbs Declaration before the burden shifts to the citizen-detainee to prove his innocence.

The one argument, not made by Justice O'Connor, that could support the two proposed evidentiary limitations is that when an American citizen is captured on a remote foreign battlefield, as opposed to being captured within United States borders, there exists a logical presumption that the individual is indeed an enemy combatant. Thus, pursuant to the "open courts rule" of *Ex parte Milligan*, a citizen captured inside the United States while he is plotting or engaging in terrorism against civilians might be entitled to the full protections of the domestic criminal justice system.[200] However, a citizen captured outside the United States while he is actively opposing the United States military might be entitled to a hearing with less procedural safeguards that determine his status as an enemy combatant. As with the definition of the term "enemy combatant," the input of Congress

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[196] *In re* Winship, 397 U.S. 358, 363-64 (1970).

[197] Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting).

[198] *Hamdi*, 124 S. Ct. at 2648 (plurality opinion).

[199] *Id.* (quoting Fuentes v. Shevin, 407 U.S. 67, 80 (1972)).

[200] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866).

regarding the evidentiary requirements of the due process hearing would provide added credence to the Court's opinion in *Hamdi*.

## D. WHERE TO GO FROM HERE: MILITARY TRIBUNALS VERSUS A FEDERAL TERRORISM COURT

### *1. Military Tribunals*

In addition to the two changes in the evidentiary requirements of the due process hearings, Justice O'Connor stated that "[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."[201] Thus, in the plurality's opinion, the neutral decision-maker assessing the merits of the citizen's enemy-combatant label may be a military tribunal rather than a federal district court.[202] Justice O'Connor noted that the military's own regulations already require the use of military tribunals in a situation where an enemy detainee claims prisoner-of-war status covered by the Geneva Convention.[203] Similarly to the two alterations in the evidentiary requirements set forth by Justice O'Connor,[204] the concept of using military tribunals to determine the enemy combatant status of a citizen was likewise treated in a single paragraph in the opinion, unsupported by any caselaw.[205] However, the idea of subjecting United States citizens to military tribunals has been addressed by the Court in past cases.

In *Milligan*, the Court examined the Civil War-era case of a United States citizen tried and convicted before a military tribunal for actions allegedly contravening the laws of war within the United States.[206] The Court held that Congress did not have the power to create military tribunals when state courts were open.[207] However, in *Quirin*, the Court unanimously held that unlawful combatants could be subjected to military tribunals for trial and punishment, even if they were United States citizens.[208] Relying on *Quirin*, it appears that subjecting a citizen to a military tribunal is not prohibited by the Constitution or precedent if that

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[201] *Hamdi*, 124 S. Ct. at 2651 (plurality opinion).

[202] *Id.* at 2651-52 (plurality opinion).

[203] *Id.* (citing Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997)).

[204] *See supra* Part V.C.

[205] *Hamdi*, 124 S. Ct. at 2651-52 (plurality opinion).

[206] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 2 (1866).

[207] *Id.* at 123.

[208] *Ex parte* Quirin, 317 U.S. 1, 31 (1942).

citizen is accused of being an unlawful, or enemy, combatant. Additionally, the fact that Hamdi was captured in a zone of active combat in Afghanistan among members of the Taliban further justifies putting Hamdi to a military tribunal in order to determine whether he was in fact an enemy combatant. Use of a military tribunal would be far less reasonable if Hamdi, an American citizen, were captured within the borders of the United States for alleged crimes not involving the military, as in *Rumsfeld v. Padilla*.[209] Thus, a simple formula may be warranted: if the citizen is captured within the United States in the midst of plotting or fighting against innocent civilians, then he should be subject to the criminal justice system, but if the citizen is captured outside the United States in a foreign zone of active combat in which the military is engaged, then he should be subject to a military tribunal.

However, the use of military tribunals to try and punish American citizens is constitutionally dubious in view of several relevant provisions. Article III, § 2 of the Constitution states, "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[210] The Fifth Amendment guarantees that no person shall be deprived of life or liberty without due process of law.[211] The Sixth Amendment guarantees the right to notice of criminal charges, the right to a speedy and public trial by an impartial jury, and the right to assistance from counsel.[212] Thus, the Constitution limits the Government's power to detain its citizens by guaranteeing procedural due process. In *Hamdi*, the Government did not charge the citizen with any crime, seeking to remove the detention from the reach of these constitutional provisions.

On the other hand, a former counsel to President Nixon has argued that the criminal justice system is simply not appropriate for terrorism cases.[213] First, terrorism is fundamentally different from other crimes because terrorist acts are not "legitimate acts of war under international law, but rather must be regarded as war crimes or crimes against humanity."[214]

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[209] 124 S. Ct. 2711 (2004). In *Padilla*, the defendant, a United States citizen, was apprehended upon arrival from Pakistan at Chicago's O'Hare International Airport subject to a warrant in connection with the investigation into the 9/11 attacks. *Id.* at 2715. The Supreme Court denied Padilla's habeas corpus petition on procedural grounds because the petition named a respondent over which the district court had no jurisdiction. *Id.* at 2727.

[210] U.S. CONST. art. III, § 2.

[211] U.S. CONST. amend. V.

[212] U.S. CONST. amend. VI.

[213] John Dean, *Appropriate Justice for Terrorists: Using Military Tribunals Rather than Criminal Courts*, FindLaw's Legal Commentary, *at* http://writ.news.findlaw.com/dean/20010928.html (Sept. 28, 2001).

[214] *Id.* (quoting Spencer H. Crona & Neal A. Richardson, *Justice for War Criminals of*

Second, criminal trials of terrorists are inefficient and costly.[215] For example, the two criminal trials of the foreign terrorists accused of the 1993 bombing of the World Trade Center required thirteen months, hundreds of witnesses, and over 1,000 exhibits.[216]

As Justice O'Connor mentioned, the basic structure and procedure of a military tribunal was established in Army Regulation 190-8, governing the use of military tribunals to determine whether a captured individual's status is that of a prisoner of war or an unlawful combatant.[217] The Regulation states that the procedures contained therein are in accordance with Article 5 of the Third Geneva Convention.[218] According to the Army Regulation, a competent tribunal shall be composed of three commissioned officers, one of which serves as the recorder.[219] The Regulation provides that the proceedings shall be held open, except if security would be compromised if held open.[220] The detainee shall be advised of his rights at the beginning of the hearing and shall be allowed to attend all open sessions.[221] The detainee shall be allowed to "call witnesses if reasonably available" and may question witnesses called against them.[222] Military witnesses are not "reasonably available" if their commanders determine that "their presence . . . would affect combat or support operations," in which case, written statements may be substituted.[223] Detainees have the right to testify, but may not be compelled to do so.[224] The three-member tribunal shall review the evidence at the conclusion of the hearing and determine by majority vote the status of the individual.[225] Finally, a written report of the tribunal's decision must be completed.[226]

Notably, these procedures do not call for the burden of proof to be placed on the accused to prove that he is not an unlawful combatant, as

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*Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 361 (1996)).

[215] *Id.*

[216] *Id.* (citing Crona & Richardson, *supra* note 214, at 350-52).

[217] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2651 (2004) (plurality opinion) (citing Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190-8 §§ 1-6 (1997)).

[218] Army Reg. 190-8 §§ 1-6 (citing Geneva Convention [No III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. V, 6 U.S.T. 3316, 75 U.N.T.S. 135).

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

[226] *Id.*

Justice O'Connor suggested in her opinion.[227] Thus, these regulations appear to be more fair to the citizen-detainee than Justice O'Connor's conception of the due process hearing, in light of her alterations. A military tribunal system, in which the citizen-detainee would be able to present evidence and witnesses to rebut his enemy combatant label before three legally trained judges, may comport with the requirements of due process as envisioned by the Fifth Amendment. Indeed, in light of the Supreme Court opinions in *Hamdi* and *Rasul v. Bush*,[228] the military established military tribunals to evaluate the enemy combatant status of foreign nationals being detained at Guantanamo Bay.[229] The regulations governing the tribunals follow much of the language of Army Regulation 190-8. They also take into account Justice O'Connor's statement regarding hearsay evidence in *Hamdi*:

> The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.[230]

However, the use of status review hearings before military tribunals has already been called into question by a federal judge.[231]

The idea of the need for an independent adjudicator in any proceeding involving the Due Process Clause is relevant here.[232] The right to an independent adjudicator should be viewed as the primary consideration of the adequacy of the process due the citizen because "[t]he rights to notice, hearing, counsel, transcript, and to calling and cross-examining witnesses all relate directly to the accuracy of the adjudicative process."[233] However, "[t]hese procedural safeguards are of no real value . . . if the decisionmaker

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[227] *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2649 (2004) (plurality opinion).

[228] 124 S. Ct. 2686, 2699 (2004) (holding that U.S. courts had jurisdiction to hear habeas corpus petitions from non-citizens detained at Guantanamo Bay, Cuba).

[229] *See* Department of Defense Order, *supra* note 147; *The Tribunals Begin*, WASH. POST, Aug. 29, 2004, at B6.

[230] Department of Defense Order, *supra* note 147, at ¶ g(9).

[231] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 155 (D.D.C. 2004). Judge James Robertson found that the trial of Salim Ahmed Hamdan, a Yemeni man alleged to be Osama bin Laden's bodyguard, before a military tribunal was unlawful, because the prisoner was not able to adequately challenge his detention. *Id.* at 173. Hamdan's attorneys have asked the Supreme Court to intervene immediately to determine the legality of the use of military tribunals in light of the Geneva Convention. *See* Carol D. Leonnig, *Justices Asked to Rule on Detainees; Yemeni's Attorneys Want to Bypass Federal Appeals Court*, WASH. POST, Nov. 24, 2004, at A4.

[232] *See* Redish & Marshall, *supra* note 178, at 476.

[233] *Id.*

bases his findings on factors other than his assessment of the evidence before him."[234] For example, if a judge were a racist and the defendant were an African American, the judge may never find for that defendant despite the presence of all of the other procedural safeguards.[235] Similarly, if the adjudicator is an integral part of the Government and the Government is a party in the case, then it is possible that the Government would "be the judge of its own case" and tilt heavily toward the Government's side in the proceeding.[236]

Extending the argument to the case of military tribunals in *Hamdi*, the emerging issue becomes whether military tribunals may ever truly act as neutral and independent decision-makers. It is certainly arguable that if the same military that captured Hamdi was also the adjudicator of his enemy combatant status, then the findings might not be impartial, even if all other procedural due process elements were in place. Judge Henry Friendly noted that "as the independence of the decisionmaker increases, the need for other procedural safeguards decreases."[237] In addition to actual fairness in the due process hearing, the presence of an independent adjudicator bolsters other values, such as the appearance of fairness, equality, predictability, transparency, rationality, and the revelation of truth.[238] Thus, Justice O'Connor's alteration of elements of due process, such as the suspension of the hearsay rules and the shifting of the burden from the Government to the individual,[239] are dwarfed in comparison to the primacy of the independent adjudicator in assuring the adequacy of due process.

In the final analysis, if the President or the military ultimately sought to follow Justice O'Connor's lead and use military tribunals to determine the status of a citizen-detainee such as Hamdi in a manner described above, Congress should enter into the debate. In passing a statute, Congress could weigh the competing constitutional interests involved, formalize a procedure utilizing military tribunals, and further legitimize the idea by, indirectly, ascribing the will of the people. However, it must be remembered that only two United States citizens, Hamdi and John Phillip Walker Lindh, have thus far been captured on a foreign battlefield, and Lindh was subjected to the criminal justice system. Likely, the advantages of using military tribunals, namely their efficiency, with regard to the

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[234] *Id.*

[235] *Id.* at 476-77.

[236] *Id.* at 477.

[237] *Id.* (citing Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975)).

[238] *Id.* at 483-89.

[239] *See supra* Part V.C.

hundreds of foreign nationals held at Guantanamo Bay waiting to have their statuses reviewed, do not at this time outweigh the mandates of the Constitution when dealing with the indefinite detention of American citizens. Moreover, the legitimacy of such a proceeding before a military tribunal may be called into question, considering the importance of a neutral and independent decision-maker.

### *2. Federal Terrorism Court*

When viewed in light of the need for an independent adjudicator, subjecting United States citizens to military tribunals is likely inadequate to comport with due process requirements. The proper place for the citizen-detainee to get his day in court regarding his enemy combatant status appears to be the federal court system. Yet, the exigencies of the War on Terror require due consideration to both the secret intelligence involved in such status hearings and the goals of the executive branch and the military in prosecuting a war. Perhaps a new court could be established specifically to appropriately take into account liberty and security. Professor Harvey Rishikof has argued that a federal terrorism court is warranted.[240] Congress could establish a federal terrorism court under either Article I or Article III.[241] A federal trial court devoted exclusively to cases involving national security could craft procedures that would deal effectively with secret evidence without damaging the quality of United States intelligence by divulging its sources.[242] Trained defense lawyers, with proper security clearance, could serve in a similar manner to public defenders.[243] Judges, most likely Article III judges with life tenure, could be housed in a fortified federal courthouse in Washington, D.C., or could travel abroad to places like Guantanamo Bay to conduct hearings.[244]

A somewhat analogous federal court already exists in the Foreign Intelligence Surveillance Court. The Foreign Intelligence Surveillance Act of 1978[245] created this federal court in order to authorize electronic surveillance if there was probable cause to believe an individual to be a member of a "foreign power," even if that individual was also an American

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[240] Harvey Rishikof, *Is it Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1, 4-5 (2003).

[241] *Id.* at 30; *see* U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, § 1.

[242] *See* Rishikof, *supra* note 240, at 5.

[243] *Id.*

[244] *Id.*

[245] 50 U.S.C. §§ 1801-11 (2000).

citizen.[246] The Court consists of eleven federal judges with appropriate security clearance and meets in secret to issue search orders.[247]

Employing a jury of the defendant's peers, as contemplated by the Constitution, would likely be out of the question in cases dealing with sensitive national security issues and intelligence. Yet, allowing the citizen alleged to be an enemy combatant to put on a defense in federal court before a federal judge advances the proceeding closer to Justice O'Connor's ideal of a meaningful opportunity to contest the facts underlying the citizen's detention before a neutral and independent decision-maker. Therefore, through the creation of a federal terrorism court, the fairness of the proceeding and the legitimacy of the result may be realized to a greater extent than is possible in a proceeding before a military tribunal for reasons discussed above in Part V.D.1.

While the guarantee of fairness to the alleged enemy combatant remains preeminent, Professor Thomas F. Powers has argued that a federal terrorism court and statutory clarification of the process by which potential enemy combatants are detained should be established in part for political reasons.[248] In *Hamdi*, the Government set forth rather extreme arguments that it possessed the unchecked authority to indefinitely detain anyone, citizen or non-citizen, whom it labeled an enemy combatant, and no judicial review was allowed. Nonetheless, Defense Department legal counsel William Hayes insisted that the detainees at Guantanamo Bay received "a rigorous review of the facts under which they were captured and detained, as well as an interrogation process, a threat assessment process, a psychological analysis, a check of background information, [and] a check of law enforcement authorities."[249] But the rebuke of the Court has caused the executive branch to take a more balanced view of security and liberty.[250] Congress must step in and clarify the review process of detainees by statute, explicitly define the term "enemy combatant," and determine the maximum time period that a detainee may be incarcerated before receiving a hearing.[251] Additionally, Congress should establish a federal terrorism court composed of Article III judges incorporating special security measures to try alleged enemy combatants who dispute their status.[252]

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[246] *See* Rishikof, *supra* note 240, at 4.

[247] *Id.*

[248] Thomas F. Powers, *Due Process for Terrorists? The Case for a Federal Terrorism Court*, WKLY. STANDARD, Jan. 12, 2004, at 22.

[249] *Id.* at 24.

[250] *Id.* at 22.

[251] *Id.* at 24.

[252] *Id.*

Congressional action in these two areas would constitutionally legitimize the actions undertaken by the Government and would act to neutralize the criticism of civil libertarians.[253] In the end, as Justice O'Connor aptly reminded, our commitment to due process is currently being tested in difficult times, yet that very commitment at home is, in part, the reason we fight abroad.[254]

It is noteworthy that, rather than submit him to the due process hearing before a neutral decision-maker as the Court mandated, the Government released Yaser Esam Hamdi to Saudi Arabia, his homeland, on October 11, 2004.[255] Thus, the Supreme Court may be forced to address the specifics of such a hearing due a citizen such as Hamdi at some point in the future if any United States citizens are captured in conjunction with a potentially endless War on Terror.

## VI. CONCLUSION

The result reached by the plurality opinion in *Hamdi v. Rumsfeld* was correct. When a United States citizen is captured on the battlefield by the United States military in conjunction with the War on Terror, the Government may not label that individual an "enemy combatant" and indefinitely detain him without access to a lawyer. The citizen's right to due process guaranteed by the Constitution mandates that he be given a meaningful hearing before a neutral decision-maker in which he may rebut the underlying facts of his detention and "enemy combatant" label.

The Court correctly reasoned that the President was congressionally authorized to detain citizen and non-citizen alike, once it has been sufficiently established that the individual is indeed an enemy combatant. However, the plurality opinion failed to adequately instruct lower courts regarding the proper course in future factually similar cases. First, the plurality opinion declined to define the term "enemy combatant." Second, the plurality's use of the *Mathews* balancing test was improper given its origins and the liberty interest involved in *Hamdi*. Third, the Court neglected to outline a constitutionally acceptable procedure for determining whether a citizen-detainee's enemy combatant status is accurate. Finally, the plurality opined that military tribunals may be constitutionally acceptable to fulfill the role of the neutral decision-maker. However, a new federal terrorism court may ultimately be preferable. Since the fairness and the constitutionality of the due process hearing is paramount to the

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[253] *Id.* at 25.

[254] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2648 (2004) (plurality opinion).

[255] Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15.

legitimacy of detaining citizen-enemy combatants in wartime, the Court's failure on the four counts above leaves the outlook for United States citizens disputing their detention in conjunction with the War on Terror murky and ambiguous.

James B. Anderson