

Power and Liberty in Wartime

Timothy Lynch

I. Introduction

Inter arma silent leges is a legal maxim that says when a country is at war, the laws must be silent. It is a controversial legal concept because it basically means that individual liberty must be subordinated to state power in wartime. America's political and legal institutions have grappled with this doctrine in previous wars and are grappling with it once again in the aftermath of the catastrophic terrorist attacks of September 11, 2001. To protect the country from additional attacks, President Bush made it clear that he wanted to wield extraordinary powers. Many of the constitutional protections that had been designed to safeguard individual liberty would have to yield to those powers. To be sure, President Bush did not make a dramatic announcement to that effect before a joint session of Congress, but his position was clear enough from the official papers that his legal representatives filed in federal court in terrorism-related litigation. Although the president did not explicitly invoke the *inter arma silent leges* maxim, it was the essence of his plan to combat terrorists.

In three landmark arguments before the Supreme Court—*Hamdi v. Rumsfeld*,¹ *Rumsfeld v. Padilla*,² and *Rasul v. Bush*³—Bush administration lawyers maintained that the president could, in his discretion as commander-in-chief, arrest any person in the world and confine that person incommunicado in a prison cell indefinitely. No access had to be granted to family members and no access had to be granted to a lawyer. According to President Bush, it did not matter if the prisoner was an American citizen, and it did not matter if the person was seized on a battlefield overseas or off the streets of an American

¹124 S. Ct. 2633 (2004).

²124 S. Ct. 2711 (2004).

³124 S. Ct. 2686 (2004).

city. So long as the president designated the prisoner as an “enemy combatant,” the secretary of defense could treat the prisoner as if he essentially had no legal rights. Through his legal representatives, the president informed the Supreme Court that it could not “second-guess” his decision to imprison such individuals.⁴ Even though there were only two American citizens imprisoned on the basis of this legal rationale, the constitutional stakes were enormous. If the president could secure a legal precedent from the Supreme Court that validated his interpretation of the Constitution, there would be no limit on the number of citizens who might be arrested and imprisoned in years to come. Fortunately, in a triumph for liberty, the Supreme Court decisively rejected the president’s reading of the law. By a margin of 8–1, the Court declared President Bush’s “enemy combatant” detention policy to be unconstitutional in *Hamdi*.⁵ The Supreme Court did not reach the merits of the *Padilla* case because it found a fatal jurisdictional problem in the litigation.⁶ And in *Rasul*, the Court held that federal courts had jurisdiction to entertain habeas corpus petitions from foreign nationals held abroad.⁷

The war against al-Qaeda is unlike any war that America has ever fought. Al-Qaeda terrorists are much more dangerous than a band of criminals. Simply to file a murder indictment against Osama bin Laden and his top lieutenants for the mass murder of September 11, 2001, would have been woefully inadequate. This is a real war—and yet, this enemy cannot be pinpointed on a map because it is not a nation-state. Further, al-Qaeda operatives do not wear uniforms—they impersonate civilians and, worse, their objective is to commit war crimes by murdering as many Americans as they possibly can. Given the unusual character of this war, the rationale of some of the Supreme Court’s wartime precedents may be inapplicable. Other precedents were wrongheaded when they were initially decided. To sort through the complexities of this new conflict, this article will present a legal paradigm that can properly resolve the tension between power and liberty in wartime under the American Constitution.

⁴Brief for Respondent at 34, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696).

⁵*Hamdi*, 124 S. Ct. at 2651.

⁶*Id.* at 2715.

⁷*Id.* at 2699.

Unlike the simple and sweeping “rules-of-war-paradigm” advanced by the Bush administration, the paradigm set out below begins with three threshold questions, each of which has constitutional implications: (1) What is the status of the individual in question—is he a citizen, illegal immigrant, or nonresident alien? (2) Where was the individual seized—on American soil or an overseas battlefield? (3) What punishment does the government seek to impose—deportation, detention, or execution? Such factors can be pivotal in resolving a constitutional controversy involving arrest, imprisonment, and trial.

The primary objective of this article is not to analyze the Supreme Court’s decisions in *Hamdi*, *Padilla*, and *Rasul*. Rather, the goal is to outline a normative model that describes how the Court should have tackled those cases, as well as similar cases that are likely to arise as the war on terror unfolds. In that context, the Court’s three opinions provide a starting point to establish principles that can guide the justices in balancing civil liberties and national security. Naturally, the ground rules that control that tradeoff cannot be finalized in this brief article. But crucial issues are at stake, and a timely examination of those issues—if only to settle on a framework that might lead to ultimate solutions—is urgently needed.

The baseline, insists Justice Antonin Scalia, must be the U.S. Constitution. He reminds us that the doctrine of *inter arma silent leges* “has no place in the interpretation and application of [our] Constitution.”⁸ That is because our founding document fully anticipates the necessity of wartime measures. It is a legal charter that empowers and limits government in both peacetime and wartime. Our commitment to liberty, the Constitution, and the rule of law is put to the ultimate test when government officials seek to “silence” those limits during wartime.

II. The Enemy Combatant Cases

Before delving into many of the complex constitutional issues that have arisen in recent years, it will be useful to briefly review the facts of the landmark “enemy combatant” cases that were handed down by the Supreme Court at the conclusion of its 2003–2004 term. It will also be useful to review an enemy combatant case that has

⁸Hamdi, 124 S. Ct. at 2674 (Scalia, J., dissenting).

not yet reached the Supreme Court, or received much notoriety, namely, the imprisonment of Ali Saleh Kahlah al-Marri.

A. Yaser Hamdi: American Citizen Seized Abroad

After the vicious attacks of September 11, 2001, President Bush dispatched U.S. military forces to Afghanistan “with a mission to subdue al-Qaeda and quell the Taliban regime that was known to support it.”⁹ Yaser Hamdi was taken prisoner by soldiers of the Northern Alliance, which is a coalition of military groups opposed to the Taliban government. The U.S. military, in turn, transferred Hamdi to the U.S. Naval Base at Guantanamo Bay, Cuba, in January 2002.¹⁰ A few months later, the prison authorities at Guantanamo discovered that Hamdi was an American citizen by virtue of his having been born in Louisiana in 1980.¹¹ After that revelation, the Department of Defense transferred Hamdi to a naval brig in Norfolk, Virginia. President Bush declared Hamdi an “enemy combatant,” which meant that Hamdi was not going to be charged with a crime and that he was not entitled to “prisoner of war” protections under international law.¹²

In June 2002, Hamdi’s father, Esam Foulid Hamdi, filed a petition for a writ of habeas corpus on his son’s behalf. President Bush’s lawyers urged the federal courts to summarily dismiss the petition because the courts could not “second-guess” the president once he designated any person to be an “enemy combatant.”¹³ Hamdi’s lawyers argued that a summary procedure would be unconstitutional. Before a habeas petition could be dismissed, they maintained, Hamdi had to have an opportunity to present his side of the case and to rebut the government’s allegations.

The issue fractured the Supreme Court.¹⁴ Although only a plurality of the Court could agree on the proper way to handle such habeas

⁹*Id.* at 2635.

¹⁰*Id.* at 2636.

¹¹*Id.* at 2635–36.

¹²*Id.* at 2636.

¹³See Brief for Respondents-Appellants at 12, *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895).

¹⁴See *Hamdi*, 124 S. Ct. at 2652–60 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 2660–74 (Scalia, J., dissenting); *id.* at 2674–85 (Thomas, J., dissenting).

petitions, fully eight members of the Court agreed with Hamdi that a summary procedure would violate the Constitution. Only one member of the Court, Justice Clarence Thomas, agreed with the sweeping proposition that the courts were “incapable” of resolving habeas petitions in wartime.¹⁵

B. Jose Padilla: American Citizen Seized in the United States

Jose Padilla was arrested by federal law enforcement agents at Chicago’s O’Hare International Airport in May 2002. Padilla, who is an American citizen, had just alighted from a flight that had originated in Pakistan.¹⁶ Attorney General John Ashcroft announced the arrest and said Padilla was engaged in a plot to detonate a “dirty bomb” in the United States.¹⁷

President Bush declared Padilla an “enemy combatant” who had “close ties” to al-Qaeda.¹⁸ The president then ordered Secretary of Defense Donald Rumsfeld to take Padilla into custody and to transfer him to a military brig.¹⁹ Padilla was taken to the Consolidated Naval Brig in Charleston, South Carolina. Like Hamdi, Padilla was held incommunicado—no access to family members or an attorney.

A petition for a writ of habeas corpus was filed on Padilla’s behalf and that petition alleged that his imprisonment was unlawful. The Bush administration responded to that petition by urging the federal district court to summarily dismiss the petition because it had been filed in the wrong jurisdiction and because, on the merits, the court could not “second-guess” President Bush’s “enemy combatant” designation.²⁰ Padilla’s attorneys argued that, at a bare minimum, they had to have their “day in court” to present a defense to the government’s allegations.²¹

¹⁵*Id.* at 2674–75 (Thomas, J., dissenting).

¹⁶*Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004).

¹⁷See David Savage, *Detention of a Citizen Questioned*, *Los Angeles Times*, June 12, 2002, at A1.

¹⁸*Padilla*, 124 S. Ct. at 2715.

¹⁹*Id.*

²⁰Respondents’ Response to, And Motion to Dismiss, the Amended Petition for a Writ of Habeas Corpus at 11, *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02-Civ-4445).

²¹Petitioners’ Reply to Motion to Dismiss Petition for Writ of Habeas Corpus, *Padilla v. Bush*, 233 F. Supp. 2d. 564 (S.D.N.Y. 2002) (No. 02-Civ-4445).

In a 5–4 decision, the Supreme Court ruled that Padilla’s habeas petition did suffer from a fatal jurisdictional defect.²² The petition could be refiled in the appropriate jurisdiction, but the case would have to be reargued. Four members of the Court found no jurisdictional problem. On the merits, the four dissenters said there could be “only one possible answer to the question whether [Padilla] is entitled to a hearing on the justification for his detention.”²³ Given that strong statement, it is abundantly clear that when the case is reargued, the Bush administration will not be able to prevent Padilla from having his day in court to present a defense to the allegations that have been leveled against him.²⁴

C. *Fawzi Khalid Abdullah Fahad al-Odah: Foreign National Seized Abroad*

Fawzi Khalid Abdullah Fahad al-Odah is a citizen of Kuwait.²⁵ He was seized in Afghanistan during the war between American military forces and the forces of the Taliban regime. Because the U.S. military considered al-Odah to be a member of the hostile forces, he was transferred to the Guantanamo Bay prison camp, where he has been imprisoned with approximately 600 other non-Americans who have been captured abroad.²⁶

A petition for a writ of habeas corpus was subsequently filed on al-Odah’s behalf and that petition alleged that his imprisonment was illegal because he had never been a combatant against the United States. President Bush had previously designated al-Odah and all of the other prisoners at Guantanamo Bay to be “enemy combatants.” Thus, the president’s lawyers urged the federal judiciary to summarily dismiss the petition because the federal judiciary could not “second-guess” the president’s enemy combatant designation

²²Padilla, 124 S. Ct. at 2727.

²³*Id.* at 2735 (Stevens, J., dissenting).

²⁴Indeed, a strong argument can be made that Padilla will not only get a hearing, he will likely go free if the Department of Justice does not file formal criminal charges. See Robert A. Levy, *Will They Let Padilla Go?*, *Legal Times*, August 2, 2004.

²⁵Al-Odah’s case was briefed and argued with *Rasul*. See *Al-Odah v. United States*, 124 S. Ct. 2686 (2004) (companion case) (No. 03-343). Shafiq Rasul, a British citizen who was one of the original petitioners, has since been released from custody.

²⁶*Rasul v. Bush*, 124 S. Ct. 2686, 2690 (2004).

and because the federal judiciary lacked jurisdiction to hear habeas claims from noncitizens who are captured abroad and held abroad.²⁷

The Supreme Court, in a 6–3 decision, held that U.S. courts do have jurisdiction to hear habeas corpus petitions that allege illegal imprisonment by foreign nationals that are captured and held abroad.²⁸ Three members of the Court concluded that the federal habeas statute simply did not extend to “aliens detained by the United States overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts.”²⁹

D. Ali Saleh Kahlah al-Marri: Foreign National Seized in the United States

Ali Saleh Kahlah al-Marri is a citizen of Qatar. Just a day before the September 11, 2001, terrorist attacks, al-Marri entered the United States with his wife and five children. Al-Marri was traveling on a student visa and he says that his plan was to earn a master’s degree at Bradley University in Peoria, Illinois, where he had previously earned a bachelor’s degree in 1991.³⁰

Al-Marri was arrested on a material witness warrant by the Federal Bureau of Investigation in December 2001. He was subsequently charged with making false statements to the FBI and with identity and credit card fraud. Al-Marri denied the allegations and prepared for his trial on those charges. With his trial only four weeks away, President Bush declared al-Marri to be an “enemy combatant.”³¹ Acting on the president’s orders, the U.S. military removed al-Marri from a civilian prison facility in Illinois and transferred him to a navy brig in South Carolina. Like Hamdi and Padilla, al-Marri was then held incommunicado—no access to family members and no access to legal counsel.

²⁷Brief for the Respondents at 43, *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

²⁸*Rasul*, 124 S. Ct. at 2699. Justice Anthony Kennedy, concurring in the judgment, would have ruled more narrowly. Kennedy wrote: “In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases. This approach would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States.” *Id.* at 2701.

²⁹*Id.* at 2701 (Scalia, J., dissenting).

³⁰*Al-Marri v. Rumsfeld*, 360 F.3d 707, 708 (7th Cir. 2004), petition for cert. filed, No. 03-1424 (U.S. Apr. 9, 2004).

³¹*Id.*

In July 2003, a petition for a writ of habeas corpus was filed on al-Marri's behalf and that petition alleged that his imprisonment was unlawful. President Bush's lawyers responded by urging the district court to summarily dismiss the petition because of jurisdictional errors.³² Al-Marri's petition was dismissed by the district court and an appeal to the Supreme Court is presently pending.³³

III. The Power of Government to Seize and Imprison Citizens Within American Borders

A. *Seizure*

Absent an invasion or rebellion on U.S. territory, the Fourth Amendment establishes the fundamental law regarding the parameters of the government's power to arrest an individual. The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."³⁴

The arrest of a person is the quintessential "seizure" under the Fourth Amendment.³⁵ That amendment shields the citizenry from overzealous government agents by placing limits on the powers of the police. The primary "check" is the warrant application process. That process requires the police to apply for arrest warrants, allowing impartial judges to exercise independent judgment regarding whether sufficient evidence has been gathered to meet the probable cause standard of the Fourth Amendment.³⁶ When government agents seize a person without an arrest warrant, the prisoner must be brought before a judicial magistrate within forty-eight hours so that an impartial judicial officer can examine the government's conduct and discharge anyone illegally seized.³⁷

³²Motion to Dismiss or Transfer Petition for Writ of Habeas Corpus, *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (2003) (No. 03-1220).

³³*Supra* note 30.

³⁴U.S. Const. amend. IV.

³⁵See *Payton v. New York*, 445 U.S. 573 (1980).

³⁶See *McDonald v. United States*, 335 U.S. 451 (1948).

³⁷See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

There are indications that the Bush administration has a much more expansive view of the government's power to seize individuals. In one of its briefs to the Supreme Court, for example, the president's lawyers wrote, "The Commander in Chief . . . has authority to seize and detain enemy combatants wherever found, including within the borders of the United States."³⁸ Former Deputy Assistant Attorney General John Yoo has also advanced the idea of a military arrest authority by drawing a sharp distinction between criminal law investigations and terrorism investigations that implicate national security. According to Yoo, the president is not constrained by Fourth Amendment procedures when he is seeking to apprehend enemy combatants.³⁹

Thus far, there has not been any enemy combatant-related litigation involving Fourth Amendment issues. Padilla and al-Marri were both arrested on material witness warrants. Still, it is worth exploring the issue here, even if only briefly, because it will likely arise sometime soon. The unstated premise of President Bush's invocation of his commander-in-chief authority seems to be that every single American jurisdiction—from Daytona Beach, Florida, to Fort Wayne, Indiana, to Reno, Nevada, to Fairbanks, Alaska—is a war zone. Indeed, this is one of the startling legal consequences of President Bush's wartime paradigm. That is, on the president's view, the homes in sleepy American neighborhoods are no different from neighborhoods in Baghdad, Iraq, or Kabul, Afghanistan. Military commanders can search and arrest at will. Of course, the fact that this power has been exercised infrequently (or perhaps even not at all) does not alter the legal proposition that has been asserted.

Al-Qaeda operatives may well be on U.S. soil plotting additional attacks against innocent civilians, but to say the president can search any American home or arrest any American citizen without having to bother with the Fourth Amendment's warrant application process—so long as his objective is to find an enemy combatant—is

³⁸Brief for the United States at 38, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027).

³⁹See, e.g., Testimony of John Yoo before the U.S. House Permanent Select Committee on Intelligence (October 30, 2003) ("The federal government and the executive branch have broader sources of constitutional authority to protect the national security that do not require a warrant."), available at http://www.aei.org/news/filter.newsID.19374/news_detail.asp.

absurd. Such a bold assertion was not advanced even during the Korean and Vietnam wars when there were communist spies on U.S. territory and the Soviet Union had a nuclear arsenal that targeted the American homeland.

The Fourth Amendment does not bar arrests or searches—but it does regulate them. Law enforcement agents must first gather evidence of wrongdoing before they can obtain and execute arrest warrants. Although the Fourth Amendment doctrine of exigent circumstances permits government agents to act without warrants in emergencies, the war on terrorism does not give the police a roving, general warrant to arrest any person, anytime on suspicion of terrorism. The Constitution never would have been ratified by the American revolutionaries if the president could wield such power over citizens—even in wartime.⁴⁰

B. Imprisonment

The Constitution places several limitations on the power of the government to deprive an American citizen of his liberty on American soil. As noted, the Fourth Amendment prohibits unreasonable seizures. The Fifth Amendment guarantees due process. The Sixth Amendment guarantees a speedy and public trial. The Bush administration has sidestepped those provisions by declining to file formal criminal charges against its enemy combatant prisoners. Since there is no criminal proceeding under way, it is argued, the ordinary rules of criminal procedure do not apply.

Given the noncriminal nature of the imprisonment, defense counsel for the prisoners have turned to the law of habeas corpus. The Constitution provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.”⁴¹ The right to habeas corpus is, in essence, a right to judicial protection against lawless incarceration by executive authorities. It is a legal writ that was lauded by American and English jurists as a great bulwark for individual liberty. Here is how Joseph Story defined the writ in his treatise on constitutional law:

⁴⁰If America can no longer “afford the luxury” of the Fourth Amendment, proponents of that view must try to persuade their fellow citizens to amend the Constitution.

⁴¹U.S. Const. art. 1, § 9, cl. 2.

Habeas corpus, literally, Have you the Body. The phrase designates the most emphatic words of the writ, issued by a Judge or Court, commanding a person, who has another in custody, or in imprisonment, to have his body (*Habeas Corpus*) before the Judge or Court, at a particular time and place, and to state the cause of his imprisonment. The person, whether a sheriff, gaoler, or other person, is bound to produce the body of the prisoner at the time and place appointed: and, if the prisoner is illegally or improperly in custody, the Judge or Court will discharge him. Hence it is deemed the great security of the personal liberty of the citizen against oppression and illegal confinement.⁴²

William Blackstone said the writ of habeas corpus was “the most celebrated writ in English law.”⁴³ Indeed, its esteemed reputation is such that it is typically referred to as the “Great Writ.”⁴⁴

President Bush’s expansive assertion of his commander-in-chief authority strikes at the heart of habeas corpus. According to President Bush and his lawyers, Article III courts may not “second-guess” the president’s decision to designate a person as an enemy combatant.⁴⁵ That may be the case if the writ of habeas corpus has been suspended; but otherwise, the courts must review the legality of the imprisonment. If the citizen has been unlawfully deprived of his liberty, the court should see to it that his liberty is promptly restored. That is what habeas corpus is all about.⁴⁶

A habeas proceeding that involves an American citizen on American soil should not even require an evidentiary hearing.⁴⁷ Citizens

⁴²Joseph Story, *A Familiar Exposition of the Constitution of the United States* 396 (1840).

⁴³3 Blackstone Commentaries 129.

⁴⁴39 Am. Jur. 2d *Habeas Corpus and Postconviction Remedies* § 1 (1999).

⁴⁵*Supra* note 13.

⁴⁶See *Harris v. Nelson*, 394 U.S. 286, 292 (1969) (“[T]he power of inquiry on federal habeas corpus is plenary.”) (citation and internal quotation marks omitted).

⁴⁷Jose Padilla’s seizure might not have been “on American soil.” Because law enforcement agents seized Padilla immediately after he alighted from an international flight from Pakistan, it is far from clear that his particular case ought to be treated any differently than if he had been arrested as he was boarding the plane in Pakistan. This point is discussed more fully in Brief of the Cato Institute, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027). For purposes of this article, however, that issue will be set aside in order to analyze the parameters of the government’s power to seize and imprison an American citizen within America’s borders. See, e.g., *Padilla v. Rumsfeld*, 352 F.3d 695, 722 (2d Cir. 2003).

at home enjoy the broadest constitutional protections against the power of the government. In such circumstances, the government must either file formal criminal charges or release the prisoner.⁴⁸

A president who is conscientious about his responsibility to defend the lives of the innocent while respecting the rights of those who seem to be collaborating with the enemy is not without options. First, when the evidence is insufficient for prosecution, the suspect can be placed under surveillance. Second, if the exigencies of war are apparent, the president can seek to persuade the Congress to suspend the writ of habeas corpus. When the writ is suspended, the police can move quickly against suspected persons without having to present evidence to a judge. Suspending the writ is an extraordinary step that leaves the liberty of every citizen resting on the judgment or even whim of any law enforcement agent. That is why the suspension procedure is vested in the legislature—it was too drastic a measure to leave in the hands of a single official.

After the catastrophic attacks of September 11, 2001, the Bush administration initially planned to ask the Congress to suspend the writ.⁴⁹ For whatever reason, the plan was abandoned, but President Bush then tried to bypass the Constitution's checks and balances with his "enemy combatant" legal theory. He asserted, on one hand, that habeas corpus petitions can be filed with the courts; but he insisted, on the other hand, that the courts must throw the petitions out because the judges may not "second-guess" the president's decision.⁵⁰ President Bush cannot avoid habeas review by simply employing the "enemy combatant" designation against citizens. The law of habeas corpus cannot be so easily evaded.

Over and above the constitutional safeguard afforded by habeas review, Congress has enacted a federal law that pertains to the imprisonment of American citizens on American soil. The Non-Detention Act, 18 U.S.C. § 4001(a), states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except

⁴⁸See generally *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2660 (2004) (Scalia, J., dissenting).

⁴⁹Jonathan Alter, *Justice vs. Terror*, Newsweek, December 10, 2001 ("When Attorney General John Ashcroft sent the secret first draft of the antiterrorism bill to Capitol Hill in October, it contained a section explicitly titled: 'Suspension of the Writ of Habeas Corpus.'").

⁵⁰See, e.g., Brief for the Petitioner at 43, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027).

pursuant to an Act of Congress.” That law was designed to prevent a future president from issuing an executive order that would set up prison camps (or “detention centers”) for citizens who are perceived to be a threat to national security. On the government’s view, however, the law means that if such a prison system is contemplated, the president need only place the system under military rather than civilian control. On the government’s reading of the law, it is illegal for the attorney general to set up prison facilities for people who are accused of being enemy combatants, but it is legal for the secretary of defense to administer such facilities: “Section 4001(a) pertains solely to the detention of American citizens by *civilian* authorities. It has no bearing on the settled authority of the *military* to detain enemy combatants in a time of war.”⁵¹ That is a fanciful interpretation of Section 4001(a).

The Non-Detention Act prohibits unilateral executive incarceration in circumstances where the president might be tempted to imprison citizens without formal criminal charges. Of course, one could argue that the act is impractical in a war against al-Qaeda terrorists, but that is an argument for repealing the law, not evading it. The civilian-military distinction that has been advanced by the Bush administration is specious.

In sum, the liberty of citizens on American soil has the strongest protections of American law. Unless the writ of habeas corpus has been suspended, the president can only imprison a citizen by prosecution in federal court on a formal criminal charge, where the full panoply of constitutional rights must be accorded to the accused.

IV. The Power of Government to Seize and Imprison Citizens Outside American Borders

A. Seizure

Given the unusual character of America’s war with al-Qaeda, it is appropriate for the judiciary to afford the president a measure of deference in the exercise of his executive authority as commander-in-chief. When the U.S. military is sent abroad to vanquish terrorist training camps, soldiers have the authority to capture and detain both enemy personnel and their collaborators. The Supreme Court

⁵¹Brief for the Petitioner at 45, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027) (emphasis in original).

has never held that arrest warrants are required on the battlefield. Although the Bush administration and others have repeatedly argued that the rules of the criminal justice system are ill-suited for war, they fail to mention that there has been no legal challenge to the *capture of enemy forces outside of America's borders*. Counsel for Hamdi challenged the legality of his indefinite detention, but Hamdi's initial capture was *not* challenged in the Supreme Court or the lower courts. Similarly, when the "American Taliban," John Walker Lindh, was captured in a combat zone in Afghanistan, there was no serious contention that the U.S. military had perpetrated an "illegal arrest." The strenuous pleas to give the military latitude to *seize* enemy combatants, including combatants who turn out to have been born in America, amount to sound and fury that signifies little. The objection turns out to be a classic straw man.

B. Imprisonment

While it is sensible to afford military authorities some deference with respect to the capture and brief detention of enemy personnel on the battlefield, it is another matter when the president has made a determination to imprison an American citizen without formal criminal charges. As the U.S. Court of Appeals for the Second Circuit observed, once a person has been confined to a jail cell, any immediate threat that he may have posed has been effectively neutralized.⁵² If the government determines that an American citizen must be deprived of his liberty because he poses a threat to public safety, it must be prepared to defend that assessment in a court of law.

In *Hamdi*, the Supreme Court acknowledged that American citizenship entitles a prisoner to file a petition for a writ of habeas corpus to challenge his detention.⁵³ As noted, the right to petition for a writ of habeas corpus is, in essence, a right to seek judicial protection against lawless incarceration by executive authorities. If an independent body could not review and reject the president's decision to incarcerate a citizen, the writ never would have acquired its longstanding reputation in the law as the "Great Writ." If habeas corpus has not been suspended, the writ retains its full legal force—no matter where the seizure of a citizen takes place.

⁵²See Padilla, 352 F.3d at 700.

⁵³See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2644 (2004).

Thus, citizens who are captured abroad cannot be imprisoned on the basis of an allegation leveled by the president. Citizens must have access to counsel and an opportunity to rebut the government's allegation before an impartial judge. If the government can persuade the judge that the citizen is an enemy combatant, continued incarceration in a military brig would be legitimized.

V. The Power of Government to Seize and Imprison Foreign Nationals Within American Borders

A. Seizure

One argument that has been ubiquitous since the war with al-Qaeda began has been that "noncitizens do not have the same rights as citizens." Does that mean the police have plenary authority to stop, question, and arrest foreign nationals on U.S. soil? The proposition has some surface appeal, but it cannot withstand close scrutiny.

The notion that noncitizens do not have the same rights as citizens can be true or false depending upon the circumstances. Such a notion is too sweeping for universal application to the Fourth Amendment or other constitutional provisions. First, it should be noted that while some provisions of the Constitution employ the term "citizens," other provisions employ the term "persons" or "the people" or "the accused."⁵⁴ Thus, it is safe to say that when the Framers of the Constitution wanted to use a narrow or broad classification, they did so. The Fourth Amendment, for example, establishes standards and procedures with respect to searches, arrests, probable cause, and warrants. It applies to the people.⁵⁵ There are no exceptions for noncitizens.

Second, the Supreme Court has repeatedly held that constitutional guarantees generally apply to aliens as well as to citizens.⁵⁶ The

⁵⁴See, e.g. U.S. Const. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged . . ."); U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .").

⁵⁵U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .").

⁵⁶See generally *Wong Wing v. United States*, 163 U.S. 228 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). See also *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971). Indeed, under the Equal Protection Clause, classifications based on alienage are inherently suspect and subject to heightened judicial scrutiny. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

police, for example, are not permitted to conduct raids on the homes of lawful immigrants or on the hotel rooms of European tourists simply because they are “not Americans.”⁵⁷ Whatever the territorial limitations of the Fourth Amendment may be, it shields the liberty of individuals in the homeland—citizen and noncitizen alike.⁵⁸

B. Imprisonment

President Bush shocked the American legal community by asserting what was essentially a “new day of executive detentions.”⁵⁹ But absent an invasion or rebellion on American soil, it is farfetched to suggest that any person in America can be imprisoned on the mere say-so of the president.

However, it is not unreasonable or implausible to suggest that wartime circumstances can mean a change in the rules, methods, and procedures by which the government can deal with the problem of *illegal aliens*. American law generally denies the benefit of a transaction to one who procures the transaction with fraud. Thus, why should an individual who has entered the United States surreptitiously or through false pretenses benefit from that wrong by acquiring the full panoply of constitutional rights that are accorded to citizens and long-term permanent residents?

Before a nonresident alien can acquire standing to assert constitutional protections against detention and imprisonment, the first order of business ought to be an examination of the prisoner’s immigration status. “If that status was obtained by fraud, misrepresentation or other unlawful means, then it should be deemed void *ab initio*. Such an alien should be treated under the law as if he never was lawfully admitted to the United States—because in a very real sense he was not.”⁶⁰

⁵⁷Circumstances do matter, however. When the police know *in advance* that a particular person is an illegal immigrant, they have more leeway to stop and arrest that person. See *Aguirre v. INS*, 553 F.2d 501, 501–02 (1977).

⁵⁸The controlling precedent concerning the Fourth Amendment’s application to aliens abroad is *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Fourth Amendment does not apply to property owned by a nonresident alien and located in a foreign country).

⁵⁹*Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (2003) (Wilkinson, J., *op.*).

⁶⁰George Terwilliger, et al., *The War on Terrorism: Law Enforcement or National Security?*, Federalist Society National Security White Paper, available at <http://www.fed-soc.org/Publications/Terrorism/militarytribunals.htm> (last checked Aug. 17, 2004).

The danger of government overreaching in this context can be “checked” with habeas actions and judicial review by impartial Article III judges. That is, if the president can persuade an independent federal judge that the prisoner’s presence on U.S. soil was accomplished by fraud (or other illegal means) and that the prisoner is an enemy combatant, the prisoner can be incarcerated in a military brig. Such a person need not be charged with a criminal offense.

These are the legal principles that come to the fore in the al-Marri case. Al-Marri is the foreign national who claims that he came to the United States to pursue a graduate degree. President Bush, on the other hand, claims that al-Marri is an al-Qaeda operative who entered the United States under false pretenses. Many civil liberties advocates argue that al-Marri must be “charged or released.” President Bush maintains that al-Marri can be imprisoned indefinitely. Both claims are overstated.

If the writ of habeas corpus has not been suspended, the president cannot prevent meaningful judicial review. But al-Marri’s insistence upon a full-blown trial where the government must introduce enough evidence to convince a jury beyond a reasonable doubt is also overblown. To resolve the competing claims of liberty and security, an impartial federal judge ought to hear both sides. If the president can convince a judge that al-Marri is not a bona fide student, he should be deported. If the president can present evidence that al-Marri has associations with al-Qaeda, he ought to be detained in a military brig.

VI. The Power of Government to Seize and Imprison Foreign Nationals Outside American Borders

A. Seizure

President Bush and his legal representatives have urged the federal judiciary to set aside the ordinary rules of criminal procedure and recognize a sweeping rule-of-war-paradigm.⁶¹ This legal theory is dangerously misguided with respect to the homeland, but makes perfect sense with respect to military and intelligence operations

⁶¹Others have propounded this wartime paradigm as well. See William P. Barr and Andrew G. McBride, *Military Justice for al Qaeda*, *Washington Post*, November 18, 2001, at B7; Brad Berenson, *Earth to Second Circuit: We’re at War*, *Wall Street Journal*, December 29, 2003, at A15.

abroad. As previously noted, however, there has been no serious legal challenge to the idea that the U.S. military has broad discretion to capture enemy personnel abroad. The Supreme Court has never held that the Fourth Amendment's requirements apply in the battlefield, and rightly so.

B. Imprisonment

In *Rasul v. Bush*,⁶² the Supreme Court confronted the question of whether the federal judiciary has jurisdiction to consider a challenge to the legality of the detention of foreign nationals captured abroad in connection with the ongoing war with the al-Qaeda terrorist network. By a 6–3 vote, the Court concluded that the federal courts do have jurisdiction to hear such cases.

Although *Rasul* turned upon an interpretation of the terms of the federal habeas statute,⁶³ all of the justices acknowledged that the Constitution itself could confer habeas jurisdiction in certain situations. It will be useful to examine the constitutional bases for jurisdiction here, even if only briefly.

Habeas actions most certainly involve the prisoner, but only indirectly. The real legal action is between the court and the party responsible for the prisoner's incarceration, that is, the custodian. Thus, when the writ of habeas corpus has not been suspended, a prisoner such as al-Odah should have an opportunity to present a petition to a federal judicial forum that his incarceration is mistaken or unlawful. Since the president and the secretary of defense are al-Odah's custodians, the issue is whether *they* are within the jurisdiction of a federal judicial forum, which, of course, they are.

This idea is hardly a novel innovation in the law of habeas corpus. Indeed, Judge Cooley emphasized the jurisdictional component of the custodian in 1867. Here is an excerpt from Judge Cooley's opinion:

The important fact to be observed in regard to the mode of procedure upon this [habeas] writ is, that it is directed to, and served upon, not the person confined, but his jailor. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him

⁶²*Supra* note 3.

⁶³28 U.S.C. § 2241.

by compelling the oppressor to release his constraint This is the ordinary mode of affording relief, and if other means are resorted to, they are only auxiliary to those which are usual. *The place of confinement is, therefore, not important to the relief, if the guilty party is within reach of process, so that by the power of the court he can be compelled to release his grasp.* The difficulty of affording redress is not increased by the confinement being beyond the limits of the state [of Michigan], except as greater distance may affect it. The important question is, where is the power of control exercised?⁶⁴

The “power of control” for prisoners held by the U.S. military is in Washington, D.C.

There are, to be sure, legitimate *practical* issues that will arise in habeas litigation. In all of America’s previous wars, there were strong incentives for enemy personnel to remain in uniform even if there was a strong likelihood of imminent capture. Staying in uniform meant qualification for “prisoner of war” status under the terms of the Geneva Convention. Getting caught out-of-uniform might put one into the category of spy and war criminal (a status that is punishable by death). That legal framework kept the vast majority of cases outside of the American court system.⁶⁵ The war with the al-Qaeda network will entail a steady influx of cases in which the government will accuse a “civilian” of actually being an enemy combatant. The *practical* legal problems—forum shopping by prisoners, rules of evidence that may require disclosure of intelligence information—are not inconsiderable. But nearly all of those problems can be addressed by modifying the federal habeas statutes. And such modifications can be accomplished without violating the core principles of habeas review.

VII. The Power of Government to Prosecute and Execute Citizens and Foreign Nationals

A. Military Trials Within American Borders

Article III, section 2 of the Constitution provides, “The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury.” The Sixth Amendment to the Constitution provides, “In all criminal

⁶⁴In re Jackson, 15 Mich. 417, 439–440 (1867) (emphasis added).

⁶⁵Few, of course, crept in. See In re Territo, 156 F.2d 142 (9th Cir. 1946).

prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." To limit the awesome powers of government, the Framers designed a system where juries would stand between the apparatus of the state and the accused. If the government can convince a citizen jury that the accused has committed a crime and belongs in prison, the accused will lose his liberty and perhaps his life. If the government cannot convince the jury with its evidence, the prisoner will go free. In America, an acquittal by a jury is final and may not be reviewed by state functionaries.

Unfortunately, during the Civil War, the government set up military tribunals and denied many people their rights to trial by jury. To facilitate that process, the government also suspended the writ of habeas corpus—so that prisoners could not challenge the legality of their arrests or convictions.⁶⁶ The one case that did reach the Supreme Court, *Ex parte Milligan*,⁶⁷ deserves careful attention.

In *Ex parte Milligan*, the attorney general of the United States, James Speed, argued that the legal guarantees set forth in the Bill of Rights were "peace provisions."⁶⁸ During wartime, he argued, the government can suspend the Bill of Rights and impose martial law. If the government chooses to exercise that option, the commanding military officer becomes "the supreme legislator, supreme judge, and supreme executive."⁶⁹ That was not simply an abstract legal theory published in a legal periodical. That was the official policy of the government—and it had real-world consequences. Some men and women were arrested, imprisoned, prosecuted, and executed without the benefit of the legal mode of procedure set forth in the Constitution—trial by jury.⁷⁰

The Supreme Court ultimately rejected the legal position advanced by Attorney General Speed. Here is one passage from the ruling:

The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal

⁶⁶William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* 11–25 (1998).

⁶⁷71 U.S. (4 Wall.) 2 (1866).

⁶⁸*Id.* at 20 (argument for the United States).

⁶⁹*Id.* at 14 (argument for the United States).

⁷⁰Mary Surratt, for example, was prosecuted for conspiring to kill President Abraham Lincoln. Surratt was executed after her conviction by a military commission. See Rehnquist, *supra* note 66, at 162–66.

Constitution; and judicial decision has often been invoked to settle their true meaning; but until recently no one ever doubted that the right to trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that “in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,” language broad enough to embrace all persons and cases.⁷¹

The *Milligan* ruling is sound. The Constitution does permit the suspension of habeas corpus in certain circumstances and Congress does have the power “To make Rules for the Government and Regulation of the land and naval Forces,” and “To provide for organizing, arming, and disciplining, the Militia.”⁷² To reconcile those provisions with the provisions pertaining to trial by jury, the Supreme Court ruled that the jurisdiction of the military could not extend beyond those people who were actually serving in the army, navy, and militia. That is an eminently sensible reading of the constitutional text.

There is only one case in which the Supreme Court has explicitly upheld the constitutionality of using military tribunals in America to try individuals who were not in the military—*Ex parte Quirin*.⁷³ Because the *Quirin* ruling carved out an exception to the *Milligan* holding, it must be scrutinized carefully.

The facts in *Quirin* were fairly straightforward. In June 1942 German submarines surfaced off the American coast and two teams of saboteurs landed ashore—one team in New York, the other team in Florida. Both teams initially wore German uniforms, but the uniforms were discarded after they landed on the beach. Wearing civilian clothes, they proceeded inland to meet American accomplices and to make plans for sabotage. Within a matter of weeks, however,

⁷¹Milligan, 71 U.S. (4 Wall.) at 122–123 (emphasis in original).

⁷²U.S. Const. art. 1, § 8, cl. 14 & 16.

⁷³317 U.S. 1 (1942).

all of the German saboteurs were apprehended by the Federal Bureau of Investigation.⁷⁴

President Franklin Roosevelt wanted these German prisoners to be tried before a military commission so he ordered that the men be turned over to the military authorities. President Roosevelt then set up a military commission and decreed that the prisoners would not have access to the civilian court system. A secret trial was held and all of the prisoners were convicted of war crimes. The military lawyers that had been assigned to defend the saboteurs challenged the legality of the proceedings and appealed the case to the Supreme Court. Although Attorney General Francis Biddle strenuously argued that the Supreme Court had no jurisdiction over the case, the Court agreed to hear arguments in the matter.

The defense team for the saboteurs argued that the trial before the military commission was inconsistent with the *Milligan* precedent and that the Supreme Court ought to order a new trial in a civilian court. The Supreme Court rejected that argument and sought to distinguish the *Milligan* ruling from the circumstances found in *Quirin*. The Court ruled that the jurisdiction of military commissions could extend to persons accused of “unlawful belligerency.”⁷⁵ The Court characterized the *Milligan* case as one involving a nonbelligerent. And since *Quirin* involved prisoners who *admitted* that they were unlawful belligerents, the *Milligan* precedent did not apply.⁷⁶ Under the rationale of *Quirin*, then, anyone who is accused of and admits to being an unlawful belligerent can be deprived of trial by jury. Even an American citizen arrested on American soil could be tried and presumably executed by U.S. military authorities as long as he is charged and convicted of “unlawful belligerency.”

The *Quirin* ruling is unpersuasive for two reasons. First, the attempt to distinguish *Milligan* is unconvincing. The charges that were leveled against Milligan were quite serious. He was accused of treasonous acts—spying and essentially levying war against the U.S. military. The Supreme Court did not elaborate on the nature of the charges against Milligan because it held that the accused would get a jury trial regardless. It was disingenuous of the *Quirin* Court to distinguish *Milligan* on the ground that the *Milligan* Court

⁷⁴See Louis Fisher, *Nazi Saboteurs on Trial* 46 (2003).

⁷⁵*Quirin*, 317 U.S. at 36–38, 48.

⁷⁶*Id.* at 45.

had not been confronted with crimes that were subject to the laws of war. That claim is unsupported by the record and is plainly wrong.

Second, and more fundamentally, the *Quirin* ruling cannot be reconciled with the constitutional guarantee of trial by jury. The Court's reasoning in *Quirin* is defective because it is circular: The government informs the prisoner that he is not entitled to a trial by jury because he is an unlawful combatant. The prisoner denies the charge and demands his constitutional rights so that he can establish his innocence. The government responds by diverting the case to a military tribunal because the charges subject the accused to the laws of war. A subsequent conviction by the tribunal supposedly confirms the fact that the case was properly diverted outside of the civilian court system in the first place. Of course, that is like saying that a convicted rapist should not be allowed to conduct an independent DNA test on the evidence in his case by virtue of his conviction. As Justice Scalia has noted, the *Quirin* ruling was not the Supreme Court's "finest hour."⁷⁷

In sum, the issue is not whether war crimes can be perpetrated on U.S. soil. They most certainly can be. Rather, the issue is what are the constitutional procedures governing the investigation and prosecution of such events. The constitutional text is clear: If the government is going to level charges, prosecute, and possibly execute a person, it must proceed according to the mode of trial set forth in the Bill of Rights—trial by jury.

B. Military Trials Outside American Borders

There is no easy answer to the question of whether the government can use military commissions to prosecute and execute foreign nationals who are accused of war crimes. There is historical support for military commissions in such circumstances. After World War II, for example, some German and Japanese military officials were tried for war crimes before military tribunals.⁷⁸ History, however, is no substitute for constitutionality.

Historical precedents aside, there is some force to the argument that foreigners that have never set foot on American soil have no standing to demand the constitutional safeguards that are set forth

⁷⁷*Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2669 (2004) (Scalia, J., dissenting).

⁷⁸*Johnson v. Eisentrager*, 339 U.S. 763 (1950); see *In re Yamashita* 327 U.S. 1 (1946).

in the American Constitution.⁷⁹ But that argument suffers from a questionable premise. A proper inquiry would begin with an examination of the source of whatever power the president is claiming and only then determine the implications for the rights of individual persons. Justice Hugo Black expressed this point well in *Reid v. Covert*⁸⁰: “The United States [government] is entirely a creature of the Constitution. Its power and authority have no other source. It can act only in accordance with all of the limitations imposed by the Constitution.”⁸¹ If there are any exceptions to that proposition, then surely the proponents of military commissions must bear the burden of persuasion on the matter. What is their source of authority to prosecute and execute persons with procedures that are nowhere mentioned in the Constitution? If the safeguards that are set forth in the Bill of Rights do not apply, what limits on presidential power exist—and what is their source? Can the president set up a system of summary trials to be followed by firing squads? Can Congress establish such procedures? If such procedures would be illegal, *why* would they be illegal?

Given the nature of the American Constitution and the clear language of the jury trial provisions, the most sensible interpretation would seem to be that the government does not have the power to create an alternative system of justice by which it can try and execute individuals. The Constitution does reference a military court system, but that system only applies to members of the U.S. military. If Congress could, in its discretion, expand the jurisdiction of those courts to others, the jury trial guarantee would be worth very little.

It does not necessarily follow that every single rule of procedure pertaining to civilian jury trials must be extended to a foreign national who is accused of war crimes. Indeed, Congress would be well-advised to consider the enactment of relaxed rules that would apply in special circumstances. An extended discussion of such rules is beyond the scope of this article, but once the most basic guarantees—the right to an indictment, right to a public jury trial, right to confront witnesses and so forth—are honored by the government, the burden of persuasion could fairly be shifted to the accused to demonstrate that a statutory or judge-made rule is illegal or unjust.

⁷⁹See *Eisenstrager*, 339 U.S. at 777.

⁸⁰354 U.S. 1 (1957).

⁸¹*Id.* at 6.

VIII. Conclusion

At this juncture, no one knows how long America's war on the al-Qaeda terrorist network will last. It may well turn into America's longest war. Whatever the ultimate timeline turns out to be, there can be little doubt that an important phase of the conflict has just concluded. President Bush sought sweeping powers pursuant to his commander-in-chief authority, but that move was decisively rebuffed by the Supreme Court in the "enemy combatant" cases.

As new controversies arise, it will be crucially important for the judiciary not to conflate separate and distinct legal issues. To properly resolve the tension between power and liberty in wartime, the courts must begin with three threshold questions: (1) What is the status of the individual—is he a citizen, illegal immigrant, or non-resident alien? (2) Where did capture or seizure take place—on American soil or an overseas battlefield? (3) What punishment does the government seek to impose—deportation, detention, or execution? The parameters of the government's power can vary depending upon the answers to those questions.

The modern threat to the Constitution and individual liberty comes not only from terrorists, but also from well-meaning policymakers and intellectuals who opt for expediency and subterfuge over candor and accountability. Almost no one seeks a formal modification of the Constitution, but there is no shortage of people who seem to think it is necessary to improvise constitutional procedures during wartime. The legal maxim, *inter arma silent leges*, is invoked to rationalize the improvisation. As Justice Scalia noted in his *Hamdi* dissent, the American Constitution anticipates the exigencies of war and accommodates them *consistent with certain safeguards and democratic principles*.⁸² If wartime can be used as an excuse to weaken those safeguards and principles, which are the "supreme law of the land," they are likely to be frittered away.⁸³ Thus, anyone who prizes ordered liberty must be vigilant against those who threaten it—some are foreign; some are domestic.

⁸²See *Hamdi*, 124 S. Ct. at 2674 (Scalia, J., dissenting).

⁸³History does not support the notion that America will "swing back toward liberty once the war is over." The state may surrender some of its wartime powers at the conclusion of the conflict, but it typically retains more power than when the war began. That "ratchet effect" means that our liberties will steadily diminish over the long term. See James Bovard, *Terrorism and Tyranny* (2003); Paul Craig Roberts and Lawrence Stratton, *The Tyranny of Good Intentions* (2000); Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (1989).