

## **Hamdi v. Rumsfeld**

316 F. 3<sup>rd</sup> 450 (U.S. Court of Appeals, 4<sup>th</sup> Circuit, 2003)

**WILKINSON**, Chief Judge, and **WILKINS** and **TRAXLER**, Circuit Judges:

Yaser Esam Hamdi filed a petition ... challenging the lawfulness of his confinement in the Norfolk Naval Brig. On this third and latest appeal, the United States challenges the district court's order requiring the production of various materials regarding Hamdi's status as an alleged enemy combatant. The district court certified for appeal the question of whether a declaration by a Special Advisor to the Under Secretary of Defense for Policy setting forth what the government contends were the circumstances of Hamdi's capture was sufficient by itself to justify his detention. Because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper, and we remand the case with directions to dismiss the petition.

I.

Although acknowledging that Hamdi was seized in Afghanistan during a time of active military hostilities, the petition alleges that "as an American citizen, ... Hamdi enjoys the full protections of the Constitution," and that the government's current detention of him in this country without charges, access to a judicial tribunal, or the right to counsel, "violat[e]s the Fifth and Fourteenth Amendments to the United States Constitution." By way of relief, the petition asks, inter alia, that the district court: (1) "Order Respondents to cease all interrogations of Yaser Esam Hamdi, direct or indirect, while this litigation is pending"; (2) "Order and declare that Yaser Esam Hamdi is being held in violation of the Fifth and Fourteenth Amendments to the United States Constitution"; (3) "To the extent Respondents contest any material factual allegations in th[e] Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations"; and (4) "Order that Petitioner Yaser Esam Hamdi be released from Respondents' unlawful custody."

On June 11, before the government had time to respond to the petition, the district court appointed Public Defender Frank Dunham as counsel for the detainee and ordered the government to allow the Defender unmonitored access to Hamdi. On July 12, we reversed the district court's order granting counsel immediate access to Hamdi. We cautioned that Hamdi's petition involved complex and serious national security issues and found that the district court had not shown proper deference to the government's legitimate security and intelligence interests. We did not order the petition dismissed outright, however, noting our reluctance to "embrac[e] [the] sweeping proposition ... that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Id.* Rather, we sanctioned a limited and deferential inquiry into Hamdi's status, noting "that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Id.* (citing *Ex parte Quirin* (1942)). We also instructed that, in conducting the inquiry, "the district court must consider the most cautious procedures first, conscious of the

prospect that the least drastic procedures may promptly resolve Hamdi's case and make more intrusive measures unnecessary." *Id.*

Following this remand, the district court held a hearing on July 18. During this hearing, the court expressed its concern over possible violations of Hamdi's rights as an American citizen. The court also questioned the government's most basic contentions regarding the ongoing hostilities, asking "with whom is the war I should suggest that we're fighting?" and "will the war never be over as long as there is any member [or] any person who might feel that they want to attack the United States of America or the citizens of the United States of America?" The court directed that "[a]ll of these [answers should] be provided in the answer that the government is to file to the petition" and directed the United States to file such a response to Hamdi's petition by July 25.

On July 25, the government filed a response to, and motion to dismiss, the petition for a writ of habeas corpus. Attached to its response was an affidavit from the Special Advisor to the Under Secretary of Defense for Policy, Michael Mobbs, which confirms the material factual allegations in Hamdi's petition—specifically, that Hamdi was seized in Afghanistan by allied military forces during the course of the sanctioned military campaign, designated an "enemy combatant" by our Government, and ultimately transferred to the Norfolk Naval Brig for detention. Thus, it is undisputed that Hamdi was captured in Afghanistan during a time of armed hostilities there. It is further undisputed that the executive branch has classified him as an enemy combatant.... According to Mobbs, interviews with Hamdi confirmed the details of his capture and his status as an enemy combatant.

In keeping with our earlier instruction that the district court should proceed cautiously in reviewing military decisions reached during sanctioned military operations, we directed the district court to first "consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further." Following this order, the district court held a hearing on August 13 to review the sufficiency of the Mobbs declaration.

During this hearing, the district court recognized that "the government is entitled to considerable deference in detention decisions during hostilities." The court also noted that it did not "have any doubts [Hamdi] had a firearm [or] any doubts he went to Afghanistan to be with the Taliban." Despite these observations, however, the court asserted that it was "challenging everything in the Mobbs' declaration" and that it intended to "pick it apart" "piece by piece." The court repeatedly referred to information it felt was missing from the declaration, asking "Is there anything in here that said Hamdi ever fired a weapon?" The court questioned whether Mr. Mobbs was even a government employee and intimated that the government was possibly hiding disadvantageous information from the court.

The district court filed an opinion on August 16, finding that the Mobbs declaration "falls far short" of supporting Hamdi's detention. The court ordered the government to turn over, among other things, copies of Hamdi's statements and the notes taken from any interviews with him; the names and addresses of all interrogators who have questioned Hamdi; statements by members of the Northern Alliance regarding the circumstances of Hamdi's surrender; and a list of the date of Hamdi's capture and all of the dates and locations of his subsequent detention.

Upon the Government's motion to certify the August 16 production order for immediate appeal, the district court certified the following question: "Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?" We then granted the Government's petition for interlocutory review ...

## II.

Yaser Esam Hamdi is apparently an American citizen. He was also captured by allied forces in Afghanistan, a zone of active military operations. This dual status—that of American citizen and that of alleged enemy combatant—raises important questions about the role of the courts in times of war.

### A.

The importance of limitations on judicial activities during wartime may be inferred from the allocation of powers under our constitutional scheme. The war powers ... invest "the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war." These powers include the authority to detain those captured in armed struggle. These powers likewise extend to the executive's decision to deport or detain alien enemies during the duration of hostilities, and to confiscate or destroy enemy property.

Article III contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II. "In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs."

The reasons for this deference are not difficult to discern. Through their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution's allocation of the warmaking powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them. Thus the Supreme Court has lauded "[t]he operation of a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker v. Goldberg* (1981).

The deference that flows from the explicit enumeration of powers protects liberty as much as the explicit enumeration of rights. The Supreme Court has underscored this founding principle: "The ultimate purpose of this separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.* (1991). Thus, the textual allocation of responsibilities and the textual enumeration of rights are not dichotomous, because the textual separation of powers promotes a more profound understanding of our rights. For the judicial branch to trespass upon the exercise of the

warmaking powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical. This right of the people is no less a right because it is possessed collectively.

These interests do not carry less weight because the conflict in which Hamdi was captured is waged less against nation-states than against scattered and unpatriated forces. ...

B.

Despite the clear allocation of war powers to the political branches, judicial deference to executive decisions made in the name of war is not unlimited. The Bill of Rights which Hamdi invokes in his petition is as much an instrument of mutual respect and tolerance as the Fourteenth Amendment is. It applies to American citizens regardless of race, color, or creed. And as we become a more diverse nation, the Bill of Rights may become even more a lens through which we recognize ourselves. To deprive any American citizen of its protections is not a step that any court would casually take. ...

The duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict. The Founders "foresaw that troublous times would arise, when rulers and people would ... seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law." *Ex Parte Milligan* (1866). While that recognition does not dispose of this case, it does indicate one thing: The detention of United States citizens must be subject to judicial review.

It is significant, moreover, that the form of relief sought by Hamdi is a writ of habeas corpus. In war as in peace, habeas corpus provides one of the firmest bulwarks against unconstitutional detentions. ... [I]ts essential function of assuring that restraint accords with the rule of law, not the whim of authority, remains unchanged. Hamdi's petition falls squarely within the Great Writ's purview, since he is an American citizen challenging his summary detention for reasons of state necessity.

C.

As the foregoing discussion reveals, the tensions within this case are significant. Such circumstances should counsel caution on the part of any court. Given the concerns discussed in the preceding sections, any broad or categorical holdings on enemy combatant designations would be especially inappropriate. We have no occasion, for example, to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding. See, e.g., *Padilla v. Bush* (S.D.N.Y. Dec. 4, 2002). We shall, in fact, go no further in this case than the specific context before us—that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces.

The safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict. In fact, if deference to the executive is not

exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain. For there is a "well-established power of the military to exercise jurisdiction over members of the armed forces, those directly connected with such forces, [and] enemy belligerents, prisoners of war, [and] others charged with violating the laws of war." *Duncan v. Kahanamoku* (1946). As we emphasized in our prior decision, any judicial inquiry into Hamdi's status as an alleged enemy combatant in Afghanistan must reflect this deference as well as "a recognition that government has no more profound responsibility" than the protection of American citizens from further terrorist attacks.

In this regard, it is relevant that the detention of enemy combatants serves at least two vital purposes. First, detention prevents enemy combatants from rejoining the enemy and continuing to fight against America and its allies.....

Second, detention in lieu of prosecution may relieve the burden on military commanders of litigating the circumstances of a capture halfway around the globe. This burden would not be inconsiderable and would run the risk of "saddling military decision-making with the panoply of encumbrances associated with civil litigation" during a period of armed conflict. ...

The judiciary is not at liberty to eviscerate detention interests directly derived from the war powers of Articles I and II. As the nature of threats to America evolves, along with the means of carrying those threats out, the nature of enemy combatants may change also. In the face of such change, separation of powers doctrine does not deny the executive branch the essential tool of adaptability. To the contrary, the Supreme Court has said that "[i]n adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny ... lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta v. United States* (1989). If anything, separation of powers bears renewed relevance to a struggle whose unforeseeable dangers may demand significant actions to protect untold thousands of American lives.

The designation of Hamdi as an enemy combatant thus bears the closest imaginable connection to the President's constitutional responsibilities during the actual conduct of hostilities. We therefore approach this case with sensitivity to both the fundamental liberty interest asserted by Hamdi and the extraordinary breadth of warmaking authority conferred by the Constitution and invoked by Congress and the executive branch.

### III.

After the district court issued its August 16 production order, it granted respondent's motion for an interlocutory appeal of that order. The following question was certified for our review:

Whether the Mobbs Declaration, standing alone, is sufficient as a matter of law to allow a meaningful judicial review of Yaser Esam Hamdi's classification as an enemy combatant?

...

A.

18 U.S.C. § 4001 (2002) regulates the detentions of United States citizens. It states in [part]: "(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Hamdi argues that there is no congressional sanction for his incarceration and that § 4001(a) therefore prohibits his continued detention. We find this contention unpersuasive.

Even if Hamdi were right that § 4001(a) requires Congressional authorization of his detention, Congress has, in the wake of the September 11 terrorist attacks, authorized the President to "use *all necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." Authorization for Use of Military Force (Sept. 18, 2001) (emphasis added). As noted above, capturing and detaining enemy combatants is an inherent part of warfare; the "necessary and appropriate force" referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops....

B.

Hamdi and amici also contend that Article 5 of the Geneva Convention applies to Hamdi's case and requires an initial formal determination of his status as an enemy belligerent "by a competent tribunal." Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135.

This argument falters also because the Geneva Convention is not self-executing. "Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action." *Goldstar (Panama) v. United States* (4th Cir.1992). The Geneva Convention evinces no such intent. Certainly there is no explicit provision for enforcement by any form of private petition. And what discussion there is of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11 instructs them to arrange a "meeting of their representatives" with the aid of diplomats from other countries, "with a view to settling the disagreement." Geneva Convention, at art. 11. Similarly, Article 132 states that "any alleged violation of the Convention" is to be resolved by a joint transnational effort "in a manner to be decided between the interested Parties." *Id.* at art. 132; *cf. id.* at arts. 129–30 (instructing signatories to enact legislation providing for criminal sanction of "persons committing ... grave breaches of the present Convention"). We therefore agree with other courts of appeals that the language in the Geneva Convention is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries."

... This is not to say, of course, that the Geneva Convention is meaningless. Rather, its values are vindicated by diplomatic means and reciprocity, as specifically contemplated by Article 132. ...

For all these reasons, we hold that there is no purely legal barrier to Hamdi's detention. We now turn our attention to the question of whether the August 16 order [of the District Court] was proper on its own terms.

IV.

As we will discuss below, we conclude that Hamdi's petition fails as a matter of law. It follows that the government should not be compelled to produce the materials described in the district court's August 16 order.

We also note that the order, if enforced, would present formidable practical difficulties. The district court indicated that its production request might well be only an initial step in testing the factual basis of Hamdi's enemy combatant status. The court plainly did not preclude making further production demands upon the government, even suggesting that it might "bring Hamdi before [the court] to inquire about [his] statements."

Although the district court did not have "any doubts [that Hamdi] had a firearm" or that "he went to Afghanistan to be with the Taliban," the court ordered the government to submit to the court for in camera, ex parte review: (1) "[c]opies of all Hamdi's statements, and the notes taken from any interviews with Hamdi, that relate to his reasons for going to Afghanistan, his activities while in Afghanistan, or his participation in the military forces of the Taliban or any other organization in that country"; (2) "[a] list of all the interrogators who have questioned Hamdi, including their names and addresses, and the dates of the interviews"; (3) "[c]opies of any statements by members of the Northern Alliance" regarding Hamdi's surrender; (4) "[a] list that includes the date of Hamdi's capture, and that gives all the dates and locations of his subsequent detention"; (5) "[t]he name and title of the individual within the United States Government who made the determination that Hamdi was an illegal enemy combatant"; (6) "[t]he name and title of the individual within the United States Government who made the decision to move Hamdi from Guantanamo Bay, Cuba to the Norfolk Naval Station"; and (7) "the screening criteria utilized to determine the status of Hamdi." The court's order allows the government to redact "intelligence matters" from its responses, but only to the extent that those intelligence matters are outside the scope of inquiry into Hamdi's legal status.

Hamdi argues vigorously that this order should be affirmed. Because of the alleged "breadth with which Respondents construe their authority to imprison American citizens whom they consider to be enemy combatants," Hamdi argues we must allow the district court to subject the government's classification of him to a searching review.... Such an observation only begs the basic question in this case—whether further factual exploration would bring an Article III court into conflict with the war-making powers of Article I and II. Here, the specific interests asserted by the government flow directly from the war-making powers and are intimately connected to them. Whatever the general force of these interests (which we discussed extensively above), they are most directly implicated by captures in a zone of active combat operations.

A review of the court's August 16 order reveals the risk of "stand[ing] the war-making powers of Articles I and II on their heads." The district court, for example, ordered the government to produce all Hamdi's statements and notes from interviews. Yet it is precisely such statements, relating to a detainee's activities in Afghanistan, that may contain the most sensitive and the most valuable information for our forces in the field. The risk created by this order is that judicial involvement would proceed, increment by increment, into an area where the political branches have been assigned by law a preeminent role.

The district court further ordered the government to produce a list of all interrogators who have questioned Hamdi, including their names and addresses and the dates of the interviews, copies of any statements by members of the Northern Alliance regarding Hamdi's surrender, and a list that includes the date of Hamdi's capture and all the dates and locations of his subsequent detention. Once again, however, litigation cannot be the driving force in effectuating and recording wartime detentions. The military has been charged by Congress and the executive with winning a war, not prevailing in a possible court case. Complicating the matter even further is the fact that Hamdi was originally captured by Northern Alliance forces, with whom American forces were generally allied. The district court's insistence that statements by Northern Alliance members be produced cannot help but place a strain on multilateral efforts during wartime. The court also expressed concern in its order that the Northern Alliance did not "identify the unit [to which Hamdi was affiliated]," "where or by whom [Hamdi] received weapons training or the nature and extent thereof," or "who commanded the unit or the type of garb or uniform Hamdi may have worn...." In demanding such detail, the district court would have the United States military instruct not only its own personnel, but also its allies, on precise observations they must make and record during a battlefield capture.

Viewed in their totality, the implications of the district court's August 16 production order could not be more serious. The factual inquiry upon which Hamdi would lead us, if it did not entail disclosure of sensitive intelligence, might require an excavation of facts buried under the rubble of war. The cost of such an inquiry in terms of the efficiency and morale of American forces cannot be disregarded. Some of those with knowledge of Hamdi's detention may have been slain or injured in battle. Others might have to be diverted from active and ongoing military duties of their own. The logistical effort to acquire evidence from far away battle zones might be substantial. And these efforts would profoundly unsettle the constitutional balance.

For the foregoing reasons, the court's August 16 production request cannot stand.

V....

B....

1. ... As we have emphasized throughout these appeals, we cannot set aside executive decisions to detain enemy combatants "without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Quirin*. We cannot stress too often the constitutional implications presented on the face of Hamdi's petition. The constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels courts to assume a deferential posture in reviewing exercises of this authority. And, while the Constitution assigns courts the duty generally to review executive detentions that are alleged to be illegal, the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally.

Indeed, Article III courts are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not. Any evaluation of the accuracy of the executive branch's determination that a person is an enemy combatant, for example, would require courts to consider, first, what activities the detainee was engaged in during the period leading up to his seizure and, second, whether those activities rendered him a combatant or not. The first question is factual and, were we called upon to delve into it, would



likely entail substantial efforts to acquire evidence from distant battle zones. The second question may require fine judgments about whether a particular activity is linked to the war efforts of a hostile power—judgments the executive branch is most competent to make.

Hamdi's petition places him squarely within the zone of active combat and assures that he is indeed being held in accordance with the Constitution and Congressional authorization for use of military force in the wake of al Qaida's attack. *Quirin*. Any effort to ascertain the facts concerning the petitioner's conduct while amongst the nation's enemies would entail an unacceptable risk of obstructing war efforts authorized by Congress and undertaken by the executive branch.

2. Hamdi contends that, although international law and the laws of this country might generally allow for the detention of an individual captured on the battlefield, these laws must vary in his case because he is an American citizen now detained on American soil. As an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime. But as we have previously pointed out, Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to the well-established laws and customs of war. Hamdi's citizenship rightfully entitles him to file this petition to challenge his detention, but the fact that he is a citizen does not affect the legality of his detention as an enemy combatant. ...

The *Quirin* principle applies here. One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such. The privilege of citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there. ...

4. ... To conclude, we hold that, despite his status as an American citizen currently detained on American soil, Hamdi is not entitled to challenge the facts presented in the Mobbs declaration. Where, as here, a habeas petitioner has been designated an enemy combatant and it is undisputed that he was captured in a zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention. Because these circumstances are present here, Hamdi is not entitled to habeas relief on this basis.

C.

Finally, we address Hamdi's contention that even if his detention was at one time lawful, it is no longer so because the relevant hostilities have reached an end. In his brief, Hamdi alleges that the government "confuses the international armed conflict that allegedly authorized Hamdi's detention in the first place with an on-going fight against individuals whom Respondents refuse to recognize as 'belligerents' under international law." Whether the timing of a cessation of hostilities is justiciable is far from clear.... The executive branch is ... in the best position to appraise the status of a conflict, and the cessation of hostilities would seem no less a matter of political competence than the initiation of them.... In any case, we need not reach this issue here. The government notes that American troops are still on the ground in Afghanistan....

VI.

... The nation has fought since its founding for liberty without which security rings hollow and for security without which liberty cannot thrive. The judiciary was meant to respect the delicacy of the balance, and we have endeavored to do so.

The events of September 11 have left their indelible mark. It is not wrong even in the dry annals of judicial opinion to mourn those who lost their lives that terrible day. Yet we speak in the end not from sorrow or anger, but from the conviction that separation of powers takes on special significance when the nation itself comes under attack. Hamdi's status as a citizen, as important as that is, cannot displace our constitutional order or the place of the courts within the Framers' scheme. Judicial review does not disappear during wartime, but the review of battlefield captures in overseas conflicts is a highly deferential one. That is why, for reasons stated, the judgment must be reversed and the petition dismissed. It is so ordered.

### Editor's Notes

(1) **Query:** Despite the "tensions" manifest in, and acknowledged by, the court's opinion in this case, there is no dissent. In the interest of intellectual balance, we pose the following challenge:

The court's decision turns on an "undisputed fact": that Hamdi was captured by forces allied with the United States in Afghanistan during a time of active military hostilities. Because of this "fact," says the court, the principle of *Ex Parte Quirin* (1942) applies, and that principle, as stated by the *Hamdi* court is: "One who takes up arms against the United States in a foreign theatre of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such." Yet the court maintains that the Constitution, rightly understood, precludes judicial review of whether Hamdi had actually "tak[en] up arms against the United States." If mere "capture" in a theatre of military hostilities means judicial deference to military designation as "enemy combatant," then what is to prevent capture and detention of journalists and other civilians in a theatre of war? And if Hamdi, as a citizen, has the right to petition for a writ of habeas corpus, what good is that right if a court constitutionally cannot inquire into whether he had indeed "tak[en] up arms against the United States"?

How would you advise Judge Wilkinson to answer this challenge?

(2) By all accounts, Judge Wilkinson and his colleagues give respectable, though perhaps not compelling, reasons why courts are in a poor position to review battlefield decisions. This fact may seem to reinforce the Latin maxim "*inter arma silent leges*"—in time of war, the law is silent. See William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Knopf, 1998). But Wilkinson and company suggest a different view. They do not agree that restraining courts necessarily means silencing the Constitution. They suggest just the opposite: that silencing courts in situations like this is the best way to let the Constitution speak. They suggest this when they say that their decision honors a right that is "no less a right" than the individual rights at stake in this case. This additional right, unlike the right Hamdi claims, is a *positive* right—a right not *against* the government but *to* something good that comes through the agency of government: the people's right to pursue *national defense* in time of war. The court then proceeds to reconcile (some critics would say sacrifice) Hamdi's *negative* rights—his claimed exemptions *from* the war powers of the government—to this collective right of the nation's people to pursue national defense. **Query:** What does this suggest about the *Hamdi* court's answer to the question WHAT is the Constitution? If Hamdi's constitutional rights are shaped by the people's *constitutional* right to national defense, as Wilkinson and his colleagues apparently hold, then can the Constitution be the mere charter of *negative* liberties that Chief Justice Rehnquist describes in *DeShaney v. Winnebago* (1989; reprinted below, p. 1513)? Or is the Constitution also a charter of *positive* benefits, like the "common defence"? And if the "common defence," why not also "the general Welfare"? See Sotirios A. Barber, *Welfare and the Constitution* (Princeton: Princeton University Press, 2003), esp. chaps. 2,3.

(3) When the Fourth Circuit en banc voted to affirm the three-judge panel in *Hamdi*, one dissenting judge said this was the first time in American history that a federal court had approved denying a citizen constitutional protection solely because the executive had designated him an enemy combatant and "without testing the accuracy of the designation." *N.Y. Times*, July 10, 2003, A17. The Supreme Court reversed this situation in *Hamdi II*, reprinted in the casebook, p \_\_\_\_\_.