

THOMAS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 03–6696

YASER ESAM HAMDI AND ESAM FOUAD HAMDI, AS
NEXT FRIEND OF YASER ESAM HAMDI, PETITION-
ERS *v.* DONALD H. RUMSFELD, SECRETARY
OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[June 28, 2004]

JUSTICE THOMAS, dissenting.

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners’ habeas challenge should fail, and there is no reason to remand the case. The plurality reaches a contrary conclusion by failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs and by using the balancing scheme of *Mathews v. Eldridge*, 424 U. S. 319 (1976). I do not think that the Federal Government’s war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them. But even if I were to agree with the general approach the plurality takes, I could not accept the particulars. The plurality utterly fails to account for the Government’s compelling interests and for our own institutional inability to weigh competing concerns correctly. I respectfully dissent.

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I

“It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U. S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U. S. 500, 509 (1964)). The national security, after all, is the primary responsibility and purpose of the Federal Government. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 662 (1952) (Clark, J., concurring in judgment); *The Federalist* No. 23, pp. 146–147 (J. Cooke ed. 1961) (A. Hamilton) (“The principle purposes to be answered by Union are these—The common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks”). But because the Founders understood that they could not foresee the myriad potential threats to national security that might later arise, they chose to create a Federal Government that necessarily possesses sufficient power to handle any threat to the security of the Nation. The power to protect the Nation

“ought to exist without limitation . . . [b]ecause it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.” *Id.*, at 147.

See also *The Federalist* Nos. 34 and 41.

The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains. “Energy in the executive is a leading character in the definition of good government. It is essential to

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the protection of the community against foreign attacks.” The Federalist No. 70, p. 471 (A. Hamilton). The principle “ingredien[t]” for “energy in the executive” is “unity.” *Id.*, at 472. This is because “[d]ecision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number.” *Ibid.*

These structural advantages are most important in the national-security and foreign-affairs contexts. “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.” The Federalist No. 74, p. 500 (A. Hamilton). Also for these reasons, John Marshall explained that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” 10 Annals of Cong. 613 (1800); see *id.*, at 613–614. To this end, the Constitution vests in the President “[t]he executive Power,” Art. II, §1, provides that he “shall be Commander in Chief of the” armed forces, §2, and places in him the power to recognize foreign governments, §3.

This Court has long recognized these features and has accordingly held that the President has *constitutional* authority to protect the national security and that this authority carries with it broad discretion.

“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. . . . Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance . . . is a question to be decided *by him.*” *Prize Cases*, 2 Black 635, 668, 670 (1863).

The Court has acknowledged that the President has the

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authority to “employ [the Nation’s Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy.” *Fleming v. Page*, 9 How. 603, 615 (1850). With respect to foreign affairs as well, the Court has recognized the President’s independent authority and need to be free from interference. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (explaining that the President “has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results”); *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948).

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But it is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive. I cannot improve on Justice Jackson’s words, speaking for the Court:

“The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, com-

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plex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.” *Ibid.*

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

For these institutional reasons and because “Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act,” it should come as no surprise that “[s]uch failure of Congress . . . does not, ‘especially . . . in the areas of foreign policy and national security,’ imply ‘congressional disapproval’ of action taken by the Executive.” *Dames & Moore v. Regan*, 453 U. S. 654, 678 (1981) (quoting *Agee*, 453 U. S., at 291). Rather, in these domains, the fact that Congress has provided the President with broad authorities does not imply—and the Judicial Branch should not infer—that Congress intended to deprive him of particular powers not

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specifically enumerated. See *Dames & Moore*, 453 U. S., at 678. As far as the courts are concerned, “the 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.’” *Ibid.* (quoting *Youngstown*, 343 U. S., at 637 (Jackson, J., concurring)).

Finally, and again for the same reasons, where “the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress[, and i]n such a case the executive action ‘would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.’” *Dames & Moore, supra*, at 668 (quoting *Youngstown, supra*, at 637 (Jackson, J., concurring)). That is why the Court has explained, in a case analogous to this one, that “the detention[,] ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger[, is] not to be set aside by the courts without the clear conviction that [it is] in conflict with the Constitution or laws of Congress constitutionally enacted.” *Ex parte Quirin*, 317 U. S. 1, 25 (1942). See also *Ex parte Milligan*, 4 Wall. 2, 133 (1866) (Chase, C. J., concurring in judgment) (stating that a sentence imposed by a military commission “must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress”). This deference extends to the President’s determination of all the factual predicates necessary to conclude that a given action is appropriate. See *Quirin, supra*, at 25 (“We are not here concerned with any question of the guilt or innocence of petitioners”). See also *Hirabayashi v. United States*, 320 U. S. 81, 93 (1943); *Prize Cases*, 2 Black, at

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670; *Martin v. Mott*, 12 Wheat. 19, 29–30 (1827).

To be sure, the Court has at times held, in specific circumstances, that the military acted beyond its warmaking authority. But these cases are distinguishable in important ways. In *Ex parte Endo*, 323 U. S. 283 (1944), the Court held unlawful the detention of an admittedly law-abiding and loyal American of Japanese ancestry. It did so because the Government’s asserted reason for the detention had nothing to do with the congressional and executive authorities upon which the Government relied. Those authorities permitted detention for the purpose of preventing espionage and sabotage and thus could not be pressed into service for detaining a loyal citizen. See *id.*, at 301–302. Further, the Court “stress[ed] the silence . . . of the [relevant] Act and the *Executive Orders*.” *Id.*, at 301 (emphasis added); see also *id.*, at 301–304. The Court sensibly held that the Government could not detain a loyal citizen pursuant to executive and congressional authorities that could not conceivably be implicated given the Government’s factual allegations. And in *Youngstown*, Justice Jackson emphasized that “Congress ha[d] not left seizure of private property an open field but ha[d] covered it by three statutory policies inconsistent with th[e] seizure.” 343 U. S., at 639 (concurring opinion). See also *Milligan, supra*, at 134 (Chase, C. J., concurring in judgment) (noting that the Government failed to comply with statute directly on point).

I acknowledge that the question whether Hamdi’s executive detention is lawful is a question properly resolved by the Judicial Branch, though the question comes to the Court with the strongest presumptions in favor of the Government. The plurality agrees that Hamdi’s detention is lawful if he is an enemy combatant. But the question whether Hamdi is actually an enemy combatant is “of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to

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belong in the domain of political power not subject to judicial intrusion or inquiry.” *Chicago & Southern Air Lines*, 333 U. S., at 111. That is, although it is appropriate for the Court to determine the judicial question whether the President has the asserted authority, see, *e.g.*, *Ex parte Endo*, *supra*, we lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches.¹ In the words of then-Judge Scalia:

“In Old Testament days, when judges ruled the people of Israel and led them into battle, a court professing the belief that it could order a halt to a military operation in foreign lands might not have been a startling phenomenon. But in modern times, and in a country where such governmental functions have been committed to elected delegates of the people, such an assertion of jurisdiction is extraordinary. The [C]ourt’s decision today reflects a willingness to extend judicial power into areas where we do not know, and have no way of finding out, what serious harm we may be doing.” *Ramirez de Arellano v. Weinberger*, 745 F. 2d 1500, 1550–1551 (CA DC 1984) (en banc) (dissenting opinion) (footnote omitted).

See also *id.*, at 1551, n. 1 (noting that “[e]ven the ancient Israelites eventually realized the shortcomings of judicial commanders-in-chief”). The decision whether someone is an enemy combatant is, no doubt, “delicate, complex, and involv[es] large elements of prophecy,” *Chicago & South-*

¹Although I have emphasized national-security concerns, the President’s foreign-affairs responsibilities are also squarely implicated by this case. The Government avers that Northern Alliance forces captured Hamdi, and the District Court demanded that the Government turn over information relating to statements made by members of the Northern Alliance. See 316 F. 3d 450, 462 (CA4 2003).

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ern Air Lines, supra, at 111, which, incidentally might in part explain why “the Government has never provided any court with the full criteria that it uses in classifying individuals as such,” *ante*, at 8. See also *infra*, at 18–20 (discussing other military decisions).

II

“The war power of the national government is ‘the power to wage war successfully.’” *Lichter v. United States*, 334 U. S. 742, 767, n. 9 (1948) (quoting Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238). It follows that this power “is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict,” *In re Yamashita*, 327 U. S. 1, 12 (1946); see also *Stewart v. Kahn*, 11 Wall. 493, 507 (1871), and quite obviously includes the ability to detain those (even United States citizens) who fight against our troops or those of our allies, see, e.g., *Quirin*, 317 U. S., at 28–29, 30–31; *id.*, at 37–39; *Duncan v. Kahanamoku*, 327 U. S. 304, 313–314 (1946); W. Winthrop, *Military Law and Precedents* 788 (2d ed. 1920); W. Whiting, *War Powers Under the Constitution of the United States* 167 (43d ed. 1871); *id.*, at 44–46 (noting that Civil War “rebels” may be treated as foreign belligerents); see also *ante*, at 10–12.

Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so. See *ante*, at 9. The Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” of September 11, 2001. Indeed, the Court has previously concluded that language materially identical to

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the AUMF authorizes the Executive to “make the ordinary use of the soldiers . . . ; that he may kill persons who resist and, of course, that he may use the milder measure of seizing [and detaining] the bodies of those whom he considers to stand in the way of restoring peace.” *Moyer v. Peabody*, 212 U. S. 78, 84 (1909).

The plurality, however, qualifies its recognition of the President’s authority to detain enemy combatants in the war on terrorism in ways that are at odds with our precedent. Thus, the plurality relies primarily on Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3406, T. I. A. S. No. 3364, for the proposition that “[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities.” *Ante*, at 12–13. It then appears to limit the President’s authority to detain by requiring that the record establish that United States troops are still involved in active combat in Afghanistan because, in that case, detention would be “part of the exercise of ‘necessary and appropriate force.’” *Ante*, at 14. But I do not believe that we may diminish the Federal Government’s war powers by reference to a treaty and certainly not to a treaty that does not apply. See n. 6, *infra*. Further, we are bound by the political branches’ determination that the United States is at war. See, e.g., *Ludecke v. Watkins*, 335 U. S. 160, 167–170 (1948); *Prize Cases*, 2 Black, at 670; *Mott*, 12 Wheat., at 30. And, in any case, the power to detain does not end with the cessation of formal hostilities. See, e.g., *Madsen v. Kinsella*, 343 U. S. 341, 360 (1952); *Johnson v. Eisentrager*, 339 U. S. 763, 786 (1950); cf. *Moyer, supra*, at 85.

Accordingly, the President’s action here is “supported by the strongest of presumptions and the widest latitude of judicial interpretation.” *Dames & Moore*, 453 U. S., at 668

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(internal quotation marks omitted).² The question becomes whether the Federal Government (rather than the President acting alone) has power to detain Hamdi as an enemy combatant. More precisely, we must determine whether the Government may detain Hamdi given the procedures that were used.

III

I agree with the plurality that the Federal Government has power to detain those that the Executive Branch determines to be enemy combatants. See *ante*, at 10. But I do not think that the plurality has adequately explained the breadth of the President's authority to detain enemy combatants, an authority that includes making virtually conclusive factual findings. In my view, the structural considerations discussed above, as recognized in our precedent, demonstrate that we lack the capacity and responsibility to second-guess this determination.

This makes complete sense once the process that is due Hamdi is made clear. As an initial matter, it is possible that the Due Process Clause requires only "that our Government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions." *In re Winship*, 397 U. S. 358, 382 (1970) (Black, J., dissenting). I need not go this far today because the Court has already explained the nature of due process in this context.

In a case strikingly similar to this one, the Court addressed a Governor's authority to detain for an extended

²It could be argued that the habeas statutes are evidence of congressional intent that enemy combatants are entitled to challenge the factual basis for the Government's determination. See, e.g., 28 U. S. C. §§2243, 2246. But factual development is needed only to the extent necessary to resolve the legal challenge to the detention. See, e.g., *Walker v. Johnston*, 312 U. S. 275, 284 (1941).

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period a person the executive believed to be responsible, in part, for a local insurrection. Justice Holmes wrote for a unanimous Court:

“When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what *he deems* the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm.” *Moyer*, 212 U. S., at 85 (citation omitted; emphasis added).

The Court answered *Moyer*’s claim that he had been denied due process by emphasizing that

“it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. Thus summary proceedings suffice for taxes, and executive decisions for exclusion from the country. . . . Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power.” *Id.*, at 84–85 (citations omitted).

In this context, due process requires nothing more than a good-faith executive determination.³ To be clear: The Court has held that an executive, acting pursuant to statutory and constitutional authority may, consistent with the Due Process Clause, unilaterally decide to detain an individual if the executive deems this necessary for the public

³Indeed, it is not even clear that the Court required good faith. See *Moyer*, 212 U. S., at 85 (“It is not alleged that [the Governor’s] judgment was not honest, if that be material, or that [Moyer] was detained after fears of the insurrection were at an end”).

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safety even if he is mistaken.

Moyer is not an exceptional case. In *Luther v. Borden*, 7 How. 1 (1849), the Court discussed the President’s constitutional and statutory authority, in response to a request from a state legislature or executive, “to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress [an] insurrection.” *Id.*, at 43 (quoting Act of Feb. 28, 1795). The Court explained that courts could not review the President’s decision to recognize one of the competing legislatures or executives. See 7 How., at 43. If a court could second-guess this determination, “it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States.” *Ibid.* “If the judicial power extends so far,” the Court concluded, “the guarantee contained in the Constitution of the United States [referring to Art. IV, §4] is a guarantee of anarchy, and not of order.” *Ibid.* The Court clearly contemplated that the President had authority to detain as he deemed necessary, and such detentions evidently comported with the Due Process Clause as long as the President correctly decided to call forth the militia, a question the Court said it could not review.

The Court also addressed the natural concern that placing “this power in the President is dangerous to liberty, and may be abused.” *Id.*, at 44. The Court noted that “[a]ll power may be abused if placed in unworthy hands,” and explained that “it would be difficult . . . to point out any other hands in which this power would be more safe, and at the same time equally effectual.” *Ibid.* Putting that aside, the Court emphasized that this power “is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals.” *Ibid.* Finally, the Court explained that if the President abused this power “it would be in the power of

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Congress to apply the proper remedy. But the courts must administer the law as they find it.” *Id.*, at 45.

Almost 140 years later, in *United States v. Salerno*, 481 U. S. 739, 748 (1987), the Court explained that the Due Process Clause “lays down [no] categorical imperative.” The Court continued:

“We have repeatedly held that the Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest. For example, in times of war or insurrection, when society’s interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous.” *Ibid.*

The Court cited *Ludecke v. Watkins*, 335 U. S. 160 (1948), for this latter proposition even though *Ludecke* actually involved detention of enemy aliens. See also *Selective Draft Law Cases*, 245 U. S. 366 (1918); *Jacobson v. Massachusetts*, 197 U. S. 11, 27–29 (1905) (upholding legislated mass vaccinations and approving of forced quarantines of Americans even if they show no signs of illness); cf. *Kansas v. Hendricks*, 521 U. S. 346 (1997); *Juragua Iron Co. v. United States*, 212 U. S. 297 (1909).

The Government’s asserted authority to detain an individual that the President has determined to be an enemy combatant, at least while hostilities continue, comports with the Due Process Clause. As these cases also show, the Executive’s decision that a detention is necessary to protect the public need not and should not be subjected to judicial second-guessing. Indeed, at least in the context of enemy-combatant determinations, this would defeat the unity, secrecy, and dispatch that the Founders believed to be so important to the warmaking function. See Part I, *supra*.

I therefore cannot agree with JUSTICE SCALIA’s conclusion that the Government must choose between using

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standard criminal processes and suspending the writ. See *ante*, at 26 (dissenting opinion). JUSTICE SCALIA relies heavily upon *Ex parte Milligan*, 4 Wall. 2 (1866), see *ante*, at 14–16, 17–20, and three cases decided by New York state courts in the wake of the War of 1812, see *ante*, at 13–14. I admit that *Milligan* supports his position. But because the Executive Branch there, unlike here, did not follow a specific statutory mechanism provided by Congress, the Court did not need to reach the broader question of Congress’ power, and its discussion on this point was arguably dicta, see 4 Wall., at 122, as four Justices believed, see *id.*, at 132, 134–136 (Chase, C. J., joined by Wayne, Swayne, and Miller, JJ., concurring in judgment).

More importantly, the Court referred frequently and pervasively to the criminal nature of the proceedings instituted against Milligan. In fact, this feature serves to distinguish the state cases as well. See *In re Stacy*, 10 Johns. *328, *334 (N. Y. 1813) (“A military commander is here assuming *criminal jurisdiction* over a private citizen” (emphasis added)); *Smith v. Shaw*, 12 Johns. *257, *265 (N. Y. 1815) (Shaw “might be amenable to the civil authority for treason; but could not *be punished*, under martial law, as a spy” (emphasis added)); *M’Connell v. Hampton*, 12 Johns. *234 (N. Y. 1815) (same for treason).

Although I do acknowledge that the reasoning of these cases might apply beyond criminal punishment, the punishment-nonpunishment distinction harmonizes all of the precedent. And, subsequent cases have at least implicitly distinguished *Milligan* in just this way. See, e.g., *Moyer*, 212 U. S., at 84–85 (“Such arrests are not necessarily for punishment, but are by way of precaution”). Finally, *Quirin* overruled *Milligan* to the extent that those cases are inconsistent. See *Quirin*, 317 U. S., at 45 (limiting *Milligan* to its facts). Because the Government does not detain Hamdi in order to punish him, as the plurality acknowledges, see *ante*, at 10–11, *Milligan* and the New

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York cases do not control.

JUSTICE SCALIA also finds support in a letter Thomas Jefferson wrote to James Madison. See *ante*, at 12. I agree that this provides some evidence for his position. But I think this plainly insufficient to rebut the authorities upon which I have relied. In any event, I do not believe that JUSTICE SCALIA's evidence leads to the necessary "clear conviction that [the detention is] in conflict with the Constitution or laws of Congress constitutionally enacted," *Quirin, supra*, at 25, to justify nullifying the President's wartime action.

Finally, JUSTICE SCALIA's position raises an additional concern. JUSTICE SCALIA apparently does not disagree that the Federal Government has all power necessary to protect the Nation. If criminal processes do not suffice, however, JUSTICE SCALIA would require Congress to suspend the writ. See *ante*, at 26. But the fact that the writ may not be suspended "unless when in Cases of Rebellion or Invasion the public Safety may require it," Art. I, §9, cl. 2, poses two related problems. First, this condition might not obtain here or during many other emergencies during which this detention authority might be necessary. Congress would then have to choose between acting unconstitutionally⁴ and depriving the President of the tools he needs to protect the Nation. Second, I do not see how suspension would make constitutional otherwise unconstitutional detentions ordered by the President. It simply removes a remedy. JUSTICE SCALIA's position might therefore require one or both of the political branches to act unconstitutionally in order to protect the Nation. But the power to protect the Nation must be the power to do so lawfully.

⁴I agree with JUSTICE SCALIA that this Court could not review Congress' decision to suspend the writ. See *ante*, at 26.

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Accordingly, I conclude that the Government's detention of Hamdi as an enemy combatant does not violate the Constitution. By detaining Hamdi, the President, in the prosecution of a war and authorized by Congress, has acted well within his authority. Hamdi thereby received all the process to which he was due under the circumstances. I therefore believe that this is no occasion to balance the competing interests, as the plurality unconvincingly attempts to do.

IV

Although I do not agree with the plurality that the balancing approach of *Mathews v. Eldridge*, 424 U. S. 319 (1976), is the appropriate analytical tool with which to analyze this case,⁵ I cannot help but explain that the plurality misapplies its chosen framework, one that if applied correctly would probably lead to the result I have reached. The plurality devotes two paragraphs to its discussion of the Government's interest, though much of those two paragraphs explain why the Government's concerns are misplaced. See *ante*, at 24–25. But: “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Agee*, 453 U. S., at 307 (quoting *Aptheker*, 378 U. S., at 509). In *Moyer*, the Court recognized the paramount importance of the Governor's interest in the tranquility of a Colorado town. At issue here is the far more significant interest of the security of the Nation. The Government seeks to further that interest by detaining an enemy soldier not only to prevent him from rejoining the ongoing fight. Rather, as the Government explains, detention can serve to gather critical intelligence regarding the intentions and capabilities of our adversaries, a function that the Gov-

⁵Evidently, neither do the parties, who do not cite *Mathews* even once.

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ernment avers has become all the more important in the war on terrorism. See Brief for Respondents 15; App. 347–351.

Additional process, the Government explains, will destroy the intelligence gathering function. Brief for Respondents 43–45. It also does seem quite likely that, under the process envisioned by the plurality, various military officials will have to take time to litigate this matter. And though the plurality does not say so, a meaningful ability to challenge the Government’s factual allegations will probably require the Government to divulge highly classified information to the purported enemy combatant, who might then upon release return to the fight armed with our most closely held secrets.

The plurality manages to avoid these problems by discounting or entirely ignoring them. After spending a few sentences putatively describing the Government’s interests, the plurality simply assures the Government that the alleged burdens “are properly taken into account in our due process analysis.” *Ante*, at 25. The plurality also announces that “the risk of erroneous deprivation of a detainee’s liberty interest is unacceptably high under the Government’s proposed rule.” *Ante*, at 26 (internal quotation marks omitted). But there is no particular reason to believe that the federal courts have the relevant information and expertise to make this judgment. And for the reasons discussed in Part I, *supra*, there is every reason to think that courts cannot and should not make these decisions.

The plurality next opines that “[w]e think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts.” *Ante*, at 27. Apparently by limiting hearings “to the alleged combatant’s acts,” such hearings “meddl[e] little, if at all, in the strategy or conduct of war.” *Ante*, at 28. Of course, the meaning of the combatant’s acts may

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become clear only after quite invasive and extensive inquiry. And again, the federal courts are simply not situated to make these judgments.

Ultimately, the plurality's dismissive treatment of the Government's asserted interests arises from its apparent belief that enemy-combatant determinations are not part of "the actual prosecution of a war," *ibid.*, or one of the "central functions of warmaking," *ante*, at 27. This seems wrong: Taking *and holding* enemy combatants is a quintessential aspect of the prosecution of war. See, *e.g.*, *ante*, at 10–11; *Quirin*, 317 U. S., at 28. Moreover, this highlights serious difficulties in applying the plurality's balancing approach here. First, in the war context, we know neither the strength of the Government's interests nor the costs of imposing additional process.

Second, it is at least difficult to explain why the result should be different for other military operations that the plurality would ostensibly recognize as "central functions of warmaking." As the plurality recounts:

"Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Ante*, at 26 (internal quotation marks omitted).

See also *ibid.* ("notice" of the Government's factual assertions and "a fair opportunity to rebut [those] assertions before a neutral decisionmaker" are essential elements of due process). Because a decision to bomb a particular target might extinguish *life* interests, the plurality's analysis seems to require notice to potential targets. To take one more example, in November 2002, a Central Intelligence Agency (CIA) Predator drone fired a Hellfire missile at a vehicle in Yemen carrying an al Qaeda leader, a citizen of

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the United States, and four others. See Priest, CIA Killed U. S. Citizen In Yemen Missile Strike, *Washington Post*, Nov. 8, 2002, p. A1. It is not clear whether the CIA knew that an American was in the vehicle. But the plurality's due process would seem to require notice and opportunity to respond here as well. Cf. *Tennessee v. Garner*, 471 U. S. 1 (1985). I offer these examples not because I think the plurality would demand additional process in these situations but because it clearly would not. The result here should be the same.

I realize that many military operations are, in some sense, necessary. But many, if not most, are merely expedient, and I see no principled distinction between the military operation the plurality condemns today (the holding of an enemy combatant based on the process given Hamdi) from a variety of other military operations. In truth, I doubt that there is any sensible, bright-line distinction. It could be argued that bombings and missile strikes are an inherent part of war, and as long as our forces do not violate the laws of war, it is of no constitutional moment that civilians might be killed. But this does not serve to distinguish this case because it is also consistent with the laws of war to detain enemy combatants exactly as the Government has detained Hamdi.⁶ This, in fact, bolsters my argument in Part III to the extent that the laws of war show that the power to detain is part of a sovereign's war powers.

Undeniably, Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause. Against this, however, is the Government's overriding interest in protecting the Nation. If a deprivation of lib-

⁶Hamdi's detention comports with the laws of war, including the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3406, T. I. A. S. No. 3364. See Brief for Respondents 22–24.

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erty can be justified by the need to protect a town, the protection of the Nation, *a fortiori*, justifies it.

I acknowledge that under the plurality's approach, it might, at times, be appropriate to give detainees access to counsel and notice of the factual basis for the Government's determination. See *ante*, at 25–27. But properly accounting for the Government's interests also requires concluding that access to counsel and to the factual basis would not always be warranted. Though common sense suffices, the Government thoroughly explains that counsel would often destroy the intelligence gathering function. See Brief for Respondents 42–43. See also App. 347–351 (affidavit of Col. D. Woolfolk). Equally obvious is the Government's interest in not fighting the war in its own courts, see, *e.g.*, *Johnson v. Eisentrager*, 339 U. S., at 779, and protecting classified information, see, *e.g.*, *Department of Navy v. Egan*, 484 U. S. 518, 527 (1988) (President's "authority to classify and control access to information bearing on national security and to determine" who gets access "flows primarily from [the Commander-in-Chief Clause] and exists quite apart from any explicit congressional grant"); *Agee*, 453 U. S., at 307 (upholding revocation of former CIA employee's passport in large part by reference to the Government's need "to protect the secrecy of [its] foreign intelligence operations").⁷

⁷These observations cast still more doubt on the appropriateness and usefulness of *Mathews v. Eldridge*, 424 U. S. 319 (1976), in this context. It is, for example, difficult to see how the plurality can insist that Hamdi unquestionably has the right to access to counsel in connection with the proceedings on remand, when new information could become available to the Government showing that such access would pose a grave risk to national security. In that event, would the Government need to hold a hearing before depriving Hamdi of his newly acquired right to counsel even if that hearing would itself pose a grave threat?

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For these reasons, I would affirm the judgment of the Court of Appeals.