

**More Questions than Answers:  
The Indeterminacy Surrounding Enemy Combatants Following *Hamdi v. Rumsfeld***

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**I. Introduction**

On January 9, 2004, the United States Supreme Court granted petitioner Yaser Esam Hamdi's request to review his failed appeal before the Fourth Circuit in *Hamdi v. Rumsfeld*.<sup>1</sup> In conjunction with this grant of certiorari, the Supreme Court also decided to review a similar case that was successfully appealed to the Second Circuit in *Padilla v. Rumsfeld*<sup>2</sup> on January 9, 2004.<sup>3</sup> The legal community and media's excitement surrounding these cases stemmed from the likelihood that the Court would articulate upon its previous rulings in *Ex Parte Milligan* and *Ex Parte Quirin*. In these prior cases, the Court delineated the Executive's power to deem American citizens "enemy combatants" under Article II of the United States Constitution.<sup>4</sup> The Court's rulings in these cases gave the Executive the power to deny to such American citizens access to American courts before their indefinite detention in certain situations.<sup>5</sup>

The extent of the Executive's power to detain American citizens was particularly important in light of the September 11th attacks and the Bush Administration's subsequent War on Terrorism. Civil liberties advocates argued that the Executive's uncontested authority to withhold from American citizens access to American courts infringed upon the constitutionally protected civil liberties of American citizens. They feared this expansion could be used to indefinitely detain Arab Americans in a manner

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<sup>1</sup> 337 F.3d 335 (4th Cir. 2003).

<sup>2</sup> 352 F.3d 695 (2d Cir. 2003).

<sup>3</sup> See, e.g., Bill Myers, *Prof: Terror Cases Could Let Court Demonstrate Independence*, 150 CHICAGO DAILY LAW BULLETIN 2, April 1, 2004; *Court Will Hear Challenge to Enemy Combatant's Detention*, 26 THE NAT'L LAW JOURNAL 13, January 19, 2004 at col.2; Gina Holland, *Court to Hear "Dirty Bomb" Case*, CHARLESTON GAZETTE, Feb. 21, 2004 at 1A; Anne Gearen, *High Court Agrees to Quick Review of Padilla Case; The U.S. is Appealing a Ruling that the "Dirty Bomb" Suspect Had to Be Freed Within 30 Days*, THE PHILADELPHIA INQUIRER, January 24, 2004 at A03; Associated Press, *Supreme Court to Rule on "Combatant" Rights*, Feb. 20, 2004, available at <http://www.msnbc.msn.com/id/4313349>.

<sup>4</sup> *Ex Parte Milligan*, 71 U.S. 2 (1866) (holding that Executive's detention of American citizen and resident of a loyal state during the Civil War in which the courts were functioning as an enemy combatant was unconstitutional under Article II of the Constitution); *Ex Parte Quirin*, 317 U.S. 1 (1942) (holding that Executive's detention of American citizens caught on American soil in an attempt to sabotage American facilities during World War II for the German army as an enemy combatant was constitutional under Article II of the Constitution).

<sup>5</sup> *Milligan*, 71 U.S. 2; *Quirin*, 317 U.S. 1.

similar to the internment of Japanese Americans during World War II.<sup>6</sup> On the other hand, government officials and supporters contended that the need to obtain information vital to the prevention of future terrorist attacks required a more powerful executive authority. They reasoned that the Executive's power to declare American citizens "enemy combatants" was constitutional under Article II of the Constitution, given the Court's rulings in *Milligan* and *Quirin* and the current War on Terrorism.<sup>7</sup>

Even though the Court declined to reach a decision in *Padilla* on jurisdictional grounds,<sup>8</sup> in *Hamdi* the Supreme Court held in a plurality opinion that American citizens designated as "enemy combatants" by the Executive were constitutionally entitled to a "meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."<sup>9</sup> The decision in *Hamdi* initially drew rave reviews from many civil liberties advocates like American Civil Liberties Union legal director Steven Shapiro.<sup>10</sup>

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<sup>6</sup> See, e.g., American Civil Liberties Union, *ACLU Calls Victory for Right to Counsel in Enemy Combatant Case Positive Step*, Dec. 4, 2002, available at <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=11414&c=111>; Human Rights Watch, *U.S. Circumvents Courts With Enemy Combatant Tag*, June 12, 2002, available at <http://www.hrw.org/press/2002/06/us0612.htm>; Human Rights First, *Enemy Combatants*, available at [http://www.humanrightsfirst.org/us\\_law/after\\_911/PDF/Enemy%20Combatants.pdf](http://www.humanrightsfirst.org/us_law/after_911/PDF/Enemy%20Combatants.pdf); Jonathan Turley, *You Have Rights – If Bush Says You Do*, L.A. TIMES, June 3, 2004 at B11; Unitarian Universalist Service Committee, *UUSC Joins Legal Challenge to Government's Power to Restrict Civil Liberties*, Aug. 21, 2003, available at <http://www.uusc.org/info/article082103p.html>.

<sup>7</sup> See, e.g., Associated Press, *White House Counsel Defends Policy on Enemy Combatants*, Feb. 24, 2004, available at [http://www.usatoday.com/news/washington/2004-02-24-detainees\\_x.htm](http://www.usatoday.com/news/washington/2004-02-24-detainees_x.htm); Henry M. Holzer, *Civil Liberties Hysteria*, FRONT PAGE MAGAZINE, July 2, 2003, available at <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=8694>; Charles Krauthammer, *Enemy Rights*, August 16, 2002, available at <http://www.townhall.com/columnists/charleskrauthammer/ck20020816.shtml>; American Center for Law & Justice, *Brief of Amicus Curiae in Support of Respondents*, March 24, 2004, available at <http://www.aclj.org/resources/natsec/antiterrorism/Hamdi%20Amicus.pdf>.

<sup>8</sup> *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (dismissing the case on the ground that Padilla failed to sue the commander of the naval brig on which he was detained, the proper adverse party to Padilla's habeas petition).

<sup>9</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004); see also *infra* notes 24 through 27 and accompanying text. Although Congress can constitutionally suspend the writ of habeas corpus in cases of rebellion, invasion, or "when the public safety may require it," U.S. Const., Art. I., Sec. 9., cl. 2, this paper shall focus on the Executive's power to suspend that writ with respect to American citizens it determines to be "enemy combatants."

<sup>10</sup> Zachary Coile & Bob Egelko, *Justices Affirm Rights of Detainees: Terror Suspects Must be Given Access to U.S. Courts*, S.F. CHRONICLE, June 29, 2004 at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2004/06/29/MNGNJ7DKGL1.DTL>; see also American Civil Liberties Union, *Supreme Court Ends Term With Reaffirmation of Rule of Law During Times of National Crisis*, June 29, 2004, available at <http://www.aclu.org/court/court.cfm?ID=16029&c=261>; Human Rights Watch, *Court Limits President's Power Over Terrorism Detainees*, June 28, 2004, available at <http://hrw.org/english/docs/2004/06/28/usdom8969.htm>; Human Rights First, *Supreme Court Upholds Right of Detainees in "War on Terrorism" to Challenge Their Detention*, June 28, 2004, available at

Although the Court's insistence upon some form of review of the Executive's designation of American citizens as "enemy combatants" is desirable from a civil liberties standpoint, the opinion left many unanswered questions. Among these questions are: 1) the role of Congressional authorization in the Executive's determination to detain American citizens as "enemy combatants"; 2) the extent of the constitutionally required discovery process; 3) the length of detention; 4) the type of "neutral decisionmaker" sufficient to satisfy the detainees' constitutional rights; and 5) the applicability of *Hamdi* to American citizens detained outside of open combat hostilities.

Furthermore, as will be discussed, despite the excitement expressed by civil liberties groups following *Hamdi*, the decision will be of limited utility in preventing unconstitutional detentions in the event of future terrorist attacks or times of crisis. The limited utility of this cases stems from the narrow scope of the ruling and the limited strength of jurisprudential precedent during times of crisis.

In this Comment, I will conduct a detailed examination of the Court's language and holding in *Hamdi*. I will also address the limitations and ambiguities of the Court's holding. I will conclude with an analysis of the Bush Administration's attempt to conform to *Hamdi* in the ongoing military tribunals set up for the Guantanamo detainees designated as "enemy combatants."

## **II. *Hamdi's* History and Array of Holdings**

Yaser Esam Hamdi was born an American citizen in Louisiana in 1980, and moved with his family to Saudi Arabia as a child.<sup>11</sup> By 2001 Hamdi was a resident of Afghanistan; at some point that year he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and later turned over to the United States military.<sup>12</sup> The United States initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay, Cuba in January 2002.<sup>13</sup> Upon learning that Hamdi was an American citizen in April 2002, the Government transferred him to a naval brig in Norfolk, Virginia. He

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[http://www.humanrightsfirst.org/media/2004\\_alerts/0628\\_omni.htm](http://www.humanrightsfirst.org/media/2004_alerts/0628_omni.htm).

<sup>11</sup> *Hamdi*, 124 S. Ct. at 2635.

<sup>12</sup> *Id.* at 2635-36.

<sup>13</sup> *Id.* at 2636.

remained at this location until he was transferred to a naval brig in Charleston, South Carolina in early 2004.<sup>14</sup>

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed a petition for writ of habeas corpus under 28 U.S.C. § 2241 in the United States District Court for the Eastern District of Virginia, naming as petitioners his son and himself as next friend.<sup>15</sup> The petition argued that Hamdi, as an American citizen, was entitled to be notified of the charges against him, to have access to legal counsel, and to have the merits of his case heard before an impartial tribunal under the Fifth and Fourteenth Amendments.<sup>16</sup>

The District Court initially appointed a federal public defender as counsel for the petitioners and ordered that counsel be given access to Hamdi. However, the United States Court of Appeals for the Fourth Circuit reversed that order, holding that the District Court had failed to extend appropriate deference to the Government's security and intelligence interests.<sup>17</sup> The Fourth Circuit directed the District Court to consider "the most cautious procedures first," and ordered the District Court to conduct a deferential inquiry into Hamdi's status as an "enemy combatant," noting that "if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's detention of him is a lawful one."<sup>18</sup>

On remand, the Government attached to its response a declaration from Michael Mobbs, who identified himself as Special Advisor to the Under Secretary of Defense for Policy.<sup>19</sup> In his declaration, Mobbs set forth the evidentiary support for Hamdi's detention as an "enemy combatant," namely that Hamdi was allegedly a member of a Taliban military unit at the time of his capture on the battlefield in Afghanistan by the Northern Alliance.<sup>20</sup>

The District Court held that the Mobbs Declaration fell "far short" of supporting Hamdi's detention as an "enemy combatant," and criticized the generic and hearsay nature of the affidavit.<sup>21</sup> The Fourth Circuit reversed, stressing that it was "undisputed

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Hamdi v. Rumsfeld*, 296 F.3d 278, 279, 283 (4th Cir. 2002).

<sup>18</sup> *Id.* at 283-84.

<sup>19</sup> *Hamdi*, 124 S. Ct. at 2636-37.

<sup>20</sup> *Id.* at 2637.

<sup>21</sup> *Id.*

that Hamdi was captured in a zone of active combat in a foreign theater of conflict.”<sup>22</sup> In addition, the Fourth Circuit rejected Hamdi’s arguments that 18 U.S.C. § 4001(a) and Article 5 of the Geneva Convention rendered any such detention unlawful.<sup>23</sup> The Circuit Court held that Congressional authorization for Hamdi’s detention could be found in the post-September 11th Authorization for Use of Military Force (AUMF) and that the Geneva Convention did not intend to create a private right of action.<sup>24</sup>

The Supreme Court, in a plurality opinion written by Justice O’Connor and joined by the Chief Justice and Justices Kennedy and Breyer, reversed the Fourth Circuit’s opinion.<sup>25</sup> In her opinion, Justice O’Connor held that although the AUMF did not use the specific language of detention, it authorized the President to detain “individuals legitimately determined to be Taliban combatants who engaged in armed conflict against the United States” for the duration of the hostilities in Afghanistan, which are currently ongoing.<sup>26</sup> Therefore, the Court determined that Hamdi was being held “pursuant to an Act of Congress” in accordance with 18 U.S.C. § 4001(a).<sup>27</sup>

Justice O’Connor then held that American citizens who dispute their status as enemy combatants “must receive notice of the factual basis for [their] classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker” under the Due Process Clause of the Constitution.<sup>28</sup> However, given the “exigencies of the circumstances” and the “uncommon potential [of the enemy combatant proceedings] to burden the Executive at a time of ongoing military conflict,” the Court

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<sup>22</sup> *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003).

<sup>23</sup> 18 U.S.C. § 4001(a) states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”

Article 5 of the Geneva Convention states that “[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, [are prisoners of war], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

<sup>24</sup> *Hamdi*, 316 F.3d at 467-68. The AUMF authorizes the President to use “all necessary and appropriate force” against “nations, organizations, or persons” associated with the September 11, 2001 terrorist attacks. 115 Stat. 224.

<sup>25</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2652 (2004)

<sup>26</sup> *Id.* at 2642 (internal quotations and citations omitted).

<sup>27</sup> *Id.* at 2639-40.

<sup>28</sup> *Id.* at 2648 (citing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (“An essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case’”) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)) and *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 617 (1993) (“due process requires a ‘neutral and detached judge in the first instance’”) (quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972))).

held that “hearsay . . . may need to be admitted as the most reliable available evidence from the Government in such a proceeding.” Further, the plurality held that “the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as the presumption remained a rebuttable one and fair opportunity for rebuttal was provided.”<sup>29</sup>

While Justice O’Connor recognized the traditional deference to military discretion during wartime, she held that “it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”<sup>30</sup> If the Court’s articulated standards were not met through the use of an appropriately authorized and properly constituted military tribunal, “a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.”<sup>31</sup>

Finally, the Court established when the due process requirements it established in *Hamdi* arose: “initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made [by the Government] to *continue* to hold those who have been seized.”<sup>32</sup>

With respect to Hamdi, the Court held that he had not received constitutionally-mandated Due Process.<sup>33</sup> Specifically, the Court held that “[a]n interrogation by one’s captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker.”<sup>34</sup> Therefore, the Court vacated the Fourth Circuit’s decision and remanded the case for further proceedings.<sup>35</sup>

In his concurrence, Justice Souter, joined by Justice Ginsburg, found that Hamdi’s detention was forbidden by 18 U.S.C. § 4001(a) and unauthorized by the AUMF, but noted that “the need to give practical effect to the conclusions of eight members of the Court rejecting the Government’s position calls for me to join with the plurality in

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<sup>29</sup> *Id.* at 2649.

<sup>30</sup> *Id.* at 2649-50.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 2649 (italicization in original).

<sup>33</sup> *Id.* at 2651.

<sup>34</sup> *Id.*

ordering remand on terms closest to those I would impose.”<sup>36</sup>

### III. Questions Raised by *Hamdi*

Although the Court’s ruling in *Hamdi* clarified several questions that arose with respect to the present War on Terrorism and the Executive’s power to declare American citizens “enemy combatants,” it raised many legal questions that remain unanswered. This section shall highlight several of the most important questions raised by the decision.

First, does the Executive have the constitutional authority to detain American citizens as “enemy combatants” without Congressional authorization? In *Hamdi*, the Court’s plurality opinion bypassed this question by holding that the AUMF authorized Hamdi’s detention.<sup>37</sup> Furthermore, the Court held that the AUMF satisfied the exception delineated in 18 U.S.C. § 4001(a).<sup>38</sup> However, *Hamdi* does not address whether the Executive can detain American citizens as “enemy combatants” in the absence of Congressional authorization.<sup>39</sup>

Obviously, given the limitations placed upon the Court in hearing only those cases and controversies arising before it, one cannot blame the Court for failing to provide the American people with sufficient direction as to when the Executive can declare American citizens “enemy combatants.”<sup>40</sup> However, given the dramatic importance of the issue, especially in light of the War on Terrorism, the Court should have indicated its thoughts in dicta on the constitutionality of executive action in the

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<sup>35</sup> *Id.* at 2652.

<sup>36</sup> *Id.* at 2660.

<sup>37</sup> See *supra* notes 25 to 26 and accompanying text.

<sup>38</sup> *Id.*

<sup>39</sup> One can discern from Justice Souter’s concurrence that the test for Executive detentions of American citizens as “enemy combatants” absent Congressional authorization is identical to that when Congress has authorized the detention. However, that view did not command a majority of the Court, and thus is not helpful in providing legal scholars and the American community guidance in the case of future Executive action without Congressional authorization.

For an argument that such unilateral action by the Executive is constitutional, see Jared A. Simmons, *In Civilian Dress and With Hostile Purpose: The Labeling of United States Citizens Captured on American Soil as Enemy Combatants*, 37 IND. L. REV. 579 (2004). For an argument that the Executive cannot constitutionally declare American citizens “enemy combatants” without Congressional authorization, see Stephen I. Vladeck, *The Detention Power*, 22 YALE L. & POL’Y REV. 153 (2004).

<sup>40</sup> See, e.g., *Miller v. French*, 530 U.S. 327, 349-350 (2000) (holding that the core function of the Judiciary was to decide “cases and controversies properly before them”) (quoting *United States v. Raines*, 362 U.S. 17, 20 (1960)); Abraham S. Goldstein, *The Passive Judiciary* (1981).

“enemy combatant” area absent Congressional authorization.<sup>41</sup>

Second, what is the extent of the discovery process constitutionally due an American citizen who contests his status as an “enemy combatant”? The Court’s plurality opinion in *Hamdi* held that American citizens detained as enemy combatants must be given a “fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”<sup>42</sup> Nevertheless, it remains unclear exactly what sort of discovery process would be sufficient to satisfy the constitutional right of American citizen “enemy combatants” to have a “fair opportunity” to rebut the Government’s factual assertions regarding their detentions.

Although the Court established that a presumption in favor of the government and the admission of hearsay evidence would satisfy the constitutional rights of an “enemy combatant” tribunal,<sup>43</sup> it did not elaborate upon the extent of the discovery process to which an American citizen “enemy combatant” is entitled. Nor did the Court address whether such a detainee must be provided with exculpatory evidence by the Government.<sup>44</sup> The limited opportunities of the “enemy combatant” detainees at Guantanamo Bay to conduct discovery in order to muster defenses to their detention hardly constitutes a “fair opportunity to rebut the Government’s factual assertions”

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<sup>41</sup> See Linda P. McKenzie, *The Pledge of Allegiance: One Nation Under God?*, 46 ARIZ. L. REV. 379, 383 (2004) (criticizing the Supreme Court for failing to provide adequate direction to lower courts as to whether a challenged government action violates the Establishment Clause); Margery I. Miller, *A Different View of Habeas: Interpreting AEDPA’s “Adjudicated on the Merits” Clause When Habeas Corpus is Understood as an Appellate Function of the Federal Courts*, 72 FORDHAM L. REV. 2593, 2596 (2004) (criticizing the Supreme Court for failing to provide a clear definition of the “adjudicated on the merits” clause in the Antiterrorism and Effective Death Penalty Act of 1996); Rebecca D’Arcy, *The Legacy of Dames & Moore v. Regan: The Twilight Zone of Concurrent Authority Between the Executive and Congress and a Proposal for a Judicially Manageable Nondelegation Doctrine*, 79 NOTRE DAME L. REV. 291, 294 (2003) (describing scholars’ criticism of the Supreme Court’s “unwillingness” or “failure” to articulate limiting principles for the President as Commander in Chief to appeal to “fundamental principles” in our constitutional structure in acting without Congressional approval in the area of national security).

<sup>42</sup> See *supra* note 28 and accompanying text.

<sup>43</sup> See *supra* notes 28- 31 and accompanying text.

<sup>44</sup> The Court in *Hamdi* noted, as will be discussed below, that “an appropriately authorized and properly constituted military tribunal” akin to that provided by Army Regulation 190-8, § 1-6 could satisfy the constitutional rights of American citizen “enemy combatant” detainees. See *infra* notes 50 through 51 and accompanying text. That tribunal process allows for detainees to call for witnesses who are “reasonably available,” but that such witnesses are not to be determined to be “reasonably available” if their presence would “affect combat or support operations.” Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6(e)(6) (1997). Nevertheless, the Court in *Hamdi* failed to articulate upon what types of witnesses are “reasonably available,” how long detainees would have to call such witnesses, or what the Government would be required to turn over to the detainees in the way of exculpatory evidence.

regarding their detentions.

Third, how long can an American citizen be held as an “enemy combatant” when the hostilities are of an indefinite duration? In its opinion in *Hamdi*, the Court held that “[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities,”<sup>45</sup> and that “indefinite detention for the purpose of interrogation is not authorized” by the AUMF.<sup>46</sup> Aside from justifying Hamdi’s current detention under “clearly established principle[s] of law and war” by noting that active combat operations against Taliban fighters are ongoing in Afghanistan,<sup>47</sup> the Supreme Court offered no guidance as to what constitutes “active combat operations.” Further, the Court failed to determine whether it is constitutional to indefinitely detain an American citizen when such operations are sporadic and without a foreseeable conclusion, as in the case of the current War on Terrorism.

Fourth, what type of “neutral decisionmaker” would satisfy the constitutional rights of American citizens detained as “enemy combatants”? As discussed above, *Hamdi* affirmed the notion that either an Article III court or “an appropriately authorized and properly constituted military tribunal” could meet the constitutional standards of an “enemy combatant” tribunal.<sup>48</sup> Nevertheless, the Court failed to articulate what type of “appropriately authorized and properly constituted military tribunal” would satisfy the constitutional rights of American citizen “enemy combatant” detainees. It did note that the military had processes in place to “determine the status of enemy detainees who assert prisoner of war status under the Geneva Convention.”<sup>49</sup>

Presumably, a process similar to the Army tribunal that determines the status of

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<sup>45</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641 (2004) (citing Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.I.A.S. No. 3364 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”); Article 20 of the Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1817 (stating that prisoners of war shall be released as soon as possible after “conclusion of peace”); Praust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L. J. 503, 510-11 (2003) (stating that prisoners of war “can be detained during an armed conflict, but the detaining country must release and repatriate them without delay after the cessation of active hostilities unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences”) (internal quotations and citations omitted)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2642.

<sup>48</sup> See *supra* notes 30 - 31 and accompanying text.

<sup>49</sup> *Hamdi*, 124 S. Ct. at 2651 (citing Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997)).

prisoners of war would satisfy the constitutional rights of American citizen detainees. If so, three commissioned officers would form a “competent tribunal” that could determine the status of the detainee using a preponderance-of-the-evidence standard.<sup>50</sup> The Army regulation fails to explain whether the commissioned officers must be impartial or free from knowledge of the detainee or bias with regard to his or her detention. The Court’s opinion in *Hamdi* likewise fails to clarify the ambiguities in the Army regulation. In short, the Court does not explain what type of “neutral decisionmaker” would be required to satisfy the constitutional rights of American citizens detained as “enemy combatants.”<sup>51</sup>

Fifth, is the Court’s ruling in *Hamdi* limited to American citizens detained in open combat hostilities? In *Hamdi*, the Court restricted its holding to detainees captured on the battlefield in the war in Afghanistan.<sup>52</sup> It failed to detail what the Government must allege in order to classify an American citizen as an “enemy combatant.” In other words, because the Court both declined to rule upon *Padilla* on jurisdictional grounds<sup>53</sup> and failed to espouse a rule in dicta in *Hamdi*, it is still unclear whether the Executive has the constitutional authority to declare American citizens “enemy combatants” who are caught on American soil fighting for Al Qaeda or another terrorist organization.<sup>54</sup> In an area as pivotal as this one, it is irresponsible for the Court to leave the American public in doubt as to when the Executive can use its awesome power to declare American citizens

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<sup>50</sup> Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6(c), (e)(9) (1997).

<sup>51</sup> Indeed, if the commissioners of the “enemy combatant” tribunal have knowledge of the detainee or bias with regard to his detention, one can hardly say that the tribunal is a “neutral decisionmaker” at all.

<sup>52</sup> *Hamdi*, 124 S. Ct. at 2639 (“The threshold question before us is whether the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’ There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying as such. It has made clear, however, that, for purposes of this case, the ‘enemy combatant’ that it is seeking to detain is an individual who, it alleges, was ‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.”).

<sup>53</sup> See *supra* note 8.

<sup>54</sup> *Quirin*, *Milligan*, and *Hamdi* all referred to “enemy combatants” in the war context, where the opposition was an identifiable army of a distinct nation or group of states. See *supra* note 4 and *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). However, terrorist organizations such as Al Qaeda do not have an identifiable army or land base, and are therefore not enemies in the traditional sense of the term in war. Therefore, it remains unclear as to whether the Executive can constitutionally detain American citizen members of Al Qaeda or other terrorist organizations as “enemy combatants,” as there is no case law precedent on point or discussing such a fact pattern in dicta.

“enemy combatants.”

These are just some of the many questions that *Hamdi* has raised with regard to the constitutional issues surrounding “enemy combatants.” Due to the lack of precedent in the “enemy combatant” issue area, the Court had wide latitude in developing tests and rules regarding when and for how long American “enemy combatants” could be detained, and what type of review they were entitled to upon detention. Nevertheless, the Court chose to narrow its holding to the facts presented before it. Perhaps this decision was wise in a jurisprudential sense, but it was disappointing in explaining to the American public exactly what the Constitution requires of the Executive when it decides to detain American citizens as “enemy combatants.”

#### **IV. The Limited Utility of *Hamdi***

Civil liberties advocates initially praised the *Hamdi* decision as a vindication of the rights of American citizens to be free from unsubstantiated and unwarranted detention.<sup>55</sup> American Civil Liberties Union legal director Steven Shapiro insisted that *Hamdi* was “a strong repudiation of the [Bush] administration’s argument that its actions in the war on terrorism are beyond the rule of law and unreviewable by American courts.”<sup>56</sup> Human Rights Watch U.S. Program director Jamie Fellner stated that *Hamdi* rejected the proposition that “the president should have unfettered discretion to decide who could be detained without charges, for how long and under what conditions.”<sup>57</sup>

Although Shapiro and Fellner are right that *Hamdi* did provide American citizens with a legal buffer against unsubstantiated and unwarranted detention, *Hamdi* was not a complete victory for the civil liberties of American citizens. The narrow scope of the Court’s language in *Hamdi* and the Judiciary’s deference to the Executive in times of crisis limit the role of the decision in protecting innocent American citizens from detention as “enemy combatants.”

Before exploring the limits of *Hamdi*, it will be helpful to briefly review the limits of any Supreme Court decision. Ever since former President Andrew Jackson’s

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<sup>55</sup> See *supra* note 7 and accompanying text.

<sup>56</sup> *Id.*

<sup>57</sup> Human Rights Watch, *Court Limits President’s Power Over Terrorism Detainees*, June 28, 2004, available at <http://www.commondreams.org/news2004/0628-09.htm>.

purported response to the Court's decision in *Worcester v. Georgia* – “Mr. Marshall has made his decision, now let him enforce it” – legal scholars and analysts have been acutely aware of its limited enforcement capability under the Constitution.<sup>58</sup> As Brian M. Feldman explains, the Supreme Court's power depends upon its legitimacy in the eyes of the American people and government officials as a learned, fair adjudicator of disputes, accurately interpreting the mandates of the legislative branch and the Constitution.<sup>59</sup>

Executive power is limited by whether the American public and government officials perceive the President as acting in accordance with constitutional mandates.<sup>60</sup> As stated by Justice Jackson in his noteworthy dissent in *Korematsu v. United States*,<sup>61</sup> “[t]he chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.”<sup>62</sup>

Since the impact of *Hamdi* rests upon its ability to constrain executive action in the eyes of the American public, the questions raised in Part III of this Comment significantly diminish *Hamdi's* effect.<sup>63</sup> The President can curtail the rights of “enemy combatants” in several ways. He may act without Congressional approval; he may limit the discovery process of detainees; he may extend the detention period of detainees; he may appoint biased decisionmakers to the “enemy combatant” tribunals. He may also

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<sup>58</sup> Brian M. Feldman, *Evaluating Public Endorsement of the Strong and Weak Forms of Judicial Supremacy*, 89 VA. L. REV. 979, 989-90 (2003). See also Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 392-94 (1998); Richard P. Longaker, *Andrew Jackson and the Judiciary*, 71 POL. SCI. Q. 341, 346-47 (1956). For a more thorough description of the actual facts surrounding the *Worcester* controversy, see CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835 759 (rev. ed. 1928). Another famous example of the enforcement limitations of the Court was Abraham Lincoln's response to the Court's famous decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856). According to Barry Friedman, “Lincoln accepted . . . the binding nature of the decision as to the parties before the Court, but denied that the Court could bind people in future cases.” Friedman, *supra*, at 424. See also Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 785 (2002) (stating that “the Lincoln administration felt free to ignore the Court's opinion in order to recognize black citizenship in the context of the regulation of coastal ships, passports and patents, as well as to pass laws abolishing slavery in the territories and the District of Columbia”); Vijay Sekhon, *Maintaining Legitimacy in the High Court: Understanding the “25 Years” in Grutter v. Bollinger*, 3 CONN. PUB. INT. L. J. 359, 367-68 (2004).

<sup>59</sup> Feldman, *supra* note 58 at 1003-04; Sekhon, *supra* note 58 at 367-68.

<sup>60</sup> See, e.g., Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 L. & CONTEMPORARY PROBLEMS 7 (2000); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217, 324 (1994).

<sup>61</sup> 323 U.S. 214 (1944).

<sup>62</sup> *Id.* at 248.

extend *Hamdi* to domestically detained American citizens without suffering the loss in political capital generally associated with executive defiance of Supreme Court precedent since he can justifiably argue that the Court has not ruled upon the questions presented above. Thus, the narrow scope of *Hamdi*'s ruling drastically limits the empirical effect of the decision on future executive action with respect to "enemy combatants."

The nature of Executive power and social psychology in times of crisis further limit the practical force of *Hamdi* in the event of future periods of upheaval in the United States. Historically, presidents have extended their power to the outer boundaries of constitutional authority in times of crisis.<sup>64</sup> President Abraham Lincoln's suspension of the writ of habeas corpus during the Civil War, President Franklin D. Roosevelt's detention of Japanese-Americans during War II, President Harry Truman's seizure of the steel mills during the Korean War, and President Bush's enactment of the Patriot Act during the current War on Terrorism are just a few of the most cited examples.

In addition, Congress' swift passage of the Patriot Act<sup>65</sup> demonstrates that Congress typically acquiesces to the executive branch's proposed methods to deal with such crises.<sup>66</sup> The political culture of the United States tends to defer to executive action during wartime, and Congress tends to cave in to executive pressure during such periods.<sup>67</sup> Congressional approval of the National Security Act during the Korean War,

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<sup>63</sup> See Part III, *supra*.

<sup>64</sup> See, e.g., *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *Korematsu*, 323 U.S. 214 (1944); *Quirin*, 317 U.S. 1 (1942); *Milligan*, 71 U.S. 2 (1866); Peter Marguiles, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equality, and Procedure After September 11th*, 84 B.U.L. REV. 383 (2004); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J. L. PUB. POL'Y 667, 688-95 (2003).

<sup>65</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). The Senate voted almost unanimously for the Patriot Act of 2001 following the September 11th attacks, with a vote of 98-1 in favor. Senator Russ Feingold, a Democrat from the state of Wisconsin, was the lone voice of dissent against the Act in the upper branch of Congress. The House vote was less one-sided, with a vote of 356-66 in favor. See American Library Association Website, available at <http://www.ala.org/> (May 8, 2003); see also Vijay Sekhon, *The Civil Rights of "Others": Antiterrorism, The Patriot Act, and Arab and South Asian American Rights in Post-9/11 American Society*, 8 TEX. F. ON C.L. & C.R. 117, 118 (2003).

<sup>66</sup> See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029, 1040 (2004); Darren W. Stanhouse, *Ambition and Abdication: Congress, the Presidency, and the Evolution of the Department of Homeland Security*, 29 N.C. J. INT'L L. & COM. REG. 691, 710-11 (2004); Sekhon, *supra* note 60 at 118; Anthony E. Bundy, *The Constitutional War Powers of the President: A Study of the Evolution of the Executive Branch's Authority to Innate Hostilities*, ch. 4, available at [http://newman.baruch.cuny.edu/digital/2000/honors/bundy\\_1995.htm#foot\\_30](http://newman.baruch.cuny.edu/digital/2000/honors/bundy_1995.htm#foot_30).

<sup>67</sup> See Kim L. Schepelle, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6

the Foreign Intelligence Surveillance Act during the Vietnam War, and the Patriot Act during the War on Terrorism are a few examples.<sup>68</sup> Consequently, one cannot expect the legislative branch to provide a significant check on the Executive power to detain American citizens as “enemy combatants.”

Finally, and most importantly, the demonstrated social psychology of the American public during wars or times of crisis means that *Hamdi* will provide only a limited constraint on executive action with respect to “enemy combatants.” Specifically, the attitude of Americans toward racial minorities during periods of strife limits the potential impact of *Hamdi*. As delineated by Michael Omi, Howard Winant, and Ian Haney Lopez, race is a socially constructed phenomenon, and Americans have tended to view certain minority groups as “others” outside of the traditional, “American” social circle.<sup>69</sup> Asian Americans, Arab Americans, and Hispanic Americans are among these racial groups defined as “others” due to their relatively recent arrival in large numbers on American soil.<sup>70</sup>

During times of crisis, these “other” racial groups are not viewed as deserving of the constitutional or economic protections afforded to more traditional, “American” racial groups. Examples include but are not limited to the enactment of the Chinese Exclusion Act during the economic downturn of 1882, Japanese internment during World War II, the passage of Proposition 187 (curtailing benefits to illegal immigrants, who were primarily of Hispanic origin) in California during the economic downturn of the early 1990s, and the passage of the Patriot Act during the current War on Terrorism, which curtailed the civil liberties of Arab and South Asian Americans.<sup>71</sup> Thus, the history of American attitudes towards the civil liberties of “other” Americans illustrates that, in the event of a future war or crisis, *Hamdi* will have limited precedential value due to the fact that Americans will likely perceive the threat of “enemy combatants” as originating from

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U. PA. J. CON. L. 1001, 1001-02 (2004). For a historical analysis of “states of emergency,” see Clinton L. Rossiter, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948); C.J. Friedrich, *CONSTITUTIONAL REASON OF THE STATE: THE SURVIVAL OF CONSTITUTIONAL ORDER* (1957).

<sup>68</sup> See Schepelle, *supra* note 67 at 1016-34.

<sup>69</sup> Michael Omi & Howard Winant, (Routledge 1986); Ian F. Haney Lopez, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); see also Sekhon, *supra* note 58 at 134-35.

<sup>70</sup> Sekhon, *supra* note 58 at 134-35.

<sup>71</sup> *Id.* at 142-46.

Arab or South Asian Americans, who are socialized as “others” in American society.

## V. The Government’s Implementation of *Hamdi*: the Enemy Combat Status Review Tribunals

This paper has tried to outline several of the major questions presented by the Supreme Court’s decision in *Hamdi* and has attempted to demonstrate that its narrow scope will probably not constrain future executive action because of the history of judicial deference to the Executive in times of crisis. I will conclude with some thoughts on the use of the *Hamdi* in creating the Guantanamo Enemy Combatant Status Review Tribunals (CSRT).

The Supreme Court in *Rasul v. Bush*<sup>72</sup> stated that the detainees in Guantanamo Bay, Cuba were entitled to habeas relief in United States federal courts under 28 U.S.C. §2241.<sup>73</sup> Consequently, the executive branch implemented the Guantanamo Enemy Combatant Status Review Tribunals in order to try to determine whether the detainees are “enemy combatants.” The Secretary of the Navy’s order declaring the commencement of the tribunals was issued a month after the Supreme Court’s opinions in *Rasul* and *Hamdi*, and the structure of the tribunals indicates an attempt to conform the process to the Court’s disposition in *Hamdi*.<sup>74</sup>

The tribunals consist of three neutrally commissioned officers of the United States Armed Forces who determine the status of the detainees by majority vote.<sup>75</sup> The Government provides the detainee with:

the assistance of a Personal Representative; an interpreter, if necessary; an opportunity to review unclassified information relating to the basis for his

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<sup>72</sup> 124 S. Ct. 2686 (2004).

<sup>73</sup> *Id.* The detainees at Guantanamo Bay, Cuba reportedly consist of over seven hundred individuals detained by United States authorities from around the world in the War on Terrorism since January 11, 2002. Human Rights Watch, *Guantanamo: Two Years On*, January 9, 2004, available at <http://hrw.org/english/docs/2004/01/09/usdom6917.htm>; Amnesty International, *Guantanamo Bay -- A Human Rights Scandal*, available at <http://web.amnesty.org/pages/guantanamobay-background-eng>. The detainees have been kept there due to their purported insulation from international legal standards regarding the treatment of prisoners of war. Since the commencement of the detentions, many of the detainees have been released. For more information on Guantanamo Bay, see Human Rights Watch, *Guantanamo Detainees*, available at [http://hrw.org/doc/?t=usa\\_gitmo](http://hrw.org/doc/?t=usa_gitmo); Amnesty International, *Guantanamo Bay – Documentation*, available at <http://web.amnesty.org/pages/guantanamobay-library-eng>.

<sup>74</sup> Gordon R. England, *Implementation of Combatant Status Review Tribunal*, July 29, 2004, available at <http://www.defense.gov/news/Jul2004/d20040730comb.pdf>.

<sup>75</sup> *Id.* at 3.

detention; the opportunity to appear personally to present reasonably available information relevant to why he should not be classified as an enemy combatant; the opportunity to question witnesses testifying at the tribunal; and, to the extent that they are reasonably available, the opportunity to call witnesses on his behalf.<sup>76</sup>

There is a rebuttable presumption that the Government's evidence that the detainee is an enemy combatant is genuine and accurate, in accordance with *Hamdi*.<sup>77</sup> Although the process ostensibly grants protections to the detainees, the Government has exploited the narrowness of the *Hamdi* decision in several ways to deny rights to the detainees.

First, several of the Guantanamo detainees have been detained without Congressional authorization.<sup>78</sup> The Executive's continued detention and decision to proceed towards tribunals with these detainees exhibits its belief that it has the right to detain individuals as enemy combatants absent Congressional authorization. At present, this practice by the Executive is presumably constitutional because the Supreme Court in *Hamdi* failed to rule that Congressional authorization was required in order to detain an individual as an "enemy combatant."

Second, the Guantanamo detainees are only entitled to a minimal discovery under the guidelines set forth by the Secretary of the Navy. Members of the armed forces are only deemed to be "reasonably available" to testify at the hearings "if, as determined by their commanders, their presence at a hearing would [not] adversely affect combat operations."<sup>79</sup> Given the prejudices against detainees that likely permeate the United States military, one can imagine the limitations this places on the detainees who, upon managing to find favorable witnesses, must deal with commanders who share similar interests with the Government in detaining all plausible suspects.

Witnesses will not be determined to be "reasonably available" if "they decline properly made requests to appear at a hearing, if they cannot be contacted following reasonable efforts by the CSRT staff, or if security considerations preclude their presence at a hearing." Furthermore, "non-U.S. Government witnesses will appear before the

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<sup>76</sup> *Id.* at 1-2.

<sup>77</sup> *Id.* at 9.

<sup>78</sup> Although many of the detainees have been captured from Afghanistan in Operation Enduring Freedom, others have been captured as terrorist suspects from around the globe. See *supra* note 73.

<sup>79</sup> England, *supra* note 74, at 9.

Tribunal at their own expense.”<sup>80</sup> These provisions dramatically limit the ability of detainees to present witnesses in their favor at the tribunal process. Thus, the Executive took advantage of the leeway provided by *Hamdi*’s silence on the constitutional discovery rights of “enemy combatant” detainees.

Third, the Executive’s decision to use military tribunals to determine the detainees’ status as enemy combatants exhibits its willingness to stretch the dicta in *Hamdi* to suit its needs. Whether the process as a whole is sufficient to satisfy the “neutral decisionmaker” limitation in *Hamdi* is a question left open by the plurality. However, the Executive contends this process satisfies the requirement.

Finally, the Executive’s willingness to declare all of the Guantanamo detainees enemy combatants, even those not captured in open combat hostilities, demonstrates the Executive’s exploitation of another of the holes in *Hamdi*. Under *Hamdi*, the question remains open as to whether individuals caught outside of the battlefield can be classified as “enemy combatants.”

In short, the Guantanamo CSRT illustrates the Executive’s willingness to take advantage of several of the gaps created by the Supreme Court’s opinion in *Hamdi*.<sup>81</sup> Unfortunately, *Hamdi* did not provide the necessary “strong repudiation” of the Bush Administration’s tactics with respect to the detention of American citizens as enemy combatants.

## **VI. Conclusion**

This Comment has highlighted the numerous questions raised by the Supreme Court’s opinion in *Hamdi*. The holdings in *Hamdi*, its ambiguity, and the social psychology of terrorism provide limited ammunition for those attempting to defend enemy combatant prosecutions by the United States Government. The structure and results of the Guantanamo CSRT illustrate the manner in which the Government can and does exploit the unclear direction given by the Supreme Court in *Hamdi*. One can only hope that the Court decides to clarify its decision in *Hamdi* in a manner that ensures that

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<sup>80</sup> *Id.*

<sup>81</sup> It should be noted that, as of September 8, 2004, one detainee had been declared to not be an “enemy combatant,” whereas twenty-nine detainees had their “enemy combatant” status confirmed. See Toni Locy, *Tribunal Orders Release of Guantanamo Detainee*, USA TODAY, September 8, 2004, available at

American citizens will be protected from accusations of enemy combatant status by the Government.