Habeas Corpus in the War Against Terrorism: *Hamdi v. Rumsfeld* and Citizen Enemy Combatants

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I. INTRODUCTION

On October 11, 2004, Yaser Hamdi arrived home in Saudi Arabia after being held incommunicado in U.S. Navy brigs for nearly three years.\(^1\) Without a hearing and without formal charges ever having been filed against him, Hamdi was detained as an “enemy combatant”\(^2\) following his seizure by Afghan allies of the United States, allegedly on a battlefield in Afghanistan. Hamdi’s release was part of a settlement negotiated by his defense counsel and the U.S. Department of Justice\(^3\) after the United States Supreme Court ruled in his favor on a writ of habeas corpus petition filed by his father.\(^4\)

In times of national crisis civil liberties are sometimes abridged in exchange for greater security.\(^5\) The Framers, countenancing such an

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2. “There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. . . . [F]or purposes of this case . . . [Hamdi] is an individual who . . . was ‘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.” The Court limited itself to the question “whether the detention of citizens falling within that definition is authorized.” *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639 (2004). See also, Jason Binimow, Annotation, Designation as Unlawful or Enemy Combatant, 185 A.L.R. FED. 475 (2004).


4. *Hamdi*, 124 S. Ct. at 2638. Two similar cases were decided at the same time: *Rumsfeld v. Padilla*, 124 S. Ct. 2711, (2004), and *Rasul v. Bush*, 124 S. Ct. 2686 (2004). These cases will not be discussed at length here because *Rumsfeld v. Padilla* was decided on a jurisdictional question and did not reach the habeas issue, and Rasul v. Bush involved an alien habeas petitioner; this Note focuses on the application of habeas corpus to citizen enemy combatants of the War Against Terrorism.

5. See, e.g., *Hamdi*, 124 S. Ct. at 2648 (“Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship.”); Padilla v. Rumsfeld, 352 F.3d 695, 714 (2d Cir. 2003) (“The Constitution envisions grave national emergencies and contemplates significant domestic abridgements of individual liberties during such times.”), rev’d, 124 S. Ct. 2711 (2004); cf. Steven R. Shapiro,
eventuality, granted to Congress the power to suspend the right to a writ of habeas corpus in times of rebellion or invasion.\(^6\) In Hamdi’s case, Congress had not suspended habeas corpus, though it had authorized the president to use military power against terrorists and their allies.\(^7\) Yet the executive sought to curtail Hamdi’s access to habeas corpus by classifying him as an enemy combatant, thereby subjecting him to executive discretion instead of domestic criminal law with all of its attendant constitutional protections. Hamdi’s petition and the government’s arguments supporting his detention led to questions about separation of powers and the protection of civil liberties in times of national threat. In such times the public desire for security spikes, and officials charged with the public’s safety will feel either pressure to guarantee security at all costs or be tempted to exploit the public fear to their own political or ideological ends.\(^8\)

It is the function of the judiciary to stand as a bulwark against the people’s representatives when public fear and outrage compel or allow measures that contravene or undermine core constitutional principles.\(^9\) This responsibility is most effectively fulfilled when the courts use conflicts like Hamdi’s as opportunities to reiterate or pronounce bright-line legal rules that make the boundaries of proper government action

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\(^6\) U.S. Const. art. I, § 9, cl. 2; see generally Jeffrey D. Jackson, The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex parte Merryman, 34 U. Balt. L. Rev. 11 (2004) (presenting the debate about whether the executive may also suspend habeas corpus in times of emergency, and concluding that excluding the president from that power is an important structural limitation that protects civil liberties).

\(^7\) Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (“In General.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”).

\(^8\) Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165 (1963) (“The imperative necessity for safeguarding... rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit government action.”); see also Jennifer M. Hannigan, Comment, Playing Patriot Games: National Security Challenges Civil Liberties, 41 Hous. L. Rev. 1371, 1375 (2004) (citing Justice Brennan’s factors outlining the motivation to infringe civil liberties during times of crisis: the national fervor that leads to an exaggeration of the security risks that supposedly would result from full exercise of civil liberties; the public’s willingness to accept abridgements of its liberties in exchange for more security in the face of the exaggerated risks; and the inexperience (or, I would add, self-serving calculations) of decisionmakers who are unwilling or unable to scrutinize the crisis and distinguish legitimate risks from hyperbole).

\(^9\) See, e.g., THE FEDERALIST NO. 48 (James Madison).
clear for citizenry and public officials alike. Hamdi’s petition was an opportunity for the Court to reinforce, in a time of crisis, the fundamental liberty of corporal freedom that habeas corpus guarantees by construing the Constitution’s separation of powers strictly instead of subjectively. Unfortunately, the plurality’s balancing test failed to do so in three significant ways: (1) it failed to clarify the separation of powers of the three branches of federal government; (2) it failed to protect adequately the rights guaranteed by habeas corpus doctrine; and (3) it failed to create clarity and predictability for citizen detainees. The Court should have resolved the debate with a strict interpretation of habeas corpus doctrine and other constitutional principles, rather than a nebulous balancing test that accommodates Congress’s avoidance of political responsibility while indulging the president’s military power.

Even though Hamdi is limited to detainees classified as enemy combatants it puts all citizens at risk. The War Against Terrorism is clearly not a conventional war and the terrorist enemy is not readily apparent. Activities ranging from political activism to library and internet usage to travel can raise red flags to security and intelligence officers putting anyone, however innocent, under the national security microscope. Moreover, because of the religious and racial factors involved in Middle Eastern terrorism, certain minority populations are more likely to be targeted for government action, whether it is justified or not. The implication is that this war will be fought internally as much as abroad, making everyone a potential suspect that could be classified as an enemy combatant and treated according to Hamdi. Furthermore, there is no identifiable end to this war and the adjustments made by the American public will be in place for a long time, and may become permanent either because the War Against Terrorism will be interminable, or through the force of habit, tradition, and precedent. To avoid abuses in the zealous prosecution of this war the perimeters of executive power must be drawn clearly, strictly enforced, and fundamental liberties jealously guarded.

II. Hamdi v. Rumsfeld

A. Background

The U.S. Constitution forbids the suspension of a citizen’s right to a writ of habeas corpus “unless when in Cases of Rebellion or Invasion the public Safety may require it.”10 The placement of this clause within

Article I places suspension within the power of Congress when it is deemed necessary. The implementation of habeas corpus and the procedure for its invocation are codified at 28 U.S.C. § 2241. Section 2241(a) and (b) place jurisdiction over petitions for the writ in the Supreme Court as a forum of first resort, as well as in the federal courts. Section 2241(c) defines the proper petitioner for a writ of habeas corpus. Section 2241(d) creates federal court habeas jurisdiction over petitioners from State custody.

The first serious challenge to executive authority over citizen enemy combatants arose from a habeas corpus petition following the Civil War. President Lincoln had suspended habeas corpus in September 1863 pursuant to an act of Congress authorizing suspension upon the president’s determination. Ex parte Milligan followed the suspension.

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11. See Jackson, supra note 6 (concluding that, although the Constitution is not explicit in giving the power of suspension solely to Congress and thus excluding the President, structural considerations and judicial precedent make it clear that the President cannot suspend the writ of habeas corpus).

Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had. The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

The writ of habeas corpus shall not extend to a prisoner unless— (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or (5) It is necessary to bring him into court to testify or for trial.

Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

15. Shapiro, supra note 5, at 104 (President Lincoln actually suspended the writ without first obtaining congressional authorization. Congress later granted authorization after the decision in Ex parte Merryman, 17 F. Cas. 144 (D. Md. 1861) (No. 9,487), which held that the Constitution only allows Congress to suspend habeas corpus.).

16. 71 U.S. (4 Wall) 2 (1866).
reinstatement of habeas corpus at the close of the war. Milligan, a civilian, was charged with complicity with the Confederacy as a result of his attempts to undermine Union war efforts in Indiana. He was tried by a military court and sentenced to death.\textsuperscript{17} Although the district court in \textit{Milligan} recognized the special circumstances of insurrection, it held that constitutional principles such as due process could not be negated by national emergency.\textsuperscript{18} The court held that since Milligan was a citizen of a loyal state in which the courts were open throughout the war, the military commission that condemned him had no jurisdiction over him.\textsuperscript{19}

In \textit{Ex parte Quirin}, a World War II case involving German saboteurs who disembarked from submarines in New York and Florida, the military commission that tried the saboteurs sentenced them to death.\textsuperscript{20} The Supreme Court held that the president’s war powers conferred jurisdiction over enemy combatants upon the executive branch.\textsuperscript{21} In his application for a writ of habeas corpus, one of the defendants argued that his U.S. citizenship entitled him to more stringent due process protections, specifically the right to a jury trial.\textsuperscript{22} The Court denied his application, holding that his status as an “unlawful combatant” placed him squarely within the purview of military tribunals and no right to jury trial existed there.\textsuperscript{23} The Court distinguished \textit{Milligan} upon the Quirin defendants’ admission to being unlawful combatants as opposed to Milligan’s status as a civilian together with the uncertainty about the charges leveled against him.\textsuperscript{24}

While the doctrine of habeas corpus is well developed, it is unclear how habeas corpus applies to enemy combatants who are also U.S. citizens. Prior to \textit{Hamdi}, “[t]he Supreme Court decided the most nearly applicable case, \textit{Quirin}, on stipulated facts, never considering what factual demonstration was required.”\textsuperscript{25} This condition was probably due,
in part, to the paucity of cases involving citizen enemy combatants and, in part, to the finite durations of most of America’s wars. The War Against Terrorism presents the courts with a new dilemma: what if the citizen enemy combatant was taken during a nontraditional war that has no end in sight? Thus, when citizen detainees of the War Against Terrorism, like Hamdi, disputed their designation as enemy combatants, the federal courts found themselves between a rock and a hard place—between the government’s security and military interests and the detainee’s compelling interest in avoiding indefinite, perpetual, and potentially unjustified detention—without clear precedent to determine the outcome.

Each court faced with the issue came to a different conclusion. The Eastern District of Virginia determined that core American constitutional principles trump the government’s unproven interest in detaining Hamdi.26 The Fourth Circuit, on the other hand, weighed the balance differently.27 The Supreme Court then applied the problem to its own scales and came up with yet a third result. Similar discrepancies can be found in the José Padilla court decisions28 and the executive’s decision to prosecute John Walker Lindh under the traditional criminal justice system.29

26. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 536 (E.D. Va. 2002) (“We must protect the freedoms of even those who hate us, and that we may find objectionable. If we fail in this task, we become victims of the precedents we create. We have prided ourselves on being a nation of laws applying equally to all and not a nation of men who have few or no standards . . . . We must preserve the rights afforded to us by our Constitution and laws for without it we return to the chaos of a rule of men and not of laws. Our Constitution was the first to develop a government of checks and balances . . . . While the Executive may very well be correct that Hamdi is an enemy combatant whose rights have not been violated, the Court is unwilling, on the sparse facts before it to find so at this time on the basis of the Mobbs Declaration.”), rev’d, 316 F.3d 450 (4th Cir. 2003), vacated, 124 S. Ct. 2633 (2004).

27. Hamdi v. Rumsfeld, 316 F.3d 450, 465 (4th Cir. 2003) (“The safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict. . . . For there is a ‘well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, and enemy belligerents, prisoners of war, and others charged with violating the laws of war.’ As we emphasized in our prior decision, any judicial inquiry into Hamdi’s status as an alleged enemy combatant in Afghanistan must reflect this deference as well as ‘a recognition that government has no more profound responsibility than the protection of American citizens from further terrorist attacks.’”), vacated, 124 S. Ct. 2633 (2004) (citations omitted).

28. Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003) (finding that the AUMF did not authorize the resident to detain American citizens, as required by the Non-Detention Act (18 U.S.C. § 4001(a) (2001)), and that the constitution does not extend the executive’s war powers to cover the detention of citizens as enemy combatants without any kind of process), rev’d, 124 S. Ct. 2711 (2004).

B. Facts and Procedure

One week after the September 11, 2001 terrorist attacks on New York City and Washington, D.C., Congress passed a joint resolution entitled Authorization to Use Military Force (“AUMF”), authorizing the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks.”30 Nearly four weeks later, combat operations in Afghanistan commenced.31 Yaser Hamdi was captured by the Northern Alliance in December 2001.32 He was surrendered to U.S. forces which detained and interrogated him in Afghanistan.33 In January of 2002, Hamdi was transferred to the U.S. naval base at Guantánamo Bay, Cuba and subjected to further interrogation. Upon confirmation that Hamdi was a U.S. citizen, he was transferred in April of 2002 to a naval brig in Virginia, and then later to a similar facility in South Carolina.34 In June of 2002, Hamdi’s father filed a petition for a writ of habeas corpus in the Eastern District of Virginia.35

1. Hamdi’s petition for writ of habeas corpus

Hamdi’s petition claimed his detention was not legally authorized.36 The AUMF did not suspend habeas corpus, and Hamdi had not been charged with any crime nor afforded any process.37 Specifically, the petition requested that the court:

(1) appoint counsel for Hamdi; (2) order [the government] to cease interrogating him; (3) declare that he is being held in violation of the Fifth and Fourteenth Amendments; (4) . . . “schedule an evidentiary hearing, at which [the government might] adduce proof in support of [its] allegations”; and (5) order that Hamdi be released from his “unlawful custody.”38

33. Id. at 2636.
34. Id.
36. Brief for Petitioners/Appellees at 9, Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895).
37. Id.
38. Hamdi, 124 S. Ct. at 2636 (quoting Hamdi v. Rumsfeld, 296 F.3d 278, 280 (4th Cir. 2002)). The original petition filed by Hamdi’s father and Frank Dunham, the Federal Public Defender, could not be obtained.
The district court appointed counsel and ordered the government to allow Hamdi the same access to counsel as is normally accorded to criminal defendants. ³⁹

2. Fourth Circuit Court of Appeals

Upon the government’s appeal, the Fourth Circuit Court of Appeals⁴⁰ reversed the order, holding that Hamdi was a special case - one that required greater deference to the executive because of the associated threats to national security and impairment of the government’s efforts to gather counter-terrorist intelligence. ⁴¹ In essence, the Fourth Circuit’s reasoning employed its own balancing test, weighing the national security interests of the government against Hamdi’s personal liberty interest.

Acknowledging that this was no ordinary criminal case, the appellate court held that traditional constitutional deference to the executive in “sensitive matters of foreign policy, national security, or military affairs” should have slowed the district court’s nearly automatic employment of the habeas routine. ⁴² The court observed that there was “little indication in the order . . . that the [district court] gave proper weight to national security concerns,” and instructed the lower court to consider “the most cautious procedures first” upon remand. ⁴³

On the other hand, the Fourth Circuit also denied the government’s motion to dismiss the petition altogether. ⁴⁴ The government argued that the executive’s designation of Hamdi as an enemy combatant put him beyond the reach of judicial review. ⁴⁵ This was due to the military and national security nature of Hamdi’s detention which gave rise to the deference owed to the executive in such matters. The Fourth Circuit rejected the government’s expansive interpretation, holding that “with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on

³⁹. See Hamdi, 296 F.3d at 281.
⁴⁰. Id. This case is known as “Hamdi II.” “Hamdi I,” Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002), dismissed a petition for writ of habeas corpus filed by a public defender and a private citizen neither of which had any relationship with Hamdi, thereby failing the “next friend” requirement.
⁴¹. Hamdi, 296 F.3d at 281.
⁴³. Hamdi, 296 F.3d at 282, 284.
⁴⁴. Id. at 283.
⁴⁵. Id.; Brief for Respondents/Appellants at 28, Hamdi v. Rumsfeld 296 F.3d 278 (4th Cir. 2002) (No. 02-6895).
the government’s say-so.” The Fourth Circuit’s decision changed the issue to how much judicial protection habeas petitioners could expect once they had been classified as enemy combatants by the executive branch.

3. The government’s argument

On remand, the government conceded the judiciary’s jurisdiction over habeas corpus petitions of citizen enemy combatants. It also adjusted its judicial deference argument; instead of asserting that the executive’s detention of citizen enemy combatants was immune from judicial review, the government argued that such review was substantially limited by the deference owed to the executive in matters of national security and military affairs to the question of whether a detention was authorized. Accordingly, the only evidence provided by the government to support Hamdi’s detention was a declaration by Michael Mobbs (“Mobbs Declaration”), a Special Advisor to the Under Secretary of Defense for Policy, that Hamdi was an enemy combatant. Mobbs supported his conclusion by claiming to be familiar with the facts and circumstances related to the capture and detention of Hamdi by virtue of his review of “relevant records and reports.” This hearsay, the government argued, was sufficient to satisfy judicial oversight and the requirements of due process because of the national security context. The government asserted, therefore, that Hamdi’s detention was legal and the habeas petition should be dismissed.

4. The Supreme Court of the United States

The district court found the Mobbs Declaration woefully inadequate to the task of judicial review and rejected the government’s expansive interpretation of the deference owed by the judiciary. As it engaged in
the balancing process mandated by the Fourth Circuit. The district court found that the government failed to provide evidence sufficiently weighty for dismissal, and repeated its order to the government to produce proper evidence for in camera review. Into the Fourth Circuit for the second time, the government’s appeal stressed the executive’s need for wide latitude and discretion in its war-making powers, a position with which the Fourth Circuit agreed. The appellate court accepted the Mobbs Declaration as sufficient to justify the government’s position by weighing national security more heavily and Hamdi’s liberty interest less than the district court did, and finding a distinction between detention authorized by the executive’s enforcement of criminal law and detention under its war powers function. The court held, therefore, that there was no justification for any further factual inquiry and remanded with an order to dismiss the petition.

Dismissal of the case and the subsequent denial of rehearing led Hamdi to appeal to the United States Supreme Court. In a plurality decision, the Court vacated the Fourth Circuit’s dismissal and remanded. The plurality consisted of four justices: Justice O’Connor, Chief Justice Rehnquist, and Justices Kennedy and Breyer. Justices Souter and Ginsburg concurred, to secure the minimum of constitutional protections for Hamdi in the case’s outcome, but denied that the president had even been authorized to detain him. Justices Scalia and Stevens dissented by applying habeas doctrine strictly, and Justice Thomas’s dissent accepted the government’s position without

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54. Id. at 530 ("This case represents the delicate balance that must be struck between the Executive’s authority in times of armed conflict and the procedural safeguards that our Constitution provides for American citizens detained in the United States.").

55. Id. at 535.

56. Id. at 528.


58. Id. at 477 ("Judicial review does not disappear during wartime, but the review of battlefield captures in overseas conflicts is a highly deferential one.").

59. Id. at 473.

60. Id. at 476.


63. Id. at 2660 ("Because I find Hamdi’s detention forbidden by [the Non-Detention Act] and unauthorized by the Force Resolution, I would not reach any questions of what process he may be due . . . . Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of eight members of the Court rejecting the Government’s position calls for me to join with the plurality in ordering remand on terms closest to those I would impose.").
C. Justice O’Connor’s Opinion for the Plurality

The threshold issue for the plurality was whether detention of citizen enemy combatants had been authorized. Hamdi challenged the legality of his detention citing 18 U.S.C. § 4001(a), the Non-Detention Act, which states, “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The plurality rejected his argument, concluding that the AUMF’s authorization to use all “necessary and appropriate” force included the power to detain individuals taken in combat “for the duration of the particular conflict in which they were captured” because it “is so fundamental and accepted an incident to war.”

Justice O’Connor reiterated the Quirin finding that “there is no bar” to the U.S. holding one of its citizens as an enemy combatant. Although the plurality sympathized with Hamdi’s concern about the indefinite nature of his detention, agreeing that Congress had not authorized indefinite detention and that international law allows detention only for the duration of hostilities, it was deemed irrelevant to the authorization question since active combat in Afghanistan was concurrent with the Court’s deliberations.

Justice O’Connor distinguished Milligan from Hamdi on the condition of the habeas petitioners upon capture. Milligan was arrested by the military in his own home in Indiana as a civilian. By contrast, Hamdi was allegedly taken on the field of battle in Afghanistan carrying a weapon against coalition soldiers (the Northern Alliance). This, reasoned Justice O’Connor, made Hamdi more analogous to Haupt, the defendant in Quirin. Indeed, the plurality opinion makes much of Hamdi’s seizure in a foreign combat zone in finding executive detentions of citizen enemy combatants legitimate.

Having found the AUMF and Quirin to satisfy the threshold issue of whether detention was authorized, Justice O’Connor next considered the “question of what process is constitutionally due to a citizen who

64. Doubt remains, therefore, not only in the outcomes of individual cases of citizen enemy combatant habeas petitioners, but also about the Court’s use of this balancing test itself since five of the nine justices explicitly opposed Justice O’Connor’s rationale.
65. Hamdi, 124 S. Ct. at 2640-41 (holding that “[i]n light of these principles, it is of no moment that the AUMF does not use specific language of detention”).
66. Id. at 2640.
67. Id. at 2641-42.
68. Id. at 2642. This is an odd analogy since Haupt was captured on the continental U.S. which was never a combat zone during World War II.
69. Id. at 2643.
disputes his enemy-combatant status.” 70 Both the government and Hamdi conceded that, “absent suspension, the writ of habeas corpus remains available to every individual detained within the United States,” and that the writ had not been suspended. 71 Justice O’Connor asserted that the writ of habeas corpus statute is clear in providing habeas petitioners with an opportunity to challenge the facts used by the government to justify their detention, and that the courts have some discretion within the mandates of due process as to how this can be achieved. 72 She rejected, therefore, the government’s assertion that the Mobbs Declaration alone fulfilled Hamdi’s right to due process. 73 Additionally, the Court rejected the Fourth Circuit’s holding that Hamdi’s status as an enemy combatant was undisputed as a matter of law by virtue of his capture in a foreign combat zone: “the circumstances surrounding Hamdi’s seizure cannot in any way be characterized as ‘undisputed’ as ‘those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances.” 74 On the other hand, the vigorous habeas order of the district court was likewise rejected as not being sufficiently delicate in accommodating the government’s concerns. 75

To balance these competing interests, Justice O’Connor compromised between the extremes proposed by the parties. Hamdi requested a full habeas hearing with unfettered access to counsel. 76 The government argued that the “some evidence” standard 77 of the Fourth Circuit should suffice. The plurality settled upon the Mathews balancing test, by which “the process due in any given instance is determined by weighing ‘the private interest that will be affected by the official action’ against the Government’s asserted interest . . . .” 78 Though articulated

70. Id.
71. Id. at 2644.
73. Hamdi, 124 S. Ct. at 2648. Although the plurality later stated that hearsay like the Mobbs Declaration might be acceptable as the most reliable evidence available, id. at 2649, this would be insufficient in the absence of neutral judicial review of the detainee’s rebuttal to that evidence.
74. Id. at 2644 (quoting Hamdi v. Rumsfeld 337 F.3d 335, 357 (4th Cir. 2003) (en banc) (Luttig, J., dissenting)).
75. Hamdi, 124 S. Ct. at 2648 (“[N]either the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance . . . .”).
77. The “some evidence” standard, adopted by the Fourth Circuit in its dismissal of Hamdi’s petition, called for the court’s focus to be “‘exclusively on the factual basis supplied by the Executive to support its own determination’” and “‘does not require’ a ‘weighing of the evidence,’ but rather calls for assessing ‘whether there is any evidence in the record that could support the conclusion.’” Id. at 2645 (quoting Brief for the Respondents at 34, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696)).
78. Hamdi, 124 S. Ct. at 2646 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
differently, this test is essentially the same as that employed by the
district court and by the Fourth Circuit Court of Appeals. Like the lower
courts before it, the plurality weighed Hamdi’s interest in freedom from
bodily restraint against the government’s interest, including “the burdens
the Government would face in providing greater process.” For Hamdi,
the Court considered the “interest of the erroneously detained individual”
in preserving his liberty, preventing oppression and abuse of innocents
by checking the executive’s power of detention, preserving the checks
and balances of American government generally, and reaffirming the
fundamental right of a citizen “to be free from involuntary confinement
by his own government without due process of law . . . .” Finding the
protection of these rights significant, the plurality concluded that the
exigencies of war and national security did not completely override
Hamdi’s private interest.

On the other hand, the plurality did not ignore the government’s
interests in national security and in the interrogation of Hamdi. The
Court also recognized the burdens that full due process would place on
the government’s war-making abilities. Finding significant weight on
this side of the scales, the plurality was unwilling to mandate the full
criminal process that would normally follow a successful habeas petition.

The balance that the plurality struck was to create what it called
“basic process.” “Basic process” retains fundamental protections that
the Court determined to be “core elements;” citizen-detainees are entitled
to “notice of the factual basis for [their] classification” as enemy
combatants, and to “a fair opportunity to rebut the Government’s factual
assertions before a neutral decisionmaker.” On the other hand, “basic
process” does not guarantee other protections normally afforded in
criminal due process, and can, therefore, be “tailored to alleviate [the]
uncommon potential burden on the Executive” of citizen-combatant
proceedings. The plurality provided examples of where “basic process”
might deviate from normal criminal due process. For example, normally
inadmissible hearsay, such as the Mobbs Declaration, might be allowed,
or a rebuttable “presumption in favor of the Government’s evidence”
would shift the burden of proof to the habeas petitioner and away from
the executive. Justice O’Connor also mentioned the possible use of

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80. *Id.* at 2647.
81. *Id.*
82. *Id.* at 2646-47.
83. *Id.* at 2649.
84. *Id.* at 2648-49.
85. *Id.* at 2649.
86. *Id.*
military tribunals in lieu of conventional civilian jury trials (with a caveat to the executive that civilian courts would be open to a habeas petitioner in the absence of process afforded by military tribunals). With this balance the plurality believed it had satisfied the most important aspects of both competing interests.

In summary, the plurality held that citizen enemy combatants who petition for a writ of habeas corpus are entitled to confront the allegations against them before a neutral decisionmaker. Any further protections of due process, however, are to be balanced against the executive’s national security interests and war-making powers with the deference traditionally accorded those interests. This balance may lead to a lowered standard of due process, stripped of all but the “essential constitutional promises,” than would be expected by a traditional application of habeas corpus doctrine.

D. Justice Souter’s Concurrence

Justice Souter, joined by Justice Ginsburg, would have ordered Hamdi’s release. He concluded that the government had “not made out a case on any theory,” because it had not even met the threshold question of authorization to detain Hamdi. For Justice Souter, the real threshold issue was “how broadly or narrowly to read the Non-Detention Act.” The government argued that the act does not apply to military detentions in wartime, or, alternatively, that the statutory requirement was satisfied by the AUMF. Justice Souter determined that the act’s legislative history required a strict reading and consequently rejected both arguments.

Justice Souter noted that the Non-Detention Act was passed in conjunction with the repeal of the Emergency Detention Act of 1950, which gave the Attorney General broad discretionary power to detain citizens in times of emergency. Congress did so with the express intent of preventing another episode like the forceful internment of thousands of innocent and loyal Japanese-Americans during World War II.

87. Id. at 2651. The issue remains, however, as to whether the executive has been authorized to create military tribunals for citizen enemy combatants. See discussion infra Part III.A.3.
88. Hamdi, 124 S. Ct. at 2649.
89. Id. at 2655.
90. Id. at 2654; 18 U.S.C. § 4001(a).
92. Id. at 20.
93. Hamdi, 124 S. Ct. at 2654.
94. Id.; see generally Korematsu v. United States, 323 U.S. 214 (1944) (upholding the conviction of a Japanese-American for entering an area the executive had declared off-limits to citizens with Japanese ancestors, by deferring to the executive’s security and war-making
hoped to preclude that possibility not only by withdrawing the executive’s authority, but also by requiring Congress to set forth clearly the exact perimeter of the executive’s power before any detentions could be made.\textsuperscript{95} A broad reading of the statute - endorsed by the government and adopted by the plurality - would undermine this purpose by allowing authorization to be implied where none is explicitly stated.\textsuperscript{96} Furthermore, Justice Souter argued, strict construction of the Non-Detention Act is mandated by precedent as well as by the legislative history.\textsuperscript{97}

Justice Souter concluded that the Non-Detention Act does apply to military detentions during wartime. Looking at the historical context that motivated the enactment of the Non-Detention Act, he concluded that it was especially applicable to times of crisis and national emergency, such as war.\textsuperscript{98} Refuting the government’s assertion that the act applies only to the domestic criminal code and not to military detentions,\textsuperscript{99} Justice Souter observed that the legislative history clearly indicates that Congress contemplated that the bill “would sweep beyond imprisonment for crime and apply to executive detention in furtherance of wartime security” and intended as much.\textsuperscript{100}

Under strict construction, Justice Souter found that the AUMF did not authorize Hamdi’s detention because “it never so much as uses the word detention,” and there would be no reason for Congress to imply more power than was explicitly granted by the resolution “given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit.”\textsuperscript{101} Justice Souter concluded that Congress intended to preclude any detention not explicitly sanctioned by a congressional act, fearing that it “might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority.”\textsuperscript{102} Because Congress’s precise intent was “to preclude reliance on vague congressional authority . . . as authority for detention or imprisonment at the discretion of the Executive,” the AUMF fails to satisfy the clarity and

\begin{itemize}
  \item 95. Hamdi, 124 S. Ct. at 2655.
  \item 96. Id.
  \item 97. Id. (citing Ex parte Endo, 323 U.S. 283, 300 (1944) (“We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.”)).
  \item 98. See id.
  \item 100. Hamdi, 124 S. Ct. at 2656.
  \item 101. Id. at 2657.
  \item 102. Id. at 2654 (quoting H.R. REP. NO. 92–116, at 2, 4–5 (1971)).
\end{itemize}
explicitness requirements of the Non-Detention Act. 103 Unless Congress clearly authorized detention or imprisonment, the executive has no power to detain citizens on American territory. 104

E. Justice Scalia’s Dissent

Justice Scalia looked at the historical development of habeas corpus in the context of citizen enemy combatants for his reasoning. From this he concluded that the executive has two alternatives to avoid a court order to release Hamdi upon a habeas petition: prosecution or suspension of the writ of habeas corpus. 105 For Justice Scalia, the distinction between enemy aliens and citizens who aid the enemy is important because “our constitutional tradition” is to detain the former for the duration of hostilities, but to charge the latter with treason or some other offense and try them criminally. 106 Where national crises, such as rebellion or war, make normal criminal process for suspected traitors impracticable, the Congress is empowered to suspend the writ of habeas corpus. 107 Therefore, if the executive wishes to avoid the burdens imposed by due process it can only do so only by urging Congress to employ the Suspension Clause. 108

Justice Scalia confronted the plurality position by claiming that, although the Constitution does not explicitly require a choice between these alternatives, tradition and precedent preclude any other options. 109 Justice Scalia’s examination of the English and early American histories of habeas corpus, culminated in his reliance upon Ex parte Milligan. 110 The conclusion he took from Milligan and the habeas history is that “criminal process was viewed as the primary means—and the only

103. Hamdi, 124 S. Ct. at 2654. Notably, Justices Scalia and Kennedy agree that the AUMF is not clear enough “to satisfy the interpretive canon that statutes should be construed so as to avoid grave constitutional concerns; or with the clarity necessary to overcome the statutory prescription that ‘[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.’ 18 U.S.C. § 4001(a).” Id. at 2671 (citations omitted).

104. Id. at 2660 (“[T]he Government has failed to justify holding [Hamdi] in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that [the Non-Detention Act] is unconstitutional. I would therefore vacate the judgment of the Court of Appeals and remand for proceedings consistent with this view.”).

105. Id.

106. Id. This is exactly what the executive did with John Walker Lindh. See Lindh, supra note 29 and accompanying text.


108. Although President Lincoln asserted an executive right to suspend habeas corpus during the Civil War, that interpretation of the Constitution was rejected in Ex parte Merryman. See supra note 15.


110. 71 U.S. (4 Wall) 2 (1866).
means absent congressional action suspending the writ—not only to punish traitors, but to incapacitate them,” and that this “is consistent with the Founders’ general mistrust of military power permanently at the Executive’s disposal.”[111] The plurality’s reliance upon the government’s interest in national security to abridge due process, therefore, is at odds with that wariness.[112]

The plurality relied heavily upon Quirin to avoid the rule in Milligan and to justify the government’s holding of a U.S. citizen as a military prisoner instead of as a criminal or traitor. Justice Scalia dismissed Quirin as poorly decided and of weak value as precedent.[113] Furthermore, the plurality read Quirin incorrectly. According to Justice Scalia it is properly distinguished from Hamdi’s petition because the defendants in Quirin conceded that they were enemy invaders, and thus their status as enemy combatants was undisputed.[114] Therefore, Haupt’s (the citizen enemy combatant in Quirin) detention by the executive under the rules of war (i.e. without criminal trial and normal due process) was lawful. Hamdi, on the other hand, vigorously contested his classification as a belligerent. Therefore, Justice Scalia concluded, “where those jurisdictional facts are not conceded—where the petitioner insists that he is not a belligerent—Quirin left the pre-existing law in place: Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release.”[115] Since it is not the Court’s function “to make illegal detention legal by supplying a process that the Government could have provided, but chose not to,” the Court should have granted Hamdi’s habeas petition instead of remanding with instructions for “basic process.”[116]

Justice Scalia would hold that in the absence of suspension of the writ of habeas corpus, criminal proceedings must be brought promptly or

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111. *Hamdi*, 124 S. Ct. at 2668.
112. *Id.* at 2669.
113. *Id.* (“The case was not this Court’s finest hour.”); see also Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1296 (2002) (calling Quirin “an old and troubling court decision” and cautioning against its revitalization as a tool to justify the use of military tribunals against American citizens deemed “unlawful belligerents”). Historical research on Quirin has revealed that “a principal reason for authorization of these military tribunals [to be held in secrecy] was the government’s wish to cover up the evidence of the FBI’s bungling of the case.” *Id.* at 1291 (citing David J. Danelski, *The Saboteurs’ Case*, 1 J. Sup. Ct. Hist. 61 (1996)). Additionally, Quirin is associated temporally and contextually with Korematsu v. United States, 323 U.S. 214 (1944), which upheld the executive’s detention of citizens with Japanese ancestry during World War II. The plurality’s poor choice of precedent in Quirin is a subject that could occupy another paper of itself and is beyond the scope of this Note.
115. *Id.*
116. *Id.* at 2673.
the detainee must be released. The plurality reached beyond the limits of judicial power by qualifying and limiting the process due to an American citizen in special circumstances such as the War Against Terrorism. Justice Scalia argued that those limitations are better and more properly defined by the people’s representatives than by the Supreme Court’s use of a balancing test of its own devising.

F. Justice Thomas’s Dissent

Justice Thomas accepted the government’s arguments in their entirety. His conclusion was based on his view of separation of powers doctrine. Citing such classic cases as Curtiss-Wright, Youngstown Sheet & Tube, and Dames & Moore, he interpreted a broad sweep of executive authority over citizens taken in battle as a necessary adjunct to the president’s national security responsibility. Justice Thomas concluded that the AUMF implicitly gave the executive plenary authority over any combatant captured, whether or not a U.S. citizen, by authorizing military action. Once the political branches have determined that the United States is at war and the executive’s security powers have been authorized, the executive is supported “by the strongest of presumptions and the widest latitude of judicial interpretation.” Therefore, although the judiciary may examine the legality of Hamdi’s detention, it cannot interfere with the executive’s “political” determination that Hamdi is an enemy combatant.

Consequently, Justice Thomas accepts the Mobbs Declaration as sufficient factual basis for Hamdi’s detention. Calling upon the

117. Id. at 2671.
118. Justice Scalia called this a “Mr. Fix-it Mentality.” “The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences . . . of the other two branches’ actions and omissions.” Id. at 2673.
119. Id. at 2672 (“[The Court] claims authority to engage in this sort of ‘judicious balancing’ from Mathews v. Eldridge, a case involving . . . the withdrawal of disability benefits! Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.” (citations omitted)).
121. Hamdi, 124 S. Ct. at 2675-77.
122. Id. at 2679. He also alluded to the opinion that the no such authorization is ever needed: “Although the President very well may have inherent authority to detain those arrayed against our troops . . . we need not decide that question . . . .” Id.
123. Id. at 2679-80 (quoting Dames & Moore v. Regan, 453 U.S. 654, 668 (1981)).
124. Hamdi, 124 S. Ct. at 2678.
125. “[I] do not think the plurality has adequately explained the breadth of the President’s authority . . . an authority that includes making virtually conclusive factual findings . . . . In this context, due process requires nothing more than a good-faith executive determination.” Id. at 2680.
Youngstown precedent, Justice Thomas pointed to the reasons why the courts should not second-guess determinations of this nature made by the executive. First, in matters of national security and foreign diplomacy “the courts simply lack the relevant information and expertise . . . .”126 Second, even if the judiciary possessed all of the relevant information, its decisions on these matters “are simply not amenable to judicial determination because ‘[t]hey are delicate, complex, and involve large elements of prophecy.’”127 Third, the Court has interpreted the Constitution to assign foreign and military affairs exclusively to the political branches.128 Of Justice Jackson’s three categories in his Youngstown concurrence, Justice Thomas puts Hamdi’s detention into the first category—the president’s authority is at its apogee when his actions arguably fall within the purview of his Article II powers and he has received congressional authorization.129 Accordingly, Justice Thomas would have affirmed the Fourth Circuit ruling dismissing Hamdi’s petition.130

III. Analysis

Security crises often come into direct conflict with civil liberties. The record of the United States in dealing with such conflicts is mixed. It is admirable that civil liberties have been protected and even expanded in spite of the many security crises through which the nation has passed. On the other hand, times of threat and fear have frequently led Americans to accept government intrusions on their liberties.131 In hindsight, the general sentiment of the American people became one of regret for each of these incidents and to regard them as unnecessarily drastic.132 Our responsibility, of course, is to learn from history and to institute policies

129. Hamdi, 124 S. Ct. at 2677.
130. Id. at 2685.
131. See Shapiro, supra note 5, at 103-05 for an overview of intrusions on civil liberties during national emergencies. These include the following: the Alien and Sediton Acts of 1798 used to imprison newspaper editors who were too vocal in their criticism of President Adams’ foreign policy; President Lincoln’s suspension of habeas corpus during the Civil War used to imprison newspaper editors who opposed his policies on the Southern rebellion; the Espionage Act of 1917 used to silence protests against U.S. involvement in World War I; the internment of citizens with Japanese ancestry during World War II; and the Supreme Court’s questionable deference to the government in its prosecution of a Vietnam protester who burned his draft card.
132. E.g., id. at 105-06 (“[I]t now seems clear that the Supreme Court’s decisions in World War I and World War II were plainly wrong . . . The fact that these decisions were written by some of the Supreme Court’s staunchest defenders of civil liberties . . . only highlights the difficulty of preserving civil liberties in the midst of war.”).
and procedures that prevent the recurrence of such events.

A. Separation of Powers Issues

The government’s brief and Justice Thomas’s dissenting opinion purport to require complete deference to the executive’s detention of Hamdi for the sake of preserving the federal government’s separated powers. In reality, this position conflates the legislative, executive, and judicial powers into the singular hands of the executive. The executive alone created the criteria it used to classify Hamdi as an enemy combatant, and determined the length and condition of his detention. The executive alone retained custody of Hamdi. And the executive claimed that it alone could have adjudicated the matter by, first, denying judicial review completely133 and, second, asserting that habeas review was limited only to the question whether detention per se was authorized.134

Criticizing the president’s assertion of his prerogative to merge these powers,135 Neal Katyal and Laurence Tribe observed:

A time of terror may not be the ideal moment to trifle with the most time-tested postulates of government under law. It is certainly not a good time to dispense lightly with bedrock principles of our constitutional system. Central among those principles is that great power must be held in check and that the body that defines what conduct to outlaw, the body that prosecutes violators, and the body that adjudicates guilt and dispenses punishment should be three distinct entities. To fuse those three functions under one man’s ultimate rule, and to administer the resulting simulacrum of justice in a system of tribunals created by that very same authority, is to mock the very notion of constitutionalism and to make light of any aspiration to live by the rule of law.136

The Hamdi Court did much to preserve the separation of judicial and executive powers by insisting on more than mere nominal review of the executive’s authorization to detain. By guaranteeing that habeas petitioners will be afforded judicial review of their classification as an enemy combatants the Court partially honored its central function as the branch of government empowered to determine guilt and punishment. Unfortunately, the Court’s effort to compromise between Hamdi’s and

133. See infra note 48 and accompanying text.
134. See infra note 53 and accompanying text.
the government’s competing interests confuses the separation of powers of the three branches. By limiting the process afforded citizens who are accused of being enemy combatants, the plurality’s decision surrendered to the executive many of the safeguards that the judiciary should use to protect the public against the arbitrary exercise of power. Furthermore, the *Hamdi* decision itself is an incursion by the judiciary into the legislative domain in its selection of which due process elements should and should not be retained in citizen enemy combatant petitions. Finally, the *Hamdi* decision completely neglected the Article I incursions of the Bush administration’s detention policy by legitimizing the executive’s exercise of the legislative power to create the right to detain someone, and its establishment of inferior tribunals.

1. Executive incursions into the judiciary

Due process is often considered to be a collection of protections of individual liberties and indeed it is as much. But it is also a structural protection that is meant to prevent excessive blurring of the lines between the executive and judicial powers.  

This is achieved by preventing the executive from becoming the “judge in his own case” that would combine executive and judicial functions making both arbitrary and open to abuse. Thus, the protections of due process function not only as a safeguard for individuals, but also as “guideposts for the exercise of executive authority[,] . . . at once [protecting] individual [liberty] and standard[s] of executive conduct.”

By surrendering certain procedural protections because they are inconvenient to the executive’s prosecution of the War Against Terrorism, the *Hamdi* decision blurs the line between executive and judicial powers that are meant to be maintained as distinct. By making hearsay admissible, and then presuming its truth, the Court removed at least two of the guideposts that define the proper limits of executive conduct. The presumption in favor of the government’s case shifts the burden of proof to the habeas petitioner, eviscerating the fundamental premise of the writ of habeas corpus: that *he who detains* is charged with proving the legality of the detention. Under the plurality’s “basic


process” the petitioner must prove the legality of his liberty. In these ways the Hamdi decision allows the executive power to detain to reach beyond its boundaries into the realm of the judiciary’s power to curb arbitrary detention. In times of crisis, when the executive has its greatest incentive to expand its powers, and Congress and the public it represents have corresponding incentives to capitate, the judiciary must be at its strongest and clearest.

2. Judicial incursions into the legislature

Hamdi caused the Supreme Court also to become guilty of acting beyond its prescribed limits. The plurality held that certain “core elements” of due process must be afforded the enemy combatant habeas petitioner. As noted above, it explicitly excluded other procedural protections and left room for the exclusion of still more. Indeed, it seems as though anything not enumerated as part of “basic process” can, and arguably will be, excluded in future litigation concerning War Against Terrorism detentions. The question arises as to how the Court settled on its list of protections that were to be included in “basic process.” Certain protections that once seemed fundamental—presumption of innocence of the detainee, burden of proof on the police power, the right to remain silent, the right against self-incrimination—are now not deemed to be “core elements” or “essential promises” of the Constitution, at least in regard to citizens that the executive, on its own, classifies as enemy combatants. Without an answer to the first question, a more important structural question arises: is it not the function of the legislature, the elected representatives of the people, to decide which liberties and procedural protections the people will surrender?

The separation of federal powers is a structural safeguard to liberty in two ways; it protects the minority from the potential for tyranny in majority rule, and it protects individual liberties against arbitrary power by diffusing power among competing branches. Under this scheme, any national abridgment of civil liberties must be accomplished by all three branches of the federal government. Thus,

[d]espite the more sweeping grant of power to the President in the opening Vesting Clause of Article II, [the enumerated legislative powers of Article I] create a framework that requires legislative

141. See supra notes 84-85 and accompanying text.
142. See supra notes 86-87 and accompanying text.
143. Wilkinson, supra note 137, at 1688.
144. Katyal & Tribe, supra note 113, at 1268.
approval for all significant deprivations of liberty. This framework is itself fractal of a larger order, for the Constitution’s entire structure creates a ‘rights-protecting asymmetry’ whereby the concurrence of all three branches is necessary before the government may decisively alter anyone’s legal rights or entitlements: In a word, these rights may not be curtailed except pursuant to duly enacted law.\textsuperscript{145}

This concern was the crux of Justices Souter’s and Ginsburg’s argument in their concurring opinion: That the legislature had deliberately erected a barrier to the executive and judicial branches’ power to deprive a citizen of physical liberty without the participation and approval of Congress through the Non-Detention Act.\textsuperscript{146} Indeed, the purpose of the act was to prevent another \textit{Korematsu} decision, in which the Supreme Court legitimized racially motivated executive wartime detentions that were conducted without express congressional authorization.\textsuperscript{147} The concurrence concluded that the AUMF was insufficient congressional approval of Hamdi’s detention and, therefore, that the Court should not sustain it.\textsuperscript{148}

Justices Scalia and Stevens also took issue with the lack of congressional participation in Hamdi’s detention. They, like Justices Souter and Ginsburg, found insufficient congressional authorization to detain.\textsuperscript{149} They also focused on the tradition of habeas corpus doctrine, drawing upon the Suspension Clause and precedent for the premise that Congress alone can suspend the writ.\textsuperscript{150} The \textit{Hamdi} decision was, in effect, a partial suspension of the writ (by limiting the procedural protections the writ invokes) in the absence of any congressional action to suspend. Even if one accepts the plurality’s conclusion that the AUMF was sufficient to satisfy the requirements of the Non-Detention Act, i.e. that the executive was authorized to detain Hamdi, it says nothing of the deprivation of procedural protections like the rule of evidence against hearsay or the presumption of innocence in favor of the detainee. Although incomplete, this was nonetheless a judicial incursion into the legislative prerogative that dishonors the structural system of the

\begin{footnotes}
\footnotetext[145]{Id. (emphasis added).}
\footnotetext[146]{See supra Part II.D.}
\footnotetext[147]{See supra note 94 and accompanying text. “Although an Act of Congress ratified and confirmed an Executive order authorizing the military to exclude individuals from defined areas and to accommodate those it might remove, the statute said nothing whatever about the detention of those who might be removed; internment camps were creatures of the Executive, and confinement in them rested on assertion of Executive authority.” Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2654 (2004) (citations omitted) (Souter, J., concurring).}
\footnotetext[148]{See supra note 104.}
\footnotetext[149]{See supra note 103.}
\footnotetext[150]{See supra Part II.E.}
\end{footnotes}
Constitution, and, in Justice Scalia’s opinion, unduly enlarges the power of the Court at the expense of Congress’s authority. In essence, the *Hamdi* plurality decided that the executive could not legislate abridgments to due process, *but the Supreme Court could.* Although the Court recognized that “commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection,” it failed to see that it also requires the protection of legislative approval.

By ratifying in part and “fixing” (as Justice Scalia put it) in part the executive’s action against Hamdi, the plurality participated with the executive in the usurpation of Congress’s power to define the curtailment of the public’s liberties. Removing this power (and, more importantly, this responsibility) from the representatives of the people seriously undermines those structural protections that Madison and others saw as the fundamental barrier to tyranny. This remains true even if Congress’s members prefer to insulate themselves from potentially unpopular decisions by allowing the president or the Supreme Court to abridge civil liberties. The Court should have put the ball back into Congress’s court by holding that, unless it legislated and empowered the president to prosecute and detain Hamdi legally, it would order his release. Only representatives directly accountable to their constituencies and endowed by the Constitution with legislative power should take action regarding the quantity and quality of liberty that American citizens enjoy.

3. Executive incursions into the legislature

The *Hamdi* decision ratified two improper legislative actions taken

151. Scalia, in his dissent, stated:

It should not be thought, however, that the plurality’s evisceration of the Suspension Clause augments, principally, the power of Congress. As usual, the major effect of its constitutional improvisation is to increase the power of the Court. Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds . . . to prescribe what procedural protections *it* thinks appropriate.

*Hamdi*, 124 S. Ct. at 2672 (Scalia, J., dissenting).

152. *Id.* at 2646-47 (quoting Jones v. United States, 463 U.S. 354, 361 (1983)).

153. J. Harvie Wilkinson III stated:

[For Jefferson] . . . ‘the solution was clear: a bill of rights, which he advocated from the moment he first saw the Constitution. . . . But Madison—who in the end would write the national Bill of Rights—he sensed that a limited enumeration of human rights would never prevent anyone from misusing power. Only structural balances within a government, Madison thought, pitting one force against another, could keep the misuse of power in check and so protect minority rights.

*Wilkinson*, *supra* note 137, at 1688 (quoting Bernard Bailyn, TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITY OF THE AMERICAN FOUNDERS 48 (2003)); *see also*, e.g., THE FEDERALIST NOS. 10, 47 (James Madison).
by the executive with respect to enemy combatant detentions: the president’s creation of military commissions and his expansion of the enemy combatant category.

Two months after the terrorist attacks of September 11, 2001, President Bush issued a Military Order through which he created military commissions to try suspected terrorists and al-Qaeda collaborators. Yet the creation of “tribunals inferior to the Supreme Court” is an enumerated power of Congress. A review of precedents on inferior tribunals led Professor Pfander to conclude:

The inferior tribunals account suggests reasons to proceed cautiously in the consideration of the legality of military tribunals or commissions for the trial of illegal enemy combatants, especially any who claim U.S. citizenship or commit alleged crimes on U.S. soil. The account holds that the President lacks power to fashion his own set of tribunals, free from legislative control. Instead, the Constitution empowers Congress to create inferior tribunals, including all courts that act as such outside the parameters of Article III.

In *Milligan*, the Court held that, even when Congress properly creates military tribunals, they cannot be used to try citizens when civil courts are open and unobstructed. Although the plurality reads *Quirin* to modify that holding to allow military trials of citizen enemy combatants, Katyal and Tribe assert that the general principle that “congressional authorization [is] at least a necessary requirement for such tribunals” has “never [been] repudiated in subsequent cases.” This principle “leaves the president little unilateral freedom to craft an order to detain people on his own suspicion for indefinite warehousing or trial at his pleasure in a system of military justice.” And yet, that is exactly what the Military Order has done: it has authorized the Secretary of Defense to detain individuals classified as enemy combatants and to appoint military commissions to try them.

155. U.S. CONST. art. I, § 8, cl. 9 (“The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court. . . .”).
157. See supra notes 15-19 and accompanying text.
159. Id.
160. Exec. Order, supra note 154, at § 3 (“Any individual subject to this order shall be - (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States . . . .”); id at § 4(b) (“The Secretary of Defense . . . shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be
The plurality opinion lacks a clear rejection of the executive’s claim of authority to appoint military commissions with jurisdiction over enemy combatants of the War Against Terrorism without congressional input.\textsuperscript{161} Instead, the opinion vaguely implies that military tribunals “appropriately authorized and properly constituted” could meet the standards of “basic process” without making clear that such authorization and constitution must come from Congress.\textsuperscript{162} The Court should have clearly repudiated the executive’s use of this legislative power, especially when it is employed against American citizens. While it asserted the Court’s right to oversee habeas petitions, it should have invalidated the use of these commissions and sent the issue back to the president. The president then could have made his recommendation to Congress for authorization of the tribunals, specifications as to who could be tried by them, and so forth. This would have allowed all three branches to pass off on the detention scheme and reduce the risk of abuse.

The Hamdi decision also improperly validated the executive’s exercise of legislative powers in defining the extent of its authority to detain. This Note has already discussed the concerns of four of the justices that Congress had not clearly authorized Hamdi’s detention.\textsuperscript{163} If this is the case, then the executive acted as a legislature in expanding the authorization to cover Hamdi. Even if the AUMF is sufficient authorization for detention, Hamdi’s classification as an enemy combatant probably rests upon criteria originating from the executive. Congress defined the offenses that qualified someone for trial by military commission, and to this the Department of Defense added twenty more.\textsuperscript{164} This action has been called “spectacular usurpation of the legislative function,” and indeed, it flows naturally out of the executive’s argument that authorization to use the military against those responsible for the September 11 attacks is actually a blank check of power over anyone it labels an “enemy combatant.”\textsuperscript{165} The government and Justice

\textsuperscript{161}. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2651 (2004) (“There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.”).

\textsuperscript{162}. Cf. Neal K. Katyal, Executive and Judicial Overreaction in the Guantánamo Cases, 2004 CATO SUP. CT. REV. 49, 66-67 (2004) (“[The Rasul and Hamdi decisions] should force a tremendous rethinking of the way the commissions will operate. In my view, the entire process for the commissions is flawed from start to finish, from their procedure to their substance to their adjudication.”).

\textsuperscript{163}. See supra Part II.D; notes 147-51 and accompanying text. The four justices are Souter, Ginsburg, Scalia, and Stevens.


\textsuperscript{165}. Katyal, supra note 162, at 67 (“This spectacular usurpation of the legislative function is
Thomas argued that congressional participation is not necessary because these detention powers were inherent to the president’s Article II Commander-in-Chief powers.\textsuperscript{166} However, a recent survey of the history of the federal detention power revealed that there \textit{never was} such authority inherent in the executive branch; it has always resided with the legislature despite the contrary assertions and efforts of many presidents.\textsuperscript{167} Justice Souter’s structural argument against implying authorization to detain in order to satisfy the Non-Detention Act is as applicable here. He wrote:

\begin{quote}
The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory. . . .\textsuperscript{168}
\end{quote}

Permitting the executive to create an added list of offenses by which it will classify aliens,\textsuperscript{169} American citizens captured abroad,\textsuperscript{170} and American citizens apprehended domestically\textsuperscript{171} as “enemy combatants” and thereby deny them due process is to allow exactly the arbitrary exercise of power to which American citizens applaud themselves as being immune. This capricious use of power is most easily illustrated by the differing fates of Yaser Hamdi and John Walker Lindh. Lindh, the executive decreed, was not an enemy combatant (even though he was found armed and in the company of enemy troops), and so was provided a lawyer and access to family, prosecuted criminally, and afforded the full array of due process and constitutional protections.\textsuperscript{172} Hamdi, on the bound to have predictable consequences: offenses are consistently defined in ways that benefit the prosecution. Indeed, the offenses are all defined after the fact, raising the concern that the offenses are defined to fit particular offenders, rather than being demarcated in a sober and evenhanded way.\textsuperscript{74}.

\begin{footnotes}
\item[166] \textit{See supra} Part II.B.3 and Part II.F.
\item[170] \textit{E.g.,} \textit{Hamdi,} 124 S. Ct. 2633.
\item[171] \textit{E.g.,} Rumsfeld \textit{v.} Padilla, 124 S. Ct. 2711 (2004).
\end{footnotes}
other hand, was classified as an enemy combatant, and so was denied access to anyone but military interrogators and held in military custody for nearly three years. The executive has refused to disclose the factual differences (if there are any) that dictated the disparate fates of Lindh and Hamdi, and it has argued that no other branch of government should have any oversight of these determinations. This is not the regularity, transparency, and equality of rule of law; this is rule by executive fiat.

The *Hamdi* decision partially ameliorated that condition by reasserting the principle of judicial review of a habeas petitioner’s detention. The Court did not go far enough, however, because it left the executive’s legislation untouched. Even worse, the Court indirectly validated the criteria created by the executive by affording a different, lower standard of review to citizens classified as enemy combatants by the executive. In other words, the Court allowed the executive to apply rules of its own devising – a dangerous conflation of legislative and executive powers. The Court thus protected its own jurisdiction over habeas petitioners, but did not protect Congress’s domain over the creation of crimes and authorization to detain.

Instead, the Court should have remanded with an order to the lower courts to scrutinize the criteria the government used to classify Hamdi as a combatant, and to weed out any criterion not created by Congress. If the executive determined that the criteria it created were essential to success in the War Against Terrorism, again, the president could recommend their adoption to Congress.

This failure of the Court to observe strictly the separation of powers is unacceptable given that “[a]t stake . . . 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.”173 This constraint is one of the few assertions of the Magna Carta whose applicability has endured the centuries because of its essential nature to limited government.174 Moreover, the principal method of constraint created by the Founders is the separation of powers. Thus,

> the Constitution sets up a structure whereby the concurrence of all three branches is normally needed in order to authorize a decisive departure from the legal status quo. Certainly, when a President is to take action

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174. MAGNA CARTA ¶¶ 39 & 40 (“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement [sic] of his equal or by the law of the land. To no one will we sell, to no one deny or delay right or justice.”).
that puts basic constitutional guarantees at risk, legislative authorization is presumptively required. Nothing in the Constitution, including the Commander-in-Chief Clause, alters this basic constitutional arrangement.175

**B. Inadequate Preservation of Habeas Corpus Protections**

A principal purpose of the separation of powers is to ensure the preservation of American civil liberties through the end of a security crisis. The writ of habeas corpus is an essential tool of this system. It is the vehicle through which the unlawfully detained may invoke due process protections by requiring their captor to justify the detention. The Hamdi decision’s sacrifice of many, if not most, due process protections eviscerates the effectiveness of habeas corpus and weakens the barrier that centuries of experience erected between the individual and the state’s executive power. The “basic process” standard articulated by the plurality is unclear and may prove ineffective. What constitutes a “fair opportunity to rebut” the government’s evidence? How secure, for example, is Hamdi’s right to access counsel?176 What is the evidentiary tipping point at which the burden of proof shifts from the government to the detainee?177 What if the detainee alleges that the government’s evidence was obtained through torture and is therefore unreliable or unfairly self-incriminating?178 According to Hamdi lower courts may use

176. The plurality’s statement on the matter seems to be dictum and is qualified as applying to the proceedings on remand: Hamdi asks us to hold that the Fourth Circuit also erred by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney. Since our grant of certiorari in this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unequivocally has the right to access to counsel in connection with the proceedings on remand. No further consideration of this issue is necessary at this stage of the case. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2652 (2004) (citation omitted). The government contends that Hamdi’s access to counsel is a matter for executive discretion and did not concede that he was entitled to such. Brief for Respondents at 39-42, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (No. 03-6696). The possibility remains, therefore, that a court could accept the government’s argument that access to counsel would jeopardize national security or interfere with military operations or interrogation and deny the right since it is not enumerated as a “core element” of due process in the plurality’s opinion.
177. If hearsay is allowed, is the Mobbs Declaration sufficient, as the Fourth Circuit found, or is something more substantial required of the government?
their discretion in deciding how those questions are to be answered. The government might easily exploit this vagueness. For example, if the case against a terror suspect is weak, the government could classify him as an enemy combatant and use \textit{Hamdi} to remove most of the due process constraints.179 Whether one is inclined to suspect the government of such duplicity, or whether one implicitly trusts government action, where civil liberties are concerned the most sensible approach is the healthy skepticism and wariness exemplified by this nation’s revolutionary and founding generations.180

The weakening of due process standards runs the risk of turning the habeas review into a rubber-stamping of executive detention, a judicial imprimatur legitimizing detentions that do not conform to constitutional and common law standards.181 A court sympathetic to the executive’s national security dilemma, like the Fourth Circuit, or ideologically prone to give wide latitudes of deference to the executive, like Justice Thomas, will not be inclined to afford detainees much more than the bare minimum that is required by the relaxed standards of “basic process.”182

\footnote{179. This problem with the \textit{Hamdi} decision is compounded by the Executive’s usurpation of legislative powers in creating offenses that will define a detainee as an enemy combatant. \textit{See supra Part III.A.3.}}

\footnote{180. \textit{E.g., JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, ¶ 3 (1785) Here, Madison stated: 
Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. \textit{Id; see generally, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-87, ch. 1 (1998)}.}}

\footnote{181. Katyal and Tribe forecast that “without suitably sculpted legislation the prospect of habeas review could require the disclosure of intelligence information in such proceedings—a prospect that could lead courts to water habeas review down to nothing more than a hollow formality.” Katyal & Tribe, \textit{supra} note 113, at 1308. This potential is exacerbated by the fact that “basic process” has already hurried this process along by watering down the procedural protections that habeas corpus invokes.}

\footnote{182. The bare minimum required by “basic process” is not much: “notice of the factual basis for [a detainee’s] classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” \textit{Hamdi}, 124 S. Ct. at 2648-49.}
It is conceivable that a court not interested in questioning the executive may give the detainee “notice of the factual basis for his classification as an enemy combatant,” grant a hearing, accept whatever reasonable evidence the government presents, and send the detainee right back to indefinite detention. The plurality’s “basic process” standard is too relaxed to require a court more sympathetic to the government’s interests than to the detainee’s to conduct a truly meaningful review, one that would insure that detention is justified.

These concerns should not be considered “ideological or unduly melodramatic.” As the plurality itself held, we should consider the ramifications of this doctrine on “the erroneously detained individual.” Consider the plight of Brandon Mayfield, a Muslim convert and law-abiding attorney from Oregon. He was held on a material witness warrant, like José Padilla, after the FBI fingerprint unit mistakenly matched his fingerprint to the train bombings in Madrid, Spain in March 2004. Subsequent investigation revealed that sloppy laboratory practices and the defensiveness of a lead FBI fingerprint expert were the principal causes of the mistake that led to Mayfield’s incarceration.

One wonders what consequences would follow if Mr. Mayfield had been re-classified as an enemy combatant and transferred incommunicado to a naval brig as was Mr. Padilla. According to Hamdi, he would suddenly find that certain “non-essential” constitutional protections such as the presumption of innocence, did not apply to him. With a presumption in favor of the government’s evidence, limited or no access to counsel, and other due process protections suspended by the executive’s unilateral designation of him as an enemy combatant, Mayfield would have a difficult time rebutting the evidence that resulted from error within the executive. In fact, his exoneration would rely entirely on the will of the executive to expose its own error. The odds would be stacked against...
Mayfield in such a way that an unjustified and mistaken detention of an American citizen could be perpetuated, based upon the will of the executive, because the constitutional safeguards meant to prevent it are not “essential promises” of the Constitution or “core elements” of due process. 189

To guard against that possibility, what is required is an exacting habeas review according to its tradition, not a weaker one. As James Pfander observed, apart from the separation of powers questions raised by allowing the executive to establish tribunals,

the designation of an individual as an enemy combatant presents the classic issue of jurisdictional boundaries on which constitutional rights of the first magnitude depend. Citizens . . . enjoy familiar rights to counsel, bail, freedom from self-incrimination, and a speedy trial before a jury of their peers—rights that an enemy combatant designation avowedly sacrifices in favor of indefinite detention and interrogation. With so much depending on the designation’s factual accuracy, the inferior tribunals account suggests the need for relatively searching review of the government’s enemy combatant designation. 190

Not only does Hamdi permit military tribunals to control the level of a citizen detainee’s access to habeas rights through its unilateral enemy combatant classification, but when the judiciary reviews the evidence justifying detention it is already skewed in the government’s favor. In other words, the judiciary co-adjudicates with the executive; the executive judges in its classification of the detainee, and the courts finish with a cursory examination of the executive’s determination. It should be the other way around: courts should approach the detainee as a free person until the executive has shown otherwise.

C. Lack of Predictability and Uniformity

Finally, the need for a bright-line rule also derives from core ideals sought after in the law: uniformity and predictability. The Hamdi decision creates no predictability for detainees, nor uniformity for government actors. Already the executive has treated two detainees from

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189. Hamdi, 124 S. Ct. at 2648-49.
190. Pfander, supra note 156, at 759.
factually similar, if not identical, situations in drastically different ways, an aberration not corrected by Hamdi. Although Hamdi created some limitations on the power that the executive had enjoyed since 2001, the decision does not establish much set procedure that the government is required to follow. Thus, the executive is still allowed to pursue the course of action most advantageous to its policies without regard for the implications those acts have on the individual liberty interests of detained American citizens. As a result, Mr. Lindh, captured in Afghanistan, was given counsel, and prosecuted criminally, whereas Mr. Hamdi, also captured in Afghanistan, was held incommunicado indefinitely. Likewise, Mr. Padilla, captured in a U.S. airport, was also held incommunicado indefinitely. Unlike Lindh and Hamdi, Mr. Padilla was not captured in a foreign combat zone in possession of weapons, but, like Milligan, was captured on U.S. territory at a time when the civilian courts were open and habeas corpus had not been suspended.

Before Hamdi the executive claimed complete discretion to treat these citizen detainees as it wished—clearly a circumstance the Constitution was designed to prevent. Hamdi does little to remedy this for a detainee appearing in a court that tends to favor heavily the government’s security interests, like the Fourth Circuit.

Further evidence of this flaw is found in the considerably divergent lower federal court rulings on Mr. Hamdi’s petition, and in other enemy combatant cases in which conflicting constitutional interpretations have led to very different results. The Mathews balancing test does nothing to cure these disparate outcomes. Consequently, two habeas petitioners in the same situation, making the same arguments, are likely to face very different outcomes depending on how their respective courts employ the Mathews test. Disparate outcomes are certainly possible with any subjective test that is applied differently by different courts. However, the freedom from unjustified and indefinite detention that is so fundamental to our liberal tradition cannot be served

191. E.g., compare Hamdi, 124 S. Ct. 2633 (where Mr. Handi was detained as an enemy combatant) with United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002) (where a detainee of identical circumstances, i.e. a U.S. citizen captured as an enemy combatant on the field of battle in Afghanistan, was prosecuted under normal criminal procedure); see also Hamdi, 124 S. Ct. at 2554 (Scalia, J., dissenting) (pointing to the difference between Lindh’s treatment and Hamdi’s).

192. See supra Part II.B for the disparity between the decisions of the District Court for the Eastern District of Virginia and the Fourth Circuit.

193. Compare Hamdi v. Rumsfeld, 316 F.3d 450, 465 (4th Cir. 2003) (holding that the Government’s security interests so outweighed Mr. Hamdi’s liberty interests as to make one hearsay document sufficient to justify indefinite detention), vacated, 124 S. Ct. 2633, with Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003) (holding that the president’s inherent war powers did not extend to cover the detention of an American citizen as an enemy combatant, and, further, that the AUMF did not satisfy the Non-Detention Act’s requirement of express congressional authorization to detain American citizens at all), rev’d, 124 S. Ct. 2711 (2004).
by such a test. Habeas corpus requires bright-line rules and their strict application as advocated, for example, by Justice Scalia’s dissent.\textsuperscript{194}

The disparity between outcomes for similar petitioners that results from the differing rules of men is what the rule of law has always sought to avoid. Professor Brooks observed:

[L]egal rules that were designed to protect basic rights and vulnerable groups have lost much of their analytical force, and thus, too often, their practical force.

The erosion of clear boundaries in some areas of the law also leads to a slippery slope, allowing the disingenuous to assert that there is also blurriness even in areas of the law that remain both relevant and clear. Thus, lawyers for the Bush administration went from the legitimate conclusion that the Geneva Conventions cannot easily be applied to many modern conflicts, to the disingenuous and flawed conclusion that there were therefore no legal constraints at all on U.S. interrogation practices. In fact, regardless of whether or not the Geneva Conventions apply to a given conflict, and regardless of whether or not a particular detainee is entitled to the protections of the Geneva Conventions, international law and U.S. treaty commitments prohibit the use of torture and other forms of cruel, inhuman, or degrading treatment of detainees—and there can be little doubt that many of the interrogation practices authorized by the Pentagon constitute torture or cruel, inhuman, and degrading treatment. In practice, then, the breakdown of clear boundaries in some areas of the law also dangerously undermines the efficacy of other legal rules.\textsuperscript{195}

IV. CONCLUSION

Times of national crisis like the War Against Terrorism require bright-line rules that enforce the pre-defined, proper boundaries of government action, especially executive action. Such times are not appropriate for judicial improvisation or innovation because the stakes are high and judgment is often clouded by passion, patriotism, fear, or powerful desires for governmental strength and efficiency.

[T]he war against terrorism is fundamentally different than any previous conflict this nation has fought . . . . [I]t is clear that there will never be a negotiated surrender in the war against terrorism and that the

\textsuperscript{194} Hamdi, 124 S. Ct. at 2660-74.

terrorist threat is unlikely to end anytime soon. We do not have the luxury, therefore, of regarding any restrictions on liberty as temporary expedients, like wartime rationing. Instead, such restrictions must be regarded as potentially permanent transformations in America’s constitutional value system. At a bare minimum, that suggests the need for closer judicial and political scrutiny . . . . 196

If civil liberties are to be sacrificed temporarily in the name of greater security, then that decision must be made by elected representatives of the people with the constitutional power and political responsibility assigned to them. That process would create a temporary congressional measure that could be repealed when the crisis is over, or if the measure is found to be excessive or insufficient. Instead, we now have precedent that weakens the structural protections of the Constitution firmly rooted in the law.

Where the legislature remains silent, there the writ of habeas corpus should speak against executive detention. Authorization to detain American citizens should not be implied. If there is no explicit detention authority granted and if the Suspension Clause has not been invoked, then the writ of habeas corpus demands either prosecution under existing legislated offenses or release. The American people should not have to trade the insecurity created by terrorism for insecurity about their civil liberties.

\[ Jared \textbf{Perkins} \]

\[196. \text{Shapiro, supra note 5, at 116.}\]