

courts. And, in *Johnson v. Eisentrager*,⁴⁷⁸ the Court overruled a lower court decision that, in reliance upon the dissenting opinion in *Yamashita*, had held that the Due Process Clause required that the legality of the conviction of enemy alien belligerents by military tribunals should be tested by the writ of *habeas corpus*.

Failure of the Executive Branch to provide for any type of proceeding for prisoners alleged to be “enemy combatants,” whether in a military tribunal or a federal court, was at issue in *Hamdi v. Rumsfeld*.⁴⁷⁹ During a military action in Afghanistan,⁴⁸⁰ a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had authority to hold such an “enemy combatant” while providing him with limited recourse to the federal courts. The Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan.⁴⁸¹ However, the Court ruled that the government may not detain the petitioner indefinitely for purposes of interrogation, but must give him the opportunity to offer evidence that he is not an enemy combatant. At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision-maker, and must be allowed to consult an attorney.⁴⁸²

Without dissent, in *Hiatt v. Brown*,⁴⁸³ the Court reversed the judgment of a lower court that had discharged a prisoner serving a sentence imposed by a court-martial because of errors that had deprived the prisoner of due process of law. The Court held that the

⁴⁷⁸ 339 U.S. 763 (1950). Justices Douglas, Black, and Burton dissented.

⁴⁷⁹ 542 U.S. 507 (2004).

⁴⁸⁰ In response to the September 11, 2001 terrorist attacks on New York City’s World Trade Center and the Pentagon in Washington, D.C., Congress passed the “Authorization for Use of Military Force,” Pub. L. 107–40, which served as the basis for military action against the Taliban government of Afghanistan and the al Qaeda forces that were harbored there.

⁴⁸¹ There was no opinion of the Court in *Hamdi*. Rather, a plurality opinion, authored by Justice O’Connor (joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer) relied on the “Authorization for Use of Military Force” passed by Congress to support the detention. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, but he based his conclusion on Article II of the Constitution.

⁴⁸² 542 U.S. at 533, 539 (2004). Although only a plurality of the Court voted for both continued detention of the petitioner and for providing these due process rights, four other Justices would have extended due process at least this far. Justice Souter, joined by Justice Ginsberg, while rejecting the argument that Congress had authorized such detention, agreed with the plurality as to the requirement of providing minimal due process. *Id.* at 553 (concurring in part, dissenting in part, and concurring in judgement). Justice Scalia, joined by Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of *habeas corpus*, and thus would have required a criminal prosecution of the petitioner. *Id.* at 554 (dissenting).

⁴⁸³ 339 U.S. 103 (1950).