

The War against Terror as War against the Constitution

Jackson A. Niday, II

Abstract: This essay examines rhetorical dynamics in the 2004 US Supreme Court case *Hamdi v. Rumsfeld*. News reports suggested the court split 8-1 or 6-3. However, case texts show substantive disagreements created a 4-2-2-1 split in the court. Moreover, while the justices on the bench split into four camps rather than two, those camps were not defined along ideological lines. This essay argues that pragmatism, the legal philosophy that held sway in the case, achieved practical expediency at the expense of judicial and constitutional coherency. In the end, the court found a majority through neither persuasion nor principled conviction but, rather, through reluctant compromise in order to achieve a partial resolution rather than none. In other words, argumentation failed and consensus followed from necessity rather than persuasion. The essay explores the question of whether constitutionally guaranteed civil liberties were violated in the ruling.

Keywords: US Supreme Court, rhetoric, *Hamdi*, Rumsfeld, terrorism, illegal combatant, enemy combatant, Scalia, jeremiad

Résumé : Le présent essai jette un coup d'oeil sur la rhétorique dynamique du cas *Hamdi c. Rumsfeld* entendu par la Cour suprême américaine en 2004. Les rapports des médias ont suggéré que la Cour avait statué à huit voix contre une ou six voix contre trois. Toutefois, les textes du cas indiquent que des désaccords substantiels avaient entraîné une répartition des voix de 4-2-2-1 à la Cour. En outre, bien que le juges sur le banc aient été divisés en quatre camps plutôt que deux, ces camps n'étaient pas définis selon des lignes idéologiques. Selon cet essai, le pragmatisme, la philosophie juridique qui a prédominé dans ce cas, a été basée sur un opportunisme pratique aux dépens de la cohérence juridique et constitutionnelle. À la fin, la Cour a statué en majorité non par persuasion ou par conviction fondée sur des principes, mais plutôt en raison d'un compromis réticent afin d'obtenir une résolution partielle plutôt qu'aucune résolution du tout. En d'autres mots, l'argumentation a échoué et un consensus a découlé de

la nécessité plutôt que de la persuasion. L'essai tente de déterminer si des libertés civiles garanties par la constitution ont été violées lors de la décision.

Mots clés : Cour suprême américaine, rhétorique, *Hamdi*, Rumsfeld, terrorisme, combattant illégal, combattant ennemi, Scalia, jérémiades

Responding to the attacks of 11 September 2001, the Bush administration launched its war against terrorism. In the immediate wake of 9/11, the war enjoyed near-unanimous support from both sides of the aisle and across the citizenry. As the war continued, the Administration employed terms such as “illegal combatant” and “enemy combatant” to buttress its campaign of arms with a campaign of words in which the world was put on notice that anyone who was not with the US was with the terrorists (Bush). But, as its drama unfolded (punctuated by such things as Congress’s joint resolution authorizing use of military force [hereafter, the AUMF], the campaigns against al Qaeda and the Taliban, the Patriot Act, the capture of large numbers of detainees, Abu Ghraib, the Bybee memo, and the war in Iraq), a growing body of dissent began to question the Administration’s policies, methods, and rhetoric. So dangerous did the implications of the Administration’s language seem that not only did traditional political opponents vilify it, but some prominent political supporters expressed misgivings too (Eberhart). Some opponents charged that, with the campaign abroad, the Administration’s rhetoric had launched a campaign against the US Constitution at home in terms of its scope and ambition (Falk). Eventually, some of the general questions pertaining to presidential power raised by these critics manifested themselves in specific deliberations before the US Supreme Court in the cases of *Hamdi v. Rumsfeld*, *Rasul v. Bush*, and *Rumsfeld v. Padilla*.

While no case before the Supreme Court can be deemed trivial, the Administration’s war of words made these cases particularly heady. In deploying its elocutionary arsenal, the Administration managed to consign some of the most hallowed tenets of the Constitution to the scales of Justice. These three cases are cut from common cloth, but the focus here will be on the one I believe to be of greatest constitutional substance: *Hamdi v. Rumsfeld*. Before the Court in the *Hamdi* case were decisions on habeas corpus; at issue, questions of separation of powers and of Constitutional rights; at stake, the Administration’s latitude in its war on terror, on one hand, and the status of individual rights in a free society on the other.

Yaser Esam Hamdi, a US citizen, was captured as he opposed US forces in Afghanistan, sometime late in 2001. He was then detained under the “enemy combatant” label used by the Bush Administration. At the time his case came before the US Supreme Court, Hamdi had been detained for approximately three years. While the story of Hamdi the man, from the time of his capture to the eventual revocation of his US citizenship, is noteworthy in itself, the case of *Hamdi*—in terms of its language, its arguments, its conclusions, and its implications—is of far greater importance. As days turned to weeks and weeks to years, the *Hamdi* case made its way through the American judicial system, ultimately finding itself caught between two opposing legal philosophies: textualism and pragmatism. Each of these philosophies has engendered rich schools of thought and many tomes have been devoted to defining each position, but we can distill working definitions from their governing hermeneutic principles. Textualism (often called strict constructivism) calls for an interpretation and application of the law guided by taking the words of a source document literally with strict adherence to etymology and historical precedent.¹ Legal pragmatism, in contrast, adopts a hermeneutics stressing “(1) the importance of context; (2) the lack of foundations; (3) the instrumental nature of law; and (4) the unavoidable presence of alternate perspectives.”² In the *Hamdi* case, Justice O’Connor’s pragmatism battled and bested Justice Scalia’s textualism. That triumph, however, was a narrow victory, and a victory riddled with dissonance. It was also a victory that evoked from Scalia one of the more scathing jeremiads he has issued from the bench. In what follows, I shall analyze the argumentation of *Hamdi* in terms of substance and style, and will look at the various opinions issued, along with a detailed examination of Scalia’s lamentation.

A decidedly American philosophy, pragmatism seeks what works. In that pursuit, its focus on the instrumental often privileges expediency over principle. For many human endeavors, finding expedient resolutions simply makes sense, but when it comes to a people’s constitution, expediency should arouse some measure of trepidation. In this case, expediency precipitated a series of compromises, the final one setting a dangerous precedent that abridges fundamental provisions of the Constitution.

Despite news reports to the contrary, this case defies easy characterization. Some popular news media reported this ruling as an 8–1 split; others, as a 6–3 split. Those generalizations, however,

neglected the philosophical struggle and, in turn, the constitutional significance of the arguments. In reality, the court splintered into four camps. The first (the plurality) was led by Justice O'Connor (a pragmatist), and was joined by Justices Rehnquist (a conservative), Kennedy (regarded as a conservative centrist), and Breyer (regarded as a liberal and pragmatist). The first camp was most dramatically opposed by the second comprised, surprisingly enough, by Justices Scalia (a conservative textualist) and Stevens (a liberal). The third position was expressed by Justice Thomas alone. The fourth was that of Justices Souter (moderate and independent) and Ginsburg (regarded as a liberal centrist). Perhaps the safest generalization one can offer is that the case did not split along "conservative" and "liberal" lines. The Court's fragmentation, coupled with such unpredictable alliances, suggests that for each justice the issues at stake cut past the flesh of partisan politics, the sinews of procedure, and the marrow of nationalism, piercing down to the convictions of their souls.

Some reporters depicted the decision as an 8–1 split, no doubt, because Thomas distinguished himself as the only justice defending absolute power for the government (Grieve; Lithwick; ACLU). He asserted that the government had a "compelling interest" in national security, reasoning that, because threats to the state existed without limit, the state's power to protect itself should also exist without limit. In terms of structure, the logic is unassailable. If one accepts the premises of the syllogism, the Constitution's habeas corpus provision falls to the side, futile, and Yaser Hamdi could be detained in perpetuity. Justice Thomas adhered to those premises in his lone dissent, but that does not mean the court was cloven into a clean 8–1 split. As different as the opinions of the others were from Thomas's, they differed substantially among themselves—so substantially that the case was ultimately resolved not through persuasion rooted in evidence and shared principles but rather through a begrudged concession rooted in systemically imposed practicality.

Turning to the opinions of the remaining justices, the majority of the case reads as a personal quarrel between Justice O'Connor and Justice Scalia. The clash begins immediately. Writing for the plurality, O'Connor characterizes the issue before the Court in these terms: "The threshold question before us is whether the Executive has the authority to detain citizens who qualify as 'enemy combatants'" (*Hamdi* O'Connor 8). Scalia disagreed. Following his initial

response that offers historical-relational definitions of both habeas corpus and the Constitution's Due Process and Suspension Clauses, Scalia characterizes the issue before the court in this way: "The relevant question ... is whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoing *by aiding the enemy in wartime* [emphasis in original]" (*Hamdi* Scalia 6). No wider chasm could separate the two justices. For O'Connor, the issue hinges on a definition linked to the term "enemy combatant." For Scalia, that term and concept have no place in the discussion.

From a rhetorical perspective, and given the venue of this disagreement, it would be difficult to overstate the significance of the term "enemy combatant." Its presence or absence dictates the following arguments of either side because, depending on whether it is given place in the argument, the term places the case differently with respect to the Constitution. Specifically, in absence of the term, the Constitution's clauses on treason control the ruling. But, if allowed, the term requires a legal rationale beyond constitutional provisions. Beyond dictating the arguments' bearing, two broader implications follow depending whether the term is used. First, this initial disagreement regarding point of departure tells us something about the O'Connor-Scalia dispute as discourse per se. The central premise of stasis theory, an ancient standby in the rhetorical tradition, tells us that, before any intelligent discussion can ensue, the people arguing must agree on what is being discussed—on the matters of fact. Only then can the parties move to subsequent questions of definition, of quality, and of jurisdiction. To underscore this notion, contending parties must agree on the question of "what is the subject for our debate?" before it can be said they are engaged in a coherent conversation. Until they agree on what the topic being discussed is, advocates talk *at* one another rather than *with* one another. Second, and following logically from the first implication, as legions of philosophers, cognitive psychologists, and rhetoricians have similarly argued, different personal philosophies create different perceptual realities. This initial disagreement as to whether the term "enemy combatant" has a place in the argument, then, stems not from any facts of the *Hamdi* case but from the incommensurable perspectives with which each approached the case. Those perspectives, reflected in the language of the opinions, grant radically different roles for the Constitution to play with regard not simply to the case of Mr. Hamdi, but with respect to the American governmental process writ large.

While several sections from the Constitution pertain to the *Hamdi* case, two clauses serve as a point of departure for analysis. The first is the passage enumerating the sole civil liberty found in the document's original text: the writ of habeas corpus. Specifically, Article I, Sect. 9 states, "The 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." In brief, the Great Writ requires the government either to press charges and bring a suspect to trial or to release the person. The second is the due process clause found in the Fifth Amendment. It states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ; nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law" The grand jury exclusion for military members pertains only to those persons serving in the US military forces, not to citizens taking up arms against the state, who, as Scalia noted several times in this case, are tried in the criminal system (*Hamdi* Scalia 6).

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Given those explicit constitutional provisions, the plurality's case rests on problematic arguments. Let's start with the plurality's definition of "enemy combatant," and then move to its initial assertion of the legal grounds for Yaser Hamdi's detention. To begin, the plurality stated that the government lacked a complete definition of "enemy combatant." Several problems follow from that statement. As the government presented its case, not only did the court have to define "enemy combatant," but it also had to provide (even if tacitly) some rationale for accepting the term. Nevertheless, members of the plurality accepted what the government did offer: an enemy combatant is "an individual who, [the government] alleges, was "part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there" (*Hamdi* O'Connor 8-9) Initially, it seems Occam himself could have sliced no more parsimonious a definition. Where the definition is lacking the plurality does not say.

From an analytical perspective, the definition is as notable for what it does not say as much as for what it does. Lumping all enemy combatants into one pile, the language of the Administration and the plurality makes no distinction between citizen and alien.

If, under the law, all enemy combatants are seen as having the same nature then, under the law, all enemy combatants should receive the same treatment. The language in the US Constitution and various treaties, however, does make a distinction between citizen and alien. The language recognizes distinctions among enemies that are differences of kind, not degree. The Constitution follows a measured pattern, introducing a term, prescribing a definition, and establishing a standard of evidence. The first clause of Article III, Section 3 states, "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." As the Constitution stipulates, categorical distinctions in nature require categorical differences in treatment. Marked combatants from an opposing nation warrant one treatment; alleged traitors, another. The term that prevails, O'Connor's or Scalia's, will have philosophical and practical consequences. The point is semantic, but not merely semantic. Its significance increases as the argument continues. A rose may be the same under another name, but a detainee is not.

Moving to the legal grounds for Yaser Hamdi's detention, the Government employed a tactic that was disingenuous, if not nefarious. As respondent, the Government's burden was to provide grounds justifying Yaser Hamdi's indefinite detainment. And it did so. In fact, the Government provided multiple grounds. However, the grounds provided were competitive with one another, not complementary. In its first point, the Government said that "no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II" (*Hamdi* O'Connor 9). Constitutional grounds should be the most secure to stand on. But, just to be sure, the Government also asserted that "Congress has in fact authorized Hamdi's detention, through the AUMF" (9) To borrow a phrase, we can call this behavior "fishing for grounds." Which piece of bait would the court bite? It was impossible for them to say with absolute certainty—though the Government could anticipate the Court's response to its first point. The Government's remedy? Drop two lines in the water, reasoning if the court wouldn't take the first, it might take the second.

What was wrong with the tactic used by the Government? An advocate before the court is supposed to provide a unified legal theory

for a case to rest upon. If the Government had interpreted Article II correctly, no higher appeal exists other than possibly to "the People." The choice to include the AUMF intimates that the Government was missing confidence, and injects a competing theory. The plurality responded oddly to this approach. Its members accepted the latter grounds and stated explicitly that they did not address the former. However, soon after the plurality claimed to ignore the former, it explicitly rejected the former as a refusal from the executive branch to acknowledge the Court's proper role in the governing process, noting, "that unlimited power, wherever lodged at such a time, [is] especially hazardous to freemen" (*Hamdi O'Connor* 23–4). Beyond the obvious wrangling for power between the executive and the judiciary branches, the offer and acceptance entailed in this fishing expedition suggest an inappropriate participation on the part of the plurality. Not only are the Government's two claims at odds with one another, their combined presence requires the plurality to do too much of the Government's work. Rather than the Government providing grounds based on a unified legal theory, the Court is being asked to decide the grounds on which the case can stand. Doing just that, the plurality turned to select precedent to defend its assertion that their interpretation of the AUMF did not violate constitutional provisions. They focused on one statute, 18 USC. § 4001(a), and two cases, *Ex parte Quirin* and *Ex parte Milligan*, in an opinion that had the two-fold effect of providing the Government ground while quarreling directly with Scalia.

The statute in the limelight, 18 USC. § 4001(a), states, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Passed in 1971, § 4001(a) had the dual intent of repealing the Emergency Detention Act of 1950 and of alleviating any ambiguity on who could suspend the writ of habeas corpus.³ The AUMF was an Act of Congress. The plurality accepted that "the AUMF is explicit congressional authorization for the detention of [enemy combatants]" (*Hamdi O'Connor* 10). Since "enemy combatants" includes both aliens and citizens, the matter was closed for the plurality. There is, however, one concern. The language of § 4001(a) seems simple enough, and simple language promises to more readily fix meaning. But, even in the best of circumstances, language is slippery. While the statute appeared to settle one question (who could authorize detainment?) its language is not precisely that of the Constitution's. Namely, it does not expressly mention the Great Writ, and that

lack of specificity matters. For, barring an amendment, when statutory law conflicts with constitutional law, the latter wins. Is § 4001(a) clearer than the Constitution because it specifies Congress as agent? Or, because the absence of the term "habeas corpus," is § 4001(a) more ambiguous? One may say these questions blow an innocuous point completely out of proportion. At first blush, perhaps. However, this little twist works itself into a sizable knot as the plurality's reasoning continues.

Continuing, the plurality asserted a line of argument whose expressed contradiction apparently goes unnoticed by its own members. In sum, the plurality labels Hamdi a "prisoner of war." From that language a specific logical progression must follow. Prisoners of war, as the plurality admits, are detained only to keep them from returning to the fight. After hostilities are ended, prisoners of war are "exchanged, repatriated, or otherwise released" (*Hamdi O'Connor* 11). For an alien enemy combatant, no logical, philosophical, or practical problem ensues. But how does this line of reasoning square with a citizen enemy combatant? Are the same post-war remedies available to a POW who is a citizen of the country he is fighting against? Obviously, no. A citizen suspected of treason cannot be exchanged, repatriated, or simply released. Using language that fails to recognize the constitutional distinctions of citizenship in its definitions (namely that a citizen guilty of taking up arms against the nation is not an enemy combatant, but rather a traitor), the plurality compounded ambiguity with contradiction. That is, in preferring the Administration's language of "enemy combatant" over the Constitution's language of treason, the plurality employed a term that ignored existing and meaningful distinctions under the law.

From this foundation, problems of coherency and contradiction in the plurality's argumentation arise. Arriving at the question of whether the government has the authority to detain, the plurality interpreted the AUMF with this decree: "[I]t is of no moment that the AUMF does not use specific language of detention" (*Hamdi O'Connor* 12). That is, the plurality held that the AUMF authorized detention of citizens without explicitly mentioning detention or suspending the Great Writ. One could surmise that the phrase "any and all force" subsumes the Great Writ. While open to attack on grounds that a right of such primacy should be suspended only if enumerated, that interpretation at least would have provided a response to the habeas corpus question. But the

plurality abandoned that possibility, explicitly stating that "All agree that suspension of the writ has not occurred here" (18). The question is unavoidable: if the writ of habeas corpus is not suspended, how can the Government detain indefinitely, as it had done?

Let's now shift point of view in this drama. The Scalia-Stevens alliance asserted that the pragmatism of Justice O'Connor's camp obliterated the Great Writ. The legal mechanism they employed to do so was the Matthews Calculus, a legal heuristic for balancing competing goods drawn from *Matthews v. Eldridge*. *Matthews* was a case dealing with Social Security claims. In that case the US Supreme Court declared that due process was not a static concept but one that must adjust to meet the requirements of individual cases. In the words of the plurality, "*Matthews* dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process" (*Hamdi* O'Connor 22). As the plurality read the Matthews Calculus, it provided them a rationale wherein the Government would not compromise its intelligence gathering by presenting evidence against Yaser Hamdi, but where Hamdi would still get a hearing in court. That proposition should give everyone pause. Scalia and Stevens dissented in a critique of six lengthy subsections.

The Scalia-Stevens claim was this: "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 ... allows Congress to relax the usual protections temporarily" (*Hamdi* Scalia 1). As stated above, without suspension of the Writ, the Executive branch is barred by the Constitution from detaining without charging. Moreover, no one—not the other justices, nor advocates of any party in the suit—claim that the AUMF is "an implementation of the Suspension Clause" (2). In short, the Constitution leaves the Executive with a choice: charge and try an alleged traitor or release the person.

For evidence Scalia and Stevens presented a twelve-hundred-word history tracing the migration of the writ of habeas corpus from

seventeenth-century England to the United States. But are there qualifications that might alter the general rule? Scalia and Stevens addressed that question in section II of their dissent, comprised of two-parts. In the first subsection of that response, the dissent agreed with the plurality that “enemy combatants” may be detained until the end of hostilities—as long as they are *alien* enemy combatants. Such persons are prisoners of war, and such treatment is consistent with the laws of war. In contrast, citizens are “treated as traitors and subject to the criminal process” (*Hamdi* Scalia 6). The dissent traced historical precedent harkening as far back as 1746, cataloged details from 18 USC., and ended with a timely case quite similar to *Hamdi*, the case of *United States v. Lindh* (2002), where the accused was tried and convicted under the criminal system. Continuing, the dissent acknowledged that military exigency can forestall criminal procedures. Looking to precedent dating back to 1688, the dissent cited four suspensions of the writ in England. Turning to the States, the dissent (in typical Scalia style) wove an argument of authority and precedent with more than fifteen citations tracing the legal history of suspension of the Writ. With that compilation of cases, the dissent asserted that the writ can be suspended only by an act of the legislature whose language specifically names the writ “rather than by silent erosion through an opinion of this Court” (26).

But did Scalia and Stevens create a false dichotomy? There could exist some middle category between prisoner of war and traitor. That, in effect, was the plurality’s position. Refuting that possibility, the two offered a detailed rebuttal in sections III and IV of their opinion. Their refutation deserves reading in its entirety, but their thesis is simply that “a view of the Constitution that gives the Executive authority to use military force rather than force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions” (*Hamdi* Scalia 17).

We now come to section V of the dissent. Here, the tenor of the dissent takes a decisively strident turn. The section opens aggressively, declaring that “there is a world of difference between the people’s representatives’ determining the need for that suspension (and prescribing the conditions for it) and this Court’s doing so” (*Hamdi* Scalia 21). Returning to the AUMF, Scalia focused on eleven words: “the President is authorized to use all necessary and appropriate force” (21). The plurality of four read those words to mean the President was not barred from detaining enemy combatants, be those enemy combatants aliens or citizens. Scalia and Stevens

rejoined with a point the plurality already conceded, namely that the AUMF "is not remotely a congressional suspension of the Writ, and no one claims that it is" (21). The plurality's line of reasoning cannot be reconciled with this point of agreement. The dissonance produced by this one point that the camps agree upon brings us to an oft-observed facet of human behavior. Where people believe much of worth at stake, and where they find reason impotent in their aims, they tend to fall back on passionate railing. And that is just what Justice Scalia did.

It is at this point that the dissent waxes most poetic. Earlier on in his opinion, Scalia had planted a seedling image of "bobtailed judicial inquiry" (*Hamdi* Scalia 12), a seed that now blossomed into a jeremiad of grand sarcasm. This mode of irony seems akin to the pedestrian satire of *Saturday Night Live* and out of place in the nation's highest court. Structural constraints of the venue disallow satire. Satirists critique from outside. But, even when dissenting, justices critique from within—within their education, within their robes, within their appointments, within the halls of the great court. Given the structural determinants that dictate meaning in this venue, Scalia's sarcasm is perhaps better understood as a lamentation of frustration, loss, and disbelief.

Before parsing his rhetoric, we should listen to the tone created in the whole:

It should not be thought, however, that the plurality's evisceration of the Suspension Clause augments, principally, the power of Congress. As usual, the major effect of its constitutional improvisation is to increase the power of the Court. Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections *it* thinks appropriate. It "weighs the private interest . . . against the Government's asserted interest," . . . and—just as though writing a new Constitution—comes up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a "neutral" military officer rather than judge and jury. It claims authority to engage in this sort of "judicious balancing" from *Matthews v. Eldridge* . . . a case involving . . . *the withdrawal of disability benefits!* Whatever the

merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer. (24)

If ever a passage in American political rhetoric calls forth images of Isaiah preaching naked in the city streets, surely this one does. With a veritable orgy of rhetorical flourish, Justices Scalia and Stevens castigate the plurality. The lamentation manifests itself at every unit level of communication—diction, syntax, dramatic action, trope, even punctuation.

Even taken from context, the word choices accrete into a moral (rather than a legal) critique. The passage above includes these choices: sham, evaded, evisceration, improvisation, guise, unheard-of, distorted, transmogrifying, lassitude, and saps. These are not terms of law, though they are obviously terms of judgment. And that is a point of some weight. We see in this passage a Supreme Court justice who has abandoned the framework of law to make his case. While hardly without precedent, any such move by a Supreme Court justice merits notice. Finding no remedy in law, Scalia turned to a rhetoric of moral indictment.

In its furore, this rhetoric of dissent marries the moral diction above with distinct rhetorical schemes and stylish sentence structures. The passage couples anaphora (repetition of the same words at the beginning of successive clauses) with isocolon (similarity not only of structure but of length) and interjects alliteration (repetition of consonants) with a flurry of plosive “p’s.” The effect is a measured pounding of expression. As pace and tension rise in this rhetorical paroxysm, Scalia augments his syntactical schemes with poignant punctuation. He places the word “it” (whose antecedent is the plurality) in italics. He uses parenthesis, set off by dashes, to convey shock at the plurality’s inversion of burden and procedure. Were it not for the venue, the use of quotes with “neutral” and “judicial balancing” would come off as a puerile gesture. Combining italics and exclamation points, he stylistically screams disbelief at the plurality’s grounds and warrants. The passage ends, however, without stylistic flair, but rather in somber simplicity. Juxtaposed as it is with what preceded it, the ending sentence stands out in the jarring relief of anticlimax. The statement never concedes the opposing argument; it only bemoans what is lost. This is the style of the jeremiad—that apocalyptic genre used

by those who believe they bear witness to a willful rejection of higher authority.

One could accept the substance of the dissent without endorsing its rhetoric; however, a final dramatic and disquieting twist of the Court's ruling gives some place for Scalia's lamentation. The plurality proper was comprised of four justices, not six. Thomas stood alone fully endorsing the Government's "compelling interest" (*Hamdi* Thomas 1). Unaccounted for were two justices: Souter and Ginsburg. Had the two remaining justices repudiated Scalia and Stevens, one might assume a judicial wisdom resided in the majority. Based on the weight of majority rule, Scalia and Stevens possibly could be dismissed as co-conspirators in adolescent rant.

But Souter and Ginsburg did not denounce Scalia and Stevens. On the contrary, on the principal point at issue Souter and Ginsburg threw in their lot with Scalia and Stevens, saying "the Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even on the facts the Government claims. If the Government raises nothing further than the record now shows, the Non-Detention Act entitles *Hamdi* to be released" (*Hamdi* Souter 3). Underscoring their position, the two add, "In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty ... is not well entrusted to the Executive ..." (7). In their reading of the AUMF, it did not qualify as a "clear statement of authorization to detain" (7). Moreover, in their reading of the Geneva Convention and Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, the two conclude, "[T]here is reason to question whether the United States is acting in accordance with the laws of war it claims as authority" (13). On all matters of principle, then, Souter and Ginsburg align themselves with Scalia and Stevens.

But where would allegiance to principle leave the Court? In a 4-4-1 split of indecision. Bowing to the Fates, Souter and Ginsburg struck an unpalatable compromise: "I would therefore vacate the judgment of the Court of Appeals and remand for proceedings consistent with this view [that of Scalia and Stevens]. Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of the Court rejecting the Government's position calls for me to join

with the plurality in ordering remand on the terms closest to those I would impose" (15).

Myriad philosophical treatises attempt to plumb the consequences of pragmatism. Most of those celebrate its departure from metaphysics, ontology, history, and dogmatism. The spirit of that celebration is perhaps best captured in a statement from one of America's most renowned pragmatists, William James. In putting forth his own brand of pragmatism, James once said, "The truth of an idea is not a stagnant property inherent in it. Truth *happens* to an idea. It *becomes* true, is *made* true by events" (97). As far as he goes with that idea, I agree. But, the *Hamdi* case lends credence to James's notion in the most disquieting way.

In the process of making truth, the *Hamdi* case ends on a note of dissonance that grates far beyond a 5–4 partisan split. In a 5–4 split, the majority rules. Do such splits impose a tyranny of the majority rather than rule by reason? Perhaps so in some cases. But, if so, the assumptions of democratic governments assert a preference for tyranny of the majority over tyranny of the one, or tyranny of the few.

The *Hamdi* case was a different sort of thing. It began with a federal constitution that grants the writ of habeas corpus, with justices possessing the most distinguished *vitas*, and with a case having an immediate precedent, and ended on a note of abandonment rather than resolution or honest disagreement. The question I am most concerned with is not whether or not Yaser Esam Hamdi was guilty. The question is over what role a document called a constitution plays in a people's governing of themselves when the tenets of that document are put to a true test. For in times when fears of terror run rampant and provide sufficient emotional grounds for pragmatic expediency, a government can find myriad occasions to abrogate—rather than constitutionally suspend—liberties.

The treatment of the Great Writ in this case invites remembrance of words penned in a time when the branch of philosophy called metaphysics was not something to blush about. In his explanation of the problems with democracies, Aristotle concluded, "Where laws do not rule, there is no constitution" (252). The pragmatism driving the *Hamdi* case may have moved into that territory Aristotle feared. Obviously, the *Matthews Calculus* was drawn from existing precedent. But in this case, its invocation violated the classical prescription of appropriateness, and its application supplanted

a higher law, the Great Writ. And though its doing so did not precipitate anything like an implosion of the American political system, the precedent it set may mean that Scalia's lamentation was not for naught.

Notes

- 1 See entry in *Black's Law Dictionary*, "strict constructivism."
- 2 See entry in *The Internet Encyclopedia of Philosophy*, "legal pragmatism."
- 3 The question arose due to a conflict between the Constitution's structure and historical events. The writ of habeas corpus is addressed in Article I of the Constitution. Since that article enumerates the powers and responsibilities of Congress, it seems logical that only Congress can suspend the Great Writ. But historically, it had been the Executive, under President Lincoln, who had suspended the Writ.

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