DETENTION IN THE "WAR ON TERROR": CONSTITUTIONAL INTERPRETATION INFORMED BY THE LAW OF WAR

*Alec Walen and Ingo Venzke**

---

* Alec Walen, Ph.D., J.D., is a visiting scholar at the Max Planck Institute for Comparative Public Law and International Law. Ingo Venzke, LL.M., is a Ph.D. student and research fellow at the Max Planck Institute for Comparative Public Law and International Law. The authors would like to thank Charles Garraway, Richard Fallon, Sergio Dellavalle, Gabor Rona, Matthias Hartwig, and Silja Vöneky for their helpful comments on earlier drafts of this paper.

INTRODUCTION

In waging the "war on terror," the United States (U.S.) has detained numerous individuals for many years and claims the right to detain them for their whole lives on the ground that they are dangerous. But the basis for this claim of dangerousness is often flimsy hearsay testimony or similarly unreliable evidence. Those who care about justice as well as security want to be sure that those who are detained for long periods of time have either had a fair trial and been convicted of a serious crime or, if they are being preventively detained, then it is only because of reliable evidence—regularly reviewed—showing that their release would pose an unacceptable risk to security. The following is a constitutional argument for striking a just balance between liberty and security, one that is superior to the one struck by the Combatant Status Review Tribunals (CSRTs) that currently determine whether captured individuals can be detained as "enemy combatants."

The Bush administration has argued that there are no constitutional limits on when it can detain nonresident aliens in the interest of security in the "war on terror." This argument is based on a widespread misreading of *Johnson* v. *Eisentrager*,[1] according to which the Supreme Court has "emphatically" rejected the claim that nonresident aliens benefit from constitutional protections of their liberty.[2] We expose this misreading and argue that all persons detained by the United States in the "war on terror" have rights under the U.S. Constitution. In particular, the fundamental protection the Fifth Amendment provides for liberty—guaranteeing that it cannot be deprived without due process of law—applies to all detainees, not only to citizens and resident aliens but also to aliens captured and held by the United States outside the territory of the United States.[3]

Furthermore, we contend that the law of war, as a part of international law, provides substantive norms for distinguishing between different kinds of detainees and determining the content of their due process rights.[4] These

---

1. 339 U.S. 763 (1950).

2. The claim that the rejection was "emphatic" was made by Chief Justice Rehnquist in United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990).

3. A direct implication of this thesis is that CIA detentions of aliens for interrogation purposes are also covered by constitutional law, contrary to the view implicit in President Bush's Executive Order, Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency. Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 20, 2007).

4. This position was recently taken in Al-Marri v. Wright, 487 F.3d 160, 169 (4th Cir. 2007), but only with respect to resident aliens, as the court, we think wrongly, took the position that only resident aliens benefit from constitutional rights.

substantive norms show that CSRTs are inadequate in two fundamental regards. First, they misapply to civilians concepts that are relevant to combatants, including the idea of detention until "the cessation of active hostilities." Second, they use standards for detention that strike the wrong balance between claims of liberty and of security, allowing people to be detained on the basis of flimsy evidence that does not reliably show that they are too dangerous to be released.

These two claims are separate. The Court could decide that nonresident aliens benefit from constitutional rights and decide not to look to international law for guidance on the content of those rights. But were the Court to decide that the law of war is irrelevant to constitutional interpretation, it would not only be in error, but it would abandon the longstanding and deep connection between constitutional law and international law.

Lastly, there is the question of how these rights could be vindicated. A detainee may be able to press his claim for due process by invoking his statutorily granted right to appeal the determination that he is an enemy combatant. But if not, he must maintain the right of habeas corpus to contest his unconstitutional detention. The Military Commissions Act of 2006[5] (MCA) strips federal courts of their jurisdiction to hear habeas petitions by detainees in the "war on terror." The U.S. Constitution does not, however, allow the stripping of habeas jurisdiction when that jurisdiction is necessary to protect constitutional rights. The most recent court ruling on this point, *Boumediene v. Bush*,[6] gets this wrong by holding that nonresident alien detainees have no constitutional rights. They not only have such rights, but if they cannot raise these rights on appeal, then the right to habeas is guaranteed to them as a subsidiary procedural right.

We develop our argument in six parts. In Parts I and II we give an introductory overview of the U.S. practice of detentions in the "war on terror," and the Supreme Court's discussion of the practice in *Hamdi v. Rumsfeld*.[7] In Part III we critically discuss *Hamdi*'s misapplication of the law of war and provide the legal parameters of a detention policy consistent with the law of war. In Part IV we argue for the extraterritorial applicability to nonresident aliens of the core constitutional right not to be deprived of liberty without due process of law. In Part V we elucidate the link between constitutional norms and international law. Finally, we argue that these rights can be enforced by U.S. courts in Part VI.

---

5. 10 U.S.C. § 948a (2006).

6. 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007).

7. 542 U.S. 507 (2004).

I. BACKGROUND ON DETENTION IN THE "WAR ON TERROR"

The latest reports indicate that the United States now holds approximately 375 detainees from the "war on terror" in Guantánamo Bay, Cuba,[8] approximately 620 in Afghanistan,[9] and over *18,000* in Iraq.[10] We focus on the detainees in Guantánamo, as there is little publicly available information on those held elsewhere.[11] We adopt this focus for illustrative purposes only, and not as an indication that the rights of detainees are or should be fundamentally different depending on where they are held.

Of the 375 or so detainees still in Guantánamo, approximately eighty have been determined to be eligible for release or transfer and will presumably be released or transferred as the United States proceeds with negotiations with other countries that would receive them.[12] Since 2002, approximately 390 detainees have been released to other countries; 111 were released in 2006 alone.[13] This record of releasing detainees lends some support to the Department of Defense's claim that "[t]he United States does not desire to hold detainees for any longer than necessary."[14]

Nonetheless, there is still ground for concern. Even if the United States releases all eighty detainees who have been determined eligible for release, it

---

8. Press Release, U.S. Dep't of Defense, Detainee Transfer Announced (June 19, 2007), *available at* http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=11030 (last visited Sept. 11, 2007).

9. *See* Ben Fox, *Ex-Guantánamo Prisoner, Once Among Youngest Held, Back in U.S. Custody*, INT'L HERALD TRIB., Jan. 18, 2007, *available at* http://www.iht.com/articles/ap/2007/01/19/news/CB-GEN-Guantanamo-Juvenile.php (last visited Sept. 17, 2007).

10. *See* Walter Pincus, *U.S. Holds 18,000 Detainees in Iraq*, WASH. POST, Apr. 15, 2007, at A24 ("The average stay in these detention centers is about a year, but about 8,000 of the detainees have been jailed longer, including 1,300 who have been in custody for two years, said a statement provided by Capt. Phillip J. Valenti, spokesman for Task Force 134, the U.S. Military Police group handling detainee operations.").

11. But see id.; Michael Moss & Souad Mekhennet, *Jailed 2 Years, Iraqi Tells of Abuse by Americans*, N.Y. TIMES, Feb. 18, 2007, at 1.1 (describing cases of an Iraqi detainee held in Iraq for over two years, during which time he was questioned only once, and subjected to harsh, degrading treatment many times); Omar *ex rel.* Omar v. Harvey, 479 F.3d. 1 (D.C. Cir. 2007) (describing the process given a United States citizen detained in Iraq in a way that seems very much like a CSRT hearing).

12. Press Release, U.S. Dep't of Defense, *supra* note 8; *see also* Sara Wood, *Administrative Tribunals to Begin for High-Value Guantanamo Detainees*, AM. FORCES PRESS SERV., Mar. 6, 2007, *available at* http://www.globalsecurity.org/security/library/news/2007/03/sec-070306-afps01.htm (last visited Sept. 6, 2007).

13. Wood, *supra* note 12. The countries to which prisoners have been released include "Albania, Afghanistan, Australia, Bangladesh, Bahrain, Belgium, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Libya, Maldives, Morocco, Pakistan, Russia, Saudi Arabia, Spain, Sweden, Sudan, Tajikistan, Turkey, Uganda, United Kingdom, and Yemen." Press Release, U.S. Dep't of Defense, *supra* note 8.

14. Wood, *supra* note 12.

will still be holding approximately three hundred detainees in Guantánamo, not to mention the others held in Afghanistan, Iraq, and most likely elsewhere—including those held by the Central Intelligence Agency (CIA). Even assuming that some others will be found eligible for release, hundreds (or thousands, counting those held outside Guantánamo) could well be held in preventive detention "for the duration of hostilities," which in the context of a "war on terror" could be generations. Indeed, even if Guantánamo is closed down, many detainees would still be kept in long term preventive detention (presumably now on U.S. soil),[15] and their constitutional rights would still be an issue.

It is true that every detainee in Guantánamo has been found to be an "enemy combatant" by a CSRT.[16] By itself, however, this is not very reassuring. These determinations are structured to err on the side of detaining those who were not "enemy combatants." A detainee has access to a "personal representative" who can review the government's evidence and share with him the unclassified portions thereof, but he does not have access to legal help.[17] The government's evidence can include anything the CSRT deems relevant, including hearsay.[18] Lastly, and most tellingly, a detainee is determined to be an "enemy combatant" if that conclusion is supported by a "preponderance of the evidence," and there is a rebuttable presumption that the U.S. government's evidence is "genuine and accurate."[19] In other words, if a detainee cannot rebut the government's evidence, the government's evidence is taken to be sufficient.

In practice, the presumption that the U.S. government's evidence is genuine and accurate may be very hard for a detainee to rebut effectively,

---

15. See Thom Shanker & David Johnson, *Legislation Could Be Path to Closing Guantánamo*, N.Y. TIMES, July 3, 2007, at A10.

16. The foundations for CSRTs were laid in the Detainee Treatment Act, 10 U.S.C. §§ 1001–1006 (2005) [hereinafter DTA]. "Between July 2004 and March 2005, [the Department of Defense] conducted 558 CSRTs at Guantánamo Bay. At the time, thirty-eight detainees were determined to no longer meet the definition of enemy combatant, and 520 detainees were found to be enemy combatants." Wood, *supra* note 12. As of October 2005, at the latest, the U.S. Government claimed that all detainees in Guantánamo Bay had had their status reviewed by a CSRT. *See* U.N. Econ. & Soc. Council, *Situation of Detainees at Guantánamo Bay*, ¶ 27, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006), *available at* http://www.ohchr.org/english/bodies/chr/docs/ 62chr/ E.CN.4.2006.120_.pdf (last visited Sept. 24, 2007). We do not know what percentage of detainees in Afghanistan and Iraq have likewise had (similar) status review hearings.

17. *See* Deputy Secretary of Defense, Memorandum for Sec'y of the Military Dep't 4 (July 14, 2006), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRT Procedures.pdf (last visited Sept. 24, 2007).

18. *Id.* at 6.

19. *Id.*

leaving many "innocent" detainees unable to make their case.[20] Furthermore, the affidavit of Stephen Abraham, a lieutenant colonel in the U.S. Army Reserve who served on a CSRT board, indicates that the problems inherent in the design of CSRTs are made worse by inept and biased implementation of the procedures.[21]

Coming on the heels of *Hamdi*, where the Supreme Court found that Hamdi had been detained as an enemy combatant without any opportunity to contest the evidence, CSRTs are a real improvement. However, even supplemented by an annual review, CSRTs cannot suffice to provide the process due nonresident aliens before being preventively detained for years or even decades.[22] And it is important to keep in mind that detainees in Afghanistan, Iraq, and possibly elsewhere, may get even less by way of procedural protections. Moreover, CIA detainees seem to receive no process at all.[23]

The inadequacies of the CSRTs—even if the procedures were flawlessly executed—are really our focal concern. CSRTs operate as though the issue is to determine whether the individuals who come in front of them are combatants who may be preventively detained until the end of hostilities in an international conflict. That is a mistaken framing of the issue. First, preventive detention until the end of hostilities is premised on an international war. The "war on terror" as a whole cannot be conceived of this way because it covers detentions that occur where international war is ongoing and where it is not. Second, treating all detainees as "combatants" confuses the relevant standards for preventive detention of combatants and civilians. The process for preventively detaining a civilian, when the context is not detention prior to trial, should assess the evidence of his dangerousness so that his detention lasts no longer than actually necessary to meet serious security needs. CSRTs do not weigh the evidence with that question in view.

---

20. For illustration of this point, *see* Time Change—Examining Proposals to Limit Guantanamo Detainees' Access to Habeas Corpus Review, United States Senate Committee on the Judiciary, (2006) (statement of Thomas Sullivan, Partner, Jenner & Block), *available at* http://judiciary.senate.gov/testimony.cfm?id=2416&wit_id=5772 (last visited Sept. 6, 2007).

21. *See* Reply to Opposition to Petition for Rehearing at app., Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) (No. 06–1196). Colonel Abraham declares that those charged with gathering information for the CSRT boards seemed to be generally untrained and inexperienced in either legal or intelligence matters; that the information available to them was incomplete; that access to information that might have been exculpatory was denied him when he was officially tasked with finding it; and that CSRT boards faced pressure from above not to find that someone was not an "enemy combatant." *Id.*

22. The Department of Defense reports that the detainees in Guantánamo have had two annual reviews, as of March 6, 2007. *See* Wood, *supra* note 12.

23. *See* Exec. Order No. 13,440, *supra* note 3 and accompanying text.

To see how these design problems arose, we turn now to an aspect of the *Hamdi* decision that has so far received very little critical discussion—namely, the way the Court seems to license indefinite and perhaps perpetual detention.

II. SUPREME COURT'S POSITION ON DETENTION IN THE "WAR ON TERROR"

The Court (by which we mean the plurality opinion) in *Hamdi* was concerned with the possibility of perpetual detention. It addressed that concern in three ways. First, it pointed out that one of the more objectionable reasons for indefinite detention was not in play: "we agree that indefinite detention for the purpose of interrogation is not authorized [by Congress in the Authorization for the Use of Military Force (AUMF)]."[24]

Second, it embraced a competing justification for detention: "The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."[25] Moreover, it framed its acceptance of that purpose in terms of the internationally recognized norms of the law of war, noting that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities."[26] Finding that "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan,"[27] and that the AUMFs grant of authority to the President to use "necessary and appropriate force" included "the authority to detain [captured individuals] for the duration of the relevant conflict,"[28] it completed the syllogism and concluded that the ongoing detentions of individuals caught while fighting against the United States in Afghanistan are "part of the exercise of necessary and appropriate force, and therefore are authorized by the AUMF."[29]

Third, it offered future courts a potential escape hatch when it allowed that its understanding "may unravel" if "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war."[30] This difficult standard—being "entirely unlike" other wars—was held not to apply at the present time. But it could allow arguments

---

24. *Hamdi*, 542 U.S. at 521. Interestingly, this *is* in play with CIA detentions. It seems the only reason President Bush believes he can order these is that they apply only to *aliens*, which he presumably thinks benefit from no constitutional protections. As for why he thinks this is true of *resident* aliens, we cannot hazard a guess.

25. *Id.* at 518.

26. *Id.* at 520–21.

27. *Id.* at 521.

28. *Id.*

29. *Hamdi*, 542 U.S. at 521.

30. *Id.*

to be made in the future that the "war on terror" has evolved in such a way that future detentions should be viewed as more problematic than the ongoing detention of captured combatants in a war that still involves active hostilities.[31]

It is important to be clear about the status of the Court's arguments here. It might seem as if they were simply statutory arguments regarding what was authorized by the AUMF. It is implausible, however, to suggest that the Court's appeal to the law of war had no constitutional significance. When the Court concluded that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant,"[32] it surely was referring to constitutional as well as statutory bars. Because the Constitution does not allow liberty to be deprived except with due process of law—interpreted to involve both procedural and substantive protections—the Court must have assumed that the law of war is relevant to the constitutionally required due process. Indeed, if we imagine that Congress had granted the President the right to hold captured citizens both indefinitely and beyond the cessation of active hostilities, there could be no doubt that the Court would have found this to be constitutionally problematic. In other words, the citation to the law of war was not merely an aid in statutory interpretation. If we are to make sense of the Court's opinion, we have to see that citation as providing also a standard for constitutionally acceptable detentions.[33]

Admittedly, the *Hamdi* Court's implicit reliance on constitutional rights was deployed in a case involving a U.S. citizen. But our larger argument is that the U.S. Constitution's protection against the deprivation of liberty without due process of law applies to nonresident aliens as well as to resident aliens and U.S. citizens. The process they are due may take into account the danger the United States faces and the difficulties involved in collecting reliable evidence of dangerousness, but it must also give due weight to their liberty interests.

We also acknowledge that it does not follow from the fact that the Court looked to the law of war to justify preventive detentions in the "war on terror" that it *has* to align constitutional law with the law of war. If the Court were to accept our position that it misinterpreted the law of war, it could decide that the law of war provides only a sufficient, not a necessary, basis for finding preventive detentions in the "war on terror" to be constitutional. Nonetheless

---

31. It is also possible to interpret this third prong not as suggesting that the law of war might allow too many to be detained for too long, but that it might not allow enough to be detained for as long as necessary.

32. *Hamdi*, 542 U.S. at 519.

33. This is how the majority in *Al-Marri* reads *Hamdi* as well. In a footnote attached to a citation to *Hamdi* it wrote that Al-Marri "is protected by the Due Process Clause and so cannot be seized and indefinitely detained by the military unless he qualifies as an enemy combatant [under the law of war]." *Al-Marri*, 487 F.3d at 181 n.10.

we proceed on the assumption that the Court was deriving constitutional authority from the law of war and that it would at least shift the burden onto the administration to provide another justification for current detention practices if it turns out that they are *inconsistent* with the law of war. In addition, we argue in Part V that it would be proper, in developing a jurisprudence for due process rights for nonresident aliens, for the Court to look to international law, including the law of war.

Before moving on to a substantive criticism of the *Hamdi* decision, it is important to be clear that the Court was indeed discussing the "war on terror" generally, and not merely the limited part of it that was an international armed conflict between the United States and the Taliban government of Afghanistan. Given the fact that the evidence the Court offered of ongoing hostilities in the "relevant conflict" was fighting in Afghanistan, and that it appealed to the law of war to justify detentions, it might seem as though it was addressing only detentions in traditional international armed conflicts.[34] Were that the case, our criticism of the decision would be misplaced.

But there are two reasons why it is hard to read the opinion that narrowly. First, the Court's concern with the danger of "perpetual detention" cannot be made sense of in the context of traditional international conflicts. Such conflicts do not raise the specter of an "unconventional war" that could last "for two generations," in which a detainee like Hamdi might be detained "for the rest of his life."[35] To raise that specter, the Court had to invoke not the war in Afghanistan, but the larger "war on terror." Second, the Court was fundamentally concerned with the President's authorization under the AUMF, which was broadly directed at "'nations, organizations, or persons' associated with the September 11, 2001, terrorist attacks."[36] In other words, the AUMF lumped together combatants such as the Taliban soldiers and noncombatants—such as members of al Qaeda—and the Court seemed to follow along, using the term "enemy combatant" to cover both. Moreover, the CSRTs created in the wake of *Hamdi* apply to both, without distinction.

In the end, it is not completely clear whether the *Hamdi* Court was discussing the larger "war on terror" or only the war in Afghanistan. It is clear, however, that in establishing CSRTs the Bush Administration reads *Hamdi* as

---

34. This is how the majority in *Al-Marri* reads *Hamdi*. *Id.* at 178–79.

35. *Hamdi*, 542 U.S. at 520. Of course there was the 100 Year War between France and England, but it is hard to imagine the war in Afghanistan itself lasting anything like that long. In fact, there is a sense in which that international war is already over because the Karzai government is not fighting the United States and the United States is no longer an occupying power. Now the United States is merely helping the Karzai government fight an insurgency, an example of a non-international armed conflict.

36. *Id.* at 518.

relevant to the larger "war on terror." We discuss the opinion below as though that were the correct reading. And on that reading—in treating this larger "war" as though any putative terrorist detained in it would properly be categorized as an "enemy combatant"—the Court departed substantially from the law of war. We now turn to explaining why that is so.

III. CRITICIZING THE COURT'S TREATMENT OF DETAINEE RIGHTS UNDER THE LAW OF WAR[37]

The Court made two basic mistakes in invoking the law of war to justify indefinite, possibly perpetual, preventive detention in the "war on terror." First, it failed to see that the cessation of "active hostilities" does not fit the "war on terror" as a whole. Second, it failed to see that the detainees captured in the "war on terror" are usually not combatants, but are instead civilians. If we correct these errors we see that legal detentions generally require more than CSRT hearings. We also see that the law of war, as it now stands, can reasonably be applied even given the new threats raised by terrorism.

A. Misapplication of the Norms of International Armed Conflict: The Cessation of Active Hostilities

The Court appealed to the cessation of "active hostilities" for setting a limit to the length of detentions in the "war on terror." In so doing, the Court relied on a part of the law of war that deals with international armed conflict. However, the notion of the cessation of active hostilities does not fit the "war on terror" as a whole, as the "war on terror" extends beyond any international war that may form part of it.

The 1949 Geneva Conventions and the Additional Protocols thereto provide the modern statements of the law of war with regard to the treatment and justification of detention of those interned during war. In particular, the Third and Fourth Convention (GC III and GC IV respectively), together with the Additional Protocol I (AP I), provide the law governing the detention of prisoners of war and other detainees.[38]

---

37. To speak with the Supreme Court, we use the phrase "law of war" where many authors would instead use "laws of armed conflict."

38. These are, respectively, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. The United States is a signatory of these Geneva Conventions, but not the AP I. Nevertheless, the articles of the AP I that we rely on, notably art. 75 on minimum guarantees, are generally regarded as customary international law. *See*

The Supreme Court cited GC III, Article 118, for the proposition that "detention may last no longer than active hostilities."[39] This provision is only triggered under Common Article 2, which provides that certain provisions of law are applicable to "cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them"; and "cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[40] Because the Geneva Conventions are customary international law, the reference to high contracting parties can be replaced with a reference to states. This shows that the reference to "active hostilities" is limited to wars between states.

The Geneva Conventions also apply, in Common Article 3, to non-international armed conflicts, such as wars between a state and groups such as the Taliban after they were removed from power and became a rebel group. But Common Article 3 provides minimum standards for humane treatment and fair trial;[41] it does not discuss when detentions are legally justified. It is only in the law triggered by Common Article 2 that one finds provisions justifying detention, and, as just noted, Common Article 2 refers to instances of international armed conflict.

The Court was right to think that the conflict in Afghanistan counted as an international armed conflict. The problem with the Court's analysis is that it can be read as though the law of war justified detention that could go on as long as the "war on terror" lasts. Since much of the "war on terror" extends beyond such international armed conflicts, however, the appeal to GC III cannot possibly justify detentions until the end of the "war on terror." Indeed, since appeal to the cessation of "active hostilities" was designed to fit the context of a war between states, using it in another context strips it from its normative foundation. Moreover, the notion of "active hostilities" loses its meaning if taken from the context of a conflict between states and used instead to refer to

---

Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L & POL'Y 419, 427 (1987) ("We support in particular the fundamental guarantees contained in article 75"); William H. Taft, *The Law of Armed Conflict after 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003) ("While the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.").

39. *Hamdi*, 542 U.S. at 520.

40. GC III, *supra* note 38, art. 2; GC IV, *supra* note 38, art. 2, ¶¶ 1–2. This was also adopted by reference in AP I, art. 1, ¶ 3 ("This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.").

41. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795 (2006).

ongoing acts of terrorism and the United States's ongoing efforts to combat them.[42]

It might be suggested that the "war on terror" presents a new set of problems and that the old law has to be adapted to these new problems. Perhaps—but extensions of the Geneva Conventions have to make sense and appealing to the cessation of active hostilities is a categorical confusion. If civilians who are members of certain terrorist groups are especially dangerous, then it is the provisions dealing with the detention of civilians, not those dealing with the return of combatants after an international armed conflict, that should be re-examined.

We turn now to the second confusion: treating detainees in the "war on terror" as if they were combatants.

B. Misapplication of the Norms of International Armed Conflict: Confusing Civilians and Combatants

A second mistake in the Court's reasoning in *Hamdi* was to treat the detainees in the "war on terror" as though they were combatants. There presumably were some combatants captured in the wars against Afghanistan and Iraq. Indeed, if the government's position on Hamdi is factually accurate, he may well have been a combatant.[43] But the opinion seems to be general, and those captured in the "war on terror" during non-international armed conflicts, such as the current fight against the Taliban, are not combatants.[44] Terrorists

---

42. We do not mean to imply that the law regarding when active hostilities have ceased, even in the context of international armed conflict, is entirely clear. A good sense for the problem can be gained by comparing the majority and the dissenting opinions in Ludecke v. Watkins, 335 U.S. 160 (1948).

43. The government relied on a declaration by Michael Mobbs, according to which Hamdi was 'affiliated with a Taliban military unit and received weapons training' . . . 'remained with his Taliban unit following the attacks of September 11' . . . during the time when Northern Alliance forces were 'engaged in battle with the Taliban,' 'Hamdi's Taliban unit surrendered' to those forces, after which he 'surrender[ed] his Kalishnikov assault rifle' to them.

Declaration of Michael H. Mobbs at 3–4, Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002) (No. 2:02CV439). If the United States was in overall control over the Northern Alliance at this time, then the conflict would have been international, and Hamdi would count as a combatant. Hamdi, however, claims to have been a civilian in Afghanistan doing relief work. *Hamdi*, 542 U.S. at 511.

44. Note that the category of "combatants" exists only in international armed conflicts and not in non-international armed conflicts. The justification for this becomes intuitively clear when one considers that only combatants are immunized from prosecution for legal acts of war which would otherwise constitute a crime. Others may be retrospectively granted amnesty in a non-international context, but that should not be confused with an immunity. *See* Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict art. 6, ¶ 5, Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter AP II].

in general are civilians. The point here is not the one that Hamdi himself was making—that he was a civilian, in no way engaged in hostilities, mistakenly taken to be a combatant. The point is that even those who were engaged in hostilities were mostly doing so as civilians. And the rules for detaining and releasing civilians are not the same as those for detaining and releasing combatants.

The definitions of civilians and combatants are laid out in AP I, which codifies a negative definition of civilians as those who are not combatants. "A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol."[45] There are a few things worth highlighting in these provisions. First, with one exception, all combatants must be linked to a Party, in other words, a signatory state.[46] Second, the reason for this requirement is that combatants are privileged to engage in hostilities; they may legally kill and otherwise perform legal acts of war that civilians may not perform.[47] Individuals can benefit from such a privilege if and only if they are properly connected with a Party that confers the right to engage in hostilities on them.[48] Third, the definitions are exhaustive. A civilian is anyone who is not a combatant.[49] Fourth, terrorists who operate through organizations such as

---

45. AP I, *supra* note 38, art. 50, ¶ 1.

46. The exception is GC III, article 4(A), paragraph 6, which endorses the concept of *levée en masse*, a spontaneous rise of the people in self-defense against the invading army. GC III, *supra* note 38, art. 4(a), ¶ 6.

47. The right to engage in hostilities is explicitly mentioned at the end of AP I, article 43, paragraph 2. AP I, *supra* note 38, art. 43, ¶ 2. *See also* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 9 (2004) ("The underlying theory of the combatant's privilege is that wars are conflicts between public entities, not between individuals. The detention of combatants is not punishment, but rather, simply a way of putting combatants *hors de combat* for the duration of the conflict. Privileged combatants cannot be prosecuted for engaging in violence when that violence complies with the rules regarding conduct of combat."). DIETER FLECK, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 67 (1995) ("[O]n the basis of the ordinary meaning, a combatant is a person who fights. As an international legal term, the combatant is a person who is authorized by international law to fight in accordance with international law applicable in international armed conflict.").

48. *See, e.g.*, KENNETH WATKIN, WARRIORS WITHOUT RIGHTS? COMBATANTS, UNPRIVILEGED BELLIGERENTS, AND THE STRUGGLE OVER LEGITIMACY 12 (2005) ("Combatancy is assessed in terms of . . . its intimate and continuing link to legitimacy.").

49. The exhaustive nature of the distinction is generally accepted. *See* Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 INT'L REV. RED CROSS 45, 45–46 (2003); Oscar M. Uhler et al., Commentary, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans.) (1958) ("There is no intermediate status; nobody in enemy hands can be outside the law."); HCJ 769/02 Public Committee against Torture in Israel v. The Government of Israel [2006] ¶ 26, available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM (last visited Oct. 8, 2007) ("That definition [of civilians] is 'negative' in nature.

al Qaeda, or who operate on their own, are civilians. These organizations do not have a link to Parties to the conflict. This last point bears repeating: the terrorists who are the target detainees in the "war on terror" are generally civilians under the governing law of war.

Despite the fact that the distinction between civilians and combatants is reasonably clear in the law of war, the Supreme Court misapplied it. As was noted above, the Supreme Court cited GC III, Article 118, for the proposition that "detention may last no longer than active hostilities."[50] What Article 118 actually says is that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities."[51] The term "prisoners of war" applies only to captured combatants and certain limited classes of civilians—generally those who accompany armed forces that belong to a party in the conflict, not those who strike out on their own.[52] Thus, while the Supreme Court may have been right to cite this clause for someone like Hamdi who—if the government is factually correct—may have been a combatant, it was wrong insofar as it cited it for preventive detentions generally. Those detained or interned as civilians generally are *not* covered under that release or repatriation clause.

The preventive detention of civilians in time of occupation—the condition that applied in Afghanistan at the time of *Hamdi*—is covered most directly by GC IV, Article 78: "[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."[53] What is noteworthy here is how high the barrier to detention is.

It defines the concept of 'civilian' as the opposite of 'combatant."); *Id.* at ¶¶ 27–28 ("the state asked us to recognize a third category of persons, that of unlawful combatants. . . . [A]s far as existing law goes, the data before us is not sufficient to recognize this third category."). *See also* Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 180 (Mar. 3, 2000) ("[civilians are persons] who are not, or no longer, members of the armed forces.").

50. *Hamdi*, 542 U.S. at 520.

51. Naturally, "[p]risoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence." GC III, *supra* note 38, art. 119.

52. A general six-item list of types of people who can become prisoners of war if captured is given in GC III, article 4(A). GC III, *supra* note 38, art. 4(A). Paragraphs 4–6 concern specific categories of civilians who are due the protections of prisoners of war. *Id.* The one exception to the claim that citizens can become prisoners of war only if they accompany armed forces of a party to a conflict concerns the concept of *levée en masse*. *See supra* note 46. Whether these civilians should also be treated as combatants with regard to release conditions is a question we do not address here.

53. GC IV, *supra* note 38, art. 78, ¶ 1. AP I, article 75, paragraph 3 reinforces this GC IV passage, but adds nothing new with regard to when a detainee must be released: "Except in cases of arrest or detention

The emphasis on using preventive detention only rarely is sounded three times: only when it is "necessary"; "for imperative reasons of security"; "at the most." As the official commentary to this passage states, the point of the language used was to ensure that "such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved."[54] We will see in section D at the end of this Part, that this approach to preventive detention as exceptional conflicts with the use of CSRTs as currently configured.

The other relevant Article of GC IV, Article 133, may seem to link the detention of civilians with that of combatants. It reads: "[i]nternment shall cease as soon as possible after the close of hostilities." But it should be noted that this does not imply that internment during hostilities is as unproblematic for civilians as it is for prisoners of war and other detained combatants. This article is based on the premise that "hostilities are the main cause for internment";[55] accordingly when they cease, it can be generally presumed that the need for preventive detention will cease as well. Rather than implying that civilians can be detained as long as combatants, it provides simply *another* limit to the detention of civilians. This is clear from GC IV Article 132, which states that "[e]ach interned person shall be released . . . as soon as the reasons which necessitated his internment no longer exist."

These provisions show that the *Hamdi* Court misapplied the law insofar as it approved of holding "enemy combatants" until the cessation of "active hostilities" on the grounds that this is in accordance with the law of war. Most of these "enemy combatants" are not combatants at all. They are civilians and their detention until the cessation of active hostilities is not straightforwardly authorized by the law of war.

The U.S. government has tried to resist this conclusion by taking the position that those civilians who engage in hostilities turn into a species of combatant—unlawful enemy combatants.[56] This can be seen, for example, in

---

for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist." AP I, *supra* note 38, art. 75, ¶ 3. This provision of AP I serves as an ultimate safety net for persons who are not covered by the relevant parts of GC IV because they do not qualify as "protected persons" as defined in GC IV, article 4.

54. Uhler, *supra* note 49, at 368. *See also* Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶ 320 (Feb. 20, 2000) ("The judicial or administrative body reviewing the decision of a party to a conflict to detain an individual must bear in mind that such measures of detention should only be taken if absolutely necessary for reasons of security.... [T]he involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary will be unlawful.").

55. Uhler, *supra* note 49, at 515.

56. There are also scholars who adopt this line. *See, e.g.*, YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 28 (2004) ("A civilian may convert himself into a combatant."). The assumption that an individual could individually gain combatant status

the remarks of the Legal Advisor to the U.S. Department of State, John B. Bellinger: "it's very clear, and an accepted [sic] in international law, that individuals who take up arms illegally . . . are combatants because they are fighting, but they are 'unlawful combatants' because they are doing it in an illegal way."[57] Plausible as his claim may sound in terms of lay English, it is, as we have seen, simply and straightforwardly wrong as an account of international law.[58]

Again, there may be reason to amend the law of war when it comes to the detention of civilians. We return to examine that possibility in section E of this Part. Our point now is that by treating civilians as combatants, the Court did not respect the law of war as it now stands.

C. The Law of War and International Human Rights Law

So far we have been discussing only the limits on detention provided by the law of war as it deals with international armed conflict. But that leaves much of the "war on terror" ungoverned by international law. It might be thought, then, that the right way to get guidance from international law on detentions in the "war on terror," especially when it is waged outside of the context of international armed conflict, is to look to international human rights law. Perhaps surprisingly, this would not yield much guidance, as it turns out that international law is more lax when it comes to preventive detention outside the context of international armed conflict than in it. However, an argument can still be made that the law of war for international armed conflict presents a basic floor for legal detentions.

---

according to his actions is also implicit in Eric Talbot Jensen, *Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 209 (2005).

57. John B. Bellinger III, Digital Video Press Conference (Mar. 13, 2006), *available at* http://www.usembassy.de/germany/bellinger_dvc.html (last visited Sept. 6, 2007).

58. *See supra* notes 48–49 and accompanying text. The *Hamdi* Court cites *Ex Parte Quirin*, 317 U.S. 1, 31 (1942), hoping thereby to show that the "capture, detention, and trial of unlawful combatants" is legally well grounded. 542 U.S. at 518. But there is no reason to take *Quirin* as precedent for treating *civilians* who unlawfully use force as combatants in the modern, legal sense of the word. *See also Al-Marri*, 487 F.3d at 186 ("[M]erely engaging in unlawful behavior does not make one an enemy combatant. . . . The *Quirin* petitioners were first enemy combatants associating themselves with the military arm of the German government with which the United States was at war.").

When a state of international armed conflict does not exist,[59] the most pertinent and universally applicable human rights law is the International Covenant on Civil and Political Rights (ICCPR).[60] The relevant language for our discussion from the ICCPR is found in Article 9:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law . . . .
>
> . . . .
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.[61]

While these clauses provide meaningful procedural protection, they do not provide any substantive guidance on when a state can take a concern for security to provide the basis for preventive detention. The prohibition on arbitrary detention would not restrict the use of CSRTs to license preventive detentions. Such detentions would certainly count as being in accordance with a procedure established by law (the Detainee Treatment Act of 2005 (DTA) and the regulations promulgated pursuant to it, to be precise).[62]

Paragraph 4, which requires that there be some form of review by a court, may provide *some* ground to criticize the use of CSRTs, but not a significant one. The DTA provides for the right to appeal a CSRT finding that an individual is an "enemy combatant," first to the Circuit Court for the District of Columbia, and from there to the U.S. Supreme Court.[63] It could be argued that the appeal right is too limited and that detainees also need to have a right

---

59. The only provision of the law of war that applies after wars and occupations end, but not generally in peacetime as well as war is AP I, article 75, paragraph 6: "Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict." AP I, *supra* note 38, art. 75, ¶ 6. Note also that only selected provisions of GC IV cover for the length of an occupation; others end one year after "general close of military operations." GC IV, *supra* note 38, art. 6. Articles 78, 132 and 133, which we have discussed above, are among those that last only a year after the close of military operations. AP I, article 3(b) eliminates this one-year restriction, but the United States is not a signatory to the AP I. AP I, *supra* note 38, art. 3(b).

60. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

61. *Id.* art. 9, ¶¶ 1, 4.

62. *See supra* notes 16–17.

63. DTA § 1005(e)(2)(A).

to habeas.[64] But unless there were some substantive legal problem with the sorts of preventive detentions that the United States is now using in the "war on terror," the procedural right to habeas would be of limited value. It might allow certain factual inquiries that could not be raised on appeal. But the right to habeas, by itself, would not provide a ground to challenge the legal framework for preventive detentions. For that, more substantive standards are needed.

Nevertheless, it would be quite anomalous if the United States were to conclude that it has greater legal liberty to put nonresident aliens in possibly perpetual preventive detention if it captures them *after* a period of occupation of another country ends than if it captures them *during* a period of occupation.[65] The solution to this anomaly is to be found in the link that should be made between the law of war and U.S. constitutional law. Our argument in the next two Parts will be that nonresident aliens benefit from the Constitution's prohibition on deprivations of liberty without due process of law (again, understood to have both substantive and procedural dimensions) (Part IV), and that the law of war provides substantive guidance on how to interpret this constitutional norm for the case of nonresident aliens (Part V). The standards deployed in the Geneva Conventions provide an appropriate baseline for balancing the United States' legitimate concern with security against the rights of individuals to their liberty. The fact that international human rights law does not provide a similar baseline does not give the United States license to change the balance between its security interests and liberty interests of individuals. It is not as if international human rights law provides competing norms for balancing state security interests against individual liberty interests when international armed conflicts are not ongoing. International human rights law simply does not address in any substantial way the balance. Thus, the only substantive guidance from international law comes from the law of war. If the balance between security and liberty is appropriately struck in the Geneva Conventions, then that is *the* proper constitutional balance for dealing with nonresident aliens.

D. The Conflict Between U.S. Policy and the International Law Standard for Balancing Security and Liberty

Even if the Supreme Court did not properly describe the law of war in *Hamdi*, it might be argued that CSRTs strike—or would strike if staffed by well

64. This is the argument the Court decided to entertain when it granted certiorari, after initially denying it in the *Boumediene* case. *Boumediene*, 476 F.3d 981.

65. The period of occupation would count as a period of international armed conflict.

trained individuals who had access to the intelligence they need[66]—a legally justifiable balance between the security interests of the United States and the liberty interests of detainees. We argue here for the contrary position.

As noted above, GC IV provides that when a state "considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."[67] The balance struck here allows for only minimal use of preventive detention, and only in exceptional cases. Nonetheless, it is a balance that is called for and thus, security concerns can, if serious enough, justify preventive detentions.[68]

The United States may claim that the CSRT procedure provides just this sort of balance.[69] Ongoing preventive detention is allowed only after a CSRT has determined by a preponderance of the evidence that those detained are "enemy combatants" in the functional sense of individuals who have taken up arms against the United States and its allies.[70] This is a determination based on an individualized hearing. Moreover, a holding that a detainee is an "enemy combatant" is reviewed on an annual basis.[71]

But there are at least three problems with the CSRT procedures.[72] First, a preponderance of the evidence is a comparative notion; it does not imply that the evidence is particularly strong. A preponderance of the evidence could be

---

66. *See* Reply to Opposition to Petition for Rehearing, *supra* note 21.

67. GC IV, *supra* note 38, art. 78, ¶ 1.

68. If security can be preserved relatively well with less drastic measures than internment, then those less drastic measures must be taken. For example, the practice of releasing detainees if they can come up with a reliable "sponsor" within the community provides a way of protecting security while also promoting liberty. The existence of this practice was pointed out to us by Charles Garraway. *See also Bremer: Iraq detainees to be freed* (Jan. 7, 2004), *available at* http://www.cnn.com/2004/WORLD/meast/01/07/sprj.nirq.bremer/index.html (last visited Nov. 21, 2007). In any event, the only legitimate factor counterbalancing the deprivation of liberty is individual dangerousness constituting a security risk. Notably, this excludes detention for the purpose of gathering information, which would be illegal in all circumstances. *Cf. Hamdi*, 542 U.S. at 521.

69. This may only be true of detainees in Guantánamo, as the CSRT regulations we have been discussing apply only there. The DTA does call for status review procedures to be developed for Afghanistan and Iraq as well. DTA § 1005(a). But we are uncertain how much they resemble the procedures for Guantánamo. Importantly, the DTA covers detainees *only* in Guantánamo, Afghanistan or Iraq. If the United States holds detainees elsewhere, those detainees are not covered by the DTA.

70. *See supra* notes 16–21 and accompanying text.

71. *See* DTA § 1005(a)(1)(A). Interestingly, the DTA has different clauses covering detainees in Guantánamo, on the one hand, and in Afghanistan and Iraq, on the other. The procedure for annual review is only to be found in the clause covering Guantánamo. *Compare* § 1005(a)(1)(A) *and* § 1005(a)(1)(B).

72. For further discussion of how limited and problematic CSRTs are see *Boumediene*, 476 F.3d at 1005–06 (Rogers, J., dissenting).

one piece of hearsay evidence from a dubious source, as compared to nothing but the detainee's own denials on the other side. This problem is exacerbated by the fact that CSRTs use a rebuttable presumption that the U.S. government's evidence is "genuine and accurate."[73]

Second, though initial hearings are individualized, further review of detention decisions are not, at least not in the relevant way, individualized. If someone is found to be an "enemy combatant," he is subject to detention until the cessation of "active hostilities," which in the war on terror would seem to mean until the United States is no longer concerned about terrorist attacks. Even with an annual review of his case, the presumption, once an individual is declared an "enemy combatant," is that he can be held as long as the "war on terror" goes on. The kind of individual consideration contemplated by the Geneva Conventions, however, involves more than an annual review to see if new facts have surfaced showing that his detention was a mistake.[74] It requires an individualized assessment of just how great a risk an individual poses, to ensure that he is held no longer than necessary for "imperative reasons of security."

Third, the definition of an "enemy combatant" is not only misleading, as most detainees in the "war on terror" are civilians, but is also not particularly tightly tied to a showing of dangerousness. The MCA defines an "unlawful enemy combatant,"—a narrower category than the "enemy combatant" category CSRTs use—in part, as "a person who has engaged in hostilities or who has *purposefully and materially supported hostilities* against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)."[75] Merely providing "material support" for hostilities against the United States is an awfully expansive term that may have nothing to do with being a supporter of terrorism. It might be met, for example, by someone who, from time to time, cooks food for members of terrorist organizations. Moreover, it is not clear what falls under the label of forces "associated" with the Taliban and al Qaeda. Would a member of Hamas, which has been declared a terrorist organization, count? A huge percentage of the population of the Gaza strip could then be indefinitely

---

73. *See* Deputy Secretary of Defense, *supra* note 17.

74. Indeed, an annual review is insufficient. GC IV, article 43 provides that such revision shall take place "periodically, and at least twice yearly." GC IV, *supra* note 38, art. 43. Also, in the context of occupation, this decision must be reviewed periodically, "if possible every six months." *Id.* at ¶ 2.

75. Military Commissions Act, 10 U.S.C § 948(a)(1)(A)(i)(emphasis added) [hereinafter MCA]. The CIA can detain for interrogation an even broader class of aliens, those who the Director of the CIA determines "to be a member or part of or supporting al Qaeda, the Taliban, or associated organizations." *See* Exec. Order No. 13,440, *supra* note 3 and accompanying text. Taken literally, the CIA could indefinitely detain any alien who has done nothing more than express support for the Taliban.

detained, even though many of them think of Hamas as a political party, not a terrorist organization.[76]

To follow the norms of international law, then, the United States would need to adopt different procedures that reflect a balance between security and liberty that is more respectful of the claims of liberty. This does not mean that the United States has to sacrifice its legitimate security interests. Measures necessary to protect its security *can* legally be taken under international law. However, it is a violation of international law to treat civilians like combatants who can be detained until the "war on terror" is either "won" or abandoned.

E. Defense of the International Law Standard for Balancing Security and Liberty

It might be argued, given the exigencies of the "war on terror," that the United States is right to push for changes in the law of war. In particular, it might be argued that the United States is right to push for a functional definition, rather than a status definition, of combatants. According to the functional definition, anyone who fights is a combatant. According to the status definition, anyone who is entitled to fight is a combatant. The law of war uses the status definition and we argue here that doing so strikes at least a defensible balance between the security interests of the United States and the liberty interests of detainees. The burden for changing the law of war, therefore, sits squarely on those who seek to change it.

The premise underlying the United States' push to use the functional definition is that members of groups like al Qaeda fight like combatants. They present a danger more like that presented by combatants fighting for another country than that presented by normal criminal activity (even organized criminal activity). In addition, the problems of obtaining evidence sufficient to convict them of criminal activity are so great that they need to be preventively detained. They need to be detained, as combatants are detained, until the fight against the organizations to which they belong is over.

These empirical claims are bolstered by a simple thought experiment.[77] Suppose a combatant, fighting for a state with which the United States is at war, and a civilian member of al Qaeda are captured side by side, both carrying weapons, both having been shooting at U.S. troops. According to the law of

---

76. "[T]he mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living and is not, therefore, a valid reason for interning him or placing him in assigned residence." Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 577 (Nov. 16, 1998).

77. *See* Charles Garraway, *"Combatants" - Substance or Semantics?" in* INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 317, 329-32 (Michael Schmitt & Jelena Pejic eds., 2007).

war, the combatant can be detained until the cessation of hostilities with the country for which he fights, but the civilian can be detained only as long as his individual detention is necessary for imperative reasons of security. Moreover, the combatant's detention does not have to be reviewed at all once he is determined to be a combatant; by contrast, the civilian's status has to be reviewed every six months.[78] But surely it is absurd to treat the civilian, who had no privilege to fight at all, so much better than the combatant. If he fights like a combatant, he should be detained like one.

In response we point out that it is necessary to divide civilians who are thought to function like combatants into two categories: those who are caught red-handed and those who are not. Any civilian caught engaging in combat would be caught engaging in a serious crime. He can presumably be convicted and detained for as long as the relevant sentence allowed. Thus, he is actually *more* subject to detention than a person with the status of combatant. On the other hand, if a civilian is not caught red-handed, then there is likely to be some doubt that he is a combatant and a danger that he will be detained without cause. This danger of wrongly detaining someone who is not a combatant is much less likely to be present with combatants who, in order to act lawfully, must be wearing a distinctive insignia.[79] Thus, the thought experiment does not apply accurately to either category.

It might be objected that it is not always possible to prosecute those caught red-handed. Capture in conditions of combat is a messy business and it is not always possible for those who did the capturing to participate in a subsequent trial. Indeed, sometimes the people who were eyewitnesses to a capture have been killed in subsequent combat themselves. Moreover, whether or not they are available for trial, they may have had little opportunity in the confusion of real combat, to make extensive notes about who they captured and what they were doing. If civilians had to be released as soon as it is no longer necessary to detain them for imperative reasons of security, then the civilians who cannot be tried because of a paucity of evidence might be released earlier than they should be.

In response we point out that these are exactly the sorts of civilians who *can* justifiably be preventively detained. We do not deny that many detainees in the "war on terror" *are* committed to fighting the United States and to using

78. *See* GC IV, *supra* note 38, arts. 43 & 78, ¶ 2.

79. Any combatant not wearing distinctive insignia is guilty of a war crime. More significantly for our point, we assume that it is very unlikely that anyone who is not a combatant would be wearing the uniform or insignia of a combatant, especially as doing so would not only probably subject him to detention until the cessation of hostilities, but also would mark him as a target for the enemy who, without knowing better, is likely to shoot at the civilian in combatant's clothes.

terrorist means in doing so. A category of preventive detention is justified for those civilians for whom: a) there is insufficient evidence to obtain a conviction for criminal actions, and yet b) there is good reason to believe that they are terrorists, and c) no less restrictive treatment would serve the security interests of the United States and its allies.[80] Their cases may have to be reviewed regularly, in contrast with what is due captured combatants. But they can still be detained as long as there is good reason to believe that their ongoing detention is imperative for security reasons, in other words, that they are still a real threat. And regular review of their cases is a relatively small price to pay to ensure that those who might have mistakenly been picked up as being terrorists are released as soon as possible.

IV. EXTRATERRITORIAL APPLICATION TO NONRESIDENT ALIENS OF THE CORE CONSTITUTIONAL RIGHT NOT TO BE DEPRIVED OF THEIR LIBERTY WITHOUT DUE PROCESS OF LAW

We now turn to the question of whether nonresident aliens can benefit from the argument in Part III as a matter of constitutional law.

A. Rasul v. Bush:[81] *A Headcount*

When the Supreme Court most recently addressed the question whether nonresident aliens have enforceable constitutional rights,[82] six of the nine Justices took the position that they do. Five took that position in footnote fifteen in the majority opinion of *Rasul*, and one, Justice Kennedy, took it in the text of his concurring opinion. Even though one of the five who signed onto the majority opinion, Justice O'Connor, has since retired, there should still be at least five members of the Court who embrace the position that nonresident aliens have constitutional rights.[83]

Starting then with footnote fifteen, it reads:

> Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory

80. Civilians can also be detained in the short run while looking for a country that would not violate their human rights. *See, e.g.*, Qassim v. Bush, 407 F. Supp. 2d 198, 199 (D.D.C. 2005).

81. 542 U.S. 466 (2004).

82. It is not redundant to describe constitutional rights as enforceable. For brevity, however, we assume that all constitutional rights are enforceable.

83. We draw no inferences from the initial denial of certiorari in *Boumediene*, nor from the Court's subsequent decision to grant certiorari.

> subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'[84]

This text indicates that nonresident aliens could be subject to treatment by the United States that would normally justify granting the writ of habeas: "custody in violation of the Constitution or law or treaties of the United States."[85] By itself, this does not imply that it is their constitutional rights that have been violated—there are two other possibilities: violations of the law or treaties of the United States. Yet the citation the Court offers for this claim does implicate constitutional rights.

The supporting citation is Justice Kennedy's concurring opinion in *United States v. Verdugo-Urquidez*,[86] and the cases cited therein. *Verdugo-Urquidez* held that the Fourth Amendment's protection against unreasonable searches does not extend to nonresident aliens whose property outside the United States is searched by U.S. authorities. Justice Kennedy's concurring opinion rejected the thought that the holding followed from the general proposition that nonresident aliens have no constitutional rights. Instead, he framed the question as "what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations."[87] In so framing the question, he extended a point Justice Harlan had made concurring in *Reid v. Covert*:[88] It is "not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place."[89] Justice Harlan's point concerned only U.S. citizens; by citing it in this case, however, Kennedy was extending it to aliens as well. Thus, the *Rasul* majority's citing this opinion makes it clear that they agreed that constitutional rights could apply to nonresident aliens.

Justice Kennedy's own opinion in *Rasul* focused on the constitutional right to habeas, as originally discussed in *Eisentrager*. The Court in *Eisentrager* denied that twenty-one German detainees, who had been convicted of war crimes by a military commission in China and who were later repatriated to

---

84. *Rasul*, 542 U.S. at 484.

85. This phrase comes from the federal habeas statute, 28 U.S.C. § 2241(c)(3) (2007). We say "normally" because the MCA has stripped federal courts of habeas jurisdiction over these detainees.

86. *Verdugo-Urquidez*, 494 U.S. at 259.

87. *Id.* at 277.

88. 354 U.S. 1 (1957).

89. *Verdugo-Urquidez*, 494 U.S. at 277 (citing to *Reid*, 354 U.S. at 74) (Harlan, J., concurring) (emphasis in original).

Germany to serve their sentences in an American army base prison, had a right to contest their detentions using habeas corpus. Nonetheless, it endorsed the view that the constitutionally guaranteed right to habeas "is a subsidiary procedural right that follows from possession of substantive constitutional rights."[90] Thus, to find that the detainees in Guantánamo had a constitutional right to habeas, Justice Kennedy had to first find that they had constitutional rights that might be violated by their custody in Guantánamo. He found that was the case both because "Guantánamo Bay is in every practical respect a United States territory,"[91] and because "the detainees at Guantánamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status."[92] The important point, then, is that Kennedy, relying on *Eisentrager*, came down again, consistently with his opinion in *Verdugo-Urquidez*, in favor of nonresident aliens having constitutional rights that the United States could violate.

It must be observed that both the majority and Justice Kennedy concurring in *Rasul* expressed the view that nonresident aliens can benefit from constitutional rights only when brought to U.S. territory, or at least territory that is "subject to the long term, exclusive jurisdiction and control of the United States."[93] Justice Kennedy's reasoning in *Verdugo-Urquidez* was not in the same way tied to United States controlled territory and that provides some reason to think that the majority would extend constitutional rights to aliens held by the United States outside territory controlled by the United States. But just how the remaining members of the *Rasul* majority and Kennedy would handle extending constitutional rights to nonresident aliens held by the United States outside of territory controlled by the United States cannot be predicted with great confidence.

B. The Case Law: An Open Question

We argue in this section that there is no settled case law on whether nonresident aliens benefit from constitutional rights. In the next section, we argue that because the Court confronts a choice between two different policies the only honest approach to the choice is to examine the underlying reasons.

There are many voices in the debate that take the view that the law is already clear: constitutional protections do not extend to nonresident aliens.

---

90. *Eisentrager*, 339 U.S. at 781.

91. *Rasul*, 542 U.S. at 487.

92. *Id.* at 487–88. In 2004, detainees did benefit from no legal process, as the CSRTs had not yet been established. It is unclear whether Justice Kennedy would consider the process they provide adequate to meet his concerns.

93. *Id.* at 484.

For example, in *Boumediene* the majority declared: "[p]recedent in . . . the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States."[94] There are two Supreme Court cases that are primarily relied on for the view that nonresident aliens have no constitutional rights. In reverse chronological order they are *Verdugo-Urquidez* and *Eisentrager*. We address these in turn.

The majority opinion in *Verdugo-Urquidez*, written by Chief Justice Rehnquist, claimed that aliens outside the United States or territory controlled by the United States do not benefit from any constitutional rights. The first thing to note about this opinion is that it was *not* a majority opinion *for that claim*. Justice Kennedy was one of the five who signed on to the opinion, but in his concurring opinion he stated: "I do not mean to imply, and the Court has not decided, that persons in the position of the respondent have no constitutional protection."[95] He took this position in part because he thought that the stronger claim in Justice Rehnquist's opinion, that aliens benefit from no constitutional rights, was not "fundamental" to the opinion.[96] In other words, at most four Justices in *Verdugo-Urquidez* embraced the strong position that aliens outside the United States benefit from no constitutional rights, and if Justice Kennedy was right, they did so only in dicta.

How did Justice Rehnquist reach the stronger position? He spent some time trying to show that the cases in which aliens were found to have constitutional rights "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[97] Moreover, by "substantial connections" he meant connections deeper than mere presence in the country; he meant something like lawfully and voluntarily establishing residence in the country.[98]

---

94. 476 F.3d at 991. Disappointingly, even Judge Rogers, in dissent in *Boumediene*, bought the majority line about what the precedent actually says. *Id.* at 1011 ("[T]he Supreme Court in *Eisentrager* held that the Constitution does not afford rights to aliens in this context." *Eisentrager*, 339 U.S. at 770; *accord Verdugo-Urquidez*, 494 U.S. at 269. Although in *Rasul* the Court cast doubt on the continuing vitality of *Rasul*, 542 U.S. at 475–79, absent an explicit statement by the Court that it intended to overrule *Eisentrager* 's constitutional holding, that holding is binding on this court.). A proper reading of *Eisentrager*, as we demonstrate, shows there is nothing to overrule.

95. *Verdugo-Urquidez*, 494 U.S. at 278.

96. *Id.* at 275.

97. *Id.* at 271.

98. Rehnquist commented that Verdugo-Urquidez's "lawful but involuntary" presence in the country (he was brought into the United States by U.S. marshals after being delivered to the border by Mexican police) "is not of the sort to indicate any substantial connection with our country." *Id.*

This statement of what the case law shows is, however, inaccurate. As Rehnquist himself showed in an earlier part of the discussion, analyzing the so called "Insular Cases,"[99] aliens outside the United States, but in territories controlled by the United States, benefit from constitutional rights, even if only from "fundamental" ones.[100] Moreover, as Justice Kennedy noted, a criminal defendant taken to U.S. territory and tried there benefits from all the normal constitutional trial rights, even though he has taken no voluntary steps to develop a substantial connection with the United States.[101]

Nevertheless, taken together, the cases Rehnquist reviewed establish that aliens benefit from constitutional rights only insofar as they live in, or at least are present in, territory controlled by the United States. They do not establish that aliens outside territory controlled by the United States have constitutional rights.

Rehnquist also examined the case that did the most to disconnect constitutional protection from living in territory governed by the United States: *Reid v. Covert.* He noted correctly that the plurality and concurring opinions in *Reid* were all couched in terms of how the Constitution's Fifth Amendment due process rights would cover U.S. *citizens* abroad.[102] Connecting this with what was shown about aliens, we see that no case law establishes that *aliens* living outside territory controlled by the United States benefit from constitutional rights.

Of course, failing to establish that something is the case is not the same as establishing that something is not the case. The argument so far leaves it an open question whether aliens outside of U.S. territory benefit from constitutional rights. To plug that hole, Rehnquist appealed to *Eisentrager* and claimed that *Eisentrager*'s "rejection of extraterritorial application of the Fifth Amendment was *emphatic*."[103] This would be very significant, if true, for it is the Fifth Amendment that guarantees that the federal government shall not deprive a person of life, liberty or property without due process of law.[104] If

---

99. Balzac v. Porto Rico, 258 U.S. 298 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (Fifth Amendment grand jury provision inapplicable in Philippines); Dorr v. United States, 195 U.S. 138 (1904) (jury trial provision inapplicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901).

100. *Verdugo-Urquidez*, 494 U.S. at 268.

101. *Id.* at 278. Indeed, 14 years prior to *Verdugo-Urquidez*, the Court had held that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to [the] protection [of the due process clauses of the Fifth and Fourteenth Amendments]." Mathews v. Diaz, 426 U.S. 67, 77 (1976).

102. *See Verdugo-Urquidez*, 494 U.S. at 270.

103. *See id.* at 269.

104. U.S. CONST. amend. V.

such protections do not apply, then it is unclear why any others should. But Rehnquist's reading of *Eisentrager* is sloppy and exaggerated.[105]

The first thing to notice is that if this were the right reading of *Eisentrager*, then *Eisentrager* would no longer be good law; it would have been overruled six years later by *Reid*, which held, emphatically, that the Fifth Amendment's protection of due process rights *does* apply extraterritorially.[106] *Eisentrager* was not overruled by *Reid* because *Eisentrager* was concerned with the extraterritorial application of the Fifth Amendment to aliens, whereas *Reid* was concerned with the extraterritorial application of the Fifth Amendment to U.S. citizens. Nonetheless, even adjusting Rehnquist's point so that it only applies to aliens, the fact that *Reid* established that the Fifth Amendment does have extraterritorial application six years after *Eisentrager* provides some reason to question whether the holding in *Eisentrager* presupposed a view about the territorial limits of the Constitution that is no longer good law.[107]

Second, the passage in *Eisentrager* that Rehnquist cited to support his claim about what *Eisentrager* "emphatically" rejected does *not* refer specifically to the extraterritorial application of the Fifth Amendment. Rather, it refers only to "[s]uch extraterritorial application of organic law."[108] The actual reference of that clause is "the companion civil rights Amendments" such as "freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments."[109] In other words, the text is not even about the Fifth Amendment's Due Process clause.

Third, not only did Rehnquist misdescribe the text he quotes, he was simply mistaken that *Eisentrager* emphatically rejected the extraterritorial application of the Fifth or other amendments. A fair reading of the majority opinion in *Eisentrager* is that the Court actually left open the possibility that nonresident aliens might benefit from *some* constitutional rights. It is crucial to be clear about this, as *Eisentrager* is the lynchpin case for those who think that there is settled precedent according to which the Constitution does not

105. It was also unnecessary. Rehnquist could have satisfied himself with a narrower argument about Fourth Amendment rights. But he seems to have wanted to make a statement about the limits of constitutional protections generally.

106. *Reid*, 354 U.S. at 2.

107. Gerald L. Neuman, *Closing the Guantánamo Loophole*, 50 LOY. L. REV. 1, 61 (2004) [hereinafter Neuman I].

108. *Verdugo-Urquidez*, 494 U.S. at 270 (quoting *Eisentrager*, 339 U.S. at 784).

109. *Eisentrager*, 339 U.S. at 784.

apply to nonresident aliens.[110] But neither the explicit language of the case nor the reasoning of the case supports this claim.

The explicit language of *Eisentrager* never says that nonresident aliens as a category do not benefit from constitutional rights. It always frames the issue more narrowly in terms like these: the "nonresident *enemy* alien, especially one who has remained in the service of the enemy."[111] As the Court put it in concluding its discussion of the application of the Fifth Amendment to the petitioners in that case: "[w]e 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."[112] Notice how different this holding is from Justice Rehnquist's gloss. Admitting that nonresident aliens can be tried in times of war by military commissions, and then punished if convicted, is a far cry from admitting that nonresident aliens benefit from no Fifth Amendment protections at all.[113]

In addition, the argument in *Eisentrager*, with regard to nonresident aliens having Fifth Amendment rights, implies nothing stronger. The argument proceeded in three steps. First, the Court noted that "American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans."[114] This is relevant because the petitioners in this case were contesting their convictions by military commissions. The Court reasoned that "[i]t would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies."[115] It would be a mistake, however, to infer from this argument that the Court meant to say that nonresident aliens benefit from *no* Fifth Amendment rights. Indeed, one of the cases the Court cites, *Wade v. Hunter*,[116]

---

110. Even those writers who are fairly critical of the DTA and MCA, such as Richard Fallon and Daniel Meltzer accept that *Eisentrager* should be interpreted to hold "that the Constitution did not compel the extension of jurisdiction because the petitioners, given their limited contacts with the United States, enjoyed no constitutional rights." Richard H. Fallon & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2056 (2007).

111. *Eisentrager*, 339 U.S. at 776 (emphasis added).

112. *Id.* at 785.

113. Some argue that *Eisentrager*'s ruling should be understood jurisdictionally: that federal courts do not even have the jurisdiction to hear habeas petitions from nonresident aliens because they lack "standing." 339 U.S. at 777. But that cannot be the right way to read the case, as Justice Jackson goes on to say that "the doors of our courts have not been summarily closed upon these prisoner" and proceeds to assess their arguments on the merits. *Id.* at 780.

114. *Id.* at 783.

115. *Id.*

116. 336 U.S. 684 (1949).

actually holds that the Fifth Amendment's Double Jeopardy Clause *does* apply to conscripted American citizens. Thus, the only point the Court made in the end was the comparative point that nonresident aliens could not have *more* Fifth Amendment protections than conscripted U.S. citizens.

Second, the Court noted that *resident* aliens, in time of war, have relatively thin Fifth Amendment rights, and again argued that it would be perverse to extend greater coverage to nonresident aliens than to resident aliens.[117] But this too is only a comparative point, and it is not as if resident aliens, even in time of war, have *no* Fifth Amendment rights.

Third, the Court noted that it would be absurd to grant to "irreconcilable enemy elements, guerrilla fighters and 'were-wolves'" living under a condition of military occupation, all the rights granted U.S. citizens in the U.S, rights such as the "freedoms of speech, press, and assembly" or the "right to bear arms."[118] But this point, along with the two preceding points, is consistent with the view taken a few years later by Justice Harlan "that the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case."[119] Again, Harlan said this in a discussion of what was due American citizens overseas, but the arguments in *Eisentrager* are fully consistent with extending Harlan's point to nonresident aliens.

In sum, *Eisentrager* no more "emphatically" rejected any and all application of the Fifth Amendment to nonresident aliens than it "emphatically" rejected the application of any and all Fifth Amendment protections to conscripted American citizens. The only point the *Eisentrager* Court needed to make to justify its holding was that the nonresident aliens in that case did not suffer the violation of any Fifth Amendment rights by being tried and convicted by a military commission. Any stronger inferences one might draw from the Court's sometimes incautious language would be unwarranted in view of a careful reading of the case.[120]

Finally, one might appeal to the fact that the majority in *Zadvydas v. Davis* took *Verdugo-Urquidez* to have held that the "Fifth Amendment's protections do not extend to aliens outside the territorial boundaries."[121] But this was in

---

117. *See Eisentrager*, 339 U.S. at 784.

118. *See* Neuman I, *supra* note 107. This is the part of the *Eisentrager* argument that most impressed the majority in *Boumediene*. *See* 476 F.3d at 991.

119. *Reid*, 354 U.S. at 75.

120. For a similar, though complementary, reading of *Eisentrager*, *see* Neuman I, *supra* note 107, at 54–65. *See also* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 984 (2002).

121. 533 U.S. 678, 693 (2001).

dicta. Moreover, it was only a parenthetical reading of the holding of *Verdugo-Urquidez*. In the text of *Zadvydas* itself, the Court said only that "[i]t is well established that *certain* constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."[122] This provides no ground for the claim that nonresident aliens can be indefinitely detained without raising any constitutional concerns.

Thus, we see that there is no well established rule that nonresident aliens do not benefit from any constitutional rights or protections. The flip side is true as well, however. Justice Rehnquist was correct to note that *Reid* extended constitutional rights beyond the territorial control of the United States only to U.S. citizens. And the Insular cases extend (fundamental) constitutional rights to aliens only in territories controlled by the United States. Thus, to resolve the issue and to do so honestly, we must look to the underlying justifications for adopting one policy or another.

C. Reasons to Recognize that Nonresident Aliens Benefit from Constitutional Rights.

There has been a longstanding fight in U.S. jurisprudence between those who take a "membership" position, who would extend constitutional protections only to U.S. citizens or those in U.S. territory, and those who take a "mutuality of obligation" position,[123] according to which whenever the United States exercises authority over people and expects them to respect its law, it acquires an obligation to respect those people in return—an obligation that is to be understood in terms of those people having constitutional rights against the United States.[124] We argue here, following the lead set by Gerald Neuman, that the only reasonable position is the mutuality of obligation position.[125]

---

122. *Id.* (emphasis added).

123. In an earlier article, Alec Walen & Ingo Venzke, *Unconstitutional Detention of Nonresident Aliens: Revisiting the Supreme Court's Treatment of the Law of War in Hamdi v. Rumsfeld*, 67 HEIDELBERG J. INT'L L. 843, 870 (2007), we referred to this as the "responsibility position."

124. We draw this distinction from Gerald L. Neuman's work. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 116 (1996) [hereinafter NEUMAN II]; Neuman I, *supra* note 107.

125. Neuman also discusses two other positions: "universalism" and "global due process." Universalism would require the United States to recognize constitutional rights the would fit a just world order. As he points out, this is not what the actual U.S. Constitution was designed to do. NEUMAN II, *supra* note 124, at 110. Global due process is the view that only core constitutional protections apply to nonresident aliens, where the limit has something to do with "practicality." Neuman contrasts that with what he calls mutuality, which asks which constitutional protections must be provided if a government is "to justify its claim to obedience." *Id.* at 116. We follow Neuman in thinking that it is this last question which is normatively fundamental.

Indeed, it turns out that the only plausible version of the membership position collapses into the mutuality position.[126]

There are a number of important legal and moral ideas that underlie the mutuality position. The most basic may be the moral idea that all persons possess equal dignity; no one exists to serve others. Aliens cannot have duties to respect U.S. law, unless the U.S. law has a duty to respect them.[127] As James Madison put it in the context of aliens in the United States: "as they owe, on one hand, a temporary obedience [to the laws], they are entitled, in return, to their protection and advantage."[128] Now what was once the temporary obedience owed by aliens in the United States has been extended to a permanent demand that aliens everywhere obey a range of U.S. laws.[129] The United States claims the right to prosecute nonresident aliens for crimes that affect the United States or its citizens.[130] Thus, Madison's point must be adapted to recognize that even nonresident aliens are entitled, in return, to the Constitution's most basic protections.

In addition, the mutuality approach gives due weight to the idea that with authority comes responsibility. This notion of responsibility is reflected in the fundamental legal principle that the U.S. government is a creature of law. Accordingly, it should never have a free hand to inflict whatever certain members of the government, particularly the executive, may want to inflict upon whomever they want to inflict it.[131] This is not to say that the government

---

126. Note, we do not mean to imply that there may not be other reasons for extending constitutional rights to nonresident aliens. For example, the desire to obtain the good will of other nations could provide a self-interested reason to extend constitutional protections broadly. Our main concern is to show that there are principled reasons to do so, and that the arguments against the mutuality position do not succeed.

127. This Kantian conception of political equality and reciprocity could be challenged by Hobbesians, who point out that according to Hobbes the people owe a duty to the sovereign, but the sovereign owes no duties to the people. Without entering into a debate about Hobbesian political theory, it is enough to point out that the Hobbesian view does not fit United States practice, in which the government has many duties to the people.

128. James Madison, *Madison's Report on the Virginia Resolutions (1800), in* 4 DEBATES, RESOLUTIONS AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (J. Elliot ed., 2d ed. 1836), *available at* http://www.teachingamericanhistory.org/ratification/elliot/vol4/reportvirginia.html (cited in Neuman I, *supra* note 107, at 52).

129. *See* Neuman I, *supra* note 107, at 45 (stating that after World War II, "extraterritorial enforcement of U.S. law mushroomed.").

130. *See* NEUMAN II, *supra* note 124, at 108.

131. Consider Justice Kennedy's statement, concurring in *Verdugo-Urquidez*: "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." 494 U.S. at 277. *See also Reid*, 354 U.S. at 5–6 ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."); Neuman I, *supra* note 107, at 44–45.

has to treat nonresident aliens just as it would citizens. It is only to say that it cannot view the treatment of nonresident aliens simply as a question of political expedience, unbounded by concern for the value of liberty that lies at the heart of the Constitution.

This principle that the government may not do whatever it wants with nonresident aliens is itself legally well grounded in a number of ways. The framers of the Constitution clearly took certain rights protected by the Constitution to be natural rights possessed by all persons.[132] It is also reflected in the civil war amendments, which ended slavery and the legacy of categories of people subject to unchecked power.[133] Lastly, it is at the core of international human rights law which not only binds governments in relation to their constituencies, but in their actions towards all individuals under their jurisdiction.[134]

What, then, can be said in favor of the membership position? Its root appeal lies in the social contract notion of a community that has come together under a shared commitment to a particular legal system. So the question for the membership position is whether there is a plausible conception of membership in a legal community according to which constitutional protections would not be offered to nonresident aliens who are nonetheless subject to U.S. power. The answer is no.

One way to frame the membership position is to view the Constitution as a compact between members of society. But as Justice Kennedy notes, "[t]he force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms."[135] In other words, the Constitution takes on a legal life of its own, and not only does it govern some who did not assent to the compact but eventually, if it should last long enough, it will govern a people none of whom were part of the originating compact.

---

132. *See* THE DECLARATION OF INDEPENDENCE ¶ 2 (1776) ("We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . ."). *See also* JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 290–93 (1996).

133. U.S. CONST. amend. XIII–XV.

134. *See* ICCPR, *supra* note 60, art. 2 ¶ 1 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"). *Id.* Despite the recent, implausible protestations of the United States, "territory" and "jurisdiction" have to be read disjunctively. *See, e.g.*, Ralph Wilde, *Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICH. J. INT'L. L. 739, 790–804 (2005).

135. *Verdugo-Urquidez*, 494 U.S. at 276.

One might appeal to another level of membership and say that it is only those who are duty bound by the Constitution who are also capable of benefiting from its protections. This idea, however appealing it may be in the abstract, does not make sense when one thinks about the workings of constitutional law. With the exception of the Thirteenth Amendment, ending slavery, all other constitutional rights are actually merely limitations on state actors. The First Amendment's right to free speech, for example, is really just a prohibition on making laws that abridge the freedom of speech. Likewise, the Fifth Amendment's protection of liberty is really just a guarantee that the government shall not remove it without due process of law. Thus, with regard to all but one right, only government actors have a duty.[136] Yet it is the people or persons in general who benefit from the various rights. Thus, this notion of a membership community is also implausible.

One might broaden the conception of membership community yet again, so that it comprises people who have a duty to obey the law that is ultimately grounded in the Constitution. Perhaps only they are entitled to benefit from the protections offered by the foundational legal principles of the law. But if the condition that would allow one to benefit from constitutional rights is that one is subject to prosecution by U.S. prosecutors for violations of U.S. laws, then everyone in the world benefits from constitutional rights, as everyone in the world is subject to prosecution by U.S. prosecutors enforcing laws that defend the United States and its citizens.[137]

One might try to narrow, rather than broaden, the conception of membership, so that it includes only citizens. Certainly citizens are paradigmatically members of a society; the only ones with a full stake, including the right to have a say, through their voting, in what the law will be. And if one defines the community this way, one can then say that the country has *chosen*—perhaps as a matter of magnanimity, or perhaps to avoid the unsightly spectacle of a two-tiered system of justice within the "homeland"—to grant resident aliens constitutional rights as well. Such a choice, one might then argue, was not morally *required*, and a similar choice is likewise not required with regard to nonresident aliens. If there are prudential reasons to allow the legislature and executive more flexibility with regard to nonresident aliens, then they should not be granted constitutional rights which would interfere with the pursuit of those reasons.

---

136. Could it be argued that the one duty binding on all saves this position? If so, that it would mean that only government officials benefited from constitutional rights prior to the adoption of the 13th Amendment. Surely that position cannot be maintained.

137. *See* NEUMAN II, *supra* note 124, at 108.

The proper response to this suggestion is to question whether it really was morally unnecessary to grant resident aliens constitutional protections. Can it really be maintained that they might come to the United States at their peril, subject to arbitrary search and seizure, to prosecution without due process, and to whatever punishment the state might choose to dispense? Such a position has a certain consistency to it, but in contrast to Madison's position, that they owe obedience to the law and are owed the protection of the law at the same time, this position is, to use an antiquated word, barbaric. If this is the price of maintaining the membership position, then the price is too high.

Moreover, the moral failure of this interpretation of the membership position cannot be remedied by expanding membership to Rehnquist's conception of the relevant membership position, one that includes resident aliens who have voluntarily and legally established substantial connections with the United States. For one thing, this position would leave illegal immigrants and those captured abroad and tried in the United States subject to the same abusive treatment that we would not allow the government to inflict on aliens with a "substantial connection" to the United States—a position that the Court has, as noted above, rejected. More fundamentally, Rehnquist's position is still without a solid moral foundation. The primary moral appeal of his position lies in the image of citizens as hosts and of aliens who have made the relevant substantial connection as invited guests. But it still fails to come to terms with the extent to which, to stick to the domestic metaphor, one also has relations with and makes demands on one's neighbors. It would indeed be especially perverse to expect one's neighbors to respect one's own rights (as one formulates them), and then not respect their basic rights in return.

In sum, we see that the membership position either reduces to the mutuality position, or it assumes a morally barbaric form, one more fit for members of the mafia than a moral community.

We can think of only one other argument for the position that limits constitutional rights to those who are U.S. citizens or who are to be found in territory generally governed by U.S. law, and that is one that appeals to the notion of sovereignty.[138] The thought is that where the United States is sovereign, as it is over its territories, its Constitution rules; but where the United States is not sovereign some other country must be sovereign. Where

---

138. It seems likely that some thought along this line explains the almost fetishistic concern some courts had with whether Cuba was technically still sovereign over Guantánamo, even despite the United States having unchecked effective control. *See, e.g.*, Al Odah v. United States, 321 F.3d 1134, 1140–41 (D.C. Cir. 2003) (reading *Eisentrager* "to mean that the constitutional rights mentioned are not held by aliens outside the *sovereign* territory of the United States.") (emphasis added); *Boumediene*, 476 F.3d at 992 ("The text of the lease and decisions of circuit courts and the Supreme Court all make clear that Cuba—not the United States—has *sovereignty* over Guantánamo Bay.") (emphasis added).

another country is sovereign, its guarantees of rights are the only ones to which people can look. The only exception would be for U.S. citizens who are confronted by the exercise of U.S. power in another country. They, as members of U.S. society, can demand that their government treat them with the respect due U.S. citizens. But nonresident aliens must look to their own governments or the governments where they reside for the protection of their rights.

In a world divided between sovereigns that take care of their own citizens and visitors, this position might make sense. But in reality it makes no sense at all. First, it presupposes that executive power and jurisdiction always correspond with sovereign control over territory. That is not the case. Guantánamo itself represents a living counter-example, as Cuba has sovereignty but exercises neither executive powers nor jurisdiction over Guantánamo. Moreover, it would be a mistake to fixate on the special status of Guantánamo as a place where the United States can exercise control as long as it chooses. The same problem arises, even if not indefinitely, whenever one country invades and occupies another. In such periods there are people who live under the power of a sovereign, but according to this picture, have no rights against it. Rather, they live at the mercy of it. This puts the lie to the sanguine unspoken premise of this view.

Second, even if the world were fully divided between sovereigns that took care of their own people, the appeal of this model presupposes that all sovereigns do a reasonable job of protecting their people. This, however, is patently false. There are many countries that provide little to no protection for anyone.[139] The position articulated here would allow the United States to exploit the moral and legal degradation of regimes that show no respect for human rights. The behavior of the United States should not be allowed to sink to the lowest common denominator, especially not when the United States has the economic and military clout to influence other states and cause them to sink lower than they might independently be willing to go.

There is one more move that someone might make to deny that nonresident aliens are due constitutional protections. It might be agreed that the membership position is morally defensible only when interpreted to coincide with the mutuality position, but at the same time, it might be asserted that this kind of choice is one that has to be left to the people, speaking democratically.

---

139. Consider, for example, the many reports of the United States engaging in "rendition" to countries that will torture people to get information. *See, e.g.*, Jane Mayer, *Annals of Justice; Outsourcing Torture; The Secret History of America's "Extraordinary Rendition" Program*, THE NEW YORKER, Feb. 14, 2005, at 106.

It might be thought that it is up to the people, not unelected judges, to *extend* the Constitution's protections to nonresident aliens.[140]

The problem with this argument is that it presupposes that *the right* interpretation of the Constitution is one in which nonresident aliens are left outside its protections. It might be tempting to think that because it has not yet been concluded that they are *inside* its protections. But the truth is that it has also not yet been decided that they are *outside* its protections. Lack of established precedent is just that; it does not favor one choice over another.

It might be argued that those who voted to adopt the Bill of Rights in 1791 would not have expected the Fifth Amendment to provide protections to nonresident aliens. But even if that were true, the reason is surely that those who drafted and ratified the text would not have expected the United States to have the power it now has. We simply cannot know how they would have voted, or even what text they might have voted on, if the United States had been the kind of power then that it is now.

In sum, it is up to the present Court—or if they duck it, some future Court—to determine how to interpret the coverage of the Due Process Clause. Our point is that the relevant moral reasons clearly point in the direction of interpreting it through the principle of mutuality of obligation.[141]

Again, we are not saying that the United States has to accord nonresident aliens every constitutional right it accords residents (whether alien or citizen). We agree with Justice Harlan, that "the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due.'"[142] If application of a particular protection would be "anomalous," then it cannot also be "due." As noted by Justice Kennedy, concurring in *Verdugo-Urquidez*, certain rights such as the Fourth Amendment right against warrantless searches, would be anomalous in foreign countries.[143] Likewise, the worries expressed by Justice Jackson, that the United States would be obliged to protect, for example, the right to bear arms of those living in a country occupied by the U.S. military, should not be a concern.[144] The Constitution is not a suicide pact,[145] and such

---

140. This is the kind of position articulated by ANTONIN SCALIA, A MATTER OF INTERPRETATION 59 (Amy Gutmann ed., 1997).

141. For theoretical support for looking to morality to interpret constitutional text, *see* Ronald Dworkin, *Commentary* to ANTONIN SCALIA, A MATTER OF INTERPRETATION 115–27 (Amy Gutmann ed., 1997); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION 7–15 (1996).

142. *Reid*, 354 U.S. at 75.

143. 494 U.S. at 278.

144. *Eisentrager*, 339 U.S. at 784.

145. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

rights would not be "due." However, "[t]he time has long passed when 'no quarter' was the rule on the battlefield."[146] Now enemies in battle are captured if possible, and those who are captured are due certain protections under the law of war. Likewise, they are due certain fundamental protections under the U.S. Constitution. The most basic of these is that they not be deprived of their liberty without due process of law.[147]

V. THE LINK BETWEEN CONSTITUTIONAL NORMS AND THE LAW OF WAR

There are two issues left to resolve. First, how should the Court understand the Fifth Amendment due process rights of nonresident aliens? Second, how can aliens bring due process challenges to their detentions? In Part III we discussed what the law of war, as represented in the Geneva Conventions and the Additional Protocol I, has to say about the process due civilians in the current "war on terror." In Part II we argued that the Court's citation to the law of war in *Hamdi* had constitutional significance. Now in this Part we want to tie these loose ends together and argue that U.S. constitutional law should properly take guidance from the law of war when devising norms of due process for nonresident aliens. Then, in the next and final Part, we address how nonresident aliens can bring their challenges in court.

A. Grounding a Link

International law has figured in U.S. law since its founding. The Declaration of Independence was written to show "a decent Respect to the Opinions of Mankind."[148] Article I, section 8, of the U.S. Constitution lists among the enumerated powers of the Congress "[t]o define and punish . . . Offenses against the Law of Nations."[149] And as early as 1804, the Supreme Court treated international law as a constraint on the interpretation of statutes analogous to that provided by constitutional text: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[150] Our suggestion, then, is that when interpreting the

146. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 788 (rev. 2d ed. 1920) (quoted by the Court in *Hamdi*, 542 U.S. at 518).

147. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("The Fifth Amendment's Due Process Clause forbids the Government to 'depriv[e]' any 'person . . . of . . . liberty . . . without due process of law.' Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.").

148. THE DECLARATION OF INDEPENDENCE ¶ 1.

149. U.S. Const. art. I, § 8; *see also Ex Parte* Quirin, 317 U.S. at 27–28.

150. Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

U.S. Constitution, it makes sense to look to international law norms for guidance.

In opposition to this view, there has been, in recent years, a chorus of complaints that U.S. law should not be interpreted with reference to international legal standards. Leading this charge has been Justice Scalia. As he once put it, "where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."[151] His complaint seems to be that consulting the views of other nations would somehow undermine the sovereignty of the United States or the power of the U.S. people democratically to govern themselves. But the complaint is overblown. No one is suggesting that the standards of international law, much less the "views of other nations," should be binding upon the Justices of the Supreme Court.[152] The suggestion is only that these standards are relevant for the light they cast on how U.S. constitutional norms should be interpreted.[153]

As Harold Koh has argued, one of the ways in which foreign and international law has been invoked by the Supreme Court has been in interpreting what he calls "community standards."[154] These are norms such as avoiding "cruel and unusual punishment"[155] or providing "due process of law" that invoke standards that are shared by many nations. The United States has a long tradition of consulting the practices of other countries and international conventions and covenants when considering how to interpret these concepts. For example, in carving out the limits of the death penalty the Court has looked repeatedly to the practices of other countries and international conventions and covenants that reject the death penalty for rape,[156] for juveniles,[157] and for the mentally retarded.[158] So too has the Court looked to international legal opinion in matters of "substantive due process" liberty rights. In *Bowers v. Hardwick*,

---

151. Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1988) (Scalia, J., dissenting).

152. International law has no force in the United States if inconsistent with the U.S. Constitution, as properly interpreted. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 115 (1987).

153. To be fair to Scalia, his real concern is that Justices on the Supreme Court would use their own judgment to settle issues where there is not a settle consensus, and where neither an original understanding of the text nor U.S. history and tradition calls for a particular resolution. But then the influence of foreign law is really a red herring. What really bothers him is the use of constitutional judgment. *See* SCALIA, *supra* note 140, at 59. We disagree with his jeremiad against judicial judgment, but do not press the argument here.

154. Harold Hongju Koh, *International: Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45 (2004).

155. U.S. CONST. amend. VIII.

156. Coker v. Georgia, 433 U.S. 584, 596 n.10 (1976).

157. *See Thompson*, 487 U.S. at 830; Roper v. Simmons, 543 U.S. 551, 575–78 (2005).

158. Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002).

Chief Justice Burger concurred that the Constitution's protection of privacy did not protect the right to engage in homosexual sodomy in part because "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization."[159] And when the Court overturned *Bowers* in *Lawrence v. Texas*, it took issue with Burger's reading of the state of international law, noting that "[t]he sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction."[160]

The case for looking to international legal norms for guidance in interpreting the U.S. Constitution is particularly strong when there is no developed legal framework for interpreting a particular norm. In cases of first impression, a court will normally look to the actions of other courts and to legal authorities in general, for their "persuasive" authority. The goal in doing so is not, of course, to abdicate their responsibility in formulating a legal decision. As Koh says, judges do not look to international law in order to do "some kind of global 'nose count.'"[161] Rather, the point of looking to international law is to discover reasoned guidance in a more or less uncertain area of law.

The case for looking to international legal norms for guidance in interpreting the U.S. Constitution is even stronger when the United States is taking actions in an international context. Indeed, in the context of the "war on terror," the United States claims universal jurisdiction to prosecute nonresident aliens for commission of international crimes. The MCA lists twenty-eight crimes that, according to its own terms, have traditionally been tried by military commissions.[162] The United States can claim the right to prosecute nonresident aliens for those crimes, even when they are committed outside U.S. jurisdiction and its citizens are not the victims of the crimes, only if these crimes are international crimes. The international law framework that establishes universal jurisdiction is the Geneva Conventions, which provide for universal jurisdiction over grave breaches of the laws of war.[163] Thus, to prosecute nonresident aliens under the MCA's appeal to universal jurisdiction, the United States has committed itself to respecting the law of war as stated in the Geneva Conventions.

---

159. 478 U.S. 186, 196 (1986).

160. 539 U.S. 558, 572 (2003).

161. Koh, *supra* note 154, at 56.

162. Regarding the claim that these are crimes traditionally tried by military commissions, see 10 U.S.C. § 950p; regarding the list of 28 offenses, see 10 U.S.C. § 950v(b)(1)-(28). Whether this claim is true or not is immaterial to our purposes here.

163. GC III, *supra* note 38, arts. 129–30; GC IV, *supra* note 38, arts. 146–47.

The development of due process rights for nonresident aliens is just such a case of first impression in an international context. As noted in Part IV, section B, there is no settled case law on the foundational question whether nonresident aliens benefit from Fifth Amendment due process rights. If it is agreed that they do, then the law must be developed to determine how they do. Again quoting Justice Harlan, the question is: "what process is 'due' a defendant in the particular circumstances of a particular case."[164] Our suggestion is that among the best sources for determining what process is due is the law of war. Moreover, in claiming universal jurisdiction, the United States commits itself to respecting the same.[165]

B. Defending Against Fairness Objections

There are at least two sorts of objections that could be raised to the suggestion that the United States look to the law of war when searching for a standard for the process due a nonresident alien before he is subject to long term preventive detention; it would put the United States at an unreasonable disadvantage in combating international terrorism and it would unfairly give nonresident aliens advantages over resident aliens and citizens. We focus in this section on the fairness objection, but we pause briefly to address the other.

We argued in Part III, section E that the balance struck in the law of war allows the United States to do what it would need to do to protect itself from terrorism, while also respecting the importance of liberty. We add here that if it were truly imperative to strike a new balance in the war on terror, the reasons for doing so would apply as well in the domestic case, or when dealing with nonresident citizens, as when dealing with nonresident aliens.[166] Since there is no significant push to rewrite constitutional protections domestically or for U.S. citizens abroad, we infer that there is probably no good reason to embrace a different balance when extending constitutional protections to nonresident aliens.

Turning now to the fairness objection, one might argue for a fairness principle, as articulated in *Eisentrager,* according to which it would be constitutionally anomalous to have to offer nonresident aliens more protections

---

164. 354 U.S at 75 (Harlan J., concurring).

165. If due process rights for nonresident aliens were modeled on the rights contained in GC IV, would that imply that the United States was now constitutionally bound to adhere to GC IV? No, if the Congress and Executive wanted to withdraw from the treaty, they would be constitutionally free to do so. The standard in GC IV is separable from the treaty itself. However, even if the United States were to withdraw from the treaty, it would be in violation of customary international law were it to act contrary to its provisions.

166. *See, e.g.*, Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365 (2007).

than those offered U.S. citizens or resident aliens.[167] There are reasons to doubt the validity of this principle; since aliens lack the vote, they form a kind of discrete and more or less insular population that may need *extra* protection from political forces in the United States that would unjustly seek political benefit at their expense.[168] Moreover, it is not unheard of for aliens to have advantages that citizens lack.[169] But we put these concerns to the side in order to examine the *Eisentrager* test both with regard to the treatment *Eisentrager* said was due resident aliens and with regard to the issue of the suspension of habeas.

Justice Jackson noted in *Eisentrager* that resident aliens from an enemy country can be detained for the duration of the war against that country. "Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act."[170] The process so described seems actually thinner than that provided by a CSRT. If this is all that a resident alien civilian is entitled to receive, then surely it is mistaken to think that nonresident alien civilians are entitled to more.

There are at least two responses that can be made to this argument, however. First, it is not clear that the Alien Enemy Act should still be considered good law regarding resident aliens. It might be argued, in the wake of *Zadvydas*—the 2001 case constitutionally limiting the use of preventive detention on resident aliens who had been ordered removed by the Immigration

---

167. *Eisentrager*, 339 U.S. at 784.

168. *See* Katyal, *supra* note 166, at 1373. Consider also that international law sets higher standards for states in their relation with foreigners, as compared to nationals, when it comes to expropriation and compensation This finds expression in the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, art. 1, Mar. 20, 1952, Eur.T.S. 9, in relation to which the European Court of Human Rights explained:

> Especially as regards a taking of property effected in the context of a social reform or an economic restructuring, there may well be good grounds for drawing a distinction between nationals and non-nationals as far as compensation is concerned. To begin with, non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption.

Lithgow and Others v. United Kingdom, 102 Eur. Ct. H.R. (ser. A) at 116 (1986). Similar reasoning has also been used when assessing the protections offered to out-of-state residents, as compared to in-state residents, by the Privileges and Immunities clause, U.S. CONST. art. IV, § 2. *See* United Building & Construction Trades Council v. Mayor of Camden, 465 U.S. 208 (1984).

169. For example in European Community law we find the well established term of "Inländerdiskriminierung" (i.e., reverse discrimination). The French brewer could sell a product denoted "beer" in Germany even if it does not meet the German "Reinheitsgebot" of 1516 which limits the ingredients to malted barley, hops, yeast and water, because he or she benefits from fundamental freedoms of European Community law. A German could not do so. *See* Case 178/84, Comm'n v. F.R.G., 1987 E.C.R. 1227.

170. *Eisentrager*, 339 U.S. at 775.

and Naturalization Service, and who were being held indefinitely (beyond the ninety day removal period stated in the statute) because no other country would take them—that resident aliens now have a constitutional right not to be detained indefinitely; that the United States now must either deport them to their home country or release them, perhaps under some program of supervised release.[171] In addition, the United States has signed the Fourth Geneva Convention, which is federal law that occurs later in time than the Alien Enemy Act, and is inconsistent with it. Indeed, the GC IV uses a standard for the preventive detention of resident aliens much like the standard it uses for nonresident aliens under occupation: "[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it *absolutely necessary*."[172] This is more limiting than the free hand granted the President under the Alien Enemy Act.

Second, it is possible to distinguish the security situation of the resident alien from the nonresident alien. Nonresident aliens are not such an immediate threat to the United States. They are already effectively deported, and thus the same cause for detention is not present in their case.[173] A stronger presumption against preventively detaining nonresident aliens should therefore pass the *Eisentrager* test.

Turning now to the suspension of habeas, an argument can be made that nonresident aliens should not benefit from enforceable constitutional rights in places like Afghanistan and Iraq because conditions there are such that, were those same conditions to apply in the United States, habeas would be suspended, or at least subject to suspension. Habeas can be suspended "when in Cases of Rebellion or Invasion the public Safety may require it."[174] If habeas were suspended in the United States, even citizens could be denied the benefit of the Fifth Amendment's due process clause. By analogous reasoning, if equally drastic conditions, amounting to a "Rebellion or Invasion," apply outside the United States where the United States is nonetheless trying to impose order and provide for the public safety, then Fifth Amendment rights need not apply.

This is an important argument. We concede that if the security situation in a region where the United States is operating is sufficiently insecure, then it

171. On supervised release as an option, *see Zadvydas*, 533 U.S. at 699–700.

172. GC IV, *supra* note 38, art. 42, ¶ 1 (emphasis added).

173. A similar point is marked in GC IV, which makes it harder to justify preventively detaining nonresident aliens under occupation than resident aliens. "In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise." Uhler, *supra* note 56, art. 78.

174. U.S. CONST. art. I, § 9, cl. 2.

would make sense for habeas rights to be suspended there. The insurrections, with incursions from other countries, in Afghanistan and Iraq may seem to be paradigm cases for such a suspension. But it is important to keep in mind that the conditions for suspending habeas can and should be read to apply in a limited manner.[175]

There are not many historical examples to work with, but those that exist show that habeas should be suspended only where, and only for as long as, it is imperative to do so. Habeas has been suspended a total of four times in the history of the United States. The first time was during the Civil War where habeas seems to have been suspended broadly.[176] The next time it was suspended, in 1871, President Grant suspended it for only ten counties of North Carolina in his effort to combat the Ku Klux Klan.[177] Habeas was next suspended by the Governor of the Philippines in 1905, in two provinces of the Philippines, in order to combat organized bands that were terrorizing the population.[178] Finally, it was suspended in what was then the territory of Hawaii in 1941.[179] In all but the first suspension, the range of the suspension was limited to an area as small as or smaller than a state or territory. It was limited to those regions where, and for those times when, the problem was sufficiently intense to warrant suspension.

We would suggest that the same should apply in Iraq and Afghanistan. Were the Court to recognize that nonresident aliens have constitutional rights, and were Congress to decide that these rights might have to be suspended in certain territories where the United States is engaged in trying to quell insurrections, it would be appropriate for the executive to suspend habeas, but only in those areas where the need for public safety requires its suspension, and only for as long as the violence necessitated such a suspension.[180]

---

175. One might have also thought that if habeas is available for U.S. citizens in a region, it must be available to all in a region. The Circuit Court for the District of Columbia recently found that a U.S. citizen in Iraq had the right to habeas. Omar *ex rel. Omar*, 479 F.3d. at 1. But it is not clear that habeas cannot be allowed to some and denied to others. *See* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 976–78 (1998).

176. Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 14 (D.D.C. 2006).

177. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 178 n.190 (1980). In fact, it was only suspended for at most nine counties at a time, as the suspension was lifted in Marion County before being imposed on Union County. *Id.*

178. *See* Fisher v. Baker, 203 U.S. 174, 179 (1906).

179. *See* Duncan v. Kahanamoku, 327 U.S. 304, 307 (1946).

180. The *Fisher* case provides a good model. The suspension of habeas was lifted in the two provinces where it had been imposed in less than a year, once the Governor determined that the conditions requiring the suspension no longer existed. 203 U.S. at 180–81.

Importantly, the mere fact that U.S. troops patrol an area and that they may from time to time engage in hostilities with civilians, does not by itself imply that conditions are so lawless that habeas should, or even legally could, be suspended. Thus, while this argument does provide a basis for limiting the practical significance of extending due process rights to nonresident aliens, it does not undermine the significance of such an extension all together. Rather, it provides another safety valve for Congress and the Executive to address emergency situations and thereby should ease any concerns about the security implications of extending due process rights, modeled on those found in the Geneva Conventions, to nonresident aliens.

In sum, it is perfectly appropriate and consistent with U.S. constitutional law, both in text and in practice, to take guidance from international legal authorities. It is particularly appropriate to use such authorities as a starting point in cases of first impression and cases dealing with international affairs. The question of how to extend the Fifth Amendment's protection against the deprivation of liberty without due process to nonresident aliens, both civilians and combatants, is just such a case of first impression arising in the context of international affairs. The international law discussed in Part III above should be a default position for U.S. constitutional law unless it can be shown that adhering to these norms disables the United States from effectively fighting international terrorism or is unfair to others whose constitutional rights can be taken as fixed points. There is no reason to think these exceptions apply. Therefore, the international legal norms discussed in Part III should be adopted by the Supreme Court in place of the legally misguided holding in *Hamdi*, to the effect that "enemy combatants" can be detained until the end of the "war on terror."

VI. ACCESS TO COURT

A. Appeals and Habeas Rights

Though the public discussion of detainee access to the federal courts during the "war on terror" has focused almost exclusively on the availability of habeas corpus, there is another possible route into federal courts: appeal. The DTA grants detainees a right to appeal determinations by CSRTs that they are "enemy combatants" first to the Court of Appeals for the District of Columbia, and then to the Supreme Court.[181] This appeal right allows detainees to argue that the Tribunals violated their constitutional rights.[182] There is no obvious reason why the issues discussed here could not be raised on appeal.

181. DTA § 1005(e)(2)(A).

182. *Id.* § 1005(e)(2)(C)(ii).

However, given the recent decision of the Supreme Court to review the D.C. Circuit's decision to deny petitioners a right to habeas in *Boumediene*,[183] this argument may be moot. The scope of review under the DTA is officially limited to matters of law, with the single exception of whether the CSRTs determination "was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs]."[184] This limitation may leave out factual questions important for determining whether a detention is constitutionally defensible.[185] Unless the function of habeas is adequately provided for by appeal rights, the MCA cannot constitutionally succeed in stripping away the right to habeas.[186] In taking certiorari in *Boumediene*, the Court seems to be expressing some sympathy with the position that the processes provided for in the DTA are not an adequate substitute for habeas.[187]

In sum, if we are right and nonresident aliens benefit from the Fifth Amendment right not to be deprived of their liberty without due process of law, and if the CSRTs do not provide due process of law, then these detainees cannot be denied their day in court. Unless they can raise the issue of their unconstitutional detention on appeal from their CSRT hearings—something that no detainee has yet successfully done—they have a subsidiary right to constitutional habeas to contest their unconstitutional detentions.[188]

B. Judicial Power to Remedy Unconstitutional Detention

Even granting that nonresident alien detainees have a constitutional right not to be detained without due process of law, and that they have a subsidiary right to petition for habeas corpus to vindicate that right if they cannot raise it on appeal, it does not necessarily follow that the courts are in a position to do anything for them. They must first establish that the facts support their claim that they are indeed being denied due process. And then there must be an acceptable remedy available to them. We conclude our discussion of alien detention with a brief review of these issues, arguing that there is some role the courts can play.

---

183. *See Boumediene*, 476 F.3d 981.

184. DTA § 1005(e)(2)(C)(i).

185. We discuss the factual determinations in the next section, VI(B).

186. "[T]he substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the Great Writ." Swain v. Pressley, 430 U.S. 372, 381 (1977). By contrast, one that is inadequate would constitute a suspension of the writ. *Id.*

187. At this point in time, no opinions have yet been issued discussing an appeal under the DTA. It should be noted that the *Boumediene* court declined to convert the habeas petitions in that case into DTA appeals. 476 F.3d at 994.

188. On this being a subsidiary right, *see Eisentrager*, 339 U.S. at 781.

We start by reviewing what we suggest is the basic remedy. First, CSRTs should be redesigned so that they distinguish civilians from combatants. Having made that distinction, the remedy for each would be different. For combatants the CSRTs could function as they do now, but it would be made clear that the cessation of active hostilities is a reference to the international armed conflict in which they were captured. Once such a war is over—as it arguably is in both Afghanistan and Iraq—then combatants must either be tried for crimes and sentenced accordingly, or repatriated. For civilians a richer review of evidence of dangerousness would be required. They could be preventively detained only as long as there is reliable evidence that their release would provide a specific and significant threat to security.

With these suggested revisions on the table, we can ask how courts should approach the task of adjudicating appeals or habeas petitions (because it may be possible to raise many of the factual issues only through habeas, we focus only on that). We start with a preliminary question: would not a right to habeas disrupt military activities? As Justice Jackson said in *Eisentrager*, discussing the idea of granting habeas rights to the twenty-one German detainees:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.[189]

Indeed, in the wake of *Rasul*, over 181 Guantánamo detainees filed habeas petitions in the D.C. District Courts.[190] Are we not, then, proposing a course of action that would invite disaster by opening up floodgates of disruptive litigation?

A number of things need to be said to answer that question. We start by pointing out the role that habeas would play in a properly running system. It is an avenue for bringing issues before the courts that generally would have systematic relevance. It would take only one habeas petitioner to establish the structural reforms mentioned above. Assuming the Supreme Court agreed to resolve the issue, either reaffirming or revising its holding in *Hamdi* regarding indefinite detention, then there would be no need for future petitioners to raise the same issue. Of course, no matter what the Court says, if the door to habeas is open, some will try to abuse it. But once the law in this area is developed we

189. *Eisentrager*, 339 U.S. at 779

190. *See Hamdan*, 464 F. Supp. 2d at 11. *Boumediene*, however, lists only fifty-six detainees as having been involved in the appeal to that case. 476 F.3d at 984.

can expect a flood of habeas litigation if and only if the United States does not act in accordance with the law.[191]

Second, at least two of the presuppositions underlying what Justice Jackson said in *Eisentrager* are not true. Jackson writes that "[t]he writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace."[192] But the constitutional writ is available only as a subsidiary procedural right to enforce constitutional rights. Combatants have no constitutional right not to be held during active hostilities, so they would have no standing to sue then. As for civilians, if the hostilities in the area are sufficiently disruptive, habeas can be suspended. If not, then allowing habeas rights should not be too disruptive of military activities. In addition, Jackson writes as though the detainees might have to be "transport[ed] across the seas for hearing." This is no longer true. The Court in *Rasul* held that the prisoner who seeks habeas no longer has to be in the jurisdiction of the court that will hear the petition.[193] The only person who has to be in that court's jurisdiction is the custodian (or someone with authority over the immediate custodian).[194]

Third, in terms of the threat of disrupting the commanders in the field, it is important to be realistic. Even currently, while the situation in Afghanistan and Iraq is quite unstable, and U.S. soldiers are dying in action, the United States is (mostly) not in active battle mode; it is in policing mode. Police can and do take time off patrol to go to court. Moreover, the courts at issue would not primarily be the federal court where a habeas petition would be heard. Habeas litigation can almost always be handled by lawyers without the need for witnesses.[195] The relevant courts where military witnesses might be called upon to testify would be the military commissions that would try civilians and those combatants accused of war crimes; CSRTs to determine the status of combatants; and a reformed version of CSRTs for civilians—we suggest the name: Individual Dangerousness Assessment Tribunals (IDATs).

We turn now to the question of how to assess the factual questions that a court would have to resolve to handle a habeas petition. We start with combatants, assuming that the question of distinguishing combatants from civilians is normally unproblematic. How would a court be able to determine

---

191. *See* David A. Martin, *Offshore Detainees and The Role of Courts After Rasul v. Bush: The Underappreciated Virtues of Deferential Review*, 25 B.C. THIRD WORLD L.J. 125, 143 (2005).

192. *Eisentrager*, 339 U.S. at 779.

193. *Rasul*, 542 U.S. at 484.

194. *See Rasul*, 542 U.S. at 478 (discussing the change in the law wrought by Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973)).

195. *See* Martin, *supra* note 191, at 139.

if there are indeed ongoing active hostilities? This is a classic case of a question that is beyond the competency of a court—one that lies almost exclusively in the competency of the Executive. The President, informed as he is by military leaders in the field, will know much more about this than a court. In addition, the Constitution gives the President, not the Courts, the role of Commander in Chief of the armed forces[196] and general authority over foreign affairs.

Nonetheless, the President is as bound by the Constitution as any other officer of the state and he may not order the detention of combatants after active hostilities have ended.[197] If a combatant petitioner, perhaps with the aid of expert testimony, can make out the claim that active hostilities have ceased, then the burden would shift to the government to offer evidence that this was not the case. The court would then owe substantial deference to the executive's judgment, but not absolute deference. Following the Court's definition of substantial deference in *Turner Broad. Sys., Inc. v. FCC* (Turner II), the job of a court would be "to assure that in formulating its judgment, [the executive] has drawn reasonable inferences based on substantial evidence."[198] This would not put the courts in a position to second guess the executive's judgment about whether there are ongoing hostilities. Nor, however, would it allow the government to present a mere sham justification. Even giving substantial deference, a clearly bogus claim that there are ongoing active hostilities, in the relevant sense, could be rejected.[199]

Turning now to civilians, the factual question would be whether there is good reason to believe they are sufficiently dangerous to be preventively detained. Again, a court could only do so much. The issue would be essentially one of confirming that the relevant tribunal—the IDAT—was correct to find that substantial evidence indicates that the individual was really involved

196. *See* U.S. CONST. art. II, § 2.

197. It is true that the Court in *Ludecke* held that "[w]hether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled." 335 U.S. at 169. But compulsion may be in the wings, so it is worth thinking about how to approach this question.

198. 520 U.S. 180, 195 (1997). Martin suggests an even stronger form of deference, requiring only that the executive produce "some evidence." Martin, *supra* note 191, at 147. This is a fine point; our basic point is the same as Martin's: to strike an acceptable balance between letting the executive and military do its job and ensuring that it takes its job seriously. *Id.* at 150.

199. For a case showing the limits of substantial deference, see Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957, 1014 (N.D. Cal. 2004) *rev'd on other grounds*, Gonzales v. Carhart, 127 S.Ct. 1610 (2007) (holding that even using substantial deference, Congress's finding of fact that there is no need for a health exception to the prohibition on "partial birth abortions" should be rejected, because it "has not drawn reasonable inferences based on substantial evidence.").

in and committed to engaging in terrorism. Though habeas courts do traditionally have the authority to resolve factual matters,[200] they normally do not re-examine the facts determined by another tribunal.[201] The kinds of factual claims that habeas courts typically look at concern procedural defects in a trial that led to a conviction.[202] Facts showing such defects would presumably be the sorts of things one could raise on appeal from an IDAT, assuming the CSRT appeal procedures still applied.[203] Whether by appeal or by habeas, however, it should be possible for a detainee to argue for his release if he can show that the government has provided no substantive evidence that he is in fact dangerous.

This brings us to the power of the courts to provide remedies. The issue here is the separation of powers. As Justice Kennedy said, concurring in *Rasul*:

> The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs.[204]

Importantly, Kennedy was not saying that the judicial power may not enter into the realm of military affairs at all. Rather, as he said, "[a] necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated."[205] What mattered for Kennedy was that the courts show a proper respect for "military necessity." He reasoned that the courts could grant habeas to petitioners in Guantánamo because it was far removed from any hostilities, and because:

---

200. *See* 28 U.S.C. § 2246 (2007) (on oral evidence, depositions and affidavits); 28 U.S.C. § 2247 (2007) (on documentary evidence).

201. *See* Herrera v. Collins, 506 U.S. 390, 400 (1993).

202. An illustrative list of such defects is provided in United States v. Hayman, 342 U.S. 205, 212 n.12 (1952); Moore v. Dempsey, 261 U.S. 86 (1923) (mob domination of trial); Mooney v. Holohan, 294 U.S. 103 (1935) (knowing use of perjured testimony by prosecution); Johnson v. Zerbst, 304 U.S. 458 (1938) (no intelligent waiver of counsel in federal court); Waley v. Johnston, 316 U.S. 101 (1942) (coerced plea of guilty); United States *ex rel.* McCann v. Adams, 320 U.S. 220 (1943) (no intelligent waiver of jury trial in federal court); House v. Mayo, 324 U.S. 42 (1945) (denial of right to consult with counsel).

203. *See* DTA § 1005(e)(2)(C)(i).

204. *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).

205. *Id.* (citing *Ex Parte* Milligan, 71 U.S. 2, 4 (1866)).

> Indefinite detention without trial or other proceeding . . . suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus . . . . Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.[206]

In other words, we come to a balance of constitutional interests.[207] On the one hand is the interest of the Executive in controlling military matters, while on the other hand are the interests of individuals in their liberty. Where the Executive's need for control over military matters is strong, the courts can do nothing for the individual. But where the executive's control over military matters would not really be implicated, and where the individual's interest in liberty is strong, the courts can do something for the individual.

If a court were convinced, having given the Executive the benefit of substantial deference, that its claim that there are ongoing hostilities in the relevant sense is a sham, then the court has already made the determination that the Executive's control over military matters is not really implicated. Thus, in such a case the court should not feel obliged to defer to the Executive's authority over international affairs. It can order the release of detained combatants. Likewise, if it is convinced, having given all due deference to the government's evidence, that there is no real evidence that a civilian is a terrorist, it could order him released.

This brings us to a last objection. Justice Scalia, dissenting in *Hamdi*, observes the following about habeas:

> The text of the 1679 [English] Habeas Corpus Act makes clear that indefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ . . . [Section] 7 of the Act specifically addressed those committed for high treason, and provided a remedy if they were not *indicted and tried* by the second succeeding court term. That remedy was *not* a bobtailed judicial inquiry into whether there were reasonable grounds to believe the prisoner had taken up arms against the King. Rather, if the prisoner was not indicted and tried within the prescribed time, 'he shall be discharged from his

206. *Id.* at 488.

207. This kind of balancing is not alien to the Court in the context of the war on terror. Indeed, it was embraced by the Court in section 3 of *Hamdi*, 542 U.S. at 524–39 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

> Imprisonment.' . . . The Act does not contain any exception for wartime. That omission is conspicuous, since § 7 explicitly addresses the offense of 'High Treason,' which often involved offenses of a military nature. . . . Writings from the founding generation also suggest that, without exception, the only constitutional alternatives are to charge the crime or suspend the writ.[208]

The point Justice Scalia is making is that the process we have been defending is inconsistent with the function of habeas. If we want to admit the necessity of detaining certain individuals because of the threat they pose, even though they have not been convicted of a crime, then we need to acknowledge that the conditions for suspending habeas apply, or that these individuals are not covered by habeas at all. Supposing that the conditions for suspending habeas do not apply, that leaves us with the choice to insist that nonresident alien civilians must be tried or released, despite the danger they may pose, or to recognize that they are not covered by constitutional habeas (given the MCA, they are already not covered by statutory habeas).

We reject this argument on the grounds that it presents a false dichotomy. The better choice is to reject Scalia's originalism with regard to the function of habeas. We endorse the view relied on in *Eisentrager*, that constitutional habeas is a subsidiary procedural right for protecting constitutional rights, and in particular the constitutional right not to be detained without due process of law. This too reflects the core historical function of habeas: providing an escape from detention for those who are detained without due process of law. What has changed is not the core function of habeas, but the notion of due process. Scalia embraces a rigid notion of the process that is due. We, however, embrace a more flexible notion, one that takes due process to reflect the appropriate balance between competing concerns. Given this notion, a "bobtailed judicial inquiry" may be the best that can be offered a detainee. Yet that option will do more to preserve the overall balance of constitutional rights than Scalia's rigid position, which would either lead to dangerous terrorists being released, or, more likely, unjustly deny constitutional protections to nonresident aliens who live at the mercy of the U.S. government. Our argument in Part IV, section C above convinces us that it is more important to protect this extension of constitutional rights than to accept Scalia's crabbed originalism.

VII. CONCLUSION

The Bush administration is holding hundreds, or perhaps thousands, of detainees for what seems likely to be a great length of time, presumably until

208. 542 U.S. at 564.

the "war on terror" has been resolved. It categorizes these people as "enemy combatants," thereby lumping together combatants whose lawful military acts against the United States would be immunized by international law and civilians whose hostile acts would have been illegal. And following the Supreme Court's opinion in *Hamdi*, it has offered these detainees, at best (and not when held by the CIA), only the inadequate legal process that is provided in a CSRT hearing to determine whether they are indeed "enemy combatants."

We argue here that the Court should re-examine its holding in *Hamdi*. That holding relied on a reading of international law, specifically the law of war, and it got that law wrong. The law of war requires a distinction to be made between combatants and civilians. That distinction is relevant to the process each is due. Moreover, the process they are due is not merely an affair of international law; they are due "due process" under the U.S. Constitution. And the law of war dealing with international armed conflict is relevant as a guide to the proper interpretation of the U.S. Constitution.

Lastly, these rights can be enforced. They may be enforceable through the appeal rights provided by the DTA. But if not, then they are enforceable through habeas. The DTA and MCA have stripped nonresident aliens of their statutory habeas rights but they cannot strip them of their constitutionally guaranteed habeas rights. These are subsidiary procedural rights that ensure the protection of their constitutional rights and in particular, their constitutional right against the deprivation of liberty without due process of law.