The Detainee Cases of 2004 and 2006 and Their Aftermath

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I am indebted to Dan T. Coenen, J. Alton Hosch Professor of Law at the University of Georgia School of Law for his helpful comments. I also gratefully acknowledge the generous support of the Law & Economics Center of George Mason University School of Law. This article is adapted from 1 R O N A L D D. R O T U N D A & J O H N E. N O W A K, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 6.13(b)(2) (3d ed. 1999 & Supp. 2006).
INTRODUCTION, HISTORICAL BACKGROUND, AND AFTERMATH OF THE AL QAEDA TERRORISM ATTACK OF SEPTEMBER 11, 2001

The extraordinary attacks of September 11, 2001 set the stage for three important Supreme Court decisions filed on June 28, 2004, and a fourth decided on June 29, 2006. Justice Stevens, speaking for the Court in Rasul v. Bush, explained the factual context that led to these cases.

On September 11, 2001, agents of the al Qaeda terrorist network hijacked four commercial airliners and used them as missiles to attack American targets. While one of the four attacks was foiled by the heroism of the plane’s passengers, the other three killed approximately 3,000 innocent civilians, destroyed hundreds of millions of dollars of property, and severely damaged the U.S. economy. In response to the attacks, Congress passed a joint resolution authorizing the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed,
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or aided the terrorist attacks . . . or harbored such organizations or persons.” Acting pursuant to that authorization, the President sent U.S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.4

The trio of cases that arose in 2004 were, in turn, heavily influenced a trio of cases that date back to the Civil War and World War II. We should first focus on these earlier cases in detail to understand how the Court used them and understood them later in the detainee cases of 2004.

The first case is Ex parte Milligan,5 which grew out of, but was decided after, the Civil War. The commander of the Indiana military district ordered Milligan arrested and tried by court martial, which convicted him and sentenced him to be hanged.6 He applied for a writ of habeas corpus to the Supreme Court, contending that, because he was a civilian and citizen of a state that had not joined the rebellion, he was not under the jurisdiction of a court martial.7

The Court agreed: “It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion.”8 Milligan had not been behind enemy lines and he had not joined the Confederacy. The State of Indiana had not joined the rebellion; it was not under invasion; and its civil courts were open.

The case broadly said that:

Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, [where] the [f]ederal courts were open . . . had no jurisdiction to try, convict, or sentence for any criminal offence [sic], a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest [the military] with any such power.9

5. 71 U.S. (4 Wall.) 2 (1866).
6. Id. at 107.
7. Id. at 108.
8. Id. at 131.
9. Id. at 3. The Court explained:

Upon the facts stated in Milligan’s petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had
The Court issued its next major decision during World War II, over three-quarters of a century later, and it interpreted *Milligan* very narrowly. *Ex parte Quirin*\(^{10}\) is often called the Nazi Saboteurs case.

The time line for the *Quirin* case was remarkably swift—some would say too swift. Shortly after the government captured the alleged saboteurs in this country, President Franklin D. Roosevelt ("FDR") created a military tribunal on July 2, 1942, to try them for violating the laws of war.\(^{11}\) The FBI then transferred custody over them to the military, which tried them in secret.\(^ {12}\) Appointed counsel represented them. The Government prosecuted the defendants in a secret military trial, even while the civil courts were open.\(^ {13}\)

While that secret trial was proceeding, the defendants applied for habeas relief.\(^ {14}\) The Supreme Court heard oral argument on July 29, 1942, and issued a very pithy per curiam opinion on July 31, 1942, which denied the petitioners leave to file petitions for writs of habeas corpus.\(^ {15}\) The Court then resumed its traditional summer recess. A week after this July 31 opinion, the Government executed six of them, including, Hans Haupt, who was a U.S. citizen. The Court did not issue an extended opinion until October 29, 1942.\(^ {16}\)

The *Quirin* Court, in its extended opinion, phrased the question before it as follows:

> The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942, on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States.\(^ {17}\)

This time, the Court’s answer was yes.\(^ {18}\)

*Quirin* read *Milligan* narrowly, and held that rules protecting civilians from court martial while civil courts can function and are open does not insulate combatants from military jurisdiction, even if the combatant is a...
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U.S. citizen. In this case, the combatants were Nazi spies who secretly entered this country from Germany. At least one of them was a U.S. citizen; the Government captured them within the United States.

*Quirin* upheld FDR’s rules and permitted trial by military commission of these eight who allegedly entered the United States secretly and without uniforms. *Quirin* drew a distinction between “lawful” and “unlawful” combatants and said that their status as combatants removed them (including the American citizen) from the purview of *Milligan*’s holding that the military cannot try citizens of states with open civilian courts by court martial.

The *Quirin* Court defined “unlawful belligerents,” or “unlawful combatants” in language that would include al Qaeda and other terrorists: the “distinguishing characteristics of lawful belligerents [are] that they ‘carry arms openly’ and ‘have a fixed distinctive emblem.’ . . . [P]ersons who take up arms and commit hostilities’ without having the means of identification prescribed for belligerents are punishable as ‘war criminals.’

President Bush’s order, after September 11, 2001, setting up military tribunals, borrowed heavily from FDR’s order, but gave the combatants more rights, including public trials. President Roosevelt’s order, in contrast, required that the *Quirin* trial be held in secret.

The claim of the detainees in the trio of cases decided in June 2004, did not involve the constitutionality of the military tribunals that President

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19. Id. at 45-46.
20. Id. at 20.
22. Id. at 48.
23. The Court said:
   By universal agreement and practice the law of war draws a distinction between
   the armed forces and the peaceful populations of belligerent nations and also
   between those who are lawful and unlawful combatants. Lawful combatants are
   subject to capture and detention as prisoners of war by opposing military forces.
   Unlawful combatants are likewise subject to capture and detention, but in addition
   they are subject to trial and punishment by military tribunals for acts which render
   their belligerency unlawful. The spy who secretly and without uniform passes the
   military lines of a belligerent in time of war, seeking to gather military
   information and communicate it to the enemy, or an enemy combatant who
   without uniform comes secretly through the lines for the purpose of waging war
   by destruction of life or property, are familiar examples of belligerents who are
   generally deemed not to be entitled to the status of prisoners of war, but to be
   offenders against the law of war subject to trial and punishment by military
   tribunals.
   Id. at 30-1 (emphasis added).
24. Id. at 45.
25. Id. at 34.
Bush created because the government had not yet begun prosecution of any of the detainees on grounds of being “illegal combatants.” As discussed below, the only issue in those cases was whether the government must allow the detainees some hearing to determine if they were combatants and thus whether the military could detain them until the conclusion of the war, or if the military had captured them by mistake. The purpose of the detention for the Guantanamo detainees is not to prosecute them but to keep them from rejoining the battle on behalf of the Taliban or al Qaeda.26

In contrast, in Quirin, the purpose of the military trial in Quirin was to prosecute them as spies.

The Quirin Court announced that Milligan was “inapplicable” to the circumstances before it.27 The Court read Milligan narrowly: the detainee in that case was not “a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war.”28 The Quirin saboteurs not only conspired to harm the United States but also did so as persons associated with the enemy’s forces, so they were enemy combatants subject to military jurisdiction under the laws and customs of war.29

The third decision in the triumvirate of cases that set the stage for the detainee cases is Johnson v. Eisentrager,30 which also arose out the World War II experience. Like Quirin, it deferred to the military.

The facts took place shortly after Germany, not Japan, had surrendered.31 A U.S. military commission in China32 tried certain German soldiers and found that they had engaged in military activity against United States in China after the surrender of Germany, in violation of the laws of war.33 The U.S. Government then confined these German nationals in the custody of the U.S. Army, which held them in a prison in occupied Germany.34 They sued in the U.S. courts, claiming that their military “trial, conviction, and imprisonment violate[d] . . . the Constitution, . . . [the] laws of the United States, and provisions of the Geneva Convention governing treatment of prisoners of war.”35

26. If they were combatants, the military could detain them. If they were combatants, the military could also prosecute them for any alleged war crimes.
27. Ex parte Quirin, 317 U.S. at 45.
28. Id.
29. Id. at 45-46.
31. Id. at 766.
32. That military tribunal had no international participation. Id.
33. Id.
34. Id.
35. Eisentrager, 339 U.S. at 767.
The military held the prisoners in occupied Germany, in the immediate physical custody of officers who were not parties to the proceeding, but the Court assumed that “the respondents named in the petition have lawful authority to effect that release.” Hence, the Court’s process could reach the Secretary of Defense and the other defendants if the Court chose to exercise jurisdiction.

If Germany were still at war against the United States, then the United States could capture and detain these combatants but not prosecute them, for they would not be violating the laws of war. It is no crime to be a soldier. However, these German combatants were fighting the United States after their government, Germany, was no longer at war against the United States. That inconvenient fact converted their actions from lawful to unlawful belligerency (or from privileged or unprivileged belligerency).

36. Id. Justice Jackson, for the Court, explained the basic issue:
The ultimate question in this case is one of jurisdiction of civil courts of the United States vis-à-vis military authorities in dealing with enemy aliens overseas. The issues come here in this way:
Twenty-one German nationals petitioned the District Court of the District of Columbia for writs of habeas corpus. They alleged that, prior to May 8, 1945, they were in service of German armed forces in China . . . [and] that their employment there was by civilian agencies of the German Government. Their exact affiliation is disputed, and, for our purposes, immaterial. On May 8, 1945, the German High Command executed an act of unconditional surrender, expressly obligating all forces under German control at once to cease active hostilities. These prisoners have been convicted of violating laws of war, by engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan. Their hostile operations consisted principally of collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces. They, with six others who were acquitted, were taken into custody by the United States Army after the Japanese surrender and were tried and convicted by a Military Commission constituted by our Commanding General at Nanking by delegation from the Commanding General, United States Forces, China Theatre, pursuant to authority specifically granted by the Joint Chiefs of Staff of the United States. The Commission sat in China, with express consent of the Chinese Government. The proceeding was conducted wholly under American auspices and involved no international participation. After conviction, the sentences were duly reviewed and, with immaterial modification, approved by military reviewing authority. Id. at 765-66. The United States repatriated these prisoners to Germany to serve their sentences. Id. at 766. Their immediate custodian was an American Army officer, the Commandant of Landsberg Prison. Id. The process of the district court could not reach him, so the respondents named in the petition included the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the Army, and the Joint Chiefs of Staff of the United States. Eisentrager, 339 U.S. at 766. The Supreme Court assumed that “while prisoners are in immediate physical custody of an officer or officers not parties to the proceeding, respondents named in the petition have lawful authority to effect that release.” Id. at 766-67.
37. Id. at 765-66.
That made them “illegal combatants” (or “unlawful” or “unprivileged” combatants) and that is why the military tribunal convicted them. They argued that they were civilians, but the Court found that the issue was “immaterial.”

_Eisentrager_ broadly held that no statute gave these prisoners any right to seek a writ of habeas corpus to test the legality of their detention. Justices Black, Douglas, and Burton were the only dissenters. Justice Jackson, for the Court, held that German nationals, confined in the custody of the United States Army in Germany following conviction by military commission of having engaged in military activity against United States in China after surrender of Germany, had no right to the writ of habeas corpus to test the legality of their detention. The _Eisentrager_ Court concluded that the statute simply did not extend habeas jurisdiction to enemy aliens held in occupied Germany, and that this statute was constitutional.

I. THE 2004 DETAINEE CASES

A. Background

These three cases—_Milligan_, _Quirin_, and _Eisentrager_—set the stage

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38. Id. at 765. _Torture_. Whether or not the combatant is “lawful” or “unlawful,” both international law and American statutory law forbids torture of detainees. 22 U.S.C. § 2152 (2004 & Supp. 2006); 22 U.S.C. §§ 6401, 6402 (2004 & Supp. 2006); 18 U.S.C. § 2340A (2000). See, e.g., Implementation of the Convention Against Torture, 8 C.F.R. § 208.18 (2006); Richard P. Shafer, Annotation, _Construction and Application of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment_, 184 A.L.R. FED. 385 (2003 & Supp. 2005). If the combatants are unlawful, they lose certain privileges, such as the right to eat as a group, or to cook their own meals. However, the Government cannot prosecute any combatants for violating the laws of war without giving them a trial. It needs no trial simply to detain a combatant for the duration of the conflict, but it will have to grant a limited hearing if the detainee claims that the military captured him by mistake and that he never was part of the forces fighting for al Qaeda or those who harbor al Qaeda.

39. 339 U.S. at 781. The Court said, inter alia: “Courts will entertain [an alien’s] plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment.” Johnson v. Eisentrager , 339 U.S. 763, 775.

40. Id. at 763.

41. Id. at 765-66, 781.

42. Id. at 777: “To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States” (emphasis added).
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for the three cases that the Court decided in June 2004. The 2004 cases involved three types of detainees:

(1) *Rasul*, which involved two Australians and twelve Kuwaitis who were: (a) captured abroad in Afghanistan during the same hostilities, and (b) held in military custody at Guantánamo Bay, Cuba, an American Naval Base.\(^{43}\)

(2) *Hamdi*, which involved an American citizen captured in Afghanistan allegedly fighting against American troops and their coalition partners.\(^{44}\) He allegedly fought for al Qaeda and the Taliban, a group that controlled Afghanistan and harbored al Qaeda.\(^{45}\)

(3) *Padilla*, which involved an American citizen arrested when he entered the United States on a flight that originated in Pakistan and ended in Chicago.\(^{46}\) Prior to his entrance in the United States, he had fought with al Qaeda in Afghanistan and Pakistan.\(^{47}\) He had been “armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States.”\(^{48}\)

B. The Rasul Case

The first decision, which sheds a great deal of light on the other two, is *Rasul v. Bush*.\(^{49}\) The petitioners were captured abroad during the hostilities, and were citizens of Australia and Kuwait.\(^{50}\) Their brief emphasized “that [t]hey are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States.”\(^{51}\)

The military transferred them to a prison at the Guantánamo Bay, Cuba, Naval Base, which the United States occupies under a lease and treaty recognizing Cuba’s ultimate sovereignty, but giving this country complete jurisdiction and control for so long as it does not abandon the leased areas.\(^{52}\) Petitioners filed suits under federal law challenging the

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45. *Id.* at 512-13.
48. *Id.* at 390 (citation omitted).
49. 542 U.S. at 468. Stevens, J., delivered the opinion of the Court, in which O’Connor, Souter, Ginsburg, and Breyer, JJ., joined. *Id.* at 466. Kennedy, J., filed an opinion concurring in the judgment. *Id.* at 485. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and Thomas, J., joined. *Id.* at 488.
50. *Id.* at 470-71.
52. *Id.* at 471.
legality of their detention, alleging that they had never been combatants against the United States or engaged in terrorist acts, and that they have never been charged with "wrongdoing, permitted to consult counsel, or provided access to courts or . . . other tribunal[s]."

Justice Stevens, for the Court in Rasul, found that the federal court has jurisdiction to hear the habeas claims but did not decide what further proceedings may be come necessary. The Court did not even decide that the litigants would win, only that the lower courts had jurisdiction. Later, in Hamdi, the O’Connor plurality articulated procedures that it required for U.S. citizens, and one would think that aliens would not be in a better position than—American citizens would when it comes to procedures calculated to give the alleged combatants a "meaningful opportunity to contest the factual basis for [their] detention."

In reaching the conclusion that the Court had jurisdiction, Justice Stevens first had to distinguish Johnson v. Eisentrager. Stevens said that there were six critical facts that explained Eisentrager and those factors were not present in the Rasul case:

The German prisoners were (a) enemy aliens who (b) had never been or resided in the United States, (c) were captured outside U.S. territory and there held in military custody, (d) were there tried and convicted by the military (e) for offenses committed there, and (f) were imprisoned there

53. Id. at 471-72.
54. Stevens said: [W]hat further proceedings may become necessary after respondents make their response to the merits of petitioners’ claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Id. at 485.
55. Rasul, 542 U.S. at 484 n.15 (where Justice Stevens emphasized that the broad allegations of petitioners, if true, met the statutory requirements for habeas jurisdiction): Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.

Id. (quoting 28 U.S.C. § 2241(c)(3)). Later, Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005), emphasized this distinction: The Supreme Court’s Rasul decision did give district courts jurisdiction over habeas corpus petitions filed on behalf of Guantánamo detainees such as Hamdan. . . . [t]hat a court has jurisdiction over a claim does not mean the claim is valid.

Id. at 40 (emphasis added).
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at all times. Petitioners here differ from the Eisentrager detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. The Eisentrager Court also made clear that all six of the noted critical facts were relevant only to the question of the prisoners’ constitutional entitlement to habeas review.  

Let us consider these distinctions in more detail. The District Court construed the Rasul suits as habeas petitions and “dismissed them for want of jurisdiction,” pursuant to Johnson v. Eisentrager, which had held that aliens detained outside United States sovereign territory may not invoke habeas relief.  

To find jurisdiction, the Rasul Court first had to distinguish Eisentrager. It said that statutory interpretations following Eisentrager now gave the courts habeas jurisdiction, even if they did not have jurisdiction over the detainee, as long as the court had jurisdiction over the jailer, “‘the person who holds him in what is alleged to be unlawful custody’” and jurisdiction exists as long as “‘the custodian can be reached by service of process.’”  

Then, the Court concluded that exercising habeas jurisdiction over a naval facility in Guantánamo, Cuba, would not be exercising extraterritorial jurisdiction because detainees at Guantánamo are “within ‘the territorial jurisdiction’ of the United States.” The Guantánamo facility is special and is in a unique situation, the Court concluded: although the United States occupies it under a lease and treaty recognizing Cuba’s ultimate sovereignty, that lease gives the United States complete jurisdiction and control for so long as it shall not abandon the leased areas. That special status, the Court argued, allows habeas jurisdiction to extend to Guantánamo. This conclusion accepted what the petitioners

58. Rasul, 542 U.S. at 467 (citation omitted).
59. Id. at 472-73. See also id. where the D.C. Circuit held that “the privilege of litigation” does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign’” (quoting Odah v. United States, 321 F.3d 1134, 1144 (D.C. Cir. 2003)).
60. Id. at 478-79 (quoting Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494-95 (1973)).
61. Id. at 480 (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).
62. Rasul, 542 U.S. at 471.
63. Id. at 487 (where Kennedy, J., concurring in the judgment, emphasized: “[T]his lease is no ordinary lease. Its term is indefinite and at the discretion of the United States”).
had specifically argued—that Guantánamo is unique and therefore unlike other American bases or places that America has abroad.64

In addition, the Government conceded at oral argument that the existing “habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base.”65 The habeas statute draws no distinction based on citizenship, so if there is habeas jurisdiction over an American held at Guantánamo, the Court argued, there must be habeas jurisdiction over an alien in Guantánamo.66 Jurisdiction, however, says nothing about whether the habeas petitioners will win on the merits.67

The Rasul case also was different from Johnson v. Eisentrager,68 because—unlike Eisentrager and his fellow Germans—the Rasul petitioners (citizens of Australia and Kuwait) “are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States.”69 The President, acting “pursuant to” an authorization of Congress, had “sent U.S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.”70 But none of the petitioners in Rasul were citizens of Afghanistan.

The Court on this point embraced and adopted the position that the Rasul petitioners advocated in their brief, which was based on the distinction that these detainees were different from Afghans captured in Afghanistan because: “They are not enemy aliens, but citizens of our closest allies [Australia & Kuwait] who allege they have committed no wrong against the United States, and whose allegations at this stage must be accepted as true [sic].”71

One might certainly criticize this distinction. One might think that what is important is not where you were born or where you are a citizen, but what you are doing now. If a cat has babies in the oven, we call them kittens, not muffins. It does not matter where they were born; what matters is what they are doing when captured.72

65. Rasul, 542 U.S. at 481.
66. Id.
67. See Hamdan, 415 F.3d at 40 (arguing “[t]hat a court has jurisdiction over a claim does not mean the claim is valid”).
69. Rasul, 542 U.S. at 476 (emphasis added).
70. Id. at 470.
72. See Duncan v. Kahanamoku, 327 U.S. 304, 313-14 (1946); see also Ex parte Quirin, 317 U.S. 1, 31, 36-37 (1942) (both lawful and unlawful combatants, regardless of
But the Court does accept a crucial distinction between aliens of friendly countries and aliens of countries who are our allies. Thus, nothing in \textit{Rasul} requires any habeas protection for Iraqis captured in Iraq or Afghans captured in Afghanistan, because those aliens are nationals of countries at war with the United States.

Granted, the Court might later announce that even nationals of countries at war with the United States have a right to habeas. But if that were the rule, it would suggest that we acted unconstitutionally in World War II when we held over 400,000 enemy detainees (soldiers captured aboard) in the United States.\footnote{Territo, 156 F.2d at 143 (where the court refused to release one enemy alien who was a dual citizen (Italian-American) captured in battle during World War II). \textit{Territo} noted what was considered obvious at the time: The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released. \textit{Id.} at 145.} If the Court really meant that anyone detained in a war has a right to file a habeas petition, such a rule would place a significant burden on any government conducting a war. Think of the tens of thousands of detainees held during the First Gulf War, the Vietnam War, the Korean War, the Civil War—all undeclared wars.

But the Court did not create this startling new principle, nor did the \textit{Rasul} petitioners advance it. Such a rule would overturn historical precedent dating back to well before the founding of our republic.\footnote{E.g., \textit{William Winthrop, Military Law and Precedents} 788 (rev. 2d ed. 1920) points out that ("'[c]aptivity is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character'. . . . A prisoner of war is no convict; his imprisonment is a simple war measure").} Not even the dissent in \textit{Rasul}, when it gave dire warnings and articulated a parade of horribles, suggested that the Court’s ruling extended to nationals of countries who are not allies but engaged in armed combat against the United States.

Another important distinction between the facts of \textit{Eisentrager} and \textit{Rasul} is that the petitioners “deny that they have engaged in or plotted acts of aggression against the United States."\footnote{\textit{Rasul}, 542 U.S. at 476.} They basically argued that they were captured by mistake.

The military did not directly capture some of the detainees. “Relatives of the Kuwaiti detainees allege that the detainees were taken captive ‘by local villagers seeking promised bounties or other financial
rewards’ while they were providing humanitarian aid in Afghanistan and Pakistan, and were subsequently turned over to U.S. custody.”

The Northern Alliance, “a coalition of Afghan groups opposed to the Taliban,” captured the Australian, David Hicks, in Afghanistan, and then turned him over to the United States. Pakistani authorities arrested the Australian, Mamdouh Habib, in Pakistan “and turned [him] over to Egyptian authorities, who in turn transferred him to U.S. custody.” These detainees (whom third parties captured) fit a factual scenario that simply would not apply to anyone that U.S. soldiers captured in the theater of war.

Another important factual distinction is that a Military Commission had tried and convicted the Germans in *Eisentrager*. In contrast, the petitioners in *Rasul* “have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory [Guantánamo Bay Naval Base] over which the United States exercises exclusive jurisdiction and control.” The *Rasul* petitioners were asking for some type of hearing, while the *Eisentrager* petitioners already had a hearing that determined that they were enemy combatants (a conclusion implied by the factual finding that they had committed war crimes).

The Court remanded for further proceedings but did not indicate what procedures are due these non-citizens during their hearings. The O’Connor plurality in *Hamdi* did discuss what process is due and it is to that case we now turn.

C. The Hamdi Case

In *Hamdi v. Rumsfeld*, the father of a natural born American citizen captured as an enemy combatant during military operations in Afghanistan petitioned, as the detainee’s next friend, for a writ of habeas corpus. The father agreed that his son had gone to Afghanistan before September 11, 2001. While the habeas petition provided no details surrounding Hamdi’s capture, Hamdi’s father, in other papers, claimed that his son went to Afghanistan to do “relief work,” and arrived in Afghanistan less than two months before September 11, 2001. As some point in 2001, a

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76. Id. at 472 n.4.
77. Id.
78. Id.
81. Id. at 485.
83. Id. at 510.
84. Id. at 511.
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Government affidavit explained, members of the Northern Alliance captured Hamdi, armed with an assault rifle and part of a Taliban unit. The Alliance turned him over to American troops. The Government originally detained Hamdi in Guantánamo, but when the military discovered that he was a U.S. citizen, it transferred him to a naval brig in Norfolk, Virginia, where his father filed the habeas petition. The district judge envisioned an elaborate hearing and ordered production of additional material regarding the detainee’s status. The Government petitioned for interlocutory review, and the Fourth Circuit reversed. The Supreme Court reversed both the trial court and the Fourth Circuit, finding that the former required too many procedural safeguards while the latter required too few.

Hamdi, unlike Rasul, produced no majority opinion. O’Connor wrote the plurality, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer. Justice Thomas dissented and would have allowed the Government to detain Hamdi without any further procedures because the President, acting “with explicit congressional approval,” determined that Hamdi is an enemy combatant, the military could detain him, and the Court should not “second-guess that decision.”

Although we do not have an opinion of the Court, we do know that if the Government follows what the O’Connor plurality says, that will garner at least five votes, i.e., the four votes of the plurality and Thomas’s vote. Hence, it makes sense to treat O’Connor’s resolution as a workable holding of the Court, a resolution that would secure at least five votes before the membership of Rehnquist Supreme Court changed in 2005.

Justice Souter, joined by Justice Ginsburg, filed a separate opinion. They joined with the plurality regarding O’Connor’s procedures in order to

85. Id. at 513.
86. Id. at 510. The military questioned Hamdi after the Northern Alliance turned him over to U.S. authorities. Hamdi, 542 U.S. at 513. Hamdi, it appears, did not claim that he was a volunteer aid worker attached to no particular bona fide organization. From assorted news reports, it appears that he wanted to join the Saudi Army to obtain military training so he could learn to kill Israelis. Id. at 512. When the Saudi Army rejected him, he joined the Taliban to secure his military training. Id. at 513. He was captured with an assault rifle in his hand, fighting on behalf of the Taliban. Id. The case proceeded on the assumption that his father’s factual allegations were true.
87. Id. at 510-11.
88. Id. at 513.
89. Hamdi, 542 U.S. at 514.
90. Id. at 509.
91. Id. at 579 (Thomas, J., dissenting).
93. Hamdi, 542 U.S. at 539.
“give practical effect” to the Court’s judgment and to “remand on terms closest to those [they] would impose.” These two votes were not needed because of Thomas’s opinion, but they serve to emphasize the importance of the practical results of the O’Connor plurality.

Before deciding the power of the Government to detain an “enemy combatant,” the Court had to define the term. The O’Connor plurality accepted the Government’s definition. An “enemy combatant” is “an individual who, [the Government] alleges, 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 plurality said that it would answer only the narrow question before it: “[W]hether the detention of citizens falling within that definition is authorized.” Its answer was yes.

Hamdi argued that a federal statute, section 4001(a) of Title 18, forbids his detention. That law, enacted to prevent another detention similar to the detention of Japanese Americans on the West Coast during World War II, provides: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”

The plurality rejected that argument and concluded that Congress had in fact authorized Hamdi’s detention. After September 11, 2001, Congress passed a resolution—the Authorization for Use of Military Force (AUMF)—empowering the President to “use all necessary and appropriate force against . . . nations, organizations, or persons that he determines planned, authorized, committed, or aided” in the September 11, 2001, al Qaeda terrorist attacks.

O’Connor explained that if Congress authorized

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94. Id. at 553 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).
95. Id. at 516 (emphasis added).
96. Id.
97. Id. at 518.
98. Id. at 515.
100. Hamdi, 542 U.S. at 515.
§ 1. This joint resolution may be cited as the “Authorization for Use of Military Force.”
(a) 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.
military force to fight al Qaeda, the Taliban, and any others who aided either of them, then it is reasonable to conclude that the United States military will capture enemy combatants (prisoners) and detain them to prevent them from rejoining the battle.\footnote{102}

The plurality then concluded that there were no constitutional or other prohibitions on Hamdi’s detention, if the Government would create some procedural protections to prevent the detention of individuals who do not fit the definition of “enemy combatant.” The plurality said: “We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”\footnote{104}

Then, the plurality announced what those procedures should be. The procedures it required are, frankly, not particularly burdensome. It said that there is no need for a searching inquiry, but there must be some inquiry. This inquiry must be before a neutral decisionmaker, but that decisionmaker can be a member of the military branch.\footnote{105} The evidence may include hearsay, and there may even be “a presumption in favor of the Government’s evidence” if this presumption is rebuttable and if the petitioner has a fair opportunity to rebut.\footnote{106}

The basic rule is that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”\footnote{107} These are the “core elements.”\footnote{108} Beyond that:

\begin{quote}
[T]he exigencies of the circumstances may demand that, aside from
\end{quote}
these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. *Hearsay, for example, may need to be accepted* as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a *presumption in favor of the Government’s evidence*, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, *once the Government puts forth credible evidence* that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasiv e evidence that he falls outside the criteria.  

One normally reads rules in light of their purpose. In this case, the plurality tells us, the purpose is not to punish, not to prove war crimes, and not even to determine future dangerousness. Instead, the goal is much more modest: to prevent erroneous factual conclusions that would incarcerate individuals who were not combatants: 

A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant.  

Right after this comment, the plurality cited *Mathews v. Eldridge*, a civil case involving the termination of social security disability benefits. *Mathews* held that “an evidentiary hearing is not required prior to termination of disability benefits and that the . . . administrative procedures” already provided for such termination fully comported with due process.  

The plurality’s reliance on this civil case, where the stakes did not involve loss of liberty, emphasizes that the plurality is not requiring the higher procedural protections of a criminal case even though the result in this instance is a loss of liberty for the detainee. 

The plurality did not merely cite *Mathews v. Eldridge* (a case that neither the Petitioner nor Respondent cited), it relied on it and quoted from it to explain the process that is due. That process is not very elaborate: “In the words of *Mathews*, process of this sort would sufficiently address the ‘risk of erroneous deprivation’ of a detainee’s liberty interest while eliminating certain procedures that have questionable additional value in

109. *Id.* at 533-34 (emphasis added).
110. *Id.* at 534.
112. 424 U.S. at 349.
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light of the burden on the Government.”

This is all the process that the Constitution requires of Hamdi, a U.S. citizen imprisoned on U.S. soil, in order for the Government to assure itself that it does not mistakenly capture and detain the errant tourist or embedded journalist.

The plurality made clear that this rather simple process does not apply to initial captures on the battlefield. Even “[t]he parties agree[d] that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized.” But at some point after that, there must be this truncated procedure for U.S. citizens held on U.S. soil.

In making its case to detain an alleged combatant, the Government may rely on what we would call “ordinary business records” in civilian life:

The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. . . . [F]actual disputes at enemy-combatant hearings are limited to the alleged combatant’s acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States.

D. THE PADILLA CASE

The third case in this triumvirate is Rumsfeld v. Padilla. The Government arrested Padilla, a U.S. citizen, on May 8, 2002, as he stepped off a plane at Chicago’s O’Hare Airport on a flight from Pakistan, pursuant to a material witness warrant issued in connection with a grand jury investigation into the September 11th terrorist attacks. On May 22, Padilla’s appointed lawyer moved to vacate the material witness warrant.

On June 9, while that motion was pending, the President ordered Secretary of Defense Donald H. Rumsfeld to designate Padilla an “enemy combatant” and detain him in military custody. “[T]he President invoked his authority as ‘Commander in Chief of the U.S. armed forces’

113. Hamdi, 542 U.S. at 534 (O’Connor, J., plurality).
114. Id.
115. Id. at 534-35 (citation omitted).
117. Id. at 430-31.
118. Id. at 431.
119. Id.
and the Authorization for Use of Military Force Joint Resolution” (AUMF).\textsuperscript{120} “The President also made several factual findings explaining his decision to designate Padilla an enemy combatant” and “concluded that it is ‘consistent with U.S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant.’”\textsuperscript{121}

Later that day, Department of Defense officials took custody of Padilla and transported him to the navy brig in Charleston, South Carolina, where he remained.\textsuperscript{122} His lawyer filed a habeas petition in New York on June 11, 2002.\textsuperscript{123} The Second Circuit held that the President lacked authority to detain Padilla militarily because neither the Constitution nor an Act of Congress authorized the detention.\textsuperscript{124}

The Supreme Court (5 to 4) dismissed Padilla’s habeas petition on jurisdictional grounds.\textsuperscript{125} Chief Justice Rehnquist, speaking for the majority, concluded that the Commander of the naval brig in South Carolina, the immediate custodian of Padilla, was the only proper respondent (not Secretary Rumsfeld), pursuant to settled habeas law.\textsuperscript{126} Padilla must file his action in the district court whose territorial jurisdiction includes the place where the custodian is located, so the district court in

\textsuperscript{120} Id. The AUMF authorized the President:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks 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.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). \textit{Hamdi} agreed that detaining belligerents is appropriate force. \textit{Rumsfeld}, 542 U.S. at 518. When there is fighting, it is expected that soldiers will capture and detain some of the people they are fighting. Id.

\textsuperscript{121} \textit{Rumsfeld}, 542 U.S. at 431. The Court further elucidated the President’s findings in a footnote:

[T]he President “[d]etermine[d]” that Padilla (1) “is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;” (2) that he “engaged in . . . hostile and war-like acts, including . . . preparation for acts of international terrorism” against the United States; (3) that he “possesses intelligence” about al Qaeda that “would aid U.S. efforts to prevent attacks by al Qaeda on the United States”; and finally, (4) that he “represents a continuing, present and grave danger to the national security of the United States,” such that his military detention “is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States.”

\textit{Id.} at 431 n.2.

\textsuperscript{122} Padilla v. Hanft, 423 F.3d 386, 390 (4th Cir. 2005).

\textsuperscript{123} \textit{Id.} at 390.

\textsuperscript{124} Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003).

\textsuperscript{125} \textit{Rumsfeld}, 542 U.S. at 450-51.

\textsuperscript{126} \textit{Id.} at 446.
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New York clearly did not have jurisdiction over Padilla’s custodian.\(^\text{127}\) Accordingly, the Court refused to release Padilla, and dismissed his habeas petition without prejudice to his filing a new petition elsewhere.\(^\text{128}\)

The Court did not release Padilla, whom the military had held without an arrest warrant issued by an Article III judge for several years.\(^\text{129}\) The Government had detained Padilla because the President had “designated” him as an “enemy combatant,”\(^\text{130}\) and combatants are not normally “charged” with crimes; instead, the Government simply detains them until the end of hostilities.

After the Supreme Court decision, Padilla remained in military detention,\(^\text{131}\) not charged with any crime because the Government was not holding him for a crime. It was holding him as an enemy combatant, just as it held the enemy combatants in prior wars (whether declared, like World War II), or undeclared (like the Korean War, or the Civil War).

The military held him until January 2006, when the Government transferred him to civilian custody and charged him with a crime, in an apparent effort to preclude the Supreme Court from granting certiorari, causing the Fourth Circuit to charge the Government with attempting to manipulate its jurisdiction.\(^\text{132}\) We discuss the aftermath of this case below.

While the Supreme Court, in its 2004 *Padilla* decision, did not reach the question whether the President has authority to detain Padilla

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\(^{127}\) *Id.* Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissented and would have allowed an exception to the statute. *Id.* at 456-65 (Stevens, J., dissenting). Kennedy, J., joined by O’Connor, J., also filed a concurring opinion arguing that the rules that the Court imposed were really more like rules of venue rather than subject matter jurisdiction. *Id.* at 451 (Kennedy, J., concurring). They also warned that the Government could not avoid habeas jurisdiction by moving the petitioner from district to district in a bad faith attempt to defeat federal court jurisdiction:

I would acknowledge an exception if there is an indication that the Government’s purpose in removing a prisoner were to make it difficult for his lawyer to know where the habeas petition should be filed, or where the Government was not forthcoming with respect to the identity of the custodian and the place of detention. In cases of that sort, habeas jurisdiction would be in the district court from whose territory the petitioner had been removed.

*Id.* at 454.

\(^{128}\) *Rumsfeld*, 542 U.S. at 451.

\(^{129}\) *Id.* at 457 n.2 (Stevens, J., dissenting).

\(^{130}\) *Id.* at 457.

\(^{131}\) *Padilla v. Hanft*, 423 F.3d 386, 388 (4th Cir. 2005).

\(^{132}\) See, e.g., Molly McDonough, *High Court Poised to Weigh Padilla Appeal: Justices End Unusual Stalemate Over Transfer From Military Custody*, A.B.A. J., Jan. 10, 2006, http://www.abanet.org/journal/redesign/j6padilla.html (“[a]fter detaining Padilla as an enemy combatant for [three and one-half] years, the government was pressing for Padilla’s quick release to civilian custody to be tried later this year in Florida on a new set of charges”).
militarily, what the O’Connor plurality said in Hamdi says a lot about that issue. First, Hamdi held that the AUMF authorized detention of U.S. citizens. Second, Hamdi cited, relied on, and reaffirmed Quirin, the Nazi Saboteurs Case. One of those saboteurs was an American citizen, whom the Government captured in the United States shortly after he arrived. Quirin, upheld the power of the military to detain an American citizen held on American soil if that citizen is a combatant. Hence, Hamdi, because of its reaffirmation of Quirin, supports the conclusion that the Government can continue to detain Padilla, if the Government could make the same showing it must make in Hamdi, pursuant to the same truncated procedural protections it had to grant to Mr. Hamdi.

The Government captured Mr. Hamdi in the theater of war while it captured Mr. Padilla as he was entering the United States from a flight that originated in Pakistan. Padilla was not in the zone of conflict (Afghanistan), but he had been there, like the spies whom the Government captured in Quirin. The fact that Hamdi embraced Quirin indicated that a majority of the justices would not draw a distinction between Messrs. Hamdi and Padilla based on where the Government captured them. The Government captured the American citizen in Quirin while he was in the United States, unlike Mr. Padilla, whom the Government captured at our borders while he was trying to enter. Both, at the time of capture, were far from the theater of war, but both had been in the theater of war and had entered the United States to spy for the adversary and to wreak havoc.

The conclusion that the Government can continue to detain Mr. Padilla if it makes the same showing, with the same procedural safeguards that it grants to Mr. Hamdi, is based on more than O’Connor’s repeated approval of Quirin, although the plurality’s reaffirmation of Quirin is hardly insignificant. The fact that the O’Connor opinion in Hamdi repeatedly embraced Quirin, and that the Scalia dissent rejected Quirin is crucial, because Quirin authorized the military detention of U.S. citizens who are determined to be enemy combatants. If the military determines them to be unprivileged combatants, then Quirin allows their trial before a military tribunal.

133. Rumsfeld, 542 U.S. at 430.
134. Hamdi, 542 U.S. at 518.
135. Id. at 522-24.
137. Id. at 37.
138. Id.
139. An Article III court, on habeas, can review the military determination that an individual is a combatant. However, the Hamdi plurality concludes that, if the military gives
In *Hamdi*, in addition to the four justices who joined the plurality, Justice Thomas, in his dissent, would allow the Government to hold Hamdi without any further hearing.\(^{140}\) He also embraced *Quirin*, which allowed the military detention (and military trial) of a U.S. citizen arrested in the United States.\(^{141}\)

The Opinion of Justice Souter, joined by Justice Ginsburg, cited *Quirin*, did not criticize it, and otherwise said nothing about it.\(^{142}\)

the detainee a relatively informal, truncated hearing, and the detainee is unable to rebut the military’s determination, the Article III court will deny the writ. 542 U.S. at 538 (O’Connor, J., plurality).

\(^{140}\) *Id.* at 579 (Thomas, J., dissenting).

\(^{141}\) *Id.* at 584 (Thomas, J., dissenting).

\(^{142}\) *Id.* at 548-49 (Souter, J., concurring). In dictum, Justice Souter, joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment in *Hamdi*, opined that Mr. Hamdi had to be treated as a POW and not an “illegal combatant” (or “unprivileged belligerent”) because “he was taken bearing arms on the Taliban side of a field of battle in Afghanistan. He would therefore seem to qualify for treatment as a prisoner of war under the Third Geneva Convention, to which the United States is a party.” *Id.* at 549. His assumption is mistaken because one does not become a “legal combatant” (or “privileged belligerent”) merely by taking up arms. Under the Geneva Accords, in order to be treated as a “legal combatant” (and therefore a POW) instead of an “illegal combatant” (or “privileged belligerent”), one must wear a distinctive uniform visible from a distance, respect the laws of war, have a command structure, not target civilians, etc. The fact that Hamdi was a combatant does not make him a lawful combatant because, e.g., he wore no uniform. The Geneva Convention Relative to the Treatment of Prisoners of War (GPW), to which Justice Souter refers, lists four criteria an organization must meet for its members to qualify for lawful combatant status:

1. The organization must be “commanded by a person responsible for his subordinates;”
2. The organization’s members must have “a fixed distinctive emblem or uniform” recognizable at a distance;
3. The organization’s members must “carry[] arms openly;” and
4. The organization’s members must “conduct[] their operations in accordance with the laws and customs of war.”

Geneva Convention (III) Relative to Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention]. Al Qaeda and the Taliban simply do not fit that definition. “On February 7, 2002, the White House announced the President’s decision, as Commander-in-Chief, that the Taliban militia were unlawful combatants pursuant to GPW and general principles of international law, and, therefore, they were not entitled to POW status under the Geneva Conventions.” United States v. Lindh, 212 F. Supp. 2d 541, 554-55 (E.D. Va. 2002); *Id.* at 557-58 (agreeing with the President’s decision as to the Taliban); *Id.* at 552 n.16 (“[T]here is no plausible claim of lawful combatant immunity in connection with al Qaeda membership.”). Coming to the same conclusion is *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005) (citations omitted):

One problem for Hamdan is that he does not fit the Article 4 definition of a “prisoner of war” entitled to the protection of the Convention. He does not purport to be a member of a group who displayed “a fixed distinctive sign recognizable at a distance” and who conducted “their operations in accordance with the laws and customs of war.”
GPW, Article 4’s recitation of the qualifications for prisoner of war status is oriented toward groups or entities. Geneva Convention Relative to Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. An individual, such as Mr. Hamdi, cannot take individual actions that would undermine his status, because that status is based on the character and actions of the group with which he is affiliated. Geneva Convention Relative to Treatment of Prisoners of War art. 7, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (prohibiting the renouncing of prisoner of war status). “Lawful combatant immunity” is a doctrine rooted in the customary international law of war. It forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets. In short, it is not a crime for a soldier to fight a war, even though the soldier kills other soldiers and engages in other warlike acts that are crimes in the absence of war. Johnson v. Eisentrager, 339 U.S. 763, 793 (1950) (Black, J., dissenting) (“[T]he legitimate ‘acts of warfare,’ however murderous, do not justify criminal conviction. . . . [T]he action is not a crime”) In the period after the attack of September 11, 2001, the lay press often said that the distinction between “lawful” and “unlawful” combatants was new. That is simply incorrect. This principle goes back many years. Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; Brussels Declaration of 1874, art. 9, July 27, 1874, reprinted in THE LAWS OF ARMED CONFLICTS 25 (Dietrich Schindler & Jiri Toman, eds., Martinus Nijhoff Publishers, 3d ed. 1988); MANUAL OF MILITARY LAW 240 (British War Office 1914); Geneva Convention Relative to Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Waldemar A. Soli & Edward R. Cummings, A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949, 9 CASE W. RES. J. INT’L L. 205, 212 (1977); Lt. Col. William K. Lietzau, USMC, “Old Laws, New Wars: A Strategy for Developing International Law During the Global War on Terrorism” (July 2004) (unpublished). Ex Parte Quirin, 317 U.S. at 30-31 summarized the distinction between “lawful” and “unlawful” combatants: By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Id. at 30-31; see also, e.g., James W. Garner, Punishment of Offenders Against the Laws and Customs of War, 14 AM. J. INT’L L. 70, 73 (1920); MYRES S, MCDONALD & FLORENTINO P. BELLARICO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 712 (1961); Lindh, 212 F. Supp. 2d at 557-58 (defendant fighting for al Qaeda or the Taliban is not entitled to “lawful combat” status). The mistake of Justice Souter is his apparent belief that a lawful combatant is simply one who is captured in a battle. If one belongs to a group that does not fight according to the laws of war (which rules were drafted to reduce civilian casualties), one does not have the advantage of being detained as a Prisoner of War. POW’s, unlike unlawful combatants, have the right, e.g., to live as a group, cook their own meals. The Government can prosecute unlawful (or unprivileged) combatants for their unlawful belligerency, but only after a trial. It can also
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Only the dissent of Justice Scalia criticized Quirin: “The case [Quirin] was not this Court’s finest hour.”[^143] The remaining justices accepted and relied on Quirin as good law. Only Stevens joined Scalia’s statement.[^144] Quirin allowed the military detention of U.S. citizens arrested and held on U.S. soil.[^145] And Hamdi says that Quirin is good law.[^146]

Moreover, O’Connor’s summary, in Hamdi, of what she views as the holding of that case, adopts language that would allow the Government to detain, in military custody, Padilla as an enemy combatant, if the Government can make a showing at Padilla’s hearing that Padilla is a “combatant”:

> [W]e are called upon to consider the legality of the Government’s detention of a United States citizen on United States soil as an “enemy combatant” and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. . . . [W]e hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.[^147]

Recall that Padilla was arrested in the United States,[^148] unlike Hamdi, who was captured in Afghanistan.[^149] But that fact seems to be without moment; the language of O’Connor’s plurality opinion applies without regard to where the individual was captured; instead, the crucial fact is where that individual is detained, that is, on U.S. soil.

The Hamdi plurality read the Authorization for Use of Military Force (AUMF)[^150] very broadly. Justice O’Connor’s plurality opinion in Hamdi

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[^143]: Hamdi, 542 U.S. at 569 (Scalia, J., dissenting). It is true enough that the secret trial in Quirin is not something that is part of the American tradition. However, if the trial had been public, the newspapers would have reported that we captured the Nazis by more luck than cunning. Hitler’s Germany would have had more incentive to try again. Every U.S. soldier guarding the home borders was one less soldier fighting in the European or Asian fronts. It was not inevitable, in 1942 when the Court decided Quirin, that the Americans would win the war. Indeed, some of the darkest days of the war were in 1942.

[^144]: Id. at 554.

[^145]: Quirin, 317 U.S. at 37-38.

[^146]: Hamdi, 542 U.S. at 519.

[^147]: Id. at 509 (O’Connor, J., plurality) (emphasis added).

[^148]: Rumsfeld, 542 U.S. at 430.

[^149]: Hamdi, 542 U.S. at 510 (O’Connor, J., plurality).

[^150]: On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States, killing approximately 3,000 people. One week later, in response to these “acts of treacherous violence,” Congress passed a resolution authorizing the President to “use all necessary and appropriate force
concluded that the “AUMF authorizes the President to use ‘all necessary and appropriate force’ against ‘nations, organizations, or persons’ associated with the September 11, 2001, terrorist attacks.” ¹⁵¹

The separate Souter opinion disagreed, but on statutory (not constitutional) grounds. Souter argued that the AUMF, simply as a matter of statutory interpretation, did not authorize Hamdi’s detention.¹⁵²

The O’Connor plurality went on to say that this language in the AUMF covers Mr. Hamdi, who was captured in Afghanistan, because there can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.¹⁵³

That language does not preclude holding Padilla, because, in context, the O’Connor plurality was talking about the length of confinement (“the duration of the particular conflict”).¹⁵⁴ It was responding to the argument that no one knows when this war against terrorism would end.

In the next sentence, O’Connor relied upon and cited Quirin with approval.¹⁵⁵ Note, she did not merely refer to the case but reaffirmed it as the law today, in a crucial paragraph:

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by “universal agreement and practice,” are “important incident[s] of war.” The purpose of detention is to prevent captured individuals from returning to the field of battle against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

151. Hamdi, 542 U.S. at 518 (O’Connor, J., plurality).
152. Id. at 541 (Souter, J., dissenting).
153. Id. at 518 (O’Connor, J., plurality) (emphasis added). Title 18 U.S.C. § 4001(a) (2000) provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” Hamdi, an American citizen, argued that this provision negated any government power to detain him. Hamdi, 542 U.S. at 517 (O’Connor, J., plurality). But the Court found that the AUMF provided the government with its statutory authorization. Id. (“[W]e agree with the Government’s alternative position, that Congress has in fact authorized Hamdi’s detention, through the AUMF”).
154. Hamdi, 542 U.S. at 518 (O’Connor, J., plurality).
155. Id.
and taking up arms once again.\footnote{Id. (citation omitted).}

The lower courts have also read this language as reaffirming the validity of \textit{Quirin}.\footnote{\textit{Hamdan}, 415 F.3d at 36 which—after considering other cases—concludes: “[W]e are thus left with nothing to detract from \textit{Quirin}'s precedential value.” And, it concludes that Hamdan’s effort to distinguish \textit{Quirin} on “the ground that the military commissions there were in ‘war zones,’ while Guantánamo is far removed from the battlefield,” is unsuccessful, because “the military commission in \textit{Quirin} sat in Washington, D.C., in the Department of Justice building.” \textit{Id.} at 38.}Indeed, the Fourth Circuit, relying on this analysis, held that the Government could keep Padilla in custody without charging him with a crime because the military held him as an enemy combatant.\footnote{Padilla v. Hanft, 423 F.3d 386, 396-97 (4th Cir. 2004).} The Government need not charge combatants; typically, it simply holds them.\footnote{\textit{Id.} at 390.}

Shortly after O'Connor’s crucial paragraph in \textit{Hamdi}, O'Connor again reaffirmed, in broad language: “There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”\footnote{\textit{Hamdi}, 542 U.S. at 519.}

Right after that sentence, she says, \textit{yet again}, in summarizing what \textit{Quirin} held:

In \textit{Quirin}, one of the detainees, Haupt, alleged that he was a naturalized United States citizen. We held that “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.” While Haupt was tried for violations of the law of war, nothing in \textit{Quirin} suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities.\footnote{\textit{Id.} (quoting \textit{Quirin}, 317 U.S. at 37-38).}

At another point the O'Connor plurality says that the Government could have detained Milligan “for the duration of the conflict, whether or not he was a citizen” if it could have shown that he was a combatant.\footnote{\textit{Id.} at 522.}

Later, O'Connor reaffirms \textit{Quirin} in response to Justice Scalia’s dissent arguing that the Government cannot detain an American citizen without judicial process unless it suspends the writ of habeas corpus. She says that even if Scalia is right, even if these earlier cases say “that the military does not have authority to try an American citizen accused of spying against his country during wartime—\textit{Quirin} makes undeniably clear that this is not the law today.”\footnote{\textit{Id.} Instead, \textit{Quirin} is the law.}
Repeatedly, the O’Connor plurality authorizes the military to detain American citizens during wartime (even if the war is undeclared), if Congress authorizes the detention (which, the plurality concludes, Congress had done), and if the Government gives the combatant “a meaningful opportunity” to rebut the factual basis of that detention before a neutral arbiter.\footnote{164}{Id. at 509.}

II. THE LIMITS OF THE AUMF

At one point, O’Connor suggests that she is interpreting the AUMF to have limited geographic applicability:

The AUMF authorizes the President to use “all necessary and appropriate force” against “nations, organizations, or persons” associated with the September 11, 2001, terrorist attacks. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.\footnote{165}{Hamdi, 542 U.S. at 518 (emphasis added) (internal citations omitted).}

One might argue that she is saying that the AUMF only authorizes detention of people in connection with the Afghan war and not the Iraqi war, or the Global War against Terrorism, unless the Government can prove that the detained citizen, like Padilla, “fought against the United States in Afghanistan.”\footnote{166}{Id.} The Court did not define what it means to have fought “in Afghanistan,” or to be “known to have supported the al Qaeda terrorist network responsible” for the September 11 attacks.\footnote{167}{Id.} However, no one has ever claimed that al Qaeda limits its actions to Afghanistan.

In context, it appears that she was merely talking about the duration

\footnote{164}{Id. at 509.}
\footnote{165}{Hamdi, 542 U.S. at 518 (emphasis added) (internal citations omitted).}
\footnote{166}{Id.}
\footnote{167}{Id. Did the Court mean that the American citizen had to be captured “physically” in Afghanistan? It never said that. If an individual were supporting the al Qaeda terrorist network, but engaged in terrorist activities outside of Afghanistan, would he be beyond military jurisdiction? The facts and language of Hamdi suggest that it is not necessary to capture the U.S. citizen abroad, because the plurality repeatedly approved of Quirin, where the unanimous Court upheld the military trial and execution of an American citizen (a spy for Nazi Germany) captured far from the theater of war, within the United States, not in Germany. A terrorist who had not left the United States for years could conspire with terrorists in another country, given the existence of telephones, email, mail, and couriers.}
of the detention. The physical location of the al Qaeda terrorist network is undeniably not limited to Afghanistan. The Government captured the Nazi saboteurs in the United States, not Germany, and O’Connor reaffirmed *Quirin* as the law today.\(^{168}\)

Evidence that she did not limit the AUMF to physical presence in Afghanistan is that she later clarified what she meant:

> To be clear, our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant; whether that is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point.\(^{169}\)

The O’Connor plurality interprets the AUMF to justify military detention of American citizens if: (1) the Government can show that an individual like Padilla is an “enemy combatant,” and (2) the Government creates a procedure that gives the individual a “meaningful opportunity” to contest the factual basis for that conclusion. The plurality then goes on to define the term “enemy combatant” in a way that clearly does not require physical presence in the theater of war or zone of combat.\(^{170}\) The Government must show that the citizen was, “‘part of or supporting forces hostile to the United States or coalition partners’ and ‘engaged in an armed conflict against the United States’” to justify his detention in the United States for the duration of the relevant conflict.\(^{171}\)

The O’Connor plurality secured only four votes, but Justice Thomas would have granted the Government even more power,\(^{172}\) so one knows that if the Government follows the O’Connor plurality, these five Justices would approve of the Court’s decision.

### III. THE MAJOR PRINCIPLES OF LAW DERIVED FROM THE DETAINEE CASES OF 2004

Now, let us try to summarize the holding in the three major detainee cases of 2004, or at least the basic legal principles that a majority of these nine justices would adopt. Following that, we shall turn to the law of prosecuting detainees for alleged war crimes. On that issue, we will focus

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169. *Id.* at 523. (emphasis added).
170. *Id.* at 522.
172. *Id.* at 579 (Thomas, J., dissenting).
on the Detainee Case of 2006, *Hamdan v. Rumsfeld*.\(^{173}\)

**A. The Absence of Declared War**

It is significant that all nine justices agreed that the United States, after the attacks of September 11, 2001, is a nation at war and that the President’s powers are measured in that climate. Not one Justice says that it is relevant that Congress never declared war. This result, in one sense, is hardly surprising, given historical precedent—Congress never declared the Korean War, for example; Congress never even declared the Civil War, the bloodiest in our history.\(^{174}\)

Yet this acknowledgment is still significant, for some commentators and Justices have argued in the past that matters are different if Congress has not officially declared war. Justice Jackson argued, in his separate opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, that things may be different if Congress has declared war.\(^{175}\) In a later case, Justices Douglas and Black argued that the war power, the “power to wage war successfully,”\(^{176}\) is a power that “stems from a declaration of war.”\(^{177}\)

None of the Justices in any of the three detainee cases embrace that argument. As Justice Thomas broadly stated in his dissent in *Hamdi*, the war power: “‘is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict,’ and quite obviously includes the ability to detain those (even United States

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175. 343 U.S. 579 (1952). Justice Jackson said: “Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress.” *Id.* at 642 (Jackson, J., concurring). Admittedly, he did go on to acknowledge that: “Of course, a state of war may in fact exist without a formal declaration.” *Id.* But, then he added:

> But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture.

*Id.* at 642 (Jackson, J., concurring).

> The power to wage war is ‘the power to wage war successfully.’ *But the war power stems from a declaration of war.* The Constitution by Art. I, § 8, gives Congress, not the President, power ‘[t]o declare War.’ Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have.

*Id.* (internal citations omitted) (emphasis added).
citizens) who fight against our troops or those of our allies.”

Several years earlier, in 1996, Osama bin Laden had actually issued what he called a “declaration of war” against the United States. Two years later, he expanded his declaration to include killing “Americans and their allies—civilian and military—. . . in any country in which it is possible to do it.” That year, al Qaeda bombed U.S. embassies in Kenya and Tanzania. President Clinton’s Ambassador to the United Nations reported this declaration and said that, in “accordance with Article 51 of the United Nations Charter,” he was reporting that the United States “has exercised its right of self-defense in responding to a series of armed attacks” by Al Qaeda. The United States, in that case, responded by firing missiles at suspected al-Qaeda camps in Afghanistan and Sudan.

B. The Length of the Detention

None of the Justices in any of the detainee cases expressed any concern that one does not know, when they decide the case, the duration of the conflict. The lawyers for the detainees tried to emphasize that point, yet, actually, what they said of this war is true of all wars. No one knew on December 8, 1941 when World War II would end, or even which side would be the victor. Similarly, history did not give the “Thirty Years War” that label on year one, or even year 29. Similarly, the “Seven Years War,” or the “Seven Days War” are names that the historians gave to these wars after they ended, not when they started.

One does not know when the war against terrorism will end. But, particular episodes of terrorism eventually end. The Red Brigade in Italy and the Bader-Minehoff gang in Germany are all terrorist groups that are no more.

178. Hamdi, 542 U.S. at 587 (Thomas, J. dissenting) (internal citations omitted).


181. E.g., Thomas F. Powers, When to Hold Them, Oct. 2004 Legal Affairs 21 (Red Brigades in Italy “did not successfully advance revolutionary Marxism-Leninism in Italy
The justices also did not express any concern that the Government had not charged any of the detainees for crimes. When soldiers are captured in a war, they are not "charged," but rather, are merely detained. The Government may decide to charge some of them for war crimes, but the Government can detain them until the end of the conflict without having to charge them. For example, the plurality in *Hamdi* agreed that the AUMF does not authorize "indefinite detention for the purpose of interrogation." But that concession meant little because no one argued for the indefinite detention for purposes of interrogation.

The Government argued for detention until the conflict was over, and the Court accepted that position. Congress’ grant of authority to use of “necessary and appropriate force” included “the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.” We do not know when the Afghanistan hostilities (the conflict that was the particular focus of *Hamdi* and *Rasul*) will end, but we do know for certain that they have not yet ended, because “[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan.” When will it end? A sure sign would be when the United States withdraws its combat troops.

The O’Connor plurality was only talking about the AUMF, which deals with detention of American citizens, yet its language may apply to all wars (the War against Terrorism; the War against the Barbary Pirates, the Boxer Rebellion) where we do not expect to mark the particular instance when the adversary signs a formal surrender agreement.

The three detention cases drew some important distinctions between the types of prisoners and the rights as to each of these types. The Court may always change its mind, and lower courts might create other distinctions, but based on what the differing Court majorities did articulate,

and eventually faded into oblivion, terrorism in Italy during the 1970s and early 1980s was a serious matter, involving thousands of bombings, hundreds of civilian deaths, and the kidnapping and assassination of prominent businessmen and government officials, including former Prime Minister Aldo Moro”). As for the Baader-Meinhof Group in Germany, “[o]n April 20, 1998 an eight-page typewritten letter in German was faxed to the Reuters news agency, signed ‘RAF’ with the machine-gun red star, declaring the group dissolved.” Red Army Faction, http://en.wikipedia.org/wiki/Baader-Meinhof_Gang. Still, before the group dissolved, it made its presence felt: “I lived in Germany when it was exceptionally dangerous in the mid-eighties with the Bader-Meinhoff gang and the Red Army faction.” Interview with Maybritt Illner of ZDF German Television, Secretary Colin L. Powell, Berlin, Germany, April 1, 2004, http://www.state.gov/secretary/former/powell/remarks/31016.htm.

183. *Id.* (emphasis added).
184. *Id.*
let us summarize the different categories.

1. **Detainees Captured in the Theatre of War Who Are Citizens of the Country with Whom We Are at War, e.g., Iraqis Captured in Iraq, Afghans Captured in Afghanistan.**

None of the justices argued that these people—aliens of countries hostile to us—have any rights to habeas in U.S. courts simply because the United States detains them. It does not matter if they are detained in Guantánamo Bay or Afghanistan. Nothing in any of the opinions suggests that our courts would be open to these people to challenge their detention. The alien litigants before the Court in *Rasul* were citizens of our allies, Australia and Kuwait, and the majority explained that is one of the reasons that *Johnson v. Eisentrager* did not apply. The Court said that unlike Eisentrager and his fellow Germans, the *Rasul* petitioners (citizens of Australia and Kuwait) “are not nationals of countries at war with the United States . . .” The Court can always make new law, but the detainee cases did not decide that issue.

2. **Detainees Captured in the Theatre of War Who Are Citizens of Countries with Whom We Are Not at War, e.g., Australians Captured in the Theatre of War in Afghanistan**

The Court divides these combatants into two categories:

a. **Combatants held outside the United States and not at Guantánamo Bay**

A majority of the Justices do not conclude that detainees held outside the United States have a right of access to Article III courts. A majority of the *Rasul* Court said that Guantánamo Bay is different than other territory outside of the United States because Guantánamo Bay is in an area over which the United States has sovereignty or quasi-sovereignty. Granted, the Court never uses the term “quasi-sovereignty,” but it emphasized that the United States has some special power over the naval base at Guantánamo Bay, based on its reading of the particular treaty. The petitioners in *Rasul* embraced that argument as well. There is something special about

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185. If the aliens challenge the procedures regarding their war crimes trials as opposed to their mere detention, the Court later ruled, on statutory grounds, that the Article III courts are open. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006), which is discussed below.  
188. “[T]he Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.” *Id.* at 471.  
189. “Petitioners do not concede that the United States lacks sovereignty over
Guantánamo Bay, and the powers of the Court extend there in a way they do not extend to a prison in Iraq, or in Afghanistan, or a military base like Diego Garcia.\footnote{190}

\textit{b. Combatants held inside the United States or at Guantánamo Bay}

Combatants held at Guantánamo Bay (if they are citizens of countries that we are not fighting) may have a right to some type of hearing if they are held at Guantánamo Bay. If they are held within the United States, then, like all persons held within the United States, they will have a right to a hearing to test their detention.

These detainees have a right to some sort of hearing but it is not elaborate. We know that because in \textit{Hamdi} (the case where the American citizen was captured in Afghanistan with an assault rifle), the Court said that this hearing need not be before an Article III judge and the normal rules of evidence do not apply, so that hearsay is admissible, and much or all of a particular hearing may be done by filing papers instead of live testimony.\footnote{191} The lack of live testimony is not unusual: courts decide most habeas petitions on the papers, with no live testimony.

In addition, because a habeas hearing is not a criminal prosecution but a civil proceeding with a bench trial, there is no jury.\footnote{192} Further, because

\begin{itemize}
\item Guantánamo. The U.S. Navy continues to inform the world on its website that the United States exercises ‘the essential elements of sovereignty over’ Guantánamo and is the ‘supreme authority’ there.” Reply Brief for Petitioners, Rasul v. Bush, 542 U.S. 466 (2004), 2004 WL 768555, *8 (internal citations omitted). During oral argument, Mr. Gibbons for Rasul said:
\begin{quote}
It has never run to any place except where the sovereign issuing the writ has some undisputed control. . . . [n]ow, Guantánamo Navy base, as I can attest from a year of personal experience, is under complete United States control and has been for a century.
\end{quote}
\textit{Id. at *16.}
\item The Court said, unlike the detainees in \textit{Eisenbrager} “they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.” \textit{Rasul}, 542 U.S. at 476. Later, the Court reemphasized this point: “By the express terms of its agreements with Cuba, the United States exercises ‘complete jurisdiction and control’ over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.” \textit{Rasul}, 542 U.S. at 480-81 (citing Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 16, 1903, T.S. No. 418, \textit{continued in effect} by Treaty of Relations, U.S.-Cuba, arts. II-III, May 29, 1934, T.S. 866).
\item \textit{Hamdi}, 542 U.S. at 533-534.
\item See 6 \textsc{Wayne R. Laffey et al.}, \textsc{Treatise on Criminal Procedure} §§ 28.1(a), 28.2 n.22 (2d ed. 2004), explaining that common law habeas was civil, and under the federal statutory scheme habeas is considered civil. \textit{See also} 1 \textit{id.} § 1.6(e), providing that “because habeas corpus and other postconviction remedies are considered civil in nature, statutory provisions dealing with those remedies also commonly are located outside of the criminal procedure code” (internal citations omitted). \textit{See also}, Whitney v. Dick, 202 U.S. 132 (1906); Ex parte Tong, 108 U.S. 556 (1883); \textit{cf.} Ex parte Quirin, 317 U.S. 1, 24 (1942).
\end{itemize}
The Detainee Cases

the detainees (at this point) are not charged with a violation of the laws of war, the Government can shift the burden of proof to the detainee once the Government makes its initial showing, using credible hearsay evidence.\(^{193}\)

Recall that *Hamdi* gives a U.S. citizen this hearing to determine if he or she is properly classified as a combatant.\(^{194}\) Whatever rights an *alien* has to a hearing are surely no more than the rights that the American citizen has. Hence, if the Government gives this alien the type of hearing that *Hamdi* articulates, it should be complying with all constitutional requirements.\(^{195}\)

After the detainee (citizen or otherwise) has this truncated hearing, the detainee can then file for a full habeas hearing in an Article III federal court, but that court, given the standards that Justice O’Connor adopted, should dismiss the habeas petition because the detainee has received the only hearing to which he or she is entitled. Of course, the Government will not be able to punish or try the detainee without a trial, but the Government can continue to detain the detainee until the end of the war, whenever that occurs.\(^{196}\) And, if the Government does decide to punish or try the
detainee for alleged war crimes, the Government will use military commissions for non-U.S. citizens, but it will use an Article III court for a U.S. citizen because the President has ordered that only non-U.S. citizens will be subjected to military commissions.\textsuperscript{197} \textit{Hamdi} did not require an Article III court; recall that only Justice Scalia, joined by Justice Stevens, embraced that proposition.\textsuperscript{198} But the President’s regulations require an Article III court to prosecute (but not to detain) an enemy combatant who is a U.S. citizen. Before the United States can detain an individual because he is an enemy combatant, the United States must provide the modest hearing requirements that \textit{Hamdi} created.

It is important to the Court that the combatants—citizens of countries not at war with the United States—are detained in our base in Cuba, because the Cuban base is special. It is unique, because the Court’s habeas jurisdiction extends to “aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty.’”\textsuperscript{199} Guantánamo Bay is the only place outside the United States where the Government exercises that type of control, given that the Court arrived at that conclusion after interpreting the specific language of the U.S. lease agreement with Cuba.\textsuperscript{200}


\textit{Hamdi} falls in this category. He has a right to a quasi-habeas hearing. It does not seem to matter if he is interred in the United States or Guantánamo Bay. If he is interred in the United States, he must file his habeas petition in the district court where the warden or jailer is located. Thus, he cannot forum-shop, although the Court, in effect, allows the Government to forum-shop when it decides where to imprison him initially. Of course, that has always been the case whenever the Government has a choice of prisons. However, once the Government places the detainee in duration of active hostilities in order to prevent him returning the battle). Still, if the Government seeks to prosecute Hamdan for war crimes, it must follow the procedures that \textit{Hamdan} requires.


\textsuperscript{198} \textit{Hamdi}, 542 U.S at 554 (Scalia & Stevens, JJ., dissenting).


custody, it cannot move him from prison to prison in a bad faith attempt to avoid the jurisdiction of the federal courts.\textsuperscript{201}

4. \textit{American Citizens Captured Within the United States, at Either the Border or Somewhere Else, Who Have Been in the Theatre of War}

Padilla falls in this category. He must file his habeas in the district court where the warden or jailer is located and seems to have the same rights as Hamdi.

Note that Padilla was captured at the border—specifically, at the O'Hare Airport. He was not window-shopping on Michigan Avenue. Typically, people crossing the border, even U.S. citizens, have fewer constitutional rights. The Fourth Amendment does not apply in the same way, so border searches without warrants are constitutional.\textsuperscript{202} And, Padilla had been fighting with al Qaeda in Afghanistan.\textsuperscript{203} His lawyers stipulated that:

Al Qaeda operatives recruited Jose Padilla, a United States citizen, to train for jihad in Afghanistan in February 2000, while Padilla was on a religious pilgrimage to Saudi Arabia. Subsequently, Padilla met with al Qaeda operatives in Afghanistan, received explosives training in an al Qaeda-affiliated camp, and served as an armed guard at what he understood to be a Taliban outpost. When United States military operations began in Afghanistan, Padilla and other al Qaeda operatives moved from safehouse to safehouse to evade bombing or capture. Padilla was, on the facts with which we are presented, “armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States.”\textsuperscript{204}

The Supreme Court did not make anything turn on the fact that the Government captured Padilla at the border, which suggests that the Court is giving the Government a great deal of power to detain any terrorist, or alleged terrorist, found in the United States and turn him over to the


In this case, if the Government had removed Padilla from the Southern District of New York but refused to tell his lawyer where he had been taken, the District Court would have had jurisdiction over the petition. Or, if the Government did inform the lawyer where a prisoner was being taken but kept moving him so a filing could not catch up to the prisoner, again, in my view, habeas jurisdiction would lie in the district or districts from which he had been removed.


\textsuperscript{204} Id. at 389-90 (internal citations omitted).
military authorities instead of proceeding in the Article III court system, if the alleged terrorist had been armed and present in a combat zone during armed conflict against the United States. The crucial point is that, in these factual circumstances, the O’Connor plurality in *Hamdi* reaffirmed *Quirin* and allowed the President to designate someone as a terrorist found in the United States, even a U.S. citizen, thereby allowing the military to detain him as a combatant without charging him with a crime, just like any other combatant detained in war. The Court did not rule on the substance of Padilla’s claim, because he had filed his habeas petition in the wrong district, so the Court dismissed on jurisdictional grounds. But Justice O’Connor’s reassertion in *Hamdi* that *Quirin* is the law today does not bode well for Padilla, because Haupt (the U.S. citizen captured in *Quirin*) was captured in the United States, not the theater of war.

The military does not have to charge the detainee with any crime (either a violation of the laws of war, or a violation of American law) if it is just detaining the individual. However, if the military wishes to punish the individual instead of merely detaining him, it must proceed with properly constituted military tribunals to punish an enemy combatant.

Due process still applies to the detained enemy combatant, but in a different, muted way. The process that is due a non-citizen who is not in this country and who is captured as part of the Global War on Terrorism is different than the process that is due any U.S. citizen, or any alien, who is in this country and tried for a crime in an Article III court. If the military detains the suspected terrorist, then he has the right to a quasi-habeas hearing (“a meaningful opportunity”) where the government must show (at least initially) that the detainee is a combatant. The finding that he is a “combatant” is the jurisdictional nexus that serves to remove the individual from the normal Article III courts. Once the government makes the initial showing, then the burden of proof can shift to the defendant to show that he is not a combatant. The Government does not have to show that he is an enemy combatant.

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205. See generally Rumsfeld v. Padilla 542 U.S. 426 (2004) (holding that the commander of naval brig where Padilla was detained was the only proper respondent in this habeas case and that the district court did not have jurisdiction over commander. Hence, Padilla refiled in the correct district).

206. “While Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities.” Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

207. Id. at 507, 519-20, 521-22. See also id. at 523: “our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant; whether that is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point.”


“illegal” combatant unless it seeks to try him for a war crime of being an illegal combatant.

Of course, Justice O’Connor made clear that the Government could set up a military tribunal to make these findings. If it does not do so, then the detainee will get his hearing in a federal habeas proceeding, but the same muted procedural rules appear to apply with the admission of hearsay, the shifting of the burden of proof, and so forth. The Government may also choose to prosecute the individual in an Article III court if it chooses for violations of the criminal law.

IV. PADILLA ON REMAND

After the Supreme Court dismissed Padilla’s original lawsuit, he filed again in the Fourth Circuit. The trial court ordered that the Government must either charge him or release him but could not simply detain him as an enemy combatant. The Fourth Circuit unanimously reversed in Padilla v. Hanfl. The Fourth Circuit held that the Joint Resolution of Congress expressed in Authorization for Use of Military Force (AUMF) gave the President the authority to detain militarily, as an “enemy combatant,” a U.S. citizen who posed a threat of returning to battle against the United States, even though the Government arrested the detainee on U.S. soil. He was, for these purposes, no different from the U.S. citizen in Quirin, whom the Government had also arrested on U.S. soil.

Padilla v. Hanfl does not mean that the military can walk the streets of

210. Id. at 533, 535 (what the Court requires does “not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here”). Moreover, O’Connor made clear that “interrogation by one’s captor” is not interrogation before “a neutral decisionmaker.” Id. at 537. So, the officers who conduct this hearing should not be the ones who were involved in the capture. However, in his dissent, Scalia criticizes the plurality because it creates hearings where the “presiding officer may well be a ‘neutral’ military officer rather than judge and jury.” Id. at 575 (Scalia, J. dissenting).

211. The O’Connor plurality said that the courts would examine this “administrative record developed after an adversarial proceeding—one with process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting.” Hamdi, 542 U.S. at 537. If the hearing that the military gave complied with Hamdi, then the role of the habeas court would appear to be at end. It would satisfy itself that the detainee received all the process that Hamdi said was due a citizen. If a non-citizen received this process, one would think that would be sufficient because the law does not normally give greater rights to noncitizens.


213. Padilla, 423 F.3d at 389.

214. Id.
Chicago or New York and arrest U.S. citizens with gay abandon. The Fourth Circuit made clear that Padilla, like Haupt, the U.S. citizen in *Quirin*, had fought behind enemy lines. Padilla had taken up arms against American forces in Afghanistan, and thereafter traveled to the U.S., at the behest of al-Qaeda, with the intent of attacking American citizens and targets. Padilla flew to the United States on May 8, 2002, to begin carrying out his terrorist assignment, when civilian law enforcement authorities arrested him upon his arrival at O’Hare International Airport in Chicago. This is the type of American citizen whom the military can detain, because this person is like Mr. Haupt, the American citizen whom the military detained in *Quirin*, and the *Hamdi* plurality said that *Quirin* is the law today.

As the court phrased the issue:

The exceedingly important question before us is whether the President of the United States possesses the authority to detain militarily a citizen of this country who is closely associated with al Qaeda, an entity with which the United States is at war; who took up arms on behalf of that enemy and against our country in a foreign combat zone of that war; and who thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets.

This conclusion should not be surprising, for the *Hamdi* Supreme Court plurality “went to lengths to observe that Haupt, who had been captured domestically, could instead have been permissibly detained for the duration of hostilities.”

Why did the military detain him? Here are the facts to which Padilla’s counsel had stipulated:

Al Qaeda operatives recruited Jose Padilla, a United States citizen, to train for jihad in Afghanistan in February 2000, while Padilla was on a religious pilgrimage to Saudi Arabia. Subsequently, Padilla met with al Qaeda operatives in Afghanistan, received explosives training in an al Qaeda-affiliated camp, and served as an armed guard at what he understood to be a Taliban outpost. When United States military operations began in Afghanistan, Padilla and other al Qaeda operatives moved from safehouse to safehouse to evade bombing or capture. Padilla was, on the facts with which we are presented, “armed and

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215. *Id.* at 389-90.
216. *Id.* at 390.
217. *Id.*
220. *Id.* at 394 (citing *Hamdi*, 542 U.S. at 519) (emphasis added).
present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States.”

Padilla eventually escaped to Pakistan, armed with an assault rifle. Once in Pakistan, Padilla met with Khalid Sheikh Mohammad, a senior al Qaeda operations planner, who directed Padilla to travel to the United States for the purpose of blowing up apartment buildings, in continued prosecution of al Qaeda’s war of terror against the United States. After receiving further training, as well as cash, travel documents, and communication devices, Padilla flew to the United States in order to carry out his accepted assignment.221

*Padilla v. Hanft* decided the issue based on these stipulated facts, which include the important fact that Padilla, like the Nazi saboteur Haupt, had been behind enemy lines, *i.e.*, “armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States.”222 This case, which authorizes the military to detain Padilla,223 does not authorize the military simply to arrest anyone walking down the street on the allegation that he is a terrorist.

*Padilla v. Hanft* and the distinctions it drew are entirely consistent with the prior law, from *Ex Parte Milligan*224 to *Quirin*. First, it upholds the power of the military to detain enemy combatants, even when they are U.S. citizens, if they had been armed and present in a combat zone during armed conflict against the United States. That was true of the U.S. citizen in *Quirin*, but not true of the U.S. citizen in *Milligan*.

Second, *Padilla v. Hanft* hardly gives the military *carte blanche*, for it limits the authority to detain to only those who have been in the enemy camp.225 Recall that in *Ex Parte Milligan*, the Supreme Court held that a military tribunal could not try a United States citizen associated with an anti-Union secret society but unaffiliated with the Confederate army while access to civilian courts was open and unobstructed.226 *Quirin* later confirmed that *Milligan* does not extend to enemy combatants.227 As

221. *Id.* at 389-90 (internal citations omitted); see also *id.* at 390 n.1 (stating that”[f]or purposes of Padilla’s summary judgment motion, the parties have stipulated to the facts as set forth by the government. It is only on these facts that we consider whether the President has the authority to detain Padilla” (internal citations omitted) (emphasis added)).

222. *Id.* at 390 (citation omitted).


224. 71 U.S. (4 Wall.) 2 (1866).

225. *Padilla*, 423 F.3d at 389, noting that Padilla “took up arms on behalf of that enemy and against our country in a foreign combat zone of that war; and who thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets.”

226. *Id.* at 131.

Quirin explained, the Milligan Court’s reasoning had “particular reference to the facts before it,” which was that Milligan was not “a part of or associated with the armed forces of the enemy.”\textsuperscript{228} The U.S. citizen in Quirin and Mr. Padilla had been associated with the armed forces of the enemy. That enemy is “al Qaeda, an entity with which the United States is at war”\textsuperscript{229}, Mr. Padilla’s lawyers stipulated to that.\textsuperscript{230}

The United States Government responded to this decision, which it won, by opposing certiorari, seeking to moot it, and asking the Fourth Circuit to vacate it\textsuperscript{231} It indicted Padilla and transferred him to a civilian prison in an effort to support its claim that Padilla’s case was moot.\textsuperscript{232} The Supreme Court denied certiorari, and did not decide the mootness claim amid complaints by the Fourth Circuit and commentators that it appeared as if the Government was trying to manipulate the jurisdiction of the federal courts.\textsuperscript{233} It seemed as though the Government snatched defeat from the jaws of victory.

Padilla’s change in status should not make the case moot for a variety of reasons. If Padilla was held unconstitutionally for the last several years, he will claim that he is entitled to damages. Now that he has been indicted, he will likely seek to exclude any evidence procured against him because of his allegedly unlawful detention. That also serves to prevent mootness. Moreover, the Government still claims that it has the right to detain enemy combatants such as Padilla; its transfer of Padilla to the custody of an Article III court does not change the Government’s claim, so the Government is free to return to its old ways. For all these reasons, the issue is simply not moot.\textsuperscript{234}

Later, during the oral argument in Hamdan v. Rumsfeld, discussed below, Justice Breyer asked the Solicitor General: “And if the president can do this, well, then he can set up commissions to go to Toledo and, in Toledo, pick up an alien, and not have any trial at all, except before that

\begin{itemize}
  \item \textsuperscript{228} Id.
  \item \textsuperscript{229} Padilla, 423 F.3d at 389.
  \item \textsuperscript{230} Padilla, 423 F.3d at 389-90.
  \item \textsuperscript{231} Padilla v. Hanft, 126 S. Ct. 1649, 1650 (2006).
  \item \textsuperscript{232} Id.
  \item \textsuperscript{233} Id. at 1649-50. After this decision, the Government charged Padilla with various crimes, turned him to civilian custody, argued that the case was moot, and opposed certiorari. The Supreme Court denied certiorari, allowed the transfer from the military authorities, but did not decide the mootness issue. \textit{Id.} at 1650 (Souter & Breyer, JJ., objecting to denial of certiorari; Ginsburg, J., dissenting from certiorari and filing an opinion; Kennedy, J., joined by Robert, C.J., & Stevens, J., writing a brief opinion concurring in the denial of certiorari).
  \item \textsuperscript{234} See, \textit{e.g.}, 1 Ronald D. Rotunda & John E. Nowak, \textit{Treatise on Constitutional Law: Substance and Procedure} § 2.13(c) (3d ed. 1999).
\end{itemize}
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special commission."²³⁵

The Government, if it had relied on Padilla v. Hanft, could have pointed out that Hamdan was not a U.S. citizen picked up in Toledo, but an alien captured in Afghanistan. He admitted being the chauffeur for bin Laden. Hamdi v. Rumsfeld²³⁶ had held that the U.S. could detain, without charges, any enemy combatant, even if that person is a U.S. citizen, if he had been fighting with the armed forces of the enemy. The Fourth Circuit defined enemy combatant to include someone who was behind enemy lines working on behalf of the enemy. That would not be true if you or I were walking down the street in Toledo, but it was true of Haupt, the Nazi saboteur who was a defendant in Quirin, and it was true of Padilla. But the Government, which tried to moot Padilla v. Hanft and vacate it, did not (or, perhaps believed it could not) rely on that case. Instead, the Government responded: “This is much more of a call for military commissions in a real war than, certainly, the use of military commissions against the Medoc Indians or any number of other instances in which the president has availed himself of this authority in the past.”²³⁷

²³⁶. 542 U.S. 507 (2004). This point is an important one and often forgotten, so Justice O’Connor’s language is worth quoting at length:

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by “universal agreement and practice,” are “important incident[s] of war.” Ex parte Quirin, 317 U.S. at 28. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Naqvi, Doubtful Prisoner-of-War Status, 84 INT’L REV. RED CROSS 571, 572 (2002) (“[C]aptivity in war is ‘neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war’”) (quoting decision of Nuremberg Military Tribunal, reprinted in 41 AM. J. INT’L L. 172, 229 (1947)); W. WINTHROP, MILITARY LAW AND PRECEDENTS 788 (rev. 2d ed. 1920) (“The time has long passed when ‘no quarter’ was the rule on the battlefield . . . . It is now recognized that ‘Captivity is neither a punishment nor an act of vengeance,’ but ‘merely a temporary detention which is devoid of all penal character.’ . . . ‘A prisoner of war is no convict; his imprisonment is a simple war measure.’ “) (citations omitted)); cf. In re Territo, 156 F.2d 142, 145 (9th Cir. 1946) (“The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released” (footnotes omitted)).

There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.

A. American Citizens Captured Abroad and Held Abroad

The Justices do not talk about this type of prisoner who is held outside the United States and not in Guantánamo Bay. The Justices repeatedly explained that the Government held Hamdi on American “soil.”238 The lower courts as well have repeatedly emphasized the fact that Padilla was on U.S. soil.239 On the other hand, the Justices did not reach this jurisdictional issue, which was not before them. In 1950, when the Court denied habeas to aliens imprisoned in occupied Germany, it distinguished the case of habeas for Americans held abroad by the United States.240 Nothing the justices said in 2004 or 2006 undercut that dictum. The justices do not suggest that the United States could act against its own U.S. citizens abroad without regard to limits of U.S. law.

B. The Nature of the Truncated Hearing or Combatant Status Review Tribunal

In the detainee cases, the Court created a loose, flexible procedure that is designed for only one purpose—to make sure that the military has not mistakenly interred someone who just happened to be passing by. Granted, O’Connor speaks for a plurality of four justices, but if the Government does what she outlined in order to determine if an individual is an enemy combatant, it knows that a majority of the Court (five votes) would uphold the constitutionality of the procedure because Justice Thomas would not overturn the procedure given the fact that he thinks O’Connor’s procedure

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238. Hamdi, 542 U.S. at 509. Id. at 539, 551 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).

With the citizen we are now little concerned, except to set his case apart as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens. Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen’s claims upon his government for protection. If a person’s claim to United States citizenship is denied by any official, Congress has directed our courts to entertain his action to declare him to be a citizen ‘regardless of whether he is within the United States or abroad.’ This Court long ago extended habeas corpus to one seeking admission to the country to assure fair hearing of his claims to citizenship, and has secured citizenship against forfeiture by involuntary formal acts.”

Id. (internal citations omitted).
is unnecessary.  

Justice O’Connor’s procedure applies to U.S. citizens, but an alleged combatant who is not a U.S. citizen would presumably receive no greater rights than a U.S. citizen. Hence, if the Government gives to non-U.S. citizens held in the Guantánamo Naval Base what the O’Connor plurality requires for U.S. citizens, one would think that it has done all that is necessary. This is the procedure that Justice O’Connor created in *Hamdi v. Rumsfeld*:

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. *Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.* Likewise, the Constitution would not be offended by a *presumption in favor of the Government’s evidence*, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the *onus could shift to the petitioner to rebut that evidence* with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the *goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant*. In the words of *Mathews [v. Eldridge]*, process of this sort would sufficiently address the “risk of erroneous deprivation” of a detainee’s liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government.

...The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs.

Her statement that “documentation regarding battlefield detainees

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already is kept in the ordinary course of military affairs” is significant, for it suggests that these records alone, like ordinary business records, are presumptively valid and enough to meet the burden of proof if the detainee has no response.  

Note, also, that *Mathews v. Eldridge*, which the *Hamdi* plurality cites to support the procedure it is creating, is a civil case, involving the termination of social security disability benefits. *Eldridge* held that an evidentiary hearing is not required prior to termination of disability benefits, and that the administrative procedures already provided for such termination fully comported with due process. The O’Connor plurality’s reliance on this civil case, where the stakes did not involve loss of liberty, emphasizes that the Court is not requiring the higher procedural protections of a criminal case even though the result in this instance is a loss of liberty for the detainee.

243. *Id.*
244. 424 U.S. 319 (1976).
245. Article 5 Tribunals. Justice Souter referred to Article 5 tribunals and opined that the United States was not implementing them. *Id.* at 539-50 (Souter, J., concurring). The Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Feb. 12, 1956), provides for the creation of tribunals to make solely a factual determination. The United States regulations implementing Article 5 are found at: U.S. DEP’T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, MULTI-SERVICE REGULATION (1 Oct. 1997) [hereinafter U.S. DEP’T OF ARMY, REG. 190-8]. Article 5 (by its express terms) applies only when the detainee has already “committed a belligerent act.” In contrast, the detainees who are parties to these actions and held in the Guantánamo Bay detention facilities were arguing that they committed no belligerent act at all, and were simply caught by mistake. That is why Justice O’Connor referred to “the errant tourist, embedded journalist, or local aid worker . . . .” *Hamdi*, 542 U.S. at 534. Article 5 is inapplicable to the detainees at Guantánamo who claim that they did not commit a belligerent act. Justice Souter did not understand that. For an Article 5 tribunal, the cost of a mistake to the detainee or the Government is simply that the detainee is warehoused in the wrong detention camp, a POW camp instead of an illegal combatant facility. We do not need to elaborate procedures for that factual scenario. The detainees in all of the detainee cases were never arguing that they belong in one detention camp rather than another. Instead, they were arguing that they should not have been captured or detained at all. An Article 5 tribunal would apply to a wounded combatant captured on the battlefield without any uniform or with questionable identification documents, who claimed to belong to a state’s armed forces, if others captured at the same time were in fact part of a militia group not qualifying for prisoner of war status under Geneva Convention III. The Article 5 tribunal would determine whether the prisoner should be held in a POW camp or an illegal combatant facility. That detainee may really be a spy or a member of another group that does not merit POW status. If POWs knew this wounded combatant and referred to him by the rank he claimed to hold, that would support categorizing him as a member of the group entitled to POW status. The cost to the military (or the detainee) if it makes a mistake in an Article 5 tribunal is simply that the combatant is housed in a different facility. In contrast, if the military mistakenly decides that the detainee is really “an embedded journalist” (to use the *Hamdi*’s plurality’s language), the cost to the government is significant, because the
In response to this case, the Government created what it calls “Combatant Status Review Tribunals,” and gave them to all detainees held at Guantánamo. It does not matter whether the detainee is a citizen of Afghanistan or Australia; they all have Combatant Status Review Tribunals, or what the military calls CSRTs (pronounced “C-serts”), using the acronym that the military favors.

Justice O’Connor’s opinion did not require the detainees to have lawyers for CSRTs, and military procedure does not provide for a lawyer. Just as a witness or target is not allowed to be accompanied by a lawyer when appearing before the grand jury, the CSRT does not allow a detainee to bring his lawyer to the CSRT. However, the witness or target can always refuse to answer questions, and the detainee has similar rights. In fact, in creating this new procedure, O’Connor referred to a somewhat analogous procedure discussed in existing military regulations. Those procedures also do not provide for lawyers.

detainee is completely freed, and hence free to return to the battle. By the middle of 2004, about 10% of the Afghans released from the Naval Base at Guantánamo Bay did return to battle, where they were recaptured or killed. Shaun Waterman, Freed Gitmo Detainees Back in Rebel Ranks, Officials Say, WASH. TIMES, July 6, 2004, at 1. The actual number may be higher, because others may not have been recaptured. The costs to the detainee are also greater, because the result of this new Combat Status Hearing is that the detainee is either released (as someone who was not a combatant at all) or indefinitely detained (as a combatant). The Government could not go on to punish the combatant as an “illegal” or “unprivileged” belligerent unless it had a military trial, but it could continue to detain him.

The hearings that the Hamdi plurality invited the military to create are new to the law and are informal, but still more formal and more elaborate than the Geneva Article 5 hearings because the stakes are higher. The Hamdi plurality briefly cited, but did not rely on, Article 5 of Geneva Convention III, and Army Regulation 190-8, §§ 1-6 (1997), which implements Article 5. AR 190-8, which never even uses the words “burden of proof” or “hearsay,” uses a much more informal procedure because its purposes are different. Hamdi created different procedures to be used in cases involving U.S. citizens detained as enemy combatants. The Department of Defense responded to Rasul by creating the tribunals that Hamdi contemplated. The Government gave these tribunals the name, “Combatant Status Review Tribunals.” The Government’s theory was that Rasul did not state what procedures were necessary, but if the Government gave a noncitizen as many rights it was giving to a citizen, it should surely meet whatever constitutional requirements exist. These issues are discussed thoughtfully in, William K. Lietzau, Old Laws, New Wars: A Strategy for Developing International Law During the Global War on Terrorism (unpublished manuscript, on file with the author).


247. See U.S. DEP’T OF ARMY, REG. 190-8, supra note 217.
C. New Legislation or Rule-Making

Constitutional rulings cannot be overtured by mere legislation. Yet, the majority did say that its holding on habeas jurisdiction on people held outside U.S. soil is based on changes in the statute since the Court considered it in Johnson v. Eisentrager. Hence, Congress, if it chose to do so, could amend the statute and go back to the world before the Supreme Court reinterpreted it. Changing the habeas statute is not necessarily suspending the writ. Indeed, Congress has periodically changed the statute over the years. That is not to argue that Congress should limit the Court’s jurisdictional powers, only that Congress has done that in the past and the Court has acknowledged that authority, at least within limits.

Other obvious legislative changes would be less dramatic. Congress could require that habeas cases brought from detainees in Cuba be brought in a particular federal court, thus preventing forum-shopping, and insuring that the judgments will be consistent. Congress, by statute, or the courts, by changing their rules, could prevent or limit class actions in this type of

249. Recall that Hamdi found habeas jurisdiction because it interpreted the statute differently than the Court in Johnson v. Eisentrager, 339 U.S. 763 (1950) had interpreted it a half-century earlier. Eisentrager did not find that its narrow interpretation of the habeas statute was constitutional. Justice Jackson, held that German nationals, confined in custody of United States Army in Germany following conviction by military commission of having engaged in military activity against United States in China after surrender of Germany, had no constitutional or statutory right to writ of habeas corpus to test legality of their detention. When the Court has extended “constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.” Eisentrager, 339 U.S. at 771.
250. Congress has changed the habeas statute throughout the years. See 28 U.S.C. §§ 2241-2255. See also Felker v. Turpin, 518 U.S. 651 (1996), holding, inter alia, that a provision of Antiterrorism and Effective Death Penalty Act (AEDPA) preventing Supreme Court from reviewing Court of Appeals order denying leave to file second habeas petition by appeal or by writ of certiorari does not, by implication, repeal Supreme Court’s authority to entertain original habeas corpus petitions. AEDPA’s new restrictions on successive habeas corpus petitions do not amount to unconstitutional “suspension” of writ. See generally WAYNE R. LAFAVE ET AL., TREATISE ON CRIMINAL PROCEDURE §§ 28.2 (2d ed. 2004).
251. On December 30, 2005, the President signed into law the Detainee Treatment Act (DTA), Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680 (2005), which, in certain respects, restricts the ability of detainees to seek relief from Article III courts. The applicability and constitutionality of this law is the subject of litigation.
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case to make sure that forum shopping to find a compliant judge in the class action context does not result in one trial judge authorized to make a ruling that binds the entire country.

The Court invited the Government to set up a military tribunal to hear the complaints of the detainees in Cuba:

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.253

If the Government creates tribunals that give the enemy combatants “a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker,” it will have given them all the process that the plurality opinion in Hamdi says is due even a U.S. citizen. 254 As discussed above, after this decision, the Government responded by creating such tribunals, called CSRTs, for all of the Guantánamo detainees, including those aliens who were citizens of the country we were invading, Afghanistan.255

V. THE CONSTITUTIONALITY OF THE MILITARY COMMISSIONS IN THE WAKE OF THE DETAINEE CASES.

A. Introduction

One of the President’s responses to the 9/11 attack was to create “military commissions” (or war crimes tribunals in popular parlance) to prosecute selected enemy combatants for alleged war crimes.256 By 2006,

253. Hamdi, 542 U.S. at 538 (citing U.S. DEP’T OF ARMY, REG. 190-8, supra note 240, para. 1-6).
254. The Hamdi Court went on to say if the military does not create such tribunals “[i]n the absence of such process . . . a court that receives a petition for a writ of habeas corpus must itself ensure that the minimum requirements of due process are achieved.” At this habeas hearing (which only occurs if the military does not create the procedures that Justice O’Connor established), the Article III court may rely on hearsay, such as affidavit testimony, “so long as it also permits the alleged combatant to present his own factual case to rebut the Government’s return.” Hamdi, 542 U.S. at 538-39 (emphasis added).
the Government had charged at least ten combatants. One of these defendants was Salim Ahmed Hamdan, a Yemeni national, who filed a habeas petition in federal court challenging the right of the military to prosecute him. He admitted being bin Laden’s chauffeur between 1996 and 2001, but denied committing war crimes.

Members of the Afghan militia captured Salim Ahmed Hamdan in Afghanistan in late November 2001 and turned him over to the American military, which incarcerated him in the detention facilities at Guantánamo Bay Naval Base in Cuba. There he was held with other enemy combatants. On July 3, 2003, the President determined “that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States.” In April 2004, Hamdan petitioned for habeas corpus. Later, the Government formally charged him with conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism. The Government alleged that he was bin Laden’s personal bodyguard and chauffeur, delivered weapons to al Qaeda members, drove bin Laden to al Qaeda training camps and safe havens in Afghanistan, and trained at an al Qaeda-sponsored camp.

Hamdan’s trial was to be before a military commission. Hamdan admitted in a signed affidavit that he was Osama bin Laden’s personal driver in Afghanistan between 1996 and November 2001. Accordingly, Hamdan was designated for trial before a military commission.

The Government gave Hamdan a formal hearing before a Combatant Status Review Tribunal. The Tribunal affirmed his status as an enemy combatant, “‘either a member of or affiliated with Al Qaeda,’ for whom continued detention was required.”

On November 8, 2004, the district court granted Hamdan’s petition in


262. Hamdan, 415 F.3d at 35-36.

263. Id. at 36.


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Among other things, the court held that Hamdan could not be tried by a military commission unless a competent tribunal determined that he was not a prisoner of war under the 1949 Geneva Convention governing the treatment of prisoners. The trial court determined that neither the Combatant Status Review Tribunal nor the Military Commission was a competent tribunal and then "enjoined the Secretary of Defense from conducting any further military commission proceedings against Hamdan." This remedy for a habeas petition is unusual because the normal rule is that the court either grants habeas and releases the prisoner or denies habeas and the prisoner remains incarcerated. This district court enjoined the trial but the prisoner remained behind bars. The Court of Appeals reversed.

B. The D.C. Circuit

After some preliminary issues, the D.C. Circuit, in *Hamdan v. Rumsfeld*, rejected all of Hamdan’s argument that the President violated the separation of powers when he established military commissions. Among other things, Congress had passed a joint resolution (Authorization for the Use of Military Force or AUMF) in response to the attacks of September 11, 2001, and the AUMF authorized use of “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” the attacks. When the military engages in battle, the historical practice is that it will take prisoners and detain them; similarly, the D.C. Circuit explained, the historical practice is that the military will prosecute those detainees charged with war crimes.

264. *Id.*
265. *Id.*
266. *Id.*
267. *Hamdan*, 415 F.3d at 44.
268. *Id.* at 37. The litigants in *Hamdan* did not seek to recuse then-Judge (later Justice) John Roberts, but others did file a motion to recuse, which the remaining panel members did not grant. They did not allow the third-parties to intervene. See Ronald D. Rotunda, *The Propriety of a Judge’s Failure to Recuse When Being Considered for Another Position*, 19 GEO. J. LEGAL ETHICS 1187 (2006).
270. *In re Yamashita*, 327 U.S. 1 (1946) involved challenges to a military commission that grew out of World War II. The Court held that that an “important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempts to thwart or impede our military effort, have violated the law of war.” *Id.* at 11 (emphasis added). “The trial and punishment of enemy combatants,” is part of the “conduct of war.” *Id.* *Ex parte Quirin*, 317 U.S. at 28, held that Congress had authorized
The Court of Appeals, like the Supreme Court in the Detainee Cases, was unimpressed that Congress had not passed an official declaration of war.\textsuperscript{271} Countries, if they formally declare war, do so against other sovereign countries; al Qaeda is not a sovereign nation.\textsuperscript{272} The United States, for example, did not declare war against the Barbary Pirates the Philippine Insurrection, or Pancho Villa and his armed bandits; it simply used the military to engage in war against them. In addition, the AUMF “went as far toward a declaration of war as it might, and as far or further than Congress went in the Civil War, the Philippine Insurrection, the Boxer Rebellion, the Punitive Expedition against Pancho Villa, the Korean War, the Vietnam War, the invasion of Panama, the Gulf War, and numerous other conflicts.”\textsuperscript{273} The court concluded that the AUMF, as well as two statutes, both authorized these military commissions.\textsuperscript{274}

The D.C. Circuit Court went on to hold that the Geneva Convention does not bar the military commission. First, the court held that the Geneva Convention, like many other treaties, is not self-executing. That is, it is not enforceable in federal court unless Congress were to enact a statute making it enforceable.\textsuperscript{275}

Secondly, even if the Geneva Convention were enforceable in court, it would not protect Hamdan as a Prisoner of War because he does not even “purport to be a member of a group who displayed ‘a fixed distinctive sign recognizable at a distance’ and who conducted ‘their operations in accordance with the laws and customs of war.’”\textsuperscript{276} The Geneva

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\textsuperscript{271} Hamdan, 415 F.3d at 38.

\textsuperscript{272} Id. (citing John M. Bickers, Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe, 34 TEX. TECH. L. REV. 899, 918 (2003)).

\textsuperscript{273} Id. (quoting Bickers, supra note 272, at 917).

\textsuperscript{274} Id. (citing 10 U.S.C. § 821 and 10 U.S.C. § 836(a)).

\textsuperscript{275} Hamdan, 415 F.3d at 38. The court plowed no new ground. It has long been the law that “a ‘treaty is primarily a compact between independent nations,’ and ‘depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it.’” Id. at 40 (citing Head Money Cases, 112 U.S. 580, 598 (1884); Restatement (Third) of the Foreign Relations Law § 907 cmt. a (1987) (“International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.”)). See also 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 6.6 (3d ed. 1999); Charlton v. Kelly, 229 U.S. 447, 474 (1913); Whitney v. Robertson, 124 U.S. 190, 194-95 (1888); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 310, 314 (1829), overruled on other grounds by United States v. Percheman, 32 U.S. 51, 74-75 (1883).

\textsuperscript{276} Hamdan, 415 F.3d at 40 (citing the Geneva Convention (III) Relative to the
The Detainee Cases

Convention, in an effort to protect civilians, requires soldiers to dress like soldiers. Al Qaeda and the Taliban, and other tribal groups that protected al Qaeda, do not wear distinctive signs and do not comply with the laws of war.

Thirdly, the D.C Circuit concluded that the Geneva Convention does not apply to al Qaeda because the Convention contemplates two types of conflict and al Qaeda does not fit within either one of them. First, there is an international conflict (even if it is not declared) between two or more of the “High Contracting Parties” to the Convention. Al Qaeda is not a High Contracting Party; it is not even a state any more than the Mafia or an international drug cartel is a state.

The second type of conflict that the Geneva Convention contemplates is what is commonly called a civil war, or what the Convention calls an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . .” This provision, the court concluded, applies to armed conflicts confined to a single country. Afghanistan is a High Contracting Party, but the Global War Against Terrorism is hardly confined to Afghanistan. The tragedy of September 11, 2001, did not even occur in Afghanistan, although it led to the American invasion in an effort to capture bin Laden and other members of al Qaeda. If the Taliban had turned over bin Laden instead of harboring him, the invasion would have been unnecessary. Moreover, the armed conflict in Afghanistan involves many nations besides the United States. Armies of Australia, Great Britain, Germany, Canada, NATO, and other countries are all fighting to this day in Afghanistan against al Qaeda and its Taliban supporters. And those supporters come from other countries as
well—from Saudi Arabia, Australia, and 38 other countries.

The trial court had argued that the United States was not engaged in a conflict with al Qaeda separate from the Taliban but the United States was apparently engaged in one conflict limited to Afghanistan. The D.C. Circuit was mystified and had “difficulty understanding the [trial] court’s rationale.” The conflict with al Qaeda, the appellate court said, arose before the invasion of Afghanistan had occurred (e.g., New York City, the Pentagon) and the conflict continues in Africa, Iraq (where some of the terrorist groups claim specific loyalty to bin Laden), and other places.

Judge Williams, who concurred in this opinion, disagreed on one issue. He thought that the Geneva Convention should apply to al Qaeda personnel to the extent they were captured in Afghanistan because the capture occurred in the territory of one of the High Contracting Powers in the course of the civil war between the Taliban and its Afghan enemies, such as the Northern Alliance. Under Williams’ view, because the Geneva Convention would apply to Hamdan who was captured in Afghanistan, the Convention required that the military commission trying him must give him all “the judicial guarantees which are recognized as indispensable by civilized peoples.”

However, both Williams and the rest of the court agreed that the Geneva Convention was unenforceable in court anyway, and that any


286. Hamdan, 415 F.3d at 41.

287. Id.

288. Id. at 44 (Williams, J., concurring). Judge Williams said, “I concur in all aspects of the court’s opinion except for the conclusion that Common Article 3 does not apply to the United States’s conduct toward al Qaeda personnel captured in the conflict in Afghanistan.” Id. (emphasis added). See also id. (stating that he would read the Geneva Convention to protect “non-eligibles in an ‘armed conflict not of an international character [i.e., a civil war] occurring in the territory of one of the High Contracting Parties’”). However, Williams also made clear that: I concur in all aspects of the court’s opinion except for the conclusion that Common Article 3 does not apply to the United States’s conduct toward al Qaeda personnel captured in the conflict in Afghanistan. Because I agree that the Geneva Convention is not enforceable in courts of the United States, and that any claims under Common Article 3 should be deferred until proceedings against Hamdan are finished, I fully agree with the court’s judgment.

Id. (internal citations omitted) (emphasis added).

289. Hamdan, 415 F.3d at 44 (Williams, J., concurring).
alleged failures in the procedures of the military commission did not deprive it of jurisdiction. The most that Hamdan could do, the D.C. Circuit concluded, was raise his claims in the military tribunal and, if that court rejected his claims and if he was then convicted, he could complain, like any convicted criminal in an Article III court, that there had been errors in his trial that were not harmless, that they deprived him of “indispensable” judicial guarantees, and that they should result in overturning his conviction.

The court, finally, turned to the argument that the Government could not treat Hamdan as a detainee who is not a POW until a “competent authority” determined his status. The President is such an authority, the entire panel agreed, both under international law and treaties and under Army Regulation 190-8. To the extent that Hamdan wants a “tribunal” instead of an “authority” to make that decision, the military commission is a competent tribunal. Hamdan can raise his claim there and the military commission can decide it.

The D.C. Circuit concluded that Hamdan, if he is ultimately convicted and then decides to appeal, can raise claims of error in his appeal. Indeed, the procedure that sets up the military commissions provides for a special appellate court. Even Judge Robertson, whose trial opinion the D.C. Circuit reversed, agreed that this special appellate court was fair and proper. President Bush had patterned the military commission on the

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290. “If Hamdan were convicted, and if Common Article 3 covered him, he could contest his conviction in federal court after he exhausted his military remedies.” *Hamdan*, 415 F.3d at 42.
291. *Id.* at 43.
292. *Id.* (emphasis in original).
293. *Id.*
294. *Id.*
295. *Hamdan*, 415 F.3d at 43.
296. “Because I agree [with the court] that the Geneva Convention is not enforceable in courts of the United States, and that any claims under Common Article 3 should be deferred until proceedings against Hamdan are finished, I fully agree with the court’s judgment.” *Hamdan*, 415 F.3d at 44 (Williams, J., concurring).

The President has, however, established a Review Panel that will review the trial record and make a recommendation to the Secretary of Defense, or, if the panel finds an error of law, return the case for further proceedings. The President has appointed to that panel *some of the most distinguished civilian lawyers in the country* (who may receive temporary commissions to fulfill the requirement that they be ‘officers,’ see Military Commission Order No. 1 (6)(H); 32 C.F.R. § 9.6(h)). And, as for the President’s naming himself or the Secretary of Defense as the final reviewing authority, that, after all, is what a military commission is. If Hamdan is triable by any military tribunal, the fact that final review of a finding of guilt would reside in the President or his designee is not ‘contrary to or inconsistent with’ the UCMJ.
military commission in *Quirin*, and recall that Justice O’Connor’s opinion in *Hamdi* tells us that *Quirin* is the law today.\(^{298}\)

**C. The Supreme Court**

The Court (5 to 3) reversed the D.C. Circuit (Chief Justice Roberts did not participate because he had been on the panel that had ruled against Hamdan).\(^{299}\) The Court held that the military commission convened to try Hamdan lacked the power to proceed because its structure and procedures violated the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions, and was not authorized by the UCMJ, the AUMF, or the recently-enacted Detainee Treatment Act (DTA).\(^{300}\)

Justice Stevens spoke for the majority on most issues and the plurality on other issues. Five other justices wrote various concurrences and dissents in the 185-page opinion. The Court said that the military could prosecute Hamdan under the UCMJ if the tribunal had procedures akin to a court martial, or if Congress authorized the President to use different procedures for the defendants. In that sense, the decision was not so much a constitutional decision but one of statutory interpretation. Congress could always change the result by enacting new law. As Justice Breyer’s concurring opinion—joined by Justices Kennedy, Souter, and Ginsburg—emphasized:

> ... Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

> Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger.\(^{301}\)

The Court brushed away the argument that the jurisdictional limitations of the DTA applied to this pending case.\(^{302}\) Congress enacted

\(^{Id.}\) (emphasis added and footnote omitted).

\(^{298}\) *Hamdi*, 542 U.S. at 522.


\(^{301}\) *Id.* at 2799 (Breyer, J., concurring).

\(^{302}\) *Id.* at 2765-66.
the DTA after Hamdan had applied for certiorari. It provides that “no court, justice, or judge” shall have jurisdiction to hear the habeas application of Guantanamo Bay detainees.303 The legislative history showed that Congress had rejected “the very language that would have achieved the result” that the Government now urged.304 The Court also rejected the President’s request for abstention on prudential grounds.

Then the Court agreed with Hamdan that no Act of Congress authorized the President to create these military commissions. The Court assumed that the “AUMF activated the President’s war powers”305 and that “those powers include the authority to convene military commissions in appropriate circumstances.”306 Moreover, “we do not question the Government’s position that the war commenced with the events of September 11, 2001,”307 but “there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.”308

The Court also relied on the Geneva Convention’s Common Article 3, which applies to an armed “conflict not of an international character of one of the High Contracting Parties.”309 A provision of that Article requires that a tribunal passing sentence must be a “regularly constituted court.”310 The Court said, first, that this Article applies because the present conflict with al Qaeda, while not limited to one nation, is not a conflict between nations,311 even though the armies of many nations (Australia, Canada, Germany, Great Britain, the United States, etc.) are now fighting in Afghanistan against citizens of many nations.312 Second, it said that a

304. 126 S. Ct. at 2766. Section 1005(h)(2) of the DTA provides that §§ 1005(e)(2) and (3)—which give the D.C. Circuit “exclusive” jurisdiction to review the final decisions of, respectively, combatant status review tribunals and military commissions—“shall apply with respect to any claim whose review is . . . pending on” the DTA’s effective date. Hamdan’s case was pending on that date. Consequently, the Government argued that §§ 1005(e)(1) and (h) repealed the Supreme Court’s jurisdiction to review Hamdan. However, the majority concluded that “ordinary principles of statutory construction” rejected that position. Id.
305. Hamdan, 126 S. Ct. at 2775 (citing Hamdi v. Rumsfeld, 542 U.S. 507 (2004)).
306. Id. (citing Hamdi, 542 U.S. at 518, Quirin, 317 U.S. at 28-29, Yamashita, 327 U.S. at 11).
307. Id. at 2778 n.31. In a footnote, Justice Stevens (this time, speaking for a plurality) added, “nothing in our analysis turns on the admitted absence of either a formal declaration of war or a declaration of martial law.” Id.
308. Id. at 2775.
309. Hamdan, 126 S. Ct. at 2795.
310. Id. at 2797.
311. Id.
312. See supra text accompanying note 284.
military commission is not a “regularly constituted court” but a court martial would be.\footnote{Hamdan, 126 S. Ct. at 2796-97. Kennedy’s opinion, concurring in part, said that the “terms of this general standard are yet to be elaborated and further defined,” but the Court “correctly concludes that the military commission here does not comply with this provision.”\textit{Id.} at 2803 (Kennedy, J. concurring).}

The Court agreed that the UCMJ does authorize the President to apply different sets of procedures for military tribunals if it is impracticable to apply the same procedures, but the President has not made an “official determination that it is impracticable to apply the rules for courts-martial” to the military commissions.\footnote{\textit{Id.} at 2791.} Moreover, “[n]othing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. . . . There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility.”\footnote{\textit{Id.} at 2792.} “Regularly constituted courts” could include military commissions if there is “some practical need” to deviate from courts martial.\footnote{\textit{Id.} at 2804 (Kennedy, J., concurring).} But, “no such need has been demonstrated here.”\footnote{\textit{Id.} at 2797.} The Court then held that the military commission could not proceed because its structure and procedures violate both the UCMJ and the 1949 Geneva Convention.\footnote{\textit{Id.} at 2797-98.} In particular, the commission rules provided that the accused and his civilian counsel (but not military counsel) may be excluded from any part of the proceeding if the presiding officer decides to close it in order to protect classified information.\footnote{\textit{Id.} at 2797 n.65.} This violation of one of the “most fundamental protections,” the “right to be present,” violates the UCMJ and the Geneva Conventions, which the Court held are judicially enforceable.\footnote{\textit{Hamdan}, 126 S. Ct. at 2792. In a footnote, Stevens added another argument: “Further evidence of this tribunal’s irregular constitution is the fact that its rules and procedures are subject to change midtrial, at the whim of the Executive. See Commission Order No. 1, §11 (providing that the Secretary of Defense may change the governing rules ‘from time to time’).” \textit{Id.} at 2797 n.65. The petitioners complained that after the Government won in the D.C. Circuit, the Government changed the rules governing the military commissions. It applied these new rules to cases like \textit{Hamdan}, where defense attorneys and prosecutors had already argued motions before the military court. One wonders why the Government would change the rules for pending cases, but it did so, thus creating a new argument for petitioners based on the unfairness of changing rules—an argument that Justice Stevens embraced.}

Later, speaking for a plurality, Stevens reemphasizes that under the
Geneva Convention the “accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.”

It is interesting that the issue of whether the accused must be present at all stages of his criminal trial—even if the Government claims that military secrets require that the defendant (but not his lawyer) be excluded for part of the trial—figured so prominently in this case, because there had not yet been a trial. Perhaps, if there were a trial, the Government might never move to exclude the defendant. The issue might never come up. Or, if there was an exclusion, it might be harmless error.

Or, conceivably the Government might actually be able to make a convincing argument that exclusion was appropriate in some rare case. For example, assume that a fellow detainee would testify that he could confirm important facts, and he was reliable because he earlier told the military where bin Laden was hiding and the military raided the hideout but missed capturing bin Laden, but his coffee was still warm. Assume that our hypothetical witness would not want the defendant present at his testimony because anyone who heard the details would know who the witness was and this witness was worried that—if there is disclosure of his identity—either he or his family in Afghanistan would be killed. Perhaps then, a court might allow the defendant to be excluded for that portion of the trial, if the witness’s fear was well-founded.

In fact, while the Hamdan case was being argued at the trial level, I called the military colonel in charge of prosecution out of curiosity and asked him if he planned to move to exclude Hamdan for part of his trial. He said, flatly, no. The Chief Prosecutor told me that he had no intention of using and could not envision using any classified evidence that would require Hamdan to be excluded from any part of his trial. The prosecution simply was not relying on any classified information and could not imagine moving to exclude him. He added that the Department of Justice had never asked him the question whether the military prosecutors were planning to exclude Mr. Hamdan from any part of his trial.

Justice Stevens, in his opinion for the Court, perhaps responds to this concern when he said, “[o]ne of Hamdan’s complaints is that he will be, and indeed already has been, excluded from his own trial. Under these circumstances, review of the procedures in advance of a ‘final decision’... is appropriate.”

321. Id. at 2798.
323. Hamdan, 126 S. Ct. at 2788 (internal citations omitted) (emphasis in original).
Hamdan was in fact excluded from a portion of the voir dire; however, the transcript shows that the defendant’s exclusion was at the suggestion of his own lawyer, who notified the military tribunal that there is “at least one area that required classified information, sir.” The prosecutors did not object to closing part of the preliminary hearing to the defendant, and that was done.

One does not find this information anywhere in the Supreme Court opinion or the briefs. It is only in the trial transcripts of the military commission, which are publicly available on the web. The Government simply did not make the argument.

Starting at the trial level, the Government proceeded as if it was irrelevant whether Hamdan would ever be excluded. It also acted as if it was irrelevant whether it was Hamdan’s own counsel who made a motion for exclusion. Perhaps the Government wanted a clean decision, one unencumbered by the factual background. However, normally rules of law are encumbered by the factual background. What is law is not the mere language in an opinion but the language, expressed as a holding, in light of the facts. In any event, if the Government wanted a clean, broad decision on this issue, it got one, but not the one it had advanced.

In the plurality, which Kennedy did not join, Stevens argued that “conspiracy to commit” war crimes is not a violation of the law of war that a military commission may try. The Government had alleged that “from on or about February 1996 to on or about November 24, 2001,” when he was captured, “Hamdan ‘willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism.’”

The Government also alleged that Hamdan was bin Laden’s “bodyguard and personal driver,” knew that bin Laden was involved in the 9/11 terrorist attacks and other terrorist attacks, arranged to transport and

325. Id. The defense lawyer then asked that his client be provided summaries of what would be said, and the prosecutor replied that that was premature because he did not know yet what the defense lawyer would introduce; “but as of right now to ask someone to make a call that we can expose the accused to this information without knowing what the information is, that’s just not feasible, sir.” Id. at 82.
326. Id.
327. Hamdan, 126 S. Ct. at 2785.
328. Id. at 2761 (internal citation omitted).
actually transported “weapons used by al Qaeda members,” drove bin Laden to training camps and other places where bin Laden urged his followers to attack America, and received weapons training at al Qaeda camps.\footnote{Stevens, along with three other justices, rejected this conspiracy claim: “There is no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity.”} In addition, not “a single overt act is alleged to have occurred in a theater of war or on any specified date after September 11, 2001.”\footnote{Of course, if the Government had charged a U.S. citizen or alien in federal court, it is not necessary, under the law of conspiracy, for each conspirator to have “command responsibilities.” Moreover, if you are a member of a conspiracy, you are liable as part of the conspiracy—even for actions that the conspiracy takes after you join it—unless you make clear that you are extricating yourself from the conspiracy. But that rule does not apparently apply if one is charging an enemy combatant.}

Stevens, speaking for the Court, concluded by highlighting that the Court has assumed:

\[T\]he truth of the message implicit in that charge—viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm.\footnote{So, Hamdan has remained detained as an enemy combatant.}

Kennedy’s opinion, concurring in part and joined by Justices Souter, Ginsburg and Breyer (in part), said that, given the conclusion that the UCMJ did not authorize Hamdan’s military commission, there is no need to decide whether Common Article 3 of the Geneva Conventions requires that the accused be present at all stages of a criminal trial or to address the validity of the conspiracy charge against Hamdan.\footnote{Kennedy emphasized and echoed Justice Breyer’s view that this case is really a decision about statutory interpretation rather than ultimate}

\begin{itemize}
\item\footnote{\textit{Id.}}
\item\footnote{\textit{Id.}}
\item\footnote{\textit{Id. at 2778.}}
\item Wayne R. LaFave, 2 Substantive Criminal Law §§12.1, 12.2(a), 12.2(c), 12.3(b)(2) (wheel or circle conspiracy), 12.3(c) (duration of conspiracy), 12.4(b) (withdrawal requires an “affirmative act bringing home the fact of his withdrawal to his confederates”) (2d ed. 2003).
\item Hamdan, 126 S. Ct. at 2798.
\item Id. at 2809 (Kennedy, J., concurring).
\end{itemize}
constitutional power: “domestic statutes control this case.”\textsuperscript{335} Moreover, “[b]ecause Congress has prescribed these limits, Congress can change them.”\textsuperscript{336}

\textit{Hamdan} does not limit the power of the Government to hold enemy combatants without trial.\textsuperscript{337} Enemy combatants, as the Detainee Cases of 2004 concluded, are held to prevent them from returning to the battle. The Government must hold a hearing, in certain cases, to make sure that the person captured is an enemy combatant, but the Government does not have to charge a combatant with a “crime,” because it is not a crime to be an enemy soldier. But if the Government does charge a combatant with war crimes, \textit{Hamdan} holds that the Government must secure Congressional authorization.

Congress responded to Justice Kennedy’s invitation in \textit{Hamdan} v. \textit{Rumsfeld} to change the rules by enacting the Military Commissions Act of 2006.\textsuperscript{338} This law authorized military commissions, precluded the defendants from being excluded from any portion of their own trials, allowed defendants to represent themselves (something the military commission rules had denied), denied evidence procured by torture, and limited judicial remedies. Opponents of this law vowed further litigation to test its limits.

\textsuperscript{335} \textit{Id.} at 2800.

\textsuperscript{336} \textit{Id.} at 2808. Justice Scalia, joined by Justices Thomas and Alito, dissented, arguing that the DTA removed Supreme Court jurisdiction. Justice Thomas also dissented, joined by Justices Scalia and by Justice Alito in part: “Today a plurality of this Court would hold that conspiracy to massacre innocent civilians does not violate the laws of war. This determination is unsustainable.” \textit{Id.} at 2838 (Thomas, J., dissenting). This case marked just the second time in 15 years that Thomas read his dissent from the bench. Justice Alito, joined in part by Justices Scalia and Thomas, rejected the majority’s conclusion that military commissions were not “regularly constituted” because that term had always been read to mean “properly constituted,” and they were properly constituted. “There is no reason why a court that differs in structure or composition from an ordinary military court must be viewed as having been improperly constituted.” \textit{Id.} at 2851 (Alito, J., dissenting).

\textsuperscript{337} Justice Stevens said, “[i]t bears emphasizing that Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm.” \textit{Hamdan}, 126 S. Ct. at 2798.

\textsuperscript{338} Pub. L. No. 109-366, S. 3930, 109th Cong. (enrolled as agreed to or passed by both House and Senate, Sept. 29, 2006).