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JUSTICE SCALIA AS NEITHER FRIEND NOR FOE TO CRIMINAL DEFENDANTS

*Tung Yin**

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I. INTRODUCTION

The topic of this symposium is whether Justice Scalia was a friend or foe of criminal defendants. At first glance, Justice Scalia may appear to have been something of a “friend” as he authored a number of opinions ruling against law enforcement: *Kyllo v. United States*, which held that the use of a thermal scanner to detect excess heat constituted a search for Fourth Amendment purposes;¹ *Arizona v. Hicks*, which held that a police officer conducted a search when he shifted a stereo system slightly to be able to see the serial numbers (which revealed that the equipment had been stolen);² *Arizona v. Gant*, where he provided the crucial fifth vote to overrule the overly expansive interior car search rule

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1. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).
2. *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987).

from *New York v. Belton*;³ *Crawford v. Washington* and *Davis v. Washington*, which re-invigorated the Confrontation Clause;⁴ and *Blakely v. Washington*, which extended the *Apprendi* rule to sentencing guidelines (and ultimately threatened the U.S. Sentencing Guidelines).⁵

To be sure, there is no reason to think that, in writing those opinions, Justice Scalia was motivated to favor criminal defendants. Indeed, in other cases, he authored important opinions that greatly expanded police discretion, such as *Whren v. United States*.⁶ Rather, *Crawford*, *Blakely*, and other opinions reflect his fidelity to his constitutional vision of originalism. Nevertheless, these cases are often offered as legitimate examples of how he did not have a purely results-oriented approach to deciding criminal procedure issues.

Yet, a closer examination of Justice Scalia's "defendant-favorable" opinions suggests that the results often have an air of unreality to them. In practice, there is no way for the police to change their behavior to address the identified unconstitutional action (in contrast to, say, reading *Miranda* warnings to dispel the inherent coerciveness of police custody), or if there is a way for the police to respond, it would be expanding the scope of criminal liability in ways that worsen the predicament for future criminal defendants.

In this Article, I focus on one of the Bush era war-on-terrorism cases, *Hamdi v. Rumsfeld*,⁷ in which the Court held that an American citizen captured on the battlefield in Afghanistan could be detained as an enemy combatant pursuant to the congressional Authorization for Use of Military Force (AUMF), but was entitled to legal representation and some kind of hearing to contest his combatant status.⁸ In Part II, I take a closer look at *Hamdi* and review the facts, procedural history, and Justice Scalia's dissent (joined by only Justice Stevens), where he argued that the Constitution prohibited such military detention of citizens and that the government's options were either (1) to charge the citizen with a crime or (2) to seek congressional suspension of the writ

3. See *Arizona v. Gant*, 556 U.S. 332, 350-51 (2009) (overruling *New York v. Belton*, 453 U.S. 454 (1981)).

4. See *Crawford v. Washington*, 541 U.S. 36 (2004); see also *Davis v. Washington*, 547 U.S. 813 (2006).

5. See *Blakely v. Washington*, 542 U.S. 296, 303-05 (2004) (applying *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

6. *Whren v. United States*, 517 U.S. 806, 819 (1996) (holding that pretextual stops did not violate the Fourth Amendment so long as the police officer had objective valid reasonable suspicion to justify the stop).

7. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

8. *Id.* at 509.

of habeas corpus.⁹ Justice Scalia's *Hamdi* dissent is often celebrated as a great civil liberties opinion in the vein of *Ex parte Milligan*¹⁰ (though, of course, it failed to carry the day, unlike *Milligan*).¹¹

It certainly sounds wonderful to declare that an American citizen should either face trial on criminal charges, with all of the due process that criminal defendants receive, or that the President should persuade Congress to suspend the writ of habeas corpus to allow military detention. But I argue that in practice, these are staggeringly bad options *even from a civil libertarian standpoint*, at least given the actual facts of Yaser Esam Hamdi's capture and detention. Thus, Part III examines three possible outcomes that might have resulted if Justice Scalia's view had prevailed in *Hamdi*: (1) the government might have been forced to release Hamdi for lack of provable charges, in which case he could have gone on the battlefield—and been lawfully targeted for killing (similar to the demise of Anwar al-Aulaqi); (2) Congress might have agreed to suspend the writ of habeas corpus (which would have left Hamdi worse off than what the majority opinion provided him); or (3) he might have faced criminal charges based on a distorted notion of conspiracy that likely would have bled into domestic crimes. In short, this Article argues that Justice Scalia's fidelity to his constitutional vision was admirable in its consistency, but it sometimes led to, or would have led to, results that simply could not be squared with the real world.

II. A CLOSER LOOK AT *HAMDI V. RUMSFELD*

Many commentators have singled out Justice Scalia's dissent in *Hamdi v. Rumsfeld* as a prime example of an opinion that favors the

9. *Id.* at 555 (Scalia, J., dissenting).

10. *Ex parte Milligan*, 71 U.S. 2 (1866).

11. *Id.* at 130-31; *see, e.g.*, Patricia M. Wald, *The Supreme Court Goes to War, in* TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES, 37, 63 (Peter Berkowitz ed., 2005) ("Who would have suspected that the most civil liberties-oriented opinion in *Hamdi* would be authored by Justice Scalia in an odd-couple dissent with Justice Stevens?"); Daniel R. Williams, *After The Gold Rush - Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment*, 112 PENN ST. L. REV. 341, 349 (2007) (describing Scalia's position as the "absolutist civil libertarian stance that restricts the power of the executive to detain enemy combatants to that extraordinary situation where the Great Writ has been suspended"); Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023 (2005) (reviewing MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003)) ("Libertarian-conservative Scalia took the view, which was joined by Justice Stevens, that enemy combatants who are citizens must always be either charged with treason or released, unless Congress has suspended the writ of habeas corpus. This is a strikingly libertarian position and one that I must say I agree with.").

individual over the government.¹² Justice Scalia did vote against the government on the merits of the case, and on first read, his reasoning for doing so calls for a strong protection of the citizen's civil rights. However, when one delves deeper by asking, "What happens next?," one concludes that Justice Scalia's principles are either unworkable or constitute a Pyrrhic victory.

On September 11, 2001, nineteen members of the terrorist group al Qaeda hijacked four American passenger planes and slammed two of them into the World Trade Center in New York and a third into the Pentagon.¹³ The fourth plane was believed to be targeting either the White House or the U.S. Capitol Building, but the passengers fought back and were prevented from taking control only because the hijackers intentionally crashed the plane into a field in Pennsylvania.¹⁴ One week later, Congress enacted, and President George Bush signed into law, an Authorization for Use of Military Force against those responsible for the 9/11 attacks.¹⁵ Within two months, the U.S. Military launched air strikes in Afghanistan against al Qaeda (and their Taliban harborers) and infiltrated special operations units on the ground to coordinate with Northern Alliance fighters. Those Northern Alliance fighters captured several thousand suspected Taliban and al Qaeda fighters, including Yaser Esam Hamdi, turning them over to American forces. Hamdi was sent to the detention facility at Guantanamo Bay, Cuba, and a few months later to a U.S. naval brig in Norfolk, Virginia.¹⁶

Hamdi's father filed a petition for a writ of habeas corpus on behalf of his son in the Eastern District of Virginia, which appointed the newly-installed federal public defender in the district (Frank Dunham) to represent Hamdi.¹⁷ The district judge ordered the government to provide Dunham access to Hamdi, but the government balked, arguing that it needed to isolate Hamdi to be able to interrogate him effectively.¹⁸ The government found a sympathetic audience in the Fourth Circuit, which reversed and remanded with directions for the district court to defer to the government's security needs and to consider Hamdi's combatant status.¹⁹

12. See *supra* text accompanying note 11.

13. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 1-10 (2004) [hereinafter 9/11 COMM'N REPORT].

14. *Id.* at 10-14.

15. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

16. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

17. *Id.* at 511-12.

18. *Id.* at 512.

19. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev'd*, Hamdi v. Rumsfeld,

Evidently the district judge had a different concept of deference. The government had submitted a declaration by an official named Michael Mobbs that set forth the basis for the determination that Hamdi was an enemy combatant, but the district court rejected it as conclusory and ordered the government to produce a wide variety of documents—such as interview notes, names and contact information for all of Hamdi’s interrogators, and the names and titles of all government officials who had a role in classifying Hamdi as an enemy combatant—for in camera review.²⁰ The government appealed a second time, and once again, the Fourth Circuit reversed the district court, directing it now to dismiss the habeas petition on the ground that it was “undisputed that Hamdi [had been] captured in a zone of active combat in a foreign theater of conflict.”²¹

The Supreme Court vacated and remanded to the Fourth Circuit in a fractured vote.²² Justice O’Connor led a plurality of four in concluding that the AUMF provided the President with standard wartime tools, including military detention of captured lawful combatants.²³ Although the AUMF was titled a “joint resolution,” it was bicameral legislation signed into law by the President and therefore constituted a statute.²⁴ As such, Justice O’Connor argued that the AUMF suspended the Non-Detention Act, thus allowing non-criminal detention of American citizens falling within its scope.²⁵ While Hamdi’s status as an American citizen did not protect him from being placed into military detention, it did guarantee him a degree of procedural due process, such as a hearing before a neutral decision maker (though not necessarily a federal judge)²⁶ and counsel to assist in challenging his enemy combatant designation in that hearing.²⁷

In a separate opinion, Justice Thomas provided a fifth vote for the detention power, although he labeled his opinion a dissent because he believed that the AUMF granted the President far more authority than the plurality suggested.²⁸ In addition, Justice Thomas mused that the

296 F.3d 278, 279, 283 (4th Cir. 2002).

20. *Hamdi*, 542 U.S. at 512-14.

21. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev’d*, *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003).

22. *Hamdi*, 542 U.S. at 516.

23. *Id.* at 518.

24. *Cf. INS v. Chadha*, 462 U.S. 919, 956 (1983).

25. *Hamdi*, 542 U.S. at 517.

26. *Id.* at 533 (right to notice of allegations and hearing before neutral decision maker).

27. *Id.* at 539 (right to counsel).

28. *Id.* at 589 (Thomas, J., dissenting).

President's role as Commander-in-Chief may provide constitutional authority to detain anyone, even an American citizen, that he deemed an enemy combatant, although ultimately he (Justice Thomas) did not resolve that issue.²⁹

Justice Souter (joined by Justice Ginsburg) argued that the language of the Non-Detention Act, as well as the historical context of its passage,³⁰ obligated Congress to provide a clear statement of its suspension in any subsequent legislation and that the AUMF failed to provide such a clear statement.³¹ To be clear, Justice Souter did not argue that Congress could not authorize the President to detain American citizens captured on the battlefield, merely that Congress had not done so in this instance.³² Recognizing, however, that there were five votes to sustain the President's detention authority, but only four votes on the issue of due process, Justice Souter joined the plurality's judgment to remand the matter to the district court.³³

In contrast, Justice Scalia (joined by Justice Stevens) challenged the President's authority to detain an American citizen allegedly captured while fighting on the battlefield against American troops, without criminal charges, even pursuant to an AUMF.³⁴ A key precedent that he relied upon was the post-Civil War decision *Ex parte Milligan*, in which the Supreme Court reversed a military conviction of a civilian in Indiana for inciting insurrection against the Union and providing assistance to the Confederacy.³⁵ The constitutional defect with the military trial, the Court explained, was that "in Indiana the Federal authority was always unopposed, and its court is always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offe[n]ce whatever of a citizen in civil life, in nowise connected with the military service."³⁶ From *Milligan*, Justice Scalia drew the conclusion that "if the law of war cannot be applied to citizens where courts are open, then Hamdi's imprisonment without criminal trial

29. *Id.* at 587.

30. *Id.* at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Although not enacted until 1971, and intended specifically to overrule the Emergency Detention Act of 1950, the Non-Detention Act was also a response to the World War II internment of over 70,000 Japanese-American citizens. *See id.*

31. *Id.* at 542-45.

32. *Id.*

33. *Id.* at 553 (explaining "the need to give practical effect to the conclusions of eight Members of the Court rejecting the Government's position").

34. *Id.* at 554 (Scalia, J., dissenting).

35. *Id.* at 567 (citing *Ex parte Milligan*, 71 U.S. 2, 6 (1866)).

36. *Ex parte Milligan*, 71 U.S. at 121-22.

is no less unlawful than Milligan’s trial by military tribunal.”³⁷

The lessons from *Milligan* and the Civil War were, according to Justice Scalia, that the government had two options available to it in terms of dealing with a citizen like Hamdi: (1) it could prosecute them in civilian court for treason or related crimes; or (2) it could seek suspension of the privilege of the writ of habeas corpus, which would then enable it to detain the citizen without judicial interference.³⁸ To be fair, Justice Scalia recognized that his approach would create challenges for the government in dealing with American citizens who purportedly fight for the enemy: “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.”³⁹

What is important to note is that Justice Scalia conceded that Congress was institutionally competent to determine whether the tools in question (prosecution for treason or suspension of the writ of habeas corpus) were adequate for the President’s needs.⁴⁰ However, he did not concede that Congress had any superior competence in crafting *additional* tools: “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.”⁴¹

III. WHAT’S WRONG WITH JUSTICE SCALIA’S PROPOSALS?

Having examined the background of and the opinions in *Hamdi*, we can now turn to evaluating Justice Scalia’s supposedly civil libertarian-friendly proposal for the President to charge Hamdi with a federal crime, to seek congressional suspension of habeas corpus, or to release Hamdi.

A. Suspension of the Writ of Habeas Corpus: Blunt Force Trauma

The fallback tool for the Executive Branch, according to Justice Scalia, was suspension of the privilege of petitioning for a writ of habeas corpus.⁴² Consistent with the individual views expressed by two former

37. *Hamdi*, 542 U.S. at 567-68.

38. *Id.* at 573 (Scalia, J., dissenting).

39. *Id.* at 577-78.

40. *Id.*

41. *Id.* at 578.

42. *Id.* at 561-63 (Scalia, J., dissenting).

Chief Justices, Justice Scalia viewed the suspension power as belonging to Congress, not the President.⁴³ Therefore, under this view, the President would not have unilateral power to detain American citizens. It is true that a requirement to suspend the writ would force the Executive Branch to involve Congress, and thus from a separation of powers perspective, would provide a measure of checks and balances.⁴⁴

However, as Dean Trevor Morrison observed a decade ago, “the suspension-as-authorization model could, if adopted more broadly, pose a serious threat to the safeguards of liberty built into the law of habeas corpus and the Constitution itself.”⁴⁵ One can ask what a citizen would most expect his civil rights to do for him when he is being detained as an enemy combatant; the answer presumably would be that due process rights are treasured in such a circumstance primarily because they are the vehicle for challenging one’s detention, especially if the citizen believes he has been classified incorrectly as a combatant.⁴⁶ The traditional notion of due process includes notice, an opportunity to challenge the governmental action, a hearing before a neutral decision maker, assistance of counsel, a right to present evidence and to challenge the evidence against oneself, and more.⁴⁷

At this point, it will be useful to consider the Bush Administration’s response to the Guantanamo Bay litigation that culminated in *Rasul v. Bush*.⁴⁸ The *Rasul* plaintiffs were suspected al Qaeda or Taliban fighters captured in Afghanistan who were brought to the U.S. naval base at Guantanamo Bay, Cuba, for detention.⁴⁹ They sought to challenge their detention via petitions for writs of habeas corpus.⁵⁰ Accordingly, these detainees were facing the same indefinite detention that Hamdi was facing.

The Bush Administration argued that federal courts lacked

43. See *Ex parte Bollman*, 8 U.S. 75, 101 (1807); see also *Ex parte Merryman*, 17 F. Cas. 144, 151-52 (C.C.D. Md. 1861) (No. 9,487).

44. See Trevor W. Morrison, *Hamdi’s Habeas Puzzle: Suspension As Authorization?*, 91 CORNELL L. REV. 411, 416 (2006).

45. See *id.*

46. Cf. Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”).

47. See, e.g., Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1279-95 (1975).

48. *Rasul v. Bush*, 542 U.S. 466 (2004).

49. *Id.* at 466.

50. *Id.*

jurisdiction to hear the habeas petitions because the detainees were non-citizens outside U.S. territory.⁵¹ In support of this argument, the government pointed to a post-World War II precedent, *Johnson v. Eisentrager*,⁵² in which the Supreme Court rejected habeas petitions filed by German prisoners who were convicted of war crimes for continuing to attack American forces after Germany had surrendered because they were outside the jurisdiction of federal courts.⁵³ *Eisentrager*'s exact holding is a bit unclear, as Justice Jackson discussed competing rationales for ruling against the defendants without specifying which rationale carried the day.⁵⁴

On the one hand, *Eisentrager* can be understood as a straightforward interpretation about the meaning of the federal habeas corpus statute, concluding that Congress had not intended for federal judges to be able to authorize habeas writs against custodians not located in any United States federal district.⁵⁵ Under this interpretation, at any time it wanted to do so, Congress could amend the habeas statute so as to give persons detained by U.S. forces outside the United States the right to seek habeas review of their detention. On the other hand, *Eisentrager* could be read more broadly as a decision holding that federal courts are disabled under constitutional principles from entertaining any claims by enemy aliens during times of war.⁵⁶ Either way, what is clear is that the defendants in *Eisentrager* lost their case, not because the Court concluded that their convictions were valid, but rather because they had no right to be heard at all.

Eisentrager seemed like a strong precedent for the government in *Rasul*; like the German prison in *Eisentrager*, the entire space at Guantanamo Bay had long been considered outside U.S. territory. During the 1990s, the Clinton Administration routinely diverted to the base those Haitian refugees who were interdicted from U.S. territory. The refugees were held there until they could be sent back to Haiti, and lower federal courts repeatedly dismissed habeas petitions filed on behalf of the refugees based on *Eisentrager*.⁵⁷ No doubt relying in part

51. *Id.* at 475-76.

52. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

53. *Rasul*, 542 U.S. at 475-76. For more on *Eisentrager*'s relevance to *Rasul*, see Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061, 1070-72 (2005).

54. Tung Yin, *Procedural Due Process to Determine Enemy Combatant Status in the War on Terrorism*, 73 TENN. L. REV. 351, 374 (2005).

55. *See id.*

56. *See id.*

57. *See Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995); *see also*

on the Haitian refugee precedents, the Bush Administration selected Guantanamo Bay as the detention site for the supposedly more dangerous captured fighters.

However, instead of following *Eisentrager* and dismissing the detainees' petitions, the Court in *Rasul* more or less disregarded the earlier case and held that the detainees could proceed with their habeas petitions in federal court.⁵⁸ The Court could have predicated its ruling on a conclusion that Guantanamo Bay was effectively U.S. territory based on the unusual terms of the lease between Cuba and the United States,⁵⁹ but after considering this approach, the Court eschewed it.⁶⁰ Instead, the Court resolved the statutory jurisdictional issue by noting that the lower federal court could issue the habeas writ against the Secretary of Defense, who would have the authority to order the commander of the military base to release any detainees who successfully challenged the grounds for detention.⁶¹

Notably, Justice Scalia agreed with the government's argument in *Rasul*.⁶² The first important observation that follows from the juxtaposition of Justice Scalia's votes in *Hamdi* and *Rasul* is that his concern for Yaser Hamdi's right to be free from military detention was uniquely based on Hamdi's status as an American citizen, not any objection to military detention itself, as that was the only difference between Hamdi and the hundreds of other men captured in Afghanistan and transported to Guantanamo Bay.

The second important observation is that Justice Scalia's view of the proper disposition of *Rasul* is exactly what suspension of the writ of habeas corpus would look like for the citizen-detainee. Prior to the decision in *Rasul*, the only due process that the detainees received to determine their combatant status was an initial screening by teams consisting of a mixture of Justice Department lawyers, Central

Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1513–15 (11th Cir. 1992); see also Bird v. United States, 923 F. Supp. 338, 340–42 (D. Conn. 1996).

58. *Rasul v. Bush*, 542 U.S. 466, 475–79 (2004).

59. *Id.* at 480–83.

60. *Id.* at 483–84. Justice Kennedy would have decided the case under the “Guantanamo Bay is in every practical respect a United States territory” theory. *Id.* at 487 (Kennedy, J., concurring).

61. The Court did not satisfactorily explain why this argument would not have applied to the Defense Secretary in *Eisentrager*, other than to suggest that *Eisentrager* had been effectively overruled by a later case that undercut one of *Eisentrager*'s precedents. See *Rasul*, 542 U.S. at 478–79 (majority opinion).

62. *Id.* at 497–98 (Scalia, J., dissenting) (“Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.”).

Intelligence Agency agents, and military personnel.⁶³ As I noted shortly after the decision was issued:

The detainees selected to be sent to Guantanamo Bay had no legal counsel, no apparent right to contest the evidence against them, and no apparent right to call witnesses or present evidence. The persons making the decision to send an individual to Guantanamo Bay may have been involved in the capture itself.⁶⁴

Critics of the detention facility called it a “law-free zone” and argued that the United States was “creat[ing] a culture of disrespect for the law.”⁶⁵

To be sure, this kind of rudimentary screening process may have been all that was possible in the early days of the war in Afghanistan.⁶⁶ After *Rasul* was decided, however, the Defense Department established Combatant Status Review Tribunals (CSRTs) to provide a more formal process for ascertaining each detainee’s combatant status.⁶⁷ In preparation for the CSRTs, each detainee was assigned a military officer as a “personal representative” (but not as legal counsel).⁶⁸ The decision makers at the CSRTs were “three neutral commissioned officers.”⁶⁹ The detainee was permitted to call “reasonably available” witnesses, and had the right to testify at the hearing or not to testify.⁷⁰

The announcement of the CSRTs could be seen as a direct response to *Rasul* and an implicit admission that the previous informal procedures would not withstand judicial scrutiny once lower federal courts began to entertain habeas petitions. Moreover, the CSRTs were subsequently supplemented with annual Administrative Review Hearings (ARHs), in which military personnel re-evaluated whether each detainee remained subject to continued detention.⁷¹ The difference between CSRTs and ARHs is that the former was concerned with verifying a detainee’s status

63. See Yin, *supra* note 53, at 1099 n.255 (citing source for Defense Secretary Rumsfeld’s description of the screening process).

64. *Id.* (citing Defense Secretary Rumsfeld’s briefing).

65. See, e.g., Thomas B. Wilner, *Law-Free Zone*, WALL ST. J., May 13, 2004, at A12.

66. Cf. *Fuentes v. Shevin*, 407 U.S. 67, 96-97 (1972) (upholding preliminary screening procedure for seizing property under writ of replevin, so long as there were more rigorous procedures afterward).

67. See Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) (on file with author).

68. *Id.* at para. c.

69. *Id.* at para. e.

70. *Id.* at para. g(8), (10), (11).

71. See Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL’Y 149, 208-09 (2005).

as a combatant—anyone who was found to be a non-combatant was subject to release—while the latter was concerned with whether a given combatant-detainee would still pose a threat to U.S. forces if released. The ARHs were the formal mechanism through which the vast majority of the Guantanamo detainee population was gradually reduced from a peak of nearly 1,000 to under 100 as President Obama entered his last year in office.

Even if one believed that the CSRTs and ARHs fell short of what should have been provided to the detainees (either as a matter of law or policy), they embodied more process than what preceded them. Perhaps the Bush Administration would have implemented them even had it prevailed in *Rasul*. In that situation, however, such procedures would have been a matter of executive grace, unilaterally revocable at any time.

1. Appointed Counsel and Suspension of Habeas Corpus

Now we can compare the procedural rights (or privileges, depending on the scenario) that detainees in a habeas-free environment receive, compared to what the Court actually provided Hamdi. Because Hamdi was already subjected to the informal screening in Afghanistan, we can assume that to be the minimum process that would be available no matter what.

In *Powell v. Alabama*, the Supreme Court concisely explained the myriad benefits that counsel provide a criminal defendant:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.⁷²

The value added by counsel in the situation where an individual is challenging his detention by the state can be seen by comparing the

72. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

success rates of habeas petitions filed by convicted felons represented by counsel (12.6 percent, according to one study in 1979) versus those representing themselves (0.9 percent, according to the same study).⁷³ A citizen detained as an enemy combatant is not, strictly speaking, a criminal defendant because military detention is not criminal prosecution.⁷⁴ However, the harm to the wrongly detained individual is the same: erroneous deprivation of liberty.

To be sure, the nature of the issues to be resolved in a criminal trial are generally more complicated than those in a combatant status determination procedure (whether informal, CSRT, or *Hamdi*-type hearing). The criminal trial encompasses not only factual questions (whether the admissible evidence proves that the defendant committed the acts specified in the elements of the crime), but also legal ones (whether the investigation comported with the Fourth and Fifth Amendments and other applicable criminal procedure rules, whether the criminal law proscribes constitutionally protected conduct, and so on). Combatant status determination, on the other hand, is primarily a factual question of whether the detainee was a combatant subject to lawful attack on the battlefield, or a non-combatant entitled to be free from targeted attack.⁷⁵ Some parts of *Powell's* recitation of the value of counsel relate entirely to legal issues, and thus have limited relevance to the citizen-detainee scenario. However, when it comes to the goal of persuading the decision maker that one was not a combatant, even if the factual question is one that does not involve legal research, synthesis, or analysis, an attorney would still be able to provide a “guiding hand” in the presentation.⁷⁶

When it comes to the assistance of counsel, the suspension-like environment of Guantanamo pre-*Rasul* (and even that of post-*Rasul*, over Justice Scalia’s dissent) falls well short of providing anything comparable to that which *Hamdi* required. By the time the case reached the Supreme Court, the Bush Administration had already relented and permitted Federal Public Defender Frank Dunham to represent Hamdi by appointment.⁷⁷ By contrast, the CSRTs—which may have been

73. PAUL H. ROBINSON, U.S. DEP’T OF JUSTICE, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 58 (1979).

74. See Yin, *supra* note 71, at 163-73 (explaining that military detainees who commit violations of the laws of war can and sometimes do face war crimes trials, which do seek to impose punishment upon those successfully convicted).

75. See Yin, *supra* note 53, at 1084-85.

76. See Yin, *supra* note 53, at 1108-14.

77. See, e.g., Frank Dunham Jr., 64, *Who Argued Terror Cases, Dies*, N.Y. TIMES, Nov. 7, 2006, at A19; *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (“He unquestionably has the right to

adopted only because of the decision in *Rasul*—did not provide appointed counsel for Guantanamo detainees. Each detainee was assigned a military officer as a “personal representative,” but that officer was neither legal counsel nor even an advocate of any kind.⁷⁸ Rather, the personal representative’s purpose was to provide logistical assistance.

At least the detainees had personal representatives to assist, in however limited a fashion, at the CSRTs. As described by then-Defense Secretary Rumsfeld, the informal screening process in Afghanistan most resembled police interrogation with neither *Miranda* warnings nor counsel. The detainees were questioned by their captors, with no one representing their interests, arguing on their behalf, or even pointing out that certain answers to some questions would qualify as admissions to hostile combatant status. This is not to say that *Miranda* warnings were legally required in Afghanistan, at least with regard to non-U.S. persons.⁷⁹ Given the circumstances of ongoing hostilities, the fog of war, the need for security, and the absence of lawyers with security clearances, it would have been infeasible to treat the military detainees as criminal suspects.

The important point is that, as a result of the Supreme Court’s decision in the eponymous case, Yaser Hamdi was in a much better position to fight an erroneous classification than the similarly-situated Guantanamo detainees were. Had the government opted to seek suspension of habeas corpus, Hamdi would have been left to languish in the naval brig for however long suspension lasted, with no assistance of counsel and no hearings to challenge his detention.

2. Is Suspension of the Writ of Habeas Corpus Realistic?

Since the beginning days of the long war against al Qaeda, there

access to counsel in connection with the proceedings on remand.”).

78. See Wolfowitz, *supra* note 67, at para. c.

79. Note that there was an internal legal struggle within the Justice Department over whether FBI agents could interrogate the other American citizen-detainee captured in Afghanistan, John Walker Lindh, while he was still in military custody and without legal representation. A Justice Department lawyer named Jessalyn Raddack opined that the better course of action was to inform Lindh that his father had retained a lawyer for him and to seek Lindh’s waiver of counsel. For a summary of Raddack’s involvement in the Lindh interrogation, see David McGowan, *Politics, Office Politics, and Legal Ethics: A Case Study in the Strategy of Judgment*, 20 GEO. J. LEGAL ETHICS 1057, 1060-67 (2007). Instead, the FBI agents in the field did not tell Lindh about the retained lawyer. *Id.* at 1060. Raddack later secretly disclosed her written legal analysis to a journalist, triggering a leak investigation that resulted in a government complaint against her to the Maryland and District of Columbia bars. *Id.* at 1060-71. By that time, she had left the government and was working for a private law firm. *Id.*

have been only a small number of American citizens subject to military detention: just Hamdi and Jose Padilla, who was arrested as he got off a plane at Chicago's O'Hare International Airport.⁸⁰ A third man, Ali al-Marri, who was not a citizen but was lawfully admitted to the United States as a resident, also spent a number of years in military detention.⁸¹ Even if we include al-Marri in the group of military detainees Justice Scalia's *Hamdi* dissent addresses, there would have been a grand total of three suspected enemy combatants for whom the government would need to seek suspension of habeas in order to justify their continued detention.

Suspension of habeas is, as one might suspect, a fairly drastic step. As Daniel Farber has explained, because of the requirement of invasion or insurrection that threatens public safety, "by definition, we are dealing with dire emergencies."⁸² The day of September 11, 2001 (particularly in the morning, as the attacks were unfolding) and even the next few days likely qualified as a dire emergency, especially given the fear of follow-up attacks.⁸³ By 2004, however, when *Hamdi* was decided, it would be hard to argue plausibly that the country was in a state of dire emergency.

Moreover, if the privilege of petitioning for a writ of habeas corpus had been suspended in its entirety, the impact would have been felt by far more than Hamdi, Padilla, and al-Marri: any person in official custody in the United States, such as federal as well as state prisoners, would lose the ability to challenge his or her detention in post-conviction proceedings in federal court. While only a fraction of the approximately 1.5 million prisoners in the United States might be eligible to seek federal habeas review at any given time, that fraction would dwarf the

80. Padilla's case was legally similar to Hamdi's in many regards, as both individuals were American citizens detained as enemy combatants in naval briggs on U.S. soil, but if anything, Padilla had an even stronger claim against such detention, given that he was captured at an American airport where there were no active hostilities. *Rumsfeld v. Padilla*, 542 U.S. 426, 430-31 (2004).

81. Like Hamdi and Padilla, al-Marri litigated the lawfulness of his detention as an enemy combatant. After several back-and-forth trips between a district court and the Fourth Circuit, see *al-Marri v. Pucciarelli*, 534 F.3d 213, 216 (4th Cir. 2008), *vacated sub nom. al-Marri v. Spagone*, 555 U.S. 1220 (2009), the government transferred al-Marri out of military detention into civilian courts and prosecuted him for a variety of federal crimes that were largely unrelated to the original basis for detaining him. See *al-Marri v. Davis*, 714 F.3d 1183, 1185 (10th Cir. 2013).

82. DANIEL FARBER, *LINCOLN'S CONSTITUTION* 191 (2003).

83. See, e.g., Tung Yin, *The Impact of the 9/11 Attacks on National Security Law Casebooks*, 19 ST. THOMAS L. REV. 157, 159 (2006) (noting that apart from the thousands of deaths and casualties, the 9/11 attacks led to a four-day closure of the stock market and the grounding of all flights for two days).

three enemy combatants in numerical terms.⁸⁴ In its basic form, the suspension solution would require the government to cut off the only federal court review of thousands of state prisoners just to deny court review of the military detention of three men.

To the extent suspension of habeas was meant seriously as a course of action, perhaps Justice Scalia meant that it would be done selectively for only American enemy combatants. One could look at historic examples of the imposition of martial law by the federal government, some of which affected only specific parts of the country. For example, Andrew Jackson (as a United States General) suspended all civil rights in New Orleans in late 1814 in advance of the Battle of New Orleans, but the rest of the country was unaffected.⁸⁵ Similarly, then-territory of Hawaii found itself under martial law immediately after the Japanese sneak attack on Pearl Harbor; the threat of invasion of the West Coast prompted the infamous military orders that ultimately led to the forced relocation and detention of over 70,000 Japanese-Americans (and 40,000 Japanese aliens) away from California, Oregon, and Washington.⁸⁶

To be sure, there are some limitations to the use of martial law as an analogy to habeas suspension. Most importantly, martial law was imposed in areas that were believed to be in danger of being invaded and thus potentially subject to loss of government control. In that event, there might no longer be courts available to adjudicate civil rights claims or police to enforce laws. The power to suspend habeas corpus includes the limitation that it be used only “when in Cases of Rebellion or Invasion the public Safety may require it.”⁸⁷ When President Lincoln took it upon himself to suspend habeas corpus during the Civil War, he subsequently justified his action on the grounds of immediacy, stating to Congress in his famous “all the laws but one” speech:

84. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ NO. 248955, PRISONERS IN 2014 (2015) (noting that in 2014, there were 1.56 million state and federal prisoners in custody). Over the past sixty years, federal habeas corpus has spawned an increasing number of procedural rules and requirements that have made it increasingly easy for courts to dispose of habeas petitions without reaching the merits: (1) those raising claims that weren’t presented to the state courts are often deemed procedurally defaulted; (2) those raising claims that were raised in previous habeas petitions are often rejected as successive petitions; and (3) those raising claims based on “new” rules (i.e., intervening Supreme Court decisions) frequently lose because such new rules are not cognizable on habeas. See generally ROGER A. HANSON & HENRY H.K. DALEY, U.S. DEP’T OF JUSTICE, NCJ NO. 155504, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 2, 18-19 (1995).

85. See, e.g., MATTHEW WARSHAUER, ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW 320 (2006).

86. See, e.g., *Ex parte Mitsuye Endo*, 323 U.S. 283, 285-87 (1944).

87. U.S. CONST. art. I, § 9, cl. 2.

It was decided that we have a case of rebellion and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power; but the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it can not be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion.⁸⁸

Criticism of Lincoln's actions focused on the fact that he had acted unilaterally rather than seeking suspension ahead of time from Congress, given that the Suspension Clause resided in Article I of the Constitution, not Article II. Lincoln himself agreed that rebellion or invasion was a necessary prerequisite but one that was obviously satisfied by the secession of the Southern states. It was necessary for him to suspend habeas without waiting for Congress to act because Congress was in recess at the time, and the fear was that by the time Congress could be hailed back into session, the conditions would have deteriorated perhaps irreversibly.⁸⁹

Suspension of habeas, even on a limited basis (as applied to American enemy combatants), would seemingly require some showing that there was rebellion or invasion, if not nationally, at least localized in the area where the would-be petitioners were detained. Justice Scalia acknowledged that it was an open question "whether the attacks of September 11, 2001, constitute an 'invasion,' and whether those attacks still justify suspension several years later," but argued that it was "for Congress rather than this Court" to answer.⁹⁰ This is an entirely defensible position and one that is consistent with Justice Scalia's general approach of interpreting the Constitution strictly based on the text (and specifically, the original meaning of the words in the text), given the language of the Suspension Clause.

However, it is also one that is arguably inimical to the rights of disfavored individuals. Because they are political branches, Congress and the White House are more sensitive to majoritarian pressures compared to federal courts. The very reason federal judges were given

88. See President Abraham Lincoln, Message to Congress, (July 4, 1861), available at <http://millercenter.org/president/speeches/speech-3508>.

89. *Id.* This point is captured in the well-known line: "Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?" *Id.*

90. *Hamdi v. Rumsfeld*, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting).

life tenure was to promote their independence so that they could “be considered as the bulwarks of a limited Constitution against legislative encroachments.”⁹¹ An individual member of Congress might well believe that suspension is not warranted *and* be willing to stand on that principle, but in a closely contested district or state, such a member might well heed public opinion, especially if the disposition of the American detainees becomes a high-profile political issue.

B. Criminal Prosecution: Slash and Burn

The other tool available to the government, in Justice Scalia’s view, was traditional criminal prosecution.⁹² The praise that Justice Scalia’s *Hamdi* dissent has received from human rights advocates and civil libertarians likely stems in part from the fact that members of those groups had consistently argued that military detainees (including the hundreds at Guantanamo Bay) should have been charged with crimes in civilian courts or released.⁹³ This push to transfer all detainees, whether citizens or aliens, out of the military detention system and into the civilian criminal justice system—i.e., to charge them with federal crimes and to prosecute them in federal courts—continued throughout President Bush’s second term and well into President Obama’s first term.

It is easy to see why the civilian criminal justice system would appear to be a preferred venue over indefinite military detention. A federal criminal defendant is entitled to a panoply of important rights set forth in the Fourth, Fifth, Sixth, and Eighth Amendments, as well as in various federal statutes. A defendant may seek exclusion of incriminating evidence on the ground that it was found in violation of the prohibition against unreasonable searches and seizures.⁹⁴ The defendant is presumed innocent and is entitled to acquittal unless the government can prove every element of the crime beyond a reasonable

91. THE FEDERALIST No. 78 (Alexander Hamilton); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (“Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

92. *Hamdi*, 542 U.S. at 560-61.

93. This is not to say that Justice Scalia completely agreed with the human rights advocates and civil libertarians. As discussed earlier, in *Rasul v. Bush*, decided the same day as *Hamdi*, Justice Scalia argued that alien fighters captured in Afghanistan in circumstances similar to those of Hamdi were entitled to no judicial process. Justice Scalia based his argument for prosecution of Hamdi solely on Hamdi’s status as an American citizen. *Rasul v. Bush*, 542 U.S. 466, 502-06 (2004) (Scalia, J., dissenting).

94. *Mapp v. Ohio*, 367 U.S. 643, 654 (1961).

doubt.⁹⁵ The defendant is entitled to the assistance of counsel, including appointment of counsel by the court if indigent.⁹⁶

Eric Holder, who was President Obama's first Attorney General, perceived federal criminal trials as offering more legitimacy than military commissions, which was why he fought to transfer suspected 9/11 mastermind Khalid Sheikh Mohammed (KSM) from the custody of the Department of Defense so that he could be prosecuted in the Southern District of New York.⁹⁷ Holder argued that federal courts had already presided successfully over a number of terrorism prosecutions and would therefore be able to oversee civilian prosecutions of KSM and other high-level al Qaeda detainees. The advantage of using an Article III court as opposed to a military commission would have been to highlight the civil rights that the United States provides to criminal defendants, even those accused of atrocities as heinous as the 9/11 attacks.

This perception of federal courts as the gold standard ties in nicely with Justice Scalia's argument that a citizen such as Hamdi should be prosecuted. Delving deeper into the suggestion of prosecuting Hamdi leads one to ask, for what crime or crimes? Justice Scalia tossed out ten federal criminal statutes in one paragraph as possibilities, including treason,⁹⁸ use of weapons of mass destruction,⁹⁹ providing material support to terrorists or to designated foreign terrorist organizations,¹⁰⁰ and seditious conspiracy,¹⁰¹ among others.¹⁰² With that variety of possible charges, one would expect that there would be something on the list that could be used to prosecute Yaser Hamdi. As Justice Scalia pointed out, another American citizen (John Walker Lindh) captured in Afghanistan fighting for the Taliban was prosecuted in an Article III court.¹⁰³ After being charged in a ten-count indictment,¹⁰⁴ Lindh pleaded

95. *In re Winship*, 397 U.S. 358, 364 (1970).

96. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963).

97. See Peter Finn & Anne E. Kornblut, *Opposition to U.S. Trial Likely to Keep Mastermind of 9/11 Attacks in Detention*, WASH. POST, Nov. 13, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/12/AR2010111207508.html> ("Khalid Sheik Mohammed, the self-proclaimed mastermind of the Sept. 11, 2001, attacks, will probably remain in military detention without trial for the foreseeable future, according to Obama administration officials.").

98. 18 U.S.C. § 2381 (2012).

99. 18 U.S.C. § 2332a (2012).

100. 18 U.S.C. §§ 2339A, 2339B (2012).

101. 18 U.S.C. § 2384 (2012).

102. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 560-61 (2004) (Scalia, J., dissenting).

103. *Id.* at 561.

104. See Indictment as to John Phillip Walker Lindh, *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002) (No. CR. 02-37-A), <https://www.justice.gov/ag/united-states-district-court->

guilty to supplying services to the Taliban and carrying an explosive during the commission of a felony, and received a twenty-year prison sentence.¹⁰⁵

Lindh's case indeed provides a useful example to study, but ultimately it fails to support Justice Scalia's argument because of a key difference between Lindh and Hamdi. Like Hamdi, Lindh was an American citizen by virtue of having been born on U.S. soil, and, like Hamdi, Lindh was captured by Northern Alliance forces after the United States began attacking Taliban and al Qaeda targets in Afghanistan. In between those pairs of events, however, their lives were very different.

Lindh was born in Washington, D.C. For the first seventeen years of his life, he lived in Maryland and then northern California. At seventeen, he decided on his own to spend just under a year in Yemen, returning to the United States for a short time, and then moving to Pakistan, finally ending up in Afghanistan in early 2001, supposedly to join the Taliban in its fight against the Northern Alliance.¹⁰⁶ He grew up in the United States and when he moved, ultimately to Afghanistan, he knew that he was still an American citizen.¹⁰⁷ That he recognized his status as an American is further demonstrated by the fact that he refused to "tak[e] part in operations against the United States . . ."¹⁰⁸ It is also reinforced by the fact that Lindh left Yemen and returned to the United States because his visa had expired; thus, "home" for him was still the United States.¹⁰⁹

In contrast, Hamdi was born in Baton Rouge, Louisiana, to two Saudi citizens who moved back to Saudi Arabia "when he was a small child."¹¹⁰ There is no evidence that Hamdi spent any time in the United States beyond those early childhood years until he was transferred from Guantanamo Bay to Norfolk in 2002. He was an American citizen because the Fourteenth Amendment and federal law grant citizenship to anyone born on U.S. soil,¹¹¹ no matter the circumstances of how the mother came to be in the country.¹¹² However, he did not grow up in the

eastern-district-virginia-alexandria-division.

105. See *United States v. Lindh*, 227 F. Supp. 2d 565, 566, 574 (E.D. Va. 2002).

106. *Id.* at 567.

107. *Id.* ("Before leaving the recruiting center, defendant was told by HUM officials not to disclose his American citizenship to anyone.")

108. *Id.* at 568.

109. See John Rico, *Can John Walker Lindh Go Home Now?*, GQ (Feb. 28, 2009), <http://www.gq.com/story/john-walker-lindh-afghanistan-captured-taliban> ("John would stay in Yemen for nine months, leaving only after his visa expired and he was forced to head home.")

110. See *Hamdi v. Rumsfeld*, 316 F.3d 450, 460 (4th Cir. 2003), *rev'd*, 542 U.S. 507 (2004).

111. 8 U.S.C. § 1401 (2012).

112. See, e.g., Shelby Grad, *Asian 'Anchor Babies': Wealthy Chinese Come to Southern*

United States, and because he grew up in Saudi Arabia as the child of Saudi citizens, he would not have had any identity as an American. If Afghanistan had deported him before 9/11, it strains credulity to believe that he would have come to the United States instead of returning to Saudi Arabia.

Nevertheless, this difference between Lindh and Hamdi—whether there was evidence that each man believed himself to be an American—does not matter from the standpoint of whether they are entitled to constitutional rights, because they both are. Even the plurality opinion in *Hamdi*, from which Justice Scalia dissented, expressly concluded that, as a citizen, Hamdi was entitled to due process rights.¹¹³ That both are entitled to the protection of the Constitution does not, however, mandate that they are similarly situated with respect to how they might be treated if criminally charged upon capture.

Consider the first statute that Justice Scalia suggested could apply to Hamdi's conduct: treason. The modern treason statute states:

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States.¹¹⁴

The operative phrase in this statute for the purposes of this discussion is “owing allegiance to the United States.” The published cases have taken a broad view of that clause, holding that American citizens owe allegiance to the United States no matter where they live.¹¹⁵ Taken at face value, such cases would fully support a treason charge based on Hamdi's alleged conduct of fighting against American forces.

California to Give Birth, L.A. TIMES (Aug. 26, 2015, 8:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-asian-anchor-babies-wealthy-chinese-20150826-story.html> (“Pregnant women travel to the United States, usually on tourist visas, so that their children will be born U.S. citizens.”); Miriam Jordan, *Where ‘Anchor Babies’ Can Be a Lucrative Business: Wealthy Chinese ‘Birth Tourists’ on Visas Spend Freely in Southern California*, WALL ST. J. (Nov. 4, 2015, 3:25 PM), <http://www.wsj.com/articles/where-anchor-babies-can-be-a-lucrative-business-1446668720> (“Thousands of wealthy foreign women, mostly Chinese, come to America each year for the express purpose of having babies on U.S. soil. The women arrive on tourist visas and typically go home with the baby after several months.”).

113. *Hamdi v. Rumsfeld*, 542 U.S. 507, 524-35 (2004).

114. 18 U.S.C. § 2381 (2012).

115. See *Kawakita v. United States*, 343 U.S. 717, 736 (1952); see also *Burgman v. United States*, 188 F.2d 637, 640 (D.C. Cir. 1951) (rejecting the argument that the jury should have been instructed that “one situate[d] in a foreign land and deprived of the protections due from the country of his citizenship is relieved of all duty of allegiance to the latter country”).

After all, given the undisputed fact that Hamdi was born in Louisiana, he was an American citizen, and therefore he owed allegiance to the United States. Yet, a closer look at these cases suggests some problems with a treason charge against Hamdi.

In *United States v. Fricke*, the defendant, during World War I, borrowed a sum of money from an American bank on behalf of a German agent.¹¹⁶ The district judge submitted to the jury the question: “Was what Fricke did, whatever you may find he did, of a character which indicated that his mind entertained an evil intent to do that wrong to the United States of America which consists in adhering to its enemies, giving them aid and comfort?”¹¹⁷ The judge explained that if a peaceful German citizen in the United States had asked to borrow money to get through hard times, it would not be treasonous to comply, but that it would be if the defendant did so after being told by the borrower “I am an alien enemy and you know it, and I want you to lend me a thousand dollars, or give me a thousand dollars, to do a wrong against the United States of America.”¹¹⁸ Similarly, in *Burgman v. United States*,¹¹⁹ in affirming the defendant’s treason conviction for preparing radio reports for German broadcasters to air against American troops, the D.C. Circuit noted that the district judge had “instructed the jury that an intent to betray one’s country is an essential element of the crime of treason and must be proved as such.”¹²⁰

A treason prosecution that presented the inverse facts to Hamdi’s was *United States v. Stephan*,¹²¹ a World War II-era case in which a seemingly naturalized citizen argued that he had obtained U.S. citizenship fraudulently, “and that as an alien he could not commit the crime of treason.”¹²² In denying the defendant a new trial, the trial court concluded that the fraud rendered the citizenship order voidable, not void, and that the defendant still owed duties and obligations to the United States; after all, fraudulently or not, he had “applied for citizenship and took the oath of allegiance voluntarily.”¹²³

What ties these cases together is the implication that the defendants breached an obligation of loyalty by taking actions that they knew were antithetical to the United States. In *United States v. Fricke*, Fricke was

116. *United States v. Fricke*, 259 F. 673, 678 (S.D.N.Y. 1919).

117. *Id.* at 682.

118. *Id.* at 682.

119. *Burgman*, 188 F.2d at 642.

120. *Id.* at 640.

121. *See United States v. Stephan*, 50 F. Supp. 445 (E.D. Mich. 1943).

122. *Id.* at 447-48.

123. *Id.* at 448.

living in the United States, so the only issue in that case was whether providing funds to an enemy alien during war time would necessarily constitute treason; the trial court's instruction stood for the proposition that it would be treasonous behavior only if the defendant knew that the enemy alien intended to harm the United States.¹²⁴ In *Burgman v. United States*, Burgman argued that he had not committed treason because (1) he was living in Europe and believed himself no longer to be a citizen of the United States, and therefore was relieved of his otherwise known obligation to be loyal; and (2) simply preparing radio broadcasts for German radio stations was not a disloyal act.¹²⁵ The trial judge allowed Burgman to argue his lack of intent to betray the United States, though the jury apparently disagreed.¹²⁶ Finally, in *United States v. Stephan*, Stephan was legally not an American citizen due to his fraud, but he held himself out to be one, and it would be entirely within the realm of reason to expect that he knew that helping a German soldier would be an act of disloyalty.¹²⁷

Was it reasonable to expect that Hamdi would recognize that the Taliban had become the enemy of his country? Put another way, was it reasonable to expect that Hamdi would recognize that the United States was *his* country? In an earlier article, I have argued that while Hamdi was properly accorded due process rights as an American citizen, he was properly classified as an enemy combatant rather than a criminal defendant, because criminal prosecution would be in effect imposing punishment on him for viewing the United States as his enemy when he had no actual connection to the country—and hence could not be said to have betrayed this country.¹²⁸ My argument focused on the fact that the United States and Canada are virtually the only nations to determine citizenship primarily based on location of birth, as opposed to parents' citizenship, thus leading to the anomalous result of someone having citizenship from a country in which that person has no meaningful ties. I argued that to treat Hamdi as having acted potentially disloyally by fighting against American troops could expose American citizens born from immigrant parents to similar charges of treason by foreign countries in the event of armed conflict with those parents' original nations.

124. *United States v. Fricke*, 259 F. 673, 676 (S.D.N.Y. 1919).

125. *Burgman*, 188 F.2d at 639.

126. *Id.* at 640.

127. *Stephan*, 50 F. Supp. at 447.

128. Tung Yin, *Enemies of the State: Rational Classification in the War on Terrorism*, 11 LEWIS & CLARK L. REV. 903, 925-26 (2007).

To illustrate this point, I used my own background: given the way China determines citizenship of its people—through blood ties, rather than place of birth—it was entirely possible that China could determine me to be its citizen even though I was born in the United States. In the event of a hot war between China and the United States, if I were to serve in the U.S. military and be captured by China, it would be preposterous to argue that I should be subject to a treason prosecution simply because China could declare me to be its citizen when I have lived my entire life in the United States and feel zero connection to China. Likewise, then, prosecuting Hamdi for treason presents an equally absurd proposition.

If we return to the contrast between Hamdi and Lindh, we see that, as noted above, there was no reason to believe that Lindh's national identity was anything but American. He held American citizenship, had not renounced it, and held citizenship from no other country. By remaining with the Taliban even after learning about the 9/11 attacks (and the Taliban's alleged role in harboring al Qaeda), Lindh threw his lot in with the entity that was now the enemy of his home country. Tellingly, in its sentencing memorandum, the district court noted Lindh's explanation for why he did not leave the Taliban on September 12, 2001, after learning about the deadly terrorist attacks the day before: "According to defendant, he might have been killed had he attempted to leave. This rationalization reflects, as the Court stated in the course of sentencing, that it appears defendant was willing to give his life for the Taliban, *but not for his country.*"¹²⁹

Whatever country or countries Hamdi might have been expected to give his life for, it is hard to see what claim the United States would have had to be on that list, apart from the fact that we have an idiosyncratic method of granting citizenship even to those who might have no reason to know or perhaps even want it.

Finally, Justice Scalia did not mention conspiracy as a possible charge to bring against Hamdi, but given the frequency with which conspiracy is charged in federal criminal cases,¹³⁰ it warrants discussion. Under 18 U.S.C. Section 371, it is a federal crime to conspire to commit an offense against the United States.¹³¹ Conspiracy is an appealing charge for at least two major reasons. First, it is an inchoate crime consisting of simple elements: an agreement between two or more

129. *United States v. Lindh*, 227 F. Supp. 2d 565, 574 (E.D. Va. 2002) (emphasis added).

130. Judge Learned Hand once observed that conspiracy is the "darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

131. 18 U.S.C. § 371 (2012).

defendants to commit an offense and an overt act in furtherance of that agreement.¹³² Second, conspirators are substantively liable for all crimes committed by co-conspirators in furtherance of the conspiracy.¹³³ In addition to conspiracy, charges under the Racketeer Influenced and Corrupt Organizations Act (RICO) share similar advantages for prosecutors and could perhaps be added to the indictment.¹³⁴

The advantage of conspiracy, therefore, would be that *if* the government could prove that Hamdi had joined a conspiracy with the plotters of the 9/11 attack, then Hamdi could be held criminally liable for the 9/11 attack.¹³⁵ The key element of a criminal conspiracy is the agreement to commit a federal offense. Could the government have made out a case that Hamdi had agreed with the 9/11 planners and operatives to carry out attacks against the United States in violation of federal statutes?

French citizen Zacarias Moussaoui, the only person charged directly with federal crimes connected to 9/11, provides an instructive comparison. He faced prosecution for six counts of conspiracy,¹³⁶ with the objects being to commit acts of transnational terrorism,¹³⁷ aircraft piracy,¹³⁸ aircraft destruction,¹³⁹ use of weapons of mass destruction,¹⁴⁰ murder of U.S. employees,¹⁴¹ and destruction of property.¹⁴² Because Rule 7 of the Federal Rules of Criminal Procedure requires only “a plain, concise, and definite written statement of the essential facts constituting the offense charged,” the indictment against Moussaoui did not specify how the government would have proven his agreement to commit those acts.¹⁴³ Nevertheless, the indictment sheds light on how the government would have gone about establishing that essential

132. See NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 8.20 (2010), http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2016_12.pdf (last updated Dec. 2016).

133. *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946).

134. See 18 U.S.C. § 1961 (2012).

135. See *Pinkerton v. United States*, 328 U.S. 640, 645 (1946) (holding all conspirators substantively liable for all criminal actions committed by co-conspirators in furtherance of the object of the conspiracy).

136. See Indictment as to Zacarias Moussaoui, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003) (No. CR. 01-455-A), <https://www.justice.gov/ag/indictment-zacarias-moussaoui>.

137. 18 U.S.C. § 2332b(a)(2), (c) (2012).

138. 49 U.S.C. § 46502 (2012).

139. 18 U.S.C. §§ 32(a)(7), 34 (2012).

140. 18 U.S.C. § 2332a(a) (2012).

141. 18 U.S.C. §§ 1114, 1117 (2012).

142. 18 U.S.C. § 844(f), (i), (n) (2012).

143. FED. R. CRIM. P. 7.

element of the conspiracy offenses.

Because Moussaoui pleaded guilty in the middle of the trial, we cannot know whether the jury would have accepted the government's theory.¹⁴⁴ However, if we take the indictment as indicative of what the prosecutors believed they could prove beyond a reasonable doubt (or at a minimum, what they felt they had probable cause to believe),¹⁴⁵ we can surmise that the government intended to prove through circumstantial evidence that Moussaoui was a member of al Qaeda and that he intended to take part in either the 9/11 attacks or some similar follow-up event. The first twelve paragraphs of count one of the Moussaoui indictment focused on the terrorist group al Qaeda and the 9/11 attacks.¹⁴⁶ There were 112 overt acts alleged, of which only nineteen involved Moussaoui. What those nineteen overt acts intended to demonstrate was that Moussaoui came to the United States and immediately took actions such as training at the al Qaeda terrorist camp, taking flight lessons in the United States, joining a gym, and buying knives. Although there is nothing inherently illegal about any of those steps, their exact similarity to actions taken by the actual nineteen hijackers suggests that Moussaoui may also have been preparing for a suicide-hijacking mission—and if so, that he must have agreed with the 9/11 planners to commit the specified unlawful acts.

Hamdi, however, was at least a further step removed from the 9/11 attacks than Moussaoui was. The government's consistent contention was that Hamdi was a member of the Taliban, not al Qaeda. While both were seen as adversaries of the United States in the days after 9/11, and while the Taliban did shelter al Qaeda in Afghanistan, the top level Taliban leadership had been divided over whether al Qaeda's declaration of war against the United States was advisable or even justified.¹⁴⁷ Of course, accurate determination of whether the Taliban leaders agreed to help carry out the 9/11 attacks or at least had advance knowledge of them is likely to elude us, short of capturing and interrogating those

144. See *United States v. Moussaoui*, 591 F.3d 263, 266 (4th Cir. 2010).

145. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (holding that the Due Process Clause requires prosecutors to have at least probable cause in order to seek an indictment).

146. Count one contained all of the operative allegations against Moussaoui; the other five counts incorporated those allegations by reference. Indictment as to Zacarias Moussaoui, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003) (No. CR. 01-455-A), <https://www.justice.gov/ag/indictment-zacarias-moussaoui>.

147. See LAWRENCE H. WRIGHT, *THE LOOMING TOWER* 287, 331 (2006) (“Bin Laden’s declaration of war against the United States had split the Taliban. There were those who said that America had always been Afghanistan’s friend, so why turn it into a powerful and unnecessary enemy?”).

persons. The exhaustive 9/11 Commission Report, for example, provided much historical background on al Qaeda's rise up through the 9/11 attacks, but had little to say about the Taliban's culpability.¹⁴⁸

Thus, one would need to infer that (1) the Taliban leadership had agreed to take part in the 9/11 attacks, and (2) by joining the Taliban, Hamdi agreed to all anti-American plots that the Taliban agreed to, even if Hamdi had no inkling himself about any of those plots. Under this theory, had the government been able to capture or extradite al Qaeda or Taliban leaders to stand trial for their roles in the 9/11 attacks, Hamdi could have been seated at a very long table with Osama bin Laden, Ayman al-Zawahiri, Khalid Sheikh Mohammed, Mullah Omar, and others. For an example of this kind of massive trial consisting of many defendants with varying degrees of culpability and connection to the various crimes making up a criminal enterprise under the RICO statute, see *United States v. Castellano*.¹⁴⁹ Professor Lynch notes in that case:

While the range of activities charged against the enterprise was vast, the involvement of many of the defendants in those activities could only be described as tangential. For example, one defendant was a juror who allegedly took a bribe to fix a prosecution of one of the members of the "crew"; another's entire involvement (limited to three of the eighty racketeering acts charged in the indictment) consisted of hiring members of the crew to bribe and ultimately to murder a witness against his son in a state prosecution entirely unrelated to the affairs of the enterprise; others were involved only in one of the many criminal affairs of the enterprise, and not at all in its more violent activities. All of these defendants were to be tried together, despite the fact that little of the evidence in what could only be an extraordinarily lengthy trial would have any direct bearing on their own actions. Moreover, the government's proof would not be limited to the actions of the defendants on trial.¹⁵⁰

Such a set-up would potentially prejudice Hamdi unfairly by forcing him to sit through a trial associating him with the alleged perpetrators of the worst terrorist attack on U.S. soil, with only a tiny fraction of the trial devoted to presenting inculpatory evidence against him—in the form of his having joined the Taliban as a foot soldier. To

148. In one part, the 9/11 Commission noted that National Security Advisor Sandy Berger received an intelligence report "quot[ing] Bin Ladin as saying that Mullah Omar had given him a completely free hand to act in any country . . ." 9/11 COMM'N REPORT, *supra* note 13, at 123.

149. *United States v. Castellano*, 610 F. Supp. 1359 (S.D.N.Y. 1985).

150. Gerard E. Lynch, *Rico: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 929-30 (1987).

be sure, this sort of prejudice is not unknown, which is why Rule 14 of the Federal Rules of Criminal Procedure permits a defendant to seek relief from prejudicial joinder by moving for severance.¹⁵¹ However, Rule 14 would have been unlikely to help Hamdi in this hypothetical trial because the potential prejudice would accrue due to not only being tried in conjunction with seemingly far more culpable co-defendants, which could be addressed by severance, but also the conspiracy charge itself, for which there is no severance remedy available.

Accordingly, while there might have been superficial appeal to the idea of bringing criminal charges against Hamdi and giving him “a day in court,” such charges would be problematic: treason would impose a duty of loyalty upon someone who likely has no conscious memories of being in the United States and whose parents were never Americans, and conspiracy would require stretching the definition of the agreement element broadly in a way that would spread into ordinary criminal cases and change conspiracy from being the “darling of the prosecutor’s nursey” into something like the prosecutor’s goddess.¹⁵²

C. The Other Way to Solve the Problem: Death from the Skies

How might the government have responded had Justice Scalia prevailed in his view? Presumably, it would have attempted to pursue the suggested options of suspension or prosecution. However, it is worth considering what might have happened had the government found itself unable to obtain habeas suspension and unable to bring criminal charges, and simply forced to release Hamdi.

One possibility is that Hamdi would have returned to Saudi Arabia and had nothing more to do with al Qaeda, the Taliban, or the United States. In that instance, release would have achieved the best possible outcome for Hamdi as well as the United States (as there would be no more need to spend resources criminally trying or detaining him).¹⁵³

Another possibility is that he would have rejoined the Taliban and taken part in insurgent attacks against U.S. and Coalition forces in Afghanistan.¹⁵⁴ Presumably, Hamdi’s presence in a group of armed

151. FED. R. CRIM. P. 14.

152. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

153. It should be acknowledged that there have been no reports of Hamdi’s having broken the terms of his negotiated repatriation to Saudi Arabia in late 2004.

154. Even as early as 2004, there were reports of released detainees who had re-entered combat against the United States in Afghanistan or elsewhere. See Vanessa Blum, *U.S. Building New Prisons for Terrorists; Construction of Guantanamo Jails Signals Long-Term Plans for Base*, NAT’L LAW J., Oct. 4, 2004, at 3; see also Matt Moore & John J. Lumpkin, *Some Detainees Have*

enemy fighters would not prevent U.S. forces from attacking.¹⁵⁵ In 2002, the Bush Administration started the era of unmanned aerial vehicle warfare when an armed Predator drone fired a missile at a car containing suspected al Qaeda operative Qaed Salim Sinan al-Harethi, killing him as well as five others, which included American citizen Kamal Derwish.¹⁵⁶ As a mere foot soldier, it would have been unlikely that Hamdi would have been targeted specifically as a military target. But could he have been? It might seem silly to consider even the possibility in a counterfactual situation where Justice Scalia's dissent carried the day, given that death would seem to be a worse personal outcome than indefinite detention.

One can look for guidance to the Obama Administration's increasing reliance on drone warfare in Afghanistan and other fronts in the war against al Qaeda. Even before Barack Obama assumed office, the *Rasul-Hamdan-Boumedienne* line of cases had already empowered federal courts to review the detention of individual detainees, making capture and detention of additional fighters a costly exercise in continuing litigation. President Obama's campaign pledge to close the Guantanamo Bay detention facility made it further politically infeasible to increase the population of detainees at the naval base. Perhaps predictably, these forces pushed the Obama Administration toward the more expedient route of attacking to kill via drone strikes.

The most relevant example of this option for our purposes was Anwar al-Awlaki, an American citizen and Muslim cleric who left the United States in late 2002 and eventually took up residence in Yemen, where he allegedly used video sermons to urge Muslim followers to engage in jihad as a recruiter for al Qaeda.¹⁵⁷ Al-Awlaki was also linked to Fort Hood shooter Nidal Hasan, "underwear bomber" Umar Farouk Abdulmutallab, and possibly to Times Square bomber Faisal Shahzad.¹⁵⁸ Al-Awlaki posed little threat of physical danger to the United States, but his ability to attract more fighters to al Qaeda raised his threat profile enough in the eyes of the Obama Administration that it placed him on

Returned to Terrorism, HOUSTON CHRON., Oct. 18, 2004, at A3.

155. If nothing else, the attack could be legally justified within international humanitarian law (i.e., the laws of war) as intended to disable or kill the other members of the group; any harm to Hamdi could have been unintended even if expected. See Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175 (2005).

156. See Greg Miller & Josh Meyer, *CIA Strike May Link 6 in U.S. to Al Qaeda*, L.A. TIMES (Nov. 9, 2002), <http://articles.latimes.com/2002/nov/09/world/fg-yemen9>.

157. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 10 (D.D.C. 2010).

158. *Id.*

the “kill list.”¹⁵⁹ On September 30, 2011, a Predator drone blasted the vehicle in which al-Awlaki was traveling, killing him and three others (including another American citizen, Samir Khan).¹⁶⁰

Al-Awlaki’s citizenship did not save him from being targeted for a drone strike. His father even brought a lawsuit in 2010 to challenge the government’s legal authority to target al-Awlaki for death without due process.¹⁶¹ The district court quickly dismissed the lawsuit on a variety of justiciability grounds, of which the important ones for our analysis were that the father lacked standing to bring the case on his son’s behalf, and that the entire case presented a non-justiciable political question.¹⁶² After the successful drone attack, al-Awlaki’s father brought a second lawsuit on behalf of his son’s estate, raising *Bivens* claims of Fourth and Fifth Amendment violations.¹⁶³ This lawsuit also failed, although the district judge did reach the merits of the claim (rather than dismissing it as a political question) by ruling that “special factors” counseled against implying a cause of action under the *Bivens* doctrine “[i]n this delicate area of war-making, national security, and foreign relations.”¹⁶⁴

Thus, under Justice Scalia’s principles, a hostile American citizen could not be captured on the battlefield and then detained for any purpose unless criminally charged, but at the same time, it would appear that the government could target that same hostile citizen for lethal attack, and the various justiciability doctrines would likely ensure that there would be no judicial recourse to stop the attack.

IV. CONCLUSION

The notion that Justice Scalia’s dissent in *Hamdi* was some kind of ode to civil liberties or was defendant-friendly ends up in a strange place. It rejects the majority’s agreement that Hamdi was entitled to a hearing before a neutral decision maker to contest his classification as an enemy combatant, to notice of the allegations underlying that determination, and to assistance of counsel—all of which, if successful, would lead not just to his release, but also to clearing his name. One

159. *Id.* at 11.

160. *See, e.g., Al Qaeda’s Anwar al-Awlaki killed in Yemen*, CBS NEWS (Sept. 30, 2011, 3:18 PM), <http://www.cbsnews.com/news/al-qaedas-anwar-al-awlaki-killed-in-yemen/>.

161. *See* Complaint for Declarative and Injunctive Relief, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-1469), <http://ccrjustice.org/sites/default/files/assets/files/Al-Aulaqi%20v.%20Obama%20Complaint.pdf>.

162. *Al-Aulaqi*, 727 F. Supp. 2d at 23-24, 35, 52.

163. *See* *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014).

164. *Id.* at 78, 80.

might argue that such process, while an improvement upon what existed before, would still fall short of a hearing before an Article III court through a formal petition for a writ of habeas corpus. However, it is far better than what Justice Scalia would have wrought: prosecution of Hamdi for betraying a country to which he had no connection; suspension altogether of habeas, leaving him in military detention with no way to challenge his classification; or release under circumstances where he would still be viewed as part of the enemy and subject to lethal attack. From a process perspective, this seems backwards.

In the end, judging by *Hamdi v. Rumsfeld*, it would appear that Justice Scalia was neither friend nor foe of a criminal defendant, but rather something more like the nutty uncle who kept talking about the way things have always been done, even when those ways might not make sense any more. Certainly, Hamdi was much better off with Justice Scalia in the dissent than in the majority in his case. True, the assessment of whether Justice Scalia's criminal procedure jurisprudence favors defendants should not depend on the ultimate result of an individual case or set of cases, but rather on the impact of the underlying doctrinal principles. It is worth observing, however, that as between John Walker Lindh and Yaser Hamdi, both American citizens captured in Afghanistan, the one who was treated as a criminal defendant was definitely *not* "better off." Following the Supreme Court's decision in his case in 2004, Hamdi was able to reach a settlement with the Bush Administration that resulted in his repatriation to Saudi Arabia under conditions similar to house arrest, in exchange for his relinquishment of his American citizenship and his agreement not to engage in hostile actions against the United States. Hamdi spent less than three years in captivity.¹⁶⁵ Lindh, on the other hand, received a sentence of twenty years of imprisonment; if he receives the maximum fifteen percent reduction of time for good behavior, he will still end up serving seventeen years.

165. See, e.g., 'Enemy Combatant' Sees Freedom, CBS NEWS (Sept. 27, 2004), <http://www.cbsnews.com/news/enemy-combatant-sees-freedom/>. To be sure, the conditions of confinement during that time, particularly during the early period when he was held incommunicado, were no doubt even harsher than those experienced in a federal penitentiary.