

Hamdi v. Rumsfeld

542 U.S. 507 (2004)

After the September 11, 2001 terrorist attacks by al-Qaeda, President Bush ordered the invasion of Afghanistan to attack the al Qaeda terrorist group and the Taliban regime that harbored it. Congress authorized the President to “use all necessary and appropriate force” against those responsible for the attacks. During the hostilities, the U.S. Armed Forces captured Yaser Esam Hamdi and transferred him to the United States. The government contended that Hamdi was an “enemy combatant” and could be held in the United States without formal charges or proceedings until the end of the conflict. Hamdi’s father filed a petition for a writ of habeas corpus in the Eastern District of Virginia.

The district court concluded that the government had fallen “far short” of supporting Hamdi’s detention without arrest or trial. The government appealed the trial court’s demand for more information; the court of appeals reversed.

Judgment of the Court: O’Connor, Rehnquist, Kennedy, Breyer.

Concurring in part and dissenting in part: Souter, Ginsburg.

Dissenting opinions: Scalia, Stevens; Thomas.

JUSTICE O’CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join. . . .

II

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as “enemy combatants.” The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government’s alternative position, that Congress has in fact authorized Hamdi’s detention, through the AUMF [Authorization for Use of Military Force].

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. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.

There is no bar to this Nation’s holding one of its own citizens as an enemy combatant. In *Ex Parte Quirin* (1942), . . . [w]e held that “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the law of war.” A citizen, no less than an alien, can be “part of or supporting forces hostile to the United States or coalition partners” and “engaged in an armed conflict against the United States.” Such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi objects, nevertheless, that Congress has not authorized . . . indefinite detention. . . . We understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

Ex parte Milligan (1866) does not undermine our holding about the Government's authority to seize enemy combatants. In that case, the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. Moreover, as Justice Scalia acknowledges, the Court in *Quirin* dismissed the language of *Milligan* that the petitioners had suggested prevented them from being subject to military process. Haupt was accused of being a spy. The Court in *Quirin* found him "subject to trial and punishment by [a] military tribunal" for those acts, and held that his citizenship did not change this result.

III

Even 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. . . .

First, the Government urges the adoption of the Fourth Circuit's holding below—that because it is "undisputed" that Hamdi's seizure took place in a combat zone, the habeas determination can be made purely as a matter of law, with no further hearing or factfinding necessary. This argument is easily rejected. . . . [T]he circumstances surrounding Hamdi's seizure cannot in any way be characterized as "undisputed," as "those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances."

The Government's second argument is that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. . . .

. . . [B]oth [the government and Hamdi] emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular

goal and the process that a citizen contends he is due before he is deprived of a constitutional right. . . . [T]he process due in any given instance is determined by weighing “the private interest that will be affected by the official action” against the Government’s asserted interest, “including the function involved” and the burdens the Government would face in providing greater process. [Precedent] contemplates a judicious balancing of these concerns, through an analysis of “the risk of an erroneous deprivation” of the private interest if the process were reduced and the “probable value, if any, of additional or substitute safeguards.” We take each of these steps in turn.

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi’s “private interest affected by the official action,” is the most elemental of liberty interests—the interest in being free from physical detention by one’s own government. . . . The risk of erroneous deprivation of a citizen’s liberty in the absence of sufficient process here is very real. Moreover, as critical as the Government’s interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. . . .

The Government also argues at some length . . . military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war. To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance. . . . We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker. At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible

evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States.

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. In the absence of such process, however, a court that receives a petition for a writ of *habeas corpus* from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved. . . . We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

The judgment of the United States Court of Appeals for the Fourth Circuit is vacated, and the case is remanded for further -proceedings.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring in part, -dissenting in part, and concurring in the judgment.

. . . [Hamdi] presses the distinct argument that the Government's claim, even if true, would not implicate any authority for holding him that would satisfy 18 U.S.C. §4001(a) (Non-Detention Act), which bars imprisonment or detention of a citizen "except pursuant to an Act of Congress." The plurality accept[s] the Government's position that if Hamdi's designation as an enemy combatant is correct, his detention (at least as to some period) is authorized by an Act of Congress as required by §4001(a), that is, by the Authorization for Use of Military Force (hereinafter Force Resolution). . . .

Because I find Hamdi's detention forbidden by §4001(a) and unauthorized by the Force Resolution, I would not reach any questions of what process he may be due in litigating disputed issues in a proceeding under the habeas statute or prior to the habeas enquiry itself. For me, it suffices that the Government has failed to justify holding him in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that §4001(a) is unconstitutional. . . .

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, dissenting.

. . . Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, §9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. . . .

I

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive. The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. . . .

These due process rights have historically been vindicated by the writ of *habeas corpus*. The writ of *habeas corpus* was preserved in the Constitution—the only common-law writ to be explicitly mentioned. Hamilton lauded “the establishment of the writ of *habeas corpus*” in his Federalist defense as a means to protect against “the practice of arbitrary imprisonments, [one of] the favourite and most formidable instruments of tyranny.” *The Federalist* No. 84. Indeed, availability of the writ under the new Constitution (along with the requirement of trial by jury in criminal cases) was his basis for arguing that additional, explicit procedural protections were unnecessary. See *The Federalist* No. 83.

II

The allegations here, of course, are no ordinary accusations of criminal activity. . . .

Justice O'Connor, writing for a plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and then released. That is probably an accurate description of wartime practice with respect to enemy aliens. The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process.

There are times when military exigency renders resort to the traditional criminal process impracticable. English law accommodated such exigencies by allowing legislative suspension of the writ of *habeas corpus* for brief periods. Our Federal Constitution contains a provision explicitly permitting suspension, but limiting the situations in which it may be invoked.” . . . Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I.

The Suspension Clause was by design a safety valve, the Constitution's only “express provision for exercise of extraordinary authority because of a crisis.” Very early in the Nation's history, President Jefferson unsuccessfully sought a suspension of *habeas corpus* to deal with Aaron Burr's conspiracy to overthrow the Government. During the Civil War, Congress passed its first Act authorizing Executive suspension of the writ of *habeas corpus*, to the relief of those

many who thought President Lincoln's unauthorized proclamations of suspension unconstitutional. Later Presidential proclamations of suspension relied upon the congressional authorization. . . . During Reconstruction, Congress passed the Ku Klux Klan Act, which included a provision authorizing suspension of the writ, invoked by President Grant in quelling a rebellion in nine South Carolina counties.

III

. . . When the writ is suspended, the Government is entirely free from judicial oversight. It does not claim such total liberation here, but argues that it need only produce what it calls "some evidence" to satisfy a habeas court that a detained individual is an enemy combatant. Even if suspension of the writ on the one hand, and committal for criminal charges on the other hand, have been the only traditional means of dealing with citizens who levied war against their own country, it is theoretically possible that the Constitution does not require a choice between these alternatives.

I believe, however, that substantial evidence does refute that possibility. Writings from the founding generation suggest that, without exception, the only constitutional alternatives are to charge the crime or suspend the writ. Further evidence comes from this Court's decision in *Ex parte Milligan*. There, the Court issued the writ to an American citizen who had been tried by military commission for offenses that included conspiring to overthrow the Government, seize munitions, and liberate prisoners of war. The Court rejected in no uncertain terms the Government's assertion that military jurisdiction was proper "under the 'laws and usages of war'": "It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."

Milligan is not exactly this case, of course, since the petitioner was threatened with death, not merely imprisonment. But the reasoning and conclusion of *Milligan* logically cover the present case. The Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the war, it would have no such authority. But if the law of war cannot be applied to citizens where courts are open, then Hamdi's imprisonment without criminal trial is no less unlawful than *Milligan's* trial by military tribunal.

Milligan responded to the argument, repeated by the Government in this case, that it is dangerous to leave suspected traitors at large in time of war: "If it was dangerous, in the distracted condition of affairs, to leave *Milligan* unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended."

The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal. In the Founders' view, the "blessings of liberty" were threatened by "those military establishments which must gradually poison its very fountain." *The Federalist* No. 45. No fewer than 10 issues of the *Federalist* were devoted in whole or part to allaying fears of

oppression from the proposed Constitution's authorization of standing armies in peacetime. . . .A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions.

IV

The Government argues that our more recent jurisprudence ratifies its indefinite imprisonment of a citizen within the territorial jurisdiction of federal courts. It places primary reliance upon *Ex parte Quirin*, 317 U.S. 1 (1942), a World War II case upholding the trial by military commission of eight German saboteurs, one of whom, Hans Haupt, was a U.S. citizen. The case was not this Court's finest hour.

Quirin would still not justify denial of the writ here. In *Quirin* it was uncontested that the petitioners were members of enemy forces. They were "admitted enemy invaders," and it was "undisputed" that they had landed in the United States in service of German forces. The specific holding of the Court was only that, "upon the conceded facts," the petitioners were "plainly within [the] boundaries" of military jurisdiction. But where those jurisdictional facts are not conceded—where the petitioner insists that he is not a belligerent—*Quirin* left the pre-existing law in place: Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release. . . .

VI

Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group; currently we know of only two, Hamdi and Jose Padilla. Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different. *Rasul v. Bush* (Scalia, J., dissenting). Moreover, even within the United States, the accused citizen-enemy combatant may lawfully be detained once prosecution is in progress or in contemplation. The Government has been notably successful in securing conviction, and hence long-term custody or execution, of those who have waged war against the state.

I frankly do not know whether these tools are sufficient to meet the Government's security needs, including the need to obtain intelligence through interrogation. It is far beyond my competence, or the Court's competence, to determine that. But it is not beyond Congress's. If the situation demands it, the Executive can ask Congress to authorize suspension of the writ—which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an "invasion," and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court. If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.

The Founders well understood the difficult tradeoff between safety and freedom. "Safety from external danger," Hamilton declared, "is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of

continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free.” *The Federalist* No. 8. The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it. . . .

JUSTICE THOMAS, dissenting.

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision. . . . The plurality reaches a contrary conclusion by failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs. . . . I do not think that the Federal Government’s war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them. . . .

I

“It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Haig v. Agee* (1981). The national security, after all, is the primary responsibility and purpose of the Federal Government. The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains. “Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.” *The Federalist* No. 70. The principle “ingredien[t]” for “energy in the executive” is “unity.” This is because “[d]ecision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number.”

Judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive. . . .

Several points, made forcefully by Justice Jackson, are worth emphasizing. First, with respect to certain decisions relating to national security and foreign affairs, the courts simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld. Second, even if the courts could compel the Executive to produce the necessary information, such decisions are simply not amenable to judicial determination because “they are delicate, complex, and involve large elements of prophecy.” Third, the Court in *Chicago & Southern Air Lines* and elsewhere has correctly recognized the primacy of the political branches in the -foreign-affairs and national-security contexts.

Finally, and again for the same reasons, where “the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress[, and i]n such a case the executive action ‘would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.’” *Dames & Moore*. That is why the Court has explained, in a case analogous to this one, that “the detention ordered by the President in the

declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger [is] not to be set aside by the courts without the clear conviction that [it is] in conflict with the Constitution or laws of Congress constitutionally enacted.” *Ex parte Quirin*, (1942).

. . . The plurality agrees that Hamdi’s detention is lawful if he is an enemy combatant. But the question whether Hamdi is actually an enemy combatant is “of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.” *Chicago & Southern Air Lines*. That is, although it is appropriate for the Court to determine the judicial question whether the President has the asserted authority, we lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches.

IV

. . . Additional process, the Government explains, will destroy the intelligence gathering function. It also does seem quite likely that, under the process envisioned by the plurality, various military officials will have to take time to litigate this matter. And though the plurality does not say so, a meaningful ability to challenge the Government’s factual allegations will probably require the Government to divulge highly classified information to the purported enemy combatant, who might then upon release return to the fight armed with our most closely held secrets.

The plurality manages to avoid these problems by discounting or entirely ignoring them. Ultimately, the plurality’s dismissive treatment of the Government’s asserted interests arises from its apparent belief that enemy-combatant determinations are not part of “the actual prosecution of a war,” or one of the “central functions of warmaking.” This seems wrong: Taking and holding enemy combatants is a quintessential aspect of the prosecution of war.

Undeniably, Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause. Against this, however, is the Government’s overriding interest in protecting the Nation. I acknowledge that under the plurality’s approach, it might, at times, be appropriate to give detainees access to counsel and notice of the factual basis for the Government’s determination. But properly accounting for the Government’s interests also requires concluding that access to counsel and to the factual basis would not always be warranted. Though common sense suffices, the Government thoroughly explains that counsel would often destroy the intelligence gathering function. Equally obvious is the Government’s interest in not fighting the war in its own courts and protecting classified information. . . .