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THE PROCESS DUE INDEFINITELY DETAINED CITIZENS*

CARL TOBIAS**

A very controversial feature of the “war on terror” is the scope of the power which Congress has granted President George W. Bush to designate suspected terrorists enemy combatants and indefinitely detain them. The United States Court of Appeals for the Fourth Circuit has most fully, if not clearly, resolved this question.

The United States incarcerated two citizens with little process for more than a year in the Charleston and Norfolk naval brigs. The first litigated three habeas corpus petitions before the Fourth Circuit and a fourth to the Supreme Court before the government released him. The second convinced a South Carolina district judge to grant his habeas petition, although the Fourth Circuit overturned that decision and the government effectively mooted the Supreme Court appeal by indicting him. The war on terror’s indefinite character indicates that additional detainees will be imprisoned, and will pursue relief, in Fourth Circuit districts and the Fourth Circuit will decide appeals of the determinations.

These ideas suggest that the Fourth Circuit war on terror jurisprudence merits review. The Article first descriptively analyzes the government’s use of executive authority to detain numerous Americans and non-citizens, then critically assesses Fourth Circuit resolution of habeas challenges to detention. Finding that the court’s jurisprudence is unclear, the Article proffers recommendations that clarify the precedent with a meticulously calibrated balance of national security and civil liberty.

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INTRODUCTION

One highly controversial aspect of the “war on terror” is the scope of the statutory authority that Congress has delegated President George W. Bush to designate and indefinitely detain as enemy combatants persons whom the Government suspects are terrorists. In none of the twelve regional circuits has this issue been so thoroughly ventilated, albeit unclearly resolved, as in the United States Court of Appeals for the Fourth Circuit.

The government imprisoned two American citizens with minimal process for over a year in the Norfolk and Charleston naval brig. Yaser Esam Hamdi litigated three Fourth Circuit appeals and one Supreme Court appeal of a petition for a writ of habeas corpus before his ultimate release.¹ Jose Padilla persuaded a South Carolina district judge to issue a habeas writ, but the Fourth Circuit reversed that determination, and the United States essentially mooted the Supreme Court appeal by choosing to indict him after three years’ detention.² The war on terror’s indefinite nature suggests that more detainees will be held, and will seek relief, in Fourth Circuit districts, and this appellate court will resolve appeals of the decisions.

These propositions mean that the Fourth Circuit war on terror jurisprudence requires scrutiny, which this Article undertakes. Section I descriptively reviews how the Government has invoked executive power to detain many Americans and non-citizens. Section II critically analyzes Fourth Circuit disposition of habeas petitions attacking incarceration. Because the Fourth Circuit’s jurisprudence lacks clarity, Section III offers suggestions that elucidate the precedent through a finely calibrated balance of national security and civil liberty.

I. DESCRIPTIVE ASSESSMENT

Non-citizen *and* citizen indefinite detentions jeopardize the rule of law and expose the flaws in the “realist critique”—the notion that compliance with international law would undermine American and global security—thereby requiring discontinuation of the strictures

1. See *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003), *vacated and remanded*, 542 U.S. 507, 539 (2004); *see also* *Hamdi v. Rumsfeld*, 296 F.3d 278, 284 (4th Cir. 2002); *Hamdi v. Rumsfeld*, 294 F.3d 598, 607 (4th Cir. 2002); *infra* note 210 and accompanying text (documenting his release).

2. See *Padilla v. Hanft*, 389 F. Supp. 2d 678, 692 (D.S.C. 2005), *rev’d*, 423 F.3d 386, 397 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062, 1062 (2006).

which ordinarily govern.³ For instance, executive branch officials proffer many arguments to suspend the rules that normally apply in criminal prosecutions. The ideas encompass the cost, time, and risk which federal court trials are said to impose, the purported lack of necessity for safeguarding terrorists' liberties, the assertions that available information fails to meet strict evidentiary requirements and national security demands its secrecy be maintained, and the view that indefinite detentions provide the Government much needed control.⁴

The United States has imprisoned 15,000 terrorism suspects for long periods. Since 2001, executive officers have followed then-Attorney General John Ashcroft's directive to use "every available law enforcement tool" for incapacitating those "who participate in, or lend support to, terrorist activities" with: (1) protracted detentions through criminal charges and material witness warrants for people in America legally, and (2) immigration charges for suspects in the nation unlawfully, which some observers have described as profiling mostly targeted at U.S. Arab and Muslim communities.⁵

The Bush Administration rationalizes this effort with the practical contentions enumerated above and with legal arguments based mainly on Article II of the Constitution; *Ex parte Quirin*, the World War II Supreme Court decision that involved Nazi saboteurs; the Authorization for Use of Military Force (AUMF) that Congress passed immediately after the September 11, 2001 terrorist attacks; as

3. See, e.g., DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 5 (2003) (observing that since September 11, society has not struck a proper balance between national security and individual liberties); Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1410–11 (2002).

4. See, e.g., David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 977 (2002) (observing that military tribunals permit the use of classified evidence to convict suspects); Dickinson, *supra* note 3, at 1437; see also Ruth Wedgwood, *Al Qaeda, Terrorism and Military Commissions*, 96 AM. J. INT'L. L. 328, 330–32 (2002) (highlighting the problems with federal courts and international trials and suggesting that military commissions may offer the best alternative). See generally James Mann, *For Bush, Realpolitik is No Longer a Dirty Word*, N.Y. TIMES, Apr. 11, 2004, § 4, at 5 (describing the dynamics of the Bush presidency regarding foreign policy).

5. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* 12, 17 (April 2003) [hereinafter *OIG REPORT*]. For comprehensive assessments of detentions, see COLE, *supra* note 3; Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing The War on Terror(ism)*, 75 U. COLO. L. REV. 59, 88–91 (2004).

well as material witness and immigration legislation.⁶ The detentions are shrouded in secrecy, which restricts external monitoring and which courts have thus far generally maintained.⁷ However, the initiatives to detain non-citizens and corresponding legal attacks on those efforts, especially regarding the persons whom America has incarcerated at Guantanamo Bay, raise issues that differ from citizen detentions and litigation and, therefore, are not this Article's focus.⁸

The United States has also detained American citizens by labeling them enemy combatants. In 2002, President Bush so certified Yaser Hamdi, whom the Northern Alliance had purportedly captured on an Afghan battlefield and whom the United States

6. See U.S. CONST. art. II; 317 U.S. 1 (1942); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. I 2001)); 18 U.S.C. § 3144 (2000); 8 C.F.R. § 287.3(d) (2006). See generally MICHAEL DOBBS, SABOTEURS: THE NAZI RAID ON AMERICA (2004) (outlining the Nazi sabotage plan that led to the *Quirin* case); LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW (2003) (providing a complete overview of the *Quirin* trial); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (interpreting the AUMF as it applies to three specific issues in the war on terrorism); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673 (2005) (offering a critical reply to the Bradley & Goldsmith piece).

7. See, e.g., *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003) (holding that information regarding persons detained after 9/11 need not be disclosed), *cert. denied*, 540 U.S. 1104, 1104 (2004); *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 221 (3d Cir. 2002) (holding that newspaper publishers do not have a right to access deportation proceedings that present national security concerns), *cert. denied*, 538 U.S. 1056, 1056 (2003). But see *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710, 2002 FED App. 0291P (6th Cir. 2002) (holding that there is a First Amendment right of access to deportation proceedings).

8. Neither is the detention of Ali Saleh Kahleh Al-Marri, the habeas petitioner in *Al-Marri v. Wright*, 487 F.3d 160, 164–66 (4th Cir. 2007), *reh'g en banc granted*, (Aug. 22, 2007) (No. 06-7427), because he is a non-citizen. I mention *Al-Marri*, however, in footnotes when applicable because it is an important Fourth Circuit war on terror case. The U.S. has detained 600 non-citizens at Guantanamo Bay. OIG REPORT, *supra* note 5; MICHAEL RATNER & ELLEN RAY, GUANTANAMO: WHAT THE WORLD SHOULD KNOW 10 (2004). Observers have reported horrible conditions, the use of abusive measures to extract confessions and more information, and that many have attempted suicide. Jeffrey Toobin, *Inside the Wire*, NEW YORKER, Feb. 9, 2004, at 36, 38; COLE, *supra* note 3, at 39–43; Dickinson, *supra* note 3, at 1313–14; see, e.g., *Al Odah v. U.S.*, 321 F.3d 1134, 1136 (D.C. Cir. 2003), *rev'd*, 542 U.S. 466, 485 (2004). Few detainees had much process until 2004 when the Supreme Court decided the appeals of some, so all detainees have received some process, and the United States will schedule at most seventy-five for military commission trials. See generally Carol D. Leonnig & John Mintz, *Judge Says Detainees' Trials Are Unlawful*, WASH. POST, Nov. 9, 2004, at A1 (describing the outcomes of and reactions to the *Hamdi* district court decision); Neil A. Lewis, *Red Cross Interviews 14 Qaeda Terrorism Suspects*, N.Y. TIMES, Oct. 13, 2006, at A18 (describing the procedures that have been put in place for those who are charged with war crimes); Carol Rosenberg, *Base Plan Unchanged, Bush Aides Say*, MIAMI HERALD, May 9, 2006, at A3 (stating that at most seventy-five will have commission trials).

imprisoned without access to counsel until February 2004.⁹ A habeas corpus petition was filed on his behalf with the United States District Court for the Eastern District of Virginia, which issued rulings favorable to Hamdi, but the Justice Department sought review of the trial judge's determinations in the Fourth Circuit. The court of appeals issued three opinions essentially reversing the district court treatment, and the Supreme Court ultimately ruled that the Government could detain Hamdi as an enemy combatant, although he must receive due process to challenge this designation.¹⁰

In May 2002, the Government served a material witness warrant in Chicago's O'Hare Airport on Jose Padilla, alleging that he was implicated in a plot to detonate a "dirty bomb," and four weeks later the Chief Executive designated Padilla an enemy combatant.¹¹ His attorney filed a habeas corpus petition in the United States District Court for the Southern District of New York, which the judge denied; however, the Second Circuit ruled that Congress had not empowered the President to detain Padilla. The Supreme Court vacated that opinion because he sued in the wrong jurisdiction.¹² When Padilla refiled in the United States District Court for the District of South

9. See Jerry Markon, *Terror Suspect, Attorneys Meet for 1st Time*, WASH. POST, Feb. 4, 2004, at B3. See generally Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L. L.J. 503, 525-28 (2003) (addressing judicial review of two Hamdi challenges in the Fourth Circuit); Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567 (2004) (discussing how cases from the War of 1812 can help illustrate the advantages and disadvantages of deferring to Presidential war powers); COLE, *supra* note 3 (generally outlining military detentions and enemy combatant status); Dickinson, *supra* note 3 (same).

10. See *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *vacated and remanded*, 542 U.S. 407 (2004); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002); *Hamdi v. Rumsfeld*, 294 F.3d 598 (4th Cir. 2002).

11. *Padilla ex rel. Newman v. Rumsfeld*, 352 F.3d 695, 699-700 (2d Cir. 2003), *rev'd*, 542 U.S. 426, 451 (2004); see Donna R. Newman, *The Jose Padilla Story*, 48 N.Y.L. SCH. L. REV. 39, 40 (2003). Larry Thompson, then-Deputy Attorney General, argued *Quirin* was "clear Supreme Court" authority to detain Padilla "under the laws of war as an enemy combatant." Larry Thompson, Deputy Attorney General, Press Conference Concerning Jose Padilla at the U.S. Department of Justice (June 10, 2002); see also Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002) (describing a post-September 11 trend in which Muslims and Arabs are "identified as terrorists, and are disidentified as citizens"). The U.S. relied on these authorities to hold him "incommunicado for nearly two years." See Lyle Denniston, *Enemy Combatant Gets Lawyer*, BOSTON GLOBE, Feb. 12, 2004, at A3.

12. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 610 (S.D.N.Y. 2002), *rev'd*, 352 F.3d 695, 724 (2d Cir. 2003), *rev'd*, 542 U.S. 426, 451 (2004); see Deborah Sontag, *Terror Suspect's Path From Streets to Brig*, N.Y. TIMES, Apr. 25, 2004, at A1; Deborah Sontag, *U.S. Judge Finds Padilla Competent to Face Trial*, N.Y. TIMES, Mar. 1, 2007, at A14.

Carolina, the trial judge granted the habeas petition in February 2005.¹³ A Fourth Circuit panel reversed this determination that September, and the Government effectively mooted Padilla's Supreme Court appeal by prosecuting him two months later.¹⁴

This Article's next segment considers how district and appellate judges have treated the two petitions for writs of habeas corpus filed by American citizens contesting their designation and detention as enemy combatants and emphasizes the Fourth Circuit's resolution.

II. THE DETENTION CHALLENGES AND THEIR RESOLUTION

A. *The Hamdi Litigation*

1. District Court

Judge Robert Doumar, who initially entertained the habeas corpus petition filed on Yaser Hamdi's behalf with the Eastern District of Virginia, rigorously scrutinized the Government's arguments for indefinitely detaining Hamdi and found that executive constitutional authority, separation of powers, and *Ex parte Quirin* mandated no judicial deference to the citizen's enemy combatant designation.¹⁵ Judge Doumar "appointed counsel and ordered access . . . before allowing the United States even to respond," suggested that the American Government was possibly hiding disadvantageous information, and required the United States to produce considerable material.¹⁶ He strenuously questioned "everything in the Mobbs declaration," the affidavit prepared by a Government official which certified Hamdi was an enemy combatant; said that he "intended to

13. See *Padilla v. Hanft*, 389 F. Supp. 2d 678, 692 (D.S.C. 2005). The same judge rejected Ali Saleh Kahliah Al-Marri's habeas petition mainly because he was a non-citizen. See *Al-Marri v. Hanft*, 378 F. Supp. 2d 673, 677–78 (D.S.C. 2005). A Fourth Circuit panel initially reversed the decision; however, the court will rehear the appeal en banc. See *Al-Marri v. Wright*, 487 F.3d 160, 195 (4th Cir. 2007), *reh'g en banc granted*, *Al-Marri v. Wright*, (Aug. 22, 2007) (No. 06-7427).

14. See *Padilla v. Hanft*, 547 U.S. 1062, 1062 (2006) (denying certiorari); see also *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005) (denying order to transfer Padilla from military custody); Neil A. Lewis, *Court Refuses U.S. Bid to Shift Terror Suspects*, N.Y. TIMES, Dec. 22, 2005, at A1 (describing the case and reaction).

15. Judge Doumar's approach warrants somewhat limited review because the Supreme Court rejected it. See *infra* notes 62–64 and accompanying text.

16. *Hamdi v. Rumsfeld*, 316 F.3d 450, 460–62 (4th Cir. 2003); see also *id.* at 476 (showing that the panel rejected Judge Doumar's actions in *Hamdi*).

'pick it apart' piece by piece;" and concluded that the information tendered fell "far short of supporting Hamdi's detention."¹⁷

2. Fourth Circuit

The United States Government pursued three appeals from the rulings by the district court, and the Fourth Circuit overturned much of Judge Doumar's treatment. For example, the appellate panel cabined review and maintained that *Quirin* supported judicial acquiescence to presidential views on indefinite detentions.¹⁸ Moreover, the appeals court did not scrutinize Hamdi's imprisonment; rather it trusted the Mobbs declaration's allegation that Hamdi was in the combat zone, recited this particular fact as "undisputed," and denied Hamdi access to counsel.¹⁹ The court did so, even though the declaration was executed by a bureaucrat who lacked any first-hand knowledge about the seizure. The judges also found that the Non-Detention Act presented no bar to incarceration of an "armed and hostile citizen captured on the battlefield during wartime," which the AUMF and 10 U.S.C. § 956(5) concomitantly authorized.²⁰ The panel expressed grave concerns that the judiciary not interfere with executive and legislative prerogatives to make war or jeopardize the ongoing military initiative.²¹

The Fourth Circuit denied the suggestion for rehearing en banc, yet the opinions filed in this matter elucidated the panel judgment and afforded helpful recommendations for deciding the case. Illustrative were Judge Michael Luttig's proposals to articulate

17. *Id.* at 462. Judge Doumar evidenced greater rigor than the district judge in *Padilla* I. See *infra* Part II.B.1. See generally *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002) (affording other examples of Judge Doumar's rigor).

18. See *Hamdi v. Rumsfeld*, 296 F.3d 278, 282 (4th Cir. 2002); see also *Ex parte Quirin*, 317 U.S. 1, 28 (1942) (upholding the President's decision to detain suspected German saboteurs and try them by military commission). The panel did reject the most extreme U.S. position that "courts may not second-guess" a military enemy combatant designation. *Hamdi*, 296 F.3d at 283.

19. See *Hamdi*, 316 F.3d at 472–77. Hamdi received limited access in February 2004. Markon, *supra* note 9.

20. See *Hamdi*, 316 F.3d at 467. The judges held that the Non-Detention Act, 18 U.S.C. § 4001(a), did not modify the rule on enemy combatant detentions and that Hamdi's detention was authorized by the AUMF's "necessary and appropriate force" words and 10 U.S.C. § 956(5)'s appropriation to detain "persons 'similar to prisoners of war.'" See *Hamdi*, 316 F.3d at 467–68.

21. See *Hamdi*, 316 F.3d at 462–63, 471–77. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 6.10–6.12 (7th ed. 2004) (outlining the President's role in times of war); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-6 (3d ed. 2000) (describing the President's powers as Commander-in-Chief).

clearer legal standards for reviewing detentions.²² Judge Diana Gribbon Motz correspondingly authored an eloquent disquisition on how the judicial responsibility to protect liberty compels a more searching factual inquiry for which she offered astute practical guidance.²³

3. Supreme Court

Justice Sandra Day O'Connor, joined by Chief Justice William Rehnquist as well as Justices Anthony Kennedy and Stephen Breyer, wrote the plurality opinion which found that Congress had authorized the President to detain U.S. citizens when he labeled them enemy combatants, but that these individuals were entitled to procedural due process.²⁴ Justice David Souter, joined by Justice Ruth Bader Ginsburg, concurred in the judgment that Yaser Hamdi should receive due process but dissented from certain features of the process which Justice O'Connor afforded as well as from the holding that lawmakers had granted the Chief Executive this detention power.²⁵ Justice Antonin Scalia, joined by Justice John Paul Stevens, dissented, asserting that the Government could only detain citizens if the United States prosecuted them or lawmakers had suspended the writ of habeas corpus under Article I.²⁶ Justice Clarence Thomas also dissented, effectively acquiescing to the theory urged by the Department of Justice that the President had nearly complete authority over individuals designated as enemy combatants.²⁷

The plurality first determined that the executive branch had power to imprison citizens by labeling them enemy combatants.²⁸ Justice O'Connor seemingly acknowledged that the Non-Detention

22. He also urged that the Fourth Circuit undertake clearer factfinding. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 357 (4th Cir. 2003).

23. *See id.* at 368–76. This may have presaged her opinion for the panel majority in *Al-Marri*. *See* Jerry Markon, *Vacancies Whittle Away Right's Hold on Key Court*, WASH. POST, Aug. 8, 2007, at A1. Judge J. Harvie Wilkinson, III, the *Hamdi* panel decision author, defended the decision by criticizing both judges' views. *See Hamdi v. Rumsfeld*, 337 F.3d at 341–45. Wilkinson stated: "[t]o compare [Hamdi's] battlefield capture to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges." *Id.* at 344.

24. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 507–39 (2004). I broadly quote the plurality to capture best its intent.

25. *See id.* at 539–54; *see also infra* notes 68–69, 85, 87 and accompanying text (further discussing the plurality opinion in *Hamdi*).

26. *See Hamdi*, 542 U.S. at 554–79; U.S. CONST. art. I, § 9, cl. 2.

27. *See Hamdi*, at 579–99; U.S. CONST. art. II.

28. *See Hamdi*, 542 U.S. at 516–24; *see also supra* notes 9–14 (discussing the initial lower court challenges to both Hamdi's and Padilla's enemy combatant status); *infra* notes 148, 156, 170–79 and accompanying text (addressing Padilla's status as an enemy combatant).

Act, which Congress had passed in 1971, might require express, specific authorization from lawmakers to detain citizens on American soil.²⁹ The jurist concluded, however, that the September 2001 AUMF supplied this predicate because that authorization necessarily contemplated the detention of individuals who purportedly were captured on the battlefield in Afghanistan.³⁰ Justice O'Connor recognized that the AUMF "does not use specific language of detention" but nevertheless held that this Act constituted authorization "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war" and, therefore, by "permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."³¹ The plurality determination also characterized *Ex parte Quirin* as "the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances," remarking that the World War II opinion "both postdates and clarifies *Milligan*," which was a Civil War-era decision.³²

Justice O'Connor admonished, however, that "[e]ven in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status."³³ She ascertained that the situation's resolution necessitated a "careful examination both of the writ of habeas corpus . . . and of the Due Process Clause, which informs the procedural contours of that mechanism in this instance."³⁴

29. *Hamdi*, 542 U.S. at 517–18; see Non-Detention Act, 18 U.S.C. § 4001(a) (2000).

30. See *Hamdi*, 542 U.S. at 517–21; Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. I 2001)); *infra* note 94 and accompanying text.

31. *Hamdi*, 542 U.S. at 519; see also Authorization for Use of Military Force § 2, 115 Stat. at 224; *supra* note 6 and accompanying text (introducing the AUMF). But cf. *Al-Marri v. Wright*, 487 F.3d 160, 177–89 (4th Cir. 2007) (finding that the AUMF did not authorize Al-Marri's detention), *reh'g en banc granted*, (Aug. 22, 2007) (No. 06-7427); see also AUMF, Pub. L. No. 107-40, 115 Stat. 224; *supra* note 6 and accompanying text (introducing the AUMF).

32. See *Hamdi*, 542 U.S. at 523; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). But see *Hamdi*, 542 U.S. at 569–72 (Scalia, J., dissenting) (criticizing the plurality's reliance on *Quirin*). But cf. *Al-Marri*, 487 F.3d at 178–89 (affording a different analysis of *Quirin* and *Milligan*). See generally *TRIBE*, *supra* note 21, § 4-6 (discussing the significance of *Milligan*).

33. *Hamdi*, 542 U.S. at 524.

34. *Id.* at 525; see also U.S. CONST. art. I, § 9, cl. 2 (addressing the suspension of habeas corpus); *id.* amend. V (Due Process Clause); 28 U.S.C. §§ 2241, 2243, 2246 (2000) (outlining the process for seeking a writ of habeas corpus).

The plurality observed that the litigants held radically different views of the process which should be due in this circumstance, yet began on “common ground”³⁵: “[a]ll agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States,” and Congress has suspended the writ “[o]nly in the rarest of circumstances”³⁶ Justice O’Connor stated that “[a]t all other times, [the writ] has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law,” and the parties agreed the writ had not been suspended.³⁷ The habeas corpus legislation “makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process.”³⁸

The Government argued that the flexibility which the habeas corpus technique offered and Hamdi’s situation meant that the Mobbs declaration—the affidavit submitted by a Department of Defense official certifying Hamdi was an enemy combatant—would afford sufficient process for two major reasons.³⁹ Justice O’Connor “easily rejected” the first contention by the United States that Hamdi’s detention in a combat zone was “undisputed.”⁴⁰ The circumstances of his seizure were neither factually conceded “nor susceptible to concession in law,” while the “‘facts’ that constitute the alleged concession [were] insufficient to support Hamdi’s detention.”⁴¹ The jurist warned that an assertion that an individual “*resided* in a country” where combat operations are proceeding represented no concession that the person was “‘*captured* in a zone of active combat’ operations in a foreign theater of war” and it “certainly is not a concession that” the detainee met the Government’s enemy combatant standards.⁴² In short, the plurality

35. *Hamdi*, 542 U.S. at 525; see ALFRED C. AMAN JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 180 (2001).

36. *Hamdi*, 542 U.S. at 525; see also U.S. CONST. art. 1, § 9, cl. 2 (addressing suspension of the writ of habeas corpus).

37. *Hamdi*, 542 U.S. at 525; see also *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (“[t]he writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest”).

38. *Hamdi*, 542 U.S. at 526; see also 28 U.S.C. §§ 2241, 2243, 2246 (outlining the process for habeas corpus).

39. See *Hamdi*, 542 U.S. at 526; see also *supra* note 19 (introducing the Mobbs declaration).

40. *Hamdi*, 542 U.S. at 526.

41. *Id.*; see also *supra* notes 22–23 (treating two opinions the plurality invoked).

42. *Hamdi*, 542 U.S. at 527.

opinion repudiated "any argument that Hamdi ha[d] made concessions that eliminate any right to further process."⁴³

Justice O'Connor found more difficult the Government's second argument that greater factual exploration was improper and unwarranted in light of the exceptional "constitutional interests at stake."⁴⁴ Under this contention's extreme version, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision making in connection with an ongoing conflict" would totally eliminate individual process and relegate courts to ascertaining whether the general detention system was authorized.⁴⁵ The United States claimed that, at most, judges should review enemy combatant designations with the highly deferential "some evidence" criterion, which focuses exclusively on the Government's factual premise to support its determination and asks whether any evidence sustains the conclusion.⁴⁶ If applied to the enemy combatant situation, the criterion would mean that a reviewing court assumes the Government-enunciated basis is accurate and scrutinizes only whether the premise was valid.⁴⁷ Hamdi responded by asserting Supreme Court precedent required that someone whom the Executive detains have an opportunity to challenge the detention's legal and factual underpinnings before a neutral tribunal.⁴⁸

Justice O'Connor said that both positions emphasized legitimate concerns and highlighted the frequent tension between the autonomy the Government claims it needs to pursue efficaciously a specific objective and the process a citizen asserts is due before the individual will be deprived of essential constitutional rights.⁴⁹ She observed that the "ordinary mechanism," which the Supreme Court employs in balancing these "serious competing interests" and ascertaining the procedures required to guarantee that a citizen is not "deprived of

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See id.* at 527-28.

48. *See id.* at 528. Judge Doumar essentially concurred with this because he apparently found the process should approximate that which would attend a criminal trial. *See also supra* notes 15-17 and accompanying text (discussing the district court decision in *Hamdi*).

49. *See Hamdi*, 542 U.S. at 528. *See generally* AMAN & MAYTON, *supra* note 35, at 172-73 (describing the due process procedures that may be imposed in certain circumstances); *id.* at 180-82 (describing the modern method for determining the process due a person articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

life, liberty, or property, without due process of law,” is the test articulated in the 1976 decision of *Mathews v. Eldridge*.⁵⁰

Mathews requires a judge to determine the process which is due in a specific case “by weighing ‘the private interest’ ” that official behavior will affect against the claimed governmental interest, “ ‘including’ the function involved and the burdens the Government would face in providing greater process.”⁵¹ The *Mathews* formula then envisions those concerns’ judicious balancing through an assessment of the risk that the private interest will suffer improper deprivation, were process decreased, and the “probable value, if any, of additional or substitute procedural safeguards.”⁵²

Justice O’Connor scrutinized the balancing test’s particular elements in turn. Justice O’Connor first declared that there were “substantial interests” on each side of the case. She characterized Hamdi’s as the “most elemental of liberty interests—the interest in being free from physical detention by one’s own government”—at due process’s core, and an interest whose fundamental nature the Court had always safeguarded and would not minimize in the *Hamdi* appeal.⁵³ The Justice proclaimed that neither wartime circumstances nor accusation of treasonous conduct offsets this strong value because “commitment for *any* purpose” would be a significant liberty deprivation which mandates due process protections.⁵⁴ Justice O’Connor emphasized due process’s “absolute” character in that it is not dependent on the validity of a claimant’s allegations and found the *Mathews* calculus unchanged by the assertions regarding a detainee’s misconduct or the organizations with which he purportedly associated.⁵⁵ In short, Justice O’Connor reaffirmed a citizen’s essential right of freedom from involuntary confinement by the

50. 424 U.S. 319 (1976); see also *Hamdi*, 542 U.S. at 528–29 (quoting Amendment V of the U.S. Constitution); *Mathews*, 424 U.S. at 336. See generally William Van Alstyne, *Cracks in the “New Property”: Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977) (discussing the due process revolution).

51. *Hamdi*, 542 U.S. at 529. See generally Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (analyzing how much process is due, pre-*Mathews*).

52. See *Hamdi*, 542 U.S. at 529 (citation omitted). See generally Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (providing an overview of the due process factors set out in *Mathews*); AMAN & MAYTON, *supra* note 35, at 172–75, 178, 180–82 (outlining due process and *Mathews*).

53. *Hamdi*, 542 U.S. at 529; see also *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (stating that freedom from bodily restraint is the core liberty protected by the due process clause).

54. *Hamdi*, 542 U.S. at 530 (citing *Jones v. United States*, 463 U.S. 354, 361 (1983)).

55. *Id.*

United States without due process and balanced liberty's curtailment against the opposing governmental interests.⁵⁶

The plurality then assessed the "weighty and sensitive" interests of the Government in preventing individuals who have fought for the enemy from resuming combat against the United States.⁵⁷ Justice O'Connor said that the Constitution entrusts those who are best situated to undertake, and most politically accountable for, strategic decisions with basic war-making tactical matters.⁵⁸ The jurist also emphasized that the plurality's due process analysis considered the potential of litigation to distract military officials fighting overseas, to reveal delicate intelligence material, and to "require a futile search for evidence buried under the rubble of war," insofar as the application of heightened measures would foster these possibilities.⁵⁹

Justice O'Connor declared that striking the appropriate constitutional balance was of great national importance during ongoing combat, but found the values which the United States holds dear and the privilege of citizenship equally significant.⁶⁰ The jurist observed that the "[n]ation's commitment to due process is most severely tested" in emergencies, yet during these very moments America must preserve its domestic commitments to those tenets for which the United States battles abroad.⁶¹ After the Justice recognized the competing factors, she determined that neither the process recommended by the Government, nor that which the district court judge who first treated Hamdi apparently contemplated, struck the correct balance.⁶² Applying the *Mathews* test, Justice O'Connor found the risk that a detainee might be erroneously deprived of liberty under the rule suggested by the United States unacceptably high,⁶³ while certain "additional or substitute procedural safeguards" entertained in the district court were not warranted, given their

56. *Id.* at 531; see also *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty").

57. *Hamdi*, 542 U.S. at 531.

58. *Id.*

59. *Id.* at 531-32.

60. *Id.* at 532; see also *infra* note 88 and accompanying text (observing that national security issues should remain a consideration).

61. *Hamdi*, 542 U.S. at 532 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963)).

62. *Id.*

63. *Id.* at 532-33 (citation omitted).

“limited ‘probable value’ and the burdens they may impose on the military.”⁶⁴

The plurality, therefore, held that a detained citizen who seeks to contest his enemy combatant designation must receive notification of the classification’s factual premise and a “fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”⁶⁵ Justice O’Connor specified that the “right to notice and an opportunity to be heard ‘must be granted at a meaningful time and in a meaningful manner,’ ” declaring that “[t]hese essential constitutional promises may not be eroded.”⁶⁶

The jurist simultaneously admonished that “the exigencies of the circumstances” may require that, apart from these rudimentary components, enemy combatant designation proceedings be tailored to relieve “their uncommon potential to burden the Executive at a time of ongoing military conflict.”⁶⁷ For example, Justice O’Connor stated that the decisionmaker might need to accept hearsay as the most dependable Government evidence and to apply a “presumption in favor of” this proof, so long as the presumption is rebuttable and there is a fair opportunity to refute it.⁶⁸ Thus, after the United States tenders credible evidence that the detainee satisfies the enemy combatant standards, the “onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.”⁶⁹

Justice O’Connor justified affording this basic procedural due process with illustrations of how it would minimally affect the central war-making functions. For example, Justice O’Connor said initial battlefield captives would only receive the process which the plurality detailed after the Government *continues* to hold persons it has seized.⁷⁰ The jurist contended that documentation respecting battlefield detainees “already is kept in the ordinary course of military affairs,” so requiring an affidavit to summarize pertinent

64. *Id.*; see also *supra* notes 15–17 and accompanying text (outlining the district court’s decision).

65. *Hamdi*, 542 U.S. at 533. See generally Friendly, *supra* note 51 (analyzing how much process is due, pre-*Mathews*); Van Alstyne, *supra* note 50 (discussing the due process revolution).

66. *Hamdi*, 542 U.S. at 533 (citations omitted); see also AMAN & MAYTON, *supra* note 35, at 182 (addressing the timing of a hearing).

67. *Hamdi*, 542 U.S. at 533.

68. *Id.* at 534; see also *infra* text accompanying note 87 (reiterating Justice O’Connor’s ideas in the text).

69. *Hamdi*, 542 U.S. at 534.

70. *Id.*; see also *supra* notes 44–45 and accompanying text (discussing why Justice O’Connor believes more process may be needed).

material would impose little burden.⁷¹ She also believed that restricting the hearings to the purported combatant's actions would not disrupt efforts by military officers to wage war or meddle in the armed forces strategy.⁷²

Justice O'Connor summarized by remarking that the thorough protections which accompany detention challenges in other situations might be improper and unworkable for enemy combatants.⁷³ However, she asserted that the "threats to military operations" were not so substantial "as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator."⁷⁴

Justice O'Connor concluded with justifications for the plurality's holding and further explication of the result. First, she observed that the plurality necessarily rejected the assertion by the United States that separated powers mandated a sharply circumscribed role for the judiciary in this situation.⁷⁵ O'Connor warned that the argument which the Justice Department proffered would serve "only to *condense* power into a single branch" and "would turn our system of checks and balances on its head."⁷⁶ She concomitantly proclaimed that the Supreme Court had "long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens" and that the "Constitution . . . most assuredly envisions a role for all three branches when individual liberties are at stake."⁷⁷ Justice O'Connor similarly acknowledged the critical nature of the war power even as she declared that the authority "does not remove constitutional limitations safeguarding essential liberties."⁷⁸ The plurality also stated that, absent legislative suspension, the writ of habeas corpus "allows the [j]udicial [b]ranch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."⁷⁹

71. *Hamdi*, 542 U.S. at 534.

72. *Id.* at 535.

73. *Id.*; see also *supra* notes 67–69 and accompanying text (concerning allowing the detainee to rebut the evidence).

74. *Hamdi*, 542 U.S. at 535.

75. *Id.* at 535–36.

76. *Id.* at 536–37.

77. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

78. *Id.*; see also U.S. CONST. arts. I, II, amend. V (addressing the respective powers of the legislative and executive branches and due process).

79. See *Hamdi*, 542 U.S. at 536 (citation omitted); see also *supra* notes 36–37 and accompanying text (explaining that habeas corpus is an important check on the Executive).

Justice O'Connor deemed the Government-proffered "some evidence" standard insufficient because due process mandates a system in which a detained citizen may refute his designation.⁸⁰ She explained that the Supreme Court had previously deployed the "some evidence" idea as a "standard of review, not as a standard of proof."⁸¹ Judges have principally used the concept in scrutinizing an "administrative record developed after an adversarial proceeding—one with process" similar to that required in *Hamdi*.⁸² The criterion, therefore, was ill-suited to circumstances "in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker."⁸³ The Justice correspondingly declared, "Hamdi has received no process," and summarily rejected the notion that his military interrogation "constitutes a constitutionally adequate factfinding before a neutral decisionmaker."⁸⁴

Justice O'Connor next tendered additional guidance. She remarked that an "appropriately authorized and properly constituted military tribunal" could satisfy the demands which the plurality had articulated and that existing military regulations may offer the requisite process in similar circumstances.⁸⁵ Without this process, a district judge who entertains a habeas petition from an alleged enemy combatant must guarantee that due process's minimum requirements have been afforded.⁸⁶ The jurist reiterated that a habeas court might accept affidavit evidence, if the judge enables the purported combatant to tender facts rebutting the governmental return.⁸⁷ Justice O'Connor implored district courts to proceed with caution and undertake a "factfinding process that is both prudent and incremental," while the jurist similarly trusted that judges confronting

80. *Hamdi*, 542 U.S. at 537; see also *supra* notes 46–47 and accompanying text (describing the Government's argument as to how the evidence should be reviewed).

81. *Hamdi*, 542 U.S. at 537.

82. *Id.* (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)).

83. *Id.*; see also *supra* notes 65–66 and accompanying text (describing Justice O'Connor's discussion regarding the importance of allowing an opportunity to rebut the government's evidence).

84. *Hamdi*, 542 U.S. at 537; see also *supra* notes 42–43 and accompanying text (stating that the Court found that Hamdi made no concessions).

85. *Hamdi*, 542 U.S. at 538; see also *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Regulation 190-8, ch. 1, § 6 (1997) (dictating that under the Geneva Convention, tribunals should be made available for detainees who assert prisoner-of-war status).

86. See *Hamdi*, 542 U.S. at 538.

87. *Id.*

these delicate matters would “pay proper heed” to national security and the “constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.”⁸⁸ The plurality, thus, vacated the Fourth Circuit judgment and remanded the case for further proceedings.⁸⁹

B. *The Padilla I Litigation*

1. District Court

The trial court’s disposition of *Padilla* deserves evaluation because it relied upon *Hamdi*’s Fourth Circuit treatment and decided questions that the Supreme Court ultimately resolved.⁹⁰ For instance, District Judge Michael Mukasey extensively applied *Quirin*, which distinguished “lawful and unlawful combatants [who] are likewise subject to capture *and detention*,”⁹¹ finding incarceration power by analogy,⁹² and which he said based military tribunal approval on Article II presidential authority.⁹³ He also deferred when ruling that a tepid “some evidence” proof burden would justify citizen detention; 18 U.S.C. § 4001(a), the Non-Detention Act, governed only civilian imprisonment; and the AUMF empowered Bush to detain Padilla.⁹⁴

88. *Id.* at 539.

89. *Id.* For more analysis of *Hamdi*, see generally Bradley and Goldsmith, *supra* note 6 (discussing the *Hamdi* plurality opinion and its attention to the AUMF); Trevor W. Morrison, *Hamdi’s Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411 (2006) (highlighting the differences between the O’Connor and Scalia opinions in *Hamdi*); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005) (examining executive power from a purely administrative law perspective); *infra* note 210 and accompanying text (documenting *Hamdi*’s release).

90. See generally *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002). For example, the district court in *Padilla* determined whether the President had authority to detain a U.S. citizen and what evidence standard should be applied in determining whether the prisoner was lawfully detained and exhibited judicial deference. See *infra* notes 91–96 and accompanying text; see also *supra* notes 18–21 and accompanying text (outlining the Fourth Circuit’s acquiescence to executive power in *Hamdi*). Trial court disposition also contrasted with the *Hamdi* district court resolution and the *Padilla* Second Circuit approach.

91. See *Padilla*, 233 F. Supp. 2d at 594–95 (citing *Ex parte Quirin*, 317 U.S. 1, 30–31 (1942)).

92. If the Supreme Court perceived detention as less onerous than a military tribunal trial and “approved even that greater consequence, then our case is *a fortiori* from *Quirin*.” *Id.* at 595.

93. Congress had expressly approved military tribunals in World War II, so *Quirin* specifically reserved the question of whether the Executive alone might have power to create them. *Id.* at 595–96 (citing *Quirin*, 317 U.S. at 28–29).

94. *Id.* at 590, 596–99, 605–10. Judge Mukasey seemed to base deference on limited authority and competence to decide the issue and great executive power but did hold Padilla should have access to counsel. *Id.* at 599–605; see Non-Detention Act, 18 U.S.C.

The judge also invoked *Youngstown Sheet & Tube Co. v. Sawyer* for the notion that the Executive was “operating at maximum authority” when holding Padilla as an unlawful combatant.⁹⁵ He located this effort in the first category of Justice Robert Jackson’s renowned template which addresses interbranch disputes, making the initiative least vulnerable to attack and judicial scrutiny, as the President has full executive power and all Congress delegates.⁹⁶

2. Second Circuit

The Second Circuit’s use of the model articulated by Jackson, however, yielded different results. It held that: (1) “the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a” combat zone; (2) the Non-Detention Act is an “explicit congressional ‘denial of authority,’ ” placing the endeavor in Jackson’s last tier; and (3) the “AUMF does not authorize the President to detain [citizens] on American soil,” leaving this action in the third category, so the Executive is acting in contravention of congressional action and its actions are most susceptible to attack and judicial scrutiny.⁹⁷

Numerous propositions support the holdings which the appeals court espoused. The panel first assessed relevant constitutional text and observed that the Commander-in-Chief powers warranted deference.⁹⁸ The panel stated, however, that the federal judiciary must scrutinize and resolve challenges to executive authority, if it proceeds, even when making “war, in the face of apparent congressional disapproval [and these separated] powers concerns are

§ 4001(a) (2000); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 (Supp. I 2001)).

95. *Padilla*, 233 F. Supp. 2d at 607 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)). See generally *Youngstown at Fifty*, 19 CONST. COMMENT. 1 (2002) (affording many articles evaluating *Youngstown* at fifty from numerous perspectives); MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* (1977) (affording a valuable, comprehensive historical account of the *Youngstown* case).

96. *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring). Jackson used a second, or twilight, zone and a third tier in which executive power is least and receives the most scrutiny. See Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373, 410–16 (2002) (affording Jackson’s analytical framework).

97. *Padilla ex rel. Newman v. Rumsfeld*, 352 F.3d 695, 712 (2d Cir. 2003), *rev’d*, 542 U.S. 426 (2004).

98. *Id.* at 712–13; see also NOWAK & ROTUNDA, *supra* note 21, § 6.2 (noting that Hamilton believed it was “dangerous to restrict executive powers too severely”); TRIBE, *supra* note 21, § 4-6 (outlining the President’s executive war powers).

heightened” by domestic initiatives.⁹⁹ Finding no specific authority,¹⁰⁰ the appellate court explored whether inherent executive power satisfied the document’s “carefully crafted restraints” to guarantee that only the branch which had authority used the power.¹⁰¹ Because the Constitution authorizes lawmakers, not the President, to “define and punish . . . offenses against the Law of Nations;”¹⁰² identify the breadth accorded, and suspend, the habeas corpus writ;¹⁰³ and make exceptions from the Third Amendment ban on peacetime quartering of soldiers,¹⁰⁴ the discrete grants are “a powerful indication that, absent express [legislative approval,] the President’s Commander-in-Chief powers do not support Padilla’s confinement.”¹⁰⁵ The “specificity with which the framers allocated” this domestic authority to Senators and Representatives, and the lack of “any even near-equivalent grant . . . in Article II’s catalogue of executive powers” also prevented the judges from “read[ing] any such power into the Commander-in-Chief clause.”¹⁰⁶ The panel intimated that lawmakers might possess detention authority, but the court stated that the “President, acting alone, does not.”¹⁰⁷

The majority then canvassed relevant Supreme Court precedent. It believed *Quirin* inapplicable, as the Justices in that case left unresolved whether the Executive alone could establish military tribunals and found legislative approval for commission trial of “combatants who violated the laws of war” to support military jurisdiction.¹⁰⁸ The panel further distinguished *Quirin* because

99. *Padilla*, 352 F.3d at 713. Jackson said “Congress, not the Executive, should control [the use of war powers] as an instrument of domestic policy” and deferred little to Executive use of military power. *Youngstown*, 343 U.S. at 644.

100. See *Padilla*, 352 F.3d at 713; see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 4.1 (2d ed. 2002) (outlining Justice Jackson’s concurrence).

101. See *Padilla*, 352 F.3d at 714–15; see also *INS v. Chadha*, 462 U.S. 919, 959 (1983) (affording the quotation in this text); *Youngstown*, 343 U.S. at 587–88 (affording the other concepts in the remainder of the clause in the text).

102. U.S. CONST. art. I, § 8, cl. 10; see *Padilla*, 352 F.3d at 714.

103. U.S. CONST. art. I, § 9, cl. 2; see *Padilla*, 352 F.3d at 714 (analyzing the suspension clause).

104. U.S. CONST. amend. III; see also *Padilla*, 352 F.3d at 714–15 (stating that the Third Amendment reflects the “Framers’ deep-seated beliefs [about preventing] military intrusion into civilian life”).

105. *Padilla*, 352 F.3d at 715 (citing *Chadha*, 462 U.S. at 946).

106. *Id.*

107. *Id.* (citing *Youngstown*, 343 U.S. at 631–32). For a similar analysis of *Youngstown*, see *Al-Marri v. Wright*, 487 F.3d 160, 190–94 (4th Cir. 2007), *reh’g en banc granted*, (Aug. 22, 2007) (No. 06-7427).

108. *Padilla*, 352 F.3d at 716 (citation omitted). “*Quirin* does not speak to whether, or to what degree, the President may impose military authority upon U.S. citizens

lawmakers had enacted a statute¹⁰⁹ and the Nazi saboteurs admitted they were enemy troops. The Supreme Court, thus, never reached *Padilla*'s dispositive issue—the limits of “executive military jurisdiction—as the ‘*Quirin* petitioners upon the conceded facts, were plainly within those boundaries.’”¹¹⁰ The appeals court found inapposite a pair of Fourth Circuit *Hamdi* opinions because they were predicated on the detainee's seizure in an active combat zone overseas.¹¹¹ Finally, the panel distinguished the Supreme Court's *Prize Cases*¹¹² as implicating “capture of enemy property—not [citizen] detention”¹¹³ and a presidential endeavor Congress had authorized¹¹⁴ one-hundred years before legislators had passed the Non-Detention Act.¹¹⁵

Having determined that constitutional text and relevant Supreme Court opinions did not allow the Executive to detain American citizens, the panel surveyed whether lawmakers had approved the incarceration. The majority consulted the Non-Detention Act's terminology: “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹¹⁶ The judges read these words as a proscription on all citizen detentions, a “conclusion first reached by the Supreme Court.”¹¹⁷ Further, the panel deemed the legislative history “fully consistent with” its view because the enactment's sponsor and the major opponent “repeatedly confirmed” that the law governed presidential attempts to detain in

domestically without clear congressional authorization. We are reluctant to read into *Quirin* a principle [the Court] specifically declined to promulgate.” *Id.*

109. Because Congress did not pass the Non-Detention Act until 1971, the panel remarked that the “*Quirin* Court did not have to contend with Section 4001(a), [so that *Quirin*'s] usefulness is now sharply attenuated.” *Id.*

110. *Id.* (citing *Quirin*, 317 U.S. 1, 46 (1942)). The panel said *Quirin* and *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), concluded that “primary authority for imposing military jurisdiction upon American citizens lies with Congress [and] that—at a minimum—an Act of Congress is required to expand military jurisdiction.” *Padilla*, 352 F.3d at 717.

111. *Hamdi* had no occasion “to address the designation as an enemy combatant of an American citizen captured on American soil.” *Padilla*, 352 F.3d at 717; see *Hamdi v. Rumsfeld*, 316 F.3d 450, 465 (4th Cir. 2003).

112. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1863).

113. *Padilla*, 352 F.3d at 717–18. The dissent invoked *The Prize Cases* for broad inherent constitutional power. *Id.* at 726.

114. *Id.* at 718; see also *The Prize Cases*, 67 U.S. (2 Black) at 668–70 (discussing Congressional authorization to suppress insurrection).

115. See *Padilla*, 352 F.3d at 718; see also 18 U.S.C. § 4001(a) (2000) (providing the Non-Detention Act).

116. See *Padilla*, 352 F.3d at 718 (quoting 18 U.S.C. § 4001(a)).

117. See *id.* See generally *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (interpreting § 4001(a)).

wartime and evinced Congress' intent that it "must specifically authorize *detentions*."¹¹⁸ The appellate court said that the legislation precluded civilian *and* military detentions,¹¹⁹ finding: (1) this idea left executive war powers "unabridged" because the "President, acting alone" lacks inherent authority to detain;¹²⁰ and (2) a statute's "placement" should not "trump text, especially" when clear and "fully supported by legislative history."¹²¹ The panel concluded that a "precise, specific" law "is required to override" the enactment's ban on all citizen detentions¹²² and, thus, searched for this approval.¹²³ The appeals court detected none in the AUMF's phrasing¹²⁴ and construed the words vis-à-vis the tenets which the Supreme Court articulated in *Ex parte Endo*: judges must interpret wartime measures "to allow for the greatest possible accommodation between" war exigencies and civil liberties and find that "lawmakers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."¹²⁵ Nothing in the plain terms granted the Executive power to detain American citizens on U.S. "soil, much less the express authorization required by section 4001(a) and the 'clear,' 'unmistakable' language" which *Endo* demanded.¹²⁶ Because the AUMF was "meant to constitute specific statutory authorization within" the War Powers Resolution,¹²⁷ the

118. *Padilla*, 352 F.3d at 718–19. These indicia and its passage by 257 to 49 were "strong evidence [the Act] means what it says [: no] citizen can be detained without a congressional act authorizing the detention." *Id.* at 720.

119. *See id.* at 720. The United States asserted that the Non-Detention Act only precluded civilian detentions. *Id.* at 720–21.

120. *Id.*

121. *Id.* at 721. The United States said placing § 4001(a) in a section on prisons did not limit executive war power, and next to § 4001(b)'s exclusion of military prisons, showed Congress intended to exclude military detentions. *Id.*

122. *Id.* at 720; *see also supra* notes 24, 30–31 and accompanying text (describing the *Hamdi* plurality's interpretation of the AUMF).

123. *Padilla*, 352 F.3d at 722. *See generally* NOWAK & ROTUNDA, *supra* note 21, § 13.4 (assessing *Howe v. Smith*, 452 U.S. 473 (1981)).

124. *Padilla*, 352 F.3d at 722; *see also id.* at 725–26 (reproducing the AUMF).

125. *Ex parte Endo*, 323 U.S. 283, 300 (1944) (holding that "whatever power the War Relocation Authority may have had to detain classes of citizens, pursuant to Executive Order No. 9066, it had no authority to subject citizens who were concededly loyal to its leave procedure"); *see Padilla*, 352 F.3d at 723. For a discussion on the importance of the *Endo* decision, *see generally* Patrick O. Gudridge, *Remember Endo*, 116 HARV. L. REV. 1933 (2003).

126. *Padilla*, 352 F.3d at 723; *see* WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 38 (1994).

127. *Padilla*, 352 F.3d at 723; *see* The War Powers Resolution, 50 U.S.C. § 1541 (2000); *see also* NOWAK & ROTUNDA, *supra* note 21, § 6.12 (discussing the war powers resolution); Robert J. Glennon, Jr., *The War Powers Resolution Ten Years Later*, 78 AM. J.

panel thought it “inconceivable” that Congress would mandate such a resolution to employ force overseas yet “leave unstated and to inference something so significant and unprecedented as authorization to detain American citizens under the Non-Detention Act.”¹²⁸ Moreover, 10 U.S.C. § 956(5), which “authorizes nothing beyond the expenditure of money,” failed to satisfy the Non-Detention Act, the requirements that *Endo* had propounded as well as Fourth and Fifth Amendment guarantees.¹²⁹

3. Supreme Court

The Supreme Court reversed the Second Circuit disposition on procedural grounds.¹³⁰ Chief Justice Rehnquist, the author of the majority opinion in which Justices O'Connor, Scalia, Kennedy, and Thomas joined, held that the petitioner's immediate custodian, the commander of the South Carolina naval brig where the United States detained Padilla, was the only proper respondent.¹³¹ The Chief Justice grounded the holding on the express terminology in the habeas corpus legislation, which states that the appropriate respondent is “the person who has custody” over the petitioner, and on relevant Supreme Court determinations which have articulated an “immediate custodian” rule.¹³² Therefore, the majority observed

INT'L. L. 571, 581 (1984) (concluding that The War Powers Resolution did not give Congress the intended increase in its war-making power).

128. *Padilla*, 352 F.3d at 723; see also Bryant & Tobias, *Youngstown Revisited*, *supra* note 96, at 386–98 (suggesting that neither the AUMF nor the Patriot Act grants the Executive Branch the authority to detain American citizens).

129. *Padilla*, 352 F.3d at 723–24. Judge Richard Wesley, who concurred in part and dissented in part, differed with respect to many aspects of the majority opinion. For example, he found the “President, as Commander-in-Chief, has inherent authority” for, and the “Joint Resolution specifically and directly authorized,” detentions. *Id.* at 726.

130. See *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004). The opinion, therefore, warrants less comprehensive assessment than the determination in *Hamdi*. However, *Padilla* deserves some evaluation, as this case might have been the litigation in which a federal court actually provided the due process mandated by *Hamdi*. See *infra* notes 154–56.

131. See *Padilla*, 542 U.S. at 440–43; see also 10 U.S.C. § 951(c) (2000) (“There shall be an officer in command of each major military correctional facility. Under regulations to be prescribed by the Secretary concerned, the officer in command shall have custody and control of offenders confined within the facility which he commands, and shall usefully employ those offenders as he considers best for their health and reformation, with a view to their restoration to duty, enlistment for future service, or return to civilian life as useful citizens.”).

132. See *Padilla*, 542 U.S. at 434–35; see also 28 U.S.C. §§ 2242–43 (2000) (“The writ, or order to show cause shall be directed to the person having custody of the person detained.”); *Wales v. Whitney*, 114 U.S. 564, 574 (1885) (“[T]he writ must be directed to the person in whose custody the party is.”); *Guerra v. Meese*, 786 F.2d 414, 416 (D.C. Cir. 1986) (“[T]he custodian is the person having a day-to-day control over the prisoner.”);

longstanding federal court practice accorded with the statute and case law and reaffirmed that the proper respondent is the warden of the facility in which the individual is detained, not the Attorney General, the Secretary of Defense, or another remote supervisory officer.¹³³

Chief Justice Rehnquist ascertained that neither recognized exceptions to this doctrinal concept nor those which Padilla and the four dissenting Supreme Court members urged were applicable.¹³⁴ For instance, the majority summarily rejected the habeas petitioner's arguments that the rule is flexible and should not govern the facts related to his unusual circumstances.¹³⁵ The Chief Justice specifically found that nothing undermined the rationale or statutory foundation for the doctrinal approach when physical custody is at issue in "core" habeas proceedings, such as the one which implicated Padilla, even though the majority acknowledged the notion of custody had expanded over time.¹³⁶ The majority similarly recognized the unique nature of Padilla's incarceration; however, it concluded that the appellee was basically disputing physical custody which the Executive had imposed.¹³⁷ These findings prompted Chief Justice Rehnquist to hold that the U.S. District Court for the Southern District of New York, the court in which Padilla had originally filed, lacked jurisdiction.¹³⁸ The majority observed that lawmakers had inserted phraseology in the habeas corpus enactment to prevent a judge from issuing the habeas writ on behalf of an applicant who was located a substantial distance from the court. It also found this commonsense reading justified by other provisions of the habeas legislation, related statutory exceptions to the "district of confinement" notion, and

Jones v. Biddle, 131 F.2d 853, 854 (8th Cir. 1942) ("The statutes relating to habeas corpus manifestly contemplate that the respondent named in an application for habeas corpus shall be the person, within the territorial jurisdiction of the court, who has the physical custody of the person of the petitioner and who is capable of producing him in court.").

133. See *Padilla*, 542 U.S. at 435–38; see also *Al-Marri v. Rumsfeld*, 360 F.3d 707, 712 (7th Cir. 2004) (holding that the warden of the facility is the proper custodian).

134. See *Padilla*, 542 U.S. at 435–38; see also *id.* at 454–55, 459–64 (Stevens, J., dissenting).

135. See *id.* at 435–38. But see *Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973) (rejecting "interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements.").

136. See *Padilla*, 542 U.S. at 435–37; see also *Strait v. Laird*, 406 U.S. 341, 345–46 (1972) (holding that there is proper jurisdiction other than where the custodian is located if a majority of the petitioner's contacts with the custodian occurred in the other jurisdiction).

137. *Padilla*, 542 U.S. at 439–40; see *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 499–500 (1973) (explaining that the jurisdictional requirements of the writ can be flexible in certain circumstances).

138. *Padilla*, 542 U.S. at 442.

Federal Rule of Appellate Procedure 22(a).¹³⁹ Finally, the Chief Justice thought distinguishable important Supreme Court authority which Padilla urged should be dispositive.¹⁴⁰ The majority, therefore, overturned the Second Circuit judgment and remanded the appeal for “dismissal without prejudice.”¹⁴¹

C. *The Padilla II Litigation*

1. District Court

Five days later, Padilla refiled a habeas petition in the district of South Carolina, where the United States had incarcerated him.¹⁴² U.S. District Judge Henry Floyd observed that three Supreme Court opinions controlled his resolution: *Hamdi*, *Ex parte Quirin*, and *Ex parte Milligan*.¹⁴³ He began the *Hamdi* analysis by stating that Hamdi was allegedly taken into custody while on the battlefield in Afghanistan, where he was carrying a weapon against U.S. forces,¹⁴⁴ but the Government arrested Padilla unarmed in the O’Hare Airport and claimed he was plotting to attack the nation.¹⁴⁵ Judge Floyd said that the *Hamdi* plurality deemed his incarceration appropriate under the narrow factual circumstances presented—actively waging war against U.S. forces on a battlefield overseas¹⁴⁶—and that the force used to detain Hamdi came within the AUMF provisions.¹⁴⁷ In contrast, the Government first used a material witness warrant to hold Padilla on U.S. soil, and the later decision to designate and

139. See *id.*; see also 28 U.S.C. §§ 2241(a), 2242 (2000) (detailing who may issue a writ of habeas corpus and how one is to be filed, respectively); FED. R. APP. P. 22(a) (detailing habeas corpus proceedings). See generally *Carbo v. United States*, 364 U.S. 611, 617 (1961) (discussing congressional intent behind limiting a court’s jurisdictional ability to issue the “great writ”); *United States v. Hayman*, 342 U.S. 205, 212 (1952) (explaining the authority of district courts to issue writs of habeas corpus under the 1867 act).

140. See *Padilla*, 542 U.S. at 444–47. See generally *Braden*, 410 U.S. 484 (discussing the history of the writ); *Strait*, 406 U.S. 341 (same).

141. *Padilla*, 542 U.S. at 451. Justice Kennedy, joined by Justice O’Connor, concurred to explain their understanding of the statute’s construction in light of the majority holding. See *id.* Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, considered wrong the majority’s description of Padilla’s case as a “simple challenge to physical custody [which] should be resolved by slavish application of a ‘bright-line rule.’” *Id.* at 455. The dissent ascertained that the specific rule was “riddled with exceptions fashioned to protect the high office of the Great Writ” and contended that “this is an exceptional case that we clearly have jurisdiction to decide.” See *id.*

142. *Padilla v. Hanft*, 389 F. Supp. 2d 678, 682 (D.S.C. 2005).

143. *Id.* at 684.

144. *Id.*

145. See *id.* at 684–85.

146. *Id.*

147. *Id.* at 685–86.

imprison him as an enemy combatant was outside the AUMF “necessary and appropriate force” strictures.¹⁴⁸

The court dismissed the Government’s argument that *Quirin* provided sufficient justification for Padilla’s detention and must control his situation.¹⁴⁹ Judge Floyd invoked the *Padilla* Second Circuit opinion for the proposition that *Quirin* is limited to situations in which Congress has explicitly permitted citizen detention outside of the normal channels.¹⁵⁰

The jurist then relied on *Milligan* for the idea that “[t]he President may not unilaterally establish military commissions in wartime ‘because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws,’ ”¹⁵¹ remarking that the military tribunal in this case “lacked any jurisdiction to try Milligan when the civilian ‘courts are open and their process unobstructed.’ ”¹⁵² The judge recognized that *Quirin* limited *Milligan*; however, he asserted that *Milligan*’s essential premises control: “[t]he detention of a United States citizen by the military is disallowed without explicit Congressional authorization.”¹⁵³

The court next evaluated whether the AUMF had granted the President sufficient congressional authority to detain citizens militarily.¹⁵⁴ The jurist found that the Non-Detention Act prohibits the United States from detaining a citizen “except pursuant to an Act of Congress.”¹⁵⁵ The Government argued that the AUMF authorized the detention of citizens and “the Non-Detention Act does not apply to the military’s wartime detention of enemy combatants.” The court disagreed and relied upon the resolution’s plain language, concluding that it failed to authorize Padilla’s detention, which directly contradicted the Non-Detention Act.¹⁵⁶ Judge Floyd emphasized that the AUMF did not reach a “citizen [who is] arrested in a civilian setting, such as an United States airport,” but it might permit the detention of a citizen captured on the battlefield.¹⁵⁷ The judge found

148. *Id.* at 686.

149. *Id.*

150. *Id.* at 686–87.

151. *Id.* at 687–88 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866)).

152. *Id.* at 687 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) at 121).

153. *Id.* at 688; see also *Al-Marri v. Wright*, 487 F.3d 160, 178–89 (4th Cir. 2007) (affording similar analyses of *Quirin* and *Milligan*), *reh’g en banc granted*, (Aug. 22, 2007) (No. 06-7427).

154. *Padilla v. Hanft*, 389 F. Supp. 2d at 688.

155. *Id.* (quoting 18 U.S.C. § 4001(a) (2000)).

156. *Id.*

157. *Id.* at 689.

that *Ex parte Endo* instructed that the purpose of Congress and the Executive in passing a wartime statute “was to allow for the greatest possible accommodation between those liberties and the exigencies of war,”¹⁵⁸ so a court must interpret legislation to encroach upon citizens’ civil liberty only insofar as the Act clearly and explicitly provides.¹⁵⁹ Thus, because the AUMF did not include language that “clearly and unmistakably” granted the Executive authority for holding citizens such as Padilla, the AUMF failed to override the Non-Detention Act.

Judge Floyd easily rejected the government argument that the AUMF permitted citizen imprisonment, made in the preamble to the presidential order which authorized Padilla’s detention, observing that “just because the President states Petitioner’s detention is ‘consistent with [American law does not necessarily make] it so.’ ”¹⁶⁰ Judge Floyd also summarily dismissed the United States’ contention that the Non-Detention Act’s placement in the Crimes and Criminal Procedure section of the United States Code indicated that the legislation governed only civilian detentions, reiterating that the statute was “clear, simple, direct, and unambiguous” and applied to all citizen detentions.

The court next turned to the Government’s argument that the President’s inherent power as Armed Forces Commander-in-Chief authorized the detention of citizens such as Padilla. Employing Justice Jackson’s revered *Youngstown* concurrence, Judge Floyd ascertained that because Congress had legislated on citizen detentions through the Non-Detention Act, the President’s authority was at its “lowest ebb, for then [the Executive] can rely only upon his own constitutional powers minus any constitutional power of Congress over the matter.”¹⁶¹ Finding that no law supported the Government’s contention that the Executive has the inherent authority to detain Padilla, Judge Floyd ruled, as had Jackson, that “Congress, not the Executive, should control utilization of the war power as an

158. *Id.* (quoting *Ex parte Endo*, 323 U.S. 283, 300 (1945)); see also *Al-Marri v. Wright*, 487 F.3d 160, 188–89 (4th Cir. 2007) (affording a similar analysis of *Endo*), *reh’g en banc granted*, (Aug. 22, 2007) (No. 06-7427).

159. *Padilla v. Hanft*, 389 F. Supp. 2d at 689.

160. *Id.*; see also *Al-Marri*, 487 F.3d at 178–89 (affording a similar analysis of the AUMF).

161. *Padilla v. Hanft*, 389 F. Supp. 2d at 690 (quoting *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). The judge found U.S. support for its position in *The Brig Amy Warwick* (The Prize Cases), 67 U.S. (2 Black) 635, 668 (1862), and *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000), factually inapplicable to this case. *Padilla*, 389 F. Supp. 2d at 689.

instrument of domestic policy.”¹⁶² Thus, the judge rejected the Government’s argument, as that position would “offend the rule of law and violate this country’s constitutional tradition, but it would also be a betrayal of this Nation’s commitment to the separation of powers that safeguards our democratic values and individual liberties.”¹⁶³

Finally, the jurist remarked that Padilla’s detention was a civilian, not a military, law enforcement matter.¹⁶⁴ Judge Floyd suggested that civilian law furnished ample measures for the Government to detain and prosecute Padilla, so his extraordinary military detention was not only unlawful, but also unnecessary.¹⁶⁵ Therefore, as Congress had not suspended the writ of habeas corpus, the jurist ordered Padilla released.¹⁶⁶

2. Fourth Circuit

The Fourth Circuit decision in the *Padilla* litigation warrants careful evaluation, as it is the highest court to address the questions raised.¹⁶⁷ However, the unanimous panel opinion deserves minimal precedential value because the court subsequently issued an order which undermined its earlier determination.¹⁶⁸ Indeed, the court sharply criticized the Government’s litigation posture and rejected its suggestion that the determination be vacated.

Judge Luttig opened his analysis emphasizing the training which Padilla allegedly received from al-Qaeda and its affiliates in Afghanistan and Pakistan.¹⁶⁹ He recounted that Padilla ostensibly met senior al-Qaeda operations planner, Khalid Sheikh Mohammad, who supplied training, financing, and travel documents and directed that Padilla go to the United States and destroy apartment buildings. When he returned from international training, the FBI arrested Padilla in the O’Hare Airport before he could implement the alleged plot.

162. *Id.* (quoting *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring)).

163. *Id.* at 690–91.

164. *Id.* at 691.

165. *See id.* at 691–92.

166. *Id.* at 692; *see also* *Al-Marri v. Wright*, 487 F.3d 160, 189–95 (4th Cir. 2007) (affording similar analysis of inherent power and *Youngstown*), *reh’g en banc granted*, (Aug. 22, 2007) (No. 06-7427).

167. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

168. Order, *Padilla v. Hanft*, No. 05-6392, CA-04-2221-26AJ (4th Cir. Dec. 21, 2005).

169. I rely in this paragraph on *Padilla*, 423 F.3d at 388–90. The judge seemed to draw the following factual allegations recounted in the opinion from the U.S. factual statements in the joint appendix. *See id.*

Judge Luttig began his legal assessment with the idea that the *Hamdi* plurality interpreted the AUMF as reaffirming the venerated law of war principle that allows combatant detentions “to prevent a combatant’s return to the battlefield,” which is a “fundamental incident of waging war.”¹⁷⁰ Reasoning that the AUMF, as construed by the *Hamdi* plurality, enabled individuals, such as Hamdi, to be designated and imprisoned as enemy combatants, the jurist asserted that Padilla could be so labeled and confined as well.¹⁷¹ The judge stated that Padilla, like Hamdi, took up arms in Afghanistan against Afghan forces aligned with the United States, and he associated with forces in Afghanistan hostile to America.¹⁷²

Judge Luttig relied upon *Quirin* to bolster his conclusion that the President had authority to designate Padilla an enemy combatant and militarily detain him.¹⁷³ Like the *Hamdi* plurality, Judge Luttig could not distinguish Haupt, the American citizen dispatched by Nazi Germany to attack United States war production facilities and detained in this country, from Padilla, who was also sent to commit hostile acts on American soil before his O’Hare capture. Thus, Padilla satisfied the enemy combatant definition under both *Quirin* and *Hamdi*, so his detention was “unquestionably authorized by the AUMF as a fundamental incident to the President’s prosecution of the war against al-Qaeda in Afghanistan.”

The jurist rejected Padilla’s assertion that his detention was unlawful. First, Padilla argued that the *Hamdi* plurality opinion was confined to the petitioner’s narrow factual situation—capture on the battlefield in Afghanistan.¹⁷⁴ The judge dismissed this contention, as the *Hamdi* plurality “never even mentioned the locus of the petitioner’s capture,”¹⁷⁵ while finding his detention permissible because the AUMF’s authorization of necessary and appropriate force implicitly sanctioned “detention to prevent a combatant’s return to the battlefield [as a] fundamental incident to waging war.”¹⁷⁶ The jurist dismissed the notion that the locus of capture supported the plurality’s reasoning, even as he admitted that the plurality acknowledged that Hamdi was captured in Afghanistan when

170. *Id.* at 391 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion)).

171. *Id.*

172. *Id.* at 391–92.

173. I rely in this paragraph on *id.* at 392.

174. *Id.* at 393.

175. *Id.*

176. *Id.* (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion)).

responding to the *Hamdi* dissent.¹⁷⁷ Thus, Judge Luttig concluded that, although the *Hamdi* plurality holding is narrow, it does not limit presidential authority to detain individuals who take up arms against the United States, “depending upon the geographic location where that enemy combatant happens to be captured.”¹⁷⁸ The judge reinforced this position by observing that the *Hamdi* plurality read *Quirin* to support Haupt’s detention, even though he was captured domestically.¹⁷⁹

The Fourth Circuit also dismissed the argument that military detention was unnecessary or inappropriate because Padilla was amenable to criminal prosecution.¹⁸⁰ The court reasoned that criminal prosecution may not achieve the same result as military detention—preventing a combatant’s return to the battlefield—and it might allow communications between a suspected belligerent and his confederates and impede Executive attempts to glean intelligence from the detainee.¹⁸¹ These factors make military detention, rather than criminal prosecution, both necessary and appropriate uses of force which the AUMF prescribes.¹⁸²

The Fourth Circuit also rejected Padilla’s contention that the AUMF is not a clear legislative statement authorizing detentions, as both *Ex parte Endo* and *Quirin* require, interpreting neither decision to mandate a clear statement rule. The panel depended on the *Hamdi* plurality opinion for the idea that the AUMF provided a sufficiently clear statement when Justice O’Connor said that “it [was] of no moment that the AUMF does not use the specific language of detention”¹⁸³ and the resolution “‘clearly and unmistakably’ authorized Hamdi’s detention.”¹⁸⁴ Thus, Judge Luttig concluded that the authorization for Hamdi’s detention applied equally to Padilla.¹⁸⁵ Finally, the jurist easily disposed of the argument that *Ex parte Milligan* prevented both the Executive and Congress from trying civilians in a military tribunal because the *Hamdi* plurality determined that *Quirin* held *Milligan* inapplicable to enemy

177. *Id.*

178. *Id.* at 394.

179. *Padilla v. Hanft*, 423 F.3d 386, 394 (4th Cir. 2005) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004)).

180. *Id.* at 394.

181. *Id.* at 394–95.

182. *Id.* at 395.

183. *Id.* at 396 (citing *Hamdi*, 542 U.S. at 519).

184. *Id.* at 394 (4th Cir. 2005) (citing *Hamdi*, 542 U.S. 507, 519).

185. *Id.*

combatants,¹⁸⁶ so *Milligan* did not govern Padilla, whom the President had designated an enemy combatant.¹⁸⁷

After the Fourth Circuit reversed the district court's judgment, Padilla filed a petition for a writ of certiorari.¹⁸⁸ Before the Justices could address the petition, the Government indicted Padilla for terrorist activities and sought to transfer him from South Carolina military custody to Florida civilian custody.¹⁸⁹ The United States also proposed that the Fourth Circuit opinion be withdrawn.¹⁹⁰ The panel, in an unusual action, denied both Government requests,¹⁹¹ intimating that the litigation strategy was an effort to avoid Supreme Court review¹⁹² and questioning why facts which necessitated Padilla's military detention were not sufficiently compelling to preclude his transfer to civilian custody.¹⁹³ The Fourth Circuit's rejection of the Government's motions based upon the inconsistent United States actions severely erodes the determination's validity, although the Supreme Court ultimately ordered that Padilla be transferred to civilian custody.¹⁹⁴

D. Summary By Way of Transition

This evaluation of Fourth Circuit precedent which resolved habeas corpus petitions filed by citizens who disputed their enemy combatant designations and indefinite detentions finds that the appellate court's jurisprudence lacks sufficient clarity. Thus, the next section of this Article affords suggestions for elucidating the law with a carefully refined balance of the national security and civil liberty interests which are at stake.

186. *Id.* at 396.

187. *Id.* at 396–97.

188. Order, Padilla v. Hanft, No. 05-6392, CA-04-2221-26AJ (4th Cir. Dec. 21, 2005).

189. *Id.* at 1–2.

190. *Id.* at 2.

191. *Id.* at 7.

192. *Id.* at 4.

193. *Id.* at 5–6.

194. Hanft v. Padilla, 546 U.S. 1084, 1084–85 (2006). In fairness, my criticism of the Fourth Circuit for equating Padilla with Hamdi may be attributable more to the lack of clarity in the *Hamdi* Supreme Court plurality opinion, which the Fourth Circuit was bound to follow. See, e.g., *supra* notes 28–32, 67–69 and accompanying text.

III. SUGGESTIONS FOR THE FUTURE

A. *An Introductory Word About Scope and Organization*

The ideas below assume that the *Hamdi* Supreme Court plurality opinion is a very important precedent, albeit splintered and with caveats. A few reasons suggest that the Fourth Circuit's *Padilla* decision warrants less weight and that more relevance should be assigned to the district court's treatment of that case. For example, the three-judge lower court panel that issued the Fourth Circuit ruling too easily conflated the factual scenarios of *Hamdi* and *Padilla* and overvalued the ramifications of that equation. *Padilla*'s last-minute indictment also discredited the Fourth Circuit opinion, a view reinforced by Judge Luttig's withering critique of the United States' litigation tactics, particularly its motion to vacate the determination. The final section, thus, briefly criticizes the Fourth Circuit's *Padilla* opinion and recommends that courts deemphasize it and rely instead on the trial judge's habeas framework, if warranted by the facts which specific lawsuits challenging detention present. Regardless of whether jurists subscribe to this guidance, this part then offers suggestions for the minimum due process that judges should grant citizens who attack the validity of their designations as enemy combatants.

B. *A Critique of Padilla and Suggestions for Its Future Treatment*

Several considerations undermine the *Padilla* Fourth Circuit decision, especially as compared to the *Hamdi* Supreme Court plurality opinion and the *Padilla* trial court resolution. First, *Padilla* is a determination by a three-judge appellate court panel, rather than the en banc circuit, much less the Supreme Court. The Fourth Circuit also elided in an overly facile way the difference between *Hamdi*'s battlefield capture and *Padilla*'s domestic airport seizure. This meant the *Hamdi* plurality ruling governed *Padilla*, so the court ascertained that lawmakers had empowered the President to designate and imprison him as an enemy combatant and that he should not have received habeas. Moreover, the panel undervalued Judge Floyd's enunciation and application of habeas and his finding that *Padilla* deserved a writ. Third, his eleventh-hour prosecution after lengthy incarceration, which essentially mooted the Supreme Court appeal, discredited the Fourth Circuit opinion that had been issued two months earlier. This perspective derives much credence from the Government's suggestion, although rejected, that the jurists withdraw

the decision and from Judge Luttig's scathing criticism of the tortuous U.S. litigation strategy, which he intimated eviscerated the factual predicate on which the appellate determination rested. Three Justices concomitantly penned an illuminating explanatory statement that accompanied the denial of Padilla's certiorari petition, which admonished that federal courts act promptly to insure the habeas corpus writ's "office[s] and purposes . . . are not compromised," if the United States were to modify his status again.¹⁹⁵

These developments, especially the opinion's repudiation by its author and by the Government withdrawal motion, sapped the ruling of any vitality it once enjoyed. Indeed, although this determination technically remains the law of the circuit, the judgment is now so discredited that jurists must ignore or sharply circumscribe its application and treat as most relevant the *Hamdi* Supreme Court plurality opinion and the *Padilla* district court ruling.

Insofar as judges follow the above proposals, courts should attempt to harmonize the O'Connor and Floyd determinations through meticulous case-by-case analyses of individual petitioners' factual circumstances. For example, jurists must generally accord a citizen who is captured on the battlefield the process articulated in the *Hamdi* plurality decision and reviewed below. A citizen whom the Government arrests on United States territory, designates an enemy combatant, and imprisons should typically receive the habeas corpus safeguards espoused and applied by Judge Floyd. His careful explication and application of habeas furnish a salutary template from which district judges may extrapolate to address the myriad, particular factual scenarios that the ongoing conflict will undoubtedly generate.¹⁹⁶ These views obtain because, for instance, this citizen is entitled to attack his incarceration's propriety through habeas in federal court, the Government must justify the imprisonment of a

195. *Padilla v. Hanft*, 547 U.S. 1062, 1064 (2006). The *Hamdi* Supreme Court plurality may deserve greater responsibility than the Fourth Circuit for certain criticisms I make of *Padilla*. See *supra* note 194.

196. These examples are meant to be illustrative and suggestive. For example, the locus of capture might be indicative, but not dispositive, as Judge Luttig states in *Padilla*. See *supra* notes 174–79 and accompanying text. Thus, as a general matter, the citizen taken on the battlefield overseas should have due process while the citizen arrested on U.S. soil must receive habeas in federal court. More specifically, the passage of time between *Hamdi*'s battlefield capture and *Padilla*'s O'Hare arrest as well as *Padilla*'s prosecution indicate both could have received habeas in federal court. The United States' need for information that alleged terrorists possess may also be relevant. A related, but less workable, construct is Justice O'Connor's exigent/non-exigent approach. See *infra* notes 216–17 and accompanying text. These ideas reinforce the need for a meticulously calibrated evaluation of the facts that specific detention challenges present.

citizen arrested on United States soil, the Executive arguably lacks power to so designate and hold a citizen, and Justice O'Connor specifically observed that *Hamdi* was a very narrow ruling limited to the peculiar facts of battlefield capture. The unpredictable as well as fact-specific and intensive character of situations that will arise, the virtually unprecedented nature of the judicial inquiry which habeas requires in this context, and the skeletal legislative and case law provision for habeas's application to these new situations complicate the elaboration of more definitive, refined suggestions.

Finally, even if the *Padilla* Fourth Circuit opinion enjoys greater applicability than envisioned, this will not modify the recommendations below for the process due citizens, as the appellate court remanded to the trial court with instructions that it deploy the analytical construct enunciated by the *Hamdi* plurality ruling. For instance, Justice O'Connor admonished lower courts to guarantee that American citizens have notice of the factual bases for detentions and meaningful hearing opportunities to challenge their legitimacy.

C. *The Process Due Citizens*

Numerous factors impair articulation of thorough, salient guidance for judging citizens' designation as enemy combatants. One is that due process and habeas corpus are quite general, amorphous, and capacious. Defining them is complicated because the Executive has rarely detained citizens without prosecution. Yet, the *Hamdi* plurality opinion identified the process that is due in many situations and furnished individuals who lack notice of reasons for detentions and hearing opportunities greater safeguards than those who had this process, were convicted, exhausted appeals, and later sought relief.¹⁹⁷ These views may illuminate why the *Hamdi* plurality outlined both tenets, while it afforded more suggestions and examples than nuanced dictates and offered certain guidance that was terse, partial, or unclear.

197. The major executive detention case is *Quirin*, 317 U.S. 1 (1942); see also *Zadvydas v. Davis*, 533 U.S. 678 (2001) (characterizing the interpretation of a statute that would allow for the indefinite detention of aliens by the executive as one that would raise serious constitutional questions). For cases defining due process, see CHEMERINSKY, *supra* note 100, § 7.3.3; NOWAK & ROTUNDA, *supra* note 21, §§ 13.9–13.10. Justice O'Connor stated that due process informs habeas's procedural contours as a judicial review mechanism. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004). But see *id.* at 553, 575 (Scalia, J., dissenting) (stating that the plurality exceeds its authority under the Due Process Clause "to prescribe what procedural protections it thinks appropriate.").

Other complications include determining the Justices' alignments on issues which Hamdi litigated and the problems that judges will face as they evaluate various dimensions of Supreme Court treatment, namely, aspects which secured less than a majority. Instructive are the plurality ruling's features that concurring and dissenting Justices Souter and Ginsburg approved and those which dissenting Justice Thomas supported, a circumstance epitomized by his vote to uphold citizen incarceration.¹⁹⁸

The war on terror also differs significantly from conventional military engagements. For instance, the notions of "hostilities" and the "opposition" remain uncertain, and lawmakers have yet to declare war formally.¹⁹⁹ Moreover, the war on terror will generate a plethora of scenarios in which neutral decisionmakers assiduously calibrate the habeas process and balance the frequently conflicting values that implicate security and liberty.

Another dilemma is how to conceptualize the hearings which ascertain whether the United States has properly detained citizens. Their denomination as criminal or civil would facilitate the identification of salutary rules. The proceedings might be described as quasi-criminal or a civil-criminal hybrid. Nonetheless, the deleterious ramifications for citizens deemed enemy combatants—liberty's indefinite deprivation and perhaps life imprisonment—locate the hearings closer to the criminal end of the spectrum.²⁰⁰

198. See *Hamdi*, 542 U.S. at 539 (Souter, J., concurring in part and dissenting in part); *id.* at 578, 587–89 (Thomas, J., dissenting). Justices Souter and Ginsburg did "not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas." *Id.* at 553–54 (internal citations omitted). This issue is additionally complicated because Justice Samuel Alito has replaced Justice O'Connor, the plurality opinion's author, and Chief Justice John Roberts has replaced Chief Justice Rehnquist.

199. The conflict appears *sui generis* but may resemble the Korean "police action" and analogous initiatives since. See sources cited *supra* notes 95–96; see also *supra* notes 186–87 and accompanying text. See generally Curtis Bradley & Jack Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002) (discussing how often the United States has committed armed forces into combat without a formal declaration of war).

200. See *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 778–83 (1994); *Allen v. Illinois*, 478 U.S. 364, 368 (1986). See generally NOWAK & ROTUNDA, *supra* note 21, § 13.9(a) (discussing the criminal procedure standards that must be applied before an individual can be deprived of liberty). Insofar as the hearings are conceptualized as criminal, detainees will secure greater procedural safeguards; namely, those in the Fourth, Fifth, and Sixth Amendments and the Federal Rules of Criminal Procedure. In contrast, military tribunals, as presently constituted, would afford detainees fewer procedural safeguards. See *supra* note 85 and accompanying text.

Furthermore, the Justices, who believed that detention was valid and the *Mathews* analytical framework was preferable for treating citizens designated enemy combatants, may have resolved *Hamdi* incorrectly as the opinions by Justices Souter and Scalia argued.²⁰¹ However, a majority thought detention legitimate, while a plurality favored use of *Mathews* in this situation. Thus, I assume these ideas reflect the modern doctrine when tendering my views.

Justice O'Connor left several particulars for Congress, perhaps because she recognized that the Constitution delegates military governance to legislators, including who are "enemy combatants," and shared authority for federal procedure, such as mechanisms which regulate the nascent hearings.²⁰² The jurist might also have appreciated the difficulties surveyed above. They encompass how to posit cogent guidance in one fact-bound ruling and accommodate security and liberty during the unprecedented military initiative.

Lawmakers should expeditiously prescribe devices that will thoroughly govern future hearings through the consultation and incorporation of readily available sources, when necessary, which judges may deploy, if warranted, pending the adoption of comprehensive legislation. Most germane are the habeas statute;²⁰³ the Classified Information Procedures Act (CIPA);²⁰⁴ the Foreign Intelligence Surveillance Act (FISA)²⁰⁵ and the various rules that

201. See *Hamdi*, 542 U.S. at 539–44 (Souter, J., concurring in part and dissenting in part); *id.* at 554–79 (Scalia, J., dissenting); see also *supra* Part II.B.2 (reviewing Second Circuit analysis of the authority issue); *supra* Part II.A.3 (offering greater treatment of the *Mathews* formula); *infra* notes 221–25 and accompanying text (suggesting why *Mathews* balancing test may have been inappropriately applied in *Hamdi*).

202. U.S. CONST. art. I, § 8, cl. 3; 28 U.S.C. §§ 2071–75 (2000). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (analyzing shared authority for federal procedure); Peter H. Schuck, *Terrorism Cases Demand New Hybrid Courts*, L.A. TIMES, July 9, 2004, at B13 (arguing for a new due process model in enemy combatant cases); Jack L. Goldsmith & Neil Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19 (same). Of course, the Supreme Court, not Congress, ultimately decides what process is due.

203. See 28 U.S.C. §§ 2241–2261 (2000); see also ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 15 (4th ed. 2003). See generally RANDY HERTZ & JAMES S. LEIBMAN, *FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE* (4th ed. 2001) (providing a comprehensive guide to federal habeas corpus procedure).

204. Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1–16 (2000). See generally Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 441, 451–53 (2002) (discussing CIPA's effect on criminal procedure); Cameron Stracher, *Eyes Tied Shut: Litigating for Access Under CIPA in the Government's "War on Terror,"* 48 N.Y.L. SCH. L. REV. 173 (2003) (detailing CIPA's restrictions on public access to judicial proceedings).

205. See Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–63 (2000); see also *United States v. Squillacote*, 221 F.3d 542, 554 (4th Cir. 2000) (upholding electronic

effectuate this legislation; new enemy combatant detention and military tribunal authorization statutes;²⁰⁶ and the 1996 alien terrorist removal system which has yet to be invoked.²⁰⁷

In late 2005 and 2006, Congress passed the Detainee Treatment Act (DTA) and Military Commissions Act (MCA).²⁰⁸ This legislation, however, fails to provide guidelines that operate felicitously and reconcile security and liberty across multifarious circumstances because the legislation does not prescribe comprehensive strictures and because those measures afforded are overly solicitous of security. Until lawmakers prescribe thorough legislation, judges will devise techniques ad hoc. For example, Padilla's attorney filed in the District of South Carolina the very week the Justices ruled he must sue there, and the judge relied on habeas corpus to find that the Government lacked authority to detain Padilla.²⁰⁹ The Supreme Court also vacated and remanded Hamdi's petition, even though the United States quietly freed the detainee after thirty-four months of incarceration.²¹⁰

surveillance of defendants under FISA); COLE, *supra* note 3, at 67–68 (describing how the PATRIOT Act's amendments to FISA have eroded constitutional protections under the Fourth Amendment); PHILIP B. HEYMANN, *TERRORISM, FREEDOM AND SECURITY: WINNING WITHOUT WAR* 105–06, 148–51 (2003) (explaining the Government's surveillance powers under FISA and speculating that its constitutionality would most likely be upheld); CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 20 (6th ed. 2002) (using FISA as an illustration of when “Congress has made special provision for the designation of existing judges as a ‘court’ to perform particular functions”).

206. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); see Carl Tobias, *Punishment and the War on Terrorism*, 6 U. PA. J. CONST. L. 1116, 1131 n.78 (2004). The Restoring the Constitution Act of 2007 would amend certain features, such as enemy combatant designations and jurisdiction stripping, included in the Military Commissions Act. S. 576, 110th Cong. (2007).

207. See 8 U.S.C. §§ 1531–37 (2000); see also *Najjar v. Reno*, 97 F. Supp. 2d 1329, 1340 (S.D. Fla. 2000) (finding that the Alien Terrorist Removal Act was not applicable), *aff'd*, 257 F.3d 1262 (11th Cir. 2001); WRIGHT & KANE, *supra* note 205, at 20; Schuck, *supra* note 202; Goldsmith & Katyal, *supra* note 202. The stakes will often be considerably more substantial in citizen indefinite detentions than in non-citizen removals.

208. Pub. L. No. 109-148, 119 Stat. 2739 (2005); Pub. L. No. 109-366, 120 Stat. 2600 (2006).

209. *Padilla v. Hanft*, 389 F. Supp. 2d 678, 692 (D.S.C. 2005); Dan Christensen & Vanessa Blum, *Padilla Implicated in Florida Terror Case*, LEGAL TIMES, Sept. 20, 2004, at 18.

210. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–11, 539 (2004); see Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15; Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST, Oct. 12, 2004, at A2.

Despite the factors analyzed, it is possible to offer constructive guidance for the legislative branch and the federal judiciary. The suggestions provided depend on the *Hamdi* opinions, to the extent that the resolution is binding and clear, although the Justices' treatment is general, laconic, ambiguous, and fragmented. Moreover, the recommendations elucidate, amplify, and supplement this disposition, when needed, and justify the views proffered. The ideas below will have equal relevance for other citizens who may be detained, like Padilla, but his apprehension and imprisonment on U.S. territory meant that he could well have deserved more rights and procedural advantages in challenging his enemy combatant designation and detention than the ones which are explored next.²¹¹

D. Guidance

1. General Recommendations

The Supreme Court held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."²¹² Justice O'Connor grounded that holding on the test enunciated by *Mathews*.²¹³ She observed that this formulation requires the adjudicator to calculate the process due by weighing the effects of official conduct on the individual against the Government's situation, notably the harm which additional measures could foster, while balancing the risk that the private interest will suffer erroneous

211. *Hamdi*'s release meant that the ideas would have applied first to Padilla, had the United States not prosecuted him. See sources cited *supra* notes 14, 189, 209–10. Indeed, Judge Floyd's enunciation and application of habeas corpus may be preferable to the due process approach. For a sense of the national security-civil liberties spectrum, see generally BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006); DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: THE FAILURE OF PREEMPTION IN THE WAR ON TERROR* (2007); JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); ERIC A. POSNER & ADRIAN VERMUELE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007); F.A.O. SCHWARZ & AZIZ HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* (2007).

212. *Hamdi*, 542 U.S. at 533. The major elaboration was that notice and hearing opportunity be "appropriate to the nature of the case" and be "granted at a meaningful time and in a meaningful manner." *Id.* (citation omitted).

213. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

deprivation, were process confined, and the likely value, if any, which greater or replacement mechanisms would yield.²¹⁴

Justice O'Connor neglected to articulate clearly the process that detainees must have.²¹⁵ The decision did, however, mention two discrete categories of cases by implication. The first was *exigent*, referring to those cases with "uncommon potential to burden the Executive at a time of ongoing military conflict," in which detained citizens would receive what Justice O'Connor denominated "core" notice and hearing before impartial decisionmakers.²¹⁶ The second category, *non-exigent* cases, which the Court failed to define, would necessarily comprise the remaining cases. For this group, detainees would be accorded more process than the rudimentary notice and hearing granted in *exigent* cases, although the specifics of that process remain undefined.²¹⁷

I believe the Constitution, its judicial interpretation, as well as federal legislation and rules grant citizens designated enemy combatants most, if not all, of the procedures that defendants indicted for serious offenses receive, because the citizens may be indefinitely deprived of their liberty. The procedures encompass the Fourth, Fifth, Sixth, and Eighth Amendments, which circumscribe how the Government investigates behavior that is deemed a crime and how it prosecutes alleged violators, as well as devices in the United States Code and the Federal Rules of Criminal Procedure and Evidence.²¹⁸ More specifically, the protections include: rights against improper searches and seizures, double jeopardy, and self-incrimination; the right to fair notice of the charges and an opportunity for assembling a defense; compulsory process for securing witnesses and relevant

214. See *Hamdi*, 542 U.S. at 529; see also *supra* notes 51–52, 62–64 and accompanying text. See generally AMAN & MAYTON, *supra* note 35, at 180–82 (explaining the *Mathews* due process test). But see *Hamdi*, 542 U.S. at 575–77 (Scalia, J., dissenting).

215. The *Mathews* test's use did lead Justice O'Connor to find the Government's proposed "some evidence" criterion imposed an unacceptably high risk that it would erroneously deprive a citizen of his liberty and to reject certain additional or replacement protections the *Hamdi* district court suggested, as they had limited probable value and might unduly burden the military. See *supra* notes 63–64, 80–83 and accompanying text.

216. *Hamdi*, 542 U.S. at 533; see also *supra* notes 65, 67 and accompanying text; *infra* notes 279–83 and accompanying text.

217. In *exigent* cases, national security and the Government would usually receive more solicitude than individual liberties and the detainee, while in *non-exigent* situations, the propositions would be reversed. However, the notion may be so generalized that it defies particularly effective use.

218. See generally U.S. CONST. amends. IV, V, VI, VIII; FED. R. CRIM. P.; FED. R. EVID. Virtually all of the applicable provisions of the United States Code are enumerated in Title 18, which principally defines federal criminal offenses.

evidence; the right to confront and cross examine witnesses; and the right to a full, adversarial trial in open court.²¹⁹

Several justifications support the provision of these rights to detainees. Most telling, the enemy combatant designation hearings are functionally equivalent to criminal proceedings because they might result in liberty's deprivation for life, a grave consequence highlighted by Justice O'Connor.²²⁰ Citizen detainees who may experience this fate, thus, should have greater rights and procedural benefits than many civil litigants and individuals accused of offenses whose situations are not as dire.

Third, few rulings have required judges to balance the liberty interests of prosecuted adults against governmental interests as the *Mathews* Court did²²¹ and as the *Hamdi* plurality envisioned.²²² The most analogous opinions have implicated deprivations of liberty interests, which those seeking postconviction relief and juveniles vindicated.²²³ Citizens who are deemed enemy combatants and are deprived of their liberty also differ markedly from public assistance recipients who are judged ineligible and would forfeit this benefit or similar entitlements, the area where the *Mathews* calculus originated.²²⁴ Indeed, fifteen years ago the Justices rejected the formula as a broad-purpose yardstick. They emphatically declared

219. See U.S. CONST. amends. IV, V, VI; see also NOWAK & ROTUNDA, *supra* note 21, § 13.9. See generally WAYNE R. LAFAYE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE (4th ed. 2004) (outlining the constitutional guarantees that accompany criminal procedure). The last idea in the text is the norm under the Sixth Amendment and in habeas cases. See generally *United States v. Nachtigal*, 507 U.S. 1 (1993) (holding that a charge of DUI and its accompanying maximum imprisonment term of six months is a petty offense and outside the Sixth Amendment's jury trial guarantee). I rather comprehensively evaluate the proof burden below.

220. *Hamdi*, 542 U.S. at 520; see *supra* text accompanying note 56. For a rather similar analysis, see *Al-Marri v. Wright*, 487 F.3d 160, 195 (4th Cir. 2007), *reh'g en banc granted*, (Aug. 22, 2007) (No. 06-7427).

221. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); see also *supra* notes 50–52, 63–64 and accompanying text.

222. See *Hamdi*, 542 U.S. at 528–34; see also *supra* notes 50–64, 146 and accompanying text.

223. See, e.g., *Washington v. Harper*, 494 U.S. 210, 229–35 (1990) (upholding a State's procedure for the involuntary administration of an inmate's medication); *Schall v. Martin*, 467 U.S. 253, 274–81 (1984) (upholding the pretrial detention of juveniles when notice, a hearing, and a statement of facts were given prior to the detention). But see *United States v. Raddatz*, 447 U.S. 667, 667–81 (1980) (relying on *Mathews* balancing test in holding that referral of a motion to suppress to a magistrate does not violate due process). See generally NOWAK & ROTUNDA, *supra* note 21, § 13.9(a) (discussing the procedural due process required in cases that implicate a loss of physical liberty).

224. See *Hamdi*, 542 U.S. at 574–76 (Scalia, J., dissenting); see also sources cited *supra* notes 50–52.

that the Court had “invoked *Mathews* to resolve due process claims on only two occasions,” questioning whether it was “essential to the results,” and held that the *Mathews* balancing test is not appropriate for determining the legitimacy of state rules which are facets of the criminal process.²²⁵

If the *Mathews* notion could be justifiably transplanted from the somewhat inapposite public entitlement realm and applied to detentions, the detainee’s liberty, a value that Justice O’Connor characterized as absolute,²²⁶ should outweigh the governmental needs. Even when reliance on techniques for protecting the individual’s liberty might jeopardize security and, thus, arguably yield a different *Mathews* balance, the factfinder should consult and institute a number of efficacious measures—which lawmakers have prescribed and the judiciary has used—to vitiate, restrict, or ameliorate security threats.²²⁷

Notwithstanding these factors—how the grievous impacts on citizens who may be adjudged enemy combatants demands the total panoply of criminal law strictures—Justice O’Connor failed to ratify, and might have disagreed with, these views. For example, she left untreated a critical safeguard implicit in due process: one should not be convicted unless found guilty “beyond a reasonable doubt.”²²⁸ She actually imposed no proof burden on the United States and even observed that its tender may have a rebuttable presumption and could shift the burden to detainees in various circumstances,²²⁹

225. See *Medina v. California*, 505 U.S. 437, 443–44 (1992). *Patterson v. New York*, 432 U.S. 197, 210 (1977), prescribed what *Mathews* described as the correct due process approach, which remains so today. See LAFAVE, ISRAEL & KING, *supra* note 219, §§ 2.7(c), 24.6(d). Justice Scalia said that the *Mathews* test “has no place where the Constitution and the common law already supply an answer.” *Hamdi*, 542 U.S. at 576 (Scalia, J., dissenting). It is unclear why the *Hamdi* plurality relied so substantially on *Mathews*, rather than opinions, such as *Kansas v. Hendricks*, 521 U.S. 346, 356–60 (1997), *Foucha v. Louisiana*, 504 U.S. 71, 75–83 (1992), and *United States v. Salerno*, 481 U.S. 739 (1987), because they address the precise question presented: the process due to insure that someone detained non-criminally is actually who the government alleges he is. See NOWAK & ROTUNDA, *supra* note 21, § 13.9, at 649–53 (assessing some of the cases).

226. See *Hamdi*, 542 U.S. at 530–31. Justice O’Connor mainly couched the governmental interest in national security terms, but other factors may be relevant. These include the fiscal resources that large numbers of hearings consume, typified by the Guantanamo detainees and other difficulties posed by federal court prosecutions of purported terrorists, such as Zacarias Moussaoui. See *infra* note 278 and accompanying text.

227. Those mechanisms are canvassed *supra* notes 203–07 and accompanying text.

228. See NOWAK & ROTUNDA, *supra* note 21, § 13.9. Accord LAFAVE, ISRAEL & KING, *supra* note 219, §§ 10.4(a), 26.4(h).

229. See *Hamdi*, 542 U.S. at 534.

although Justices Souter and Ginsburg trenchantly disavowed the idea that the Government might enjoy a presumption casting some rebuttal burden on Hamdi.²³⁰

Justice O'Connor also disparaged the rigor manifested by the trial court that addressed the *Hamdi* litigation. The jurist initially surmised that Judge Doumar favored what she rejected: using mechanisms similar to those required in a criminal trial and "quite extensive discovery of various military affairs . . . [because] [a]nything less . . . would not be 'meaningful judicial review.'"²³¹ Justice O'Connor's dependence on the *Mathews* template similarly prompted her to find inappropriate numerous requirements gleaned from the criminal law arena, which she believed that the district judge envisioned. She considered unwarranted some "'additional or substitute procedural safeguards' . . . [recommended, given] their limited 'probable value' and the burdens they may impose on the military."²³²

This resolution suggests citizens ought to have, if not the rights which are granted to defendants charged with felonies, at least the measures afforded to habeas petitioners who lack both notice describing why the Executive detains them and hearings, a situation *Quirin* typifies. I have recounted the former, while the latter analyzed below include possible counsel, discovery, and use of evidentiary norms as well as the suggestion that the United States tender justifications for holding citizens which they have opportunities to dispute.²³³ The severe consequences, if detainees are found to be enemy combatants, and *Mathews's* valuation of the process due underlie the procedures detainees should receive.²³⁴

Factfinders who judge whether citizens were accurately detained must examine, and use throughout the hearings, a number of basic concepts. For instance, they should honor reciprocity and evenhandedness when selecting and deploying various techniques. Illustrative is Justice O'Connor's pronouncement that hearsay might

230. See *Hamdi*, 542 U.S. at 553 (Souter, J., concurring in part and dissenting in part); accord *id.* at 554, 575 (Scalia, J., dissenting); see also *supra* note 25 and accompanying text.

231. *Hamdi*, 542 U.S. at 528; see *supra* notes 15–17, 64, 197–200, 212 and accompanying text.

232. See *Hamdi*, 542 U.S. at 533 (citation omitted); see also *supra* notes 15–17, 64 and accompanying text.

233. See *supra* notes 219 and accompanying text. The criminal regime may afford defendants fewer benefits than the civil one grants plaintiffs. See, e.g., *infra* notes 251–56 and accompanying text.

234. See *supra* notes 220 and accompanying text; see also *supra* notes 50–64, 220–27 and accompanying text.

warrant acceptance as the most reliable government evidence available.²³⁵ If this does materialize, there should be commensurate allowance for detainees' hearsay offers. Reciprocity and evenhandedness are major tenets of criminal procedure and evidence jurisprudence, while CIPA dictates reciprocity in specific contexts.²³⁶

2. Specific Recommendations

a. The Neutral Decisionmaker

Justice O'Connor neither defined "unbiased arbiter" nor identified who would satisfy the command. She did offer the general rule that "even purportedly fair adjudicators 'are disqualified by their interest in the controversy,' " and broached the "possibility that the standards . . . articulated could be met by an appropriately authorized and properly constituted military tribunal."²³⁷ Yet, Justice O'Connor neglected to detail the latter suggestion, including when the military entity should be used, and whether citizens whom the body decides were correctly detained may secure federal judicial relief. She did make multiple allusions to habeas petitioners and courts, while Justices Souter and Ginsburg vociferously disputed that "an opportunity to litigate before a military tribunal might obviate or truncate inquiry by a court on habeas."²³⁸ Furthermore, relevant decisions that involved World War II military proceedings, such as *Quirin* and analogous cases, would demand that judges hear challenges to tribunal determinations upholding enemy combatant designations.²³⁹ Even though lawmakers have now authorized commissions and prescribed how they function—which is a departure from the bodies unilaterally created by the November 2001 Executive Order—the tribunals may lack impartiality, as the decisionmakers

235. See *Hamdi*, 542 U.S. at 533–34; see also *supra* note 68 and accompanying text.

236. See, e.g., *Fallen v. United States*, 378 U.S. 139, 142 (1964); FED. R. CRIM. P. 2; FED. R. EVID. 106, 611; Classified Information Procedures Act, 18 U.S.C. app. 3 § 6(f) (2000). See generally LAFAVE, ISRAEL & KING, *supra* note 219, §§ 1.5(i), 1.5(j), 2.4 (describing the need for evenhandedness and fundamental fairness in criminal procedure).

237. See *Hamdi*, 542 U.S. at 538. Justice O'Connor left unclear what exactly would constitute a "disqualifying interest," whether military tribunals should be used in *non-exigent* cases, and whether an administrative hearing could suffice.

238. *Id.* at 546, 554 (Souter, J., concurring in part and dissenting in part) (emphasis added).

239. *Ex Parte Quirin*, 317 U.S. 1, 19 (1942); *In re Yamashita*, 327 U.S. 1, 9 (1946). See generally A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309 (2003) (arguing that *Quirin* supports a broader view of the jurisdiction exercised by federal habeas corpus courts than asserted by the Government).

will remain in the military chain of command.²⁴⁰ A superior option is the federal judiciary whose lifetime appointment, undiminished pay, and venerable traditions, especially its reputation for independence, better guarantee neutrality.²⁴¹

b. Identification of Non-Exigent and Exigent Situations

The arbiter should first decide whether “the exigencies of the circumstances” necessitate that these hearings “be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”²⁴² The assignment’s fulfillment is vital, as it will suggest whether to use the rudimentary process which Justice O’Connor considered appropriate for *exigent* instances or techniques more solicitous of detainees. She voiced the greatest concern about national security but offered little guidance on when a military action is proceeding, indicia which are burdensome, or ways this duty to identify the type of situation could be satisfied.²⁴³

One threshold query the factfinder should resolve is whether the decision to designate an individual as an enemy combatant implicates an ongoing military endeavor. If a military effort is clearly in progress, the decisionmaker should consult numerous factors related to security and discern whether the Executive will be overburdened. These include: where and when the Government apprehends the citizen and stages the hearing; the person’s value as an intelligence

240. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, Military Order of Nov. 13, 2001, 3 C.F.R. § 2001 comp., at 918–21, 66 Fed. Reg. 57, 833 (Nov. 16, 2001). See generally Bryant & Tobias, *Youngstown Revisited*, *supra* note 96 (using the *Youngstown* framework to conclude that the President’s Executive Order of November 13, 2001 cannot preclude those it covers from invoking the jurisdiction of the federal courts); Tim Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, § 1, at 1; Josh White, *Panel for Detainees’ Cases Cut in Half*, WASH. POST, Oct. 22, 2004, at A12; *supra* text accompanying note 6; sources cited *supra* note 206. The DTA and the MCA sharply limit judicial review of military tribunal determinations, and the statutes purportedly strip federal courts of habeas corpus jurisdiction. *But see* Weiss v. United States, 510 U.S. 163, 178–81 (1994) (holding that the presence of military judges in a chain of command does not deprive litigants of due process). *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), invalidated the unilaterally created tribunals. The MCA purportedly validated military tribunals. However, the Supreme Court’s June 29, 2007 grants of certiorari in two cases suggest that it will consider the new tribunals’ validity. See *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195); *Al-Odah v. United States*, *cert. granted*, (U.S. June 29, 2007) (No. 06-1196).

241. See U.S. CONST. art. III. Military tribunals at most should be reserved for extreme circumstances, such as battlefield captures, assuming arguendo that this elusive notion could be defined in the existing context.

242. *Hamdi*, 542 U.S. at 533; see also *supra* note 67 and accompanying text.

243. See *Hamdi*, 542 U.S. at 531–35; see also *supra* Part II.A.3.

source; the likelihood that military activities will be disrupted; or that valuable material, such as names of putative informants or troops' locations or battlefield strategies, might be revealed.²⁴⁴

1. *Non-Exigent Situations*

When the factfinder concludes that hearings will *not* burden the Executive while a military initiative proceeds, the adjudicator should generally review and depend on a number of vaunted mechanisms. These could include several different requirements: those the judiciary uses in criminal prosecutions; the techniques Congress and judges have instituted for habeas attacks on executive detentions and that lawmakers have fashioned for related matters (particularly those implicating security, namely, hearings under CIPA, FISA, and the alien terrorist removal legislation). The justifications discussed earlier warrant application of these mandates.²⁴⁵

a. *Legal Representation*

Imprisoned citizens must then be notified of the opportunity for, and have access to, lawyers if they so wish. Justice O'Connor did not clarify whether indigent detainees enjoy a guarantee, but Justice Souter praised her "affirmation of Hamdi's right to counsel"²⁴⁶ while federal legislation offers attorneys to impecunious, detained non-citizens who are threatened with removal.²⁴⁷ Even the *Quirin* defendants, individuals whom President Franklin Roosevelt believed warranted swift execution, had able counsel.²⁴⁸ Lawmakers must proffer attorneys for indigent detained citizens, as they will have few resources to oppose imprisonment. Until the Senate and House

244. This list excludes factors, such as fiscal costs, treated *supra* note 226. A categorical approach—making battlefield captures *exigent*—lacks flexibility. For instance, even had Hamdi been seized there, a hearing in America three years later appears *non-exigent*. The approach that I suggest could afford the Government the opportunity to claim that all situations are exigent or involve state secrets, thus frontloading the due process inquiry. Judges should be aware of this possibility for tactical advantage and guard against it. Doubts should be resolved in the citizen's favor, as the impacts are so severe.

245. See *supra* notes 220–25 and accompanying text.

246. *Hamdi*, 542 U.S. at 539 (determining that Hamdi clearly had a right of access to counsel on remand); *id.* at 533 (Souter, J., concurring in part and dissenting in part); see also U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 341–42 (1963). See generally LAFAVE, ISRAEL & KING, *supra* note 219, §§ 6.4, 11.1 (outlining the constitutional right to counsel).

247. See 8 U.S.C. § 1534(c)(1) (2000); see also sources cited *supra* note 207.

248. The Nazi saboteurs had competent representation before the military commission as well as before the Supreme Court. See, e.g., DOBBS, *supra* note 6, at 195–96, 207–52; Bryant & Tobias, *Quirin Revisited*, *supra* note 239, at 319–23.

comprehensively legislate, the question might turn on the proceedings' denomination because the Court has not mandated representation of habeas petitioners who were found guilty, exhausted appeals, and then sued.²⁴⁹ Moreover, the detainee should have the opportunity for thorough, confidential deliberations with the lawyer and the requisite time to prepare fully for the hearings (although the United States monitored the cursory, initial sessions between Hamdi and his attorney after it denied them for two years).²⁵⁰

b. Notice of Facts that Support the Enemy Combatant Designation

Once those preliminary issues are resolved, the Government must afford the citizen notice of why it designated him an enemy combatant. Justice O'Connor provided only that this be appropriate to the setting and "be granted at a meaningful time and in a meaningful manner;" however, that phrase's reiteration indicates the detainee should have the maximum facts which underlie the allegation that he was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and "engaged in an armed conflict against the United States" there.²⁵¹ The quality of the opportunity to dispute the label will reflect the material which the Government tenders, and the impact for someone who is adjudged an enemy combatant will be profound. The detained citizen, therefore, should receive the most information with the greatest detail that will not jeopardize security, while the arbiter ought to employ numerous mechanisms which are treated below that help prevent revelation of valuable intelligence, as warranted. The floor must be the

249. See, e.g., *Murray v. Giarratano*, 492 U.S. 1, 3 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); see also LAFAYE, ISRAEL & KING, *supra* note 219, § 11.1 (discussing the right to counsel in post-conviction relief). See generally *supra* note 203 and accompanying text.

250. See Markon, *supra* note 9; Stuart Taylor Jr., *A Failure of Leadership?*, LEGAL TIMES, July 5, 2004, at 54; see also sources cited *supra* note 204. If the selection of a private attorney should raise concerns involving national security, court appointment of a federal public defender, such as Hamdi's counsel, might furnish greater assurance.

251. *Hamdi*, 542 U.S. at 526, 533 (internal quotation marks omitted); see also *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993) (describing the due process requirement for a neutral decisionmaker); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (explaining the due process requirement for "some kind of hearing"); *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972) (describing the importance of being provided notice and an opportunity to be heard); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (referring to the due process requirement for notice and opportunity to be heard).

certification's documentation, which the plurality asserted and the United States recognized, the military can easily locate.²⁵²

Yaser Hamdi's situation is illustrative. The only evidentiary basis for classifying him was the Mobbs declaration, a nine-paragraph affidavit compiled by a Government official who lacked first-hand knowledge about the detainee. Reliance on this affidavit that did not explain various ideas—namely, its sources and the conditions under which the data were gathered, the criteria applied when designating Hamdi, and whether the United States possessed exculpatory material—would have given the citizen an insufficient rebuttal opportunity.

c. Detainee Access to Information

The factfinder must grant, basically through discovery, access to the maximum relevant information that is consistent with the protection of national security. Justice O'Connor analyzed the central issues only tangentially, yet her demand that the citizen enjoy a fair rebuttal opportunity requires that he have all the pertinent material which justifies the designation.²⁵³ For Hamdi, this might have included his statements while in custody; the individuals and documents Michael Mobbs consulted when drafting his affidavit; and the papers that the Government would tender at the hearings.

Lawmakers have also prescribed access. For example, the habeas and alien terrorist regimes, as well as CIPA and FISA, generally manage information flow in similar contexts. The habeas legislation authorizes petitioners to take evidence orally or by deposition, interrogatory, or affidavit. It also implements rules which govern some habeas matters, empowering judges to use the federal rules—insofar as they do not violate the habeas provisions—and allows discovery under the federal strictures for good cause.²⁵⁴ When other habeas rules are silent regarding access to information, the judiciary can proceed in any legal way that honors the rules and applicable U.S. Code sections, or it can decide motions under the

252. See *supra* note 51, 71, 214 and accompanying text. Civil process grants little notice and criminal affords even less. See FED. R. CIV. P. 8; FED. R. CRIM. P. 3, 7, 9–11.

253. See *Hamdi*, 542 U.S. at 533; see also *supra* notes 65–66, 83, 202, 251 and accompanying text.

254. 28 U.S.C. § 2246 (2000); 28 U.S.C. § 2254, R. 6 Governing § 2254 Cases in the United States District Courts (2004); see also HERTZ & LIEBMAN, *supra* note 203, § 19.4 (describing discovery and Rule 6 in greater detail). See generally *Bracy v. Gramley*, 520 U.S. 899 (1997) (addressing discovery requests in habeas proceedings); *Harris v. Nelson*, 394 U.S. 286 (1969) (same); *Harris v. Johnson*, 81 F.3d 535 (5th Cir. 1996) (same), *cert. denied*, 517 U.S. 1227 (1996).

Federal Rules of Civil or Criminal Procedure.²⁵⁵ The alien terrorist removal law also enables district judges to issue subpoenas for witnesses' appearance and to compel the production of documents or similar objects which are clearly needed to resolve material issues.²⁵⁶

d. Burden of Proof

The arbiter should next determine who has the burden of proof and what the relevant standard is. Justice O'Connor left these questions unaddressed for instances which are *not exigent*, yet she found that the Government's tender, if credible, might have a rebuttable presumption, and shift the burden to the detainee, in *exigent* cases.²⁵⁷ This material should be given little weight for *non-exigent* cases, however, as the usual doctrine requires that litigants asserting a fact prove it beyond a reasonable doubt in criminal proceedings and by a preponderance of the evidence in civil matters.²⁵⁸

The jurist did intimate that the Government must show the citizen was "part of or supporting forces hostile to [the nation] or coalition partners" in Afghanistan and "engaged in an armed conflict against the United States" there.²⁵⁹ Justice O'Connor, thus, apparently required that the Government establish two important facts: (1) the detainee was a member of, or supported, hostile forces in Afghanistan; *and* (2) battled there with the United States. This quotation reflects the "enemy combatant" notion developed by the Government for the ongoing military initiative; however, tenets

255. 28 U.S.C. § 2254, R. 6 Governing § 2554 Cases in the United States District Courts (2004); *see also* HERTZ & LIEBMAN, *supra* note 203, §§ 41.1–41.8 (describing § 2255 habeas procedures for federal prisoners). Criminal process allows less discovery than civil, but *Jencks v. United States*, 353 U.S. 657, 672 (1957), grants "defendants" more. *See* FED. R. CRIM. P. 16; LAFAYE, ISRAEL & KING, *supra* note 219, §§ 14.2(b)–15.3(a).

256. *See* 8 U.S.C. § 1534 (d)(1) (2000). If the enemy combatant hearings are criminal, *Brady v. Maryland*, 373 U.S. 83 (1963), would require the U.S. to provide the "defendant" favorable information. *See* Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 3–4 (2002). For a recent opinion that analyzes numerous issues regarding detainee access to information, *see* generally *Bismullah v. Gates*, Nos. 06-1197, 06-1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007).

257. *Hamdi*, 542 U.S. at 534, 538 (2004); *see also supra* note 67–68 and accompanying text.

258. *See infra* notes 262–64 and accompanying text.

259. *See Hamdi*, 542 U.S. at 526 (internal quotation marks omitted) (quoting Brief for the Respondents at 3, *Hamdi*, 542 U.S. 507 (No. 03-6698)); *see also* COLE, *supra* note 3 (characterizing the treatment of *Hamdi* and *Padilla* as "pav[ing] the way for what will be done to American citizens tomorrow"); Engle, *supra* note 5 (discussing conceptions of non-citizens within the United States as hostile to U.S. interests).

relating to authority and separation of powers might have led Congress to modify Justice O'Connor's articulation of what must be proved.²⁶⁰ The jurist also repudiated as "inadequate" the "some evidence" theory which the administration championed when it opposed the *Hamdi* and *Padilla* litigation because the idea embodied a "standard of review, not . . . of proof," while due process commands that detainees have a way to challenge their designations.²⁶¹

The factfinder must impose on the Government the burden to show—preferably by clear and convincing evidence, arguably beyond a reasonable doubt, or at least by a preponderance of the evidence—that it has met the criteria for designating a citizen an enemy combatant. The Justices never require evidence which is less than clear and convincing to authorize the substantial deprivation of a citizen's liberty, so prescribing this burden would reaffirm the ideal that "liberty is the norm and detention without a trial is the carefully limited exception."²⁶² The Court also mandates proof beyond a reasonable doubt when one is said to act illegally.²⁶³ A preponderance of the evidence burden governs most civil lawsuits and alien terrorist removal.²⁶⁴

e. Evidence

Although the *Hamdi* plurality neglected to mention the Federal Rules of Evidence, the decisionmaker must scrutinize and apply to the greatest practicable extent the contemporary understandings imposed by those federal rules,²⁶⁵ which the judiciary deploys in civil

260. *Hamdi*, 542 U.S. at 575–79 (Scalia, J., dissenting); see *supra* notes 202, 258 and accompanying text.

261. See *Hamdi*, 542 U.S. at 537; see also *supra* notes 18–19, 46–47, 80–83, 94 and accompanying text.

262. *Hamdi*, 542 U.S. at 529 (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)); see also *Addington v. Texas*, 441 U.S. 418, 425 (1979) (explaining the importance of establishing a standard of proof in the detention context); *Jones v. United States*, 463 U.S. 354, 361 (1983) (discussing due process requirements in the context of mental health commitments). See generally *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) (holding that the President lacked inherent constitutional authority to detain the alien petitioner as an enemy combatant), *reh'g en banc granted*, (Aug. 22, 2007) (No. 06-7427).

263. See, e.g., *Jackson v. Virginia*, 443 U.S. 307, 326 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 703–04 (1975); *In re Winship*, 397 U.S. 358, 367 (1970); see also H.R. 1290 § 4(a)(15), 108th Cong. (2003) (prescribing the standard). See NOWAK & ROTUNDA, *supra* note 21, § 13.9.

264. See MCCORMICK ON EVIDENCE § 337, PRACTITIONER TREATISE SERIES (5th ed. 1999); 8 U.S.C. § 1534(g) (2000).

265. FED. R. EVID.; see also MCCORMICK, *supra* note 264 (surveying how the burden of proof is apportioned). See generally WIGMORE ON EVIDENCE (1983).

and criminal litigation.²⁶⁶ For instance, the arbiter would exercise broad discretion to judge witness credibility and the admissibility, relevance, reliability, and weight of evidence.²⁶⁷ Thus, the factfinder should infrequently admit hearsay offered by the Government when situations are *non-exigent*.²⁶⁸ Adherence to the rules is warranted because they incorporate concepts which judges have long honored and applied to foster equitable disposition.

Justice O'Connor did remark that a habeas court in the new proceedings "*may* accept affidavit evidence" similar to the material which designated Hamdi, so long as detainees might contest the designations; however, she appeared to be referencing *exigent* instances and suggested that the government must prove the continuing military action leaves non-hearsay unavailable.²⁶⁹ Therefore, if the scenario is *non-exigent*, reliance on affidavits would generally be improper. Should the hearsay nevertheless be admitted, the United States must at least produce those reports and records on which it is based—documentation that Justice O'Connor maintained, and the Government said, is now "kept in the ordinary course of military affairs."²⁷⁰ The harsh ramifications for a detainee who is found correctly designated mean that the testimony of an official with immediate, and purportedly extensive, knowledge about the label will be valuable, insofar as allowing this submission is feasible. These recommendations would better enable the citizen to probe the designation and the arbiter to scrutinize its validity and judge reliability, and the federal evidentiary measures include preferences for non-hearsay as well as for live testimony.²⁷¹

266. The alien terrorist removal legislation abjures reliance on the federal rules. See 8 U.S.C. § 1534(h) (2000).

267. See generally MCCORMICK, *supra* note 264 (surveying how the burden of proof is apportioned). CIPA allows the government to seek analogous determinations about classified data. See Classified Information Procedures Act, 18 U.S.C. app. 3 § 6 (2000); see also sources cited *supra* note 204.

268. See Hamdi v. Rumsfeld, 542 U.S. 507, 533–34, 538 (2004).

269. See *id.* at 538 (first emphasis added). I analyze the ideas in this paragraph in the event that I have misjudged her view or the arbiter allows this proffer in *non-exigent* situations and because the Government's case is also considered at this juncture.

270. Hamdi, 542 U.S. at 534; accord Hamdi v. Rumsfeld, 337 F.3d 335, 369, 374–75 (4th Cir. 2003) (Motz, J., dissenting from denial of rehearing en banc); see also *supra* notes 71, 252 and accompanying text.

271. See FED. R. EVID. 804; see also MCCORMICK, *supra* note 264, § 245. See generally WEINSTEIN'S FEDERAL EVIDENCE §§ 804.01–804.02, 804.03[6][c] (Joseph McLaughlin, ed., 2007) (discussing the hearsay exceptions that apply when witnesses are unavailable). Hamdi's circumstances elucidate these concepts because reliance on the Mobbs declaration would not have sufficed.

f. Detainee's Rebuttal

Once the United States has justified the enemy combatant label, the plurality dictated that the individual must have a "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."²⁷² Justice O'Connor emphasized these requirements, yet she posited limited guidance apart from the notions that the hearings would reflect the context and would be "granted at a meaningful time and in a meaningful manner."²⁷³

The opportunity to rebut should encompass the detainee's testimony, testimony furnished by people who support the citizen, related oral or documentary input which the detainee adduces, and cross examination of U.S. witnesses. The factfinder must permit the detainee to offer the greatest information and tender the most effective response consistent with national security and the federal rules, as his liberty will be at stake. These views, and the abilities to dispute the classification, underscore the importance of legal representation.

g. National Security, Civil Liberties, and Protective Mechanisms

Justice O'Connor evinced concern about the foundational precepts of security and liberty and the importance of meticulously reconciling them when opposed. For example, her decision voiced confidence that judges would determine the core facts in a "prudent and incremental" way and "pay proper heed" to security and liberty, which she observed can be in tension.²⁷⁴ However, Justice O'Connor analyzed few means of realizing those goals.²⁷⁵

To the extent that the detainee's presentation or his cross examination may jeopardize security, the adjudicator should review and use numerous, time-honored devices which foster that interest, safeguard liberty, and accommodate both when they conflict. These encompass protective orders as well as the military and state secret privileges, which shield classified data.²⁷⁶ Related techniques are *ex*

272. *Hamdi*, 542 U.S. at 533; *see supra* note 65 and accompanying text. Fair rebuttal would require full notice and access to the Government's basis for the designation. *See supra* notes 253–56 and accompanying text.

273. *Hamdi*, 542 U.S. at 533, 537–38 (citations omitted); *see supra* note 66 and accompanying text.

274. *See Hamdi*, 542 U.S. at 539; *see also supra* notes 53–64, 88 and accompanying text.

275. *See supra* note 202 and accompanying text. In fairness, Justice O'Connor did proffer a rather significant number of concrete suggestions. *See, e.g., supra* notes 229, 237, 253, 259, 261, 272–73.

276. *See, e.g.,* 8 U.S.C. § 1534(e) (2000); Classified Information Procedures Act, 18 U.S.C. app. 3 § 3 (2000); *see also* *United States v. Pappas*, 94 F.3d 795, 799–801 (2d Cir.

parte and in camera inspections of material that would ostensibly undermine security, with dependence on alternatives, especially summaries, if needed, which Justice O'Connor broached and CIPA, FISA and the alien terrorist removal legislation prescribe.²⁷⁷ Closed hearings, when indicated, and document redaction are similar mechanisms that judges have employed for the *Hamdi* and *Padilla* litigation and the criminal prosecution against Zacarias Moussaoui.²⁷⁸ The basic, opposed values of security and liberty and the admonitions by Justice O'Connor warrant reliance on those methods.

2. Exigent Situations

When the factfinder definitively ascertains that a continuing military initiative demands procedural tailoring to burden the Executive less, a few concepts which obtain in *non-exigent* scenarios will apply. Illustrative are access to the premises that underlie the designation and the opportunity for representation, which are furnished citizens, as well as many additional strictures that I have evaluated.²⁷⁹

1996) (detailing CIPA's process for the disclosure of classified information); *El-Masri v. United States*, 479 F.3d 296, 302–13 (4th Cir. 2007) (finding that the state secrets privilege precluded litigation under the Alien Tort Statute); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 984 (N.D. Cal. 2006) (outlining the state secrets privilege); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 758–66 (E.D. Mich. 2006) (finding that the state secrets privilege did not apply to the National Security Agency's data mining program), *rev'd*, Nos. 06-2095/06-2140, 2007 U.S. App. LEXIS 16149, 2007 FED App. 0253P (6th Cir. July 6, 2007); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1258–62 (W.D. Wash. 2002) (applying CIPA and state secrets privilege). *See generally* Adam Liptak, *A Case So Shielded One Side Is in the Dark*, N.Y. TIMES, Aug. 13, 2007, at A10 (discussing appeals of two cases involving state secrets privilege).

277. *See supra* note 71 and accompanying text; 8 U.S.C. § 1534(e); 18 U.S.C. app. 3 § 6; 50 U.S.C. § 1845(f). *See generally* *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999) (affording the trial court wide discretion in conducting a *voire dire*); *United States v. Isa*, 923 F.2d 1300 (8th Cir. 1991) (addressing the use of informants and electronic surveillance).

278. *See* *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003); *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 608–09 (S.D.N.Y. 2002) (discussing the issues surrounding the court's consideration of the sealed Mobbs declaration); *see also* *United States v. Nixon*, 418 U.S. 683, 714 (1974) (upholding in camera review of presidential materials). Moussaoui's prosecution fostered certain difficulties which these measures do not resolve. *See* *United States v. Moussaoui*, 365 F.3d 292, 315 (4th Cir. 2004). District Judge Marcia Cooke has also applied these measures in the Southern District of Florida prosecution of Padilla. *See* Deborah Sontag, *In Padilla Wiretaps, Murky View of "Jihad" Case*, N.Y. TIMES, Jan. 4, 2007, at A1. *See generally* Liptak, *supra* note 276 (discussing extreme secrecy in cases involving state secrets privilege).

279. *See supra* notes 246–252.

The decisionmaker should also consider the *Hamdi* guidance and other pertinent measures, namely the CIPA, FISA, and alien terrorist removal schemes, and effectuate techniques that could obviate or limit difficulties the hearings might provoke. For instance, Justice O'Connor said that the adjudicator may need to treat hearsay as most reliable, yet she was not countenancing wholesale admission because she indicated that the Government would have to demonstrate how a military effort necessitates the use of hearsay.²⁸⁰ Justice O'Connor also thought that the factfinder might grant the United States' contribution a rebuttable presumption, so long as the individual has a fair opportunity to dispute the material.²⁸¹ Accordingly, when there is credible evidence that the detainee satisfies the enemy combatant designation standards, he may have to rebut this "with more persuasive evidence that he falls outside the criteria."²⁸² If litigation tactics before or at the hearings jeopardize security, the arbiter should invoke the mechanisms I have discussed, such as provisos which Congress designed to rectify that eventuality.²⁸³

c. Summary By Way of Justifications

Numerous themes justify this guidance. The measures proposed protect security and liberty through assessment, calibration, and reconciliation of the fundamental, and occasionally divergent, tenets. For example, imposing the proof burdens analyzed on the Government in *non-exigent* situations and a rebuttable presumption, when its tender is credible, on the detainee for *exigent* ones accommodates the two values and the litigants. The ideas concomitantly honor Justice O'Connor's delicate balance and her perspectives while elaborating, augmenting, and refining the concepts. Judges have also used for decades a number of techniques, such as in camera evaluations and document redaction, which safeguard America and the citizen. Moreover, designating the judiciary as factfinders promotes neutral, equitable decisionmaking. Furthermore, the suggestions afford much concrete guidance, with dependence on venerable principles; namely, the rules of evidence and habeas, but judges will maintain flexibility to address diverse

280. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34, 538–39 (2004); see also *supra* notes 68, 87 and accompanying text.

281. See *Hamdi*, 542 U.S. at 534, 538–39; see also *supra* notes 68, 87 and accompanying text.

282. See *Hamdi*, 542 U.S. at 534; see also *supra* notes 69, 257–58 and accompanying text.

283. See *supra* notes 204–05 and accompanying text.

circumstances. The views also respect separated powers by, for instance, urging that lawmakers and the Executive work together and implement expeditiously comprehensive measures that govern the hearings, while practical advice is furnished for decisionmakers who will conduct them.

CONCLUSION

The detention of U.S. citizens through designation as enemy combatants poses intractable dilemmas related to national security, civil liberties, and the distribution of federal governmental authority. The *Hamdi* Supreme Court plurality treated some questions when it held that detentions are valid but that citizens must receive due process. However, the Justices identified few mechanisms which should apply, and certain specifics that were delineated remain unclear. Fourth Circuit disposition of these and closely related issues has also lacked clarity. If judges follow the guidance which this Article offers, they can elucidate detention jurisprudence and balance security and liberty. Congress in turn should review and use the ideas offered in the Article to pass thorough legislation.