The Tensions Between 'Criminal' and 'Enemy' as Categories for Globalized Terrorism

James Griffith
The New School for Social Research

ABSTRACT: This paper examines the tensions at play in three important documents involved in the 'war on terror': the "Application of Treaties" White House Legal Counsel Memo of 2001, the "National Security Strategy" document of 2002, and the 2004 Supreme Court decision *Hamdi v. Rumsfeld*. Reading these documents, it becomes clear that there is an overarching misunderstanding and confusion of the traditionally separate concepts of 'criminal' and 'enemy' in the struggle against globalized terrorism.

In his concurring opinion for *Hamdi v. Rumsfeld*, Justice David Souter clearly lays out the tensions between the tendency to approach the acts of globalized terrorism as criminal acts and as acts of an enemy:

> 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 the 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.
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> 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

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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. . . . 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*). . . . Thus, there is reason to question whether the United States is acting in accordance with the laws of war it claims as authority.[1]

In this passage, Souter explains the contradictions and inconsistencies of the government's position not just on Hamdi, but on the whole idea of attempting to rely on the traditional concepts of 'criminal' and 'enemy' in order to prosecute the so-called 'war on terror.' In this case, the government claims that it can hold a U.S. citizen in indefinite military detention for two reasons. First, Hamdi was allegedly caught on the Taliban's side of the field of battle and so is a prisoner of war who can be held until the war is over. This argument ignores (1) the fact that Hamdi challenges that he was fighting on the Taliban's side in Afghanistan and that, as an American citizen, he is entitled to obtain a writ of habeas corpus to be shown the material evidence against him (this is the bulk of the content of the case itself); (2) that the 'war on terror' has no clear way of being declared over because its 'enemy' has no state and operates in a decentralized manner that defies the very possibility of admitting military defeat; and (3) that the Taliban was a much more traditional political power than al Qaeda and that, as such a power, it has been effectively defeated, which means that, since the government claims that Hamdi was captured as a Talibani fighter, according to the Geneva Convention his term as a prisoner of war is spent.

The second aspect of the government's case against Hamdi, as a way to head off (3) above, is to claim that the Geneva Convention does not apply to opposition forces captured in the 'war on terror,' even though they are being treated according to the demands of the Geneva Convention. Whereas the first argument considers Hamdi an enemy and therefore unable to invoke his rights as a citizen, this second argument attempts to reinscribe him as a criminal and therefore avoid according him the protections of the laws of war—even though the government simultaneously claims that it is, in fact, according him those protections, absent letting him go. Here it is probably most helpful to look at the paragraph Souter cites as the government's argument against invoking the Geneva Convention:

> There is no obligation under the laws and customs of war for the military to charge captured combatants with any offense and, indeed, the vast majority of combatants seized during war are detained as simple war measures without charges. Similarly, there is no general right to counsel under the laws and customs of war for those who are detained as enemy combatants. . . . Unlawful combatants, such as Hamdi (see pp. 29-30, *infra*), who are not held as prisoners of war do not enjoy any greater right of access to counsel under the GPW [the government's abbreviation for the Geneva Convention].[2]

Souter's argument demonstrates that the government here ignores the facts that Hamdi challenges his status as enemy combatant and that, under both the Geneva Convention and the U.S. military code adopted to enforce the Convention, such a challenge requires at least a military tribunal. However, the government is attempting to circumvent the enemy issue here, as can be seen by the choice of language in the above paragraph. In the first two sentences, the parallel is drawn between traditional prisoners of war and detained enemy combatants by claiming that neither are being charged with anything and are only being held for the duration of hostilities. By the last sentence, however, Hamdi is now an unlawful combatant who, along with any other such detainees, "are not held as prisoners of war." In other words, Hamdi's case is parallel to a prisoner's of war until he challenges his status as such a parallel, when he suddenly becomes more criminal than enemy and thus not afforded the protections of the Geneva Convention.[3]

But here we will not immerse ourselves in the government's case against Hamdi. Instead, we will run through the various parts of the Supreme Court's decision itself. In its plurality, concurrence, and two dissents, this decision gives an excellent example of the constant wavering and overlapping legal and political theories at play in the 'war on terror.' These theories have their roots in a memorandum from the Justice Department's Office of Legal Counsel regarding the application of treaties and laws to al Qaeda and Taliban detainees. Thus, before investigating the Supreme Court's decision in *Hamdi*, we will examine the main document that establishes the government's legal and political interpretation of the status of those captured, i.e., whether they are enemies (prisoners of war) or criminals, in the *war* on terror. This document was written before and lays the groundwork for the thinking that informs the other documents in which we are interested, "The National Security Strategy of the United States of America," released in September 2002, and *Hamdi v. Rumsfeld*, decided June 28, 2004.

1. "APPLICATION OF TREATIES"

In the first paragraph of the "Application of Treaties" memo, the difficulties of categorization become obvious. This paragraph explains that the Office of Legal Counsel finds that the Geneva Convention Relative to the Treatment of Prisoners of War does not "protect members of the al Qaeda organization, which as a non-State actor cannot be party to the international agreements governing war" but the sentence immediately preceding this one also explains that the investigating office was asked to determine "whether certain treaties forming part of the laws of armed conflict apply to the conditions of detention and the procedures of trial of members of al Qaeda and the Taliban militia."[4] Though it is not in the immediate realm of the subject of this memo, clearly the question not being asked here is exactly what type of trial those detainees can expect. If they are not detained as prisoners of war, then they should not have to face a trial under the laws of war, i.e., they cannot qualify as war criminals. If they are not war criminals, then they would appear to be held as civil criminals, thus eliminating the political aspect of al Qaeda ("Al Qaeda is merely a violent *political* movement or organization and not a Nation-State"[5]), which would then mean anyone held for taking arms against the United States military is not held as an enemy but as a criminal, whether or not he or she is an American citizen. Such a status would drastically change the understanding of the role of the United States on the world stage. If it is a *crime*

for a Saudi member of al Qaeda to take arms against the U.S. army on a *battlefield* in Afghanistan, then the concept of 'criminal' has expanded into the realm of war, except that war as such would not be criminalized, but war *against the United States*, surely an absurdly ego-centric position to take for any individual nation.[6]

This interpretation could be incorrect in terms of the Geneva Convention. The "Application of Treaties" memo believes that "[n]on-governmental organizations cannot be parties to any of the international agreements here governing the laws of war," citing that article 2 of the Geneva Convention applies to a state of war between "High Contracting Parties," which are qualified as the state signatories of the Convention.[7] However, article 4(A)(2) of the Convention accords prisoner-of-war status to "[m]embers of other militias and members of other volunteer corps, including those of *organized resistance movements*, belonging to a Party to the conflict and *operating in or outside their own territory, even if this territory is occupied*."[8] But the memo goes on to explain that this article does not apply to al Qaeda because even militias or organized resistance movements must be representative of one of the High Contracting Parties, which al Qaeda is not. No group within Afghanistan at this time, the memo claims, qualifies as representative of Afghanistan, not only because the Taliban did not control the whole of the territory, but because it could not provide enough of the protections of a state to qualify as the new representatives of the Party that belongs to the Convention. However, one of the other reasons by which this memo demonstrates the Taliban's inadequacy as a representative of Afghanistan because Afghanistan is a failed state (thereby to demonstrate captured Talibs as not included in the Geneva Convention as well), is that "the Taliban militia had become so subject to the domination of al Qaeda that it could not pursue independent policies with respect to the outside world."[9] Such evidence of the powerlessness of the Taliban also serves to upgrade the political status of al Qaeda. Though they may not be a properly political entity in themselves, they are able to dictate foreign policy, one of the more important aspects of a political representative. In fact, in the American system, pursuit of foreign policy and defense of the nation are solely within the province of the president, which is part of the logic behind researching in this memo whether or not the president can choose to apply or not to apply, in part or in whole, the Geneva Conventions with regard to al Qaeda. To the extent, then, that al Qaeda was in control of Talibani foreign policy, such as it was, and to the extent that al Qaeda was concerned with the defense of their sovereignty over the region they claimed via the Taliban, al Qaeda is at least as legitimately political an entity as the executive branch of the United States of America.

This is not to claim, however, that al Qaeda is a fully political organization, especially not in the strong Schmittian sense, nor is the 'war on terrorism' thereby fully a war. The "Application of Treaties" memo is surely correct that al Qaeda "is a non-governmental terrorist organization composed of members from many nations, with ongoing operations in dozens of nations."[10] However, to deny that there are political motivations within al Qaeda, or to claim it when convenient for one aspect of an argument, i.e., to claim military, and thus Commander-in-Chief, priority in the prosecution of the struggle against the organization, but then to deny those captured the basic rights of anyone detained in a traditional military conflict, i.e., a conflict decided upon by political actors, is to confuse more than is already the case in a globalized world the distinction between 'criminal' and 'enemy.' This confusion serves a number of purposes for the government in its prosecution of this 'war,' purposes we have no interest in criticizing directly because it cannot be doubted that al Qaeda represents a threat to the United States and to the Westernized, globalized economic and political systems as they exist today. The issue for us is merely to point out that there is a dependence among policy-makers on maintaining that al Qaeda is simultaneously 'criminal' and 'enemy' and that this insistence on these categories does nothing to serve the prosecution of this 'war,' such as it may be. In fact, it confuses the issue, bringing aspects of this prosecution to a standstill, because, simply put, we do not know what 'we' are talking about or what 'we' are fighting.

2. "NATIONAL SECURITY STRATEGY"

If the "Application of Treaties" memo represents a confused attempt to qualify al Qaeda detainees as both enemy and not enemy, "The National Security Strategy of the United States of America" represents an attempt both to sustain an enemy status for those who would violently oppose the policies laid out in this document and to universalize the desires and assumptions of American policy, in effect qualifying opposition as illegitimate and illegal. In its third sentence, in the introduction signed by George W. Bush, it claims that "*[p]eople everywhere* want to be able to speak freely; choose who will govern them; worship as they please; educate their children—male and female; own property; and enjoy the benefits of their labor."[11] Such a claim denies the multiple warnings from Kant about the dangers of too much enlightenment too soon—that people will in fact demand not to have these freedoms because of the perceived chaos they bring.[12] Even more, in the end of this opening paragraph there is a call to the defense of these values: "the duty of protecting these values against their enemies is the common calling of freedom-loving people *across the globe and across the ages*."[13] Aside from the anachronistic view of the universal history of humanity, the parallel to Osama bin Laden's call for global jihad is only too clear.[14] Both have depoliticized, deterritorialized, and denied the aggressiveness of their goals; in both their minds, they are fighting a defensive war. In a war without geographical limit, defensiveness seems an impossibility. Additionally, "The National Security Strategy," like bin Laden's call to jihad, even denies the temporal limit of traditional war—"The war against terrorists of global reach is a global enterprise and of uncertain duration."[15] Uncertainty of duration is of course precisely how partisans fight traditional armed forces.[16] If the enemy is essentially invisible, there is no certainty of victory or defeat. But in a global war of universalized values against an 'enemy' that does not fight as an army, to depoliticize the 'enemy' is to make a criminal, or, worse, a subhuman, of that 'enemy.' "The National Security Strategy" makes such a claim: "the allies of terror are the enemies of civilization."[17] To claim that any group is an enemy of civilization is, first of all, to assume exact knowledge of civilization but also to exclude that enemy from the realm of value. When there is a claim to knowledge of universal civilization and history, the enemy of that claim is no longer human.

This document names such an approach to war "a distinctly American internationalism" based on the attempt to "stand firmly for the nonnegotiable demands of human dignity" and to "look for possibilities to expand liberty."[18] One of the ways it proposes to do this is to use foreign aid to support *nonviolent* attempts to expand liberty in various parts of the world. Considering the aggressive and, frankly, violent means by which the United States pursues its distinct form of internationalism, such a limit on what groups will be supported by foreign aid could be seen as hypocritical. It is not hypocritical, however. Because this document, like nearly all other liberalist documents,[19] claims the universalization of its values, it thinks of itself as the only legitimate perpetrator of violence, like any state would. With the territorial limits on the state, though, that claim makes more sense. When the claim to legitimate violence is universalized by one particular group, it will see any violence against it as illegitimate and criminal, rather than fully understanding the political claims at the heart of the opposing violence.

Yet "The National Security Strategy" does in fact recognize the political nature of the globalized terrorists it aims to defeat since it defines terrorism as "premeditated, politically motivated violence perpetrated against innocents."[20] Terrorism is illegitimate because, though it may be born of a legitimate political grievance and/or motivation, such grievances and motivations "deserve to be, and must be, addressed within a political process."[21] This, then, while acknowledging the political status of 'terrorism,' simultaneously takes away the potential categorization of terrorists as 'enemies.' The next paragraph even opts not to name the 'war on terrorism' a "war," but a "struggle."

"The National Security Strategy" also considers what all "rogue states" have in common. Rogue states are, presumably, different from failed states to the extent that they are able to provide the basic protections of its populace that failed states are not. They are thus functioning states that are to be banned from the international order. There are two interesting aspects to the list of qualification for rogue states we shall consider. First, if these states have no regard for international law, yet remain functioning states, they are still legitimate political entities, deserving of the respect for sovereignty that states are due and which all states expect in return.[22] Their disrespect for international law, however, puts them outside the universalized legal order that "The National Security Strategy" promotes. In this sense, the representatives of the universalized legal order must consider these states as criminal, or rogue, to isolate them from other, participating states of the universalized legal order. Yet rogue states remain states—they have specific borders and limits and fall under all the traditional political limits of "state." Even if they do not respect international law, they are legitimate political entities, legitimate and limited enemies of their other, the universalized legal and moral order. And because of their legitimate political status, their sponsorship of globalized terrorism functions as the interested third party all partisans or belligerents need to upgrade their own political legitimacy.[23] Thus, a declaration by the universalized legal order that rogue states are rogue, criminal, is a necessary strategy of rhetoric in order to delegitimate their political status which, in turn, serves to prevent any legitimation of the globalized terrorism these states sponsor as interested third parties.

Second, the list of defining characteristics of rogue states closes with these states' rejection of human rights and hatred of the United States. This is presented as one characteristic, thus equating the United States with human rights. Opposition to the United States becomes opposition to human rights, to the basic rights of the human. In their opposition to the United States, these rogue states demonstrate their opposition to humanity itself. Such an 'enemy,' of course, can only be fought fiercely, for it is hard to imagine a more just war than the fight for humanity against those that oppose it—"The reasons for our actions will be clear, the force measured, and the cause just."[24]

In essence, then, "The National Security Strategy" is, more than anything, a just war doctrine. It recognizes no limit on itself, no national sovereignty, no end in sight. It is not fighting a war, not even really fighting an enemy, but rogues and criminals. And, to a certain extent, it is correct to make this claim. However, like all representatives of the status quo, there is no attempt made to question whether or not the status quo being defended is itself legitimate, even if legal. Though it claims that "[t]he aim of this strategy is to help make the world not just safer but better,"[25] recognition of the grievances made remains limited to the rhetoric of human rights, which are equated with the United States, and cannot broach the possibility that there might be problems with the universalized legal and moral order of the status quo—and certainly cannot allow as legitimate a competing universalized legal and moral order, though in a war of globalism-vs.-globalism, that is the essence of the political issue at hand.[26]

3. *HAMDI V. RUMSFELD*

If the "Application of Treaties" memo and "The National Security Strategy" establish the background confusion and overlap of 'enemy' and 'criminal,' then the Supreme Court decision *Hamdi v. Rumsfeld* exemplifies the practice of that confusion and overlap. It is not a perfect case, to be sure. Hamdi is a U.S. citizen and is accused of fighting against U.S. troops for the Taliban, not specifically al Qaeda, but the content of the decision reveals the tensions at hand. Of the two parts more deferential to the government's case, Justice Sandra Day O'Connor's plurality and Justice Clarence Thomas's dissent, there is an acceptance if not willful encouragement of the overlapping and contradictory categorizations of detainees in the 'war on terror.' In the two parts less deferential to the government, Justice David Souter's concurrence and Justice Antonin Scalia's dissent, there is an indication that there should be some clarity as to the categorization of detainees. Of these two, though, only Souter seems to understand that the government specifically contradicts itself in its case against Hamdi. For Scalia, citizenship is the trump card that ends the debate full stop. In another terrorism case, *Rasul v. Bush*, Scalia's dissent makes clear that, for him, the categorization can be overlapping and contradictory so long as the detainee is not a U.S. citizen.

3.A. O'Connor

The plurality opinion first of all accepts the government's definition of "enemy combatant" without hesitation or question. However, the closest to an outright

definition of that phrase comes five pages into the decision and is far from complete or helpful: "The Mobbs Declaration also states that, because al Qaeda and the Taliban 'were and are hostile forces engaged in armed conflict with the armed forces of the United States,' 'individuals associated with' those groups 'were and continue to be enemy combatants.'"[27] This definition ignores the wavering in the government's case between "enemy" and "unlawful" combatant. Because of the unquestioning attitude toward the problematic and incomplete definition of "enemy combatant," it remains an open question whether other enemy combatants can expect to be treated according to United States' laws or the Geneva Convention—or either. Here, Hamdi is only granted the right to contest his status *as* an enemy combatant and he is only granted that right because he is a citizen. Such a declaration does nothing to clarify what it means to be an enemy combatant, that is, whether any protection or limit to detention can be expected at all, whether or not a citizen.

O'Connor explains that she accepts the government's vague position because "[the government] has made clear . . . for the purposes of this case"[28] what it means by enemy combatant. This temporary clarity allows the court to decide on the very particular question of "whether the detention of citizens falling within that definition is authorized."[29] Failing to interrogate the government as to precisely what it means by enemy or unlawful combatant is indicative of the failure to fully understand the challenge to the categories of 'criminal' and 'enemy' posed by globalized terrorism. Interrogating the government on this point may be beyond the purview of the Supreme Court, but failing even to recognize the conceptual problems here only furthers the confusion. By doing so, and this is implied by Souter and Scalia's dissents from the plurality, it not only allowed the government to get away with an all-too vague and constantly wavering definition of the legal status of the detainees of this 'war on terror,' it also opened up the possibility for a "precedence of exception" to be set, that is, a situation where the government can use and reformulate the "in this case" definition of enemy combatant as a way to continue to hold Hamdi while it reformulates its case against him. In effect, such a situation results in the indefinite detention of a citizen of the United States, precisely the result the court is trying to avoid.

The acceptance of the government's definition of enemy combatant combined with the plurality's acceptance of Congress' Authorization for the Use of Military Force (AUMF) as an appropriate act of Congress allowing for the military detention of a citizen, bring O'Connor to the decision that it is legitimate in theory for Hamdi to be held in detention. She makes the further point that, though there is a possibility for Hamdi to be detained indefinitely since the war on terror is a conflict without a clear method for declaring its end, "that is not the situation we have as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan."[30] But all of these concessions to the government's position ring oddly when juxtaposed with the final clarification O'Connor makes that "our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant."[31] How can it be known whether an individual is an enemy combatant when the government is unwilling to clarify exactly what an enemy combatant is? O'Connor believes that "[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them,"[32] but considering the deference paid to the loose definition in the Hamdi case, nothing has been placed within the parameters of this decision that would guarantee such a process. Instead, the "precedence of exception" has been created.[33]

Here, though, the question being dealt with is the process "due to a citizen who disputes his enemy-combatant status"[34] despite the strangeness of disputing a status that has never been clearly defined. O'Connor explains that she will use "[t]he *Mathews* calculus"[35] to lay out her assessment of the competing claims of governmental sovereignty and power to protect versus citizen's rights. The *Mathews* calculus is to analyze the risk of error on the government's part if the process at hand—evidentiary disclosure—were reduced (here, reduced to the Mobbs Declaration) versus the potential value of increasing the safeguards against such possible governmental error (here, by declaring that the government must present more evidence and allow Hamdi to present the evidence of his disputation of the government's case). She balances the demands of the *Mathews* calculus thus:

> Hearsay, for example, may need to be accepted as the most reliable evidence from the Government in such a proceeding. Likewise, the Consitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut the evidence with more persuasive evidence that he falls outside the criteria.[36]

There are two aspects of this suggestion that become problematic in terms of understanding Hamdi as criminal or enemy. To begin, the deference to a fairly loose evidentiary standard (hearsay and other rebuttable, credible evidence), shifts the burden of proof to the defendant which suggests that, given such a situation, Hamdi would not be considered a criminal in the American justice system, following the Fifth and Sixth Amendments. Yet, because the goal of this compromise is to establish through a modicum of fairness whether or not the accused is an enemy combatant and because this term has no clear definition except for the "in this case" rule given by O'Connor at the beginning of her decision, it is unclear exactly of what or how the accused is supposed to prove him- or herself innocent. In other words, the government is allowed to present vague but rebuttable evidence to accuse someone of being something the definition of which it is allowed to change in any given case. How, outside of the opportunity to rebut the Mobbs Declaration, such a situation would in any substantive way differ from the situation in which Hamdi found himself to begin with is unclear. Deferring to the lower courts to gradually define "enemy combatant" means that each case has a different definition against which it must defend itself and the precedence of exception would reappear every time. Even more, this does nothing to place Hamdi in the circumstance of a detained enemy because it does not at all address the possibility of perpetual detainment in the face of a potentially unending war against an ill-defined, non-state-oriented entity. Thus, Hamdi is left with not quite being a criminal citizen whose case is brought up in front of a jury of his peers in a court where the burden of proof is on the prosecution, but also not quite in the

realm of the enemy where he would have earned the rights and protections, in letter or spirit, of a prisoner of war under the Geneva Convention.

Yet, with her opinion, O'Connor explains that she does not recognize an executive power to unilaterally suspend *all* rights of citizens. She once more defers to the wishes of the government and claims that the evidentiary standard she has established could be held by a military tribunal, especially considering that military regulations already dictate tribunals be established for "enemy detainees who assert their prisoner-of-war status under the Geneva Conventions."[37] So, again, there is a tension created by the undefined meaning of enemy combatant. O'Connor does not demand that Hamdi be placed in the criminal or enemy categories—the government and military seem to be able to choose in which justice system they prefer to put Hamdi and others. When she writes, "In the absence of such [military tribunal] process,"[38] it is unclear whether O'Connor even believes a tribunal *should* be established, let alone whether she demands one. Although, to be sure, O'Connor demands a higher evidentiary standard than the government wanted and forces the government to allow Hamdi to challenge the facts which led to his detention, which were the questions at hand for the court, nothing in her decision works to clarify the question of what is the meaning of the status under which Hamdi was detained in the first place.

The closest she comes to assisting in the clarification is to say that the Constitution "envisions [power] for the Executive in its exchanges . . . with *enemy organizations*."[39] Here, it would seem that she is granting the political legitimacy Borradori feared giving to al Qaeda (see note 3 below). If there are non-state organizations that can be enemies of the United States, then they must have some kind of political content or form. But O'Connor does not expand on this otherwise throwaway description. At this point, she is in the middle of explaining to the executive branch that, because of the separation of powers, it does not have total power over the nation even in a time of war. Had she followed through on the logic of that formulation, she may have come to understand Hamdi as an enemy and thus as a prisoner of war and able to invoke his Geneva Convention rights—including challenging his status as an enemy. But it remains that Hamdi is accused of being an "enemy combatant." While the government wished to use the paradoxical situation as a way to prevent Hamdi from invoking his rights as either a citizen or prisoner of war, O'Connor allows him to use either set of rights, depending on the type of judicial system in which he finds himself, criminal or military. As a result, nothing of the tension between criminal and enemy has been resolved.

3.B. Scalia

For Scalia, citizenship takes absolute priority. History[40] and legal precedent demonstrate this position and the AUMF does nothing to suspend habeas corpus:

> Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause.[41]

The only examples Scalia gives where due process and habeas corpus are not necessary are "*non*criminal"[42] forms of detention, specifically "civil commitment of the mentally ill . . . and temporary detention in quarantine of the infectious."[43] Hamdi is not accused of being ill, but dangerous. The evidence presented does not hold up in civil court and prisoner-of-war status would also grant the opportunity for Hamdi to defend himself in a reasonable manner.

For Scalia, the fundamental question is whether the *crime* Hamdi is accused of committing ("the waging of war against the United States"[44]) qualifies as exceptional enough for the government to be justified in its detention incommunicado. This is where he reaches his disagreement with the plurality. For him, O'Connor's allowance of holding enemy combatants until the end of hostilities—aside from war criminals—applies only to enemy aliens. Here Scalia, like O'Connor, fails to recognize the government's wavering between "enemy" and "unlawful" in its description of Hamdi's status and thus fails to understand the tension between enemy and criminal at play here. That is because he considers citizenship as close to an absolute as possible: "Citizens aiding the enemy have been treated as traitors subject to the criminal process."[45] Again returning to the history of Anglo-American law, he explains that anyone giving allegiance or aid to an enemy state does not by those actions become an *enemy*, but remains a citizen and becomes *criminal* by his or her actions.

Yet even Scalia can envision an exception to his otherwise absolute prioritization of the criminal category. But he is strict about this exception. Only if the executive branch can persuade Congress *explicitly* to suspend habeas corpus has the exception and the emergency been made clear.[46] Even then, according to the Constitution, habeas corpus may only be suspended "in Cases of Rebellion or Invasion,"[47] neither of which could be construed as the case with *Hamdi* or with the contemporary juridical or political scenes as they exist now. What is more, when the writ is suspended, "the Government is entirely free from judicial oversight. *It does not claim such total liberation here.*"[48] This lack of claim indicates for Scalia a recognition of the lack of suspension of the writ by Congress. For us, however, it means something more. It is further evidence of an inability to place Hamdi under either category, criminal or enemy, because both categories require certain rights and assumptions which can be easily refuted by the known facts and established juridical practice. The government recognizes that there is not such an extreme emergency as rebellion or invasion, but is attempting to maintain some level of emergency in order to hold Hamdi. He cannot be held as only a criminal because the public evidence is not sufficient, but he cannot be held as an enemy because he is a citizen. Thus some kind of emergency must be appealed to, though not one that qualifies as rebellion or invasion.

As Scalia reminds us again and again, his views apply only to citizens accused of being enemy combatants and held within the clear jurisdiction of the United States. In *Rasul*, this final clause in his distinction results in his dissent from the

décision that Guantanamo Bay is effectively part of the jurisdiction of the United States' court system. In his dissent, he writes that "Guantanamo Bay is not a sovereign dominion [of the United States], and even if it were, jurisdiction would be limited to subjects."[49] Such an argument ignores the fact that, according to the 1903 agreement with Cuba, "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. 1903 Lease Agreement, Art. III; 1934 Treaty, Art. III."[50] With his restriction on the territorial aspect of the application of U.S. law, Scalia demonstrates his lack of understanding of the trans-border effect on sovereignty in a globalized order. American civil rights apply to citizens at all times, but only within the borders of the nation. Hamdi can only be a criminal and those who are held in Guantanamo Bay are enemies, perhaps even if they are American citizens. Scalia, in short, seems unable to comprehend a globalized world where the force of traditional borders is diminished if not yet completely erased.

3.C. Thomas

For Justice Thomas, the issue is even clearer: the president is acting within his constitutionally granted powers through explicit congressional approval. He writes, more than once, that "we [the Supreme Court] lack the expertise and capacity to second-guess that decision [to detain Hamdi]."[51] The plurality's *Mathews* calculus fails to adequately balance the constitutional concerns of individual liberty and national security. In fact, the court even has an "institutional inability to weigh competing concerns adequately."[52] Quoting from Hamilton's *The Federalist*, Thomas finds that the federal government's primary responsibility is national security and "'ought to exist *without limitation*.'"[53] This responsibility and the power to enforce it is entrusted to the presidency because of the necessity of expediency in such decision-making. Secrecy is also an essential aspect to the executive effectively running its responsibilities—national security and foreign affairs. Even if Congress has a legitimate role in national security and foreign affairs, the judicial branch has no place in them for Thomas, for these are political and not judicial concerns. Even more, it is not within the ability of the judiciary to determine what information is properly withheld. Thomas, of course, fails to recognize the contradictory, overlapping, and dual nature of the claim the government does in fact make in *Hamdi* because for him the government is simply flexing its authority to hold Hamdi as an enemy.

Thomas concludes his dissent by contending that the government holds Hamdi as an enemy soldier *and* to obtain intelligence from him as part of its responsibility of securing the nation. Any more progress in a criminal trial would bring to light too many insights into intelligence-gathering. In addition, a trial would also involve the testimony of military officers who should be waging war. Thomas contends that the plurality either ignores or discounts such concerns. To the plurality's contention that the risk of mistaken detention is too high to risk, again Thomas claims that "there is no particular reason to believe that the federal courts have the relevant information and expertise to make this judgment."[54] Finally, Thomas argues that

> [u]ltimately, the plurality's dismissive treatment of the Government's asserted interests arises from its apparent belief that enemy-combat 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 a 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."[55]

Thomas finds it impossible for the court to distinguish between necessary and expedient military operations and argues that "it is also consistent with the laws of war to detain enemy combatants exactly as the Government has detained Hamdi" and that "the laws of war show that the power to detain is part of a *sovereign's* war powers."[56] Thomas's strange slip at the end of his dissent, referring to the executive as the sovereign, indicates the logic that informs his thinking. For him, the executive's judgment is sacrosanct in a state of war and thus the judgment of enemy status is the sole realm of the executive/sovereign. Such logic obviously completely disregards the overlapping, confused, and contradictory form of classification that the executive branch of the government presents in the case against Hamdi, but in the exact opposite degree to which Scalia ignores it. Thomas places absolute priority on the declaration of war, allowing that declaration to determine as enemy any and all detainees in that conflict. Aside from the gutting of judicial oversight of the political branches of the government, Thomas fails to recognize the content of the government's case, the language of the accusation.

3.D. Souter

The third sentence of Souter's dissent brings to light another practical problem with both the government's case against Hamdi and the status under which Hamdi can expect to be placed so that he knows where he lies on the criminal-enemy spectrum: "It is undisputed that the Government has not charged him with espionage, treason, or any other crime under domestic law."[57] The argument behind Souter's defense, however, is that, though he agrees that the government cannot limit Hamdi's habeas invocation, he does not believe that, if Hamdi is indeed an enemy combatant, the AUMF meets the grounds of an act of Congress that allows the federal government to hold a citizen.[58] For Souter, "[i]f the Government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released."[59] In response to such a position, the government responds that § 4001(a) does not apply to military detentions during war because such detentions exist outside the realm of domestic criminal law and, further, that between "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,"[60] Congress has authorized the executive branch to detain Hamdi. Finally, the government also claims that Hamdi may be detained on the president's authority as Commander in Chief. Souter does not counter

these claims except to say that the government has not made enough of a case to justify them.

In addition, Souter explains that the AUMF cannot be interpreted to mean an authorization for the executive to detain citizens. For one thing, the word "detention" is never used in the resolution. But, even more, "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 statutory arsenal of *defined criminal offenses* covering the gamut of actions that a citizen sympathetic to terrorists might commit."[61] Souter here implies that whatever the government might accuse Hamdi of, it can be covered under the auspices of standard criminal behavior. For him, the possible issue of military force on Hamdi's part against the armed forces of the United States does nothing to preclude his status within the criminal judicial system. Because the government is not accusing Hamdi of treason, he cannot be tried under military law. This means, of course, that Hamdi is also not protected under the Geneva Convention and, if convicted, would have no hope of release after the war, should it ever end, under the Convention. Thus, for Souter, the category of criminal has supremacy over other categories. If Hamdi is in fact found guilty of taking arms against the United States, he will face the full wrath of the criminal judicial system and no mitigating factors of military code can be expected.

Even still, Souter is willing to grant the government one argument by which it could claim the AUMF would allow for detention under the Non-Detention Act, although, even if it made this argument, "the Government is in no position to claim its advantage."[62] This argument would be to claim that Hamdi is being held under the laws of war, thus declaring Hamdi an enemy. To explain why the government is unable to take advantage, Souter then goes into the analysis cited at length above. Here we will look at Souter's explanation again. If Hamdi is a prisoner of war as an enemy, then holding him incommunicado goes against the Geneva Convention, which says 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 trial.'"[63] Faced with the dilemma of a required tribunal, the government again changes tack and argues that "Taliban detainees do not qualify as prisoners of war."[64] But even such a statement would go against the military's own regulation for treatment of "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,"[65] which was implemented to apply the Geneva Conventions to military regulations and calls for a tribunal to determine whether a mistaken detention has occurred. The regulation even states that "in cases of doubt, 'persons shall enjoy the protections of the . . . Convention until such time as their status has been determined.'"[66] Souter then goes even further, emphasizing that in the USA PATRIOT Act, passed just over a month after the AUMF, there is a clause allowing a suspected *alien* terrorist to be held for not more than seven days absent criminal charges or deportation hearing. Even though Hamdi is a citizen, "[i]t 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."[67] So, according to Souter, the only way for the government to take advantage of the AUMF, which would allow them to hold Hamdi as a prisoner of war, would be to formally declare him a prisoner of war, and thus an enemy, which would then allow him to challenge that declaration under international laws of war and U.S. military regulations. Faced with such a challenge, the government declares him *not* to be a prisoner of war, but refuses to bring criminal charges and continues to hold him incommunicado, which, if we are to believe that Congress would not prescribe greater opportunities for alien detainees than citizens, violates the PATRIOT Act, passed almost immediately after the resolution which the government claims as the grant of authority to hold Hamdi in the first place. Thus, the problems created by the inability to decide whether or not Hamdi qualifies as "criminal" or "enemy" become obvious—an inability born not necessarily out of desire for near-dictatorial powers on the part of the executive branch, but born out of the ability to elide both categories, being at home and foreign within both, on the part of the "terrorist."

Again, *Hamdi* is not a perfect demonstration of the problems we find in prosecuting the 'war on terror' as it has been prosecuted up to now. Hamdi is an American citizen accused of aiding the Taliban, not a foreigner accused of being a member of al Qaeda.[68] It does present, however, excellent examples of the various approaches and complaints to the 'war on terror'—the absolute deference to a presidential judgment that relies on a consistent confusion and overlap of the categories of 'criminal' and 'enemy'; the total disregard of the blurring of issues of national citizenship presented by a global, non-state oriented threat; and the ignoring of the importance of the vague presentation of the meaning of that threat. Only Souter comprehends that there are issues within the government's case against Hamdi that extend beyond the quite specific charges presented and dealt with in this case. But Souter, as a good jurist, maintains his dissent from the plurality as a mere complaint and he does nothing to move toward an understanding of what these confusions mean beyond the specifics of *Hamdi*. Our purpose here is to suggest that what the government accuses Hamdi of and how it makes the case for that accusation demonstrate a lack of comprehension of the nature of the threat. They also demonstrate a lack of interest in comprehending that threat to establish a clear prosecution of the struggle in which the United States and the globalized West now finds itself. *Hamdi*'s confusion is rooted in the confusion we found in the "Application of Treaties" memo and "The National Security Strategy," where the White House presents considerations and definitions of globalized terrorists that are both rooted in the traditional liberalist tendency to view those who oppose the extension of the rule of a 'mature,' enlightened order as criminals but simultaneously sustains enough prioritization of the political status of the enemy to declare these same individuals enemy. The result is a confusion as to the precise understanding not only of those against whom the fight is waged, but of the actual meaning and content of the struggle itself. Not recognizing that confusion, whether on the part of Supreme Court justices or on the part of the federal government in general, is a failure not merely of the rights necessarily accorded to prisoners in a just society but also of the thoughtful capacities of that society. Deference to a confused government is deference to confusion itself. Here, we do no more than name that confusion for what it is.

notes

Hamdi v. Rumsfeld, 542 U.S. 507 (2004), 11-3 [Souter].

542 U.S. 507 (2004), Brief for Respondents, 24.

An important, but not central, additional aspect to the government's case is the that the war in Afghanistan is not over: "As the court of appeals observed, 'American s are still on the ground in Afghanistan, dismantling the terrorist infrastructure in ry country where Hamdi was captured and engaging in reconstruction efforts which prove dangerous in their own right.' Pet. App. 27a. Moreover, as the court of appeals nized (Pet. App. 27a), the determination as to when hostilities have ceased is for the cal branches and is not appropriate for judicial resolution" (Brief for Respondents,). Though this argument would, in principle, allow the government to continue to Hamdi as a prisoner of war and perhaps even allow for a military tribunal instead criminal trial during which he could challenge his status as an enemy combatant, the lem with this argument is that it conflates the Taliban with al Qaeda, which means lating a clearly more politically viable entity with a sub- or trans-state organization. a conflation risks "granting them [al Qaeda] more political legitimacy than they de- e," as Giovanna Borradori said in conversation after a paper given at The New School Social Research in 2003.

4. Memorandum for Alberto R. Gonzalez, Counsel to the President, and William nes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney neral, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban ainees* (January 22, 2002), 1.

5. Ibid.; my emphasis.

6. The concept of the criminalization of war as such is one that goes back at least to odrow Wilson and the League of Nations. For a sustained critique of this concept as the ical conclusion of liberalism, a position that serves as the basis of our analysis here, see rl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: The University of icago Press, 1996), and *The Nomos of the Earth in the International Law of the* Jus Publicum ropaeum, trans. G. L. Ulmen (New York: Telos Press, Ltd., 2003).

7. "Application of Treaties," 9.

8. Geneva Convention Relative to the Treatment of Prisoners of War, Part I, Art. A)(2).

9. "Application of Treaties," 19.

10. Ibid., 9. There are problems with considering al Qaeda a terrorist organization as ell. For now, we will just note that considering the definitions of "political" and "terror- t" which we have traditionally used in the West, the multinational aspect of al Qaeda resents enormous problems.

11. "The National Security Strategy of the United States of America," September 2002, v.

12. See Immanuel Kant, "An Answer to the Question: 'What is Enlightenment?'" and 'Idea for a Universal History, with a Common Purpose," in *Kant: Political Writings*, Second, Enlarged Edition, ed. Hans Reiss, trans. H. B. Nisbet (New York: Cambridge University Press, 1991).

13. "The National Security Strategy," iv.

14. "Since the sons of the land of the two Holy Places feel and strongly believe that jihad (fighting) against the kufr *in every part of the world* is absolutely essential, then they would be even more enthusiastic, more powerful, and larger in number upon fighting on their own land—the place of their birth—defending the greatest of their sanctities, the noble Ka'ba (the Qiblah of all Muslims). They know that *the Muslims of the world* will assist and help them to victory. To liberate their sanctities is the greatest of issues concerning all Muslims; *it is the duty of every Muslim in this world*" (Osama bin Laden, "Declaration of Jihad Against the Americans Occupying the Land of the Two Holy Places," trans. unknown in *What Does Al-Qaeda Want?: Unedited Communiqués* ed. Robert O. Marlin IV [Berkeley, CA: North Atlantic Books, 2004], 13-4; my emphasis).

15. "The National Security Strategy," iv.

16. "So Mao's military problem was how to organize *space* so that it could be made to yield *time*. His political problem was how to organize *time* so that it could be made to yield *will*, that quality which makes willingness to sacrifice the order of the day, and the ability to bear suffering cheerfully the highest social order. So Mao's real military problem was not that of getting the war over with, the question to which Western military thinkers have directed the greater part of their attention, but that of keeping it going" (E. L. Katzenbach, Jr., "Time, Space, and Will: The Politico-Military Views of Mao Tse-tung," in *The Guerilla—and How to Fight Him: Selections from the* Marine Corps Gazette, ed. Lieutenant Colonel T. N. Greene [New York: Frederick A. Praeger Publishers, 1966], 14). See also Carl Schmitt, "Theory of the Partisan," trans. unknown, *Telos* no. 127 (Spring 2004).

17. "The National Security Strategy," v.

18. Ibid., 1-3.

19. By "liberalist" we mean the tendency toward and desire for a universalization of a particular system of legal, political, and ethical values. Though such an approach to law, politics, and ethics is most frequently considered a hallmark of Western modernity, it is by no mean isolated to it. As John Gray writes, "No cliché is more stupefying than that which describes Al Qaeda as a throwback to medieval times. It is a byproduct of globalisation" (*Al Qaeda and What It Means to Be Modern* [New York: The New Press 2003], 1).

20. "The National Security Strategy," 5.

21. Ibid.

22. Immanuel Kant, "Perpetual Peace: A Philosophical Sketch" in *Kant: Political Writings*.

23. "But Wellington was also part of the Spanish guerilla war, and the struggle with Napoleon was pursued with English help. Full of hatred, Napoleon often recalled that England was the real instigator and the real beneficiary of the Spanish partisan war" (Schmitt, "Theory of the Partisan," 63).

24. "The National Security Strategy," 16.

25. Ibid., 1.

26. The war of globalism-vs.-globalism is distinct from the war of all against all, i.e., the state of nature, because "all against all" entails a pre-political, chaotic war, where globalisms maintain at least some political legitimacy—they are collectivities, political entities. We will not go so far as to claim that globalisms are post-political, however.

27. 542 U.S. 507 (2004), 5 [O'Connor]. The Mobbs Declaration is the twenty-five sentence testimony on which the government based its case against Hamdi. Michael H. Mobbs is identified by the government as Special Advisor to the Undersecretary of Defense for Policy but the content of the evidence on which he bases his declaration is not given. It simply states what the government claims. In its entirety, the declaration reads:

> Pursuant to 28 U.S.C. § 1746, I, Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, hereby declare that, to the best of my knowledge, information and belief, and under the penalty of perjury, the following is true and correct:
>
> 1. I am a Special Advisor to the Under Secretary of Defense for Policy. In this position, I have been substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and

harbor them (including the Taliban). I have been involved with detainee operations since mid-February 2002 and currently head the Under Secretary of Defense for Policy's Detainee Policy Group.

2. I am familiar with Department of Defense, U.S. Central Command and U.S. land forces commander policies and procedures applicable to the detention, control and transfer of al Qaeda or Taliban personnel in Afghanistan during the relevant period. Based upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of Yaser Esam Hamdi and his detention by U.S. military forces.

3. Yaser Esam Hamdi traveled to Afghanistan in approximately July or August of 2001. He affiliated with a Taliban military unit and received weapons training. Hamdi remained with his Taliban unit following the attacks of September 11 and after the United States began military operations against the al Qaeda and Taliban on October 7, 2001.

4. In late 2001, Northern Alliance forces were engaged in battle with the Taliban. During this time, Hamdi's Taliban unit surrendered to Northern Alliance forces and he was transported with his unit from Konduz, Afghanistan to the prison in Mazar-e-Sharif, Afghanistan which was under the control of the Northern Alliance forces. Hamdi was directed to surrender his Kalishnikov assault rifle to Northern Alliance forces en route to Mazar-e-Sharif and did so. After a prison uprising, the Northern Alliance transferred Hamdi to a prison at Sheberghan, Afghanistan, which was also under the control of Northern Alliance forces.

5. While in the Northern Alliance prison at Sheberghan, Hamdi was interviewed by a U.S. interrogation team. He identified himself as a Saudi citizen who had been born in the United States and who entered Afghanistan the previous summer to train with and, if necessary, fight for the Taliban. Hamdi spoke English.

6. Al Qaeda and Taliban were and are hostile forces engaged in armed conflict with the armed forces of the United States and its Coalition partners. Accordingly, individuals associated with al Qaeda or Taliban were and continue to be enemy combatants. Based upon his interviews and in light of his association with the Taliban, Hamdi was considered by military forces to be an enemy combatant.

7. At the Sheberghan prison, Hamdi was determined by the U.S. military screening team to meet the criteria for enemy combatants over whom the United States was taking control. Based on an order of the U.S. land forces commander, a group of detainees, including Hamdi, was transferred from the Northern Alliance-controlled Sheberghan prison to the U.S. short-term detention facility in Kandahar. Hamdi was in-processed and screened by U.S. forces at the Kandahar facility.

8. In January 2002, a Detainee Review and Screening Team established by Commander, U.S. Central Command reviewed Hamdi's record and determined he met the criteria established by the Secretary of Defense for individuals over whom U.S. forces should take control and transfer to Guantanamo Bay.

9. A subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces which supports his classification as an enemy combatant. (Ed Carpenter, Jason Felch, Sarah Moughty, James Sandler, and Ben Temchine. 2003. "The Mobbs Declaration on Hamdi," *Frontline*. http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/mobbshamdi.html [October 31, 2005].)

28. 542 U.S. 507 (2004), 8 [O'Connor].

29. Ibid., 9.

30. Ibid., 13.

31. Ibid., 16.

32. Ibid., 15n.

33. Though we may argue, especially on Schmittian terms, that such a legal status is not in itself a problem, it is a problem for the Anglo-American legal tradition that relies so much on precedence to guide its judicial and legal decision-making.

34. 542 U.S. 507 (2004), 17 [O'Connor].

35. Ibid., 22. The *Mathews* calculus refers to the Supreme Court case, *Mathews v. Eldridge* 525 U.S. 319 (1976), in which Eldridge claimed he was required to have an opportunity for an evidentiary hearing before his Social Security benefits were terminated. The court found against Eldridge, but the full statement of the *Mathews* calculus is as follows: "Resolution of the issue here involving the constitutional sufficiency of administrative procedures prior to the initial termination of benefits and pending review, requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail" (525 U.S. 319 (1976), 1 [syllabus]).

36. 542 U.S. 507 (2004), 27 [O'Connor].

37. Ibid., 31.

38. Ibid.

39. Ibid., 29.

40. Scalia's reasoning cannot be separated from his remarkable scholarship in the history of Anglo-American jurisprudence. We do not have time here, however, to cover that aspect of his dissent; we can only recommend reading it.

41. 542 U.S. 507 (2004), 1-2 [Scalia].

42. Ibid., 3.

43. Ibid., 4.

44. Ibid., 6.

45. Ibid.

46. "Where the Executive has not pursued the usual course of charge, committal, and conviction, it has historically secured the Legislature's explicit approval of a suspension" (ibid., 9).

47. The United States Constitution, Article I, § 9, cl. 2.

48. 542 U.S. 507 (2004), 11 [Scalia]; my emphasis.

49. *Rasul v. Bush*, 542 U.S. 466 (2004), 16 [Scalia].

50. 542 U.S. 466 (2004), 12 [Stevens]. This agreement is cited by Schmitt in *The* Nomos *of the Earth* as evidence of the power of what he calls *Großraum*, which is the idea of effective sovereignty, such as the ways American economic power has the effect of heavily influencing the foreign policies of a number of 'sovereign' nations.

51. 542 U.S. 507 (2004), 1 [Thomas].

52. Ibid.

53. Ibid., 2; my emphasis.

54. Ibid., 18.

55. Ibid., 19.

56. Ibid., 20; my emphasis.

57. 542 U.S. 507 (2004), 1 [Souter].

58. U.S.C. § 4001(a). Also known as the Non-Detention Act, this act reads, "No citizen ıall be imprisoned or otherwise detained by the United States except pursuant to an Act Congress."

59. 542 U.S. 507 (2004), 3 [Souter].

60. Ibid. Souter explains in a footnote that "this statute is an authorization to spend ıoney if there are prisoners, not an authorization to imprison anyone to provide the oc- ısion for spending money" (ibid., 9n. 3).

61. Ibid., 9-10; my emphasis.

62. Ibid., 10.

63. Ibid., 12.

64. Ibid.

65. Army Reg. 190-8, but "jointly promulgated by the Headquarters of the Army, Navy, ir Force, and Marine Corps" (542 U.S. 507 (2004), 13 [Souter]).

66. Ibid.

67. Ibid., 14

68. An upcoming case in the Supreme Court's current session that does involve a non- merican citizen in Guantanamo Bay challenging his detention is *Hamdan v. Rumsfeld*, ertiorari granted November 7, 2005.

A Critique of Exceptions: Torture, Terrorism, and the Lesser Evil Argument

Andrew Fiala
California State University, Fresno

ABSTRACT: There are good reasons to beware of arguments that allow for exceptions to principles about the proper limit of violence. Justifications of such exceptions occur in recent discussions of torture and terrorism. One of the reasons to be skeptical of these arguments is that when political agents make exceptions to moral principles, these exceptions can become precedents that serve to normalize immoral behavior. This aspect of political reality is ignored in contemporary attempts to justify torture and terrorism. The present paper explains why torture and terrorism are wrong despite recent attempts to justify them. It draws distinctions between torture and terrorism, while examining these practices in the context of the war on terrorism.

> Never open the door to a lesser evil, for other and greater ones invariably slink in after it.
> —Baltasar Gracian[1]

When we open the door to the lesser evil of terrorism or torture, we may end up sliding down the slippery slope toward further compromises with evil. Of course, not all slopes are slippery. However, there are good reasons to keep a wary eye out for the evil that may slink in with well intentioned exceptions to principles about the proper limit of violence.[2] One of these reasons has to do with the nature of political power. When political agents make exceptions to moral principles, these exceptions can become precedents that serve to normalize immoral behavior. This aspect of political reality is ignored in contemporary attempts to justify torture and terrorism.

RECENT JUSTIFICATIONS OF TERRORISM AND TORTURE

Terrorism may appear to be justifiable from the standpoint of consequentialism. More exactly, consequentialist reasoning can lead us to make exceptions to the basic principles of just war theory.[3] This occurs despite the fact that the just war theory would seem to be explicitly opposed to terrorism in its prohibition

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