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## Rasul v. Bush: Unanswered Questions

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# RASUL V. BUSH: UNANSWERED QUESTIONS

Randolph N. Jonakait\*

## INTRODUCTION

Of the three recent Supreme Court cases concerning enemy combatants, *Hamdi v. Rumsfeld*,<sup>1</sup> *Rasul v. Bush*,<sup>2</sup> and *Rumsfeld v. Padilla*,<sup>3</sup> *Rasul* is the case that will affect the most people and most affect future governmental operations. *Hamdi* and *Padilla* concern citizens who have been classified as enemy combatants by President Bush. Those cases consider important procedural and constitutional issues but leave much to be decided by future courts. Those issues are significant and worthy of debate,<sup>4</sup> but in a practical sense, the reach of the two decisions will be limited. As far as we know, only two citizens have been detained as enemy combatants, and it is doubtful that legions of citizens will be incarcerated as enemy combatants in the future. While the issues in those two cases, both addressed and unanswered, are important, not many people will be directly affected by their resolution.

*Rasul*, on the other hand, concluded that American courts have jurisdiction to decide habeas corpus petitions from aliens detained at the U.S. naval base at Guantanamo Bay, Cuba.<sup>5</sup> This decision has an immediate, significant impact because it affects the hundreds of aliens detained at Guantanamo Bay, but its potential reach is much broader. *Rasul*'s reasoning seems to allow anyone, alien or citizen,

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<sup>1</sup> 124 S. Ct. 2633 (2004).

<sup>2</sup> 124 S. Ct. 2686 (2004).

<sup>3</sup> 124 S. Ct. 2711 (2004).

<sup>4</sup> *Hamdi*, without a majority opinion, indicates that a citizen who has actively taken up arms against the United States can be held as an enemy combatant but is entitled to due process in the designation process. The plurality suggested what might be labeled "innovative forms of due process" that could satisfy the Constitution, but it left to lower courts the task of finding what procedures will actually satisfy due process. See *infra* Part II.A.

*Padilla* dismissed the habeas petition because the petitioner named the wrong respondents and filed it in the wrong district court. Because of this dismissal, the Court did not have to address how the executive branch must treat a citizen like Padilla who it labels an enemy combatant, and who was not captured while armed in a zone of battle, but arrested in the United States. Courts will have to confront this issue if the petition is properly re-filed. See *infra* Part II.E.

<sup>5</sup> *Rasul*, 124 S. Ct. 2686.

detained by the United States to challenge the legality of his detention by a habeas corpus petition in American courts. If so, not only are many people affected now, many others who might be detained by the United States as a result of military or other governmental actions will be affected in the future.

Whether *Rasul* really grants this broad right to habeas corpus is a question that lower courts will have to address, but there are many other issues about the possible substance of habeas corpus claims from aliens detained as enemy combatants that lower courts will also have to confront. *Rasul* did not address these issues, but they present crucial and difficult questions. Constitutional doctrine states that aliens outside American territories do not have rights under the U.S. Constitution. What valid grounds, if any, then, are there for enemy-combatant aliens abroad to claim that their detentions by the United States are illegal?

This Article will explore various questions not answered by *Rasul*. Answers, however, will be few because many of those questions have seldom, if ever, been presented to the courts. Instead, the real legacy of *Rasul* may be an opened door into uncharted legal areas.

Part I of this Article discusses federal court jurisdiction of habeas corpus petitions from aliens detained abroad as enemy combatants. While *Rasul* could have limited habeas jurisdiction to aliens detained on Guantanamo Bay because the naval base there is, in essence, U.S. territory, the Court's decision went further and grants jurisdiction to aliens held by the United States anywhere in the world.

Part II discusses the question of what substantive claims aliens can make in their habeas petitions. Because aliens not in the United States generally do not have rights under the U.S. Constitution, possible claims are not clear and will raise difficult issues that have not been squarely addressed by the courts.

## I. JURISDICTION OF THE HABEAS PETITIONS

### A. Background

Shortly after the al Qaeda attacks of September 11, 2001, Congress passed a joint resolution, "Authorization for Use of Military Force."<sup>6</sup> Its operative language states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any

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<sup>6</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

future acts of international terrorism against the United States by such nations, organizations or persons.<sup>7</sup>

Subsequently, President Bush sent U.S. military forces into Afghanistan for a campaign against al Qaeda and the Taliban, which controlled that country and supported the terrorist group.

During that military action, U.S. forces took into custody over 600 people who were transferred to and incarcerated at the U.S. naval base at Guantanamo Bay, Cuba. Fourteen of those prisoners, two Australian and a dozen Kuwaiti citizens, held since early in 2002 and claiming that they had not taken part in hostilities against the United States, brought actions in the U.S. District Court for the District of Columbia challenging the legality of their detention at Guantanamo.<sup>8</sup> The district court construed all the actions as petitions for writs of habeas corpus but, relying on *Johnson v. Eisentrager*,<sup>9</sup> dismissed them for want of jurisdiction.<sup>10</sup> The U.S. Court of Appeals for the District of Columbia Circuit, also relying on *Eisentrager*, affirmed the dismissals.<sup>11</sup> The Supreme Court, in *Rasul v. Bush*,<sup>12</sup> reversed and remanded to the district court for consideration of the legality of the petitioners' detentions.

### B. *Johnson v. Eisentrager*<sup>13</sup>

*Johnson v. Eisentrager*, decided in the aftermath of World War II, considered the habeas corpus petitions of twenty-one German nationals that had been filed in the District Court for the District of Columbia.<sup>14</sup> Military tribunals had convicted the petitioners of violating the laws of war by continuing military activities against the United States in China after Germany had unconditionally surrendered.<sup>15</sup> The trials were held in China, and the resulting sentences were approved by a military reviewing authority. The petitioners were then brought to Germany to serve their sentences in the Landsberg Prison.<sup>16</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom.*, *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd*, 124 S. Ct. 2686 (2004).

<sup>9</sup> 339 U.S. 763 (1950).

<sup>10</sup> *Rasul*, 215 F. Supp. 2d at 55.

<sup>11</sup> 321 F.3d 1134 (D.C. Cir. 2003).

<sup>12</sup> 124 S. Ct. 2686 (2004).

<sup>13</sup> 339 U.S. 763 (1950).

<sup>14</sup> *Id.* at 765.

<sup>15</sup> *Id.* at 766.

<sup>16</sup> *Id.*

The Court held that the petitioners did not have a constitutional right to have a U.S. court consider their habeas petitions.<sup>17</sup> *Eisentrager* noted the rights of an alien increased “as he increases his identity with our society.”<sup>18</sup> These rights, however, are dependent upon the alien being present in American territory. “In extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.”<sup>19</sup> The petitioners did not have the requisite presence in America to give them constitutional rights. “These prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.”<sup>20</sup> Consequently, they did not have a constitutional right to have American courts consider their habeas petitions.

In contrast, *Rasul v. Bush* held that American courts must consider the habeas corpus petitions of the aliens detained as enemy combatants in Guantanamo Bay.<sup>21</sup> *Rasul* gave a number of different reasons why *Eisentrager* did not control its outcome. The true reason for the decision is significant, however, because the extent of habeas corpus jurisdiction depends on which rationale controls.<sup>22</sup>

### C. Limiting *Eisentrager* to Its Facts

Perhaps *Rasul* limited *Eisentrager* to its facts. *Eisentrager* stated:

To support that assumption [of a constitutional right to habeas jurisdiction] we must hold that a prisoner of our military

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<sup>17</sup> See *id.* at 777 (noting the petitioners’ “basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus”).

<sup>18</sup> *Id.* at 770.

<sup>19</sup> *Id.* at 771.

<sup>20</sup> *Id.* at 778. In distinguishing another decision coming out of World War II, *In re Yamashita*, 327 U.S. 1 (1946), where the Court did adjudicate a habeas petition, *Eisentrager* stressed that the petitioners had an American presence. Yamashita, a Japanese general, was convicted of war crimes by a military tribunal in the Philippines for actions committed there. The United States then had sovereign control over that land, and *Eisentrager* stated:

By reason of our sovereignty at that time over these insular possessions . . . Yamashita’s offenses were committed on our territory, he was tried within the jurisdiction of our insular courts and he was imprisoned within territory of the United States. None of these heads of jurisdiction can be invoked by these prisoners.

*Id.* at 780.

<sup>21</sup> *Rasul*, 124 S. Ct. 2686.

<sup>22</sup> See *infra* Parts I.C–F.

authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; . . . (f) and is at all times imprisoned outside the United States.<sup>23</sup>

*Rasul*, citing this passage, stated, “On this set of facts, [*Eisentrager*] concluded, ‘no right to the writ of *habeas corpus* appears.’”<sup>24</sup>

Of course, if all those facts have to be present for *Eisentrager* to control and for courts not to have jurisdiction of habeas petitions from aliens abroad, the reach of that case is small, for seldom would those six factors be conjoined. *Rasul*, however, did not explicitly limit the previous case to those facts, but did stress how the Guantanamo detainees differed from the earlier petitioners:

They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.<sup>25</sup>

Some of these distinguishing factors’ importance to habeas jurisdiction is not obvious. Whether the detainees had access to a tribunal or were charged seem to be issues related to the substance of a habeas petition; that is, whether rights were abrogated, not whether a court has the authority to consider whether rights were violated. Thus, if a court has jurisdiction, it might consider whether detainees had access to lawful tribunals to litigate their claims to determine whether their detention is legal, but that issue does not seem to affect whether the court had jurisdiction in the first place. If it does make a jurisdictional difference, *Rasul* does

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<sup>23</sup> 339 U.S. at 777.

<sup>24</sup> 124 S. Ct. 2686, 2693 (2004) (quoting *Eisentrager*, 339 U.S. at 781). *Rasul*, at this point, plays fast and loose with the earlier case. Nowhere does *Eisentrager* suggest that these were *the* six crucial facts of its decision, if by crucial facts it means that the conjunction of all six were necessary for its decision. Instead, more fairly read, *Eisentrager* concluded that existing precedents denied aliens without a presence in the United States the right to seek habeas corpus in American courts. 339 U.S. at 763. The Court listed the factors to illustrate how unusual it would have been to ignore or overrule those precedents to grant these particular petitioners access to the courts. *See id.*

<sup>25</sup> 124 S. Ct. at 2693.

not explain why. Similarly, whether or not the detainees deny being enemy combatants might say something about whether their classification as enemy combatants is correct, but this fact does not appear to be an issue that affects whether the judiciary can hear claims of their detention's illegality. Once again, if it does, the Court did not explain why.

On the other hand, whether or not a detainee is a national of a country at war with the United States might seem to be a distinction that could affect jurisdiction. Perhaps aliens from hostile countries should not be granted as many rights in U.S. courts as other aliens. But *Rasul* does not really seem to intend for this distinction to have significance. Elsewhere, Justice Stevens's opinion for the Court stresses that the habeas statute makes no distinction between aliens and citizens.<sup>26</sup> That statute also draws no distinction between aliens from hostile countries and aliens from non-hostile countries. If that statutory language indicates that courts should not treat citizens and aliens differently for jurisdictional issues, then it also indicates that a court should not draw distinctions among aliens for jurisdictional purposes.

Furthermore, if only nationals of hostile countries were barred from seeking habeas corpus, it would not prevent anyone detained as an enemy combatant in our Afghanistan action from having access to the courts. We were not fighting a country, but al Qaeda and its supporter, the Taliban. The United States, like most of the world, did not recognize the Taliban as the legitimate government of Afghanistan.<sup>27</sup> A detainee could be a national of Afghanistan, but a person could not be a "national" of the Taliban or of al Qaeda. No one detained because of the Afghanistan action is a national of a country at war with the United States.<sup>28</sup>

Indeed, the courts are not independently able to determine who the "enemy" is in the military actions authorized in the wake of September 11. The operative language of the joint resolution authorizes "force against those nations, organizations or persons," that the president determines were involved in the 2001 attacks.<sup>29</sup> This

<sup>26</sup> See *infra* Part I.E.

<sup>27</sup> See Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648, 693 (2002) ("[T]he Taliban regime was refused diplomatic recognition by most of the international community, including the United States, as well as denied a seat in the United Nations. It was, however, accredited by the governments of Pakistan, the United Arab Emirates, and Saudi Arabia.").

<sup>28</sup> See JENNIFER ELSEA, CONG. RESEARCH SERV., REPORT FOR CONGRESS: TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 4 (2001) ("Because the current state of hostilities does not involve an enemy foreign state as such, the status of an alien as an 'enemy alien' cannot be determined according to citizenship."), available at <http://fpc.state.gov/documents/organization/7951.pdf>; see also 50 U.S.C. § 21 (2000) (defining "enemy aliens" as "all natives, citizens, denizens, or subjects of the hostile nation or government . . . who shall be within the United States and not actually naturalized").

<sup>29</sup> Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 115 Stat. 224, 224 (2001).

authorization did not define the enemy. It simply ceded the determination of the foe to the president.<sup>30</sup> The enemy is anyone the President determines to have been involved in the September 11 attacks and those who supported the attackers. While that seems to include al Qaeda, it is not limited to that group. It includes the Taliban, a non-national group that harbored al Qaeda, but it could also include many more nations, organizations, or individuals that the public, and the judiciary, do not know about. The foes do not have to be publicly announced; indeed, we can expect the president to authorize clandestine operations based on information not available to the rest of us. The identity of the enemy is changeable and simply not known outside the executive branch, and thus whether an alien is a national of a country at war with us cannot be a useful factor for determining habeas corpus jurisdiction for those detained at Guantanamo or elsewhere in the wake of September 11.<sup>31</sup>

While most of the factors that *Rasul* listed to distinguish *Eisenrager* do not seem as if they could affect jurisdiction, the last factor listed, the special status of Guantanamo Bay, could.

#### *D. The Special Status of Guantanamo Bay*

The United States occupies Guantanamo Bay under a 1903 lease with Cuba that remains in effect as long as the United States maintains a naval base there, which

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<sup>30</sup> John Ely noted that congressional authorizations for war may not have to take a specific form, but that the congressional action must

ordinarily be specific in terms of who it is we're prepared to go to war against — that is, that it not be a wholesale delegation of authority to the president to make war against whomever he regards as a suitable foe. Unlike most of the provisions of Article I, section 8, the War Clause speaks of a “declaration” — signaling a specific designation — not in terms that comfortably encompass a grant of general legislative discretion to the executive. . . . Whatever historical variation there may have been in declarations of war, “Go to war against whomever you want” would not have counted. The War Clause means only two things, but they are something: that Congress is to decide whether we go to war, *and* whom we go to war against.

JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 26 (1993).

<sup>31</sup> Of course, when a president initiates an undeclared war, Congress has not decided against whom we are battling. But at least when such a war is openly carried out, we have a good idea of the foe's identity. When we invaded Iraq, an enemy was one fighting for the Iraqi regime. When we invaded Grenada, an enemy was one fighting for the Grenadian regime. The military action in response to September 11, even as authorized by Congress, is different. Cf. Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1033 (2004) (“[A]nybody can be suspected of complicity with al Qaeda. This means that all of us are, in principle, subject to executive detention once we treat the ‘war on terrorism’ as if it were the legal equivalent of [World War II].”).



means in perpetuity if the United States so desires. The lease recognizes the “ultimate sovereignty” of Cuba over the land but also grants the United States “complete jurisdiction and control over and within” the area.<sup>32</sup> *Rasul* stated:

Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within “the territorial jurisdiction” of the United States. By the express terms of its agreements 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.<sup>33</sup>

If federal courts have jurisdiction over the habeas petitions because Guantanamo is virtually American territory where aliens have the same rights as they do in the United States, habeas corpus petitions should also be allowed from anyone held in American custody wherever the United States has complete jurisdiction and control over territory that is not formally American. Lower courts would then have to decide where, besides Guantanamo Bay, we have the qualifying “complete jurisdiction and control” that justifies habeas jurisdiction.

While *Rasul* clearly indicates that the necessary status can come from a formal document that specifies it, as the lease with Cuba does, other questions will arise. Can a foreign country grant the United States such status through other terms? If so, what terms? Does such status have to be formally given by another country, or can it occur by other means? Perhaps most important, can military action produce such status? Certainly de facto it has, as Justice Scalia’s dissenting opinion in *Rasul*, joined in by Chief Justice Rehnquist and Justice Thomas, pointed out. Scalia concluded that the American status in Guantanamo “is no different in effect from ‘jurisdiction and control’ acquired by lawful force of arms, [and] parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws.”<sup>34</sup> Lower courts will have to determine if military control over foreign territory is the equivalent of Guantanamo’s status — a decision courts seem ill-equipped to make — if that status was the determining factor in giving courts habeas corpus jurisdiction. Courts, however, may be freed from these determinations because *Rasul* also indicates that the special status of Guantanamo Bay was

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<sup>32</sup> *Rasul*, 124 S. Ct. at 2690–91 (quoting Lease of Lands for Coaling and Naval Stations, Feb. 16–23, 1903, U.S.-Cuba, art. III, T.S. No. 418).

<sup>33</sup> *Id.* at 2696 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); Lease of Lands for Coaling and Naval Stations, *supra* note 32, at art. III) (citation omitted).

<sup>34</sup> *Id.* at 2708 (Scalia, J., dissenting).

not the determining factor for finding that American courts had jurisdiction over the habeas corpus petitions from the aliens detained at the base.<sup>35</sup>

*E. Treating Aliens and Citizens the Same for Habeas Jurisdiction*

Immediately after stressing the extraordinary terms of the Guantanamo lease, Justice Stevens's opinion noted that the President had conceded that American courts had habeas jurisdiction over citizens held at Guantanamo.<sup>36</sup> The Court continued:

Considering that the [habeas] statute [(28 U.S.C. § 2241)] draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.<sup>37</sup>

The conclusion that the statute makes no jurisdictional distinction between citizens and aliens, and therefore aliens are entitled to have their habeas claims heard if comparably situated citizens have that right, is a non sequitur to the discussion of the special status of Guantanamo Bay. The Court has never held that a citizen in American custody abroad is entitled to habeas relief only if the place of confinement is controlled by the United States in the same manner that the United States controls Guantanamo Bay. Indeed, the Court has granted habeas corpus relief to a citizen held in American custody outside U.S. territory without considering whether the United States had complete jurisdiction and control over the place where the citizen was detained.<sup>38</sup> If *Rasul* held that there is federal court jurisdiction over an alien's habeas claim whenever a citizen in custody in like circumstances is entitled to federal court access, then the crucial question is not whether the United States has complete control over the place of detention but simply whether a citizen could seek habeas relief in the alien's circumstances.<sup>39</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 2696 ("Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base.").

<sup>37</sup> *Id.* (footnote omitted).

<sup>38</sup> See *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (granting habeas corpus relief to a court-martial convict held in Korea).

<sup>39</sup> Justice Scalia, dissenting, concluded that the portion of the Court's opinion "dealing with the status of Guantanamo Bay[]" is a puzzlement. . . . [T]he status of Guantanamo Bay is entirely irrelevant to the issue here." 124 S. Ct. at 2707 (Scalia, J., dissenting). Justice Scalia observed that the Court had already concluded that habeas corpus could be extended

Finally, *Rasul* indicated that *Eisentrager* did not control, not because of the status of Guantanamo, but because interpretation of the habeas corpus statute had changed since the World War II era.<sup>40</sup>

#### F. Constitutional Versus Statutory Habeas Corpus Jurisdiction

*Rasul* stressed that *Eisentrager*, while concluding that the detainees had no constitutional right to a habeas corpus petition, said nothing about the statutory right to the writ other than to conclude that the habeas statute did not grant the detainees a right to petition.<sup>41</sup> The statute did not then authorize jurisdiction, according to *Rasul*, because of the Court's earlier decision in *Ahrens v. Clark*.<sup>42</sup> In *Ahrens*, detainees on Ellis Island had filed habeas petitions in the U.S. District Court for the District of Columbia. The Supreme Court held that the district court did not have jurisdiction.<sup>43</sup> *Rasul* summarized: "Reading the phrase 'within their respective jurisdictions' as used in the habeas statute to require the petitioners' presence within the district court's territorial jurisdiction, the Court [in *Ahrens*] held that the District of Columbia court lacked jurisdiction to entertain the detainees' claims."<sup>44</sup> The *Eisentrager* petitioners were situated much like those in *Ahrens*. Their custody was not within the territorial jurisdiction of the U.S. District Court for the District of Columbia where the habeas corpus petitions were filed, and thus, that court did not have jurisdiction under the habeas statute. Consequently, *Eisentrager* concluded that the district court only had jurisdiction if the detainees had a constitutional right to the writ, but *Eisentrager* held that they did not.<sup>45</sup>

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to citizens abroad and still denied to aliens abroad: "The position that United States citizens throughout the world may be entitled to habeas corpus rights [] is precisely the position that this Court adopted in *Eisentrager*, even while holding that aliens abroad *did not have* habeas corpus rights." *Id.* at 2708 (citation omitted). Justice Stevens, writing for the Court, noted that "Justice Scalia appears to agree that neither the plain text of the [habeas] statute nor his interpretation of that text provides a basis for treating American citizens differently from aliens." *Id.* at 2696 n.10 (emphasis omitted).

<sup>40</sup> *Id.* at 2695.

<sup>41</sup> *Rasul* noted that *Eisentrager* thoroughly discussed the constitutional right to the writ and continued that *Eisentrager* "had far less to say on the questions of the petitioners' statutory entitlement to habeas review. Its only statement on the subject was a passing reference to the absence of statutory authorization: 'Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.'" *Id.* at 2694 (quoting 339 U.S. 763, 768 (1950)).

<sup>42</sup> 335 U.S. 188 (1948).

<sup>43</sup> *Id.* at 193.

<sup>44</sup> 124 S. Ct. at 2694.

<sup>45</sup> *Eisentrager*, 339 U.S. at 777.

Subsequent to *Eisentrager*, however, the Court interpreted the habeas statute differently. *Braden v. 30th Judicial Circuit Court*<sup>46</sup> held that a district court could have habeas jurisdiction even when the prisoner was not present in the court's jurisdiction. *Rasul* summarized *Braden*'s holding:

[C]ontrary to *Ahrens*, . . . the prisoner's presence within the territorial jurisdiction . . . is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because the "writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of § 2241 as long as "the custodian can be reached by service of process."<sup>47</sup>

Thus, even if aliens abroad do not have a constitutional right to habeas corpus, the statute as now interpreted gives them a right to petition for habeas relief. Ultimately, *Rasul*'s analysis indicates that the crucial question is not the status of the foreign territory where alien detainees are held, but whether the district court has jurisdiction over their custodians. The preliminary issue of jurisdiction is easily resolved, as *Rasul* indicated when it concluded that the U.S. District Court for the District of Columbia had jurisdiction over the habeas claims: "Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more."<sup>48</sup>

If this is all that is necessary for habeas jurisdiction, then the nationality of a person held as an enemy combatant does not matter, nor does the place of confinement. The Court's discussion of the Guantanamo Bay lease was unnecessary, as was the discussion of how the facts of *Eisentrager* and *Rasul* differed.<sup>49</sup> A person

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<sup>46</sup> 410 U.S. 484 (1973).

<sup>47</sup> 124 S. Ct. at 2695 (quoting *Braden*, 410 U.S. at 494–95) (alterations in original). *Rasul* continued: "*Braden* thus established that *Ahrens* can no longer be viewed as establishing 'an inflexible jurisdictional rule,' and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all." *Id.* (quoting *Braden*, 410 U.S. at 499–500).

<sup>48</sup> *Id.* at 2698 (citations omitted).

<sup>49</sup> Justice Kennedy, concurring in *Rasul*, distinguished *Eisentrager*. *Id.* at 2699–2701 (Kennedy, J., concurring). He first stressed that for practical purposes Guantanamo "belongs" to the United States. *Id.* at 2700. He also noted the *Eisentrager* petitioners were tried and convicted by military tribunals, but that the indefinite detention of the *Rasul* petitioners "suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus." *Id.* Justice Kennedy concluded:

In light of the status of Guantanamo Bay and the indefinite pretrial

held anywhere by the United States as an enemy combatant can challenge the legality of his detention<sup>50</sup> as long as the district court where the habeas petition is filed has jurisdiction over the detainee's custodian or over a supervisory official of that custodian.<sup>51</sup> In other words, after *Rasul*, all individuals detained as enemy combatants have the right of habeas corpus to challenge the legality of their incarceration.<sup>52</sup>

But while the geographical site of the detention may not matter in determining whether federal courts have jurisdiction to consider a petition for a writ of habeas corpus,<sup>53</sup> geography still may be important. It may affect the substance of the claims a detainee can bring.

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detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases. This approach would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the reasoning of *Eisentrager*.

*Id.* at 2701.

<sup>50</sup> *Cf. id.* at 2706 (Scalia, J., dissenting) ("Today's opinion . . . extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts.").

<sup>51</sup> In *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), decided the same day as *Rasul*, the Court noted that citizens held abroad are entitled to seek habeas corpus relief. "In such cases, we have allowed the petitioner to name as respondent a supervisory official and file the petition in the district where the respondent resides." *Id.* at 2725 n.16. Because *Rasul* concludes that for jurisdictional purposes the habeas statute treats aliens and citizens alike, aliens, too, should be able to name supervisory officials as respondents and file petitions in the districts where the officials reside. *See Rasul*, 124 S. Ct. 2686 (2004).

<sup>52</sup> In concluding, however, the *Rasul* opinion stressed that the Court was deciding a limited issue:

What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims.

*Id.* at 2699.

<sup>53</sup> Geography does not bar detainees from obtaining relief in the Supreme Court of Israel. The President of the Supreme Court of Israel gave the following description of the scope of the court's jurisdiction:

Our Supreme Court — which in Israel serves as the court of first instance for complaints against the executive branch — opens its doors to anyone with a complaint about the activities of a public authority. Even if the terrorist activities occur outside Israel or the terrorists are being detained outside Israel, we recognize our authority to hear the issue.

Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 153 (2002).

## II. SUBSTANTIVE CLAIMS OF HABEAS PETITIONS

### A. Constitutional Rights of Aliens

The site of the detention abroad may still matter for a habeas corpus petition because aliens not present in American territories generally do not have rights under the U.S. Constitution.<sup>54</sup> Aliens are entitled to constitutional protections only if they have had a presence in the United States.<sup>55</sup>

An issue still to be decided is whether Guantanamo Bay should be treated as American territory for the purposes of constitutional rights. *Rasul*'s discussion of Guantanamo's special status seems to imply, without explicitly stating, that position.<sup>56</sup> If constitutional rights do apply there because it is the equivalent of American territory, then aliens detained there are entitled to constitutional protections, including the right of due process. Because the Fifth Amendment's Due

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<sup>54</sup> See Torruella, *supra* note 27, at 677 n.173 ("Outside of the United States, non-U.S. citizens have few, if any, rights under the U.S. constitution."); cf. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").

<sup>55</sup> See *supra* notes 18–19 and accompanying text; see also *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893).

[A]liens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility.

*Id.* An alien, even one here illegally, can be punished for a crime only if he has been afforded the protections of the Fifth and Sixth Amendments. *Wong Wing v. United States*, 163 U.S. 228 (1896); cf. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that aliens are entitled to equal protection of the laws). An alien, even one here illegally, can be expelled or deported from the country only after having been afforded due process. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."); accord *The Japanese Immigrant Case*, 189 U.S. 86, 100–01 (1903). A foreign corporation can have its property situated in the United States seized by the government only if the government complies with the Fifth Amendment. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) ("The [Russian Corporation] was an alien friend, and as such was entitled to the protection of the Fifth Amendment. Exerting by its authorized agent the power of eminent domain in taking the [corporation's] property, the United States became bound to pay just compensation.") (citations omitted).

<sup>56</sup> Justice Kennedy, concurring, seemed to make that point when he concluded: "From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Rasul*, 124 S. Ct at 2700 (citing *Eisenrager*, 339 U.S. 763, 777–78 (1950)).

Process Clause makes no distinction between citizens and aliens,<sup>57</sup> alien detainees should be entitled to the same due process as citizens held at Guantanamo.<sup>58</sup>

The process due, however, is not clear in light of *Hamdi v. Rumsfeld*, which was decided the same day as *Rasul*. The United States had taken Yasir Esam Hamdi, an American citizen, into custody in Afghanistan as a result of our military action there. Hamdi was held as an enemy combatant and was first transferred to Guantanamo and then to naval briggs in the United States. The plurality opinion in *Hamdi* concluded that the executive had the authority to detain a citizen as an “enemy combatant” but that Hamdi was entitled to due process in challenging his classification as an enemy combatant.<sup>59</sup> The Court stated, “We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”<sup>60</sup> The plurality opinion then went on to suggest that this due process requirement could be satisfied with procedures that might not ordinarily satisfy the Fifth Amendment but could do so in that instance because of the exigencies of a continuing military conflict.<sup>61</sup> Thus, a proper hearing might permit the executive to present hearsay evidence that could be presumed correct as long as the detainee has a fair opportunity to rebut the evidence.<sup>62</sup> The opinion further suggested the “possibility” that such a hearing could be held before “an appropriately authorized and properly

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<sup>57</sup> The Fifth Amendment states, “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

<sup>58</sup> Cf. *Zadvydas*, 533 U.S. at 693 (“[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”).

<sup>59</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004).

<sup>60</sup> *Id.*

<sup>61</sup> The Court in *Hamdi* stated:

[T]he exigencies of the circumstances may demand that . . . enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution 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 that evidence with more persuasive evidence that he falls outside the criteria.

*Id.* at 2649.

<sup>62</sup> *Id.*

constituted military tribunal.”<sup>63</sup> Finally, the opinion concluded that Hamdi “unquestionably has the right to access to counsel in connection with the proceedings on remand.”<sup>64</sup> Remand, however, was back to the lower federal court for further consideration of the habeas petition, and while the *Hamdi* plurality stated that the detainee can have counsel there, it said nothing about whether he would be entitled to counsel at the suggested military tribunal hearing.

Thus, just as with lower courts considering the detentions of citizens as enemy combatants, lower courts considering the detentions of aliens as enemy combatants will have to flesh out what process is due (if any) in the determination of whether a detainee is an enemy combatant. They will have to transform the *Hamdi* plurality’s suggestions into concrete evidentiary standards and burden of proof requirements. If military tribunals are used for the classification, it will have to be determined whether military tribunals can satisfy due process as suggested, and if so, whether specific tribunals have been “appropriately authorized and properly constituted.”<sup>65</sup> And when tribunals are used, lower courts will have to determine the detainees’ right to counsel.

### *B. Rights for Aliens Classified Outside Guantanamo*

If a citizen were classified as an enemy combatant outside American territory and then transferred to the United States for detention, that classification process would have to satisfy due process because citizens are entitled to due process from the government no matter where the government acts.<sup>66</sup> In contrast, an alien without

<sup>63</sup> *Id.* at 2651.

<sup>64</sup> *Id.* at 2652.

<sup>65</sup> *Id.* at 2651.

<sup>66</sup> The *Hamdi* plurality indicated that a citizen was entitled to due process no matter where he was first detained. Without any qualification, the opinion stated that “due process demands some system for a citizen detainee to refute his classification.” *Id.* The Court stated that the citizen detainee must have the opportunity “to rebut the Government’s factual assertions before a neutral decisionmaker.” *Id.* at 2648.

The opinion allows an initial detention before a due process hearing; thus, battlefield decisions to detain are authorized. *Id.* at 2649. Only after “the determination is made to *continue* to hold those who have been seized,” is the detainee entitled to a due process hearing to rebut the executive’s assertion that he is an enemy combatant. *Id.*

Justice Scalia, joined by Justice Stevens, dissenting in *Hamdi*, concluded that the government could not detain Hamdi as an enemy combatant but could only detain him as part of a criminal process with all the rights an accused has in a criminal prosecution. *Id.* at 2673 (Scalia, J., dissenting). Justice Scalia stated that his conclusion applied “only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. . . . Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different.” *Id.* Justice Scalia gave no support to justify such differential treatment. Justice O’Connor, for the plurality, noted that “Justice Scalia can point to no case or other authority for the proposition that those captured on a foreign



already existing ties to the United States is not entitled to due process for deprivations of liberty that occur outside American territory.<sup>67</sup> This geographical distinction might limit the claims of illegal detention that aliens can bring, even though they are incarcerated on American soil.

Thus, the capture of an alien in Afghanistan and his designation there as an enemy combatant does not violate any of his constitutional rights as long as he is incarcerated outside America or its equivalent. He lacks the necessary presence in the United States to trigger any of his constitutional rights. How, if at all, does the situation change because the detainee is transferred after capture and designation to the naval base in Cuba? In other words, if the enemy-combatant classification of an alien is made outside American territory, does the classification have to satisfy due process because the detention that results is on United States soil or its equivalent?

Superficially, the situation seems akin to the “normal” habeas petition of an American prisoner serving a criminal sentence who claims that his custody is illegal not for governmental actions at the prison, but for actions in the criminal process that resulted in his incarceration. That “normal” habeas differs, however, in that the criminal proceeding that leads to the imprisonment occurs in the United States, where the petitioner, whether citizen or alien, is entitled to constitutional rights. In contrast, the designation as an enemy combatant outside American territory, no matter what the process, does not deny the alien constitutional rights. A question, then, for the courts is whether a detention in American territory that results from a process that did not, and did not have to, afford due process violates an alien detainee’s constitutional rights.

### *C. Substantive Claims for Aliens Without Constitutional Rights*

This discussion has assumed that alien detainees at Guantanamo Bay have constitutional rights because, in effect, Guantanamo is American territory. This might not be so; courts still have to decide whether aliens are entitled to constitutional rights there. Accepted doctrine, however, says that aliens outside U.S. territory do not have rights under the U.S. Constitution, and whether or not constitutional rights are enforced on Guantanamo, aliens held abroad elsewhere do not have such rights.<sup>68</sup> This doctrine, at least at first glance, makes *Rasul*’s broad conclusion that federal courts have jurisdiction to hear habeas corpus petitions from aliens in U.S. custody anywhere appear senseless. Aliens captured, classified as enemy combatants, and incarcerated outside of U.S. territory do not have due

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battlefield (whether detained there or in U.S. territory) cannot be detained outside the criminal process.” *Id.* at 2643 (emphasis omitted).

<sup>67</sup> See *supra* notes 18–19 and accompanying text.

<sup>68</sup> See *supra* Part II.B.

process or other constitutional rights to assert, whether in a habeas corpus petition or otherwise, so it hardly matters that they can file habeas petitions.

In considering what, if any, claims such aliens can bring, some implications of the doctrine that aliens abroad are without U.S. constitutional rights should be considered. The doctrine implies that the United States can kill, maim, and imprison aliens abroad, and destroy and seize their property not just during a war, but at any time, for any purpose, without violating any of their constitutional rights. If the United States, for whatever reason, seizes an Italian's yacht in the Adriatic Sea, that Italian's rights under the U.S. Constitution would not have been violated. If the United States decided to move an indigenous people out of a foreign rain forest to further U.S. corporate development or for any other reason, those people would not have constitutional rights to assert. If this country decided that it would kill every third Indonesian in Indonesia, the killed and threatened would not have had their U.S. constitutional rights violated.

The doctrine that aliens are without U.S. constitutional rights abroad has been most often enunciated in immigration matters when aliens have sought entry into the United States.<sup>69</sup> *Landon v. Plasencia*<sup>70</sup> summarized the law and reasons for it: "This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."<sup>71</sup>

Of course, there are important differences between the immigrant situation and the hypothesized raining of death, destruction, and confiscation by the United States on aliens abroad. The alien attempting entry seeks a privilege from the United States that it is under no duty to grant; part of the essence of sovereignty is that a state can determine who can enter its domain. On the other hand, if the president ordered the military simply to kill, rape, or imprison every alien in a foreign country, those killed, raped, or imprisoned would not simply be denied some privilege by the United States. Instead, they would be deprived, through U.S. actions, of

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<sup>69</sup> Cf. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1300 (2002) ("[D]ifferential review of federal distinctions between citizens and aliens, or between aliens who are nationals of one country and those who are nationals of another, has its roots in the wide berth accorded the political branches 'in the area of immigration and naturalization.'" (quoting *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976))).

<sup>70</sup> 459 U.S. 21 (1982).

<sup>71</sup> *Id.* at 32. On the other hand, the Court has also indicated that perhaps the government must still provide due process when excluding an alien on initial entry, but that constitutional concept has little meaning in this context. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

what is surely a basic human right, whatever its source — the right not to be wantonly deprived of life and liberty. And such governmental actions would not be actions of accepted sovereignty. We, of course, recognize that other nations can exclude Americans from their countries, but we surely do not believe that sovereignty allows other countries arbitrarily to kill and imprison Americans in the United States.

An alien seeking entry into the United States may be differently situated from an alien deprived of liberty as an enemy combatant, but the absence of rights for aliens abroad is general and not restricted to would-be immigrants. For example, in *United States v. Verdugo-Urquidez*,<sup>72</sup> the majority opinion by Chief Justice Rehnquist “rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.”<sup>73</sup> *Rasul* may have indicated that all aliens abroad are entitled to challenge the legality of their detentions by the United States in American courts, but it did not suggest a substantive doctrinal change that would grant constitutional rights to aliens outside U.S. territory.

On the other hand, the notion that the executive can arbitrarily deprive anyone, including aliens abroad, of life and liberty seems contrary to U.S. constitutional and other traditions. Before concluding that *Rasul* extended an empty platter to those held as enemy combatants outside the United States — they are entitled to petition for a writ of habeas corpus but cannot get relief because they have no constitutional rights to be violated<sup>74</sup> — lower courts should carefully examine whether there are other restraints on executive actions that such aliens can assert. An answer lies in the separation-of-powers doctrine that lower courts will have to consider.

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<sup>72</sup> 494 U.S. 259 (1990).

<sup>73</sup> *Id.* at 269. *Verdugo-Urquidez* held that the Fourth Amendment does not apply to a search and seizure by U.S. officials of property owned by a nonresident alien and located in a foreign country. *Id.* The Court relied on *Eisentrager*, stating that “our rejection of extra-territorial application of the Fifth Amendment was emphatic.” Justice Rehnquist then quoted the earlier case:

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. . . . None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

*Id.* (quoting *Eisentrager*, 339 U.S. at 784) (quotations omitted). At issue in *Eisentrager* were the rights of nationals of a hostile country in a declared war, and *Eisentrager*’s holding was more limited than the quoted language: “We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.” 339 U.S. at 785.

<sup>74</sup> See *supra* notes 52–54 and accompanying text.

#### D. Congressionally Authorized Detentions of Enemy Combatants

The Constitution divides the war powers between the President and Congress. The President is, of course, commander in chief of the U.S. Army and Navy,<sup>75</sup> and more generally, has the “executive power.”<sup>76</sup> In addition, the Constitution imposes on the president the duty to “take care that the laws be faithfully executed.”<sup>77</sup> Congress, on the other hand, has the authority to raise and maintain the army and navy and to provide the rules for regulating land and naval forces.<sup>78</sup> Most important to the issue here, Congress is authorized “[t]o declare war . . . and make rules concerning captures on land and water”<sup>79</sup> and has the power “[t]o define and punish . . . offences against the law of nations.”<sup>80</sup>

Congress, not the President, is specifically given the legislative power to make rules about those captured during military actions and to define what violates the law of nations.<sup>81</sup> The executive’s role is to administer and execute what Congress has authorized. As the Court summarized during World War II, the President is vested with the constitutional power during a war “to carry into effect all laws passed by Congress . . . defining and punishing offences against the law of nations, including those which pertain to the conduct of war.”<sup>82</sup> A starting question, then, is whether Congress has authorized the detention by the executive of aliens as enemy combatants who are captured as the result of the U.S. military campaign in Afghanistan. The Supreme Court’s answer to that surely would be “yes.”

As already noted, the *Hamdi* plurality, in an opinion by Justice O’Connor, and joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, found that the congressional joint resolution authorized the detention of U.S. citizens as enemy combatants. Justice Thomas, dissenting, stated that “[a]lthough the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so.”<sup>83</sup> A majority of the Court, then, has indicated that U.S. citizens can be lawfully detained as enemy combatants, and if citizens can be so detained, then surely so can aliens. *Hamdi*, however, did not fully resolve a crucial question that will confront lower courts: What is the definition of an “enemy combatant?”

<sup>75</sup> U.S. CONST. art. II, § 3, cl. 1.

<sup>76</sup> *Id.* § 1, cl. 1.

<sup>77</sup> *Id.* § 3.

<sup>78</sup> *Id.* at art. I, § 8, cls. 1, 12, 14.

<sup>79</sup> *Id.* at cl. 11.

<sup>80</sup> *Id.* at cl. 10.

<sup>81</sup> *Id.* at cls. 10, 11.

<sup>82</sup> *Ex parte Quirin*, 317 U.S. 1, 26 (1942).

<sup>83</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2679 (2004) (Thomas, J., dissenting).

*E. The Unresolved Definition of “Enemy Combatant”*

*Hamdi* indicates that neutral decision makers will have to determine whether there is sufficient proof to detain a person as an enemy combatant. Just as a court or a jury cannot decide whether someone committed a murder without a definition of “murder,” whoever reviews an enemy-combatant classification, whether a judge or a tribunal member, needs a definition of “enemy combatant” to make the determination. “Enemy combatant,” however, is not self-defining, and no accepted definition of the concept exists. Indeed, apparently no real attempt to formulate a definition has been attempted. *Hamdi* noted:

[T]he Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for the purposes of this case, the “enemy combatant” that it is seeking to detain is an individual who, it 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.<sup>84</sup>

The *Hamdi* plurality, in determining that the President could detain citizens as enemy combatants, restricted itself to those who fell within that definition,<sup>85</sup> but it also indicated the possibility of an acceptable broader definition: “The permissible bounds of the [enemy-combatant] category will be defined by the lower courts as subsequent cases are presented to them.”<sup>86</sup>

In fact, President Bush has not restricted himself to the narrow definition presented in *Hamdi*. The President classified Jose Padilla as an enemy combatant without asserting that Padilla had engaged in an armed conflict in Afghanistan against the United States<sup>87</sup> and therefore without claiming that Padilla satisfied the second prong of the *Hamdi* definition.

The *Hamdi* plurality seems to envision a definition evolving through common-law development. The President will detain on criteria he devises, and as courts review the detentions, the boundaries of what constitutes an enemy combatant will emerge. This process, however, raises a separation-of-powers issue that needs to be addressed; it gives no role for Congress even though Congress, not the President or the courts, is granted the constitutional authority to make rules for captures

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<sup>84</sup> *Id.* 2639 (quoting Brief for the Respondents at 3, *Hamdi* (No. 03-6696)).

<sup>85</sup> *See id.* (“We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.”).

<sup>86</sup> *Id.* at 2642 n.1.

<sup>87</sup> *See Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715–16 n.2 (2004).

arising from armed conflicts.<sup>88</sup> *Hamdi* concluded that Congress had authorized the detentions of enemy combatants.<sup>89</sup> Courts cannot, it would seem, simply determine the boundaries of the definition as courts might in ordinary common-law adjudication, such as traditional judicial determinations of what constitutes a tort. Instead, the courts have to decide whether the criteria used by the President are authorized by Congress. That is not an easy determination because Congress has not directly addressed the issue; no congressional statute or resolution defines “enemy combatant.” Instead, the *Hamdi* plurality indicated that Congress had authorized the detention of those who can be detained under the law of war.<sup>90</sup> The difficulty here is that the content of the law of war is unclear, as Professor George Fletcher observes:

No one quite knows what the term “law of war” means. We do assume that the law of war is part of the law of nations and Congress has authority to define “Offenses against the Law of Nations,” which means that Congress could define the law of war. There was a time when Congress took this task seriously, but since World War II, it has largely ignored the field.<sup>91</sup>

If courts decide that Congress authorized the detention of “enemy combatants” as authorized by the law of war, the courts will have to make zen-like decisions about how Congress has defined the law of war when Congress has not actually done so. In any event, the concept will be indeterminate until courts have spoken.

Another issue raised is that a potential detainee may have no advance notice that his conduct could result in incarceration as an enemy combatant. The *Hamdi* plurality said that a due process hearing had to give notice to the detainee, but that was merely notice of the factual basis for the classification.<sup>92</sup> Normal notions of due process might be thought to require something more — notice in advance of conduct that the behavior could lead to detention. Certainly that is true for the

<sup>88</sup> U.S. CONST. art. I, § 8, cls. 10, 11.

<sup>89</sup> *Hamdi*, 124 S. Ct. at 2640–41.

<sup>90</sup> It is a clearly established principle of the law of war that detention may last no longer than active hostilities. . . .

. . . [W]e understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.

*See id.* at 2641.

<sup>91</sup> George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL’Y 635, 650 (2002) (citation omitted).

<sup>92</sup> *Hamdi*, 124 S. Ct. at 2648.

criminal process.<sup>93</sup> The Ex Post Facto Clause,<sup>94</sup> which forbids retroactive definitions to justify imprisonments, only applies to criminal matters,<sup>95</sup> and enemy-combatant detentions are not criminal matters. But the issue still remains whether due process permits such detentions based on retroactive definitions.

#### *F. Authorized Detentions Under the Law of War*

The *Hamdi* plurality concluded that Congress authorized the detention of those who fought against the United States in Afghanistan because such detentions are a “fundamental and accepted . . . incident to war,” and because of the plurality’s “understanding . . . [of] longstanding law-of-war principles.”<sup>96</sup> The Court has only authorized detentions that the law of war accepts as legal.<sup>97</sup> Other kinds of detentions, then, may be illegal and grounds for habeas corpus relief.

The Supreme Court has so far only recognized two kinds of legal detentions of enemy combatants. *Ex parte Quirin*,<sup>98</sup> decided during World War II, concluded that under the law of war, “[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”<sup>99</sup>

Alien combatants can be lawfully incarcerated as prisoners of war (POWs). POWs are those who fall into their enemy’s hands while legally fighting under the laws of war.<sup>100</sup> International law requires humane treatment for POWs, including housing comparable to that provided for the forces of the detaining power in the area and the right of the prisoner to write to his family. A POW does not have to give information other than name, rank, date of birth, and serial number or an equivalent. A POW cannot be subjected to any coercive interrogation.<sup>101</sup> The President, however, did not detain those captured in Afghanistan as prisoners of war

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<sup>93</sup> See, e.g., *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (finding no fair warning that conduct violated a trespass statute when a court decision subsequent to the conduct interpreted the statute for the first time as including the conduct).

<sup>94</sup> U.S. CONST. art. I, § 9.

<sup>95</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 396 (1798).

<sup>96</sup> *Hamdi*, 124 S. Ct. at 2640–41.

<sup>97</sup> See *id.*

<sup>98</sup> 317 U.S. 1 (1942).

<sup>99</sup> *Id.* at 31. The Court went on to conclude that the acts committed by the petitioners made them unlawful combatants: “[T]hose who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants.” *Id.* at 35.

<sup>100</sup> Elsea, *supra* note 28.

<sup>101</sup> See Torruella, *supra* note 18, at 697 n.259 for a summary of authorized treatment of prisoners of war.

and has apparently held them incommunicado, housed them in prison-like conditions, and subjected them to extensive interrogations.<sup>102</sup>

The President has apparently determined that those captured are not lawful belligerents entitled to prisoner-of-war status.<sup>103</sup> Captured members of militias and organized resistance movements are entitled to be treated as POWs if they are “commanded by a person responsible for his subordinates;” wear a uniform or “hav[e] a fixed distinctive sign recognizable at a distance; . . . carry[] arms openly;” and conduct themselves “in accordance with the laws and customs of war.”<sup>104</sup>

The President has not formally stated why the detainees are not treated as prisoners of war. This could be because the captured combatants were not fighting under a qualifying command structure or because they were not openly fighting in distinctive garb that indicated their combatant status. International law also provides, however, that if there is “any doubt” whether a detainee is a prisoner of war, then a “competent tribunal” must resolve the issue.<sup>105</sup> The President has, therefore, “implicitly conclud[ed] that there is no doubt as to the status of any of the detainees.”<sup>106</sup> Others, however, have questioned this certitude. For example, Professors Katyal and Tribe state:

In circumstances in which persons “on the approach of the enemy spontaneously take up arms to resist the invading forces,” . . . the requirement of recognizable military uniforms is relaxed under international law. This would suggest that some of those fighting on behalf of the Taliban in Afghanistan — and thus some whose status the President has been unwilling to resolve on an individualized basis . . . — might in fact qualify as lawful belligerents and be entitled to relief on habeas corpus from detention other than as prisoners of war with all of the protections that flow from that status.<sup>107</sup>

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<sup>102</sup> See Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. “War on Terrorism”*, 5 THEORETICAL INQUIRIES L. 47, 56 (2004). Powell reports that, as of October 10, 2002, 598 prisoners were detained on Guantanamo and that “the justification for the detention is to interrogate the prisoners (for intelligence-gathering regarding the September 11th attacks and any planned future attacks) and incapacitate them from committing future attacks.” *Id.*

<sup>103</sup> See *id.* at 58 (“[T]he Bush Administration has made a blanket determination that all the detainees are illegal combatants . . . and are therefore not entitled to POW status.”).

<sup>104</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 3320–22, 75 U.N.T.S. 135, 138.

<sup>105</sup> *Id.* at art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 140–42.

<sup>106</sup> Powell, *supra* note 102, at 58.

<sup>107</sup> Katyal & Tribe, *supra* note 69, at 1264 (quoting Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 104, at art. 4(a), 6 U.S.T. at 3324, 75 U.N.T.S.



If Congress has only authorized detentions that conform to accepted law-of-war practices and congressional authorization is required for the detentions, then lower courts may have to determine whether detainees are legally held without prisoner-of-war status.<sup>108</sup>

### G. *Illegal Combatants*

Enemy combatants can not only be validly held as prisoners of war, but they also can be validly held, as *Ex parte Quirin* recognized, as illegal enemy combatants.<sup>109</sup> Eight men during World War II infiltrated the United States to commit sabotage on behalf of Germany.<sup>110</sup> After their capture, the President appointed a military commission to try them for actions violating the laws of war.<sup>111</sup> They contended in a habeas corpus petition that “the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal.”<sup>112</sup> The Supreme Court in *Ex parte Quirin*, however, held that Congress, by enacting Article 15 of the Articles of War, had authorized such trials by military tribunals.<sup>113</sup>

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at 138–40) (footnotes omitted); cf. Torruella, *supra* note 27, at 696–97 (quoting Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, pt. I, art. I, 1125 U.N.T.S. 609). Professor Torruella states:

[T]he fighting elements of the Taliban in Afghanistan, and possibly also those of al Qaida, could be considered rebel or insurgent groups under Protocol II of the Geneva Convention, as “organized armed groups which, under responsible command, exercis[ing] . . . control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [the Protocol].” As such they are entitled to certain protections.

*Id.* (alterations in original); see also Elsea, *supra* note 28, at 15 (“Members of al Qaida captured in Afghanistan may be entitled to POW or civilian status, depending upon the circumstances of their capture.”).

<sup>108</sup> See *United States v. Noriega*, 808 F. Supp. 791, 796 (S.D. Fla. 1992) (“[T]he Court believes that the question of prisoner of war status properly presented can be decided by the Court . . .”), *aff’d*, 117 F.3d 1206 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998).

<sup>109</sup> 317 U.S. 1, 35 (1942).

<sup>110</sup> *Id.* at 20–21.

<sup>111</sup> *Id.* at 22.

<sup>112</sup> *Id.* at 24.

<sup>113</sup> *Id.* at 28. Then Article 15 of Articles of War, now codified at 10 U.S.C. § 821 (2000), stated:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military

The Court stated, "By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases."<sup>114</sup> *Ex parte Quirin* then went on to hold that the military tribunal trials did not violate the Constitution.<sup>115</sup> And the Court has reaffirmed in both *In re Yamashita*<sup>116</sup> and *Johnson v. Eisentrager*<sup>117</sup> that enemy combatants can be tried for violating the law of war by military tribunals authorized by Congress.<sup>118</sup>

Thus, it might be concluded that Congress has authorized trials for actions of illegal combatants before presidentially-appointed military tribunals. The aliens at Guantanamo, however, were not afforded such trials. Instead, they were held without prisoner-of-war status and without any kind of trial. The question, then, is whether aliens can be indefinitely held without trials as illegal combatants solely on the executive's determination. Citizens, and presumably at least those aliens entitled to constitutional rights, are entitled to a due process hearing as to whether they are enemy combatants.<sup>119</sup> Are they entitled to due process in the determination that they are *illegal* enemy combatants? In other words, if a constitutionally proper hearing determines that a person is an enemy combatant, can the president alone determine then that the person is an illegal combatant? The Supreme Court has not explicitly addressed the issue, but because an illegal-combatant determination can bring a greater deprivation of liberty than just an enemy-combatant determination, the illegal-combatant classification would seem to require due process for those entitled to constitutional rights.

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commissions, provost courts, or other military tribunals.

*Id.*

<sup>114</sup> *Quirin*, 317 U.S. at 28. *Ex parte Quirin* also stated, "Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which as defined as such by the law of war, and which may constitutionally be included within that jurisdiction." *Id.* at 30 (citation omitted).

<sup>115</sup> We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

*Id.* at 45.

<sup>116</sup> 327 U.S. 1, 8-9 (1946).

<sup>117</sup> 339 U.S. 763, 786 (1950).

<sup>118</sup> *Ex parte Quirin* also stated, "It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." 317 U.S. at 29.

<sup>119</sup> *Hamdi*, 124 S. Ct. at 2635.

Furthermore, if the president needs congressional authorization to indefinitely detain illegal combatants without a trial, he may not have such authority. *Ex parte Quirin* did state that illegal combatants were “subject to capture and detention,”<sup>120</sup> but the issue in that case was the legality of the military tribunal trials, not the capture and detention prior to the trial.<sup>121</sup> Of course, because the trials were authorized by Congress, Congress must have also authorized the necessary corollary powers to have the trials, and the president had to be authorized to capture and detain those combatants whom the president determined violated the laws of war in order to try them. *Ex parte Quirin*, thus, seemed to be speaking of detention only in order to have a trial, not indefinite detentions without a trial.<sup>122</sup> At best it can be said that the Court has never decided whether Congress has authorized indefinite detentions simply on the president’s determination. There were no indefinite detentions without trials in *Quirin*, *Yamashita*, and *Eisentrager*, where the Court upheld the treatment of illegal combatants; instead, trials in front of military tribunals were promptly held in those cases.

Significantly, in holding that Congress had authorized military tribunal trials, the Court concluded that those authorized proceedings allowed the accused illegal combatants to defend themselves. *Yamashita* expressly stated, “[W]e held in *Ex parte Quirin*, as we hold now, that Congress by sanctioning trials of enemy aliens by military commission for offenses against the law of war had recognized the right of the accused to make a defense.”<sup>123</sup> The trials found legal in *Quirin*, *Yamashita*, and *Eisentrager* were timely ones in which the aliens had lawyers, could challenge the evidence against them, and could present evidence in their defense. Such procedures were unnecessary if Congress had also authorized indefinite detentions without trials and a defense. Indeed, by authorizing trials that allow for a meaningful defense, the inference is that Congress was forbidding unchallengeable indefinite detentions without trials.<sup>124</sup>

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<sup>120</sup> *Quirin*, 317 U.S. at 31.

<sup>121</sup> *Id.* at 18–19.

<sup>122</sup> *Cf. Ex parte Endo*, 323 U.S. 283 (1944) (holding that a Japanese-American, detained in a “Relocation Center,” had to be released). The Court noted that the removal of Japanese-Americans from designated areas of the West Coast was authorized to prevent sabotage and espionage. *Id.* at 300. Because the petitioner, even according to the President, was “a loyal and law-abiding citizen,” she could not be detained because her continuing detention did not serve the purposes of the evacuation. *Id.* at 294. The Court stated, “When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.” *Id.* at 302. *But see Hamdi*, 124 S. Ct. at 2640 (“While Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities.”).

<sup>123</sup> *Yamashita*, 327 U.S. at 9 (citing *Quirin*, 317 U.S. at 24–25).

<sup>124</sup> *Cf. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 50 (1998) (“[D]etention . . . without charges is more arbitrary than detention on charges to be

Justice O'Connor, writing for the plurality in *Hamdi*, did, however, suggest that at least some indefinite detentions were not legal.<sup>125</sup> While she concluded that the congressional joint resolution in the wake of September 11 authorized the detention of citizens as enemy combatants, she also stated, "we agree that indefinite detention for the purpose of interrogation is not authorized."<sup>126</sup> Accordingly, such incarcerations can be constitutional only if the President has the inherent power to indefinitely detain aliens as illegal combatants without trial, which is a question the courts have so far not addressed.<sup>127</sup>

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tried before a tribunal."). Professors Kaytal and Tribe describe the limited power of the President to create military tribunals:

Both the majority opinion and the Chase concurrence in [*Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)] hold congressional authorization to be at least a necessary requirement for [military] tribunals. This general principle of *Milligan* — a principle never repudiated in subsequent cases — leaves the President little unilateral freedom to craft an order to detain people on his own suspicion for indefinite warehousing or trial at his pleasure in a system of military justice.

Katyal & Tribe, *supra* note 69, at 1279–81.

<sup>125</sup> *Hamdi*, 124 S. Ct. at 2641.

<sup>126</sup> *Id.*

<sup>127</sup> *Cf.* *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In holding that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment," *id.* at 785, on non-resident alien enemies, *Eisentrager* explained that non-resident alien enemies were entitled to no more protection than resident enemies:

[R]esident enemy aliens are entitled only to judicial hearing to determine . . . that they are really alien enemies. When that appears, those resident here may be deprived of liberty by Executive action without hearing. While this is preventive rather than punitive detention, no reason is apparent why an alien enemy charged with having committed a crime should have greater immunities from Executive action than one who it is only feared might at some future time commit a hostile act.

*Id.* at 784 (citation omitted).

The President, however, has this summary power to deprive resident alien enemies of their liberty under a statute passed as part of the Alien and Sedition Acts of 1798. Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (codified as amended at 50 U.S.C. § 21 (2000)). This statute remains in effect and authorizes the President to apprehend, restrain, and remove "natives, citizens, denizens, or subjects of the hostile nation or government" when there is a declared war or "invasion or predatory incursion" of the United States. *Id.*

*Madsen v. Kinsella*, 343 U.S. 341 (1952), held that under limited circumstances the President has the power to create military commissions to try criminal cases in territory occupied by U.S. armed forces as part of a declared war. *Madsen* was tried in occupied Germany for killing her husband, a lieutenant in the U.S. Air Force. *Id.* at 344–45. The Court stated:

In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the

*H. Indefinite Detentions*

Even without interrogation, indefinite detentions may at some point raise issues that lower courts will have to address. The *Hamdi* plurality recognized that detaining enemy combatants was an accepted part of war and that the purpose of the detention is to prevent such belligerents from returning to battle.<sup>128</sup> This purpose ends when the hostilities cease, and “[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities.”<sup>129</sup> In a conventional war, the end of fighting is usually relatively clear, but, as the Court recognized, the end of the “war on terror” might never be apparent. The result could be a lifetime detention.<sup>130</sup> The *Hamdi* plurality evinced concern with this possibility:

[W]e understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.<sup>131</sup>

Justice O’Connor explained that the Court did not have to address whether the law of war had changed due to the unique nature of the armed conflict in the “war on terrorism,” as long as U.S. troops were still in active combat in Afghanistan.<sup>132</sup>

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jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. . . . The policy of Congress to refrain from legislating in this uncharted area does not imply its lack of power to legislate.

*Id.* at 348–49.

<sup>128</sup> *Hamdi*, 124 S. Ct. at 2640.

<sup>129</sup> *Id.* at 2641.

<sup>130</sup> *See id.*

We recognize that the national security underpinnings of the “war on terror,” although crucially important, are broad and malleable. . . . If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that *Hamdi* might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that *Hamdi*’s detention could last for the rest of his life.

*Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 2642. Whether U.S. combat in Afghanistan is ongoing is an issue apparently to be considered on remand in *Hamdi*. *See id.*

### *I. Determining the End of Active Hostilities*

If the *Hamdi* plurality suggested that enemy combatants cannot be held after active hostilities conclude, a major problem ensues: How is it to be determined when active hostilities have ended? *Hamdi* gives no guidance on this point.

In a related context, the Court, in *Ludecke v. Watkins*,<sup>133</sup> indicated that the President determines when a war ends.<sup>134</sup> Under the Alien Enemy Act, the President can detain and remove resident enemy aliens from the country during a declared war.<sup>135</sup> A German citizen residing in the United States during World War II was detained under this Act, and although Germany had unconditionally surrendered in May 1945, the executive branch ordered his removal in January 1946.<sup>136</sup> The Court rejected his claim that the presidential power to remove him under the Act ceased with the end of the actual hostilities: “War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops.”<sup>137</sup> Congress could determine that a war has ended, but if it does not speak, the President determines when a war concludes.<sup>138</sup> Justice Frankfurter, writing for a unanimous Court, stated:

The political branch of the Government has not brought the war with Germany to an end. On the contrary, it has proclaimed that “a state of war still exists.” . . . These are matters of political judgment for which judges have neither technical competence nor official responsibility.

. . . .

. . . Accordingly, we hold that full responsibility for the just exercise of this great power may validly be left where the

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<sup>133</sup> 335 U.S. 160 (1948).

<sup>134</sup> *Id.* at 168 (“‘The state of war’ may be terminated by treaty or legislation or Presidential proclamation.”).

<sup>135</sup> Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (codified as amended at 50 U.S.C. § 21 (2000)).

<sup>136</sup> *Ludecke*, 335 U.S. at 162–63.

<sup>137</sup> *Id.* at 167.

<sup>138</sup> *Id.* at 169 n.13.

Congress can, of course, provide either by a day certain or a defined event for the expiration of a statute. But when the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government.

*Id.*

Congress has constitutionally placed it — on the President of the United States.<sup>139</sup>

Past declared wars often concluded with a peace treaty, which presumably marked the termination of the conflict. But undeclared wars rarely, if ever, produce formal peace treaties. The conclusions of such wars, if they conclude at all, come from no formal process, and if the President has not spoken to declare a war over, that war might still be continuing. At least, there appears to be no way for the judiciary to determine that a war is over.<sup>140</sup>

The cessation of active hostilities is even more indeterminate than the end of a war. If courts are not competent to determine the end of a war, they are even less able to determine when active hostilities have ceased. Certainly *Hamdi* gave little guidance on that issue, with the plurality indicating that such hostilities continued “[i]f the record establishes that United States troops are still involved in active combat in Afghanistan.”<sup>141</sup> If, however, troops are present and the executive asserts that active hostilities continue, there seems to be no way to rebut the assertion. Even if U.S. troops have not been fired upon or initiated a military action for a while, hostilities may merely be in a hiatus, not ended. More combat may ensue or be anticipated. Without a formal cease-fire, the commander in chief normally determines whether hostilities have ceased. If detentions cannot continue after the end of active hostilities, courts will have to determine whether the judiciary merely has to defer to the executive determination of when hostilities cease, or whether courts can develop meaningful, judicially enforceable standards to decide when detentions are no longer authorized because active hostilities have ceased.

### *J. The Norms of International Law*

While aliens, via habeas corpus petitions, may be able to claim that their detentions are illegal because their detentions were not authorized by Congress, they may also be able to claim that their detentions are illegal because they violate

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<sup>139</sup> *Id.* at 170, 173 (quoting Proclamation No. 2714, 12 Fed. Reg. 1 (Dec. 31, 1946)).

<sup>140</sup> See John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT’L & COMP. L. REV. 221, 301–03 (2004).

Although the Constitution provides that Congress has the power to *declare* war, there is no provision regarding which branch has the power to *terminate* war. It has been said that the determination of when a war terminates is a far more difficult question to answer than when a war starts. The general rule is that the end of a war is something determined by the political branches of the government, such as by presidential proclamation.

*Id.* at 301.

<sup>141</sup> *Hamdi*, 124 S. Ct. at 2642.

international law. Over a century ago, the Supreme Court in *The Paquete Habana*<sup>142</sup> held that U.S. courts must enforce international law: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”<sup>143</sup> During the Spanish-American War, a U.S. naval blockade had seized a coastal fishing boat off the coast of Cuba.<sup>144</sup> The Court stated that under international law such vessels are exempt from seizure during a war<sup>145</sup> and, because of that international law, ruled that the seizure was illegal.<sup>146</sup>

Indeed, the Court in *Ex parte Quirin* extensively relied on its own conception of international law for the conclusion that military tribunals could legally try the German saboteurs.<sup>147</sup> The Court stated, “From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.”<sup>148</sup> The Court went on to conclude that spies and others who come through military lines without uniforms to wage war are not subject to prisoner-of-war status but are “offenders against the law of war

<sup>142</sup> 175 U.S. 677 (1900).

<sup>143</sup> *Id.* at 700. The Court also went on to state:

In *Brown v. United States*, there are expressions of Chief Justice Marshall which, taken by themselves, might seem inconsistent with the position above maintained of the duty of a prize court to take judicial notice of a rule of international law, established by general usage of civilized nations, as to the kind of property subject to capture. But the actual decision in that case, and the leading reasons on which it was based, appear to us rather to confirm our position.

*Id.* at 710 (citation omitted). The Court in *Habana* conceded, however, that determining the content of international law can be difficult.

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

*Id.* at 700.

<sup>144</sup> *Id.* at 678–79.

<sup>145</sup> *Id.* at 686 (“By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.”).

<sup>146</sup> *Id.* at 714.

<sup>147</sup> *See generally Ex parte Quirin*, 317 U.S. 1, 27–43 (1942).

<sup>148</sup> *Id.* at 27–28.



subject to trial and punishment by military tribunals.”<sup>149</sup> The Court again relied on international law to conclude that a citizen could be treated as an enemy combatant: “Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.”<sup>150</sup>

These precedents indicate that detainees can claim their detentions are illegal because they violate international law.<sup>151</sup> Lower courts would have to confront questions similar to those raised under a due process analysis or in response to a claim that Congress has not authorized a detention: How does international law define “enemy combatant”? Who, under international law, is a prisoner of war? Does international law define when active hostilities end? Under international law, can enemy combatants be indefinitely imprisoned for violating the laws of war without being afforded a timely, fair trial?

This separate analysis of international law might not be important if courts determine that what Congress has authorized are only detentions that comport with international law. If courts, however, determine that detentions are not congressionally authorized, courts will then have to address whether the President has inherent power without congressional authorization for the detentions. If the courts were to find that the executive branch has such inherent power, then courts would again have to address the content of the applicable international law and determine how, if at all, it restrains executive actions.

In any event, whatever the context for assessing the law of war, courts seem to be required to make decisions about international law. In doing so, courts should have to consider that the relevant law-of-war principles were forged in response to different kinds of conflicts from the present one, and this should perhaps affect the assessment of what international law requires.

International law pertaining to captured combatants developed from symmetrical wars that provided natural checks on the belligerents.<sup>152</sup> Symmetry was present because each belligerent nation could expect to capture many enemy combatants and could also expect to have many of its own soldiers captured. With such balance, each nation, in determining how to treat those it captured, had to think how its actions would affect the treatment of its own captured citizens; hence, a

<sup>149</sup> *Id.* at 31.

<sup>150</sup> *Id.* at 37–38.

<sup>151</sup> *Cf.* Powell, *supra* note 102, at 57 (“Both U.S. domestic law and international law forbid indefinite detention without trial in most contexts.”).

<sup>152</sup> *See, e.g.,* Derek Jinks, *Do We Need a New Legal Regime After September 11?: Protective Parity and the Laws of War*, 79 NOTRE DAME L. REV. 1493 (2004) (discussing the treatment and rights of different categories of captured combatants in customary and treaty-induced international law).

natural check was in place.<sup>153</sup> But now in Afghanistan and Iraq, and probably in future conflicts, the United States fights asymmetrical actions where that check has disappeared. We take hundreds or thousands into custody, but an organized enemy army does not detain large numbers of U.S. soldiers. Executive decisions on how to classify and keep these prisoners no longer have to weigh how an enemy nation will treat thousands of captured Americans. This new face of war removes an important check on the executive branch that helped shape international law. Perhaps the traditional law of war needs re-examination.<sup>154</sup>

The present conflict is asymmetrical in another way that might affect international law — the enemy is no longer a traditional state. While the invasions of Afghanistan and Iraq may look like traditional warfare, our enemy was not really a country, but rather terrorist organizations and leaders. In the future, we can expect not to battle traditional nation-states, but rather sub-national organizations or groups that transcend traditional boundaries. Thomas Barnett, a military analyst, discusses the rise of asymmetrical warfare and states that we have moved

away from warfare against states or even blocs of states and toward a new era of warfare against individuals . . . . [I]n the

<sup>153</sup> While Germany's attempt to infiltrate saboteurs into the United States early during World War II led to *Ex parte Quirin*, 317 U.S. 1 (1942), Americans also captured German saboteurs during the end of the war in a less well-known event. See LOUIS FISHER, CONG. RESEARCH SERV., REPORT FOR CONGRESS: MILITARY TRIBUNALS: THE *QUIRIN* PRECEDENT 42 (2002), available at <http://www.fas.org/irp/crs/RL31340.pdf>. Secretary of War Henry Stimson urged President Roosevelt to use different procedures to treat these enemies than had been used in the past. *Id.* Among his arguments, Stimson contended that the use of earlier methods "would be likely to lead to German maltreatment of American prisoners of war in their hands." *Id.* The earlier procedures were modified. *Id.* at 42–44 (quoting Letter from Henry Stimson to Franklin D. Roosevelt (Jan. 7, 1945)).

<sup>154</sup> Cf. Thomas J. Lepri, Note, *Safeguarding the Enemy Within: The Need for Procedural Protections for U.S. Citizens Detained as Enemy Combatants Under Ex parte Quirin*, 71 *FORDHAM L. REV.* 2565, 2573–74 (2003). During World War II

persons of low rank were responsible for making determinations that a detainee was not entitled to prisoner-of-war status, and these determinations were usually made with little deliberation. Such an informal classification procedure . . . may have worked in its context. But an irregular conflict such as the "War on Terror" demands something much more formal.

*Id.* Lepri points out that during the Vietnam War a more formal system was put in place. See *id.* at 2274. A tribunal of at least three officers, requiring a majority vote, decided on prisoner-of-war status if the detainee or someone on his behalf claimed such status. *Id.* The detainee had a right to an interpreter, a right to be present, a right to counsel, and a right to present evidence, including the right to call and cross-examine witnesses. *Id.* Counsel could be anyone reasonably available, including another detainee. *Id.* If the detainee did not have counsel, the tribunal would appoint a military lawyer for him. *Id.* This counsel could talk privately with the detainee as well as with witnesses. *Id.*

1970s we were still dealing with the “evil empire,” while in the 1980s we downshifted to “evil states,” and in the 1990s we downshifted further to “evil leaders.” [B]y the end of the century it became clear that interstate wars had . . . disappeared. All that really leaves in the international system today is mass violence within states and the terrorists that tend to emerge from those endemic conflicts over time, like all those al Qaeda operatives who cut their teeth on Afghanistan’s internal violence.<sup>155</sup>

To call our military actions against these new enemies “war” is to use that term in a different way from past usage. This shift is indicated by the apparent position of the United States that while we were legally fighting in Afghanistan, all those opposing us there were illegal combatants. Otherwise, at least some of those captured would have been granted prisoner-of-war status. This seems to constitute a different conflict from a traditional war. Mark Tushnet has an explanation:

The already long duration of the “war on terrorism” suggests that we ought not think of it as war in the sense that World War II was a war. It is, perhaps, more like a condition than a war — more like the war on cancer, the war on poverty, or, most pertinently, the war on crime.<sup>156</sup>

Because it is more of a condition than a war, it will not have a true end. Instead, like the war on crime, even significant changes in circumstances may not be apparent when they occur. At what point is it evident that it is now safe to walk the streets in a once crime-ridden neighborhood?

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<sup>155</sup> THOMAS P.M. BARNETT, *THE PENTAGON’S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY* 92–93 (2004).

<sup>156</sup> Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 279. Tushnet continues: “To say that law is silent during a more-or-less permanent condition is quite different from saying that law is silent during wartime.” *Id.*; see also Ackerman, *supra* note 31, at 1034.

For the criminal law purist, the “war on terrorism” is merely a metaphor without decisive legal significance, more like the “war on drugs” or the “war on crime” than the war against Nazi Germany. Al Qaeda is a dangerous conspiracy, but so is the Mafia, whose activities lead to the deaths of thousands through drug overdoses and gangland murders. Conspiracy is a serious crime, and crime fighters have special tools to deal with it. But nobody supposes that casual talk of a “war on crime” permits us to sweep away the entire panoply of criminal protections built up over the centuries. Why is the “war on terrorism” any different?

*Id.* (citations omitted).

The condition of the “war on terror” does not have the demarcations of a war. When did it start? When will it end?<sup>157</sup> Who is the enemy?<sup>158</sup> How is the enemy to be recognized? What is the enemy’s command structure? Who is a neutral country, and how should it be treated? What are appropriate military tactics? What are appropriate interrogation techniques? In a traditional war, those questions, while sometimes difficult, generally have answers, sometimes coming from international law. The answers now, however, to these and many more questions, are murky. Courts should address whether the law of war as it pertains to enemy combatants, formulated for different kinds of armed conflicts than those now being fought, needs modification for the present conditions.

### *K. Standing for Aliens Without Due Process Rights*

The detentions of aliens, even for those without due process rights, may be illegal because they are not congressionally authorized and not within the inherent executive powers, or because they violate international law. The question remains whether aliens without constitutional rights can raise such issues through a habeas corpus petition. The answer, derived from the earlier military tribunal decisions, appears to be “yes.” In those cases, the Court found that it could not review the correctness of a tribunal’s decision.<sup>159</sup> The Court concluded, however, that it had the power and duty to determine whether the tribunals were authorized to act and that enemy aliens could raise that issue in a habeas petition. Thus, the Court in *Yamashita* stated:

We consider here only the lawful power of the commission to try the petitioner for the offense charged.

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<sup>157</sup> [T]here is no clear beginning or end to the conflict, meaning it feels as if it has been around forever and that it will continue well past our lifetimes. Think about the Middle East. When exactly did the hostilities start there? Was it the late 1980s or early 1970s? Or was it when Israel was created in 1948? Or how about the Crusades eight centuries ago?

BARNETT, *supra* note 155, at 119.

<sup>158</sup> [T]he definition of the enemy changes over time. When the United States went into Somalia in late 1992, at first the enemy was the chaos that prevented relief workers from dealing with the famine. Then it became the lack of a functioning central state. Then it became all those warlords running around the place. Then we decided that it was one warlord who was the real problem.

*Id.*

<sup>159</sup> See, e.g., *In re Yamashita*, 327 U.S. 1, 8 (1946) (“If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts.”).

... [Congress] has not foreclosed [enemy aliens'] right to contend that the Constitution or the laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.<sup>160</sup>

If a court has the jurisdiction to decide whether a military tribunal created by the executive can lawfully try an alien for being an illegal combatant, then the court should also have the power and the duty to determine whether the President has the lawful authority to detain aliens as enemy combatants without a trial. Furthermore, just as the owner of *The Paquete Habana* could claim in American courts that the seizure of his vessel violated international law,<sup>161</sup> aliens imprisoned as enemy combatants should be able to claim that their detentions violate international law.

#### CONCLUSION

*Rasul v. Bush* allows aliens detained anywhere by the United States as enemy combatants to seek habeas corpus relief in U.S. courts. *Rasul*, however, leaves unanswered what substantive grounds aliens detained outside the United States can raise to challenge their detentions. If Guantanamo Bay is treated as the equivalent of U.S. territory, aliens detained there should be able to claim violations of due process rights. Those held elsewhere should be able to claim that their detentions are illegal because they have not been authorized by Congress, and are not within the inherent powers of the President, and that they violate international law.

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<sup>160</sup> *Id.* at 8–9; see also *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) (“It being within the jurisdiction of a Military Commission to try the prisoners, it was for it to determine whether the laws of war applied and whether an offense against them had been committed.”).

<sup>161</sup> See *supra* notes 142–46 and accompanying text.