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## HAMDI v. RUMSFELD 124 S. Ct. 2633 (2004)

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**HAMDI V. RUMSFELD**  
**124 S. Ct. 2633 (2004)**

FACTS

On September 11, 2001, the terrorist group Al Qaeda carried out an organized attack on the World Trade Center in New York City. After the attacks, Congress passed a resolution, the Authorization for Use of Military Force (AUMF),<sup>1</sup> which authorized the President to "use all necessary and appropriate force" against individuals, groups, or nations that the President determined were involved in the September 11 attacks.<sup>2</sup>

Yaser Esam Hamdi, an American citizen, was captured in Afghanistan in 2001.<sup>3</sup> The United States military detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay, Cuba, in January 2002.<sup>4</sup> Thereafter, the government learned of Hamdi's American citizenship and transferred him to a naval brig in Norfolk, Virginia, where he remained until being transferred to Charleston, South Carolina.<sup>5</sup> The United States government (the Government) sought to hold Hamdi indefinitely, without formal charges or proceedings, as an "enemy combatant" until such time as it made a determination that access to counsel or further process was justified.<sup>6</sup>

Hamdi's father, Esam Fouad Hamdi, filed a petition for a writ of habeas corpus with the United States District Court for the Eastern District of Virginia, alleging that his son's detention was not legally authorized.<sup>7</sup> Specifically, the petition asked that Hamdi be appointed counsel; that his interrogations cease; that an evidentiary hearing be scheduled to determine Hamdi's actions and status; that the court declare that Hamdi was being held contrary to the Fifth and Fourteenth Amendments; and that the court order Hamdi to be released.<sup>8</sup>

The District Court ordered that counsel be provided to Hamdi.<sup>9</sup> The United States Court of Appeals for the Fourth Circuit reversed, stating that the District Court had failed to give sufficient deference to the Government's security and intelligence interests in detaining enemy combatants.<sup>10</sup> The Fourth Circuit directed the District Court to conduct a deferential inquiry into Hamdi's status, stating that if Hamdi was, as the Government alleged, an

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<sup>1</sup> Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).

<sup>2</sup> Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635 (2004).

<sup>3</sup> *Id.* at 2635.

<sup>4</sup> *Id.* at 2636.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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

<sup>10</sup> *Id.*

"enemy combatant," the Government's detention of Hamdi was lawful.<sup>11</sup>

Upon remand to the District Court, the Government produced a declaration (Mobbs Declaration), identified as Special Advisor to the Under Secretary of Defense for Policy.<sup>12</sup> The Mobbs Declaration stated that Mobbs was intimately involved with matters relating to the detention of enemy combatants in Afghanistan and specifically knew the circumstances surrounding Hamdi's capture.<sup>13</sup> The declaration asserted that Hamdi had traveled to Afghanistan in July or August 2001, joined a Taliban military unit, received weapons training, and, in a subsequent fight, had surrendered to Northern Alliance forces.<sup>14</sup> According to the Mobbs Declaration, the United States military labeled Hamdi an "enemy combatant" in light of the circumstances surrounding his capture and subsequent interviews by United States military screening personnel.<sup>15</sup>

The Fourth Circuit directed the District Court to "consider the sufficiency of the Mobbs Declaration as an independent matter before proceeding further."<sup>16</sup> In doing so, the District Court declared the Mobbs Declaration insufficient to detain Hamdi because the document was "little more than the government's 'say-so.'"<sup>17</sup> The District Court also ordered the Government to turn over numerous documents for an *in camera* review to facilitate meaningful judicial review of whether Hamdi's detention was legally authorized and whether he had received due process of law.<sup>18</sup>

The Government appealed the production order, and the District Court certified the question of whether the Mobbs Declaration was sufficient as a matter of law to allow for meaningful judicial review of Hamdi's status as an "enemy combatant."<sup>19</sup> The Fourth Circuit reversed the production order, stating that Hamdi's undisputed capture in a zone of active combat was sufficient justification for his detention, and that no further factual inquiry or evidentiary hearing was necessary or proper.<sup>20</sup> The Fourth Circuit reasoned that because Article III of the Constitution does not contain mention of war powers, as Articles I and II clearly do, separation of powers principles prohibited a federal court from conducting further inquiry.<sup>21</sup> The Fourth Circuit ordered the habeas petition dismissed, concluding that if the

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 2637.

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

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

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

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

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2638.

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

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

facts alleged in the Mobbs Declaration were true, Hamdi had been constitutionally detained under the President's war powers.<sup>22</sup> Furthermore, the authorization for Hamdi's detention could be found under the AUMF, as capturing and detaining "enemy combatants" is an inherent part of warfare, and the AUMF authorized "necessary and appropriate force."<sup>23</sup> The Fourth Circuit expressly rejected the argument that Hamdi should be afforded greater process due to his citizenship and detention on American soil, concluding that one who takes up arms against the United States in a foreign theater of war may be labeled as an "enemy combatant" regardless of original citizenship.<sup>24</sup>

The Fourth Circuit denied rehearing en banc, and the Supreme Court of the United States granted certiorari.<sup>25</sup>

### HOLDING

The Supreme Court of the United States vacated the Fourth Circuit's judgment and remanded,<sup>26</sup> holding that a citizen-detainee must receive notice of the factual basis for his classification as an "enemy combatant," and must be afforded a fair opportunity to rebut the Government's assertions before a neutral decision-maker.<sup>27</sup> The proceedings may be tailored to lessen the burden on the Executive branch in times of ongoing military conflict.<sup>28</sup>

### ANALYSIS

The Court agreed with the Government's position that the AUMF authorizes the detention of "enemy combatants."<sup>29</sup> Citizens of the United States aligning themselves with the military arm of an enemy and engaging in belligerent acts have been held to be "enemy combatants" in the past and have been detained.<sup>30</sup> Such detentions are necessary and fundamental incidents of warfare, designed to prevent detainees from engaging in further combat,<sup>31</sup> a danger that would remain the same regardless of the citizenship

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 2639.

<sup>26</sup> *Id.* at 2638.

<sup>27</sup> *Id.* at 2648.

<sup>28</sup> *Id.* at 2649. For example, the Court stated, hearsay evidence may be considered reliable, and a presumption may be made in favor of the Government's evidence, provided that the individual accused of being an "enemy combatant" has the opportunity to rebut such a presumption. *Id.* at 2650.

<sup>29</sup> *Id.* at 2640.

<sup>30</sup> *Id.* (citing *Ex parte Quirin* 317 U.S. 1, 28 (1942)).

<sup>31</sup> *Hamdi*, 124 S. Ct. at 2640.

of the detainee.<sup>32</sup> The AUMF, authorizing "necessary and appropriate force," gives Congressional authorization for detention of "enemy combatants" by the Executive.<sup>33</sup> However, the Court stated that the AUMF does not authorize the indefinite detention of "enemy combatants."<sup>34</sup> Noting numerous international treaties,<sup>35</sup> in addition to the Court's own understanding of law-of-war standards, the Court enunciated the principle that the detention of an "enemy combatant" may last only so long as the hostilities themselves.<sup>36</sup> As long as active combat operations were underway in Afghanistan, the detention of "enemy combatants" was lawful.<sup>37</sup> Detention could not, however, be indefinite in nature.<sup>38</sup>

The writ of habeas corpus, absent suspension, is available to every individual detained within the United States.<sup>39</sup> 28 U.S.C. §2241 and subsequent provisions<sup>40</sup> provide a skeletal outline of the procedural rights due to a petitioner in federal habeas corpus proceedings, most notably the right to deny or allege facts and the right to take evidence by deposition, affidavit, or interrogatories.<sup>41</sup> It is obvious, the Supreme Court stated, that Congress intended habeas petitioners to have some opportunity to present and rebut facts, and that courts could vary the procedures as needed within the requirements of the Due Process Clause of the Constitution.<sup>42</sup>

The Government advanced the position that due to the flexibility of the habeas procedures and the circumstances in the case, the Mobbs Declaration satisfied all of the requirements of due process.<sup>43</sup> Supporting this proposition, the Government noted that Hamdi's capture in a combat zone in Afghanistan was undisputed.<sup>44</sup> The Court responded to this statement by indicating that Hamdi was being held without counsel and without an opportunity to respond to the Government's assertions, making it impossible for him to dispute the circumstances of his capture effectively.<sup>45</sup>

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<sup>32</sup> *Id.* at 2641.

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

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

<sup>35</sup> *Id.* at 2641. See Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 118, 6 U.S.T. 3316 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities"); Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, art. 20, 32 Stat. 1817 (as soon as possible after the "conclusion of peace"); Hague Convention (IV), Oct. 18, 1907, 36 Stat. 2301 ("conclusion of peace"); Geneva Convention, July 27, 1929, art. 75, 47 Stat. 2055 (repatriation should be accomplished with the least possible delay after conclusion of peace).

<sup>36</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641 (2004).

<sup>37</sup> *Id.* at 2642.

<sup>38</sup> *Id.* at 2641.

<sup>39</sup> *Id.* at 2644.

<sup>40</sup> See 28 U.S.C. § 2243 (2000); 28 U.S.C. § 2246 (2000).

<sup>41</sup> *Hamdi*, 124 S. Ct. at 2644.

<sup>42</sup> *Id.* (citing U.S. CONST., amend. V).

<sup>43</sup> *Hamdi*, 124 S. Ct. at 2644.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Furthermore, the Court noted that Hamdi's habeas petition stated only that Hamdi had resided in Afghanistan when captured by the United States, not that he had taken up arms against the United States, or even that he had been present in a combat zone.<sup>46</sup> The circumstances surrounding Hamdi's capture were undisputed only by virtue of the lack of Hamdi's response to them, not by Hamdi's admission.<sup>47</sup> The Court rejected the notion that Hamdi made any concession as to the circumstances surrounding his capture which precluded him from enjoying greater due process rights.<sup>48</sup>

The Government next argued that examining the status and reasons for detention of an individual was unwarranted under separation of powers principles.<sup>49</sup> The Government would have restricted the court's examination only to the broad detention scheme.<sup>50</sup> The highest level of review a court should engage in, the Government argued, would be a deferential "some evidence" standard.<sup>51</sup> The Court expressly rejected this argument, pointing out that this interpretation would be an express violation of separation of powers principles, as it would only serve to consolidate power in a single branch of government, the Executive.<sup>52</sup> Furthermore, "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."<sup>53</sup>

The Court recognized two competing interests at stake, that of the Government's interest in keeping "enemy combatants" from engaging in further hostilities and that of Hamdi's due process rights.<sup>54</sup> When competing interests are at stake, the Court stated, the test to be applied to determine the appropriate level of due process provided to an individual is the balancing test articulated in *Mathews v. Eldridge*.<sup>55</sup> Under the *Mathews* test, courts

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<sup>46</sup> *Id.* at 2645.

<sup>47</sup> *Id.* at 2644.

<sup>48</sup> *Id.* at 2645.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* Under this standard, the focus would be solely on the factual basis supplied by the Executive to support its determination. See *Superintendent, Mass. Corr. Inst. at Walpole v. Hill*, 472 U.S. 445, 445-457 (1985) (stating that the "some evidence" standard does not require a weighing of the evidence, only an assessment as to whether there is any evidence in the record that would support the conclusion).

<sup>52</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004).

<sup>53</sup> *Id.* at 2651.

<sup>54</sup> *Id.* at 2646.

<sup>55</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews*, an individual whose social security benefits had been terminated challenged the administrative procedures established by the Secretary of Health, Education and Welfare for determining whether a continuing disability existed. *Id.* at 325. The procedures outlined a process by which individuals receiving social security benefits would be given a questionnaire to provide information regarding the medical care they were receiving. *Id.* at 323. Based on this information, the Social Security Administration ("SSA") could decide to terminate benefits. *Id.* at 324. This decision could be appealed, and benefits could be reinstated after their removal. *Id.* at 334.

weigh three factors: 1) the nature of the private interest at stake as a result of government action; 2) the risk of erroneous deprivation under the process used and the utility of any new procedures; and 3) the Government's interest, including fiscal and administrative burdens that may arise from any proposed procedures.<sup>56</sup>

In applying the *Mathews* test, the Court stated that Hamdi's private interest was the most fundamental of liberty interests, that of "being free from physical detention by one's own government."<sup>57</sup> This private interest was not decreased simply by virtue of an ongoing war or by accusations of treason, for "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."<sup>58</sup> The Court recognized the serious risk of erroneous deprivation of an individual's liberty in the absence of sufficient process, and further noted that unchecked systems of detention have often been used as tools of oppression and abuse.<sup>59</sup>

On the other side of the balance, the Court recognized the Government's interests in keeping detainees from returning to the battlefield against the United States, and the historical necessities of such detentions.<sup>60</sup> Furthermore, the Government expressed a concern with the practical difficulties in implementing a high standard of process.<sup>61</sup> It suggested that field officers may become dangerously distracted by proceedings away from their duties, and that a judicial search for evidence may compromise national security concerns.<sup>62</sup>

Weighing these factors, the Court found neither the Government's proposed level of process nor the approach taken by the District Court to be appropriate.<sup>63</sup> The risk of erroneous deprivation of an individual's liberty was too high under the Government's proposed low level of process.<sup>64</sup> On the other hand, the District Court's suggested level of process, with its

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Noting that due process was flexible and could be tailored as the situation required, the Supreme Court of the United States that this procedure was constitutionally valid and sufficient. *Id.* at 340, 344. In so doing, the Court concluded that 1) social security benefits were not as important to an individual as welfare benefits; 2) the highly technical and medical nature of the determination, in addition to an individual's ability to submit written evidence, resulted in a low risk of erroneous deprivation of benefits; and 3) the governmental interest in minimizing fiscal and administrative costs weighed strongly in tailoring the level of process due. *Id.* at 341, 344, 348.

<sup>56</sup> *Id.* at 335.

<sup>57</sup> *Hamdi*, 124 S. Ct. at 2646 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

<sup>58</sup> *Id.* (citing *Jones v. United States*, 463 U.S. 354, 361 (1983)).

<sup>59</sup> *Id.* at 2647. See also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866) ("[The Founders] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen").

<sup>60</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2647 (2004).

<sup>61</sup> *Hamdi*, 124 S. Ct. at 2648.

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

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

"additional or substitute procedural safeguards," constituted an undue burden upon the Government, with little probative value.<sup>65</sup>

The Court held that the minimal amount of process that must be afforded to a citizen detainee seeking to challenge his classification as an enemy combatant is notice of the factual basis for the classification and a meaningful opportunity to respond to the Government's assertions before a neutral decision-maker.<sup>66</sup> However, in a nod to the Government's concerns, the Court stated that the exact procedures of any proceeding may be tailored to the circumstances in light of the burden that such a proceeding would place upon the Government at any given time.<sup>67</sup> For example, the Court suggested that the admission of hearsay as reliable evidence may be necessary and that a presumption in favor of the Government's evidence may be drawn, so long as that presumption is rebuttable.<sup>68</sup> The Court also suggested that the proceedings and standard of process could be administered by a properly constituted military tribunal.<sup>69</sup>

This approach, the Court stated, would place minimal burden upon the Government, because the process would be due only to those that the Government desired to continue to hold, not to first seizures.<sup>70</sup> Furthermore, documentation is already kept for battlefield detainees, and summarizing these materials for review by an independent tribunal would require minimal effort.<sup>71</sup>

#### CONCURRING OPINION

Justice Souter, with whom Justice Ginsburg joined, found that the Government failed to establish that the AUMF authorized the detention of "enemy combatants."<sup>72</sup> He argued that absent this express authorization from Congress, the Non-Detention Act,<sup>73</sup> which bars the imprisonment or detention of a citizen "except pursuant to an Act of Congress," required Hamdi's release.<sup>74</sup> Justice Souter concluded that Congress intended to avoid

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<sup>65</sup> *Id.*

<sup>66</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (citing *Cleveland Bd. of Education 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))).

<sup>67</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004).

<sup>68</sup> *Id.* at 2649.

<sup>69</sup> *Id.* at 2651.

<sup>70</sup> *Id.* at 2649.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2653.

<sup>73</sup> 18 U.S.C. § 4001 (1971).

<sup>74</sup> *Id.* at 2652.



a repeat of the World War II internments when it enacted the Non-Detention Act, indicating that Congress intended a requirement for clear congressional authorization for the detention of citizens,<sup>75</sup> a standard which the broad language of the AUMF did not meet.<sup>76</sup>

### DISSENTING OPINIONS

Justices Scalia, Stevens, and Thomas dissented.<sup>77</sup> Justice Scalia, with whom Justice Stevens joined, dissented from the judgment of the Court.<sup>78</sup> Justice Scalia would have held that Hamdi was entitled to a habeas corpus decree requiring his release unless the Government either promptly brought criminal proceedings against him or Congress suspended the writ of habeas corpus.<sup>79</sup> He stated that when a citizen wages war against the United States, the practice has been to prosecute that individual for treason or another crime.<sup>80</sup>

According to Justice Scalia, the Executive may not state that a detention is intended to incapacitate a wrongdoer solely in order to evade the constitutional responsibility to charge the wrongdoer with a crime.<sup>81</sup> The English Habeas Corpus Act of 1679, upon which the U.S. habeas writ is based, specifically stated that where an individual was accused of a felony or high treason, the Crown had to charge the individual within a specified time, or the individual would be set free.<sup>82</sup> The Habeas Corpus Act of 1679 did not contain any exceptions for times of war, and, as Justice Scalia asserted, high treason is of the nature that it would often (if not most of the time) occur during periods of warfare.<sup>83</sup> Citing *Ex parte Milligan*,<sup>84</sup> Justice Scalia

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<sup>75</sup> *Id.* at 2654.

<sup>76</sup> *Id.* at 2657.

<sup>77</sup> *Id.* at 2635.

<sup>78</sup> *Id.* at 2660.

<sup>79</sup> *Id.* at 2671.

<sup>80</sup> *Id.* at 2660.

The Constitution specifically mentions the crime of treason, stating that "[t]reason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S. CONST., art. III, §3, cl. 1.

<sup>81</sup> *Hamdi*, 124 S. Ct. at 2662. *See also* *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment").

<sup>82</sup> Habeas Corpus Act of 1679, 31 Car. 2, c. 2. (Eng.).

<sup>83</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2666 (2004).

<sup>84</sup> *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 128-129 (1866). In *Milligan*, the Supreme Court granted the habeas petition of Milligan, an Indiana citizen and resident detained and tried by the military during the Civil War. *Id.* at 121-122. Milligan, a civilian, was tried by a military commission for offenses including conspiring to overthrow the Government, seize munitions, and liberate prisoners of war. *Id.* at 122. The military commission found Milligan guilty and sentenced him to be hanged. *Id.* at 107-108. The President approved the War Department's order for his execution. *Id.* The Supreme Court, upon receiving Milligan's petition, held that a military commission had no jurisdiction to try a civilian citizen

stated that absent a congressional suspension of the writ of habeas corpus, there is no exception to the right to a trial for a citizen who is labeled as a belligerent or prisoner of war.<sup>85</sup>

Justice Thomas would have held that although the determination of the lawfulness of Hamdi's detention was within the scope of the judicial branch, that determination should be made with the greatest possible deference to the findings of the Government.<sup>86</sup> The judiciary is ill-equipped to determine whether an individual is truly an "enemy combatant," and has "neither [the] aptitude, facilities nor responsibility" to do so.<sup>87</sup> He further stated that judicial interference in these matters defeats the very purpose of the efficiency implied in placing war powers in the hands of a unitary Executive.<sup>88</sup> Justice Thomas stated that the Government has an overwhelming interest in the security of the nation<sup>89</sup> and that Congress has conferred broad powers upon the Executive through passage of the AUMF.<sup>90</sup> According to Justice Thomas, due process, in these circumstances, means nothing more than a "good-faith executive determination" of Hamdi's status, regardless of the accuracy of that determination.<sup>91</sup>

## CONCLUSION

*Hamdi* affirms the principle that every individual detained within the United States has access to the writ of habeas corpus, absent a suspension of the writ.<sup>92</sup> All habeas petitioners are afforded some process, but the exact nature of that process may be varied as the circumstances require.<sup>93</sup> All that due process requires is that notice of the basis for an individual's detention be provided to that individual, and that an opportunity for the individual to rebut the Government's assertions in front of a neutral decision-maker be

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residing in a state loyal to the union when the courts, created by Congress to try criminal cases, were open and functioning. *Id.* at 121. The Court specifically rejected the Government's argument that the Bill of Rights did not apply during wartime, and held that the military trial violated both the Sixth Amendment's requirement of a trial before an impartial jury and the Fifth Amendment's guarantee of a grand jury indictment for capital crimes. *Id.* at 118-130.

<sup>85</sup> *Hamdi*, 124 S. Ct. at 2670.

<sup>86</sup> *Hamdi*, 124 S. Ct. at 2678.

<sup>87</sup> *Hamdi*, 124 S. Ct. at 2678 (citing *Chicago v. Southern Air Lines*, 333 U.S. 103, 111 (1948)).

<sup>88</sup> *Hamdi*, 124 S. Ct. at 2676.

<sup>89</sup> *Id.* (citing *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

<sup>90</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2679 (2004). See *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)) ("[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' measures on independent presidential responsibility").

<sup>91</sup> *Hamdi*, 124 S. Ct. at 2680-2681.

<sup>92</sup> *Id.* at 2644.

<sup>93</sup> *Id.* at 2644.

provided.<sup>94</sup>

While it is clear that some process must be afforded an individual challenging his or her status as an "enemy combatant," the minimal nature of that process leads one to wonder if the protections afforded to an individual by the Court will have any practical effect in application. The Court indicates that presumptions in favor of the Government's evidence and the admission of hearsay evidence may be necessary to alleviate the burden of proceedings upon the Government,<sup>95</sup> but these measures make it significantly more difficult for an individual to challenge his status as an "enemy combatant." It may ultimately prove to be nearly impossible for an individual to challenge his status as an "enemy combatant" without adequate access to counsel, the ability to gather and present evidence above simple assertions, and the right to more substantial levels of process than those guaranteed by *Hamdi*. *Hamdi* could very well be a case guaranteeing formal due process, with none of the substance.

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Dannel Duddy

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<sup>94</sup> *Id.* at 2648.

<sup>95</sup> *Id.* at 2640.