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ARTICLES

COMPETING PARADIGMS OF CONSTITUTIONAL POWER IN “THE WAR ON TERRORISM”

JOHN S. BAKER, JR.*

[W]e . . . need to think more systematically and universally about the issue of combatants. Two years into the war on terror, it is time to move beyond case-by-case development. We need to debate a long-term and sustainable architecture for the process of determining when, why, and for how long someone may be detained as an enemy combatant, and what judicial review should be available.

—The Honorable Michael Chertoff¹

The inaptly named “war on terrorism”² has inspired polarized reactions which, consciously or not, rest on different paradigms of how the three branches of the federal government relate to each other in the exercise of our nation’s sovereign power to defend itself. On one side, the Bush administration has attempted to enhance and consolidate executive power in its

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1. Michael Chertoff, *Law, Loyalty, and Terror: Our Legal Response to the Post-9/11 World*, THE WEEKLY STANDARD, Dec. 1, 2003, at 15, 17. On February 15, 2005, Judge Chertoff was sworn in as the second Secretary of the Department of Homeland Security. He formerly served on the U.S. Court of Appeals for the Third Circuit from 2003 to 2005 and as head of the Justice Department’s Criminal Division from 2001 to 2003.

2. For an example of why the label “war on terrorism” is inaccurate, see ROGER SCRUTON, *THE WEST AND THE REST* (2002). Dr. Scruton states:

[T]he idea of a “war on terrorism” makes little sense. Terrorism is not, after all, an enemy, but a method used by the enemy. The enemy is of two kinds: a tyrant dictator, and the religious fanatic whom the tyrant protects. To act against the first is feasible, if we are prepared to play by the tyrant’s rules. But to act against the second requires a credible alternative to the absolutes with which he conjures. It requires us not merely to believe in something, but to study how to put our beliefs into practice.

Id. at 161.

fight against terrorists. The Patriot Act³ enhances the Executive's investigative powers, while the Intelligence Act⁴ is supposed to consolidate the power of intelligence gathering. At least for some in the administration, the underlying paradigm is that of a consolidated State, exemplified by the willingness to erode the distinction between internal law enforcement and military/war powers. Even though the Framers centralized military power in the federal government, they rejected a consolidated state as inconsistent with liberty.⁵ The administration's failure to articulate adequately its concern for liberty, while pursuing security, has made it unnecessarily vulnerable to charges that its policies jeopardize civil liberties.

Unfortunately, the Bush administration has allowed the opposition to claim the mantle of liberty in the "war on terrorism." The most visible, aggressive, and libertarian opponent has been the American Civil Liberties Union ("ACLU").⁶ The opposition is not monolithic, however. Between administration cheerleaders and die-hard opponents, there are those who support some and oppose other aspects of the "war on terrorism." Nevertheless, in the media, the conflict is framed simply as one between those for liberty and those for security. The main opposition, like the administration, does not generally distinguish law enforcement from the exercise of war powers. Thus, because the Bush administration and the opposition agree on such a fundamental premise, the opposition has been able to avoid the most serious objection to its efforts to extend its libertarian paradigm from domestic law enforcement into the arena of foreign and defense matters. That is, by rhetorically mixing police and mili-

3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, 18 U.S.C. § 1960 [hereinafter USA PATRIOT Act].

4. Intelligence Reform and Terrorist Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

5. See, e.g., THE FEDERALIST NOS. 39, 47 (James Madison, John Jay, and Alexander Hamilton, writing as Publius) (Jacob E. Cooke ed., 1961).

6. The ACLU was the first to file suit challenging the USA PATRIOT Act with the case of *Muslim Community Association of Ann Arbor v. John Ashcroft*, No. 03-72913 (E.D. Mich. filed July 30, 2003). See Press Release, American Civil Liberties Union, PATRIOT Act Fears Are Stifling Free Speech, ACLU Says in Challenge to Law (Nov. 3, 2003), at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=14307&c=262> (on file with the Notre Dame Journal of Law, Ethics & Public Policy). There are other organizations, notably the Cato Institute, which reflect a different libertarian outlook. See Cato Institute, *About Cato*, at <http://www.cato.org/about/about.html> (last visited Mar. 1, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). The Cato Institute "is named for *Cato's Letters*, a series of libertarian pamphlets that helped lay the philosophical foundation for the American Revolution." *Id.*

tary powers, the administration has facilitated the argument for extending judicial oversight from law enforcement to military powers.

In 2004, the Supreme Court decided three cases related to “the war on terrorism”: *Rasul v. Bush*,⁷ *Hamdi v. Rumsfeld*,⁸ and *Rumsfeld v. Padilla*.⁹ *Rasul*, which is listed first, out of order, was very damaging to presidential power. No doubt stunning the administration,¹⁰ *Rasul* extended habeas corpus jurisdiction to aliens detained at Guantanamo Naval Base. Although *Rasul* was a statutory holding, it clearly highlighted the issues of the judiciary’s intrusion into military matters. For the first time, the Court created a judicial check on the President’s Commander in Chief powers, when those powers are exercised outside the United States.¹¹

Between the two paradigms, one statist and the other libertarian, stands another: an originalist one—that of the Constitution’s design for liberty. The originalist paradigm is more nuanced than the other two paradigms, which are reductionist. These nuances are reflected in the opinions of the Court’s only two real originalists, Justices Scalia and Thomas, who joined in dissenting in *Rasul* and then opposed each other in separate dissents in *Hamdi*.¹² As they agree, the federal government as a whole has been given all the power necessary to protect the nation’s liberty.¹³ Their disagreement over the nature of the restraints on the exercise of military power within the United States reflects concerns dating from the Founding.¹⁴ Those his-

7. 124 S. Ct. 2686 (2004).

8. 124 S. Ct. 2633 (2004).

9. 124 S. Ct. 2711 (2004).

10. See *Rasul*, 124 S. Ct. at 2710 (Scalia, J., dissenting) (“The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs.”).

11. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (rejecting the claim that the President can exercise military power as Commander in Chief *within the United States* without congressional authorization).

12. This is not to imply that opinions by the other justices in the examined cases lack nuance. The particulars of the various opinions are discussed *infra* in Part I.

13. See *Hamdi*, 124 S. Ct. at 2682 (Thomas, J., dissenting) (“Justice Scalia apparently does not disagree that the Federal Government has all power necessary to protect the Nation.”).

14. As to matters of national defense, THE FEDERALIST PAPERS defend the proposition embedded in the Constitution that “[t]he authorities essential to the common defence . . . to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support . . . ought to exist without limitation.” THE FEDERALIST NO. 23,

torical concerns involve the use of military force primarily against American citizens, unlike the novel proposition in *Rasul* that courts can restrain the President's exercise of military power against external enemies.

The Constitution structures separation of powers to protect liberty by strengthening the federal judiciary and the President.¹⁵ In international matters, the federal judiciary has an important role *vis-à-vis* the states, namely to keep them from interfering in international matters. Not only does the Constitution give the Supreme Court original jurisdiction "[i]n all cases affecting Ambassadors, Public Ministers and Consuls,"¹⁶ it also gives Congress the power to define offenses against the Law of Nations.¹⁷ Given the Founders' understanding of the Law of Nations as the realm of sovereigns¹⁸ and their creation of an energetic Executive largely to deal with other sovereigns, they had no notion that the Supreme Court would check the President outside the United States. The Constitution distinguishes matters of internal order, where the protection of liberty demands dividing power, from external matters of defense, where the defense of liberty requires unity of power.

Rasul, although only a statutory holding, indicates the willingness of the six-member majority to reconstruct the structure of separated powers in ways that will limit the President's exercise of power in defending the nation's liberty. Of course, those justices certainly do not believe they are threatening liberty. On the contrary, they must believe that they are advancing the protec-

supra note 5, at 147. That proposition prompted objections to the Constitution on the ground that its allowance of standing armies in times of peace represented a threat to the liberties of the people. See THE FEDERALIST NOS. 24–29, *supra* note 5. Opponents argued, inter alia, that the military would be required to enforce federal laws. See THE FEDERALIST NO. 27, *supra* note 5. While admitting that occasionally the national government might have to resort to force, THE FEDERALIST NO. 27 explained that the military would not normally be required because the structure of the Constitution would incline citizens of the states to obey the law. *Id.*

15. See THE FEDERALIST NOS. 47–51, *supra* note 5.

16. U.S. CONST. art. III, § 2, cl. 2.

17. *Id.* art. 1, § 8, cl. 10; see also THE FEDERALIST NO. 42, *supra* note 5.

The power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, belongs with equal propriety to the general government; and is a still greater improvement on the articles of confederation. These articles contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the confederacy with foreign nations.

Id. at 280–81.

18. See JEREMY RABKIN, WHY SOVEREIGNTY MATTERS 23–27 (1998).

tion of liberty by extending their oversight of the President beyond our borders. Consciously or not, however, they operate under a paradigm about the distribution of sovereign power in external affairs that differs radically from that of the Framers. The three dissenters in *Rasul* would decide in accord with the Framers' paradigm regarding presidential power in matters of external national defense. As indicated by their three different positions in *Hamdi*, however, they adhere to different paradigms regarding the President's exercise of military power within the United States.

While *Rasul* was not a constitutional holding, there are indications elsewhere that members of the Court are prepared, at some point, to constitutionalize the constraints on the President's exercise of his Commander in Chief powers exercised anywhere in the world.¹⁹ This article explains *Rasul*, along with *Hamdi* and *Padilla*, with a view to promoting legislative amendment of the habeas statute in order to repeal the result in *Rasul* before the Court has the opportunity to revisit the question of the President's power to detain enemy aliens outside U.S. sovereign territory.

I. THE TERRORISM CASES DECIDED IN 2004

The three "war on terrorism" cases decided by the Supreme Court in 2004—*Rasul v. Bush*,²⁰ *Hamdi v. Rumsfeld*,²¹ and *Rumsfeld v. Padilla*²²—presented complementary factual situations: (1) foreigners captured and held in military custody outside the U.S. (at Guantanamo)—*Rasul*; (2) a presumptive American citizen captured and initially held by the military outside the U.S. (at Guantanamo), but then transferred to a military facility inside the U.S.—*Hamdi*; and (3) an American citizen arrested and initially

19. Prior to the decisions in the terrorism cases, Justice Ginsburg predicted that in an encounter between the United States and non-resident aliens: [T]he position taken in the Restatement (Third) of Foreign Relations would one day accurately describe our law. "[W]herever the United States acts," the Restatement projects, "it can only act in accordance with the limitations imposed by the Constitution." With human rights increasingly prominent on the world's agenda, that day may come sooner rather than later.

Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 7–8 (2003) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 note 1 (1978) (quoting *Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality opinion))).

20. 124 S. Ct. 2686 (2004).

21. 124 S. Ct. 2633 (2004).

22. 124 S. Ct. 2711 (2004).

held by law enforcement in the U.S. and then transferred to military custody in the U.S.—*Padilla*. Prior to the Supreme Court's decisions, many considered *Padilla* the most significant and controversial of the three cases because the arrest in the U.S. of an American citizen made his subsequent military detention the most difficult for the government to justify. On the other side, despite intense international interest in *Rasul*, history and established precedent, *Johnson v. Eisentrager*,²³ seemed strongly to favor the Justice Department. The elements of *Hamdi*—an American held in military custody in the U.S. but captured by the military during the war in Afghanistan and held as an “enemy combatant”—placed it somewhere in between these two.

The results in *Padilla* and *Rasul* confounded these expectations, while *Hamdi* was muddled in the middle with a partial victory for the government from a plurality opinion and judgment which ultimately favored the petitioner.²⁴ The majority opinion in *Padilla* did not reach the merits but, instead, held that the petition for habeas corpus²⁵ was filed in the wrong federal district court. The majority in *Rasul* held that federal district courts have jurisdiction to hear habeas corpus challenges to the legality of their military detention,²⁶ as well as other federal claims²⁷ filed by aliens held in military custody outside the United States. Ironically, the majority in *Padilla* held an American in military custody inside the United States strictly to the text of the habeas statute by requiring him to bring his challenge where he is detained,²⁸ while a different majority in *Rasul* interpreted the

23. 339 U.S. 763 (1950) (holding that an alien enemy engaged in the service of a government at war with the United States has no constitutional right to personal security or immunity from military trial and punishment).

24. Justice Souter concurred in the judgment “to give practical effect to the conclusions of eight members of the Court rejecting the Government’s position.” 124 S. Ct. at 2660 (Souter, J., concurring in the judgment). Justice Souter thought the result would “benefit” Hamdi. Indeed, Hamdi was later released as part of a deal in which he renounced his citizenship. See *‘Enemy Combatant’ Hamdi to be Freed*, UNITED PRESS INT’L (WASHINGTON), Sept. 22, 2004; see also Press Release, U.S. Dep’t of Defense, Transfer of Detainee Control Completed (Oct. 11, 2004), <http://www.defenselink.mil/releases/2004/nr20041011-1371.html> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

25. 28 U.S.C. § 2241 (2000).

26. See *id.* § 2242.

27. The Court held that federal district courts have jurisdiction, based on 28 U.S.C. § 1331, over petitioners’ claims under the Alien Tort Statute, 28 U.S.C. § 1350. See 124 S. Ct. at 2698–99.

28. *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2722 (2004) (quoting *Carbo v. United States*, 364 U.S. 611, 618 (1961) (“[W]ith respect to habeas petitions ‘designed to relieve an individual from oppressive confinement,’ the traditional

same text to allow aliens held in military custody outside the United States to file for habeas corpus effectively in any of the federal district courts.²⁹

As has often occurred in the Supreme Court opinions, this anomaly was attributable to Justice O'Connor and, to some extent, Justice Kennedy. Both signed on to the majority opinion in *Padilla*, with Justice Kennedy, joined by Justice O'Connor, also writing a concurring opinion. Justice O'Connor, however, joined the majority opinion in *Rasul*, which directly conflicts with the *Padilla* majority. Justice Kennedy, on the other hand, did not join the *Rasul* majority; he wrote separately, concurring only in the judgment. His two concurring opinions are consistent. The concurrence in *Padilla* posited possible exceptions to the normal habeas rules such that "a petition may be properly filed in any one of the federal district courts," citing *Rasul* as such an exception. Justice Kennedy's *Rasul* opinion attempted to explain the result as a limited exception to the normal habeas rule:

In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal court jurisdiction is permitted in these cases. This approach would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States and remains true to the reasoning of *Eisentrager*.³⁰

Experience has shown that exceptions have a way of becoming the general rule. Justice Stevens argued in his *Padilla*³¹ dissent for an exception to the territorial rule for those held in the United States. Writing the majority opinion in *Rasul*, in which Justice O'Connor joined, Justice Stevens rendered the territorial rule irrelevant outside the United States—as indeed it could not apply for habeas relief to be available. Steven's statement of the holding in *Rasul* references Guantanamo Bay, but the rationale as stated in the previous sentence interprets the statute to require only the ability to reach the defendant with service of process.³² Had Justice Stevens' view also prevailed in *Padilla*, the

rule has always been that the Great Writ is 'issuable only in the district of confinement.'").

29. See *Rasul v. Bush*, 124 S. Ct. 2686, 2695 (2004).

30. *Id.* at 2699, 2701 (Kennedy, J., concurring in the judgment).

31. See *Padilla*, 124 S. Ct. at 2730 (Stevens, J., dissenting).

32. *Rasul*, 124 S. Ct. at 2698.

No party questions the District Court's *jurisdiction* over petitioners' custodians. . . . Section 2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to

territorial rule would have been reduced to nothing more than an exception.

With the *Rasul* and *Padilla* majorities in direct conflict, it was not surprising that *Hamdi*, the case “in between,” was muddled without a majority opinion. *Hamdi* was the only one of the three cases that really addressed constitutional issues of separation of powers directly.³³ The differing opinions turn on the interplay of two issues: (1) Did Congress authorize military detention of an American citizen in Hamdi’s circumstances? (2) What inquiry could a federal court make in such circumstances?

On the first question, five justices—the plurality of Justice O’Connor, joined by the Chief Justice, and Justices Kennedy and Breyer,³⁴ plus Justice Thomas³⁵—accepted the Government’s position that Congress’s Authorization for Use of Military Force (the “AUMF”)³⁶ authorized the military detention on U.S. soil of an American citizen claimed to be an “enemy combatant.” Justice Thomas dissented, however. He rejected the plurality’s expanded habeas corpus inquiry, which he said violated the President’s power in our structure of separation of powers.³⁷ Four

hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.

Id. (emphasis added) (citing 28 U.S.C. § 2241).

By “jurisdiction,” the Court means only the ability to reach the petitioners’ custodian with service of process:

In *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494–95 (1973), this Court held . . . that the prisoner’s presence within the territorial jurisdiction of the district court is not “an invariable prerequisite” to the exercise of district court jurisdiction under the federal habeas statute. Rather, because “the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,” a district court acts “within [its] respective jurisdiction” within the meaning of § 2242 as long as the “custodian can be reached by service of process.”

Id. at 2695.

33. Justice Kennedy did make a passing reference to “the backdrop of the constitutional command of the separation of powers” in his concurring opinion in *Rasul*. 124 S. Ct. at 2699 (Kennedy, J., concurring in the judgment). Indirectly, of course, separation of powers is implicit in the discussion of subject matter jurisdiction and interpretation of the habeas corpus statute which appear in several of the opinions in the other two cases.

34. *Hamdi*, 124 S. Ct. at 2641–42.

35. *Id.* at 2679 (Thomas, J., dissenting).

36. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

37. *Hamdi*, 124 S. Ct. at 2680 (Thomas, J., dissenting).

I agree with the plurality that the Federal Government has power to detain those that the Executive Branch determines to be enemy combatants. But I do not think that the plurality has adequately explained the breadth of the President’s authority to detain enemy combatants,

justices—Justice Souter, joined by Justice Ginsburg, and Justice Scalia, joined by Justice Stevens—disagreed that the AUMF authorized military detention of an American citizen on U.S. soil. The two pairs split, however, on what Congress would have to do in order to authorize such detention. Justices Souter and Ginsburg would require an act with “a clear statement” by Congress in order to satisfy the Non-Detention Act,³⁸ which bars detention of a citizen “except pursuant to an Act of Congress.”³⁹ Justices Scalia and Stevens would require a suspension of the writ of habeas corpus by Congress pursuant to the Constitution.⁴⁰

On the second issue, eight of the justices—all but Justice Thomas—agreed in rejecting the Government’s position.⁴¹ The government had argued that “Hamdi has no basis for any challenge by petition for habeas except to his own status as an enemy combatant and even that challenge may go no further than to enquire whether ‘some evidence’ supports Hamdi’s designation.”⁴² Without the same majority on both issues, the Court produced a judgment only when Justice Souter, joined by Justice Ginsburg, concurred in the judgment so that there would be one.⁴³

In such a gumbo of opinions—with unusual and shifting groupings in the three cases, only one of which addresses constitutional issues of separation of powers directly—discerning any paradigms about separation of powers would appear to be very problematic. Certainly, distinctions turning on the details of alienage versus U.S. citizenship, place of detention versus place of capture, and Congress’s AUMF versus possible suspension of the writ of habeas corpus would seem to have been largely deter-

an authority that includes making virtually conclusive factual findings. In my view, the structural considerations discussed above, as recognized in our precedent, demonstrate that we lack the capacity and responsibility to second-guess this determination.

Id. (citation omitted).

38. 18 U.S.C. § 4001(a) (2000).

39. *Hamdi*, 124 S. Ct. at 2655 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (quoting 18 U.S.C. § 4001(a)).

40. *See id.* at 2660, 2665 (Scalia, J., dissenting); *see also* 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.”).

41. *See id.* at 2648 (the plurality opinion of O’Connor, J., joined by Rehnquist, C.J., Kennedy, J., and Breyer, J.); *id.* at 2653 (Souter, J., dissenting, joined by Ginsburg, J.); *id.* at 2668–71 (Scalia, J., dissenting, joined by Stevens, J.).

42. *See* Brief for the Respondents at 34–36, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6966).

43. *Hamdi*, 124 S. Ct. at 2652, 2660 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

minative. Still, fundamental differences over the interpretation of the habeas corpus statute in *Rasul* and *Padilla* do not simply reflect different readings of the same text and cases.

Some of the conflicts in these opinions are familiar ones between constitutional balancing and originalism—i.e., Justice O'Connor's plurality opinion versus Justice Scalia's dissent in *Hamdi*; and between textualism and non-textualism—i.e., Justice Stevens' majority opinion in *Rasul* and dissent in *Padilla* versus the Chief Justice's majority opinion in *Padilla* and Justice Scalia's dissent in *Rasul*. More noteworthy is that the Chief Justice and Justices Scalia and Thomas agree on interpreting the habeas statute in *Rasul* and *Padilla*, but each then goes his separate constitutional way in *Hamdi*.

Interpretation of federal statutes implicates separation of powers in that the interpreter either does or does not accept that the Constitution requires courts to make good-faith explications of Congress's meaning as expressed in the text.⁴⁴ Constitutional interpretation differs "not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text."⁴⁵ The Constitution is unusual in that it is to be read not as a list of "parchment barriers," but as institutionalizing a system of separated powers.⁴⁶ Especially on issues of war and national security, which are rarely litigated, it matters greatly under what paradigm a judge is operating. Until recently, as reflected in *Eisenrager*,⁴⁷ it would have been widely appreciated that matters of war and national security were rarely litigated precisely because the Constitution provides the courts little basis for intervening. Now, however, in an age of globalization, some justices are taking into consideration foreign and international legal sources when interpreting the U.S. Constitution. It becomes all the more necessary for originalists to be able to articulate how separation of powers operates with respect to defense of the

44. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 9–10 (1997).

45. *Id.* at 37 (quoting thereafter from Chief Justice Marshall's classic statement about the nature of a constitution in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

46. See THE FEDERALIST NO. 48, *supra* note 5, at 332–33, 338 (questioning propriety of "trust[ing] [mere] parchment barriers against the encroaching spirit of power" between the several departments).

The conclusion which I am warranted in drawing from these observations is, that a mere demarkation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

Id. at 338.

47. 339 U.S. 763 (1950).

country, including what distinctions there are between external and internal use of the military, between the military and law enforcement, and between the alien and the citizen.

II. THE CONSTITUTION'S PARADIGM FOR LIBERTY: DIVIDED POWERS IN DOMESTIC MATTERS; UNIFIED POWER IN FOREIGN AFFAIRS AND DEFENSE

Neither libertarian nor statist paradigms are compatible with the Constitution's particular version of separation of powers. Justice Ginsburg, for example, has articulated a libertarian paradigm which globalizes human rights and would extend federal judicial power as a check on the President worldwide.⁴⁸ This view is similar to that of those who opposed the Constitution⁴⁹ in distrusting a vigorous President as a threat to liberty. On the contrary, the Framers considered a vigorous President necessary to protect liberty.⁵⁰ The Framers struck a certain balance in the Constitution, and that does not include judicial balancing in matters of national defense. The President possesses a plenitude of power over the powers granted.⁵¹ Reagan demonstrated that a vigorous and effective President need not centralize as much power as possible. Those powers are restrained because they are much more clearly identified and, therefore, less threatening to liberty than those of the Congress.⁵²

48. Ginsburg, *supra* note 19.

49. For an explanation and defense of the manner in which the principle of separation of powers was implemented in the Constitution, see THE FEDERALIST NOS. 47-48, *supra* note 5.

50. See THE FEDERALIST NO. 70, *supra* note 5.

There is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government. The enlightened well wishers to this species of government must at least hope that the supposition is destitute of foundation . . . Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks . . .

Id. at 471.

51. See THE FEDERALIST NO. 23, *supra* note 5.

This is one of those truths, which to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal. The *means* ought to be proportioned to the *end*; the persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained.

Id. at 147.

52. See THE FEDERALIST NO. 48, *supra* note 5.

[I]n a representative republic, where the executive magistracy is carefully limited both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is

On the other side, statists have argued that the events of September 11th have changed everything and require more internal concentration of executive power. In fact, however, the Framers reflected on and responded to the equally challenging dangers of insurrection and war among the states. In structuring federal power to address those and other dangers, they provided constitutional power to use the military to maintain internal order, if necessary.⁵³ They understood, however, the dangers of doing so and expected the operation of the Constitution to make resort to internal use of military force a rare occurrence.⁵⁴ In *Hamdi*, despite the different positions taken by the Chief Justice and Justices Scalia and Thomas, they all viewed the President's

inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.

Id. at 333–34.

53. See THE FEDERALIST NO. 28, *supra* note 5.

That there may happen cases, in which the national government may be necessitated to resort to force, cannot be denied. Our own experience has corroborated the lessons taught by examples of other nations; that emergencies of this sort will sometimes arise in all societies, however constituted; that seditions and insurrections are unhappily maladies as inseparable from the body politic, as tumours and eruptions from the natural body; that the idea of governing at all times by the simple force of law (which we have been told is the only admissible principle of republican government) has no place but in the reveries of those political doctors, whose sagacity disdains the admonitions of experimental instruction.

Id. at 176.

54. See THE FEDERALIST NO. 8, *supra* note 5.

There is a wide difference also, between military establishment in a country, seldom exposed by its situation to internal invasions, and in one which is often subject to them, and always apprehensive of them. The rulers of the former can have no good pretext, if they are even so inclined, to keep on foot armies so numerous as must of necessity be maintained in the latter. These armies being, in the first case, rarely, if at all, called into activity for interior defence, the people are in no danger of being broken to military subordination. The laws are not accustomed to relaxations, in favor of military exigencies—the civil state remains in full vigor, neither corrupted nor confounded with the principles or propensities of the other state. . . . The army under such circumstances, may usefully aid the magistrate to suppress a small faction, or an occasional mob, or insurrection; but it will be unable to enforce encroachments against the united efforts of the great body of the people.

Id. at 47–48.

use of military powers within the territorial sovereignty of the United States, at least as against citizens, differently from what they said in *Rasul* about his use of those powers outside the United States.

A. *Basic Principles*

It is axiomatic, according to *The Federalist*, that the federal government has all the constitutional power necessary to defend the nation, whether the threat comes from foreign attack or from the breakdown of internal order:

These powers ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defense. This is one of those truths, which . . . rests upon axioms as simple as they are universal. The *means* ought to be proportioned to the *end*; the persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained.⁵⁵

The Supreme Court has confirmed the view that the Constitution confers on the federal government an “independent substantive power” with respect to national security, and specifically with respect to the “persons or property of [an] enemy found at the time, within the territory” of the United States.⁵⁶ According to the Court, these powers inhere in the national sovereignty, rather than in any particular authority granted to the federal government in the Constitution.⁵⁷

In previous wars, except the Civil War, a fairly discernable line has existed between external defense and internal police. Thus, the Supreme Court has distinguished “between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs.”⁵⁸

55. THE FEDERALIST NO. 23, *supra* note 5, at 147 (emphasis added).

56. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125–26 (1814).

57. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–19 (1936).

58. *Id.* at 315.

This same division has been reflected in federal legislation from the Founding to the Civil War and since, after Reconstruction. In 1792, Congress passed a law that limited presidential use of military forces for domestic law enforcement to situations in which ordinary means of law enforcement could not restore order.⁵⁹ During the Civil War and Reconstruction, Congress expanded the internal use of military forces. In 1878, however, Congress enacted the Posse Comitatus Act,⁶⁰ which prohibits the use of the military to execute the laws of the United States, the states, or the territories, except as specifically provided.⁶¹

The distinction between military and law enforcement powers is more than statutory. The federal government does have law enforcement powers, but those powers have limits. In particular, the federal government has no general police power.⁶² Congress must find the source for enacting criminal law either in particular enumerated powers or in the means necessary to implement those powers.⁶³ In matters of national security, on the other hand, the powers of the federal government are broader. The Constitution grants to the executive and legislative branches, as the preamble announces, specific powers to "insure domestic Tranquility and provide for the common defence."⁶⁴ Most notable and relevant for present purposes are the powers of the Congress under Article I, Section 8 to not only declare war, but also to "define and punish . . . Offenses against the Law of Nations"⁶⁵ and to "make Rules concerning Captures on Land and Water."⁶⁶ Likewise, the role of the President, under Article II, Section 2, as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States"⁶⁷ reflects the Constitution's grant of authority to the executive branch to address threats to national security independent of the Presi-

59. Brian L. Porto, Annotation, *Construction and Application of Posse Comitatus Act* (18 U.S.C.S. § 1385), and *Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Execute Laws*, 141 A.L.R. FED. 271, 281 (1997).

60. "Posse Comitatus" means "power of the country." BLACK'S LAW DICTIONARY 1200 (8th ed. 2004).

61. 18 U.S.C. § 1385 (2000).

62. See *United States v. Morrison*, 529 U.S. 598, 618 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 566 (1995) for the proposition that "[t]he Constitution . . . withhold[s] from Congress a plenary police power").

63. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324-26 (1819).

64. U.S. CONST. pmb1.

65. *Id.* art. I, § 8, cl. 10.

66. *Id.* art. I, § 8, cl. 11.

67. *Id.* art. II, § 2, cl. 1.

dent's separate role as chief magistrate and prosecutor of criminal laws.

B. *Application in "The War on Terrorism"*

It is understandable that, in the immediate aftermath of the terrorist attacks of September 11th, the knee-jerk reaction was to consolidate power. The President, as Commander in Chief of the military, operates within a centralized model. Moreover, the tactics of the terrorists made it difficult to discern any distinction between internal matters of law enforcement and external matters of defense. It is one thing to assert the proposition that a strong President is essential to both the internal and external defense of the country in order to preserve liberty. It does not follow that the President's military powers exercised within the U.S.—even though supported by Congress but without a suspension of the writ—can be exercised free of judicial scrutiny, as is appropriate outside the sovereign territory of the United States.⁶⁸

Unfortunately, the Bush administration's approach to military detention of two American citizens in the United States and its use of law enforcement abroad were part of a pattern of blurring law enforcement powers and war/foreign affairs powers.⁶⁹ While many of its politically appointed officials are conservatives who, when out of power, advocate restraints on federal power, that did not prevent adoption of policies which appear to reflect the paradigm of a consolidated State. What prevented internal consolidation from actually occurring was the institutional separation of powers, which, in internal matters, certainly includes

68. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); see also *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), in which a majority of the Supreme Court upheld President Lincoln's naval blockade of the Confederate States and the seizure of ships bound to and from them. The Court distinguished between Congress's power to declare war, which could be exercised only against a foreign power, not against a state, and Acts of Congress (1795 and 1807) which duly authorized the President to suppress insurrections. *Id.*

69. See, e.g., Kevin Sack, *Chasing Terrorists or Fears?*, L.A. TIMES, Oct. 24, 2004, at A1 (compiling administration policy via remarks of Attorney General Ashcroft).

In speech after speech, [Attorney General] Ashcroft recalled that [Robert] Kennedy's Justice Department "would arrest mobsters for spitting on the sidewalk." "Let the terrorists among us be warned," Ashcroft declared six weeks after the attacks. "If you overstay your visa, even by one day, we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage."

Id.

the federal courts. The introduction of the courts into external matters of national defense also prevents consolidation of power—to the detriment not only of security, but also of liberty, which the Founders equated in external matters *vis-à-vis* other sovereign states. As *The Federalist* observes, “The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of executive authority.”⁷⁰

The Bush administration could have done better at articulating a defense of the Presidency and this President’s policies in terms of separation of powers where it is most needed, namely in the use of military power outside the U.S. To do so, it would have had to distinguish the external from the internal use of federal power and between law enforcement and military power. As previously mentioned, however, both the Bush administration and its critics have uncritically applied the term “war on terrorism” to both internal and external issues of federal power against terrorists. With the “war” metaphor, the Bush administration has adopted policies which are militarizing matters of internal law enforcement. Thus, in the wake of September 11th, the President created for the first time a North American military command.⁷¹ Likewise, the creation of a Department of Homeland Security and a new Intelligence Agency⁷² reflect a merger of some elements of national defense and law enforcement. Some supporters of the administration have also proposed relaxing or

70. THE FEDERALIST NO. 74, *supra* note 5, at 500.

71. See Donald H. Rumsfeld, Transcript of Testimony by Secretary of Defense Donald H. Rumsfeld on Homeland Security before Senate Appropriations Committee (May 7, 2002), at <http://www.defenselink.mil/speeches/2002/s20020507-secdef.html> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

The president has approved a major revision of the command plan. Of interest today is that it will establish a combatant command for homeland defense, U.S. Northern Command, or what will undoubtedly be called NORTHCOM. NORTHCOM will be devoted to defending the people and territory of the United States against external threats and to coordinating the provision of U.S. military forces to support civil authorities.

....

In addition, NORTHCOM will be responsible for certain aspects of security, cooperation and coordination with Canada and with Mexico. It will also help DOD coordinate its military support to federal, state and local governments in the event of natural or other disasters.

Id.

72. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

eliminating the Posse Comitatus Act.⁷³ While ordinary citizens are not generally aware of these actions, they are conscious of terror threat alerts and burdensome airport security. Collectively, all these efforts may or may not have actually increased security. They have, however, fostered the impression that, increasingly, Americans are living in a garrison state, which the Framers knew eventually destroys liberty.⁷⁴

This milieu has been ideal for libertarians to thrust federal courts into foreign and military matters. *Rasul*⁷⁵ extended federal court jurisdiction not only to habeas relief, but to other federal claims including the Alien Tort Act.⁷⁶ A day after issuing the terrorism cases, the Supreme Court decided in *Sosa v. Alvarez-Machain*⁷⁷ that the Alien Tort Act allows federal courts to create causes of action for violations of well-defined customary international law norms. Citing the Restatement (Third) of Foreign Relations Law of the United States, the Court's discussion indicates that a "state policy" of "prolonged detention" might qual-

73. See Alison Mitchell, *Domestic Security Plan on House Agenda*, N.Y. TIMES, July 22, 2002, at A10.

Debate is also beginning on the Bush administration's call to consider using the military for domestic law enforcement. . . .

The Bush administration last week asked for a review of the Posse Comitatus Act of 1878 and other laws that sharply restrict the military's ability to participate in domestic law enforcement. . . .

Mr. Ridge himself sounded cautious about how far the administration would want to go in bringing the military into law enforcement.

"I think that generally that goes against our instincts as a country, to empower the military with the ability to arrest," Mr. Ridge said today. "But it may come up as a part of a discussion. It does not mean that it will ever be used or that the discussion will conclude that it even should be used."

Id.

74. See THE FEDERALIST NO. 8, *supra* note 5.

[T]he inhabitants of territories, often the theatre of war, are unavoidably subjected to frequent infringements of their rights, which serve to weaken their sense of those rights; and by degrees, the people are brought to consider the soldiery not only as their protectors, but as their superiors. The transition from this disposition to that of considering them as masters, is neither remote, nor difficult: But it is very difficult to prevail upon a people under such impressions, to make a bold, or effectual resistance, to usurpations, supported by the military power.

Id. at 48.

75. *Rasul v. Bush*, 124 S. Ct. 2686, 2698–99 (2004).

76. 28 U.S.C. § 1350 (2000).

77. 124 S. Ct. 2739 (2004).

ify.⁷⁸ That gave the Guantanamo plaintiffs a lot to work with on remand. It was precisely to prevent the possibility of judicial oversight that the Bush administration refused to subscribe to the treaty creating the International Criminal Court. If the seeds planted by *Rasul* are allowed to blossom, the use of American military force would be subjected to broad judicial oversight—not through international criminal jurisdiction under the International Criminal Court, but with similar intrusion on the Commander in Chief powers of the American President.

III. DISTINGUISHING WAR AND POLICE POWERS

Those who reject the extension of judicial oversight to military matters beyond our borders are left still to discern an originalist understanding for the use of military power within the territorial sovereignty of the United States. Of the three dissenters in *Rasul*, the Chief Justice has sided with the constitutional balancers in the *Hamdi* plurality. They believe they must balance “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.”⁷⁹ This kind of balancing, which bespeaks judicial supremacy, is consistent with both libertarian and statist paradigms. That is to say, the Court acts in a statist mode insofar as it refashions the Constitution’s allocation of and checks on the use of military power⁸⁰ and in a libertarian mode insofar as it grants liberties not provided through the text and structure of the Constitution.

To many judicial supremacists, it may seem that, especially in the absence of a clear, controlling, constitutional text, the

78. *Id.* at 2768–69 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987)).

79. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646 (2004).

80. Dissenting in *Hamdi*, Justice Scalia states:

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. . . . 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.

Id. at 2673 (Scalia, J., dissenting); see also *id.* at 2680 (Thomas, J., dissenting).

choice is between judicial balancing and no judicial role. Contained therein is the unstated premise that only the courts protect liberty. As established by the Framers, the judiciary's important role, however, was part of the larger design for protecting liberty through separation of powers.⁸¹ In considering the judicial role in *Hamdi*, the three other opinions—those by Justices Scalia, Thomas, and even Souter⁸²—pay attention to constitutional structure and give more weight to the roles of the other branches.

The two reliable originalists on the Court, Justices Scalia and Thomas, were diametrically opposed in *Hamdi* on the President's power over American citizens detained inside the U.S. during wartime. Justice Scalia observed, however, that his point was a very narrow one.⁸³ While he determined that the Constitution did not authorize the President's detention of Hamdi because Congress had not suspended the writ of habeas corpus as provided in Article I, he denied that the Court had any further role in the matter.⁸⁴ Both justices, in other words, saw a very limited role for the Court. The differences between the two justices force originalists to consider who has the better explanation of the Framers' understanding regarding the paradigm for protecting liberty within the U.S. in time of war. Whatever the original paradigm, it should guide particular policies in attempting to meet today's challenges created by the eroding of national borders. Without such guidance, the difficulties of dealing with concurrent internal and external terrorism threats make the simplicity of the statist and libertarian paradigms very attractive.

A. *Ex Parte Quirin* and *Ex Parte Milligan*

The differences between Justices Scalia and Thomas are reflected in their treatment of *Ex Parte Quirin*⁸⁵ and *Ex Parte Milligan*.⁸⁶ Arguably, the Government could draw from *Quirin* and *Milligan* a distinction between a belligerent who threatens the

81. See generally THE FEDERALIST NOS. 47–51, *supra* note 5, for a discussion of separation of powers.

82. See 124 S. Ct. at 2652, 2655 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (quoting FEDERALIST NO. 51, *supra* note 5, on separation of powers).

83. *Id.* at 2673 (Scalia, J., dissenting) (“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 the federal court.”).

84. See *id.* at 2671, 2673–74.

85. 71 U.S. (4 Wall.) 2 (1866).

86. 317 U.S. 1 (1942).

national security at the service of a foreign enemy and a civilian whose crime—although it may involve aiding and abetting an enemy in time of war—is subject to the jurisdiction of traditional law enforcement (rather than military) authority. Under that reading, the latter would enjoy the constitutional protections of an accused in ordinary courts and the former could be tried in military courts. In *Hamdi*, however, the point was that the Government detained Hamdi without any intention of trying him even in a military court.⁸⁷ According to the plurality, that was acceptable under the AUMF because “nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities.”⁸⁸

*Ex Parte Quirin*⁸⁹ concerned a group of commandos who were landed by German U-boats on U.S. beaches during World War II.⁹⁰ Their assignment from the German military authorities was to destroy military targets and war-production facilities on the homefront.⁹¹ All of the commandos were Germans except one, Haupt, who claimed to be a naturalized U.S. citizen. After capture by the FBI, the commandos were placed in military custody.⁹² Pursuant to an executive order, they were tried by a military commission, which found them all guilty and sentenced them to death. They then filed petitions for writs of habeas corpus, challenging the authority of the military tribunal and the tribunal’s denial of their constitutional rights, as specified in Article III and the Fifth and Sixth Amendments.⁹³

The Supreme Court upheld the military commission’s authority. The Court concluded that the President, as *Commander in Chief*, has the power to enforce all laws relating to the conduct of war, “and to carry into effect . . . all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.”⁹⁴ This power, the Court held, includes the authority “to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.”⁹⁵

The Court likewise rejected the would-be saboteurs’ claim to the traditional constitutional rights enjoyed by an accused in the

87. *Hamdi*, 124 S. Ct. at 2641.

88. *Id.* at 2640.

89. 317 U.S. 1 (1942).

90. *Id.* at 21.

91. *Id.*

92. *Id.*

93. *Id.* at 24.

94. *Quirin*, 317 U.S. at 26.

95. *Id.* at 28–29.

criminal justice system. The Court concluded, first, that the saboteurs were not criminal defendants, but rather were unlawful belligerents accused of violating the laws of war.⁹⁶ “[A]n enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed . . . to be offenders against the law of war subject to trial and punishment by military tribunals.”⁹⁷

The Court next rejected the commandos’ claim that, having been captured by FBI agents on U.S. soil, they enjoyed constitutional rights under Article III and the Fifth and Sixth Amendments:

We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.⁹⁸

Finally, the Court in *Quirin* readily rejected Haupt’s claim of constitutional rights by virtue of his purported U.S. citizenship.⁹⁹ U.S. citizenship, the Court held, “does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.”¹⁰⁰ By virtue of his allegiance to a foreign enemy and his taking up arms on behalf of that enemy, therefore, Haupt was subject to military punishment, rather than criminal justice.

Was this distinction between an unlawful belligerent and a traitorous civilian well-grounded in the Constitution and constitutional precedent? Should that distinction be viewed as the definitive boundary between the government’s national security power and its law enforcement authority? After the Civil War, *Ex Parte Milligan*¹⁰¹ considered the conviction by a military tribunal of a U.S. citizen, resident in Indiana, who was accused of conspiring to aid the cause of the Confederacy, then at war with the

96. *Id.* at 36.

97. *Id.* at 31.

98. *Id.* at 45; see also *In re Yamashita*, 327 U.S. 1, 23 (1946) (rejecting a Fifth Amendment challenge to the introduction of hearsay evidence in a prosecution before a military commission) (“[T]he commission’s rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require”).

99. *Quirin*, 317 U.S. at 37–38.

100. *Id.* at 37.

101. 71 U.S. (4 Wall.) 2 (1866).

United States. The Court unanimously overturned the conviction. Although the Court divided on the question of the tribunal's authority,¹⁰² it concluded that "no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, [who] in no way is connected with the military service."¹⁰³ The Court in *Quirin* distinguished *Milligan* as presenting a different case with different constitutional questions than the case before it. *Quirin* said *Milligan* involved a citizen who "was not an enemy belligerent . . . subject to the penalties imposed upon unlawful belligerents [Milligan was not] a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as . . . martial law might be constitutionally established."¹⁰⁴

B. Justice Thomas Versus Justice Scalia

The disagreement between Justices Scalia and Thomas concerns *Milligan*, *Quirin*, and their understanding of the Suspension Clause. Justice Thomas argues that *Ex Parte Milligan* supports Justice Scalia's position, but he contends *Quirin* overruled *Milligan*.¹⁰⁵ More than anyone else on the Court, however, Justice Thomas is willing to overturn well-established precedent if it does not properly interpret the Constitution.¹⁰⁶ So what Justice Thomas means is that *Quirin*, rather than *Milligan*, reflects the correct reading of the Constitution. His real concern, although labeled "an additional concern,"¹⁰⁷ is the question: Does the constitutional provision for suspension of the writ of habeas corpus provide the nation sufficient power to defend itself in all circumstances?

Justice Scalia apparently does not disagree that the federal government has all power necessary to protect the nation. If criminal processes do not suffice, however, Justice Scalia would require Congress to suspend the writ.¹⁰⁸ But the fact that the writ may not be suspended "unless when in Cases of Rebellion or

102. The majority refused to consider the scope of the military tribunal's authority in this context, although the minority readily acknowledged the authority of such a tribunal that is "exercised in time of invasion or insurrection within the limits of the United States . . . when the public danger requires its exercise." 71 U.S. at 121; see also *id.* at 142 (opinion of Taney, C.J. and Wayne, Swayne and Miller, JJ.).

103. *Id.* at 121-22.

104. *Quirin*, 317 U.S. at 45.

105. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2682 (2004) (Thomas, J., dissenting).

106. See KEN FOSKETT, JUDGING THOMAS 281-82 (2004).

107. *Hamdi*, 124 S. Ct. at 2682 (Thomas, J., dissenting).

108. See *id.* at 2674 (Scalia, J., dissenting).

Invasion the public Safety may require it,"¹⁰⁹ poses two related problems. First, this condition might not obtain here or during many other emergencies during which this detention authority might be necessary. Congress would then have to choose between acting unconstitutionally and depriving the President of the tools he needs to protect the nation. Second, I do not see how suspension would make constitutional otherwise unconstitutional detentions ordered by the President. It simply removes a remedy. Justice Scalia's position might therefore require one or both of the political branches to act unconstitutionally in order to protect the nation. But the power to protect the nation must be the power to do so lawfully.¹¹⁰

Prior to the Supreme Court's decision in *Hamdi* and, initially afterwards, my views more or less corresponded to those expressed by Justice Thomas. Of course, for an originalist, it is difficult ever to disagree with Justice Scalia's interpretations of the Constitution. In changing my own mind, I was persuaded both by Justice Scalia's arguments and by Justice Thomas' inadequate rebuttal thereto.

As indicated in the quote above, Justice Thomas follows the Framers in saying that the federal government has all the powers necessary to defend the nation against invasion and insurrection and that therefore the government should not have to violate the Constitution in order to preserve the nation. He does not, however, support his claim that the conditions for suspending the writ "might not obtain here or during many other emergencies during which this detention authority might be necessary."¹¹¹ Although he does not so specify, he may have in mind that the modus operandi of the terrorists does not fit that of a classic military invasion. The constitutional text, however, does not specify "military invasion," although undoubtedly that is what most concerned the Framers.¹¹² The term "invasion," from its Latin derivation, means "coming in." The two circumstances—"Rebellion and Invasion"—which are prerequisites for suspension, refer to the two possible sources of threats to public safety—internal and external. The language for suspension in "cases of Rebellion and Invasion," then, would seem to be virtually exhaustive.¹¹³

109. U.S. CONST. art. I, § 9, cl. 2.

110. *Hamdi*, 124 S. Ct. at 2682–83 (Thomas, J., dissenting).

111. *Id.* at 2683.

112. THE FEDERALIST NO. 24, *supra* note 5, at 155–57.

113. *Hamdi*, 124 S. Ct. at 2674 n.6 (Scalia, J., dissenting). "It is difficult to imagine situations in which security is so seriously threatened as to justify indefinite imprisonment without trial, and yet the constitutional conditions of rebellion or invasion are not met." *Id.*

The dilemma Justice Thomas sees dissolves under a proper reading of the text. Moreover, Justice Thomas shares Justice Scalia's view that a suspension of the writ by Congress would not be reviewable by the Court.¹¹⁴ Justice Thomas's concern that Congress's suspension of the writ would not make presidential acts constitutional, if they were not otherwise, misapprehends the Constitution's structure. With a proper suspension of the writ, Congress acts pursuant to the Constitution and, therefore, the President does not act in violation of the Constitution by using detention without trial. As fundamental as the writ is to liberty, survival of the nation is even more fundamental. Without the nation, courts do not exist to hear any writs. In other words, the Constitution's text and structure recognize a hierarchy of goods, with national security at the top. When public safety requires, the rights citizens normally enjoy are suspended along with the writ.

Certainly, even in the wake of the attacks of September 11th, Congress would have given the extremely careful scrutiny before approving any suspension of the writ, no matter how restricted was the requested suspension.¹¹⁵ Approval for the AUMF was less difficult to obtain because it involved the use of military force against an enemy coming from abroad. Little, if any thought was given to the possibility that an American could be among the enemy. A request for a suspension of the writ would have forced Americans to consider whether temporary suspension of their individual liberties was necessary to preserve the liberty of the nation against Americans who had joined or cooperated with the enemy.

CONCLUSION

The Bush administration has waged the "war on terrorism" without clearly distinguishing military power from internal law enforcement. Originalist Justices Scalia and Thomas disagree as to whether the military power can be applied to a U.S. citizen labeled an enemy combatant and held inside U.S. sovereign territory. This disagreement, as important as it is, should not overshadow their fundamental agreement on national defense matters. The two justices do agree that courts cannot interfere with the President's use of military power outside sovereign U.S. territory. While critics claim President Bush's policies threaten

114. *Id.* at 2683 n.4 (Thomas, J., dissenting).

115. See Justice Scalia's references to the fact that Congress can impose conditions and restrictions on a suspension of the writ. *Id.* at 2671-72 (Scalia, J., dissenting).

liberty at home, it can just as well be said that the Supreme Court's decision in *Rasul v. Bush*¹¹⁶ threatens the liberty of the nation.

Both President Bush and his critics have ignored divisions of power both between the United States and other countries and within the United States. On the one hand, Bush's "war on terrorism" has been militarizing internal police powers, even while creating a non-militarized police force in Iraq. On the other hand, President Bush's libertarian critics and a majority of the Supreme Court have been judicializing war, while ignoring the constitutional limits on judicial power. These counter-tendencies reflect different paradigms of power, internally and externally. Neither, however, is faithful to the structure of power provided in the Constitution.

These two warring paradigms mistakenly make it appear that national security and individual liberty are in conflict and that increasing the one necessarily reduces the other.¹¹⁷ As the Framers explained, no such conflict need exist in our "well-constructed" Constitution.¹¹⁸ Today, as at the Founding, there are those who reject the proposition that a strong Presidency is nec-

116. 124 S. Ct. 2686 (2004).

117. The Founders well understood the difficult tradeoff between safety and freedom. Hamilton declared:

Safety from external danger 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, *supra* note 5, at 33. The Founders warned us about the risk and equipped us with a Constitution designed to deal with it. *Hamdi*, 124 S. Ct. at 2660, 2674 (Scalia, J., dissenting).

118. See THE FEDERALIST NO. 1, *supra* note 5, at 5-6.

An enlightened zeal for the energy and efficiency of government will be stigmatized as the off-spring of a temper fond of despotic power and hostile to the principles of liberty. An over-scrupulous jealousy of danger to the rights of the people, which is more commonly the fault of the head than of the heart, will be represented as mere pretence and artifice, the stale bait for popularity at the expense of public good. It will be forgotten, on the one hand, that jealousy is the usual concomitant of love, and that the noble enthusiasm for liberty is apt to be infected with a spirit of narrow and illiberal distrust. On the other hand, it will be equally forgotten, that the vigour of government is essential to the security of liberty; that, in the contemplation of a sound and well-informed judgment, their interest can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the for-

essary for protecting liberty. Today, as at the Founding, there are those who would weaken the necessary unity of a strong Presidency by subjecting the actions of the Commander in Chief to oversight by others.¹¹⁹ Today, *unlike at the Founding*, those who would weaken the external exercise of the President's Commander in Chief powers look to the federal courts to dilute its unity.¹²⁰

Rasul's ruling that federal courts have habeas jurisdiction over foreign nationals captured abroad and incarcerated in Guantanamo Bay undermines the President's Commander in Chief powers. The decision itself is not a constitutional one because it purports to interpret a federal habeas corpus statute. That interpretation, however, does not rest on a reasonable interpretation of the text. Rather, it reflects what a majority see to be their role in extending liberty. It is based on a paradigm of judicial and presidential powers inimical to the Constitution. Congress can correct the decision by amending the habeas corpus statute. Would Congress be willing to do so? That may depend on the ability of the President to persuade the Congress, and the American people, that *Rasul* undermines, rather than advances, the cause of liberty. To make that case, it would help for the Bush administration to confess error on having detained Americans as "enemy combatants" in the U.S. without trial.¹²¹

As Justice Scalia observed, Hamdi's situation—an American citizen held in the U.S. for aiding an enemy—apparently applied only to two other people.¹²² One of those two—Lindh—had

bidden appearance of zeal for the firmness and efficiency of government.

Id.

119. See THE FEDERALIST NO. 70, *supra* note 5.

The ingredients, which constitute energy in the executive, are, first, unity This unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject in whole or in part to the control and cooperation of others In the conduct of a war, in which the energy of the executive is the bulwark of the national security, every thing would be to be apprehended from its plurality.

Id. at 472–73, 476 (emphasis added).

120. Even before the Supreme Court's decision in *Rasul*, Justice Ginsburg was very outspoken in her hope to subject the Executive's exercise of power outside the United States. See Ginsburg, *supra* note 19, at 5, 8.

121. Compare the change of position by the Justice Department's Office of Legal Counsel on the question of U.S. adherence to international treaties banning torture. See Douglas Kmiec, *Wise Counsel*, WALL. ST. J., Jan. 5, 2005, at A10.

122. See *Hamdi*, 124 S. Ct. at 2664, 2673 (Scalia, J., dissenting).

been indicted and pled guilty.¹²³ The other—Padilla—was still being held.¹²⁴ After the decision in *Hamdi*, a release of Hamdi was negotiated. If the administration had afforded Hamdi and Padilla—as U.S. citizens—the same treatment afforded Lindh, it would have diffused much of the argument that the administration was threatening liberty. Then, it would have been in a much better position to defend its position about holding the non-U.S. prisoners at Guantanamo. With greater credibility, the President would have been better able to persuade that *Rasul* undermines his constitutional authority to protect the nation's liberty.

123. *Id.* at 2664.

124. *Id.* at 2673.

