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The Easy Way Out: The Yaser Hamdi Release Agreement and the United States' Treatment of the Citizen Enemy Combatant Dilemma

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NOTE

THE EASY WAY OUT?: THE YASER HAMDI RELEASE AGREEMENT AND THE UNITED STATES' TREATMENT OF THE CITIZEN ENEMY COMBATANT DILEMMA

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> The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another [group of citizens] of their citizenship.
>
> —*Afroyim v. Rusk*[1]

INTRODUCTION

On September 22, 2004, the U.S. Department of Justice announced the impending release of Yaser Esam Hamdi, the American-

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[1] 387 U.S. 253, 268 (1967).

born "enemy combatant" taken into custody after the surrender of his Taliban military unit in Afghanistan.[2] As a condition of release, Hamdi signed an agreement with the U.S. government in which he vowed "formally to renounce any claim that he may have to United States nationality."[3] In accordance with this agreement (Release Agreement), the United States transferred Hamdi to Saudi Arabia on October 11, 2004.[4] The Release Agreement specified that Hamdi must remain in Saudi Arabia until September 2009 and be subject to strict travel restrictions and monitoring by the Saudi government.[5]

In the United States, it is well established that "the Government cannot sever its relationship to the people by taking away their citizenship";[6] yet in the renunciation provision of the Release Agreement, the government sought to achieve this very goal. By conditioning Hamdi's release on the formal renunciation of his citizenship, the Release Agreement deprives Hamdi of the rights he would enjoy as a U.S. citizen in the event of his recapture[7] and raises questions about the requirement of voluntary intent when severing one's ties to one's country. Furthermore, the United States' reliance on the Saudi government to enforce the provisions of the Release Agreement sets a dangerous precedent for the potential transfer of other citizen enemy combatants either already in custody or yet to be captured.

Part I of this Note discusses the historical progression of the meaning of U.S. citizenship, the standard of intent in the renunciation of nationality by U.S. citizens, and the events preceding the Re-

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2 Press Release, Mark Corallo, Dir. of Public Affairs, U.S. Dep't of Justice, Regarding Yaser Hamdi (Sept. 22, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/September/04_opa_640.htm [hereinafter DOJ Press Release].

3 Motion of Defendant to Stay Proceedings ¶ 8, Hamdi v. Rumsfeld, No. 2:02CV439 (E.D. Va. Sept. 24, 2004), *available at* http://www.humanrightsfirst.org/us_law/inthecourts/hamdi_briefs/Hamdi_Agreement.pdf [hereinafter Release Agreement] ("Hamdi agrees to appear before a diplomatic or consular officer of the United States . . . to renounce any claim that he may have to United States nationality pursuant to Section 349(a)(5) [of the Immigration and Nationality Act, 8 U.S.C. § 1481(a)].").

4 *See* Press Release, Richard Boucher, Spokesman, U.S. Dep't of State, Transfer of Yaser Esam Hamdi to Saudi Arabia (Oct. 11, 2004), *available at* http://www.state.gov/r/pa/prs/ps/2004/36983.htm [hereinafter DOS Press Release]. Prior to the Release Agreement, Hamdi was a dual citizen of the United States and the Kingdom of Saudi Arabia. *See Man Held as Enemy Combatant to be Freed Soon: Required to Give Up U.S. Citizenship*, CNN.COM, Sept. 22, 2004, http://www.cnn.com/2004/LAW/09/22/hamdi/index.html [hereinafter *Man Held as Enemy Combatant*].

5 Release Agreement, *supra* note 3, ¶¶ 6, 9–11.

6 *Afroyim*, 387 U.S. at 257.

7 *See* Release Agreement, *supra* note 3, ¶ 12 ("Hamdi agrees that if he does not fulfill any of the conditions of this Agreement, he may be detained immediately insofar as consistent with the law of armed conflict."); *see also Enemy Combatant's Release Delayed: Saudi Government Objects to Terms of Release*, CNN.COM, Sept. 29, 2004, http://www.cnn.com/2004/LAW/09/29/hamdi.release/ [hereinafter *Enemy Combatant's Release Delayed*] ("[I]f Hamdi violate[s] the agreement 'he may be taken back into custody as an enemy combatant.'" (quoting a Senior Justice Department official)).

lease Agreement. Part II examines the constitutionality and contractual validity of the Release Agreement. Part III considers the Saudi response to the Release Agreement and evaluates this response to demonstrate how the United States should alter its method of dealing with future citizen enemy combatants in order to respect its duties to its allies. Part III concludes by articulating the likely effects of the Release Agreement on international relations and warning of the dangers associated with the United States maintaining its current release-agreement strategy.

I
BACKGROUND

A. Citizenship in the United States and the Historical Standard of Intent in the Renunciation of Nationality

As one scholar has noted, "The theoretical and practical importance of U.S. citizenship lies in its being related to the values embodied in the U.S. Constitution."[8] Since the earliest period of colonization, the concept of citizenship has played a primary role in the formation of Americans' political and social identities.[9] Although notions of citizenship have changed throughout U.S. history, the modern view of citizenship contemplates a voluntary contract between the individual and the government.[10] In exchange for allegiance to the sovereign, the citizen retains the right to due process and equal protection of the laws, as well as the constitutional guarantee that the state will not abridge his privileges and immunities.[11] The question of when—and how—a citizen may renounce his nationality has dominated the historical progression to this current conception of citizenship in Congress and the judiciary.[12]

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8 HENRY S. MATTEO, DENATIONALIZATION V. "THE RIGHT TO HAVE RIGHTS": THE STANDARD OF INTENT IN CITIZENSHIP LOSS 1 (1997).

9 *See id.* at 19–24 (discussing four major shifts in the American concept of citizenship: (1) the early seventeenth-century view—reflected in Lord Coke's statement, made in 1608—that the colonists must remain loyal to the king by virtue of the ruler-subject relationship; (2) pre-Revolutionary sentiments that allegiance to a sovereign is not inherent in a monarchy, but rather exists as a matter of individual choice; (3) Revolutionary War era championing of this consent-based citizenship; and finally (4) the post–Civil War inclusion of blacks in the citizenry through the Fourteenth Amendment and the civil rights struggles of the modern era); *see also* JOHN DENVIR, DEMOCRACY'S CONSTITUTION: CLAIMING THE PRIVILEGES OF AMERICAN CITIZENSHIP ix–xi (2001) (describing the changing concept of citizenship in the United States and proposing "privileges of American citizenship" for the twenty-first century).

10 *See infra* note 29 and accompanying text.

11 *See* U.S. CONST. amend. XIV; DENVIR, *supra* note 9, at 5.

12 *See* MATTEO, *supra* note 8, at 29–32.

In 1830, the Supreme Court first examined the issue of expatriation in *Shanks v. Dupont.*[13] The Court's holding in *Shanks*—that a woman born in the American colonies before the Declaration of Independence, and thus born under allegiance to Britain, who was married to a British officer and living in England, remained a British citizen unless an act of the British government released her from that allegiance—demonstrated the American judicial system's early observance of the doctrine of perpetual allegiance to the British crown.[14] Because the Court's view of expatriation conflicted with the prevailing American revolutionary view of citizenship as a voluntary contract between the people and the sovereign, however, the Court generally avoided involvement in expatriation cases.[15] With the courts relatively silent on expatriation, "it was [thus] up to Congress . . . to set the rules for citizenship loss."[16]

In the post–Civil War era, Congress established that citizenship, in effect, was the citizen's to lose at the government's whim. In 1864, Congress passed the Wade-Davis Bill, requiring individuals in former Confederate states to swear allegiance to the Constitution and declaring that any of these individuals who held a civil or military office in service of the Confederacy in the future would automatically lose his U.S. citizenship.[17] The Enrollment Act of March 3, 1865 announced that military deserters would lose not only their rights to citizenship, but also their rights ever to become citizens.[18] In enacting the Expatriation Act of 1868, Congress moved beyond the Reconstruction and military contexts and announced that all people had the "natural and inherent right" to expatriate.[19]

After this sweeping proclamation, Congress remained silent on expatriation until the early twentieth century, when it passed a series of laws articulating how citizens could "exercise" their rights to re-

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13 28 U.S. (3 Pet.) 242 (1830).

14 *See id.* at 246–47 ("[Shanks's] suhsequent removal with her husband operated as a virtual dissolution of her allegiance, and fixed her future allegiance to the British crown by the treaty of peace of 1783."); MATTEO, *supra* note 8, at 34 (noting that the Court's holding was based on the terms of the Paris Peace Treaty of 1783); *see also* Sarah Helene Duggin & Mary Beth Collins, *"Natural Born" in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need To Fix It*, 85 B.U. L. REV. 53, 135 (2005) ("[T]he English common law doctrine of perpetual allegiance . . . held that the relationship between subject and sovereign endured forever; individuals were deemed incapable of transferring allegiance to any other sovereign.").

15 *See* MATTEO, *supra* note 8, at 32–33.

16 *Id.* at 33.

17 *See* Mark Gibney, *Decommunization: Human Rights Lessons from the Past and Present, and Prospects for the Future*, 23 DENV. J. INT'L L. & POL'Y 87, 91 (1994) (describing treatment of Confederate officials after the Civil War). Although the Wade-Davis Bill never became law due to President Lincoln's exercise of the pocket veto, the Bill still remains a noteworthy example of early Congressional attempts to control citizenship. *Id.*

18 Ch. 79, § 21, 13 Stat. 487, 490.

19 Ch. 249, 15 Stat. 223 (codified as amended at 8 U.S.C. § 1481 (2000)).

nounce their nationality.[20] For example, the Act of June 29, 1906 mandated denaturalization for citizens who acquired their citizenship through fraud or other illegal means.[21] This act was followed by the Expatriation Act of 1907, which listed specific voluntary acts that, if performed, would lead to expatriation.[22]

Responding to this legislation, the Supreme Court reentered the expatriation arena with its 1915 decision in *Mackenzie v. Hare*.[23] The case dealt with a challenge to a provision of the Expatriation Act of 1907, which mandated that an American woman who married a foreign man would automatically expatriate and assume her husband's nationality.[24] In upholding the statute's validity, the Court deferred to congressional views on citizenship, explaining that Congress was merely exercising its implied powers to perform its delegated duties and that the provision represented a reasonable exercise of government power, designed to avoid embarrassment in the conduct of foreign affairs.[25]

After Congress passed the Nationality Act of 1940, which mandated, among other specific denationalizing acts, expatriation for individuals remaining outside the country to avoid military service,[26] the Supreme Court broke from its tradition of deferring to Congress and began taking a more active role in preserving the voluntary nature of citizenship and expatriation.[27] This judicial protection culminated in the Court's 1967 decision in *Afroyim v. Rusk*, which held for the first time that Congress lacked the authority to take away an individual's citizenship without that individual's consent—in effect establishing

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20 *See* MATTEO, *supra* note 8, at 35.

21 Ch. 3592, 34 Stat. 596 (codified as amended at 8 U.S.C. § 1927 (2000)).

22 Ch. 2534, 34 Stat. 1228 (listing adopting foreign citizenship and swearing fealty to a foreign country as expatriating acts), *amended by* Act of May 24, 1934, ch. 344, 48 Stat. 797.

23 239 U.S. 299 (1915).

24 *See id.* at 307.

25 *See id.* at 311–12.

26 *See* Ch. 876, § 401(c), 54 Stat. 1137, 1169 (codified as amended at 8 U.S.C. §§ 1481–1503 (2000)).

27 *See* Trop v. Dulles, 356 U.S. 86, 101–04 (1958) (plurality opinion) (holding that section 401(g) of the Nationality Act violated the Eighth Amendment's prohibition on cruel and unusual punishment); Mitsugi v. Dulles, 356 U.S. 129, 137–38 (1958) (finding that the Government failed to meet the "clear, convincing and unequivocal" standard to prove a citizen's intent to expatriate); *see also* Schneider v. Rusk, 377 U.S. 163, 168–69 (1964) (invalidating a section of the Immigration and Nationality Act of 1952); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (striking down another provision of the Immigration and Nationality Act of 1952); MATTEO, *supra* note 8, at 37–41; Steven S. Goodman, *Protecting Citizenship: Strengthening the Intent Requirement in Expatriation Proceedings*, 56 GEO. WASH. L. REV. 341, 344–45 (1988) (discussing Chief Justice Warren's dissenting opinion in Perez v. Brownwell, 356 U.S. 44 (1958), *overruled in part*, Afroyim v. Rusk, 387 U.S. 253 (1967), and noting that later Supreme Court decisions ultimately incorporated Chief Justice Warren's views of Congress's powerlessness to strip citizens of their citizenship involuntarily).

citizenship as a constitutional right.[28] Justice Black's majority opinion in *Afroyim* formally acknowledged American citizenship as a voluntary social contract between the sovereign people and their government.[29] As such, Justice Black reasoned, Congress had "no express power to strip people of their citizenship."[30] *Afroyim*'s discussion of Congress's powerlessness to expatriate citizens involuntarily remains the benchmark for the modern judicial conception of American citizenship.[31] The Court's 1980 holding in *Vance v. Terrazas* expanded upon *Afroyim*, firmly establishing that an individual renouncing his citizenship must do so both voluntarily and with a specific intent to expatriate, and that such intent must be either directly expressed or fairly inferred from proved conduct.[32]

Congress codified this intent requirement in the Immigration and Nationality Act Amendments of 1986,[33] but *Afroyim* and *Terrazas* had already established the basic requirement that if the issue of intent is raised, the burden of proving intent falls on the party asserting expatriation.[34] Ultimately, the keys to the intent inquiry are both whether the individual's renunciation of citizenship is voluntary and whether the expatriating act "reasonably manifest[s] [the] individual's transfer or abandonment of allegiance to the United States."[35] Thus, today, unless an individual manifests this specific intent to renounce citizenship, an expatriating act will have no effect.

B. Yaser Esam Hamdi and *Hamdi v. Rumsfeld*

In light of *Afroyim* and *Terrazas*, Yaser Hamdi's story and the judicial proceedings leading up to the Release Agreement raise questions about whether the government's demand for his expatriation is constitutional. Hamdi, born in Louisiana in 1980 and hence an American

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28 *See* 387 U.S. at 257; Goodman, *supra* note 27, at 345–46 (noting that *Afroyim* overruled *Perez* and implemented Chief Justice Warren's views on citizenship).

29 *See Afroyim*, 387 U.S. at 257.

30 *Id.*

31 *See* MATTEO, *supra* note 8, at 45; *see also* Vance v. Terrazas, 444 U.S. 252, 260 (1980) (noting that *Afroyim* recognized that "Congress [does not have] any general power, express or implied, to take away an American citizen's citizenship without his assent").

32 *Terrazas*, 444 U.S. at 260.

33 *See* Pub. L. No. 99-653, sec. 18(a), 100 Stat. 3655, 3658 (codified as amended at 8 U.S.C. § 1841 (2000)) (adding the language "voluntarily performing any of the following acts with the intention to relinquishing United States nationality" after the language "shall lose his nationality by" to section 349(a) of the Immigration and Nationality Act); *see also* MATTEO, *supra* note 8, at 58 (noting that "'relinquishment . . . must be voluntary, conforming to Supreme Court interpretations'" of specific intent to expatriate as discussed in *Terrazas* and *Afroyim*) (quoting H.R. REP. No. 99-916, at 2 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6182, 6183).

34 *See* MATTEO, *supra* note 8, at 54.

35 *Id.* (quoting Attorney General's Statement of Interpretation of *Afroyim*, 42 Op. Att'y Gen. 397, 397 (1969)). *Afroyim* does not explicitly specify what words or conduct qualify as voluntary renunciation. *See id.*

citizen, moved with his family to Saudi Arabia as a child.[36] Although he left the United States, Hamdi retained dual citizenship between the United States and Saudi Arabia.[37] In 2001, Hamdi traveled from Saudi Arabia to Afghanistan.[38] According to the declaration of Michael Mobbs, Special Advisor to the Undersecretary of Defense for Policy, members of the Northern Alliance military coalition captured Hamdi after the surrender of his Taliban unit in 2001.[39] Hamdi surrendered a Kalishnikov assault rifle, and the Northern Alliance forces then took him into custody.[40] The Northern Alliance turned Hamdi over to the U.S. military, which detained and questioned Hamdi in Afghanistan and later transferred him to the U.S. Naval Base in Guantanamo Bay.[41] When authorities learned of Hamdi's American citizenship, they transferred him to a military brig in Charleston, South Carolina.[42]

Because al Qaeda and the Taliban qualify as hostile forces engaged in armed conflict with the United States, "individuals associated with those groups were and continue to be enemy combatants."[43] Thus, Hamdi's association with the Taliban led to his designation as an enemy combatant, and the Government claimed the right to detain him without formal charges or proceedings.[44] Hamdi's father, as next friend, filed a petition for a writ of habeas corpus on behalf of his son in June 2002.[45] The petition asserted that Hamdi, as an American citizen, enjoyed the "full protections of the Constitution" and that his detention violated his Fifth and Fourteenth Amendment rights.[46]

The U.S. District Court for the Eastern District of Virginia found this citizen's rights claim persuasive. The court appointed a federal public defender and ordered that Hamdi be allowed access to coun-

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36 Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (plurality opinion).

37 *Man Held as Enemy Combatant, supra* note 4.

38 *Hamdi*, 542 U.S. at 510. The parties disputed the nature of Hamdi's travel to Afghanistan. *See id.* at 511–12. Hamdi's father contended that his son went to Afghanistan in 2001 to do "relief work," that he had been in the country less than two months at the time of the September 11, 2001 terrorist attacks, and that he was trapped in the country after the start of the U.S. military campaign. *Id.* The Government asserted that Hamdi traveled to Afghanistan in July or August 2001, at which time he "affiliated with a Taliban military unit and received weapons training." *Id.* at 512–13.

39 *Id.* at 512–13. The Mobbs Declaration remains the primary source of information regarding Hamdi's actions in Afghanistan; Mobbs obtained his information on Hamdi from a "review of relevant records and reports" in the case. *Id.* at 512.

40 *Id.* at 513.

41 *Id.* at 510.

42 *Id.*

43 *Id.* at 513 (internal quotations omitted).

44 *See* Hamdi v. Rumsfeld, 316 F.3d 450, 473 (4th Cir. 2003) (concluding that the Mobbs Declaration, "if accurate," was sufficient to justify Hamdi's detention), *vacated and remanded*, 542 U.S. 507 (2004).

45 *Hamdi*, 542 U.S. at 511.

46 *Id.* at 511.

sel.[47] The Fourth Circuit Court of Appeals reversed this order, holding that the District Court had not shown proper deference to the government's security and intelligence interests.[48] The Fourth Circuit further concluded that "if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one."[49] The court later held; however, that Hamdi's citizenship did entitle him to "a limited judicial inquiry into his detention," though this review should not extend to a full analysis of the factual determinations surrounding his capture.[50]

On certiorari, the Supreme Court vacated and remanded the judgment of the Fourth Circuit.[51] Justice O'Connor's plurality opinion focuses on the limited question of whether the Executive has the authority to detain an American citizen who was engaged in armed conflict against the United States, by either supporting or affiliating with forces hostile to the United States in Afghanistan, as an enemy combatant.[52] The plurality concluded that the Authorization for Use of Military Force (AUMF)[53] authorized Hamdi's detention and constituted an act of Congress that negated Hamdi's rights as a citizen under the Non-Detention Act.[54] Justice O'Connor's opinion calls the detention of enemy combatants "fundamental and accepted [as] an incident to war,"[55] and affirmatively states that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant."[56]

After holding that Hamdi could be legally detained for no longer than the duration of the hostilities in Afghanistan, a conclusion unrelated to his citizenship, the *Hamdi* plurality turned to the question of the process due to citizens who challenge their status as enemy combatants.[57] Based on a balancing of the citizen's constitutional rights against the Government's interests in national security, the plurality

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47 *See id.* at 512.

48 Hamdi v. Rumsfeld, 296 F.3d 278, 279 (4th Cir. 2002), *rev'd and remanded*, 316 F.3d 450 (2003), *vacated and remanded*, 542 U.S. 507 (2004).

49 *Id.* at 283.

50 *Hamdi*, 316 F.3d at 475.

51 *Hamdi*, 542 U.S. at 516.

52 *See id.*

53 S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001). Congress passed this resolution one week after the September 11, 2001 terrorist attacks that killed more than 3,000 people in New York, Washington, D.C., and Pennsylvania. *See id.*; Timeline: September 11, 2001, http://www.whitehouse.gov/march11/timeline/oneb.html (last visited Mar. 12, 2006). In the AUMF, Congress granted the President the power "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . ." S.J. Res. 23.

54 *See Hamdi*, 542 U.S. at 517.

55 *Id.* at 518.

56 *Id.* at 519.

57 *Id.* at 524–25.

concluded that a citizen-detainee must receive notice of the factual basis for his classification as an enemy combatant, as well as a fair opportunity to rebut the Government's allegations before a neutral decision maker.[58] To justify continued detention, the decision maker must find that the Government has proven the enemy combatant status of the citizen beyond a mere "some evidence" standard.[59] The plurality carefully noted, however, that citizen enemy combatant proceedings "may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[60]

Concurring and dissenting in part, Justice Souter based his opinion on the historical context of wartime citizen internment.[61] According to Justice Souter, although the Government argued that its detention of Hamdi represented "nothing more than customary detention of a captive taken on the field of battle,"[62] the history of the Non-Detention Act requires that the Executive detain citizens only upon clear authority from Congress.[63] Justice Souter concluded that the AUMF did not provide a clear statement of authority in Hamdi's case.[64]

Likewise, in his dissent, Justice Scalia discussed the importance of Hamdi's presumed citizenship with respect to his claim of unlawful detention.[65] Justice Scalia focused on the conflict between national security and Hamdi's "constitutional right to personal liberty" as an American citizen.[66] He contended that while the plurality described wartime detention procedures that would apply to enemy aliens, Hamdi's status as a citizen should have left the Government with two options—either charge Hamdi with treason or suspend the writ of habeas corpus.[67] As the writ was not suspended, and since Hamdi challenged his classification as an enemy combatant, Justice Scalia

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58 *Id.* at 533.

59 *Id.* at 537.

60 *Id.* at 533 (announcing that hearsay testimony, for example, would be acceptable if it represented the most reliable available evidence the Government could offer, and establishing a burden-shifting scheme that requires the citizen to rebut the Government's evidence with more persuasive evidence that he was not an enemy combatant).

61 *See id.* at 542–45 (Souter, J., concurring in part and dissenting in part) (citing Korematsu v. United States, 323 U.S. 214 (1944); *Ex parte* Endo, 323 U.S. 283 (1944)).

62 *Id.* at 549.

63 *Id.* Congress passed the Non-Detention Act to supersede the Emergency Detention Act of 1950, which authorized the Attorney General to detain anyone suspected of espionage or sabotage in times of "emergency." *Id.* at 542–43. To Justice Souter, this "provide[d] a powerful reason to think that [the Non-Detention Act] was meant to require clear congressional authorization before any citizen can be placed in a cell." *Id.* at 543.

64 *Id.* at 551.

65 *See id.* at 554 (Scalia, J., dissenting).

66 *Id.*

67 *See id.* at 559, 562, 573.

concluded that Hamdi's citizenship entitled him to either a criminal trial or a judicial decree mandating his release.[68]

II
THE HAMDI AGREEMENT

The Justices' underlying concerns with citizenship, evident throughout their *Hamdi* opinions, hint at exactly what Hamdi relinquished when he signed the Release Agreement and renounced any claim to his U.S. citizenship.[69] In the Release Agreement, signed by Hamdi on September 15, 2004, Hamdi maintained that he was never affiliated with the Taliban or al Qaeda and thus was not an enemy combatant because he was never "part of or supported forces hostile to the United States and[ ] never engaged in armed conflict against the United States."[70] The Agreement maintains that Hamdi's birth in Louisiana establishes his claim to U.S. citizenship, but also states that Hamdi "considers himself to be a citizen of the Kingdom of Saudi Arabia."[71]

Under the Agreement, Hamdi not only agreed to renounce his citizenship formally pursuant to section 349(a)(5) of the Immigration and Nationality Act,[72] but he also agreed to "renounce[ ] terrorism and violent jihad"[73] and vowed never to affiliate with the Taliban, al Qaeda, or any person or group designated as a "terrorist" or "terrorist organization" by the United States.[74] He also agreed to residency and travel restrictions[75] and promised to notify Saudi and U.S. authorities immediately if he encounters known terrorists or members of terrorist organizations, becomes aware of any planned or executed terrorist attacks, or is solicited to engage in or harbor those involved in "combatant activities."[76] Hamdi released the United States from any liability for violations of "United States, foreign, or international law" arising from the government's conduct prior to the Release Agreement and

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68 *Id.* at 572–73.

69 *See* Release Agreement, *supra* note 3, ¶ 8.

70 *Id.* at 1.

71 *Id.*

72 8 U.S.C. § 1481(a)(5) (2000) ("A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality . . . (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state . . . .").

73 Release Agreement, *supra* note 3, ¶¶ 7–8.

74 *Id.* ¶ 5.

75 *Id.* ¶ 9 (requiring Hamdi to remain in Saudi Arabia for five years without travel). Additionally, the Release Agreement prohibited Hamdi from traveling to the United States for ten years, and thereafter required him to receive the express permission of the Secretaries of Defense and Homeland Security before "initiating travel to the United States." *Id.* ¶ 10.

76 *Id.* ¶ 6.

from any challenges to the Agreement's terms.[77] Interestingly, Hamdi agreed that if he failed to meet any of the conditions of the Agreement, "he [could] be detained immediately insofar as consistent with the law of armed conflict"[78]—essentially authorizing his treatment as a noncitizen enemy combatant if he ever violates the Agreement and if the United States subsequently recaptures him.[79]

A. What Did Hamdi Lose?

1. *Waiver of Rights Against the United States*

The circumstances surrounding Hamdi's detention and the terms of the Release Agreement may potentially warrant a suit against the government. However, the Release Agreement leaves Hamdi without the opportunity to challenge the government on the terms or duration of his detainment as an enemy combatant.[80] Thus, even though a potential challenge against the government's pre-Agreement conduct may have merit, it is unlikely that Hamdi can raise such a challenge now that the government has released him. Hamdi received his freedom because of the Release Agreement, and although this freedom is subject to certain restrictions, it is doubtful that he would now challenge his prerelease conditions and risk his liberty by potentially violating the waiver provision of the Release Agreement.[81]

The *Hamdi* plurality's recognition of the government's ability to detain its own citizens as enemy combatants in wartime might also limit Hamdi's chances of successfully challenging his detention.[82] Furthermore, even if Hamdi decided to challenge the waiver provision in an attempt to adjudicate the government's pre-Agreement conduct, the Release Agreement provides that any challenges arising under or relating to the Agreement must be adjudicated in the Eastern District of Virginia.[83] Since the Release Agreement does not allow Hamdi to enter the United States for ten years, the jurisdictional provision would make any litigation efforts highly complicated and

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77 *Id.* ¶ 13.

78 *Id.* ¶ 12.

79 *See supra* note 7 and accompanying text; *infra* Part II.A.2.

80 *See* Release Agreement, *supra* note 3, ¶ 13 ("Hamdi hereby releases, waives, forfeits, relinquishes and forever discharges the United States . . . from any and all claims for any violation of United States, foreign, or international law arising from acts or omissions occurring prior to the official date of this Agreement . . . .").

81 *See id.* ¶¶ 12–13. Under paragraph 12 of the Release Agreement, if Hamdi fails to "fulfill any of the conditions of th[e] Agreement, he may be detained immediately." *Id.* ¶ 12. Paragraph 12 does not provide an exception for the waiver provision, suggesting that if Hamdi attempted to challenge the United States in any forum, he could be recaptured. *See id.*

82 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (plurality opinion) ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant.").

83 Release Agreement, *supra* note 3, ¶ 14.

costly.[84] Thus, given that Hamdi is unlikely to challenge the pre-Agreement conditions, the waiver of his claims against the government has fewer implications than do the practical effects of renouncing his U.S. citizenship.

2. *Agreement to Renounce Citizenship*

Theoretically, Hamdi's agreement to renounce his U.S. citizenship[85] operates as an additional waiver of rights against the government—a waiver of his process rights in the event of future recapture by the United States. Although Hamdi's recapture and detainment is unlikely, an analysis of such a hypothetical situation highlights the significance of Hamdi's agreement to expatriate.

Because Hamdi was a U.S. citizen when he was captured in 2001, he was transferred from Guantanamo Bay to a military brig in the United States, had access to counsel, and was entitled to notice of the factual basis for his classification as enemy combatant as well as a fair opportunity to rebut the government's allegations before a neutral decisionmaker.[86] In contrast, the current procedures for noncitizens detained at Guantanamo Bay do not offer this level of process before classifying the noncitizen detainees as enemy combatants. Although noncitizen detainees are able to file habeas corpus petitions in federal district court in order to dispute the legality of their detentions,[87] they must dispute their enemy combatant classifications before a Combatant Status Review Tribunal (CSRT).[88] A CSRT consists of a neutral, three-officer panel,[89] and while it assigns a military officer to the detainee as a personal representative during tribunal proceedings, it does not provide access to counsel.[90] At the review hearing, the detainee may testify, call witnesses, or introduce other evidence; the tribunal then makes a closed-door determination of the detainee's status.[91] This basic process given to noncitizens challenging their enemy combatant classifications is lacking as compared to the process due to a citizen bringing a similar challenge. Thus, if Hamdi's renun-

84 *Id.* ¶ 10.

85 *See id.* ¶ 8.

86 *See Hamdi*, 542 U.S. at 510, 533.

87 *See* Rasul v. Bush, 542 U.S. 466, 484 (2004).

88 *See* News Release, U.S. Dep't of Def., Combatant Status Review Tribunal Order Issued (July 7, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040707-0992.html; *see also* Hamdan v. Rumsfeld, 415 F.3d 33, 43 (D.C. Cir. 2005) (upholding the validity of the CSRTs).

89 *See* News Release, U.S. Dep't of Def., *supra* note 88.

90 *See id.*

91 *See id.* As of March 2005, only thirty-eight of 558 detainees to go before a tribunal had been found not to be enemy combatants. *See* U.S. DEP'T OF DEF. COMBATANT STATUS REVIEW TRIBUNAL SUMMARY (2005), *available at* http://www.defenselink.mil/news/Mar2005/d20050329csrt.pdf (summarizing the Convening Authority Rear Admiral James M. McGarrah's review of nineteen detainee tribunals).

ciation of his citizenship is valid, he has in effect waived his due process rights in the event of recapture by the government.

B. Is the Release Agreement Valid?

A fundamental question regarding the Release Agreement is whether the Agreement is constitutionally valid and enforceable as an instrument of expatriation. While the longstanding American conception of citizenship as a contract between the citizen and the government might support the conclusion that the Agreement is a valid expression of Hamdi's intent to "contract out" of his relationship with the United States,[92] the Supreme Court's intent jurisprudence[93] and principles of contract law[94] suggest otherwise.

Under the *Afroyim* and *Terrazas* intent standard and view of citizenship as a constitutional right, Hamdi's renunciation of his citizenship must be both voluntary and committed with the express intent to expatriate.[95] Therefore, any agreement renouncing citizenship must be made under circumstances that *allow* a voluntary and intentional decision to expatriate.[96] Duress is understood to deprive a party to an agreement of his capacity to act voluntarily;[97] thus, if Hamdi signed the Agreement under duress, his agreement to renounce his citizenship would be invalid under *Afroyim* and *Terrazas.*

The Restatement (First) of Contracts defines duress, in pertinent part, as

> any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.[98]

The drafters of the *Restatement* clarified that the threat requirement is satisfied by the threat of any future situation—including continued

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92 For a discussion of this conception of citizenship, see *supra* notes 10–11 and accompanying text.

93 *See* Vance v. Terrazas, 444 U.S. 252, 270 (1980) (requiring the government to prove voluntary and intentional expatriation by a preponderance of the evidence before it may expatriate a U.S. citizen); *see also* Afroyim v. Rusk, 387 U.S. 253, 268 (1967) (holding that citizens have a constitutional right to remain citizens unless they voluntarily relinquish their citizenship).

94 *See* 28 RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON §§ 71:34, 71:43 (4th ed. 2003) (noting that duress or coercion can exist when there is a threat to continue existing imprisonment or when there is unequal bargaining power between the parties).

95 *See Terrazas*, 444 U.S. at 261.

96 *See id.*

97 *See* 25 AM. JUR. 2D *Duress and Undue Influence* § 1 (2004) ("[D]uress . . . causes the person to do an act or form a contract not of his or her own volition."); *see also Terrazas*, 444 U.S. at 268–70 (discussing duress as an affirmative defense in expatriation proceedings).

98 RESTATEMENT (FIRST) OF CONTRACTS § 492 (1932).

imprisonment—that operates as "a mere continuance of what has already been begun . . . or at least [where] a wrong will not be righted."[99]

At the time Hamdi signed the Release Agreement, the government had detained him for nearly three years.[100] With no definite release date, and with no projected release date short of the end of active combat operations in Afghanistan[101] or a potential determination by the government that he no longer posed a threat to the United States,[102] Hamdi arguably perceived that accepting the terms of the Release Agreement was the only foreseeable way to end his detention. Given Hamdi's limited options, the threat of continued detention afforded the government unequal bargaining power over Hamdi during negotiations, and Hamdi therefore promised to renounce his citizenship (along with the other provisions of the Agreement) under duress. Such a promise does not satisfy the requirement of voluntary intent,[103] which in turn casts doubt on whether Hamdi renounced his citizenship with the requisite specific intent to expatriate. Thus, from a contractual—and constitutional—standpoint, the Release Agreement represents an invalid means of expatriation.

The government could argue that the Release Agreement should not be analyzed under general contract principles due to the security and policy considerations associated with Hamdi's status as an enemy combatant. However, even analogizing the Release Agreement to either a plea bargain or a release-dismissal agreement[104]—agreements in which the government's greater bargaining power does not automatically indicate a situation of duress—the Agreement still fails to satisfy the *Afroyim* and *Terrazas* voluntary intent standard.[105]

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99 *Id.* cmt. d (noting that the threat of continued imprisonment constitutes a source of duress if that fear secures one's consent to a transaction); *see also* LORD, *supra* note 94, § 71:34 ("Imprisonment operates as a means of coercion only because of its threatened continuance.").

100 Jerry Markon, *Hamdi Returned to Saudi Arabia: U.S. Citizen's Detention as Enemy Combatant Sparked Fierce Debate*, WASH. POST, Oct. 12, 2004, at A2, *available at* http://www.washingtonpost.com/wp-dyn/articles/A23958-2004Oct11.html.

101 Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (plurality opinion).

102 *See* DOJ Press Release, *supra* note 2.

103 *See* LORD, *supra* note 94, §§ 71:34, 71:43.

104 *See* Michael C. Dorf, *Have We Heard the Last of Yaser Hamdi? Why His Promise Not to Sue the Government May Not be Binding*, FINDLAW.COM, Sept. 29, 2004, http://writ.news.findlaw.com/dorf/20040929.html (describing a "release-dismissal agreement" as a contract between "a criminal defendant who is also a plaintiff in a lawsuit against the government," whereby the individual agrees to drop his civil claim against the government "in exchange for the government's agreement to drop the criminal charges against him").

105 *See generally id.* (stating that a federal appeals court "had said that release-dismissal agreements were categorically unenforceable [in part because] . . . the threat of prosecution exerts so much pressure on a criminal defendant/civil plaintiff, that his decision to drop the lawsuit cannot be treated as truly voluntary" (emphasis omitted)).

In *Brady v. United States*,[106] the Supreme Court discussed the importance of plea agreements in the American criminal justice system and set the minimum requirement for such an agreement's validity: A criminal defendant's plea must represent a voluntary expression of his own choice, considered in the context of all relevant circumstances.[107] The plea itself is not made voluntarily unless the defendant is "fully aware of the direct consequences" of his decision, and his decision has not been induced by threat, misrepresentation, or improper promises.[108] Thus, even in the plea-agreement context, the circumstances surrounding the Release Agreement raise doubts about the voluntary nature of Hamdi's promise to expatriate. This context, however, is not an appropriate analogy to Hamdi's situation. Hamdi did not face criminal prosecution at the time he entered into the Agreement with the government—instead, he faced indefinite detention as an "enemy combatant" without any knowledge of the charges against him.[109] Furthermore, unlike a typical plea agreement, in which a defendant admits guilt, the Release Agreement explicitly states that "Hamdi maintains that he never . . . was an enemy combatant."[110]

As Michael Dorf suggests, a release-dismissal agreement provides a much more appropriate analogy to the Release Agreement.[111] In the typical release-dismissal agreement, a defendant agrees "to forgo a civil remedy for the violation of the defendant's constitutional rights in exchange for complete abandonment of a criminal charge."[112] Whereas a defendant entering a plea agreement admits guilt to receive leniency from the government, an individual enters a release-dismissal agreement "merely for the assurance that the State will not prosecute him for conduct for which he has made no admission of wrongdoing."[113] Hamdi waived his rights to sue the government for its arguably unconstitutional conduct in holding him indefinitely without charges,[114] and his promise to expatriate effectively serves as a waiver of his due process rights in the event of future capture and

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106 397 U.S. 742 (1970).

107 *See id.* at 748.

108 *Id.* at 755 (quoting Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957)).

109 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004) (plurality opinion). The *Hamdi* Court ultimately concluded, "Plainly, the 'process' Hamdi has received is not that to which he is entitled . . . ." *Id.* at 538. This implies that Hamdi had not yet received notice of the factual basis for his classification as enemy combatant or had the opportunity to rebut the allegations against him. *See id.* at 536–37.

110 Release Agreement, *supra* note 3, at 1; *see also* Dorf, *supra* note 104 ("A plea bargain . . . is in some sense the opposite of the agreement between Hamdi and the government. A defendant who pleads guilty admits guilt. By contrast, Hamdi has long maintained his innocence . . . .").

111 *See* Dorf, *supra* note 104.

112 Town of Newton v. Rumery, 480 U.S. 386, 409 (1987) (Stevens, J., dissenting).

113 *Id.* at 410.

114 Release Agreement, *supra* note 3, ¶ 13.

detention.[115] In return, by releasing Hamdi from further detention, the government in effect promised not to "prosecute" Hamdi for his alleged enemy combatant status.[116]

Release-dismissal agreements are valid if, after a case-specific analysis, it is found that the defendant entered the agreement voluntarily, and that the prosecutor had an independent legitimate reason to make this agreement directly related to his prosecutorial responsibilities.[117] Assuming *arguendo* that the government's interest in national security during the War on Terror constitutes a legitimate reason for its treatment of citizen enemy combatants[118] and for its entry into the Release Agreement,[119] the inquiry turns to whether Hamdi's assent to the terms of the Release Agreement was truly voluntary.

As the Supreme Court established in *Town of Newton v. Rumery*, the factors affecting the voluntariness of a release-dismissal agreement include (1) the defendant's knowledge and experience; (2) the circumstances of the execution of the release, including access to counsel; (3) the nature and severity of the pending charges; (4) the benefit to the defendant from signing the release; (5) the existence of a legitimate criminal justice objective for obtaining the release; and (6) the determination of whether the agreement's execution is subject to judicial supervision.[120] Hamdi had no knowledge of the American legal system, had lived in a foreign country since a young age,[121] and had no part in the filing of his initial habeas petition.[122] Although he did

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115 *See id.*; *supra* Part II.A.2.

116 Justice Stevens's dissent in *Rumery* raised a concern that the State's "willingness to drop the charge completely indicates that it might not have proceeded with the prosecution in any event"—a concern that is most notable in cases in which evidence of wrongdoing is concededly lacking. *See* 480 U.S. at 409–10 (Stevens, J., dissenting). The statement of Saudi Embassy spokesman Nail al-Jubeir, that the United States would not have released Hamdi if it had believed he was guilty, reflects this underlying tension in the release-dismissal agreement context and further supports the analogy between the Release Agreement and a typical release-dismissal agreement. *See infra* notes 166–67 and accompanying text.

117 *See Rumery*, 480 U.S. at 397–98.

118 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518–19 (2004) (plurality opinion).

119 *But see* Dorf, *supra* note 104 ("[U]nlike the prosecution in *Rumery*, the government does not appear to have a sound independent reason for the agreement . . . . It looks as though the government's principal reason for the agreement is its inability to establish that Hamdi was an unlawful enemy combatant under procedures that satisfy the Supreme Court's June decision.").

120 *Rumery*, 480 U.S. at 401–02 (O'Connor, J., concurring). In *Rumery*, the defendant was a sophisticated businessman who was not in custody at the time of the agreement and was represented by experienced counsel. *Id.* at 394 (plurality opinion). In addition, the defendant had sufficient time to consider the agreement, and had gained immunity from criminal prosecution in exchange for abandoning a less-than-certain civil claim. *Id.* For these reasons, the Court found his waiver voluntary. *Id.*

121 *Hamdi*, 542 U.S. at 510.

122 *See id.* at 510–12. In addition, as Dorf suggests, the fact that Hamdi signed the Release Agreement in Arabic may indicate a lack of familiarity with the English language. *See* Dorf, *supra* note 104.

have access to experienced counsel, Hamdi faced indefinite detention and the charge of "enemy combatant" if he did not enter into the Release Agreement.[123] Hamdi did receive great benefit from the Agreement,[124] but there was arguably no legitimate criminal-justice objective furthered by his release.[125] Lastly, there is no evidence that the Agreement was executed subject to any judicial supervision, as the parties filed the Release Agreement and Stipulation of Dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), which allows dismissal of a pending legal action by the plaintiff alone, without any action by the court.[126]

The Court set forth the *Rumery* voluntariness factors without indicating the relative weights of each;[127] thus, it is difficult to determine conclusively whether Hamdi entered into the Release Agreement voluntarily under this standard. Furthermore, Justice Stevens's dissent in *Rumery* raises two concerns not included in the voluntariness inquiry, but especially relevant in Hamdi's situation: the inherent coerciveness of an agreement in which the prosecutor agrees to drop all charges against an individual, and the fact that the agreement "exacts a price unrelated to the character of the defendant's own conduct."[128] For a detainee with no real knowledge of the charges against him or the potential length of his detention, the government's ability to offer exoneration and release represents a highly coercive tool. Additionally, Hamdi's waiver of rights against the government, his promise to expatriate, and the conditional terms of release seem disproportionate to the hearsay evidence of Hamdi's alleged conduct in Afghanistan.[129] In light of these considerations, as well as the remaining *Rumery* fac-

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123 After Hamdi's release, his counsel effectively summed up the circumstances surrounding the Release Agreement: "'When you've been in solitary confinement for three years, and somebody puts a piece of paper in front of you that says you can get out of jail free if you sign it, you don't really worry too much about the rest of the fine print.'" *See* Phil Hirschkorn, *Saudi Once Held by U.S. Returns Home*, CNN.COM, Oct. 11, 2004, http://www.cnn.com/2004/WORLD/meast/10/11/hamdi/. Hamdi's counsel apparently considered citizenship "little to surrender" in such a situation. *See id.*

124 *Cf.* Dorf, *supra* note 104 (arguing that the Agreement's benefit to Hamdi was tempered by the "parole-like" conditions of his release).

125 Dorf suggests that the Government sought the Agreement because it would have been difficult to establish that Hamdi was an enemy combatant. *See id.*

126 *See* FED. R. CIV. P. 41(a)(1)(ii); Release Agreement, *supra* note 3, Exhibit A (Stipulation of Dismissal).

127 *See* Town of Newton v. Rumery, 480 U.S. 386, 397–98 (1987).

128 *Id.* at 411 (Stevens, J., dissenting). Justice Stevens's dissent does not dispute that some release-dismissal agreements may meet the voluntariness standards set forth by the plurality opinion and Justice O'Connor's concurrence; rather, he raises these as additional concerns and indicates that the burden of proof should rest on the potential defendant in the civil action—here the Government—and that the agreement should not be upheld if that party cannot meet the burden. *See id.* at 417–18.

129 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 512 (2004) (plurality opinion) (noting that the Mobbs Declaration was "the sole evidentiary support that the Government ha[d] provided to the courts for Hamdi's detention").

tors leaning toward a finding of involuntariness in Hamdi's situation,[130] it is unlikely that a court would uphold the Release Agreement as valid, even in the release-dismissal agreement context.

C. Is Hamdi's Expatriation Legitimate?

Even assuming the government could prove that Hamdi voluntarily agreed to renounce his citizenship, merely signing the Release Agreement was not sufficient for Hamdi to expatriate. In addition to a voluntary renunciation, Hamdi must also perform an expatriating act with the specific intent to expatriate in order to fulfill the second prong of the *Afroyim* and *Terrazas* standard.[131] Although the Release Agreement left unanswered the question of whether Hamdi had performed an expatriating act before signing the Agreement,[132] the language of the Agreement implies that Hamdi's renunciation of his citizenship before U.S. authorities in Riyadh would serve as an expatriating act sufficient to sever his ties to the United States.[133] However, to determine whether Hamdi performed an expatriating act prior to signing the Release Agreement—or whether he performed an expatriating act by renouncing his citizenship in accordance with the Release Agreement—an analysis of Hamdi's actions under the Immigration and Nationality Act[134] is necessary. As the following analysis explains, Hamdi did not perform an expatriating act prior to signing the Release Agreement,[135] and the lack of voluntariness associated with the Release Agreement itself[136] leads to the conclusion that even his "formal renunciation of nationality" does not meet the standards for voluntary expatriation under the Act.[137] Therefore, Hamdi did not perform an "expatriating act" with a specific intent to expatriate, and the second prong of the *Afroyim* and *Terrazas* standard is not satisfied.

Presumably, if the government had chosen to adjudicate the question of whether Hamdi renounced his citizenship prior to his capture in Afghanistan,[138] it would have argued that Hamdi expatriated

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130 *See* Dorf, *supra* note 104 (arguing that "the factors tip in favor of invalidating [Hamdi's] plea agreement . . . .").

131 *See supra* note 96 and accompanying text.

132 *See* Release Agreement, *supra* note 3, at 1 ("[T]he question whether Hamdi has performed an expatriating act under Section 349(a) of the Immigration and Nationality Act . . . has not been adjudicated . . . .").

133 *See id.* ¶ 6.

134 *See* 8 U.S.C. § 1481 (2000). The Immigration and Nationality Act codifies specific acts that, if performed, constitute "expatriating acts." *Id.*

135 *See id.* (listing eight separate acts, the voluntary performance of which terminates the actor's U.S. citizenship).

136 For a discussion of the voluntariness of the Release Agreement, see *supra* Part II.B.

137 *See* 8 U.S.C. § 1481. *But see infra* notes 143–44 and accompanying text.

138 The United States chose not to adjudicate this issue. *See* Release Agreement, *supra* note 3, at 1–2.

himself by "entering, or serving in, the armed forces of a foreign state [when] . . . such armed forces [were] engaged in hostilities against the United States."[139] Questions surround the exact nature of Hamdi's activities in Afghanistan,[140] however, and Hamdi maintained that he neither entered nor served with Taliban forces.[141] Furthermore, the fact that Hamdi relied on his rights as an American citizen after his detention by Northern Alliance forces and his transfer to Guantanamo Bay indicates that he still considered himself a citizen and appreciated the benefits of his citizenship, even after his capture in Afghanistan.[142] Hamdi's actions in Afghanistan thus do not manifest the specific expatriating intent required to renounce citizenship, and the inquiry must turn to whether Hamdi's actual renunciation of his citizenship is sufficient to meet this requirement.

Strictly under the terms of the Immigration and Nationality Act, Hamdi's formal renunciation of his U.S. citizenship before the diplomatic officer in Saudi Arabia is an acceptable expatriating act.[143] The Agreement allowed Hamdi a seven-day window between the time he arrived in Saudi Arabia and the time he was required to renounce his citizenship;[144] hence, his appearance before authorities in Riyadh was technically of his own volition as a "free" man. However, section 349(b) of the Immigration and Nationality Act[145] states that while the party performing the expatriating act "shall be presumed to have done so voluntarily[,] . . . such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act . . . performed [was] not done voluntarily."[146] Furthermore, the *Terrazas* Court stated that performance of a statutory expatriating act is merely evidence of voluntariness; the act raises no presumption that the actor possessed the specific intent to expatriate.[147]

It is certainly more likely than not that Hamdi's formal renunciation of his citizenship was not voluntary and was not performed with the specific intent to expatriate required under the *Afroyim* and *Ter-*

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139 8 U.S.C. § 1481(a)(3)(A).

140 *See supra* notes 39–40 and accompanying text.

141 *See* Release Agreement, *supra* note 3, at 1.

142 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 510–11 (2004) (plurality opinion).

143 *See* 8 U.S.C. § 1481(a)(5) (listing "a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state" as an expatriating act); Release Agreement, *supra* note 3, ¶ 8.

144 *See* Release Agreement, *supra* note 3, ¶ 8.

145 8 U.S.C. § 1481(b).

146 *Id.*; *see also* Vance v. Terrazas, 444 U.S. 252, 270 (1980) (noting that even if the actor fails to prove that he acted voluntarily, "the question remains whether on all the evidence the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship").

147 *Terrazas*, 444 U.S. at 268 ("Th[e] matter [of intent] remains the burden of the party claiming expatriation to prove by a preponderance of the evidence.").

razas standard.[148] First, Hamdi's renunciation is tied too closely to the Release Agreement itself to conclude reasonably that his expatriating act was voluntary if his entry into the Agreement was not. If Hamdi had not signed the Release Agreement, he would not have been free to appear before authorities in Riyadh; instead, he would likely still be imprisoned in a South Carolina military brig.[149] Hamdi agreed to renounce his citizenship formally as a means to secure his release from the coercive threat of indefinite detention,[150] and it is implausible that this threat did not motivate Hamdi as he carried out his duties under the Agreement. Thus, the same concerns of voluntariness that surrounded Hamdi's entry into the Release Agreement apply to his formal renunciation in Riyadh.[151]

Hamdi's personal history also suggests that he may not have chosen to renounce his U.S. citizenship had he served his detention in due course and returned to Saudi Arabia without the necessity of a release agreement.[152] Hamdi had retained dual citizenship between Saudi Arabia and the United States for approximately eighteen years, and although it is uncertain wbether he affirmatively would have chosen to keep his U.S. citizenship after his detention by the U.S. government, his past ties to the United States suggest that his formal renunciation was not an entirely voluntary act.[153]

Moreover, the Release Agreement itself provides that if Hamdi fails to comply with any of the Agreement's requirements, he faces immediate recapture and detention.[154] With such an explicit threat designed to ensure his performance, it is more likely that Hamdi performed the expatriating act merely to avoid recapture than to manifest his intent to renounce his nationality. In other words, Hamdi's specific intent was arguably to protect his liberty rather than to exercise his "natural and inherent right" to expatriate;[155] therefore, his expatriating act does not meet either the statutory or the *Afroyim* and *Terrazas* standard for voluntary renunciation of citizenship.

In addition to Hamdi's waiver of any rights against the government relating to its conduct in his capture and detention, the Agreement also contains a promise by Hamdi to waive any challenges to the terms and conditions of the Agreement itself.[156] This waiver provision

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148 *See id.* at 270; Afroyim v. Rusk, 387 U.S. 253, 268 (1967).

149 *See* Release Agreement, *supra* note 3, ¶ 1.

150 *See id.* ¶ 8.

151 *See supra* Part II.B.

152 Presumably, all of the Taliban enemy combatants will be released after the end of active hostilities in Afghanistan. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004).

153 *See supra* notes 37–38 and accompanying text.

154 *See* Release Agreement, *supra* note 3, ¶ 12.

155 *See supra* note 19 and accompanying text.

156 *See* Release Agreement, *supra* note 3, ¶ 13.

further supports the conclusion that Hamdi did not renounce his U.S. citizenship voluntarily, because it indicates that the government may have anticipated, and preemptively chosen to avoid, any objections to the Agreement's coerciveness. The Agreement contains only a limited number of provisions potentially challengeable by Hamdi, and most of these provisions are by their nature ones that lack real actionable meaning: the provisions regarding Hamdi's release and transfer provide little fodder for judicial action;[157] the provisions requiring Hamdi to refrain from engaging in or assisting combatant activities and to renounce terrorism and violent jihad have little practical meaning to Hamdi, since he has never admitted to engaging in terrorist activities or supporting terrorism in any way;[158] the residency and travel restrictions seem more to edify the government than to constrict Hamdi's activities;[159] and the conflict-of-laws and remaining procedural provisions similarly lack relevance to Hamdi now that he has secured his release.[160]

The only provisions potentially worthy of challenge by Hamdi include the expatriation provision, the immediate-recapture provision, and the waiver provision.[161] Of these three, the Agreement's language indicates that the government itself believed the expatriation provision would be the most challengeable. The language immediately preceding Hamdi's signature reads, "I understand . . . [the Agreement's] effect on my claim to United States citizenship. I understand this Agreement and voluntarily agree to it."[162] The language directly preceding the signatures of Hamdi's counsel states, "We have carefully reviewed every provision of this Agreement . . . with the Petitioner and have explained its effect on his claim to United States citizenship. To our knowledge, the Petitioner's decision to enter into this Agreement is an informed and voluntary one."[163] This language indicates that the United States had an overwhelming concern with confirming Hamdi's voluntary entry into the Agreement and implies

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157 *See id.* ¶¶ 1–3.

158 *See id.* ¶¶ 4–5, 7.

159 *See id.* ¶¶ 9–11. Consider that the government imposed these restrictions even though it had no evidence that Hamdi had ever traveled to the United States while living in Saudi Arabia before his detention or that he ever traveled or desired to travel to Iraq, Israel, Pakistan, Syria, the West Bank, or the Gaza Strip.

160 *See id.* ¶¶ 14–18; *supra* notes 84–85 and accompanying text.

161 *See* Release Agreement, *supra* note 3, ¶¶ 8, 12–13.

162 *Id.* at 4.

163 *Id.* This language should not necessarily serve as evidence that Hamdi voluntarily entered into the Release Agreement. Not only must we consider the coercive circumstances surrounding the release, but as Justice Stevens noted in his *Rumery* dissent, "[e]ven an . . . informed" innocent person should not be forced to choose between indictment and the surrender of his constitutional rights. *See* Town of Newton v. Rumery, 480 U.S. 386, 403 (1987) (Stevens, J., dissenting).

that even the government understood that Hamdi's renunciation of his U.S. citizenship was the product of coercion.

Hamdi agreed to expatriate, and ultimately renounced his citizenship, without the requisite voluntary, specific intent. Therefore, the expatriation provision of the Agreement is not only unenforceable from a contractual standpoint, but it is also unconstitutional. Because the Release Agreement and its surrounding circumstances indicate that the government required Hamdi to renounce his citizenship without his full consent—and arguably realized the coercive nature of its demand—the government's treatment of Hamdi represents an unconstitutional "sever[ing of] its relationship" with him.[164]

III
THE FUTURE OF CITIZEN ENEMY COMBATANTS IN THE WAR ON TERROR AND BEYOND

If Yaser Hamdi had presented an isolated case of an American citizen detained by the government as an enemy combatant, many might accept the Release Agreement as an effective—although perhaps flawed—means of ending Hamdi's detention while still respecting American security interests in the War on Terror. Hamdi's case, however, sets a dangerous precedent.[165] As the Saudi Arabian response to the Release Agreement makes clear, the United States must justify its treatment of citizen enemy combatants to maintain its legitimacy in the international community.

A. Saudi Arabia's Response to the Hamdi Release Agreement

Nail al-Jubeir, a spokesman for the Saudi Embassy, contended that as an "issue of fairness," the Saudi Arabian government considers the Release Agreement unenforceable and believes that the U.S. gov-

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164 *See* Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

165 Jose Padilla, the so-called "dirty bomber," *see* Fred Barbash, *Padilla's Lawyers Suggest Indictment Helps Government Avoid Court Flight*, WASHINGTONPOST.COM, Nov. 22, 2005, http://www.washingtonpon.com/wp-dyn/content/article/2005/11/22/AR2005112201061.html, was detained for three years as a citizen enemy combatant before he was formally indicted in November 2005. *See* United States v. Hassoun, No. 04-60001-CR-COOKE (S.D. Fla. filed Nov. 17, 2005), *available at* http://news.findlaw.com/hdocs/docs/padilla/uspad111705ind.pdf. Padilla was then transferred to a federal detention facility after the Supreme Court granted the Government's request for transfer. *See* Hanft v. Padilla, No. 05-A578 (U.S. Jan. 4, 2006) (order granting transfer request), *available at* http://news.findlaw.com/hdocs/docs/padilla/scotus10406opn.html. An agreement similar to Hamdi's Release Agreement was unlikely in Padilla's situation because the Government did not "have a place to ship him to. He is an American citizen." *Newshour with Jim Lehrer: Terror Suspect Yaser Hamdi Is Released* (PBS television broadcast Sept. 22, 2004), *available at* http://www.pbs.org/newshour/bb/terrorism/july-dec04/suspect_9-22.html. However, as this Note indicates, this fact may not bar the government from attempting to transfer future citizen enemy combatants to ally nations. *See infra* Part III.B.

ernment should have set Hamdi free without conditions.[166] According to al-Jubeir, "'If [Hamdi is] guilty of something, we don't believe the U.S. government would let him go.'"[167] Al-Jubeir's statements do raise important questions regarding the government's sudden decision to release Hamdi after nearly three years of detention—questions the Release Agreement does not answer. Hamdi's renunciation of "terrorism and violent jihad"[168] does not serve as an admission of wrongdoing or a concession that his detention was authorized. Indeed, Hamdi explicitly maintained that he was not an enemy combatant.[169] Although the government has implied that Hamdi's release came only after a determination that he no longer posed a threat to the United States,[170] it provided no explanation of the basis for this determination or any justification for the length of Hamdi's detention.[171]

Furthermore, al-Jubeir raised the concern that since the Saudi Arabian government was not a party to the Release Agreement, it cannot enforce the Agreement's provisions.[172] He also noted that the Saudi Arabian government had "'asked the United States to provide [the Saudi government] with whatever information [the U.S. government has] on [Hamdi],'" but prior to Hamdi's release had received "'nothing—no charges against him . . . [or] direct evidence'" of any wrongdoing.[173] These concerns regarding the Release Agreement led

166 *Enemy Combatant's Release Delayed*, *supra* note 7.

167 *Id.*

168 Release Agreement, *supra* note 3, ¶ 7.

169 *Id.* at 1 ("Hamdi maintains that he never affiliated with or joined a Taliban military unit, never was an enemy combatant, that is, never was part of or supported forces hostile to the United States and . . . never engaged in armed conflict against the United States . . . .").

170 *See* DOJ Press Release, *supra* note 2 ("[T]he United States has determined that Mr. Hamdi could be transferred out of United States custody . . . . [T]he United States has no interest in detaining enemy combatants beyond the point that they pose a threat to the U.S. and our allies.").

171 *See id.*

172 *Terror Suspect's Release Hits Snag*, CBSNEWS.COM, Sept. 30, 2004, http://www.cbsnews.com/stories/2004/10/11/national/main648566.shtml; *see also Enemy Combatant's Release Delayed*, *supra* note 7 ("Al-Jubeir said the Saudi government objects to being asked to enforce a deal in which it had no official say."). In a September 30, 2004 press briefing, a spokesman for the U.S. Department of State addressed this concern: "[This] is an agreement between Mr. Hamdi and the Justice Department. It does not involve the Saudi authorities . . . . [H]ow it will be implemented . . . is a matter for Mr. Hamdi's lawyers, Mr. Hamdi or the Justice Department to discuss. It's not a matter involving the Government of Saudi Arabia." Daily Press Briefing, Richard Boucher, Spokesman, U.S. Dep't of State (Sept. 30, 2004), *available at* http://www.state.gov/r/pa/prs/dpb/2004/36647.htm [hereinafter Daily Press Briefing].

173 *CNN's Wolf Blitzer Reports: Interview with Adel Al-Jubeir* (CNN television broadcast Sept. 28, 2004), *available at* http://saudiembassy.net/2004News/Statements/TransDetail.asp?cIndex=477.

to a "snag"[174] in the release process that necessitated negotiations between the U.S. State Department and the Saudi government[175] and ultimately delayed Hamdi's transfer to Saudi Arabia by eleven days.[176] The results of these negotiations have not been made public,[177] and it is unclear whether any changes were ultimately made to the Agreement or the role of the Saudi government in its enforcement.[178] Regardless of the negotiation results, the United States should use the Saudi reaction to the Release Agreement as an indication of the need to resolve the citizen enemy combatant dilemma and adjust its treatment of both these combatants and its allies. In these arenas, policy choices regarding both enemy and friend have grave ramifications for the United States' legitimacy as an international power.[179]

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174 *See Terror Suspect's Release Hits Snag*, *supra* note 172 ("The planned release of a . . . suspected enemy combatant has been delayed . . . because of what the U.S. official described as a snag in negotiations with the Saudi government."). *But see* Daily Press Briefing, *supra* note 172 ("I wouldn't describe it as a snag at this point, there have just been some things we had to work out . . . .").

175 *See Terror Suspect's Release Hits Snag*, *supra* note 172.

176 *Compare* Release Agreement, *supra* note 3, ¶ 1 ("The United States agrees to release Hamdi from United States custody . . . no later than September 30, 2004 . . . ."), *with* DOS Press Release, *supra* note 4 ("Mr. Hamdi arrived in Saudi Arabia on October 11, 2004.").

177 *See* Markon, *supra* note 100 ("It was unclear yesterday what was done to break the impasse . . . . But sources familiar with the negotiations said a federal judge helped speed the process by secretly ordering the government to bring Hamdi to a hearing . . . ."). District Judge Robert G. Doumar did issue an order requiring the Government to submit to the court copies of all documents it planned to use in its case against Hamdi if the Government did not release Hamdi by a specified date. Hamdi v. Rumsfeld, No. 2:02CV439 (E.D. Va. Oct. 11, 2004) (order granting document request), *available at* http://notablecases.vaed.uscourts.gov/2:02-cv-00439/docs/70250/0.pdf. Judge Doumar dismissed Hamdi's habeas corpus petition, but in an interesting choice of wording retained jurisdiction to "enforce the terms of any *valid* settlement agreement." *Id.* (emphasis added). It remains unknown, however, whether this order actually provided the impetus for the Government to cease talks with the Saudi government and hasten Hamdi's release.

178 In an October 11, 2004 statement, State Department Spokesman Richard Boucher thanked the Saudi government for facilitating Hamdi's transfer, but did not discuss the Release Agreement. *See* DOS Press Release, *supra* note 4.

179 Questions have already been raised in the Arabic world regarding the legitimacy of the United States' treatment of its citizens in the War on Terror. Writing for the widely-read Arabic newspaper *Dar Al-Hayat*, columnist Jihad Al Khazen described various examples of Americans' liberty interests being violated by the government's "exceptional authorities" after September 11, 2001, and stated:

> [I]f we were talking about an Arab, or Third World, country there would not have been any issue to talk about, as the rule of law does not exist in such countries. However, we are talking here about the country of laws . . . .
>
> There is a famous English saying about an average man who tries to live up to the lifestyle of his wealthy neighbors (the Joneses), which goes: "Never keep up with the Joneses. Drag them down to your level."
>
> . . . .
>
> My fear is that President Bush has understood that [Middle Eastern countries] cannot keep up with the level of democracy, transparency, questioning, and rule of law of bis country; as Iraq is not the model that he wanted the countries of the region to imitate, and the plan for democracy

B. The United States' Duty to Respect its Allies in the Transfer of Citizen Enemy Combatants

Each aspect of the Saudi concerns with the Release Agreement provides an example of more effective strategies that the United States could utilize vis-à-vis its allies in future citizen enemy combatant situations. First, al-Jubeir expressed concerns regarding the lack of charges against Hamdi in light of the United States' request that the Saudi government enforce severe conditions against a seemingly innocent individual.[180] Perhaps security concerns prevent a complete public explanation of the reasons for an enemy combatant's detention or the government's justification for a combatant's release.[181] Without any explanation by the government, however, such actions seems arbitrary; providing limited information about an enemy combatant's release from detention would add legitimacy to the government's decision and would show respect to the ally to which it transfers the combatant.[182] Given that the government once considered Hamdi too dangerous to be allowed access to counsel,[183] it is especially troubling that the government has not provided some explanation for why it released Hamdi suddenly and transferred him to another country.[184]

> in the Greater Middle East (GME) remains the same. The Americans are laughing at us and *we are laughing at them; however, there is no democracy* . . . .
>
> In such a situation, the President decided to drag his country down to our levels of democracy and rule of law, in order for us to be able to communicate with one another.

Jihad Al Khazen, *Ayoon wa Azan (What I Fear)*, DAR AL-HAYAT, Oct. 24, 2004, *available at* http://english.daralhayat.com/opinion/OPED/10-2004/Article-20041023-c73c59aa-c0a8-01ed-0013-515e69b5a678/story.html (emphasis added).

180 *See supra* notes 172–73 and accompanying text.

181 *See, e.g.*, Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 926–27 (D.C. Cir. 2003) (denying release of information about detainees, explaining that "[i]t is . . . well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview"); N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 210–11 (3d Cir. 2002) (holding that reporters did not have a right of access to proceedings that were determined to present significant national security concerns).

182 As al-Jubeir's statements regarding the Release Agreement suggest, allies of the United States have confidence that the United States would not release a dangerous criminal. *See supra* note 167 and accompanying text.

183 *See supra* note 47 and accompanying text.

184 Many have speculated that the Release Agreement suggests that the Government simply had no evidence against Hamdi and could not have satisfied the due process requirements set out by the *Hamdi* plurality. *See, e.g.*, Sonja Barisic, *Is Hamdi About to be Released?*, ASSOCIATED PRESS, Aug. 12, 2004, *available at* http://www.law.com/jsp/article.jsp?id=1090180324952 ("Michael Greenberger, who worked on counterterrorism projects in the Clinton administration's Justice Department, said letting Hamdi go now is a concession that the legal argument failed and that Hamdi himself is not a threat."); *see also supra* notes 57–60 and accompanying text (describing the due process requirements when citizens challenge enemy-combatant status). This is not a sufficient reason, however, for the government to remain silent or dismissive about its justifications for Hamdi's release.

Al-Jubeir's concern that the U.S. government should not ask Saudi Arabia to enforce an agreement to which it was not a party[185] presents a somewhat more difficult problem to resolve. As noted by State Department Spokesman Richard Boucher, the Release Agreement pertained primarily to Hamdi's citizenship and his rights against the United States, and thus was the product of negotiations between the government and Hamdi's counsel.[186] If the necessity of similar agreements arises in the future, however, the U.S. government should at least consider confirming whether an allied government is willing and able to assist the United States in enforcing the agreement's terms.[187] Furthermore, in the future, the United States should refrain from publicly dismissing its allies' concerns as it did during the Hamdi negotiations with Saudi Arabia.[188] Again, showing respect for allies is crucial to maintaining legitimacy in the War on Terror, and fully acknowledging and contemplating our allies' valid concerns and perspectives[189] is another means of demonstrating this respect.

The third concern raised by al-Jubeir—the lack of information or evidence provided to the Saudi government regarding Hamdi's alleged wrongdoing[190]—is perhaps the easiest to remedy in similar future situations. Again, although the government must consider national security concerns in its release of information, there are outlets the government could use to inform allies of pertinent information about transferred individuals. For example, District Judge Robert G. Doumar ordered the United States to provide the evidence it

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See Newshour with Jim Lehrer: Terror Suspect Yaser Hamdi Is Released, *supra* note 165 (acknowledging the government's relative silence about Hamdi's release but noting that "there seems to be some indication that . . . his intelligence value is exhausted"). As part of showing respect for the help of its allies and respect for its citizens' rights, the government should be as forthright as possible regarding the release of combatants to other countries, even if this means admitting a wrongful detention.

185 *See supra* note 172 and accompanying text.

186 *See supra* note 172.

187 In Hamdi's case, the Release Agreement imposes a significant burden on Saudi Arabian authorities to monitor Hamdi's activities. *See* Release Agreement, *supra* note 3, ¶¶ 6, 9, 10. The capabilities and willingness of the Saudis to help enforce this Agreement should have been considered by the United States when it drafted the Agreement.

188 Spokesman Boucher's repeated statements that the Release Agreement is "not a matter involving the Government of Saudi Arabia" represented the government's only public response to concerns involving the lack of Saudi involvement in the Agreement. *See* Daily Press Briefing, *supra* note 172; *supra* notes 172–78 and accompanying text.

189 *See US, Saudi Still at Odds Over Release of Terror Suspect Hamdi*, TURKISHPRESS.COM, Oct. 4, 2004, http://www.turkishpress.com/news.asp?id=29570 (reporting the statements of an anonymous State Department official and suggesting that the United States "was losing patience with Riyadh's refusal to accept Hamdi, complaining that the Saudis had not raised specific objections to his repatriation"). This Note suggests only that the United States should consider allies' valid and specific concerns. Requiring the government to consider any and all of its allies' concerns could lead to a situation of endless delay in transferring combatants.

190 *See supra* note 173 and accompanying text.

planned to use against Hamdi, and the Government produced this evidence to the district court and Hamdi's counsel under seal and in a classified manner.[191] The United States could undertake similar security measures to provide evidence to allies involved in enemy combatant transfers; this would at least allow allies to completely determine the status they should afford the individual.[192]

On a more fundamental level, there are additional concerns regarding how the United States handled Hamdi's release and what it expected of the Saudi government. Even assuming *arguendo* that Hamdi effectively renounced his U.S. citizenship and repatriated as a Saudi, a situation now exists in which the United States is instructing another country on how it must control its own citizens.[193] Although this level of interference with a foreign ally's government is itself troubling, the situation becomes even more disturbing when considering that the Release Agreement is likely invalid: Without a truly voluntary renunciation of his citizenship, Hamdi remains an American citizen who is now completely subject to Saudi Arabian laws and is under the control of Saudi authorities, at the behest of the United States.[194]

Viewing the situation in this manner demonstrates the interplay between the United States' duty to respect its allies in the War on Terror and the United States' duty to respect its citizens—even those it once considered enemies—because Hamdi's circumstances and his transfer to Saudi Arabia do not represent an anomaly in the government's treatment of citizens and allies. For example, the 2004 case of Ahmed Abu Ali[195] concerned a twenty-three-year-old American citizen[196] who was detained in Saudi Arabia from June 2003 until Febru-

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191 *See* Hamdi v. Rumsfeld, No. 2:02:CV439 at 2 (E.D. Va. filed Oct. 11, 2004), *available at* http://notablecases.vaed.uscourts.gov/2:02-cv-00439/docs/70250/0.pdf.

192 *See supra* note 173 and accompanying text (noting that the Saudi government had unsuccessfully requested information regarding Hamdi from the United States).

193 *See supra* note 182 and accompanying text (discussing the burden imposed upon the Saudi government).

194 Under the terms of the Release Agreement, "the United States agree[d] to make no request that Hamdi be detained by the Kingdom of Saudi Arabia based on information as to Hamdi's conduct known to the United States . . . ." Release Agreement, *supra* note 3, ¶ 3. *But see CNN's Wolf Blitzer Reports: Interview with Adel Al-Jubeir*, *supra* note 173 ("[The Saudi Government] will have to talk to [Hamdi] to see where he may have violated our laws and we will deal with him accordingly."). If Hamdi violates any provisions of the Release Agreement, he will not be subject to Saudi law and may instead be taken back into custody by American authorities as an enemy combatant. *See supra* notes 78–79 and accompanying text.

195 Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.C. Cir. 2004).

196 Abu Ali was born in Houston, Texas, and lived in Virginia until graduating as valedictorian from his high school and enrolling as a student at the Islamic University of Medina in Saudi Arabia. *Id.* at 31–32.

ary 2005.[197] According to Abu Ali's father, an employee of the Saudi Embassy in Washington, D.C., Saudi officials repeatedly described Abu Ali's detention as "an 'American case' that Saudi Arabia ha[d] no control over due to strong political pressure from the U.S. government to keep Ahmed in Saudi custody."[198] Abu Ali was allegedly tortured in the Saudi prison,[199] and although Saudi officials indicated that they would immediately release Abu Ali to the United States upon a formal request for extradition, the United States filed no such request for nearly twenty months.[200] In an interesting coincidence, the FBI allegedly contacted Abu Ali's parents during this detention period and offered to release their son "if he revoked his U.S. citizenship and lived in another country."[201]

As District Judge Bates stated in *Abu Ali*, "[A] citizen cannot be so easily separated from his constitutional rights" as to permit the government to "work through the intermediary of a foreign country to detain a United States citizen abroad."[202] Not only have Abu Ali's arrest, detention, and possible torture with the knowledge and alleged involvement of the United States harmed the citizen, but the U.S. government's use of foreign governments as pawns to perform acts that would otherwise not withstand constitutional scrutiny demonstrates a lack of respect for the proper treatment of foreign allies. Further-

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197 *Id.* at 30; *American Charged in Alleged Plot to Assassinate President Bush*, CNN.COM, Feb. 23, 2005, http://www.cnn.com/2005/LAW/02/22/bush.plot.charges/index.html (describing the charges against Abu Ali as supporting terrorists and discussing the possible assassination of President George W. Bush). A federal jury convicted Abu Ali in November 2005, and he is now facing twenty months to life in a federal prison. *See Would-Be Bush Assassin Could Face Life: Jury Rejects Claims that Confession was Product of Saudi Torture*, CNN.COM, Nov. 22, 2005, http://www.cnn.com/2005/LAW/11/22/bush.plot.

198 *Abu Ali*, 350 F. Supp. 2d at 33; *see also id.* at 30–31 ("Petitioners have provided evidence . . . that: (i) the United States initiated the arrest of Abu Ali in Saudi Arabia; (ii) the United States has interrogated Abu Ali in the Saudi prison; [and] (iii) the United States is controlling his detention in Saudi Arabia . . . . The United States does not offer any facts in rebuttal.").

199 *Id.* at 31, 36, 38.

200 *Id.* at 32, 38. Before the *Hamdi* and *Rasul* decisions, the United States also allegedly indicated to Abu Ali and his family that if Abu Ali did not cooperate, he would either be kept in a Saudi prison and tried without counsel or classified as an enemy combatant and sent to Guantanamo Bay. *Id.* at 38. According to Abu Ali's counsel, when the U.S. government learned that Abu Ali was planning to file a habeas corpus petition, "Saudi authorities suddenly indicated they planned to press charges. Such charges might jeopardize U.S. courts' jurisdiction over Abu Ali's case." Thom J. Rose, *U.S. Denies Foreign Detention of Citizen*, WASH. TIMES, Aug. 17, 2004, *available at* http://washingtontimes.com/upi-breaking/20040817-064339-5079r.htm. The exact circumstances surrounding Abu Ali's transfer to the United States in February 2005 are unclear. *See Saudis Deny Torturing Detained American*, CNN.COM, Feb. 23, 2005, http://www.cnn.com/2005/LAW/02/23/saudi.statement (indicating uncertainty over whether the transfer was the result of a U.S. request to either charge or release Abu Ali, or whether it resulted from a deportation request made by Abu Ali himself).

201 *Abu Ali*, 350 F. Supp. 2d at 34.

202 *Id. at* 31.

more, the United States must remain mindful of the need to establish its legitimacy in the Greater Middle East at this crucial time,[203] and utilizing Middle Eastern governments to avoid the requirements of the democracy and rule of law that the United States hopes to model for the region is an ineffective way to establish this legitimacy.[204] In future situations involving citizens abroad, the United States should not rely on foreign governments to circumvent the Constitution, and the United States' treatment of its citizens should serve as a true example for the governments of the region instead of providing a reason for ridicule.[205]

CONCLUSION

All parties involved in the Release Agreement most likely viewed the Agreement as the easy way out. Hamdi received his return to Saudi Arabia and the restoration of a relative freedom.[206] In return, the United States received Hamdi's promise not to bring legal action against the government for his detention, accomplished the removal

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203 The first Iraqi elections were held on January 31, 2005. *See Sporadic Violence Doesn't Deter Iraqi Voters*, CNN.COM, Jan. 31, 2005, http://www.cnn.com/2005/WORLD/meast/01/30/iraq.main. Thus, since the United States continues to be involved in Iraq and Afghanistan, how these and surrounding countries view the U.S. government is of the utmost importance to avoid fears such as those expressed by Al Khazen. *See* Al Khazen, *supra* note 179.

204 The United States has continually utilized foreign intelligence services to interrogate suspected enemy combatants in the War on Terror, and the CIA's network of so-called "black sites" in Eastern Europe and Asia has allegedly been utilized for the torture of terrorism suspects abroad. *See* Dana Priest, *Secret Prison System Detains High-Level Terrorism Suspects*, SEATTLE TIMES, Nov. 2, 2005, at A1; Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations: "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1. As one official involved in this process remarked, "'We don't kick the [expletive] out of them. We send them to other countries so *they* can kick the [expletive] out of them.'" Priest & Gellman, *supra* (alterations in original). The United States has been involved with the arrest and detention of suspected combatants by, *inter alia*, Jordan, Egypt, Morocco, Saudi Arabia, and Syria. *See id.* A State Department official stated that although the United States officially claims to be involved in these transfers only if the suspected combatants are wanted on criminal charges by allies, "'sometimes a friendly country can be invited to "want" someone we grab.'" *Id.* In a notable example, Canadian citizen Maher Arar alleges he was taken by U.S. officials at JFK Airport and sent to Syria, where he was detained and tortured for a year before being released by the Syrian government as "completely innocent." *See* Complaint at 2, 19, Arar v. Ashcroft, No. 04-CV-0429 (E.D.N.Y. filed Jan. 22, 2004), *available at* http://www.maherarar.ca/cms/images/uploads/Arar_Complaint_FINAL.pdf.

205 *See* Al Khazen, *supra* note 179 ("[W]e are laughing at them . . . . [T]here is no democracy . . . .").

206 This Note does not mean to suggest that the Release Agreement worsened Hamdi's situation in any way other than the theoretical result of forcing his renunciation of his citizenship. As Hamdi himself stated after his return to Saudi Arabia, he feels "awesome" about being reunited with his family and being released from custody. *See* Phil Hischkorn, *Saudi Once Held by U.S. Returns Home: Hamdi Released After 'Enemy Combatant' Case Went to High Court*, CNN.COM, Oct. 11, 2004, http://www.cnn.com/2004/WORLD/meast/10/11/hamdi.

from the country of what it once viewed as a potential security threat,[207] and transferred the burden of monitoring Hamdi to another country.[208] However, with the high stakes of the Release Agreement's ramifications on citizens' rights and the legitimacy of its foreign policy in the War on Terror, the United States should avoid merely seeking simple solutions. Instead, it must strive to resolve future citizen enemy combatant situations in a manner that both respects the promises of the Constitution and models these promises to the world.

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207 *See Newshour with Jim Lehrer: Terror Suspect Yaser Hamdi Is Released*, *supra* note 165 ("[Hamdi] can't come to the United States for the next ten years. And after that, he has to seek the permission of the defense secretary before he comes here, which probably means never.").

208 *See id.* ("[The United States gets to] reduce their prison population which is increasingly burdensome.").