2. The Supreme Court Goes to War

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1. Did the Court Wade in Too Far?

In his colorful dissent in *Hamdi v. Rumsfeld*, one of the three enemy combatant cases decided at the end of the 2004 term, Justice Antonin Scalia accused the plurality opinion of "what might be called a Mr. Fix-it Mentality."[1] According to Scalia, "The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions." This conceit, in his view, has consequences for Congress and the president: "[This approach] encourages their lassitude and saps the vitality of government by the people."

For decades, a political and academic debate has been waged over the appropriate role of the judiciary in the complex social, economic, and moral issues of our national life. At year 2004, add war to that mix. All such issues, of course, have serious legal questions, attached like barnacles to their bodies corpora. So is it enough, then,

1. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2673 (2004).

for the Court to locate the legal issue, decide it, and let the other branches of government and societal groups deal with untoward consequences and devise solutions? In the past, this has been the query commentators have asked after the Court's pronouncements on abortion, affirmative action, separation of church and state, gay rights, and the like. But in 2004, this query was raised in the heretofore sacrosanct sphere of war and foreign relations, long regarded as an executive bastion. Like Justice Scalia, some critics of the enemy combatant decisions view the Court, in at least two of the cases, as acting as a superlegislature, putting its own fix on complicated areas formerly left to diplomacy and military judgment. But is that critique fair? Has the Court crossed a bridge too far in telling the other branches, schooled in the conduct of war, what to do and how to do it? Or, as other critics assert, has the Court, in effect, taken on the role of the Music Man, leading the parade, with the seventy-six trombones of our policy-making apparatus straggling behind? Opinions vary. This chapter will attempt to tease out the implications of the Court's several pronouncements for those policy makers and to suggest the unanswered questions that may require a second look by the Court itself.

There is, of course, a basic difference between the enemy combatant cases and earlier hot-button issues where the Court's intervention proved especially controversial. The enemy combatant cases did not involve issues of federalism where fifty "laboratory" states might be working independently on local solutions and competing for best answers. The federal government's jurisdiction over treatment of captured combatants was exclusive. Nor was this an issue that the other two branches had steadfastly refused to take on, such as racial segregation. In this case, the executive branch had seized the reins with vengeance and warned the others away, including, notably, the judiciary. In fact, apart from its September 19, 2001, resolution authorizing "necessary and appropriate force" against those involved with or harboring 9/11 terrorists, Congress had made no attempt to legislate

or even hold hearings as to what should be done with such persons after their capture. The status and treatment of so-called enemy combatants were solely at the executive's discretion or whim. Apart from a few "most favored nation" bows to our allies who had a handful of citizens among the more than 600 prisoners held at Guantanamo Bay, no known diplomatic initiatives had been undertaken. The executive was doing its thing without outside intervention of any kind from any other authority.

But what the *Washington Post* called "international opprobrium"[2] rained down on the United States for its alleged flaunting of international human rights and the laws of war. Front-page color photographs of hooded, shackled, caged prisoners being held incommunicado on the U.S. Guantanamo Base in Cuba for an indefinite duration, with no access to families, press, or lawyers and interminably subjected to interrogations conducted without the protections of the Geneva Conventions, repelled not only allies and enemies abroad but also many of our own citizens. The mainline press here and abroad sided with the American Bar Association, Amnesty International, Human Rights Watch, and scores of civil liberties and human rights groups to protest the status and conditions of the detainees. Even the Red Cross uncharacteristically went public with criticism of the detainees' treatment. When it was revealed that not only foreigners but also American citizens held inside the United States were being treated similarly, the clamor rose to sufficient heights that something had to give. In the United States, the situation inevitably spawned lawsuits. Despite the logistic obstacles to representing incarcerated clients who did not even know that they had lawyers or that lawsuits had been brought on their behalf and who until after, or just before, the Supreme Court heard their cases never got to see or talk to anyone about their legal rights, a half dozen habeas corpus suits were filed and lurched their way up to the Supreme Court.

2. *Belated Reform* (ed.), WASH. POST, July 9, 2004, at A18.

No one could block the lawsuits from being filed, of course, but the Supreme Court could and, it was widely predicted, *would* make short shrift of them by denials of certiorari, particularly in the case of the foreign combatants housed at Guantanamo. An intact precedent from 1950, *Johnson v. Eisentrager*,[3] denied all recourse to U.S. courts for German citizens convicted of war crimes in a U.S. military tribunal abroad and held in an American prisoner of war camp in Germany. In fact, one of the two lower courts of appeal hearing the Guantanamo cases denied all relief and dismissed the writs on the basis of that earlier precedent.[4]

There were, however, perils in that course for the Supreme Court. One was the weak factual basis for ruling that the Guantanamo Naval Base, which operated on a ninety-nine-year renewable lease from Cuba, with the United States in total and exclusive control of everything on the base, was *not* U.S. territory and thus did not fall within the *Eisentrager* precedent (by the time the D.C. Circuit case reached the Supreme Court, the Ninth Circuit had already ruled that way).[5] Second, there was what was viewed by many as executive overreaching in claiming total secret and exclusive control over the detainees' fate, with no declared processes for review or ultimate release. *If* military review panels, which were already provided for in U.S. Army regulations implementing the Geneva Conventions, had been set up, as they had been in the Gulf and Vietnam Wars to hear prisoners' objections to their status as enemy combatants on the grounds that they were, in fact, innocent bystanders and were not engaged in combat alongside our enemies; and *if* the executive had announced a system of periodic reviews to determine whether prisoners could be safely released to their home countries (both of which procedures have been put in effect since the decision), there is at least a good chance the Court would not have waded in so far or

3. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
4. *Al Odah v. United States*, 321 F.2d 1134 (D.C. Cir. 2003).
5. *Gharebi v. Bush*, 352 F.2d 1278 (9th Cir. 2003).

chastised the executive so harshly. We can certainly speculate that had even those limited processes been in place, the Court might have said that an initial military hearing and periodic review procedures were enough for foreign-born prisoners captured on or near the battlefield, no matter where they were held, and that a full-press U.S. court habeas proceeding was not necessary, nor was there any precedent for its extension to this group. International humanitarian law, as expressed in the Geneva Conventions, would have supplied a sufficient validation for the executive's actions.

As it was, however, the government hung tough on the fifty-year-old *Eisentrager* precedent, which had been decided before the promulgation of the relevant Geneva Conventions on the treatment of battlefield captures, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and myriad judicial decisions from national, regional, and international courts condemning indefinite detention, even in wartime, without any judicial review (125 members of the British Parliament filed a brief on the prisoners' behalf in the Guantanamo cases). Although at the precise moment the cases were heard in the Supreme Court there were no published reports of torture or blatantly inhumane abuses of prisoners at Guatanamo, troubling rumors of long and harsh interrogations, denial of sleep, and bombardment by noise and bright lights were widespread. Most significantly, the despicable abuses at Abu Ghraib prison in Iraq exploded into the news on the very day of oral argument, only hours after the government lawyer defending the executive's treatment of Guantanamo prisoners had assured the Court that the United States did not engage in torture.

But perhaps, too, as eminent commentators observed, the Court's more interventionist stance was a "separation of powers thing." The Court would not be told by the executive it had no right to intervene in the treatment of battlefield detainees even though individual rights were at stake and prisoners were being held in total isolation for months and years without reference to any legal regime,

national or international. The Court, when all is said and done, is a wily body (several of its members are avowed internationalists), and it is reasonable to believe that its members recognized our country, after 9/11, was involved in a new kind of war, with new dilemmas that needed new rules—the world was watching, and foreign critics were already pouncing on us as hypocrites for refusing to practice the rule-of-law values we preached so aggressively. Moreover, the Court had to be acutely aware of the infamous *Korematsu* decision, which upheld the executive's internment of 120,000 loyal Japanese Americans on undocumented executive assertions that they presented a security risk in World War II.[6] In 2004, this was a badge the Court would not wear.

II. How Far Did the Court Actually Go in the Guantanamo Case?

The Guantanamo inmates' challenge in *Rasul v. Bush*[7] came in the form of petitions for habeas corpus brought by relatives of natives of friendly countries—England, Australia, and Kuwait. The petitions claimed the detainees were innocent civilians captured abroad during the Afghanistan war by mistake who had never engaged in combat. This choice of plaintiffs had the advantage of giving a sympathetic international "feel" to the case. Indeed, the friendly status of their countries of origin was cited by the 6–3 majority as one of several factors that distinguished it from the *Eisentrager* precedent, which involved enemy alien members of the German army already convicted of war crimes by a military tribunal. Ironically, however, the non–enemy country's identity of the Guantanamo detainees could raise a question whether the vast bulk of Guantanamo detainees who are natives of Afghanistan, our avowed enemy at the time, are entitled to the relief provided in its ruling. Because the Court never suggests

6. *Korematsu v. United States*, 319 U.S. 432 (1943).
7. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

at any point in its reasoning that these detainees are not so entitled—nor has the Pentagon acted on any such distinction since the decision—it is safe to presume that all Guantanamo inmates have equal access to the writ, though obviously a native of our wartime enemy may have greater difficulty proving his innocent status if captured on or near the battlefield.

In granting access to the habeas corpus writ for the petitioner detainees, the 6–3 fragmented Court in *Rasul* wrote a quite technical opinion, heavily laden with arcane history of the writ and legal peculiarities of its varied applications. The Court saved its rousing rhetoric for the *Hamdi* case and some members for their dissent in *Padilla*—both cases dealing with American citizens.[8] At several junctures, the *Rasul* plurality opinion, authored by Justice Stevens (joined by Justices O'Connor, Souter, Ginsburg, and Breyer; Justice Kennedy

8. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). *Padilla* was the last of the trilogy of enemy combatant cases and involved an American citizen apprehended at O'Hare Airport and detained first as a material witness and later turned over to the military as an enemy combatant designated by presidential decree. A ruling on the merits was detoured temporarily by a 5–4 decision dismissing his petition for habeas corpus because his counsel did not file it in the district to which he had been transferred as a prisoner but rather the one in which he was originally held. The substantive holding in *Hamdi*, however, seems eminently applicable to his case, and his counsel won a writ for his release in the district mandated by the Court, now on appeal. Even so, Justice Stevens, writing for himself and Justices Souter, Ginsburg, and Breyer, thought this an "exceptional case" where "slavish application" to a "bright line rule" was uncalled for, since Padilla's counsel had not been given fair notice of his impending transfer to South Carolina from New York, where she filed the writ. In addition, Justice Stevens found the case "singular" because "th[e]se decisions have created a unique and unprecedented threat to the freedom of every American citizen." The government had conceded in the lower court that the principal purpose for Padilla's detention was "to find out everything he knows," provoking this excoriating reaction from Justice Stevens:

> At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating or preventing subversive activities is the hallmark of the Star Chamber.

concurred in the judgment only), stressed how "narrow but important" was the question before the Court, that question being strictly limited to whether the writ was available for "judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" In answering that question affirmatively, the Court first distinguished *Eisentrager* on several grounds, including the enemy alien status of the World War II prisoners and their prior convictions by a U.S. military tribunal for war crimes contrasted with the friendly nation origins of these prisoners and their as yet untried claims of total innocence. However, these differences, the Court emphasized, went only to the detainees' constitutional right to habeas, and their ultimate rights to habeas were based on the habeas statute, 28 U.S.C. § 2241, which had been reinterpreted since *Eisentrager* to allow the writ for U.S. captives held abroad, whether foreigners or U.S. citizens. It then said that the naval base was "within the territorial jurisdiction" of the United States due to the country's "complete jurisdiction and control" over anyone and everything that went on inside it. The Cuban government's retention of some ephemeral "ultimate sovereignty" should the United States choose not to exercise its perennial option to renew the ninety-nine-year lease had no practical or legal effect in this context. Thus, the normal presumption against extraterritorial application of domestic law did not apply. Most critically, the basic habeas corpus statute required only that the Court have jurisdiction over the custodian, not the prisoner—a proposition to which there was no disagreement among the parties here, because the writ was filed in the District of Columbia where the defendants (the president and the secretary of defense) resided. It could not be asserted, the Court concluded, that an American citizen residing or working on the Guantanamo base could not obtain the writ, and the habeas statute itself made no distinction between citizens and aliens in its geographical scope. The final word: These detainees had access to the writ.

But what precisely did the Court decide in *Rasul*, and what exactly does the executive branch have to do to meet it? How much leeway does it leave the executive in setting an altered detention regime for foreign prisoners captured on or near or even far away from the battlefield and not accorded prisoner of war (POW) status? If habeas lies, in which federal court does it lie? As to the last question, for now, it appears to lie in the D.C. Circuit, where the original cases were filed and the secretary of defense resides (the Court has already remanded the Ninth Circuit case for a ruling on whether the writ filed there should be dismissed for lack of jurisdiction). But what happens if the prisoners are moved, as the media report is under consideration, to mainland U.S. bases? Will the *Padilla* case, which dismissed the writ because it was not brought in the district where the prisoner was held and where his immediate warden (not Secretary Rumsfeld) resided, then govern? Probably. And does habeas really lie for every Guantanamo prisoner or, as the majority's closing line might suggest, only for those claiming innocence "of any wrongdoing"—that is, would someone who admitted or confessed under interrogation to participating in combat or in terrorist activity against the United States or even of being affiliated in some manner with al Qaeda be automatically denied the right to habeas? The scope of the Court's ruling on this all-important question was laconic:

> Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. Only at stake was the federal court's jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.

Over but hardly out. The Court had gotten its feet wet, but only a little.

This limited interpretation of the Court's own ruling inevitably elicits a broader question of what the scope of the habeas hearing

can include. Will the detainee be limited to arguing only that he was not an enemy fighter or terrorist? Or can he also argue that he had rights under customary international law or the Geneva Conventions to fight for the Taliban and thus merited at least POW status? If not captured on or near the battlefield, can he maintain that the government had no grounds under international law on which to justify his summary detention without charges or trial on mere allegations that he had "affiliations," "connections with," gave "support to," or "harbored" terrorists plotting against the United States (many detainees were in fact apprehended far from the battlefield, in Bosnia, Yemen, Saudi Arabia, etc.)? Are the criteria laid down in the Court's companion *Hamdi* decision (discussed subsequently) for determining whether a foreign-born detainee is an enemy combatant different from those applicable to an American-born one, like Hamdi himself? Can the foreign-born prisoner's detention outlast the end of a war in which he fought until it is determined he is no longer a risk to the United States if returned to his home? (Reportedly, several Guantanamo inmates released voluntarily by the United States to their home countries have joined the terrorist ranks.) Finally, can an inmate argue in his habeas hearing that abusive treatment he received at Guantanamo violates the tenets of international humanitarian law (the law of war) even if he is validly determined to be an enemy combatant? Already, a new wave of cases (68 in the D.C. Circuit alone) have been filed involving virtually all of these questions and have begun their slow trek to the Supreme Court.[9] This second round will, if anything, require more difficult balancing and more nuanced constitutional interpretation than the first. All things considered, it

9. One district judge has ruled that there is "no viable legal theory" to support the release of seven of the detainees captured in Bosnia and Pakistan. The ruling said that the current military reviews provide process roughly equivalent to Article 5 of the Geneva Convention. Charles Lane and John Mintz, *Detainees Lose Bid for Release*, WASH. POST, Jan 20, 2005, at A3. Another judge, however, has ruled in the detainees' favor. Both cases are currently under appeal.

seems prudent of the Court to have left these decisions to be sorted out in the lower judicial echelons. There appears to be no danger they will not be pursued.

Within days of the *Rasul* decision, the Pentagon announced it would inform all detainees of their right to file habeas and would begin its own hearings to decide who is or is not an enemy combatant and who is no longer a risk and can be sent home. These military hearings permit the prisoner to appear before a three-person military panel and have a military-appointed personal advocate, but not his own lawyer.[10] However, the prisoner is not allowed to see secret evidence upon which his detention may be based. Although the government originally did not plan to let lawyers into the facility to aid prisoners, even those who don't speak English, in filing their writs, a federal judge has now required that the original *Rasul* petitioners be allowed speedy access to their lawyers and that their conversations be unmonitored.[11] The Pentagon has also sent a number of prisoners back to their home countries on its own. Still, it is not unlikely that the newly erected multimillion-dollar holding facility at Guantanamo will continue to be used for its intended purpose indefinitely.[12]

In addition, other extraordinarily important questions not yet the subject of litigation are in the wings. Justice Scalia, dissenting in

10. As of mid-December, more than 500 of the 550 hearings had been completed and only two released, although final rulings were pending in others. Associated Press, *Guantanamo Review to Free Second Man*, WASH. POST, Dec. 21, 2004, at A22.

11. Carol D. Leonnig, *U.S. Loses Ruling on Monitoring of Detainees*, WASH. POST, Oct. 21, 2004, at A4.

12. See White, supra note 9 (annual review instituted to see if detainees can be released; 150 were released before review begun); Don Van Natta Jr. and Tim Golden, *Officials Detail a Detainee Deal by 3 Countries*, N.Y. TIMES, July 31, 2004, at A1 and A8 (swap of British prisoners in Saudi Arabia for Saudis released from Guantanamo); Mintz, *Most at Guantanamo to Be Tried*, supra note 9 (deputy commander's view that most inmates "may pose little threat and are not providing much valuable intelligence" disputed by other officials; 146 released and 56 returned to home governments so far); Dana Priest, *Long-Term Plan Sought for Terror Suspects*, WASH. POST, Jan. 2, 2005, at A1 (administration preparing long-range plans for indefinite imprisoning of suspected terrorists it does not plan to bring to trial).

Rasul, highlighted one; Justice Thomas, dissenting in *Hamdi*, alluded to another. Justice Scalia said the majority opinion "boldly extends the scope of the habeas statute to the four corners of the earth," anywhere a U.S. custodian of foreign prisoners can be reached, and in so doing "springs a trap on the Executive," which had relied on settled law to the effect that habeas must be brought within a federal judicial district where the prisoner is being held. No such district in Guantanamo exists; according to Scalia, "that should be the end of the case." The consequences of the extension, Scalia warned, will be "breathtaking"; multitudes of aliens previously held abroad after capture in combat can now file habeas petitions in the United States, with the attendant problems of transporting them, as well as witnesses for both prosecution and defense, to the United States and taking military officers away from their field duties to testify. All this will, he said, aid and comfort the enemy. Our courts will be deluged.[13] And whether his parade of horribles is hyperbolic, Justice Scalia does make a point that is not immediately refutable: If the U.S. naval base at Guantanamo is U.S. territory because of the total U.S. control over what happens on it, other bases set up in occupied or even liberated Afghanistan and Iraq or other parts of the world may also be considered U.S. territory. It is a fact that we currently have hundreds of prisoners incarcerated in foreign-based facilities, with no access to judicial review as to the grounds for their apprehension or the duration or conditions of their confinement.[14] Likewise, Justice Thomas

13. Justice Scalia suggested a special district court could be established by Congress on Guantanamo to hear the cases.

14. See Douglas Jehl and Kate Zernike, *Scant Evidence Cited in Long Detention of Iraqis*, N.Y. TIMES, May 29, 2003, at A1 and A10 (hundreds of Iraqi prisoners held in Abu Ghraib for prolonged period despite lack of evidence of security threat, Army report says; 6,500 Iraqi detainees held in Iraq); *CIA's Prisoners* (ed.), WASH. POST, July 15, 2004, at A20 (al Qaeda senior leaders held incommunicado in undisclosed locations, not accessible to Red Cross); Bradley Graham and Josh White, *General Cites Hidden Detainees*, WASH. POST, Sept. 10, 2004, at A24 (up to 100 detainees concealed in military facilities abroad).

asks in the *Hamdi* ruling, if notice and some kind of hearing is necessary to detain a battlefield captive for any prolonged length of time, is it not also required when U.S. paramilitary operations "take out" suspected terrorists all around the world?

Circumstances often compel courts to be pragmatic, in the eyes of doctrinal purists, even arbitrary. The logic of a court's rationale may not have to be taken to its limit because that limit is totally impractical or potentially undesirable for nonlegal reasons. Constitutionally, there may also be separation-of-powers concerns that call for drawing lines in the sand. Thus, the Court limited its certiorari to the question of Guantanamo inmates and several times in the opinion stressed that was all it was deciding. Having made its decision in their favor, however, the Court certainly must have recognized that a second wave of cases would inevitably follow, claiming other U.S. bases or facilities in which prisoners are held abroad also meet the "complete jurisdiction and control" test that qualified Guantanamo as a U.S. territory. And although it is at least arguable that citizens of some of the countries in which U.S. authorities detain combatants and civilians may have more potential access to local courts or that the terms of the U.S. leases may be more temporary or conditional, human rights advocates (nor probably the Supreme Court as well) will hardly be content with a jurisprudence of individual rights based on property law.

It may also be argued that the Guantanamo situation is sui generis as a legitimate application or modest extension of international law concepts that the United States has already embraced. If, for instance, the United States had recognized as applicable, at least to Taliban fighters, the Third Geneva Convention on Treatment of Prisoners and the POW protocol set out therein and if the convention's Article 5 hearings had been held to sort out the totally innocent from the illegal combatants (something the Pentagon says it is now doing but too late to avoid the Court's habeas ruling), then these measures might have inclined the Court to stop at a few sentences

in a per curiam opinion or even a denial of certiorari, leaving things as they were. That, of course, did not happen, and it was necessary for the Court to venture in deeper because the executive had refused to take any steps to provide process for the detainees akin to that laid down by international law for wars between state belligerents. Thus, the outcome might be different (or at least the argument can be made) in situations where no such close relationship to the Geneva-type conflict exists, as in the case of terrorists picked up abroad who are operating outside a traditional war setting. *Eisentrager* was not explicitly overruled by *Rasul* and could maintain legitimacy in these other factual settings. The geographic and situational scope of *Rasul* was left to a case-by-case determination in the future; it is plain that the principles by which these determinations will be made are still murky, but it is difficult to see how it could be otherwise.

The question also remains after *Rasul* whether an alien can be detained by U.S. authorities solely for interrogation or intelligence gathering, even though a citizen, under the *Hamdi* opinion (discussed subsequently), may not. Early on, Pentagon spokespersons said Guantanamo was chosen because they "wanted to put captives out of commission and find out what they knew."[15] The government's affidavits throughout the court proceedings in both *Hamdi* and *Padilla* posited the need to keep prisoners away from counsel, friends, and family in order to create a dependence on their interrogators that would lead to intelligence revelations. The plurality in *Hamdi*, however, ruled out interrogation as a reason to detain a U.S. citizen, and Justice Stevens, dissenting in *Padilla*, expounded:

> Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked

15. Scott Higham, Joe Stephens, and Margot Williams, *Guantanamo—A Holding Cell in War on Terrorism*, WASH. POST, May 2, 2004, at A1 and A15.

> interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure.

Yet, the value of detainees as a source of information remains high in the view of a substantial part of the intelligence community, and its dilution by legal restraints is likely to be vigorously opposed or circumscribed. The justices are worldly men and women and not oblivious to such concerns. The *Rasul* case does not touch the problem of whether detainees from foreign countries can be kept for intelligence purposes even if U.S. citizens can't. It seems plain after *Rasul* and *Hamdi* that Congress should tackle the problem directly and openly rather than asking the Court to determine it on the basis of old rules established for old problems in old kinds of war.

At this point, though, it seems safe to predict that the laws of war, though not specifically alluded to in the *Rasul* opinion, will ensure that battlefield detainees can be kept in temporary holding places in nearby safe places for reasonable periods of time until their status can be sorted out. During that time, they can also be questioned. But longer-term non-POWs removed far from the theater of combat, especially those kept only for intelligence reasons, are more susceptible to falling into the *Rasul* rationale.

The almost universal repulsion to the graphically displayed episodes of Iraqi prisoners at the U.S.-controlled Abu Ghraib prison being abused, and even dying, during interrogations cannot be discounted in any prediction of what the Court will do. The Court may well be inclined not to keep a hands-off policy on a problem of that size or gravity. The United States is, after all, a signer of the Convention Against Torture, which provides a cause of action for torture victims, including aliens, wherever detained. Thus, the *Rasul* Court's express finding that Guantanamo inmates may bring suit under the Alien Tort Claims Act is already being used in new lawsuits alleging that torture was in fact employed during interrogations there. Prisoners in other U.S. facilities around the world, perhaps even subjects

of CIA or other counter-terrorism operations, can be expected to follow suit.[16]

An even trickier question is the one suggested by Justice Thomas. The *Rasul* ruling assumes prisoners, like the plaintiffs, were apprehended at or near the battlefield, though many in Guantanamo actually were captured as suspected terrorists elsewhere. The CIA, pursuant to explicit presidential findings disclosed to congressional leaders, engages in worldwide covert operations that result in apprehension of noncombatants and their extended detention for interrogation (or worse). Are these situations likely candidates for a *Rasul*-like ruling? The Geneva Conventions have no apparent application to such cases, unless perhaps the subjects are residents of occupied countries like Iraq.[17] The treatment of these subjects is accordingly a matter of domestic law, either of our own country or of the country where they are being held. But the Court's habeas-based reasoning could very well be analogized to their situation, in which case the repercussions on our antiterrorism efforts might be extreme indeed. Conversely, a court might plausibly hold that habeas in that setting would interfere with the executive's preeminent duty to protect the nation. Justice Thomas, in his *Hamdi* dissent, explicitly recognized the validity of intelligence gathering as a valid interest of the government that must be given due consideration in striking the due process balance between individual liberty and national security.

Finally, the *Rasul* opinion by itself gives no clue as to what

16. See Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. TIMES, Jan 1, 2005, at A11 (government-released memoranda in American Civil Liberties lawsuit revealing harsh interrogation practices in Guantanamo); Barton Gellman and R. Jeffrey Smith, *Report to Defense Alleged Abuse by Prison Interrogation Teams*, WASH. POST, Dec. 8, 2004, at A1 (internal Defense report cited reports of beatings of detainees by special military task force in Iraq); Neil A. Lewis, *U.S. Court Asserts Authority Over American in Saudi Jail*, N.Y. TIMES, Dec. 17, 2004, at A13 (District judge finds jurisdiction over suit by American jailed in Saudi Arabia as a terrorism suspect who alleges he is detained at behest of American officials).

17. See Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1.

procedures are due in any habeas process. By contrast, the *Hamdi* opinion sets out in reasonable detail those processes due an American citizen imprisoned as an enemy combatant. But Hamdi's rights derive largely from his constitutional rights as a citizen, which may well be greater than those accorded an alien; even the president's authority to define who is an enemy combatant may be wider in the case of a foreign-born person than of a citizen. Following the Court's *Rasul* decision, a Bush administration supporter remarked dourly, "If I were a detainee, I wouldn't be breaking out the champagne"; a prominent practitioner before the Court agreed, comparing the Court with someone "test driving a number of different principles without actually forking over a down payment."[18]

District court judges are independent, often stubborn, and even ornery when it comes to standing passively and watching their regular processes shortcut. Until the Supreme Court rules that foreign detainees are not entitled to the same procedural rights as citizens, the trial courts are likely to require appointed counsel, when appropriate, and the necessary degree of discovery required to sort out factual questions. In the words of the *Washington Post*, "Having blundered its way into federal court oversight of detentions at the camp, the government will now have to figure out how to meaningfully facilitate judicial review."[19] But it is not just the government that has been figuring out what to do; the federal judiciary and eventually the Supreme Court, which, in my view, correctly entered the fray, will inevitably become the final arbiter on this series of knotty questions—that is, unless Congress acts decisively and constitutionally in the near future.

18. Charles Lane, *Finality Seems to Elude High Court's Grasp*, WASH. POST, July 4, 2004, at A12.

19. See "Belated Reform," *supra* note 2. But see Carol D. Leonnig, *U.S. Defends Detentions*, WASH. POST, Oct. 5, 2004, at A10 (U.S. defending suits by 60 Guantanamo prisoners says it need not explain reasons for detention or apprehension far from battlefield under Commander-in-Chief power "to prevent captured individuals from serving the enemy").

III. What Did *Hamdi* Decide and How Does It Interact with *Rasul*?

The second enemy combatant case, *Hamdi v. Rumsfeld*, involved an American citizen, captured by the Northern Alliance somewhere in Afghanistan and handed over to the American forces. The president designated Hamdi an enemy combatant, and Hamdi was subsequently incarcerated in a South Carolina military brig, held incommunicado with no access to family or counsel for more than two years. His father, as best friend, brought habeas; the government proffered to the court a nine-paragraph affidavit from a midlevel Pentagon officer and based on hearsay asserting Hamdi was fighting for the Taliban in an Afghanistan combat zone. The Fourth Circuit found the affidavit sufficient to support the president's designation and refused Hamdi access to counsel or to the court to refute the assertions.

The Supreme Court, seemingly much more comfortable in expressing varying emotions of outrage, commitment to old-line values, and skepticism about the executive's "Trust Us" contentions in a case involving an American citizen than in one involving an alien, came down on the side of Hamdi in four separate opinions with three different rationales, none commanding a majority but together involving eight of the nine justices (Justice Thomas was the holdout). The issue was framed by Justice O'Connor in her four-person plurality opinion. The Court was called upon, she said, to decide "the legality of the Government's detention of a United States citizen on United States soil as an enemy combatant and . . . the process that is constitutionally owed to one who seeks to challenge his classification as such." So far as we know, only three U.S. citizens have been so designated, compared with the hundreds of aliens imprisoned in Guantanamo. But the Court was on firmer ground doctrinally when it addressed the constitutional rights of U.S. citizens, and its discussion of remedies was far more detailed than the simple acknowledg-

ment of habeas jurisdiction in *Rasul*. Indeed, it was detailed enough to invoke the "Mr. Fix-it Mentality" jibe of Justice Scalia, who (together with Justice Stevens) nonetheless surprisingly would have given Hamdi even greater relief than did the majority.

Justice O'Connor (writing for herself, Chief Justice Rehnquist, and Justices Kennedy and Breyer) made several key rulings. The most controversial, for some civil libertarians, was that the president had authority under the Authorization of the Use of Military Force (AUMF) resolution, passed by Congress in the wake of 9/11, to detain anyone alleged, as Hamdi was, to be "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." She made abundantly clear, however, that this was the exclusive definition of an "enemy combatant" that the opinion would deal with (despite recognition that the government had attached the label to a much broader array of prisoners, including an American seized on American soil suspected of plotting terrorism with al Qaeda and suspected confederates of al Qaeda seized far from any battlefield and held at Guantanamo and elsewhere around the world). However, this limited definition of an enemy combatant, O'Connor continued, allowed the detention of such persons to conform to the laws of war. Adherence to the laws of war, in turn, meant that their detention was included within the "necessary and appropriate force" that the AUMF resolution authorized to be used on al Qaeda–affiliated persons and those who harbored them—in this case, the Taliban. The resolution, so interpreted, trumped an earlier U.S. statute passed in 1971, 18 U.S.C. § 4001, proscribing the detention of any U.S. citizen except pursuant to an act of Congress. (Interestingly, Justices Stevens, Scalia, Souter, and Ginsburg, in separate opinions, specifically disagreed with this ruling on the nonapplicability of 18 U.S.C. § 4001's bar to Hamdi, and Justice Breyer joined a dissent written by Justice Stevens in *Padilla* to the same effect.) Thus, by relying on international customary law—here, the laws of war—as the basis for detention of non-

POW captives, the O'Connor opinion bypassed the government's argument that Article II of the Constitution gave the president, as commander-in-chief, virtually absolute power to designate someone as an enemy combatant without individual judicial review of any sort.

A power to detain, without charges or trial, battlefield combatants not qualifying for POW treatment under the laws of war is supported by many, but certainly not all, international law experts. There are a significant number who argue that any power to detain battlefield captives other than as POWs or for specific war crimes must come from domestic law and is not found in either the Geneva Conventions or customary international law. If they are right, the 1971 statute adopted to outlaw noncongressionally authorized citizen internment would apply, and Hamdi could not be held. Justice Souter's separate concurrence in the judgment (joined by Justice Ginsburg) found that the drafters of the 1971 statute did indeed mean it to apply robustly in wartime as well as in peacetime. It was especially needed in a separation-of-powers regime, he said, where "deciding . . . what is a reasonable degree of . . . liberty whether in peace or war is not well-entrusted to the Executive Branch . . . whose particular responsibility is to maintain security."

The authorization for "necessary and appropriate force" in the AUMF resolution was not a clear enough statement of congressional intent to repeal the prior 1971 ban on citizen detention. Justice Souter hedged a bit at the end, however, acknowledging that if the laws of war did allow detentions of battlefield combatants lasting for the duration of the war, then that might justify Hamdi's detention as consistent with the earlier statute. But because the United States itself was guilty of violating these same laws of war by not providing Hamdi any process for demonstrating his innocence, as was required by Article 5 of the Third Geneva Convention, which Justice Souter said the United States admitted applied to Taliban fighters, the United States could not seek haven in the laws of war to authorize the detention and overcome the 1971 law.

Justice O'Connor did not deal with this contention of Justice Souter and of many international law experts, that the Taliban was the official armed force of a state party to the Geneva Conventions and that Taliban fighters (apart from al Qaeda partisans) should have been recognized as POWs. That omission may be explained in part because the nature of Hamdi's activities in Afghanistan were in dispute (he claimed to be a total innocent); in any case, there was the government's counter that determining whether fighters for an enemy's regime are recognized as POWs under the Geneva Conventions is a quintessential political judgment of the executive, which the Court should not second-guess. On the other hand, there are many internationalists who would say POW recognition is a treaty obligation that a country must obey and that should be enforceable by its own domestic courts, as well as by international courts. The skirting of the issue by Justice O'Connor, however, weakens, to some degree, the logic of her complex rationale supporting the president's power to detain even the limited group of enemy combatants that came within her opinion's definition. Should the United States go to war again and pursue a like policy of refusing POW status to Geneva Convention Party soldiers, the question is sure to resurface. In Iraq, the United States formally recognized Iraqi army captives as POWs.

On the other hand, a positive byproduct of Justice O'Connor's reliance on the laws of war for support of Hamdi's detention is her statement that detention of enemy combatants is limited under the laws of war to the duration of the particular conflict in which the detainees participated. The specter of indefinite detention past the end of the immediate armed conflict, be it Afghanistan or Iraq or wherever, in the name of an endless worldwide war against terrorism or even against al Qaeda obviously disturbed the Court, which was relying on laws of war principles applicable to traditional wars—that reliance, it warned, could "unravel" in the case of a conflict entirely unlike past wars. In Hamdi's case, however, armed conflict still raged in Afghanistan. He could be detained while U.S. troops were still

involved. But, O'Connor steadfastly maintained, detention under the laws of war is for the purposes of holding the detainees off the battlefield. "[C]ertainly," the opinion stated, "indefinite detention for the purposes of interrogation is not authorized" either by the laws of war or by the AUMF resolution. This limitation poses significant obstacles to the executive's earlier announced intentions to keep battlefield detainees incarcerated as long as the United States thinks they serve an intelligence purpose or pose a risk to our security.

In the end, although much is left open by the plurality opinion dealing with the definition of an enemy combatant, it should be recognized that much is decided as well. It does not decide whether the president, as commander-in-chief, has any such detention power on his own without congressional consent. It does not go beyond a definition of a detainable enemy combatant as one who took up arms against U.S. or allied forces on a specific battlefield (the plurality opinion leaves any expansion of this definition to district courts in future cases), and it appears to assume the duration of detention is restricted to the length of the defined conflict, rejecting any extended incarceration for the purpose of interrogation. It does not decide whether any of these limitations of definition, purpose, or duration apply to foreign-born enemy combatants, though logic and international human rights law suggest most of them should, and human rights activists will surely continue to push for their inclusion. It avoids all questions of whether and to what degree the Geneva Conventions apply to enemy combatants in the Afghanistan war (except as to the duration of detention). Importantly, it uses international law—the laws of war—as the linchpin of its rationale rejecting the applicability of a domestic statute that on its face appears to outlaw the detention.

The final step in Justice O'Connor's regimen for detention of citizen enemy combatants was to list the rudiments of due process that the citizen detainee must receive; this included, under the habeas statute, notice of the charges against him and the right to deny

such charges and produce any material evidence in his defense (evidence under the habeas statute may be taken by deposition, interrogatories, or affidavit, as well as through live witnesses). More basically, she used a balancing of individual liberty and governmental interests, as set out in *Mathews v. Eldridge*,[20] a welfare benefits case, to define the core rights of a detainee to include notice of the factual basis for his classification as an enemy combatant and an opportunity to rebut those presumptions before a neutral decision maker. Significantly, in weighing the competing interests, she narrowly defined the government's "weighty and sensitive interests" as "assuring that those who have in fact fought with the enemy during a war do not return to battle against the United States" and eloquently described the individual's interest as "the most elemental of liberty interests—the interest in being free from physical detention by one's own government," an interest as strong in war as in peace, an interest not diminished even by an accusation of treason. "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested." She did, however, entertain the possibility that the detainee's hearing might be "tailored" to offset the alleged burdens on field personnel performing essential military duties. The tailoring might include greater use of hearsay and a rebuttable presumption in favor of the government's evidence; even an "appropriately authorized and properly constituted military tribunal" might suffice. This last suggestion was an invitation the Pentagon seized promptly, instituting a military review process within days of the opinion's issuance, which the Pentagon said would supplement, not supplant, the habeas proceeding. According to the opinion, the hearing need not be held immediately on the battlefield; it could be held within a reasonable time when the decision is made to continue the detention.[21]

20. *Mathews v. Eldridge*, 434 U.S. 319 (1976).

21. Although Justices Souter and Ginsburg voted with the plurality to make a majority for the remand hearing, they disassociated themselves from the portion of

Hamdi, however, had been given no process at all. The government claimed in its affidavit that "undisputed" evidence showed he had been captured in a combat zone and that was sufficient. The Court rejected that argument: The circumstances of his capture were not undisputed at all—his father's affidavit said only that Hamdi resided in Afghanistan at the time of his seizure, and he was never allowed to answer the charges that he was fighting for the Taliban. And, even if undisputed, his seizure in a combat zone would not be proof that he was engaged in an armed conflict against the United States or its partners, which was the only definition of an enemy combatant acceptable in this case.

Addressing the broader separation of powers contention of the government (and Justice Thomas), Justice O'Connor further rejected the argument that the courts could review only the executive's broad detention scheme, not its application in individual cases. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."

There is no doubt that what journalist Anthony Lewis called the president's "presumptuous omnipotence"[22] had been checked. The judiciary would be watching and, theoretically, ready to move on the wartime detention process at critical stages. It had established its outpost. Hearings would not, as the doomsayers predicted, be required on the battlefield. A hybrid procedure short of the usual full court habeas hearing in every case might be crafted that would satisfy due

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the plurality that dealt with any "tailoring" of the detention hearing involving greater use of hearsay or a rebuttable presumption in favor of government evidence. And they did not agree that a military-type hearing could obviate the need for a regular habeas corpus proceeding. They could, however, envision government power to detain "in a moment of genuine emergency, when the Government must act with no time for deliberation . . . if there is reason to fear that [the citizen] is an imminent threat to the safety of the Nation and its people."

22. Anthony Lewis, *The Court v. Bush*," N.Y. TIMES, June 29, 2004, at A27.

process and not unduly burden military personnel or distract them from battlefield duties, though the acceptance of a procedure that put the burden of disproving the government's evidence on the petitioners gave civil libertarians great pause.[23] (This may have been one place where less detail on possible accommodations to the basic habeas right might have been more prudent.) And the lower courts would have to take the initiative in deciding how much further the concept of an enemy combatant could be extended for summary detention purposes.

Perplexing, however, is the extent to which the rationale and rights set out in the *Hamdi* plurality apply to noncitizens, who do not necessarily enjoy all the constitutional rights of U.S. citizens. Does their liberty interest, for instance, rank lower in the *Mathews v. Eldridge* balance? Ironically, many come from countries where no liberty interest at all in these circumstances would be recognized. If the *Hamdi* safeguards do not apply to citizen and noncitizen detainees alike, but foreigners (at least the Guantanamo inmates) do have access to habeas, exactly which rights will *Hamdi* give noncitizens? Aliens in habeas actions have not traditionally received a lesser degree of procedural protections, but the courts have never before been faced with hundreds, or even thousands, of such detainees, many allegedly intent upon injuring our own citizens as soon as they are released, and some having no place to which they can be safely returned. The government could presumably try the most dangerous for war crimes or even under our domestic criminal laws (it already has a half dozen slated for military tribunals), but even with controversially restricted

23. It's not clear whether the military tribunal to which Justice O'Connor referred would require counsel. The Army Regulations and Article 5 of the Third Geneva Convention do not. Neither do the newly initiated Pentagon status hearings for Guantanamo inmates. Hamdi, however, was specifically accorded counsel on remand to assist him in his habeas hearing. Hamdi has since been released and sent back to Saudi Arabia under certain restrictions on his freedom to travel or concert with terrorist groups. See Jerry Markham, *Hamdi Returned to Saudi Arabia*, WASH. POST, Oct. 12, 2004, at A2.

defense rights, the military trials are proving extremely slow to mount.[24] A district court ruling, currently on appeal, has stayed all military tribunal proceedings on the ground that the detainees were denied their Geneva Convention rights to a hearing on whether they merited POW status or were innocent of any engagement in combat. If they were POWs, they could be tried only by court-martial under the convention.[25]

As to civilian courts, alleged obstructionist tactics and the due process problem of nondisclosable evidence and unavailable witnesses present real problems to their extensive use, as the ongoing *Moussaoui* trial indicates too well.[26] And the open question, discussed earlier, of what the foreign detainee can claim in a habeas hearing—for example, international law violations or torture contentions—further conflates the issue. Both the *Rasul* decision and the *Hamdi* plurality opinion seem to focus exclusively on the situation of a detainee protesting his complete innocence of any involvement in an armed conflict. More nuanced challenges to the legality of detention on other grounds may well require more guidance from the Court. But the variety of scenarios in which these challenges will rise would have made detailed protocols not only impossible but probably counterproductive. The Court signaled the path and a few markers—that is all it could or likely should have done.

24. Neil A. Lewis, *U.S. Terrorism Tribunal Set to Begin Work*, N.Y. TIMES, Aug. 22, 2004, at A17 (four detainees appear in court after three years, defense lawyers complain of inadequate translation help, anonymous witnesses, loose evidence rules, and no appeal to civilian authorities); Scott Higham, *Trials Set to Begin for Four at Guantanamo*, WASH. POST, Aug. 23, 2004, at A1 and A7 (conversations between defendants and lawyers can be monitored; exculpatory evidence can be kept secret; defense lawyers and human rights activists label proceedings "fundamentally unfair"); Neil A. Lewis, *Guantanamo Tribunal Process in Turmoil*, N.Y. TIMES, Sept. 26, 2004, at A20 (officials acknowledge the process is in turmoil).

25. Carol D. Leonnig and John Mintz, *Judge Says Detainees' Trials Are Unlawful*, WASH. POST, Nov. 9, 2004, at A1.

26. *The Tribunals Begin*, WASH. POST, Aug. 29, 2004, at B6.

IV. The *Hamdi* Dissent

Who would have suspected that the most civil liberties–oriented opinion in *Hamdi* would be authored by Justice Scalia in an odd-couple dissent with Justice Stevens? Justice Scalia's construct is clean and straightforward—the U.S. Constitution prescribes the procedural and definitional requirements for treason, and U.S. laws do the same for other crimes against national security. Also, the Constitution's Suspension Clause allows Congress to suspend the writ of habeas corpus temporarily in dire national emergencies. Any detention of a citizen can and must be handled within that framework. The congressional resolution on which the plurality relies to authorize these detentions does not and could not constitutionally legislate a third option. The history of the Great Writ, described in extraordinary detail in Justice Scalia's opinion, demonstrates that its principle raison d'être was to ensure due process before the executive can deprive a citizen of liberty under any circumstances. Thus, there could not be "a different special procedure for imprisonment of a citizen accused of wrongdoing by aiding the enemy in wartime." The laws of war might permit detention of enemy aliens for the duration but the tradition for American citizens is altogether different. American terrorists and traitors can be subjected to established criminal processes, and when those processes prove totally impracticable, the writ can be, and has on occasion, been suspended.

Precedents from the War of 1812 confirmed the absence of military authority to indefinitely imprison citizens in wartime outside of normal criminal procedures. *Ex parte Milligan*, in the Civil War, rejected the "usages of war" as a justification for putting a citizen of a nonseceding state before a military tribunal for sabotage while the civilian courts in his own locale were open and operating.[27] *Ex parte Quirin*, which allowed an American citizen to be tried by a military

27. *Ex parte Milligan*, 71 U.S. 2 (1866).

tribunal, is dismissed as "not this Court's finest hour."[28] However, it involved admitted German army saboteurs stealing into the United States during wartime, not citizens captured abroad who disputed any military involvement against the United States.

Justice Scalia, like Justice Souter, did not think the AUMF resolution specific enough to repeal the earlier ban against detention of citizens except pursuant to an act of Congress, and while the laws of war might authorize detention of foreigners as enemy combatants, it could never supersede constitutional requirements for detaining citizens. Justice Scalia, however, is careful to admit the "relatively narrow compass" of his profound ruling—it applies only to citizens detained within the territorial jurisdiction of a federal court. In sum, the writ is available—until suspended—only for citizens detained where a federal court operates (it is not clear whether Scalia thinks the military could transfer or keep U.S. citizens outside U.S. territory to avoid that requirement). Within these geographical limits, however, habeas would inevitably attain for them the full panoply of criminal trial rights, notice, discovery, counsel, civilian judge, even jury, and, in treason cases, the two witnesses to an overt act rule. Justice Scalia's decision sounds generous, and it is—to a degree—but it applies only to two cases so far and might even be avoidable by military canniness in locating prisoners outside federal judicial districts. We know that Justice Scalia would not recognize any jurisdiction over the Guantanamo inmates, and he suggests Congress might legislate a separate procedure for intelligence gathering, presumably from either foreigners or Americans. Within its narrow boundaries, Justice Scalia's rationale is liberal but it leaves the vast bulk of U.S.-held detainees outside its charmed circle.[29]

28. *Ex parte Quirin*, 63 S. Ct. 2 (1942).

29. Justice Thomas is odd man out. Not "Mr. Fix-it" surely, rather Mr. "Nothing is wrong—Just trust the executive." According to Justice Thomas, the detention of Americans as enemy combatants falls squarely within the president's war powers, courts have no competence or expertise to second-guess him. Although the Court

v. Conclusion—What to Make of It All?

Like its same-term *Blakeley* decision on sentencing, the Supreme Court's entry into the arena of the war on terrorism is destined to create immediate demands for more elucidation, more explanation, and more intervention.[30] In the end, it is hard to give credence to Justice Scalia's criticism that the Court had gone too far in laying down protocols for executive treatment of wartime detainees. In some ways, however, it may not have gone far enough, considering the splintered rationales of the *Rasul* and *Hamdi* cases; to go much further might well have brought fragile coalitions down altogether. The Court has ruled definitively on one aspect of the war—U.S. and foreign detainees housed in Guantanamo who are accused of being enemy combatants fighting American forces in armed combat must be allowed access to the ancient writ of habeas corpus if they claim to be innocent bystanders, not combatants. In such a proceeding, U.S. citizens must be accorded certain basic rights to notice and to defend on the facts. Much more than that, we do not know. But for launching the quest, the Court deserves praise.

Some big questions remain unanswered. Does habeas lie for foreign detainees housed elsewhere than at Guantanamo? Does it lie

has the right to look at Hamdi's case, it should do so only with "the strongest presumptions for the Government." It should look at whether the president had general authority to detain enemy combatants, not how he exercised it in individual cases. Nor should detention be limited to the duration of a particular conflict. In certain contexts, "due process requires nothing more than a good-faith Executive determination"—the president has the power to make "virtually conclusive factual findings" on who is an enemy combatant. Detention might be justified by the need for intelligence as well as preventing return to the battlefield. In Hamdi's case, he would not grant counsel on remand or even notice of charges if it could destroy the intelligence-gathering function of his detention.

30. *Blakeley v. Washington*, 124 S. Ct. 2531 (2004) (late in the 2003 term, Court invalidated portions of state-sentencing guidelines regime, thereby throwing validity of federal sentencing guidelines into grave doubt; within weeks, Court granted certiorari on the issue of their constitutionality with argument at beginning of October 2004 term and decision rendered in January 2005).

for claims of abuse or violations of international law apart from total innocence of being a combatant at all?[31] Do foreigners have the same rights at a habeas hearing as do American-born defendants?[32] How far can the designation of "enemy combatant" carry beyond the battlefield? Do targets of intelligence covert actions abroad have any rights comparable with enemy combatants?

The laws of war, as interpreted by the *Hamdi* plurality, were a key element of the decision, but they have no applicability beyond the battlefield or occupied territory and are not readily adaptable to the war on terrorism. The Geneva Conventions and progeny are badly in need of revision if they are to meet the realities of terrorist wars. But equally deficient is our own domestic law concerning who, under what conditions, with what procedures, and for how long battlefield captives can be held. The Supreme Court entered the arena because it had to; individual liberties guaranteed by our Constitution and laws to citizens (and, to some degree, to aliens) were in jeopardy.

31. President Bush's investigative commission cites 300 cases of alleged abuse at U.S.-controlled prisons abroad and urges that all prisoners be treated "in a way consistent with U.S. jurisprudence and military doctrine and with U.S. interpretation of the Geneva Conventions." Eric Schmidt, *Abuse Panel Says Rules on Inmates Need Overhaul*, N.Y. TIMES, Aug. 25, 2004, at A1. Army investigators similarly found that the CIA hid prisoners from international human rights groups. Josh White, *Abuse Report Widens Scope of Culpability*, WASH. POST, Aug. 26, 2004, at A1 and A16. See also R. Jeffrey Smith, *Agency Is Faulted on Practices in Iraq, Secrecy Amid Probe*, WASH. POST, Aug. 26, 2004, at A18 (Army report says that CIA's detentions and interrogation practices "led to a loss of accountability, abuse, reduced interagency cooperation and unhealthy mystique that . . . poisoned the atmosphere" in Abu Ghraib).

32. See United Nations Committee on Elimination of Racial Discrimination Resolution, 64th Session, Feb.–Mar. 2004 (state parties should "ensure that noncitizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law"); American Bar Association House of Delegates Resolution, August 25, 2004 (condemning any use of torture or other cruel, inhumane, or degrading treatment or punishment upon persons within the custody or under the physical control of the U.S. government [including its contractors] and calling for an independent commission to prepare a full account of detentions and interrogations carried out by the United States).

The Court has momentarily finished the opening round, but the legal battles are still being waged. Before there are repetitions of the Afghanistan and Iraq wars, there needs to be a thoughtful debate on and legislative resolution of interrogation procedures and rights, detention limits on who and how long non-POWs can be held, and what, if any, rights adhere to targets of covert actions. It is long past time for Congress to become engaged—even though there are skeptics in the civil liberties community about what Congress may do. Congress is the branch of government directly responsible, along with the executive, to the citizenry for the reconciliation of wartime security and civil liberties, and Congress must fully accept this moment of responsibility.[33] Otherwise, there are bound to be much deeper interventions by the Court in this troubled area of the law. Once in the water, the Court may not be able to hug the shoreline much longer; instead, it will be carried irretrievably by the current out to the "boundless sea."

33. At the urging of the White House, the congressional conference committee on the Intelligence Reform Bill "scrapped a legislative measure that would have imposed new restrictions on the use of extreme interrogation measures by American intelligence officers." Douglas Jehl and David Johnston, *White House Fought New Curbs on Interrogations, Officials Say*, N.Y. TIMES, Jan. 13, 2005, at A1.

Our Supreme Court went out of its way to hurt Black and brown people. It is yet another stain on American history that we should all be deeply ashamed of. And, as evidenced by today's decisions, Shelby County was just the beginning. Unless something pretty damn major happens, we are fucked. By the time this Court and the current Republican Party are through, we will be lucky if we have a Voting Rights Act left to use as toilet paper. Sorry, I don't have a good note to end on, here. It's all bad. A decade ago tomorrow, the Supreme Court went to warâ€“and the judges won. I. The Road to the Trilogy. For a time, it looked like the Supreme Court might stay out of cases arising out of post-September 11 counterterrorism policies altogether. As I summarized in a 2009 article, the Court denied certiorari in over a dozen high-profile terrorism disputes that reached it in 2002 and 2003, including several that presented circuit splits or other issues that would ordinarily have been ripe for the Justicesâ€™ consideration. Last week's Supreme Court decision in Boumediene v. Bush has been painted as a stinging rebuke of the administration's antiterrorism policies. From the celebrations on most U.S. editorial pages, one might think that the court had stopped a dictator from trampling civil liberties. Boumediene did anything but. The 5-4 ruling is judicial imperialism of the highest order.Â Boumediene should finally put to rest the popular myth that right-wing conservatives dominate the Supreme Court. Academics used to complain about the Rehnquist Court's "activism" for striking down minor federal laws on issues such as whether states are immune from damage lawsuits, or if Congress could ban handguns in school. The Supreme Court of the United States ruled today that if states in the Union have differences that they should go to war instead of decide in the court of law. â€œSometimes the rule of law isnâ€™t enough to decide differences and this is one of those times. War is a much better way to go forward,â€ Chief Justice John Roberts said. People on both sides of the political spectrum agreed. â€œWhat better way to settle differences between several states than to obliterate each other through war,â€ Jimmy Finklebottom of Des Moines, Iowa said. â€œI was really hoping that the Supreme Court wouldnâ€™t take this case. Now we can settle this like civilized people and blow each other up!â€ Parker Terry of Portland, Oregon said. The vote for this case was facilitated by new Dominion Court Voting Machines. A number of cases were tried before the Supreme Court of the United States during the period of the American Civil War. These cases focused on wartime civil liberties, and the ability of the various branches of the government to alter them. The following cases were among the most significant. Ex parte Bollman (1807) was an early case that made many important arguments about the power of the Supreme Court, as well as the constitutional definition of treason.