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INTRODUCTION: CITIZENSHIP AS A CONSTITUTIONAL CONCEPT

The enemy combatant cases raise an important question: Does the status of citizenship itself impose limits on what Congress or the President may do when either seeks to limit the rights of citizens? Citizenship as a constitutional limitation, indeed as a constitutional concept, has not received a great deal of scholarly attention. One of the most thoughtful discussions on the topic was provided by Professor Alexander Bickel in a 1973 lecture on the meaning of citizenship in the American Constitution.[1] The lecture could have been called the insignificance of citizenship under the American constitution. The theme of Professor Bickel's lecture is that "the concept of citizenship plays only the most minimal role in the American constitutional scheme."[2] The enemy combatant cases indicate that for the majority of the Supreme Court this may not be true today.

In a certain sense, the limited role American constitutionalism has generally accorded the status of citizenship is to be applauded rather than criticized. If looked at from an egalitarian perspective, one might well ask: Why should a legal concept like citizenship give a citizen precedence over the claims of other human beings, albeit non-citizens, who are also subject to the jurisdiction of the same sovereign state? Indeed, in 1971, the Supreme Court, entirely in keeping with the passionate egalitarianism of that era, held as much in *Graham v. Richardson*.[3] As Professor Bickel pointed out in discussing the *Graham* case, the Supreme Court declined to make a distinction between citizens

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1. Alexander M. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369 (1973).

2. *Id.* at 369.

3. 403 U.S. 365 (1971).

and aliens in the conferral of state benefits.[4] The Court refused to permit Arizona and Florida to award welfare benefits to citizens but not to aliens and held that such a distinction violated the Equal Protection Clause of the Fourteenth Amendment which confers protection not on "citizens" but on "persons."[5] Professor Bickel conceded, of course, that in some spheres there were real distinctions and disparate constitutional protections between citizens and aliens.[6]

Surveying constitutional law as it existed at that time, Professor Bickel suggested the Supreme Court's actions seemed to "reaffirm the traditional minimal content of the concept of citizenship" but that its "rhetoric was at war with its action."[7] In short, Bickel believes the Court's opinions made the constitutional significance of citizenship appear much more substantive and important than in result they really were. Bickel believed that the relative unimportance accorded to citizenship both in the constitutional text and in constitutional practice was not undesirable:

> A relationship between government and the governed that turns on citizenship can always be dissolved or denied. Citizenship is a legal construct, an abstraction, a theory. No matter what safeguards it may be equipped with, it is at best something that was given, and given to some and not to others, and it can be taken away. It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a nonperson . . . .[8]

It is true, of course, that citizenship has not always been a safeguard against repression by government. In *Korematsu v.*

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4. Bickel, *supra* note 1, at 381–82.

5. 403 U.S. at 376.

6. Professor Bickel stated:

> Resident aliens are under the protection of our Constitution substantially no less than citizens. Graham v. Richardson, 403 U.S. 365, 371 (1971) (term "person" in Fourteenth Amendment means "resident aliens as well as citizens of the United States and entitled both to equal protection of the laws of the State in which they reside"). But conditions, including employment conditions, may be attached to the entry permits of visiting aliens, and in time of war, even resident enemy aliens may be subject to fairly harsh restrictions. But that is a consequence, I suggest, more of our perception of the meaning of foreign citizenship and of obligations it may impose than of the significance of the status of citizen in our own domestic law.

Bickel, *supra* note 1, at 381–82.

7. *Id.* at 385.

8. *Id.* at 387.

United States,[9] the Supreme Court rejected the claim of Fred Korematsu, "an American citizen of Japanese descent,"[10] that an order of the Commanding General of the Western Command, U.S. Army, directing that all persons of Japanese ancestry should leave a specified area of the West Coast was unconstitutional. Korematsu decided to remain in the specified area and to challenge the order. The federal district court convicted him for violation of the order and the court of appeals affirmed. The Supreme Court, per Justice Black, affirmed, 6–3. Justice Black's opinion began by saying that the strictest form of review would be employed by the Court to review legal restrictions which infringed on the "civil rights of a single racial group" and the Court promised that the challenged order would be subjected to "the most rigid scrutiny."[11] The emptiness of the promise of "the most rigid scrutiny"[12] is of course revealed by the deferential manner by which the majority ultimately evaluated the order. Responding to the claim that the case involved "imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States," the Court denied that the case had anything to do with racial prejudice.[13] The Court felt the challenged order was justified by military necessity and also simply because Congress, by enacting the legislation, had authorized the exclusion order which Korematsu was challenging.[14]

Did it not matter that thousands of the men, women, and children affected by this order were American citizens? Justice Black responded to this question by stating that the Court was aware of the "burden" that the exclusion order placed on Japanese American citizens. But the government's power to protect the nation had to be sufficiently broad to deal with the danger. The citizenship of the Japanese Americans did not preclude their deportation from the West Coast and their involuntary detention elsewhere.[15]

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9. 323 U.S. 214 (1944).
10. *Id.* at 215.
11. *Id.* at 216.
12. *Id.*
13. *Id.* at 223.
14. Justice Black declared:

> [T]he military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.

Id.

15. The *Korematsu* Court stated:

Professor Bickel comments in his lecture that even resident aliens may be subject to harsh restrictions during wartime. His implication is that these restrictions can be harsher than those that would be permissible for citizens. In fact, as the *Korematsu* case illustrates, this is not necessarily the case. Resident aliens and citizens were alike interned in relocation camps during World War II, and the citizenship status of Japanese Americans did not save them from being deported from the West Coast. Indeed, the whole Japanese American relocation program is an excellent example of Professor Bickel's basic theme that citizenship plays a very minor role in American constitutional law. Curiously, he did not cite *Korematsu* as an example of his theme, although it is most certainly that. For Bickel, the really critical significance of citizenship is that its "significance is international more than domestic, and domestic as a reflection of international."[16]

As we shall see, however, the enemy combatant cases suggest that citizenship as a constitutional concept in fact has some teeth. Two of the three cases presented a fundamental question: May the President of the United States designate a citizen of the United States an enemy combatant and detain him on that basis for an indefinite period without charges, without access to counsel, and without access to the courts? Ultimately, the Supreme Court answered this question with a resounding "No". On April 27, 2004, the Supreme Court heard oral argument in two cases involving this issue. Two United States citizens, Jose Padilla and Yaser Hamdi, had been incarcerated in the Naval Brig in Charleston, South Carolina for two years without being charged with a crime before their cases were reviewed by the Supreme Court. During that period they were denied access to a lawyer. After the Supreme Court decided to hear their cases, they were, as a matter of courtesy—not a matter of right—granted access to counsel

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> [W]e are not unmindful of the hardships imposed by it [the exclusion order] upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

Id. at 219–20 (citations omitted).

16. Bickel, *supra* note 1, at 382.

by the United States government, but only under the most restrictive and unsatisfactory conditions.

The circumstances under which these two citizens came to be incarcerated were quite different. Hamdi, an American citizen of Saudi Arabian ancestry, was seized by Alliance troops in Afghanistan in 2001. Jose Padilla was taken into custody at O'Hare Airport in Chicago in 2002. Padilla was suspected of trying to detonate a radioactive device as part of an al Qaeda plot. The United States based its legal authority for the detention of both Hamdi and Padilla on the President's authority as Commander in Chief granted to him under the Constitution. The government insisted that as part of that authority, the President could designate anyone, even a citizen, an "enemy combatant" of the United States.

In one respect, Padilla and Hamdi as citizen enemy combatants were treated differently than alien enemy combatants. The latter were sent to Guantanamo Bay, Cuba (leased by Cuba to the United States); the citizen combatants were incarcerated in what was unquestionably United States territory. What difference did this make? One difference was that, unlike the detainees at Guantanamo Bay, the citizen combatants were incarcerated in what was unquestionably United States territory and, therefore, came within the clear ambit of the habeas statute.[17]

Furthermore, the government contended that its actions were authorized by the Geneva Convention since the two individuals apprehended were enemy combatants. The United States government contended that the United States was in a war against al Qaeda and in a war against terrorism. Continuing this argument, the government asserted that soldiers could be detained until the end of the war. There were difficulties with this argument. War in the formal constitutional sense had not been declared by Congress. Moreover, even if a de facto state of war existed, it was not with a nation-state. Furthermore, the strange war which is the war against terrorism may be a war without end. Of the two cases, the government's "captured in battle" argument was more descriptive of Hamdi who was in fact captured carrying a weapon on the field of battle in Afghanistan. Indeed, a lower court upheld the validity of his detention. We shall consider each case separately.

17. "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions.*" 28 U.S.C. § 2241(a) (2000) (emphasis added).

I. THE *PADILLA* CASE

Jose Padilla was not arrested on some foreign field. He was arrested in May 2002 as he got off a flight from Pakistan at O'Hare Airport in Chicago. He was immediately arrested by federal agents on the basis of a material witness warrant and taken to New York where he was placed in federal criminal custody. Acting through appointed counsel, Padilla sought to have the warrant vacated. Before that order was ruled upon, President Bush issued an order to Secretary Rumsfeld which designated Padilla an "enemy combatant" and directed the Secretary to detain him. Padilla was then sent to the Consolidated Naval Brig in Charleston, South Carolina. On June 11, 2002, Padilla's counsel, acting as next friend, filed a petition for habeas corpus on his behalf contending that his detention was unconstitutional.[18] The petition named as respondents President Bush, Secretary Rumsfeld, and Melanie A. Marr, Commander of the Naval Brig in Charleston. The government moved to dismiss on the ground that Commander Marr was the only proper custodian vis-à-vis Padilla, and that the federal district court in Manhattan where the petition had been filed did not have jurisdiction over Commander Marr since she was located in South Carolina. Relying on the Secretary's personal involvement in the case[19] and the New York long arm statute,[20] the federal district court denied the government's motion to dismiss,[21] but the government won on the merits. The district court held that the President had the authority to detain "as enemy combatants citizens captured on American soil during a time of war."[22]

The federal district court in the *Padilla* case ruled that it had jurisdiction to hear Padilla's habeas corpus petition and denied the government's motion to dismiss the petition. Furthermore, the court ruled that Padilla, as a habeas petitioner, should be afforded access to counsel for purposes of pursuing his habeas petition[23] but the court declined to rule that access to counsel was constitutionally required.[24] As to the kind of showing that the government would be required to make in a hearing on Padilla's habeas petition, the court ruled that a minimal showing

18. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), *rev'd*, Padilla *ex rel.* Newman v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004).

19. *Id.* at 581–82.

20. *Id.* at 587.

21. *Id.* at 610.

22. Rumsfeld v. Padilla, 124 S. Ct. 2711, 2716 (2004).

23. *Padilla*, 233 F. Supp. 2d at 591.

24. *Id.* at 601.

would be sufficient. A showing of "some evidence" would suffice.[25] The district court rejected, however, the most extreme of the government's arguments, i.e., that courts could not even consider Padilla's habeas petition. Overall, the district court opinion was hardly a victory for civil liberties. The district court agreed with the government that President Bush had the authority to order Padilla's detention. Indeed, the district court made the extraordinary declaration that the assumption "that indefinite confinement of one not convicted of a crime is *per se* unconstitutional" was "simply wrong."[26]

The federal district court, per Judge Mukasey, stated that the central issue presented in the case was "whether the President has the authority to designate as an unlawful combatant an American citizen, captured on American soil, and to detain him without trial."[27] But, in fact, an analysis of Judge Mukasey's opinion discloses that the fact that Padilla, an "enemy combatant", was a U.S. citizen in fact conferred no more rights on him than if he had been a foreign national. Padilla's counsel and allied amici contended that "the Constitution forbids indefinite detention of a citizen captured on American soil so long as 'the Courts are open and their process unobstructed.'"[28] For the latter proposition Padilla relied on *Ex parte Milligan*.[29] This, of course, prompted the court to analyze and ultimately distinguish *Milligan* from the *Padilla* case.

Despite the efforts of Padilla's counsel to emphasize his status as an American citizen, Judge Mukasey gave no consideration to the constitutional status of citizenship itself. Nor apparently was it pressed by the litigants. Civil rights advocates often are not inclined to use citizenship as a civil rights tool since emphasis on the rights of citizens excludes by definition those who cannot claim that status. Yet those who take this stance forget that, in times of national insecurity and fear, any constitutional tool that requires government to respect the rule of law should not be forsaken. Citizenship is such a tool.

Judge Mukasey's discussion of the legality, indeed the constitutionality, of the indefinite detention of a citizen apprehended within the United States is primarily focused on whether Congress authorized such detention. Would the President, relying solely on his Commander in Chief authority, have the power to

25. *Id.* at 608.
26. *Id.* at 591.
27. *Id.* at 593.
28. *Id.* (quoting *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121 (1866)).
29. 71 U.S. (4 Wall.) 2 (1866).

detain an American citizen? Judge Mukasey points out that, in *Ex parte Quirin*,[30] the Court found it unnecessary to reach that point since Congress was deemed to have authorized trying the German saboteurs in that case by military commission.[31] In the *Padilla* case, the district court ruled that the detention of an unlawful enemy combatant such as Padilla was authorized both by the Authorization for Use of Military Force ("AUMF") Joint Resolution by the Congress[32] and by the President's constitutional authority as Commander in Chief.[33] The manner in which the court reaches this conclusion makes abundantly clear how little attention the court gave to the status of citizenship in determining the validity of his detention. The court said, "Here, the basis for the President's authority to order the detention of an unlawful combatant arises both from the terms of the Joint Resolution and from his constitutional authority as Commander in Chief."[34] Note that Padilla in this statement is referred to as an enemy combatant and his status as an American citizen is not mentioned in the entire sentence.

The Court of Appeals for the Second Circuit reversed.[35] Although the court of appeals agreed with the district court that there was jurisdiction, the court of appeals ruled that the President lacked both constitutional and statutory authority to detain Padilla.[36] The court of appeals strongly relied on the Non-Detention Act as creating a heavy presumption against the domestic detention of citizens by the military without specific and explicit congressional authorization.[37] The Non-Detention Act specifically provided: "No citizen shall be imprisoned or otherwise

30. 317 U.S. 1 (1942).

31. "The *Quirin* Court found it 'unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.'" Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 595 (S.D.N.Y. 2002) (quoting *Ex Parte* Quirin, 317 U.S. 1, 29 (1942)).

32. The Court stated, "[T]he Joint Resolution, passed by both houses of Congress, authorizes the President to use necessary and appropriate force in order, among other things, 'to prevent any future acts of international terrorism against the United States,' and thereby engages the President's full powers as Commander in Chief." *Id.* at 590 (quoting S.J. Res. 23m, 107th Cong., 115 Stat. 224 (2001)).

33. *Id.* at 596.

34. *Id.*

35. Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004).

36. *Id.*

37. *Id.* at 718–24.

detained by the United States except pursuant to an Act of Congress."[38] The court of appeals rejected the government's argument that the Authorization for Use of Military Force Joint Resolution constituted such explicit legislation.[39]

The Second Circuit granted the writ of habeas corpus sought by Padilla and ordered Secretary Rumsfeld to release him from military custody. In summary, the Second Circuit held that the U.S. President may not unilaterally arrest U.S. citizens on American soil and hold them in indefinite detention without prior authorization from Congress for such detention.[40]

The Supreme Court reversed the Second Circuit and ruled that the federal district court in New York where the habeas petition was filed had no jurisdiction over the matter.[41] Padilla should have filed his habeas petition in the district court in South Carolina rather than with the Federal District Court for the Southern District of New York. The Supreme Court, therefore, reversed the judgment of the court of appeals ordering Padilla's release and remanded the case for dismissal. Padilla, of course, was free to bring his habeas petition anew in the federal district court in South Carolina.

Justice Kennedy, joined by Justice O'Connor, concurred in the result in *Padilla,* but took a different view of the jurisdictional issue.[42] Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, dissented. The dissenters thought that the federal district court in New York had jurisdiction to review Padilla's habeas petition. More important for the purposes of this paper is what the dissenters said on the merits. On whether Padilla should be released, the dissenters thought there was room for differing opinions.[43] But on the issue of whether citizen Jose Padilla was entitled to a hearing, the dissenters expressed themselves with great force and clarity in the affirmative.[44] Another important

38. 18 U.S.C. § 4001(a) (2000).
39. Padilla v. Rumsfeld, 352 F.3d at 722.
40. *Id.* at 715.
41. Rumsfeld v. Padilla, 124 S. Ct. 2711, 2724–25 (2004).
42. *Id.* at 2727–29 (Kennedy, J., concurring).
43. *Id.* at 2735 (Stevens, J., dissenting).
44. The dissenting justices stated:

Whether respondent is entitled to immediate release is a question that reasonable jurists may answer in different ways. There is, however, only one possible answer to the question whether he is entitled to a hearing on the justification for his detention. At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive decision for the purpose of

feature of the Stevens dissent is that the governmental interest in securing information from citizen detainees was not justified by the use of unlawful procedures.[45]

In evaluating the *Padilla* case, it is of great importance to focus on what was perhaps the most controversial of the government's contentions. This was that *Padilla* was not entitled to judicial review—that the President's determination that a citizen was an enemy combatant and should be indefinitely detained without charges and without access to counsel was a matter in the sole discretion of the Executive. Regrettably, the opinion for the Court did not address this contention because it ruled that the trial court lacked jurisdiction to hear Padilla's habeas petition in the first place.

Interestingly, one of the leading conservative groups, the Cato Institute, declared its opposition to the government's contention that Padilla was not entitled to judicial review. The Cato Institute warned that the principles which are used to imprison the guilty may also be used to "seize the innocent."[46] Relying on *Ex parte Milligan*[47] for the principle that as long as the civilian courts are open they must be used, the Cato Institute rejected the idea that "the executive branch can serve as judge, jury and jailer in cases involving terrorist suspects."[48] The process Milligan was threatened with was arguably more respectful of due process than that used by the government in the enemy combatant cases. The issue was whether Milligan should be tried by a military or a civilian tribunal. By contrast, the government did not afford Padilla a hearing at all—military or civilian.

Because of its ruling that the federal district court in New York lacked jurisdiction, the Supreme Court avoided the eagerly awaited resolution of a fundamental constitutional question: Did the executive branch of government have the constitutional authority to detain an American citizen on United States territory for an indefinite period without charges or access to counsel because, in its unreviewable judgment, it had concluded that he should be designated an enemy combatant? In the case of Yaser Hamdi, the issue was presented once again.

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investigating and preventing subversive activity is the hallmark of the Star Chamber.

Id. (footnotes omitted).

45. *Id.* at 2735.

46. Gene Healy, Cato Institute, *Can the President Imprison Anyone, Forever?* (Apr. 28, 2004), *at* http://www.cato.org/dailys/04-28-04.html (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

47. 71 U.S. (4 Wall.) 2, 121 (1866).

48. Healy, *supra* note 46.

II. THE *HAMDI* CASE

Hamdi's father petitioned as Hamdi's next friend for a writ of habeas corpus. Pursuant to that writ, the Federal District Court for the Eastern District of Virginia appointed counsel for Hamdi and ordered the U.S. government to allow Hamdi's counsel unsupervised access to Hamdi. The court of appeals reversed this order and remanded the case back to the district court.[49] On remand, the same judge, Robert G. Doumar, Jr., issued a production order calling for the furnishing of additional material by the government regarding Hamdi's status as a detainee. The government successfully petitioned for interlocutory review. In *Hamdi v. Rumsfeld*, a Fourth Circuit panel, consisting of Chief Judge Wilkinson, and Judges Wilkins and Traxler, reversed the district court and decided a number of issues adverse to Hamdi.[50] Chief Judge Wilkinson wrote the panel decision. The panel ruled that Hamdi's American citizenship "entitled him to file a petition for writ of habeas corpus in a civilian court to challenge his detention, including the military's determination that he was an 'enemy combatant' who was subject to detention during ongoing hostilities."[51] Because Hamdi was an American citizen "currently detained on American soil," Hamdi should be granted a hearing in an Article III federal court so that he could rebut the factual basis for the government's designation of him as an "enemy combatant."[52] But what kind of hearing should he obtain? Should he get a full evidentiary hearing? In answering this question, the panel was quite clear. Hamdi was entitled only to the most minimal kind of hearing and the most perfunctory form of judicial review.[53]

What kind of showing would satisfy the government's obligation to justify Hamdi's detention? The panel ruled that an affidavit by an employee of the Department of Defense, Michael Mobbs, was sufficient to justify Hamdi's detention as authorized

49. Hamdi *ex rel.* Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2003).

50. 316 F.3d 450 (4th Cir. 2003).

51. *Id.* at 471.

52. *Id.* at 473.

53. *Id.* at 471–73 (stating that "[w]e have already emphasized that the standard of review of enemy combatant detentions must be a deferential one . . . . We hold that no evidentiary hearing is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because an inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch").

under the war powers possessed by the President of the United States.[54]

A. *Controversy in the Fourth Circuit*

A petition for rehearing was denied.[55] The opinions of the concurring and dissenting judges about the decision to deny the petition for rehearing reveal how controversial the panel's conclusion was. For one thing, the panel opinion promised Hamdi, an American citizen, more protection than a non-citizen would obtain in the circumstances. But the panel put great weight—indeed dispositive weight—on the point that it was "undisputed" that Hamdi was captured in an active combat operation zone.[56] This fact, and the supporting affidavit by Defense Department official, Matthew Mobbs, was deemed sufficient to justify Hamdi's

54. *Id.* at 476 (stating that "[t]o conclude, we hold that, despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration. Where, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in a zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention. Because these circumstances are present here, Hamdi is not entitled to habeas relief on this basis.").

55. Hamdi *ex rel.* Hamdi v. Rumsfeld, 337 F.3d 335, 340 (4th Cir. 2003).

56. It is illustrative that there was a continuing controversy throughout the *Hamdi* litigation about the nature of Hamdi's presence in Afghanistan when he was seized there by members of the Alliance. As far as the courts were informed, the government's understanding of that presence and its justification for seizing Hamdi is found entirely in the declaration by Michael Mobbs, Special Advisor to the Under Secretary of Defense. The government filed the Mobbs declaration with the district court in support of its motion to dismiss Hamdi's habeas corpus petition. The declaration was summarized by Justice O'Connor:

> The declaration states that Hamdi "traveled to Afghanistan" in July or August 2001, and that he thereafter "affiliated with a Taliban military unit and received weapons training." It asserts that Hamdi "remained with his unit following the attacks of September 11" and that during the time when Northern Alliance forces were "engaged in a battle with the Taliban," "Hamdi's Taliban surrendered" to those forces, after which he "surrender[ed] his Kalishnikov assault rifle" to them.

Rumsfeld, 124 S. Ct. at 2637.

Justice Scalia summarized an opposite portrayal of the facts in his summary of Hamdi's father's next friend habeas petition:

> Petitioner (Hamdi), a presumed American citizen, has been imprisoned without charge or hearing in the Norfolk and Charleston Naval Briggs for more than two years, on the allegation that he is an enemy combatant who bore arms against his country for the Taliban. His father claims to the contrary, that he is an inexperienced aid worker caught in the wrong place at the wrong time.

Id. at 2660.

detention as an enemy combatant even though he was an American citizen.

Hamdi contended that because he was an American citizen he had a right to meet with counsel appointed to represent him to contest the facts which led to his designation by the military as an enemy combatant.[57] The panel decision rejected this contention. The panel ruled instead that when an American citizen is captured "in an enemy country where the U.S. is engaged in active hostilities, we will require no more legal justification than what the government voluntarily provided to us in this case."[58] Fourth Circuit Judges Motz and Luttig charged that the panel, and the judges on the Fourth Circuit who voted to deny the petition for rehearing, had acquiesced in a process which led to depriving American citizens of their constitutional rights.[59]

Judge Luttig dissented from the decision to deny rehearing en banc. He had two objections to the panel decision. First, Hamdi was not allowed to challenge the facts supporting his designation as an enemy combatant by the Executive under any standard of review.[60] The panel refused even to adopt the minimal "some evidence" standard offered by the government.[61] Second, the panel refused to rule that the judiciary lacked authority to review the President's designation of an "individual as an enemy combatant."[62] Instead, the panel rested its entire decision on the point that "Hamdi conceded that he was seized in a foreign combat zone."[63]

The panel decision promised a citizen charged with being an enemy combatant the opportunity for "meaningful judicial review."[64] The panel asserted the "sweeping proposition" that an American citizen could not be detained indefinitely without being charged or being given access to counsel simply on the basis of a government assertion that the citizen was an enemy combatant.[65] Yet, Judge Luttig observed, the judicial review actually afforded a citizen by the panel decision "entailed absolutely no judicial inquiry into the facts on the basis of which the government designated that citizen as an enemy combatant."[66]

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57. *Hamdi*, 337 F.3d at 349.
58. *Id.*
59. *Id.* at 351.
60. *Id.* at 358 (Luttig, J., dissenting).
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* (quoting Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002)).
65. *Id.* at 358 (citing *Hamdi*, 296 F.3d at 283).
66. *Id.* at 358.

Paradoxically, it does not seem that Judge Luttig himself was really concerned with affording a citizen designated an enemy combatant meaningful judicial review. For example, he says the panel made a promise to the Executive "that the Judiciary would not sit in full review of his judgments as to who is an enemy combatant . . . ."[67] But, in fact, the panel "adopted a rule that will henceforth do just that, cast the Judiciary as ultimate arbiter, in each and every instance, of whether the Executive has properly so classified a detainee."[68] Judge Luttig makes it very clear that he would subject government designations of enemy combatant status to only the most minimal kind of judicial review.[69]

The foregoing is hardly the end of Judge Luttig's critique. The panel decision, he says, is based on the theory that it was "undisputed" that Hamdi was "seized in a foreign combat zone."[70] But Judge Luttig says it was *not* undisputed.[71] Nor was Judge Luttig alone in this view. Judge Traxler, concurring in the denial of the petition for rehearing, also took this view.[72] Judge Traxler quotes from Luttig's concurrence as follows: "Judge Luttig correctly observes that the habeas petition does not *explicitly* state that 'Hamdi was captured in zone of active combat in a foreign theater of conflict.'"[73]

For Judge Luttig, the panel decision was analytically too weak to establish the principle that he wanted the Fourth Circuit to endorse: only the most minimal judicial review of a government (military) assertion of enemy combatant status on the part of a citizen is necessary. Similarly, the government contended that for detention to be justified all that was required was "some" factual basis for the assertion that a citizen is an enemy combatant. This standard is deferential in the extreme. Of course, this most deferential standard of review could be used to call the government to account.

Judge Diane Motz also dissented from the denial of rehearing en banc; she believed that Hamdi had been denied the meaningful judicial review to which an American citizen is entitled. Judge Motz charged in her dissent that the government failed to meet even a minimal standard of review.[74] The panel decision was the first time that a federal court had approved the

67. *Id.* at 359.
68. *Id.*
69. *Id.* at 367–68.
70. *Id.* at 360.
71. *Id.* at 361. Judge Luttig provides a detailed account on this point.
72. *Id.* at 364.
73. *Id.* at 345–46.
74. Judge Motz said:

forfeiture of a citizen's constitutional rights simply on the basis of an executive designation of the citizen as an enemy combatant with no opportunity to contest the accuracy of the designation.[75] Can a citizen designated an enemy combatant by the government ever be denied his constitutional rights? This was Judge Motz's response: "The rights provided in the Constitution to each American citizen include the right to due process of law and to petition for a writ of habeas corpus. Unquestionably, the availability of habeas relief extends to detention pursuant to the Executive's military authority."[76]

> [A] panel of this court has held that a short hearsay declaration by Mr. Michael Mobbs—an unelected, otherwise unknown, government 'advisor,' —'standing alone' (subject to no challenge by Hamdi or court-ordered verification) is 'sufficient as a matter of law to allow meaningful judicial review' and approval of the Executive's designation of Hamdi as an enemy combatant. I cannot agree.

Id. at 368 (citation omitted) (Motz, J., dissenting).

75. *Id.* at 369.

76. *Id.* (citations omitted). For the proposition quoted in this excerpt, Judge Motz relies on *Ex parte Milligan*, 71 U.S. 2, 120–21 (1866), and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). *Ex parte Milligan* certainly supports the contention that citizens are entitled to due process to avail themselves of the petition for habeas corpus in order to assure that process. But *Duncan v. Kahanamoku* nowhere refers to citizens but instead refers throughout to "individuals," which presumably include both citizens and non-citizens. Similarly, Judge Motz believes that the branch of government responsible for assuring due process including the right to petition for habeas corpus relief is the Judiciary. The government, however, contended that judicial review should not be available. The case cited by the government for this proposition was *In re Yamashita*, 327 U.S. 1 (1946). That case involved Japanese generals who had led Japanese troops in the Pacific during World War II and were tried by a U.S. military commission in the Philippines. The issue in the case was whether the commission's procedures and rulings were subject to review by the U.S. courts. The Supreme Court ruled that the Japanese generals were not entitled to judicial review. But Yamashita was hardly a citizen; he was a Japanese general and an enemy one at that. Judge Motz relied on *Sterling v. Constantin*, 287 U.S. 378 (1932), for the proposition that the issue of whether the government has exceeded its discretion is a judicial question. But the facts of *Sterling* did not involve either the President or the U.S. military. *Sterling* held that military and executive orders issued by the Governor of Texas and generals in the Texas National Guard to restrict or regulate the production of oil owned by private owners were subject to federal judicial review. No mention was made in that case as to whether the private owners were citizens; nor, of course, was there any issue as to whether they were "enemy combatants."

Neither *Yamashita* nor *Sterling* is exactly apposite for the propositions for which they were asserted in the Fourth Circuit in the *Hamdi* case. Some of the language in *Sterling* does seem to support Judge Motz's position that Hamdi should obtain judicial review. For example, the Court in *Sterling*, per Chief Justice Hughes, criticized the Governor of Texas for his actions: "In the place of judicial procedure, available in the courts which were open and functioning, he set up his executive commands which brooked neither delay nor appeal." 287

The panel professed to accept the principle that detention of American citizens had to be subject to judicial review.[77] Yet the panel then proceeded to deprive that principle of any meaning. The Executive cannot designate a citizen an enemy combatant thereby depriving him of rights he would otherwise have without giving that citizen the right to challenge the enemy combatant designation in court. Moreover, the court must require the Executive to "substantiate" that designation.[78] It is in this latter respect that Judge Motz most faults the panel decision. Judge Motz contends that *Ex parte Quirin*,[79] where during wartime an American citizen was held without granting him judicial review, was not to the contrary.[80] In *Quirin*, "the citizen, after consultation with legal counsel, stipulated to the facts supporting the enemy combat designation."[81] Indeed, even when dealing with enemy combatants who are not citizens, the Supreme Court has declined to rule that an enemy combatant cannot challenge that designation in court. In such situations the courts are open for the designated enemy combatant to challenge whether a state of war exists and whether in fact the designated enemy combatant is, in fact, an alien enemy.[82]

Judge Traxler was one of the judges on the Fourth Circuit panel in *Hamdi*. Concurring in the decision to deny a petition for rehearing en banc, he was particularly stung by the charge of Judge Motz and Judge Luttig that the panel in evaluating the Mobbs declaration gave too much weight to the fact that Hamdi was seized in a foreign combat zone.

Judge Traxler, citing to *Juragua Iron Co. v. United States*,[83] said that in war time "all persons residing in an enemy country during hostilities are deemed to be enemies, regardless of nationality."[84] Both Judges Motz and Luttig, representing both the left and the right on the Fourth Circuit, complained about the breadth and essential unworkability of this principle. Any embedded journalist or, indeed, any American citizen caught in

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U.S. at 402. Chief Justice Hughes commented in *Sterling* that "[t]here is no ground for the conclusion that military orders in the case of insurrection have any higher sanction or confer any greater immunity." *Id.* at 401. Arguably, that comment has some relevance to whether citizens detained as enemy combatants have a right to obtain judicial review to challenge that designation.

77. *Hamdi*, 337 F.3d at 369.
78. *Id.*
79. 317 U.S. 1 (1942).
80. *Hamdi*, 337 F.3d at 369–70 (Motz, J., dissenting).
81. *Id.* at 370.
82. *Id.* at 370; *see* Johnson v. Eisentrager, 339 U.S. 763, 770 (1950).
83. 212 U.S. 297, 305–06 (1909).
84. *Hamdi*, 337 F.3d at 351.

a zone where the U.S. military was engaged in active combat would, under this view, be subject to indefinite detention without access to counsel or the courts. American citizens could be detained in Yugoslavia, the Philippines, or Korea just by the assertion of a military proclamation that the area was a "zone of active combat."[85]

B. *The Fourth Circuit Opinions in* Hamdi*: A Summary*

If one analyzes the long argumentative and contentious opinions of the Fourth Circuit judges in the *Hamdi* case, two principles emerge. First, the American citizenship of an enemy combatant entitled him to judicial review. Second, the judicial review afforded should be meaningful judicial review. There was a real split on the Fourth Circuit, however, about what meaningful judicial review really meant. For the panel whose decision the Fourth Circuit refused to rehear, the judicial review owed Hamdi was minimal indeed. The simple declaration of a Defense Department official relying on hearsay information to the effect that Hamdi was an enemy combatant was deemed sufficient to constitute meaningful judicial review. The panel contended that its position was justified because Hamdi's enemy combatant status was undisputed. Others on the court disputed Hamdi's "undisputed" enemy combatant status. Still others thought the citizen enemy combatant had a right to challenge that designation in court and that the denial of that right violated due process. The case proceeded to the Supreme Court, which found that the judicial review approved by the Fourth Circuit was inadequate. The Supreme Court, therefore, vacated the judgment of the Fourth Circuit and remanded the case for further proceedings.

III. THE *HAMDI* CASE IN THE SUPREME COURT

The enemy combatant cases of 2004 are reminiscent of the various opinions in the *Steel Seizure Case*[86]—in that case, as in

85. *Id.* at 352. Judge Traxler's response to this criticism was that the panel decision did not speak to the situation in any of those countries but just to the President's Article II powers with respect to Afghanistan. Furthermore, American journalists and tourists who, without the approval of our military, venture into a country with whom we are at war or who fail to return to this country in time of war, necessarily expose themselves to risks including detention. Judge Traxler contended that the circumstances of armed conflict against a foreign government in a foreign land required "the deference we have shown the Executive in the making of military decisions." *Id.*

86. Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579 (1952).

Hamdi, claims of necessity and security had to be balanced against claims of liberty and freedom. Those for whom national security and executive flexibility in the service of national security are the most important values for the nation can find language supporting those views in the *Steel Seizure Case* opinion. Similarly, those who believe that the guarantees of liberty in the Constitution must be adhered to, particularly when those who would limit it do so without specific constitutional textual support justifying such limitation, also find support in the *Steel Seizure Case* opinions. In the future, the opinions in the enemy combatant cases of 2004 will also be conscripted to support the competing claims of security and liberty.

When the Supreme Court's decision in *Hamdi*[87] was announced, civil liberties organizations rejoiced.[88] After all, the Supreme Court had not accepted the most extreme of the government's arguments that once the executive branch determined that a citizen was an "enemy combatant," he could be detained indefinitely, without judicial review and without congressional authorization. However, the Court did not reject this argument either. There was no need to rule on the issue, the Court declared, since Congress had, in fact, authorized detention of citizen enemy combatants.[89] The executive branch, not surprisingly, viewed the case as a victory. United States Justice Department spokesman Mark Corallo emphasized that the Supreme Court had in fact upheld the authority of the President to detain enemy combatants including U.S. citizens. Corallo said, "This authority is crucial in times of war whether the enemy combatants are individuals who join our enemies on the battlefield to fight against America and its allies, or whether they are individuals who infiltrate our border to commit hostile and warlike acts against our nation."[90]

Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Kennedy and Breyer, delivered the plurality opinion for the Court. Justice O'Connor declared that the threshold issue was whether the Executive could detain American citizens who it

87. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

88. Illustrative is the comment of Stephen R. Shapiro, National Director of the American Civil Liberties Union: "Today's historic rulings are a strong repudiation of the administration's argument that its actions in the war on terrorism are beyond the rule of law and unreviewable by American courts . . . ." *A Mixed Verdict on the Terror War*, CNN, July 6, 2004, *at* http://www.cnn.com/2004/LAW/06/28/scotus.terrorcases.reaction/ (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

89. *Hamdi*, 124 S. Ct. at 2639.

90. Charles Lane, *Court Says Detainees Have Right to Hearing*, WASH. POST, June 29, 2004, at A10.

designated "enemy combatants."[91] For purposes of ruling on that issue in the case, the Court used the government definition of the term "enemy combatants." These were individuals who were either part of, or in support of, forces hostile to the United States and its coalition partners in Afghanistan and who were "engaged in an armed conflict against the United States there."[92] The Court would, therefore, address only a narrow question: Was the detention of American citizens who fell within that definition authorized? Justice O'Connor declared that Congress had, in fact, authorized the detention of Yaser Hamdi through the Authorization for Use of Military Force ("AUMF").[93] Hamdi's counsel argued, to the contrary, that Congress, instead of authorizing his detention, had, in fact, expressly forbade it by embracing 18 U.S.C. § 4001(a) which provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." This legislation had been enacted to prevent any repeat of the Japanese internment camp experience in World War II. The government, however, had an interpretation of that statute which would clearly undermine the purpose attributed to it by Justice O'Connor. The government said that the statute applied only to civilian prisoners and not to military detainees. The Court, however, again said it need not rule on this contention since, in the AUMF, Congress provided the authorization demanded by Congress in § 4001(a). The AUMF authorized the President to use "all necessary and appropriate force" against nations, organizations, or individuals associated with the September 11, 2001, terrorist attacks on the United States.[94] In short, those "who fought against the United States in Afghanistan as a part of the Taliban" were individuals Congress intended to target by enacting AUMF.[95] The plurality viewed the AUMF as a declaration of war against the Taliban. Accordingly, the capture and detention of lawful and unlawful combatants were simply incidents of war.[96] In light of this wartime context, it was not deemed significant that the AUMF did not specifically authorize detention.[97]

Did Hamdi's status as a citizen of the United States limit the government's power to detain him? Justice O'Connor, relying on *Quirin*, stated: "There is no bar to this Nation holding one of

91. *Hamdi*, 124 S. Ct. at 2639.
92. *Id.*
93. *Id.*
94. *Id.* at 2640.
95. *Id.*
96. *Id.*
97. *Id.* at 2641.

its own citizens as an enemy combatant."[98] There was no point in drawing a line between citizen and alien enemy combatants. Nothing in *Quirin* suggested that the alleged U.S. citizenship of Haupt, one of the German saboteurs apprehended in that case, "would have precluded his mere detention for the duration of the relevant hostilities."[99] When apprehended on a foreign battlefield, enemy combatants, whether aliens or citizens, are treated as fungible: "A citizen, no less than an alien, can be 'part of our supporting forces hostile to the United States or coalition partners' and 'engaged in armed conflict against the United States'. . . ; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict."[100]

In *Ex parte Milligan*, the Supreme Court famously ruled that American citizens could not be tried by a military tribunal when the civilian courts were open. However, in *Hamdi*, Justice O'Connor declared, arguably contrary to *Milligan*, that "[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."[101] Justice O'Connor then continued, "In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved."[102] In short, Justice O'Connor declared that either a court or a "military tribunal," operating under the standards that the plurality deemed essential, could determine whether Hamdi was properly designated an enemy combatant.[103] These latter propositions, it should be emphasized, did not command the support of five justices. Only the plurality Justices—Justice O'Connor, the Chief Justice and Justices Kennedy and Breyer—supported this point. Justice Souter, joined by Justice Ginsburg, concurred, but he did not support the view that the procedures the plurality set forth could be used by military tribunals as well as courts.

Does *Hamdi* undermine or limit *Milligan*? O'Connor insists that they are quite different cases. The central fact of *Milligan* was that "Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there."[104] Justice O'Connor then applied the *Hamdi* facts to a hypothetical *Milligan* scenario:

98. *Id.* at 2640.
99. *Id.*
100. *Id.* at 2640–41.
101. *Id.* at 2651 (citation omitted).
102. *Id.*
103. *Id.* at 2642.
104. *Id.*

> Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.[105]

Moreover, Justice O'Connor said *Quirin* makes it clear that the *Milligan* principle that an American citizen cannot be tried by a military tribunal while the civilian courts are open does not apply to an "American citizen accused of spying against his country during wartime . . . ."[106] But the central precept of *Milligan* is still a vital one for the substantive issue presented, but not decided, in the *Padilla* case: an American citizen who is not a prisoner of war should be tried by a civil court and not by a military tribunal. The difference between the *Padilla* facts and the *Hamdi* facts is critical. As far as *Padilla*-type facts are concerned, the *Milligan* principle has not been altered by *Quirin.* This analysis is supported by Justice O'Connor's comment in *Hamdi* that "Justice Scalia largely ignores the context of this case: A United States citizen captured in a *foreign* combat zone."[107] In short, it can be argued that the substantive issue, which was not decided in *Padilla,* was indirectly passed on by the plurality in *Hamdi.* When Jose Padilla was arrested, he, unlike Yaser Hamdi, was a civilian, not a prisoner of war. Furthermore, he was not arrested in a foreign combat zone, but in O'Hare International Airport in Chicago, Illinois.

The next question with which the plurality dealt was this: What constitutional process is due a citizen who disputes his enemy combatant status?[108] In answering this question the plurality rejected the government's argument, accepted by the Fourth Circuit below, that Hamdi's status as an enemy combatant was "undisputed."[109] The government's next argument was that individual judicial determinations of a citizen's enemy combatant status were incompatible with the institutional capacities of courts and belonged instead within the sphere of military decision-making. The plurality rejected this contention altogether, holding that the citizen enemy combatant was owed some pro-

105. *Id.*
106. *Id.*
107. *Id.* at 2643.
108. *Id.*
109. *Id.* at 2644.

cess more demanding than that involved in simply presenting to the court a declaration by a Defense Department official that the citizen in question was, in fact, an enemy combatant.[110]

But the plurality also rejected Hamdi's contention that he was entitled to a procedure that would be accompanied by the procedures commonly associated with a criminal trial. The Court instead sought a procedure that would be consistent with due process and yet would meet to some extent the competing interests of government and the individual citizen detainee. The Court fell back on a due process test which originated in the context of the denial of Social Security disability benefits. In *Mathews v. Eldridge*,[111] the Court set forth the following three-part test which indicated the factors that were relevant in determining an appropriate procedure:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[112]

Applying the foregoing factors in *Mathews*, Justice O'Connor described the process to which a citizen designated an enemy combatant is due: "We therefore hold 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 decision-maker."[113] However, this summary of the minimum due process procedure to which the citizen-detainee is entitled is, in fact, even more minimal than might appear at first blush. Hearsay evidence may be used in the procedure described above.[114] Furthermore, the proceeding can operate with a presumption in favor of the government's evidence.[115] The burden is then, of course, on the citizen-detainee to rebut that evidence.

Is the *Mathews* test, as adapted for citizen detainees challenging their enemy combatant status, suited for the due process task

110. *Id.* at 2650–51.
111. 424 U.S. 319 (1976).
112. *Id.* at 335.
113. *Hamdi*, 124 S. Ct. at 2648.
114. *Id.* at 2649.
115. *Id.*

which the plurality has set for it? Ardent civil libertarians may argue that a procedure designed for administrative proceedings involving disability benefits is insufficiently protective where what is involved is the indefinite detention—the deprivation of liberty—of a citizen. However, it is certainly a procedure superior to the one advanced by the government, but rejected by the plurality, where only the broad detention scheme, with no opportunity for individual consideration of the challenges by individual citizens to their status as enemy combatants, would have been submitted for judicial review.

A. *The Significance of the Souter and Ginsberg Opinions*

Justice Souter, joined by Justice Ginsburg, filed a concurrence in part and dissent in part. Their opinion is critical if one wishes, as I do, to develop a holding from the opinions in *Hamdi* as to the procedure to which a citizen detained on American soil is entitled if he wishes to challenge his status as an enemy combatant. Justice Souter did not believe that the AUMF constitutes a sufficiently explicit exception to the Non-Detention Act. Therefore, since Congress had not authorized the detention of citizen Hamdi, the Non-Detention Act was violated and the government had no legal authority to detain him. Under this analysis, Hamdi's writ of habeas corpus should be granted and he should be released.

Eight members of the Court in fact rejected the government's position in the *Hamdi* case. In those circumstances, Justice Souter declared there was a need to give practical effect to that rejection. Although declining to reach the constitutional questions raised by Hamdi's detention, Justice Souter stated "that someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decision maker . . . ."[116] Although Justice Souter does not indicate the source of this procedure, it is certainly not statutory, because no statute requires it. The source for this procedure, therefore, has to be the Due Process Clause. However, Justice Souter rejected the pro-government procedures which Justice O'Connor added to those essentials such as a presumption in favor of the government's evidence or a resultant shifting of the evidentiary burden to the citizen-detainee. Nor did Justice Souter accept the idea "that an opportunity to litigate before a military tribunal might

116. *Id.* at 2660 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

obviate or truncate enquiry by a court on habeas."[117] Justice Souter did agree with the plurality that Hamdi should have the right to counsel in the proceeding on remand.

In summary, there are six justices in *Hamdi* who conclude that due process requires that a citizen-detainee challenging his designation as an enemy combatant is entitled to certain due process essentials. These include notice of the factual claim against the citizen-detainee that he is an enemy combatant and a fair opportunity, presumably in a hearing, to contest the government's assertions before a neutral arbiter or decision-maker.

B. *The Scalia and Stevens Dissent in* Hamdi

Justice Scalia, joined by Justice Stevens, dissented. Scalia believed the government's indefinite detention of Hamdi violated the Due Process Clause of the Fifth Amendment:

> The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. When a *citizen* was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed by indictment and trial.[118]

Citizenship for Justices Scalia and Stevens is a term signifying a status from which constitutional rights flow. Justice Scalia, as is evident from the above, shares the view of Justices Souter and Ginsburg that citizens have to be tried by the civil courts. Justice Scalia made it clear that, under the constitutional scheme in cases of illegal detention, due process rights are secured and protected by another constitutional right, the right to habeas corpus. Justice Scalia observed that the importance of the writ of habeas corpus is signified by the fact that it is the only common law writ actually preserved in the Constitution.[119] In light of this, Justice Scalia asked "whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoing *by aiding the enemy in wartime.*"[120] For Justice Scalia the answer to this question is dependent on whether those aiding the enemy are citizens or aliens. Justice O'Connor contends that captured enemy combatants, citizens or not, have traditionally been

117. *Id.*

118. *Id.* at 2661 (Scalia, J., dissenting).

119. Justice Scalia states that "the writ of habeas corpus was preserved in the Constitution—the only common law writ to be explicitly mentioned." *Id.* at 2662. *See* U.S. CONST. art. I, § 9, cl. 2.

120. *Hamdi*, 124 S. Ct. at 2663.

detained until hostilities have ceased.[121] However, Justice Scalia found the situation with respect to those who are American citizens to be quite different, stating, "Citizens aiding the enemy have been treated as traitors subject to the criminal process."[122]

Justice Scalia asserted that, for the government constitutionally to detain Hamdi, suspension of the writ of habeas corpus is the constitutionally provided alternative. The unconstitutionality of the government's position is based in part on its failure to use this alternative. One could argue that the Executive did in fact suspend the writ of habeas corpus. If indefinite detention of an American citizen during wartime without charges and without access to counsel can be accomplished through a suspension of the writ of habeas corpus, it is arguable that President Bush *de facto* suspended the writ of habeas corpus. This *de facto* suspension, however, was still unconstitutional because it is for Congress to suspend the writ and not the President. The courts could have ruled that President Bush's action *vis-à-vis* Hamdi constituted a *de facto* suspension of the writ and was unconstitutional because the writ can only be suspended by Congress.

Justice Scalia stated that where American citizens have been charged with warring against their country, either the writ of habeas corpus has been suspended or they have been committed to trial for criminal prosecution. But then he queried whether it was "theoretically possible that the Constitution does not *require* a choice between these alternatives."[123] He answers this question in the negative.[124]

Justice Scalia stated that "[w]hen the writ is suspended, the Government is entirely free from judicial oversight."[125] As far as individual citizen-detainees were concerned, this was not exactly the government's position in *Hamdi.* The government argued that it needed only to make a showing of "some evidence" to meet the minimal standard of review owed to detainees charged with being enemy combatants.[126] Justice Scalia pointed out that the Suspension Clause was only rarely to be used. The Framers were clearly reluctant to give the military the kind of enduring power which is implicit in "indefinite wartime detention authority."[127] Focusing on the Constitutional text, he notes that although the Framers gave Congress power to "raise and support

121. *Id.*
122. *Id.*
123. *Id.* at 2666.
124. *See id.* at 2666–69.
125. *Id.* at 2665–66.
126. *Id.* at 2645.
127. *Id.* at 2668.

armies," they also limited such power, providing that "no Appropriation of Money" to be used for standing armies "Shall be for a longer Term than two Years."[128]

Justice Scalia attacked the government's argument that *Ex parte Quirin* had modified or altered the principle of *Ex parte Milligan*, which stated that as long as the civil courts were open, citizens must be tried there rather than before military tribunals. The government relied on *Quirin* as precedent authorizing the "indefinite imprisonment of a citizen within the territorial jurisdiction of federal courts."[129] Haupt, a U.S. citizen, and one of the captured German saboteur defendants in *Quirin*, presented a very different case than that presented by newspaper editor Edward Milligan. Justice Scalia contended that the *Quirin* Court itself distinguished that case from the facts of *Milligan*. Edward Milligan was not "'a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war . . . .'"[130] In *Quirin*, Justice Scalia pointed out, the petitioners conceded their belligerent status; here, that was not the case. Therefore, *Milligan*, not *Quirin*, was the relevant precedent: "But where those jurisdictional facts are *not* conceded—where the petitioner insists that he is *not* a belligerent—*Quirin* left the preexisting law in place . . . ."[131]

Constitutionally, Justice Scalia declared, the government only had two courses of action open to it with respect to a citizen such as Hamdi. Hamdi must either (1) be charged with treason and tried in the federal courts for that offense, or (2) if the government wanted to detain him without charges, counsel or trial, the writ of habeas corpus must be suspended.[132] Nor did the Authorization for Use of Military Forces ("AUMF"),[133] as claimed by the government, justify Hamdi's detention, as AUMF does not remotely constitute a "congressional suspension of the writ [of habeas corpus]."[134] Indeed, no one contended that it did. Scalia's position was that no congressional legislation, whether it be 18 U.S.C. § 4001(a) or the AUMF, could authorize detention of American citizens consistently with the Suspension Clause:

128. *Id.* at 2668 (quoting U.S. CONST. art. I, § 9, cl. 12).

129. *Id.* at 2669.

130. *Id.* (quoting *Ex parte* Quirin, 317 U.S. 1, 45 (1942)).

131. *Id.* at 2670.

132. *Id.* at 2671.

133. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Moreover, the statute lacked the statutory clarity demanded by *Ex parte* Mitsuye Endo, 323 U.S. 283 (1944) and Duncan v. Kahanamoku, 327 U.S. 304, 314–16 (1946).

134. *Hamdi*, 124 S. Ct. at 2671.

"[I]f [the Suspension Clause] merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed."[135]

Justice Scalia insisted that "[c]itizens and non-citizens, even if equally dangerous, are not similarly situated."[136] Justice Scalia made it very clear that the principles set forth in his dissent "apply only to citizens," and then only to a specific class of citizens—those citizens "who are detained within the territorial jurisdiction of a federal court."[137] But "[w]here the citizen is captured outside and held outside the United States, the constitutional requirements may be different."[138]

If it is contended that national security and the need to secure intelligence through interrogation will be defeated by Scalia's reading of the Constitution, his remedy is simple. The Constitution provides a remedy for extraordinary circumstances: "If the situation demands it, the Executive can ask Congress to authorize suspension of the writ [of habeas corpus]—which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today."[139] Justice Scalia emphasized the textual requirements of the Suspension Clause.[140] Suspension of the writ is permissible only in case of "Rebellion or Invasion."[141] Was September 11, 2001 an "Invasion?" Even if it was, could suspension, even if Congress authorized it, still be justified three years after that event? As has been said of other cases involving the extent of executive power,[142] Justice Scalia observed that the Court's rejection in *Hamdi* of the Executive's position does not enhance the power of Congress but instead, as usual, further aggrandizes the power of the courts. Although acknowledging this trend, Scalia wants no part of it. Issues concerning the definition of an "Invasion" and the duration for which Congress can justify a "Suspension of the Writ" are "questions for Congress, rather than for this Court."[143] Under this view, once Congress had resolved these issues, they would not be subject to judicial review.

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135. *Id.* at 2672.
136. *Id.* at 2671 n.5.
137. *Id.* at 2673.
138. *Id.*
139. *Id.* at 2673–74.
140. *Id.* at 2674.
141. U.S. CONST., art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").
142. United States v. Nixon, 418 U.S. 683 (1974).
143. *Hamdi*, 124 S. Ct. at 2674.

In *Morrison v. Olsen*,[144] Justice Scalia, in a lonely dissent, contended that the special prosecutor law with its encroachment on executive power was an impermissible infringement on executive power.[145] The consequence of that infringement, he prophesied, would lead to harassment of the Executive by Congress in a manner unwarranted by the specific remedies afforded in the Constitution for abuse of executive power—impeachment and the ballot box.[146] He thought that the likelihood of such abuse was particularly great when Congress was in the control of one party and the Executive in the control of the other.[147] Events proved him correct: the special prosecutor law was repealed and there has been no sentiment for its resurrection. In the past, Justice Scalia's insistence on formalism has, in the end, resulted in an insistence also on due process, fairness, and the rule of law. Perhaps his dissent in *Hamdi* will eventually yield a similar result.

C. *The Thomas Dissent*

Since the focus of this paper is on the significance of citizenship in the enemy combatant cases, I will not linger long on the dissent of Justice Thomas. His position is clear: in this context, citizenship has no particular significance. In contrast to Justice Scalia's dissent in *Hamdi*, Justice Thomas's dissent does not focus on the rights of citizens at all. Citizens and aliens may be treated fungibly in wartime by an Executive which, Thomas believes, has ultimate authority under the Constitution to decide who is an enemy combatant.[148] Justice Thomas, whose dissent would give much greater authority to the Executive than the plurality did, "acknowledge[d] that the question whether Hamdi's executive detention is lawful is a question properly resolved by the Judicial Branch, though the question comes to the Court with the strongest presumptions in favor of the Government."[149] Whether Hamdi's status as an enemy combatant could be determined by a military tribunal operating under the standards set forth by the plurality as well as by a court is a point on which Justice Thomas does not rule. However, Justice Thomas found that the process which constitutionally is due to someone in Hamdi's situation is minimal to say the least. To put it another way, for Justice Thomas, Hamdi's status as a citizen appears to offer him no

144. 487 U.S. 654 (1988).
145. *Id.* at 706.
146. *Id.* at 711.
147. *Id.* at 712–13.
148. *Hamdi*, 124 S. Ct. at 2678.
149. *Id.*

greater measure of constitutional protection. But Thomas pointed out, perhaps inadvertently, that, in his view, Scalia's position is in fact not as protective of the constitutional rights of citizens or, of anyone else:

> I do not see how suspension would make constitutional otherwise unconstitutional detentions ordered by the President. It simply removes a remedy. Justice Scalia's position might therefore require one or both of the political branches to act unconstitutionally in order to protect the Nation. But the power to protect the Nation must be the power to do so lawfully.[150]

The fundamental point is that, in his dissent, Justice Thomas never gives any importance to the fact, so pivotal for Scalia, that Hamdi is a United States citizen.

IV. *RASUL V. BUSH*: ALIEN DETAINEES AT GUANTANAMO BAY

This paper is concerned with citizenship as a limitation on the government's power to detain citizens by designating them as enemy combatants. The situation of the alien detainees at Guantanamo Bay does not directly touch on this issue, but *Rasul v. Bush*[151] merits some attention since it, in contrast with *Hamdi*, highlights the theme of this paper—that an individual's citizenship matters.

In *Rasul*, two Australian citizens and twelve Kuwaiti citizens, captured in Afghanistan during hostilities between the U.S. and the Taliban in the aftermath of the attacks by al Qaeda on the World Trade Center on September 11, 2001, challenged their indefinite detention at the Guantanamo Bay United States Naval Base in Guantanamo Bay, Cuba. These alien detainees were held in Guantanamo Bay without any statement of the charges against them, and without access to counsel. They brought suit in the United States District Court for the District of Columbia, which construed all the actions as petitions for writs of habeas corpus and dismissed them for lack of jurisdiction[152] based on the authority of *Johnson v. Eisentrager*, which held that aliens detained outside the U.S. were not entitled to obtain habeas corpus relief.[153] The court of appeals affirmed.[154] However, the Supreme Court per Justice Stevens ruled, in a 6-3 decision, that

150. *Id.* at 2683.

151. 215 F. Supp. 2d 55 (D.D.C. 2002).

152. *Id.* at 57.

153. *Id.* at 65 (discussing Johnson v. Eisentrager, 339 U.S. 763 (1950)).

154. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.* Rasul v. Bush, 124 S. Ct. 2686 (2004).

the federal courts had jurisdiction to hear habeas petitions from hundreds of non-citizens held at the United States Naval Base at Guantanamo Bay.[155] The Court rejected the government's position that under *Eisentrager* the alien detainees at Guantanamo Bay were not entitled to habeas corpus relief.[156]

What were the habeas rights under the United States Constitution of enemy aliens detained at the Naval Base at Guantanamo Bay, given that Guantanamo Bay was under the jurisdiction of the United States? Stevens pointed out that the government itself had conceded that the federal courts would have jurisdiction over the claims of an American citizen detained at Guantanamo Bay and concluded that the enemy aliens detained at the Naval Base should not be treated any differently than U.S. citizens:

> Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American

155. Rasul v. Bush, 124 S. Ct. 2686 (2004).

156. *Eisentrager* was held not relevant to the disposition of the Guantanamo Bay case for a number of reasons. The complainant German enemy aliens in *Eisentrager* were not entitled to claim protection under the Constitution. These enemy aliens seeking habeas relief had never resided in the U.S., were captured outside the territory of the U.S., and were imprisoned at all times outside the United States. In addition, the enemy aliens in *Eisentrager* had been tried and convicted by U.S. military commissions outside the United States for offenses against the laws of war.

Without responding directly to the question of whether the habeas statute could have application outside the jurisdiction of the United States, Justice Stevens rejected the government's premise that the U.S. Naval Base at Guantanamo Bay, Cuba was not within the territorial jurisdiction of the United States. Under its 1903 lease agreement with Cuba the U.S. had "'complete jurisdiction and control'" over the Naval Base and, indeed, could exercise such control on a permanent basis, if it so chose. But Justice Stevens pointed out that the habeas corpus statute had been interpreted since *Eisentrager* not to require that persons seeking habeas relief be present within the territorial jurisdiction of the United States District Court where the habeas petition was filed. These cases were brought under 28 U.S.C. § 2241(a), (c)(3) (2000), which gives federal courts jurisdiction with respect to applications for habeas corpus by "persons" who claim to be held in custody "in violation of the Constitution, or laws or treaties of the United States." The government contended that, the question of the applicability of *Eisentrager* aside, the long-established principle that federal legislation does not have extraterritorial applicability unless Congress specifically so provides would itself defeat the contention of the petitioners. Clearly, the habeas statute contained no such provision. *Id.* at 2696–98.

citizens, are entitled to invoke the federal courts' authority under § 2241.[157]

Justice Kennedy, although concurring in the result, took a different approach to the question of whether the aliens at the Naval Base at Guantanamo Bay were entitled to avail themselves of habeas corpus. For him, *Eisentrager* provided the relevant framework for the disposition of the habeas petitions of the Guantanamo Bay alien-detainees:

> The [*Eisentrager*] Court began by noting the "ascending scale of rights" that courts have recognized for individuals depending on their connection to the United States. Citizenship provides a longstanding basis for jurisdiction, the Court noted, and among aliens physical presence within the United States also gave the Judiciary power to act . . . ." This contrasted with the "essential pattern for seasonable Executive constraint of enemy aliens . . . ." The place of the detention was also important to the jurisdictional question, the Court noted. Physical presence in the United States "implied protection . . . ," whereas in Eisentrager "th[e] prisoners at no relevant time were within any territory over which the United States is sovereign."[158]

In Kennedy's view, then, citizenship is a factor that provides an entitlement to habeas corpus jurisdiction, as is some connection to the United States, particularly when coupled with physical presence in the United States. These characteristics were lacking in *Eisentrager*, but Guantanamo Bay was "in every respect" a United States territory. Second, unlike the detainees in *Eisentrager*, the Guantanamo Bay detainees were "being held indefinitely, and without benefit of any legal proceeding to determine their status."[159] In *Eisentrager*, the prisoners there had been tried by a military commission and sentenced to prison terms. They were found and detained outside the United States and had already been proven to be actual enemies of the United States at trial. In *Rasul*, there had been no trial or hearing of any kind afforded to the detainees.

Justice Scalia, joined by Justice Thomas, dissented in *Rasul*. Scalia described, and perhaps overstated,[160] the Court's holding:

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157. *Id.* at 2696.

158. *Id.* at 2699 (citations omitted).

159. *Id.* at 2700.

160. Is the holding in *Rasul v. Bush* concerning the rights of alien detainees to habeas relief limited to Guantanamo Bay, which was territory over which the United States was deemed to exercise exclusive jurisdiction and control under a 101 year-old lease? Or, did the majority, as Justice Scalia charged in his

"The Court today holds that the habeas statute, 28 U.S.C. § 2241, extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdiction of all its courts."[161] Scalia's dissent underscores the distinction he makes between the right of citizens to avail themselves of the right to habeas corpus as compared to aliens outside the territory.[162] Scalia's emphasis on the lack of rights, either statutory or constitutional, on the part of aliens detained by the U.S. military abroad contrasts sharply with the majority opinion in *Rasul v. Bush.* For example, a dramatic moment during oral argument occurred when Justice Souter asked Solicitor General Theodore Olson if it would make any difference if the detainees in Guantanamo Bay were citizens rather than aliens. The Solicitor General responded that, under the habeas statute, there would be federal jurisdiction to hear the claims of American citizens detained at Guantanamo Bay.[163] The Court referred to this colloquy and concluded: "Considering that the [habeas] statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship."[164] Justice Scalia contended that the Court should not have focused on the fact that the statute makes no distinction between aliens and citizens but rather on the Solicitor General's answer to Justice Souter's question which was that United States citizens may enjoy greater habeas rights than aliens.[165]

The Solicitor General's position that U.S. citizens throughout the world may have habeas rights, Justice Scalia declared, was exactly the position taken by *Eisentrager,* which also held at the

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dissent, boldly extend "the scope of the habeas statute to the four corners of the earth?" Linda Greenhouse, Supreme Court correspondent for the *New York Times* suggests that Scalia's charge is more than rhetoric: "The majority's analysis suggested, in fact, that federal courts might have jurisdiction to hear claims of illegal detention from those held in foreign locations as well." Linda Greenhouse, *Supreme Court Affirms Legal Rights of Those Deemed 'Enemy Combatants,'* N.Y. TIMES, June 29, 2004, at A14.

161. *Rasul,* 124 S. Ct. at 2701 (Scalia, J., dissenting).

162. *Id.* For example, Justice Scalia points out that 28 U.S.C. § 2241, by its very language, bars habeas relief to any of the alien detainees at Guantanamo Bay since none of them were within the territorial jurisdiction of any of the courts specified in § 2241. *Id.*

163. *Id.* at 2696 (Stevens, J.) (citing Tr. of Oral Arg. at 27).

164. *Id.*

165. *Id.* at 2708 (Scalia, J., dissenting) (quoting Tr. of Oral Arg. at 40) ("[C]itizens of the United States, because of their constitutional circumstances, may have greater rights with respect to the scope and reach of the Habeas Statute as the Court has or would interpret it.").

same time "that aliens abroad *did not have* habeas corpus rights."[166] Indeed, Justice Scalia pointed out that *Eisentrager* had gone out of its way to note that the case of citizens was an entirely different matter: "'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.'"[167] For Justice Scalia, the result reached in *Rasul v. Bush* and *Rumsfeld v. Padilla* is disturbing. Domestic citizen-detainees are now in a worse position with respect to obtaining habeas relief than alien detainees incarcerated outside the United States. Non-citizen detainees held at the United States Naval Base at Guantanamo Bay are able to seek review of their detentions by filing petitions for habeas corpus in any of the ninety-four federal judicial districts, while domestic detainees may challenge their confinement only in the district in which they are confined.[168]

But in fact the equality between aliens and citizens that the Court finds in the habeas statute is not very far-reaching. Justice Stevens' opinion for the Court is very clear that the enemy aliens at the Naval Base at Guantanamo Bay have the same right to invoke habeas jurisdiction as any American citizen that might have been detained there. But the Court does not speak to the issue of whether the claims of the alien petitioners should be evaluated under procedures that would be afforded citizens who found themselves in similar circumstances. Indeed, the actual response of the Secretary of the Navy to that question has been to establish procedures for these aliens, that if citizens were involved, would seem to fail minimal due process standards.

V. THE PRIVILEGES AND IMMUNITIES OF UNITED STATES CITIZENS: A LIMITATION ON INDEFINITE ACTION?

Why is it presumed that citizens have more rights than others? One could argue that the constitutional scheme taken as a whole has been deemed to confer more rights on citizens than aliens. Only recently, Chief Justice Rehnquist acknowledged this idea as a principle of constitutional law, stating that "Congress may make rules as to aliens that would be unacceptable if applied to citizens."[169] The protections Justice Scalia would afford citizens detained as enemy combatants are far greater than those he

166. *Id.*

167. *Id.* at 2705–06 (quoting Johnson v. Eisentrager, 339 U.S. 763, 769 (1950)).

168. *Id.* at 2711.

169. Demore v. Kim, 538 U.S. 510, 522 (2003).

would afford to alien enemy combatants.[170] Although Justice Scalia is not clear on this point, his insistence on the greater degree of constitutional protection accorded to citizens compared to others is based not on the constitutional text but on the Anglo-American constitutional tradition. As we have seen, a textually-based argument predicated on the privileges and immunities of United States citizenship is, thus, certainly an arguable position, but not one espoused by any of the justices in the enemy combatant cases.

An insistence that citizens under our Constitution are not at the mercy of the unreviewable will of the Executive is admirable. But does the Constitution support this contention? The Due Process Clause of the Fifth Amendment, upon which Justice Scalia relies, refers, after all, to persons, not citizens.[171] Similarly, the Due Process Clause of the Fourteenth Amendment extends its embrace to persons, not just citizens. An additional textual problem is that, while the Fourteenth Amendment prohibits the states from abridging the privileges and immunities of U.S. citizens, the Amendment does not speak to the federal government. But if the Citizenship Clause[172] is read together with the Privileges and Immunities Clause[173] of the Fourteenth Amendment, the resolution of the problem is certainly illuminated by the declaration of the Supreme Court as recently as 1999 in *Saenz v. Roe*:[174] "[T]he protection afforded to the citizen by the Citizenship Clause of that Amendment is a limitation on the powers of the National Government as well as that of the States."[175] The phrase, "privileges and immunities of United States citizenship," is a concept that constitutes a limitation on the federal government as well as the governments of the states. Justice Samuel Miller in the *Slaughterhouse Cases*[176] set forth the privileges and

170. *See Rasul*, 124 S. Ct. at 2708 (Scalia, J., dissenting) (discussing the majority's misapplication of domestic law to aliens detained at Guantanamo Bay, Cuba).

171. Professor Kenneth Karst struggled with this dichotomy in the context of the Equal Protection Clause by suggesting that the "broader principle of equal citizenship extends its core values to noncitizens, because for most purposes they are members of our society. . . . If it is paradoxical to suggest that a citizenship principle protects aliens, the paradox is one of rhetoric, not substance." Kenneth Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 45–46 (1977).

172. U.S. CONST. amend. XIV, § 1, cl. 1.

173. *Id.* cl. 2.

174. 526 U.S. 489 (1999).

175. *Id.* at 507–08.

176. 83 U.S. 36 (1873).

immunities of United States citizenship.[177] His list was certainly not a generous one. But lest it be thought that his *Slaughterhouse Cases* opinion left the privileges and immunities of the Citizenship Clause of the Fourteenth Amendment without any content, Justice Miller listed a number of privileges and immunities relating to "the Federal government, its National character, its Constitution, or its laws."[178] In the paragraph summarizing them he made the following statement: "The right to peaceably assemble and petition for redress of grievances, *the privilege of the writ of habeas corpus*, are *rights of the citizen* guaranteed by the Federal Constitution."[179] Justice Bradley, dissenting, in the *Slaughterhouse Cases*, also stated that the right of habeas corpus is among "the privileges and immunities of citizens of the United States"[180] and has been since the enactment of the original Constitution. It is a puzzle why Justices Scalia and Stevens did not anchor the right of a citizen to habeas corpus in the privileges and immunities of citizens of the United States. Despite the foregoing, this right of the citizen to habeas corpus review as a privilege and immunity of United States citizenship is not mentioned in any of the opinions of the justices in the enemy combatant cases. This is more than surprising since the two enemy combatant cases involving United States citizens—Padilla and Hamdi—came to the federal courts by way of habeas corpus review.

CONCLUSION

Recently, the government and Hamdi's counsel were involved in negotiations for his release.[181] Whether this willingness on the part of the United States to negotiate was due to a reluctance on the part of the government to employ the procedure which six Justices in *Hamdi* endorsed is unclear. It may also be that the government, for security reasons, did not wish to disclose the nature and the source of the information which it may possess against Hamdi. Or it may be, as the press reported, that

177. *Id.* at 79–80.

178. *Id.* at 79.

179. *Id.* (emphasis added).

180. *Id.* at 118–19.

181. In early August, the U.S. Department of Justice announced that it was involved in negotiations for the imminent release of Yaser Hamdi. Justice Department officials, speaking anonymously, were reported as saying that Hamdi's release would indicate that "the government had reached the end" of the interrogation process, that he had no more information in the way of intelligence to offer, and that he posed no threat to the United States. Philip Shenon, *U.S. Signals End to Legal Fight Over an 'Enemy Combatant,'* N.Y. TIMES, Aug. 13, 2004, at A10.

Hamdi no longer had any value for intelligence purposes.[182] On October 11, 2004, a United States aircraft crew flew Yesar Edam Hamdi to Saudi Arabia where he joined his family. The Pentagon explained his release by saying national security did not require continuation of his detention. The agreement under which Hamdi was released included requirements that Hamdi renounce both terrorism and his United States citizenship.[183] Sources reported that Judge Doumar of the United District Court in Norfolk, Virginia had "helped speed the process by secretly ordering the government to bring Hamdi to a hearing" on October 12. The hearing was canceled when it was learned that Hamdi had been released and flown to Saudi Arabia.[184] Although the procedure set forth by the Court in *Hamdi* was not in fact employed in Hamdi's case, at least the minimum procedure which due process demands to evaluate a challenge by a citizen designated an enemy combatant and detained in the United States has now been set forth.

In this article, my purpose has been to analyze the enemy combatant cases in order to reach some conclusions concerning whether the government can treat citizens in the same manner as non-citizens once it decides that individuals in either category are enemy combatants. The response of the majority of the present Supreme Court Justices as to whether citizens can be detained as enemy combatants is that it makes no difference whether the person who is designated an enemy combatant is a citizen or not—at least as far as habeas relief is concerned. But the enemy combatant cases do indicate that citizens at least are entitled to a procedure that contains the essentials of due process.

In an insecure world menaced by fears of terrorism and inclined to sacrifice, therefore, too quickly the liberty of its citizens, we should revisit the idea that rights should never depend on citizenship. It is a well-motivated idea, but it should not be given uncritical acceptance by civil libertarians. If government is emboldened to act in difficult times in a repressive manner, citizenship can require, as Justice Scalia has shown, a constitutional procedure which government is obliged to follow. If that procedure is deemed too cumbersome for the age of terrorism, at least the minimal due process procedure outlined by Justice O'Connor and amended by Justices Souter and Ginsburg is bet-

182. *Id.*

183. Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST, Oct. 12, 2004, at A2.

184. *Id.*

ter than the absence of any individualized procedure, which the government initially sought to defend.[185]

Professor Bickel wrote in 1973: "It is gratifying, therefore, that we live under a Constitution to which the concept of citizenship matters very little indeed."[186] But in 2004, it is a disturbing idea that, in a time of war and emergency, the Constitution affords no greater measure of protection to citizens than noncitizens with respect to a restraint on liberty as serious as indefinite detention. One certainly can appreciate the egalitarian impulse behind the assertion that it is somehow distasteful to accord a greater measure of constitutional protection against repressive action by government for citizens as opposed to noncitizens. The citizen-person distinction suggests inequality. This is probably true but its truth should not be at the expense of the fact that the concept of citizenship is suffused with constitutional rights.[187] Constitutional protection in an ideal world should be accorded to all. The Court in *Hamdi* alternately embraced, and withdrew from, citizenship as a constitutional concept. But in *Hamdi*, citizenship did serve as an additional protection against arbitrary action by government. Citizenship matters.

185. *See supra* notes 113–16 and accompanying text (describing the minimal due process requirements guaranteed to U.S. citizens detained as enemy combatants).

186. Bickel, *supra* note 1, at 387.

187. *See supra* notes 179 and 180 and accompanying text (explaining that habeas corpus and privileges and immunities are rights of citizens guaranteed by the Constitution).