SUPREME COURT OF THE UNITED STATES

No. 03–6696

YASER ESAM HAMDI AND ESAM FOUAD HAMDI, AS NEXT FRIEND OF YASER ESAM HAMDI, PETITIONERS *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 SOUTER, with whom JUSTICE GINSBURG joins, concurring in part, dissenting in part, and concurring in the judgment.

According to Yaser Hamdi's petition for writ of habeas corpus, brought on his behalf by his father, the Government of the United States is detaining him, an American citizen on American soil, with the explanation that he was seized on the field of battle in Afghanistan, having been on the enemy side. It is undisputed that the Government has not charged him with espionage, treason, or any other crime under domestic law. It is likewise undisputed that for one year and nine months, on the basis of an Executive designation of Hamdi as an "enemy combatant," the Government denied him the right to send or receive any communication beyond the prison where he was held and, in particular, denied him access to counsel to represent him.[1] The Government asserts a right to hold Hamdi under these conditions indefinitely, that is, until the Government determines that the United States is no longer threatened

[1]The Government has since February 2004 permitted Hamdi to consult with counsel as a matter of policy, but does not concede that it has an obligation to allow this. Brief for Respondents 9, 39–46.

by the terrorism exemplified in the attacks of September 11, 2001.

In these proceedings on Hamdi's petition, he seeks to challenge the facts claimed by the Government as the basis for holding him as an enemy combatant. And in this Court he presses the distinct argument that the Government's claim, even if true, would not implicate any authority for holding him that would satisfy 18 U. S. C. §4001(a) (Non-Detention Act), which bars imprisonment or detention of a citizen "except pursuant to an Act of Congress."

The Government responds that Hamdi's incommunicado imprisonment as an enemy combatant seized on the field of battle falls within the President's power as Commander in Chief under the laws and usages of war, and is in any event authorized by two statutes. Accordingly, the Government contends that Hamdi has no basis for any challenge by petition for habeas except to his own status as an enemy combatant; and even that challenge may go no further than to enquire whether "some evidence" supports Hamdi's designation, see Brief for Respondents 34–36; if there is "some evidence," Hamdi should remain locked up at the discretion of the Executive. At the argument of this case, in fact, the Government went further and suggested that as long as a prisoner could challenge his enemy combatant designation when responding to interrogation during incommunicado detention he was accorded sufficient process to support his designation as an enemy combatant. See Tr. of Oral Arg. 40; *id.*, at 42 ("[H]e has an opportunity to explain it in his own words" "[d]uring interrogation"). Since on either view judicial enquiry so limited would be virtually worthless as a way to contest detention, the Government's concession of jurisdiction to hear Hamdi's habeas claim is more theoretical than practical, leaving the assertion of Executive authority close to unconditional.

The plurality rejects any such limit on the exercise of habeas jurisdiction and so far I agree with its opinion. The plurality does, however, accept the Government's position that if Hamdi's designation as an enemy combatant is correct, his detention (at least as to some period) is authorized by an Act of Congress as required by §4001(a), that is, by the Authorization for Use of Military Force, 115 Stat. 224 (hereinafter Force Resolution). *Ante*, at 9–14. Here, I disagree and respectfully dissent. The Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even on the facts the Government claims. If the Government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released.

I

The Government's first response to Hamdi's claim that holding him violates §4001(a), prohibiting detention of citizens "except pursuant to an Act of Congress," is that the statute does not even apply to military wartime detentions, being beyond the sphere of domestic criminal law. Next, the Government says that even if that statute does apply, two Acts of Congress provide the authority §4001(a) demands: a general authorization to the Department of Defense to pay for detaining "prisoners of war" and "similar" persons, 10 U. S. C. §956(5), and the Force Resolution, passed after the attacks of 2001. At the same time, the Government argues that in detaining Hamdi in the manner described, the President is in any event acting as Commander in Chief under Article II of the Constitution, which brings with it the right to invoke authority under the accepted customary rules for waging war. On the record in front of us, the Government has not made out a case on any theory.

II

The threshold issue is how broadly or narrowly to read the Non-Detention Act, the tone of which is severe: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Should the severity of the Act be relieved when the Government's stated factual justification for incommunicado detention is a war on terrorism, so that the Government may be said to act "pursuant" to congressional terms that fall short of explicit authority to imprison individuals? With one possible though important qualification, see *infra*, at 10–11, the answer has to be no. For a number of reasons, the prohibition within §4001(a) has to be read broadly to accord the statute a long reach and to impose a burden of justification on the Government.

First, the circumstances in which the Act was adopted point the way to this interpretation. The provision superseded a cold-war statute, the Emergency Detention Act of 1950 (formerly 50 U. S. C. §811 *et seq.* (1970 ed.)), which had authorized the Attorney General, in time of emergency, to detain anyone reasonably thought likely to engage in espionage or sabotage. That statute was repealed in 1971 out of fear that it could authorize a repetition of the World War II internment of citizens of Japanese ancestry; Congress meant to preclude another episode like the one described in *Korematsu* v. *United States*, 323 U. S. 214 (1944). See H. R. Rep. No. 92–116, pp. 2, 4–5 (1971). While Congress might simply have struck the 1950 statute, in considering the repealer the point was made that the existing statute provided some express procedural protection, without which the Executive would seem to be subject to no statutory limits protecting individual liberty. See *id.*, at 5 (mere repeal "might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority"); 117 Cong. Rec. 31544 (1971) (Emergency Detention Act "remains as the only

existing barrier against the future exercise of executive power which resulted in" the Japanese internment); cf. *id.*, at 31548 (in the absence of further procedural provisions, even §4001(a) "will virtually leave us stripped naked against the great power . . . which the President has"). It was in these circumstances that a proposed limit on Executive action was expanded to the inclusive scope of §4001(a) as enacted.

The fact that Congress intended to guard against a repetition of the World War II internments when it repealed the 1950 statute and gave us §4001(a) provides a powerful reason to think that §4001(a) was meant to require clear congressional authorization before any citizen can be placed in a cell. It is not merely that the legislative history shows that §4001(a) was thought necessary in anticipation of times just like the present, in which the safety of the country is threatened. To appreciate what is most significant, one must only recall that the internments of the 1940's were accomplished by Executive action. Although an Act of Congress ratified and confirmed an Executive order authorizing the military to exclude individuals from defined areas and to accommodate those it might remove, see *Ex parte Endo*, 323 U. S. 283, 285–288 (1944), the statute said nothing whatever about the detention of those who might be removed, *id.*, at 300–301; internment camps were creatures of the Executive, and confinement in them rested on assertion of Executive authority, see *id.*, at 287–293. When, therefore, Congress repealed the 1950 Act and adopted §4001(a) for the purpose of avoiding another *Korematsu*, it intended to preclude reliance on vague congressional authority (for example, providing "accommodations" for those subject to removal) as authority for detention or imprisonment at the discretion of the Executive (maintaining detention camps of American citizens, for example). In requiring that any Executive detention be "pursuant to an Act of Congress,"

then, Congress necessarily meant to require a congressional enactment that clearly authorized detention or imprisonment.

Second, when Congress passed §4001(a) it was acting in light of an interpretive regime that subjected enactments limiting liberty in wartime to the requirement of a clear statement and it presumably intended §4001(a) to be read accordingly. This need for clarity was unmistakably expressed in *Ex parte Endo*, *supra*, decided the same day as *Korematsu*. *Endo* began with a petition for habeas corpus by an interned citizen claiming to be loyal and law-abiding and thus "unlawfully detained." 323 U. S., at 294. The petitioner was held entitled to habeas relief in an opinion that set out this principle for scrutinizing wartime statutes in derogation of customary liberty:

> "In interpreting a wartime measure we must assume that [its] purpose was to allow for the greatest possible accommodation between . . . liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.*, at 300.

Congress's understanding of the need for clear authority before citizens are kept detained is itself therefore clear, and §4001(a) must be read to have teeth in its demand for congressional authorization.

Finally, even if history had spared us the cautionary example of the internments in World War II, even if there had been no *Korematsu*, and *Endo* had set out no principle of statutory interpretation, there would be a compelling reason to read §4001(a) to demand manifest authority to detain before detention is authorized. The defining character of American constitutional government is its con-

stant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights." The Federalist No. 51, p. 349 (J. Cooke ed. 1961). Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.

III

Under this principle of reading §4001(a) robustly to require a clear statement of authorization to detain, none of the Government's arguments suffices to justify Hamdi's detention.

A

First, there is the argument that §4001(a) does not even apply to wartime military detentions, a position resting on the placement of §4001(a) in Title 18 of the United States Code, the gathering of federal criminal law. The text of the statute does not, however, so limit its reach, and the

legislative history of the provision shows its placement in Title 18 was not meant to render the statute more restricted than its terms. The draft of what is now §4001(a) as contained in the original bill prohibited only imprisonment unauthorized by Title 18. See H. R. Rep. No. 92–116, at 4. In response to the Department of Justice's objection that the original draft seemed to assume wrongly that all provisions for the detention of convicted persons would be contained in Title 18, the provision was amended by replacing a reference to that title with the reference to an "Act of Congress." *Id.,* at 3. The Committee on the Judiciary, discussing this change, stated that "[limiting] detention of citizens . . . to situations in which . . . an Act of Congres[s] exists" would "assure that no detention camps can be established without at least the acquiescence of the Congress." *Id.*, at 5. See also *supra*, at 4–6. This understanding, that the amended bill would sweep beyond imprisonment for crime and apply to Executive detention in furtherance of wartime security, was emphasized in an extended debate. Representative Ichord, chairman of the House Internal Security Committee and an opponent of the bill, feared that the redrafted statute would "deprive the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises." 117 Cong. Rec., at 31542. Representative Railsback, the bill's sponsor, spoke of the bill in absolute terms: "[I]n order to prohibit arbitrary executive action, [the bill] assures that no detention of citizens can be undertaken by the Executive without the prior consent of Congress." *Id.*, at 31551. This legislative history indicates that Congress was aware that §4001(a) would limit the Executive's power to detain citizens in wartime to protect national security, and it is fair to say that the prohibition was thus intended to extend not only to the exercise of power to vindicate the interests underlying domestic criminal law, but to statutorily unauthor-

ized detention by the Executive for reasons of security in wartime, just as Hamdi claims.[2]

B

Next, there is the Government's claim, accepted by the Court, that the terms of the Force Resolution are adequate to authorize detention of an enemy combatant under the circumstances described,[3] a claim the Government fails to support sufficiently to satisfy §4001(a) as read to require a clear statement of authority to detain. Since the Force Resolution was adopted one week after the attacks of September 11, 2001, it naturally speaks with some generality, but its focus is clear, and that is on the use of military power. It is fairly read to authorize the use of armies and weapons, whether against other armies or individual terrorists. But, like the statute discussed in *Endo*, it never so much as uses the word detention, and there is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked

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[2]Nor is it possible to distinguish between civilian and military authority to detain based on the congressional object of avoiding another *Korematsu* v. *United States,* 323 U. S. 214 (1944). See Brief for Respondents 21 (arguing that military detentions are exempt). Although a civilian agency authorized by Executive order ran the detention camps, the relocation and detention of American citizens was ordered by the military under authority of the President as Commander in Chief. See *Ex parte Endo*, 323 U. S. 283, 285–288 (1944). The World War II internment was thus ordered under the same Presidential power invoked here and the intent to bar a repetition goes to the action taken and authority claimed here.

[3]As noted, *supra*, at 3, the Government argues that a required Act of Congress is to be found in a statutory authorization to spend money appropriated for the care of prisoners of war and of other, similar prisoners, 10 U. S. C. §956(5). It is enough to say that this statute is an authorization to spend money if there are prisoners, not an authorization to imprison anyone to provide the occasion for spending money.

statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit. See, *e.g.*, 18 U. S. C. §2339A (material support for various terrorist acts); §2339B (material support to a foreign terrorist organization); §2332a (use of a weapon of mass destruction, including conspiracy and attempt); §2332b(a)(1) (acts of terrorism "transcending national boundaries," including threats, conspiracy, and attempt); 18 U. S. C. A. §2339C (Supp. 2004) (financing of certain terrorist acts); see also 18 U. S. C. §3142(e) (pretrial detention). See generally Brief for Janet Reno et al. as *Amici Curiae* in *Rumsfeld* v. *Padilla*, O. T. 2003, No. 03–1027, pp. 14–19, and n. 17 (listing the tools available to the Executive to fight terrorism even without the power the Government claims here); Brief for Louis Henkin et al. as *Amici Curiae* in *Rumsfeld* v. *Padilla*, O. T. 2003, No. 03–1027, p. 23, n. 27.[4]

C

Even so, there is one argument for treating the Force Resolution as sufficiently clear to authorize detention of a citizen consistently with §4001(a). Assuming the argument to be sound, however, the Government is in no position to claim its advantage.

Because the Force Resolution authorizes the use of military force in acts of war by the United States, the argument goes, it is reasonably clear that the military and its Commander in Chief are authorized to deal with enemy belligerents according to the treaties and customs known collectively as the laws of war. Brief for Respondents 20–

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[4]Even a brief examination of the reported cases in which the Government has chosen to proceed criminally against those who aided the Taliban shows the Government has found no shortage of offenses to allege. See *United States* v. *Lindh*, 212 F. Supp. 2d 541, 547 (ED Va. 2002); *United States* v. *Khan*, 309 F. Supp. 2d 789, 796 (ED Va. 2004).

22; see *ante*, at 9–14 (accepting this argument). Accordingly, the United States may detain captured enemies, and *Ex parte Quirin,* 317 U. S. 1 (1942), may perhaps be claimed for the proposition that the American citizenship of such a captive does not as such limit the Government's power to deal with him under the usages of war. *Id.,* at 31, 37–38. Thus, the Government here repeatedly argues that Hamdi's detention amounts to nothing more than customary detention of a captive taken on the field of battle: if the usages of war are fairly authorized by the Force Resolution, Hamdi's detention is authorized for purposes of §4001(a).

There is no need, however, to address the merits of such an argument in all possible circumstances. For now it is enough to recognize that the Government's stated legal position in its campaign against the Taliban (among whom Hamdi was allegedly captured) is apparently at odds with its claim here to be acting in accordance with customary law of war and hence to be within the terms of the Force Resolution in its detention of Hamdi. In a statement of its legal position cited in its brief, the Government says that "the Geneva Convention applies to the Taliban detainees." Office of the White House Press Secretary, Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002), www.whitehouse.gov/news/releases/2002/02/20020207–13.html (as visited June 18, 2004, and available in Clerk of Court's case file) (hereinafter White House Press Release) (cited in Brief for Respondents 24, n. 9). Hamdi presumably is such a detainee, since according to the Government's own account, he was taken bearing arms on the Taliban side of a field of battle in Afghanistan. He would therefore seem to qualify for treatment as a prisoner of war under the Third Geneva Convention, to which the United States is a party. Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3320,

T. I. A. S. No. 3364.

By holding him incommunicado, however, the Government obviously has not been treating him as a prisoner of war, and in fact the Government claims that no Taliban detainee is entitled to prisoner of war status. See Brief for Respondents 24; White House Press Release. This treatment appears to be a violation of the Geneva Convention provision that even in cases of doubt, captives are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." Art. 5, 6 U. S. T., at 3324. The Government answers that the President's determination that Taliban detainees do not qualify as prisoners of war is conclusive as to Hamdi's status and removes any doubt that would trigger application of the Convention's tribunal requirement. See Brief for Respondents 24. But reliance on this categorical pronouncement to settle doubt is apparently at odds with the military regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190–8, §§1–5, 1–6 (1997), adopted to implement the Geneva Convention, and setting out a detailed procedure for a military tribunal to determine an individual's status. See, *e.g.*, *id.*, §1–6 ("A competent tribunal shall be composed of three commissioned officers"; a "written record shall be made of proceedings"; "[p]roceedings shall be open" with certain exceptions; "[p]ersons whose status is to be determined shall be advised of their rights at the beginning of their hearings," "allowed to attend all open sessions," "allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal," and to "have a right to testify"; and a tribunal shall determine status by a "[p]reponderance of evidence"). One of the types of doubt these tribunals are meant to settle is whether a given individual may be, as Hamdi says he is, an "[i]nnocent civilian who should be immediately returned to his home or released." *Id.*, 1–6*e*(10)(*c*). The

regulation, jointly promulgated by the Headquarters of the Departments of the Army, Navy, Air Force, and Marine Corps, provides that "[p]ersons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed." *Id.*, §1–6*g*. The regulation also incorporates the Geneva Convention's presumption that in cases of doubt, "persons shall enjoy the protection of the . . . Convention until such time as their status has been determined by a competent tribunal." *Id.*, §1–6*a*. Thus, there is reason to question whether the United States is acting in accordance with the laws of war it claims as authority.

Whether, or to what degree, the Government is in fact violating the Geneva Convention and is thus acting outside the customary usages of war are not matters I can resolve at this point. What I can say, though, is that the Government has not made out its claim that in detaining Hamdi in the manner described, it is acting in accord with the laws of war authorized to be applied against citizens by the Force Resolution. I conclude accordingly that the Government has failed to support the position that the Force Resolution authorizes the described detention of Hamdi for purposes of §4001(a).

It is worth adding a further reason for requiring the Government to bear the burden of clearly justifying its claim to be exercising recognized war powers before declaring §4001(a) satisfied. Thirty-eight days after adopting the Force Resolution, Congress passed the statute entitled Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), 115 Stat. 272; that Act authorized the detention of alien terrorists for no more than seven days in the absence of criminal charges or deportation proceedings, 8 U. S. C. §1226a(a)(5)

(2000 ed., Supp. I). It is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado.

D

Since the Government has given no reason either to deflect the application of §4001(a) or to hold it to be satisfied, I need to go no further; the Government hints of a constitutional challenge to the statute, but it presents none here. I will, however, stray across the line between statutory and constitutional territory just far enough to note the weakness of the Government's mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war. It is in fact in this connection that the Government developed its argument that the exercise of war powers justifies the detention, and what I have just said about its inadequacy applies here as well. Beyond that, it is instructive to recall Justice Jackson's observation that the President is not Commander in Chief of the country, only of the military. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 643–644 (1952) (concurring opinion); see also *id.*, at 637–638 (Presidential authority is "at its lowest ebb" where the President acts contrary to congressional will).

There may be room for one qualification to Justice Jackson's statement, however: in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people (though I doubt there is any want of statutory authority, see *supra*, at 9–10). This case, however, does not present that question, because an emergency power of necessity must at least be limited by

the emergency; Hamdi has been locked up for over two years. Cf. *Ex parte Milligan,* 4 Wall. 2, 127 (1866) (martial law justified only by "actual and present" necessity as in a genuine invasion that closes civilian courts).

Whether insisting on the careful scrutiny of emergency claims or on a vigorous reading of §4001(a), we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons' insistence, confined executive power by "the law of the land."

IV

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

Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of eight members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose. See *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result). Although I think litigation of Hamdi's status as an enemy combatant is unnecessary, the terms of the plurality's remand will allow Hamdi to offer evidence that he is not an enemy combatant, and he should at the least have the benefit of that opportunity.

It should go without saying that in joining with the

plurality to produce a judgment, I do not adopt the plurality's resolution of constitutional issues that I would not reach. It is not that I could disagree with the plurality's determinations (given the plurality's view of the Force Resolution) that someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decision maker, see *ante*, at 26; nor, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel, see *ante*, at 32–33. On the other hand, I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi, see *ante*, at 27, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas, see *ante*, at 31–32.

Subject to these qualifications, I join with the plurality in a judgment of the Court vacating the Fourth Circuit's judgment and remanding the case.