

Unconstitutional Detention of Nonresident Aliens: Revisiting the Supreme Court's Treatment of the Law of War in *Hamdi v. Rumsfeld*

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One of the things that makes the Bush administration's prosecution of the “war on terror” particularly worrisome, if not galling, is the prospect that the U.S. will detain individuals for many years, if not their whole lives, on the basis of flimsy hearsay testimony or similarly unreliable evidence of dangerousness. 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 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 legal argument for striking a just balance between liberty and security, one that is superior to

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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 detainees in the United States’s “war on terror” have rights under the U.S. Constitution. The fundamental protection the Fifth Amendment provides to liberty, guaranteeing that it cannot be deprived without due process of law, applies to all detainees, to aliens captured and held by the U.S. outside the territory of the U.S. as well as to citizens and resident aliens.

Furthermore we contend that the law of war, as a part of international law, provides substantive norms for interpreting the content of this due process right. This is a distinct point; the Court should recognize that nonresident aliens benefit from constitutional rights even if it decides not to look to international law for guidance on their content. But were the Court to decide that the law of war is irrelevant to constitutional interpretation, it would not only be in error, it would be abandoning the longstanding and deep connection between constitutional law and international law, a connection reflecting the status of the U.S. as one nation in a community of nations.

We develop our argument in five parts. In Parts 1 and 2 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*.³ In Part 3 we critically discuss the *Hamdi* decision’s misapplication of the law of war, and provide the legal parameters of a detention policy consistent with the law of war. In Part 4 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. Finally, we elucidate the link between constitutional norms and international law (Part 5).

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).

³ 542 U.S. 507 (2004).

1. Background on Detention in the “War on Terror”

The latest reports indicate that the U.S. now holds approximately 385 detainees from the “war on terror” in Guantanamo Bay, Cuba,⁴ approximately 620 in Afghanistan,⁵ and over 18,000 in Iraq.⁶ We focus on the detainees in Guantanamo, as there is little publicly available information on those held elsewhere.⁷ 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 385 or so detainees still in Guantanamo, approximately 80 have been determined to be eligible for release or transfer and will presumably be released or transferred as the U.S. proceeds with negotiations with other countries that would receive them.⁸ Since 2002, approximately 390 detainees have been released to other countries; 111 were released in 2006 alone.⁹ This record of releasing detainees supports the Department of Defense’s claim that “[t]he United States does not desire to hold detainees for any longer than necessary”.¹⁰

Nonetheless, there is still ground for concern. Even if the U.S. releases all 80 detainees who have been determined eligible for release, it will still be holding approximately 300 detainees in Guantanamo, not to mention the others held in Afghanistan, Iraq and most likely elsewhere. Of those detainees, only 13 are at this point slated to receive a

⁴ Sgt. Sara Wood, “Administrative Tribunals to Begin for High-Value Guantanamo Detainees” American Forces Information Service (March 6, 2007), at <<http://www.globalsecurity.org/security/library/news/2007/03/sec-070306-afps01.htm>>.

⁵ See Ben Fox, Ex-Guantanamo Prisoner, Once Among Youngest Held, Back in U.S. Custody, at <<http://news.findlaw.com/ap/o/51/01-19-2007/7395001134d47eb4.html>>.

⁶ See Walter Pincus, U.S. Holds 18,000 Detainees in Iraq, Wash. Post, April 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.”)

⁷ But see *id.*, and Michael Moss/Souad Mekhennet, Jailed 2 Years, Iraqi Tells of Abuse by Americans, N. Y. Times, Feb. 18, 2007. (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 v. Harvey*, 2007 WL 420137, at *1 (D.C. Cir. Feb. 9, 2007) (describing the process given a U.S. citizen detained in Iraq in a way that seems very much like a CSRT hearing).

⁸ See Wood, *supra* note 4.

⁹ *Id.* 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.” See News Release, dated December 17, 2006, at <<http://www.globalsecurity.org/military/library/news/2006/12/mil-061217-dod01.htm>>.

¹⁰ *Id.*

trial in front of a military commission for criminal acts;¹¹ one, David Hicks, has faced trial, pled guilty, and been sentenced to serve nine months in prison, most of it in Australia.¹² Reports are that the Administration plans, in the long run, to try at most 60 to 80 of the detainees.¹³ Even assuming that some others will be found eligible for release, hundreds (or thousands, counting those held outside Guantanamo) could well be held in preventive detention “for the duration of hostilities”, which in the context of a “war on terror” could be generations.

It is true that the detainees in Guantanamo have all been found to be “enemy combatants” by a CSRT.¹⁴ But this, by itself, 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.¹⁵ The government’s evidence can include anything the Tribunal deems relevant, including hearsay.¹⁶ A detainee can call witnesses for his defense, but only those who are “reasonably available”;¹⁷ witnesses who are not part of the U.S. government have to pay their own way to the Tribunal, and military witnesses will not be deemed reasonably available if their participation might “adversely affect combat or support operations”.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

¹¹ See Wood, *supra* note 4. Wood indicates 14 are slated to face trial; we subtract one for David Hicks, whose plea bargain was struck after her article was published.

¹² See William G l a b e r s o n, Australian to Serve Nine Months in Terrorism Case, N. Y. Times, March 31, 2007.

¹³ See Craig W h i t l o c k, U.S. Faces Obstacles to Freeing Detainees, Wash. Post, at A1 (Oct. 17, 2006) (reporting the statement of John B. B e l l i n g e r III, Legal Advisor to the U.S. Secretary of State).

¹⁴ The foundations for CSRTs were laid in the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739. “Between July 2004 and March 2005, [the Department of Defense] conducted 558 CSRTs at Guantanamo Bay. At the time, 38 detainees were determined to no longer meet the definition of enemy combatant, and 520 detainees were found to be enemy combatants.” Wood, *supra* note 4. As of October 2005, at the latest, the U.S. Government claimed that all detainees in Guantanamo Bay had had their status reviewed by a CSRT. See the United Nations Report of the Chairperson of the Working Group on Arbitrary Detention, “Situation of Detainees at Guantanamo Bay” (February 15, 2006), at 15, and 15 n. 27; available at <http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf>. We do not know what percentage of detainees in Afghanistan and Iraq have likewise had (similar) status review hearings.

¹⁵ See The Deputy Secretary of Defense’s “Memorandum for Secretaries of the Military Departments”, dated July 14, 2006, “Enclosure 1”, p. 4, available at <<http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>>.

¹⁶ Id. at 6.

¹⁷ Id. at 4.

¹⁸ Id. at 6.

“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, leaving many “innocent” detainees unable to make their case. Illustration of this point is contained in the Senate testimony of Thomas Sullivan, a lawyer who has represented Guantanamo detainees in habeas petitions. In one hearing, a client of his was told by the Tribunal that he associated with a known al Qaeda operative. The detainee asked who this operative was. The Tribunal President admitted that he did not know. Sensibly enough, the detainee responded: “How can I respond to this?” Despite his denying that he associated with al Qaeda, he was, nonetheless, found to be an enemy combatant.²⁰

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 longer.²¹ And it is important to keep in mind that CSRTs are really a best case scenario; there is no reason to believe the detainees in Afghanistan and Iraq get procedural protections that are equally thorough.

This is really our main point. CSRTs operate as though the issue were determining 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 interstate war. The “war on terror” as a whole cannot be conceived of this way because it covers detentions that occur both where interstate 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.

To see how this problem 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 licensed indefinite and perhaps perpetual detention.

¹⁹ Id. at 6.

²⁰ Senate testimony of Thomas Sullivan, legal representative for seven Guantanamo detainees, given on September 25, 2006, available at <http://judiciary.senate.gov/testimony.cfm?id=2416&wit_id=5772>.

²¹ The Department of Defense reports that the detainees in Guantanamo have had two annual reviews, as of March 6, 2007. See Wood, *supra* note 4. After the latest round, 273 detainees were recommended for continued detention. Peculiarly, together with 80 recommended for release or transfer, and 14 for trial, this adds up to less than the total of 385 in Guantanamo.

2. Supreme Court's Position on Detention in the "War on Terror"

The Court in *Hamdi* was concerned about 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")]."²² 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."²³ 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".²⁴ Finding that "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan",²⁵ and that the AUMF's grant to the President of the authority to use "necessary and appropriate force" included "the authority to detain [captured combatants] for the duration of the relevant conflict",²⁶ it completed the syllogism and concluded that the ongoing detentions of combatants caught fighting against the U.S. in Afghanistan are "part of the exercise of necessary and appropriate force, and therefore are authorized by the AUMF".²⁷ 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".²⁸ This difficult standard – being "entirely unlike" other wars – was held not to apply in the present. But it could allow arguments 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.

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"²⁹ it surely was

²² 542 U.S. at 521.

²³ *Id.* at 518.

²⁴ *Id.* at 520-21.

²⁵ *Id.* at 521.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 519.

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 detainees both indefinitely and beyond the cessation of active hostilities, there could be no doubt that the Court would have found this to be constitutionally objectionable. 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.

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. It may apply to them in different ways; it may be that only “fundamental” rights extend to nonresident aliens. But if any right is to be counted a fundamental right, the right not to be deprived of one’s liberty without due process – again, understood in substantive as well as procedural ways – must be one.

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 nonetheless hold that the current practices on preventive detention are constitutional. That is, it could take the law of war to provide a sufficient, but not a necessary, basis for finding preventive detentions in the “war on terror” to be constitutional. But 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 5 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, at least for its persuasive authority.

Before moving on to a substantive criticism of the *Hamdi* decision, it is important to highlight an ambiguity in it. The evidence the Court offered of ongoing hostilities in the “relevant conflict” was fighting in Afghanistan. That makes it seem as though it sees the relevant conflict as the war between the U.S. and Afghanistan under the Taliban, an international conflict that was relatively limited in nature.³⁰ Such struggles over

³⁰ In some sense that war goes on because the new Karzai government has not been able to secure the country from Taliban attacks aimed at regaining control. In another sense, the war is over because the Karzai government is not fighting the U.S., and the U.S. is no longer an occupying power. Now the U.S. is

territory are a familiar part of the law of war. They 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”.³¹ To raise that specter, the Court had to invoke not the war in Afghanistan, but the “war on terror”. That it was willing to treat this “war” as something that might be “unlike the conflicts that informed the development of the law of war” was at best a gross equivocation. Except insofar as the “war on terror” involves international conflicts such as the U.S.’s wars against Afghanistan under the Taliban and Iraq under Saddam Hussein, or non-international armed conflicts such as the current fight against the Taliban, it simply is wholly unlike the wars covered by the law of war. We turn, now, to explaining why that is so.

3. Criticizing the Court’s Treatment of Detainee Rights Under the Law of War³²

The Court makes two basic mistakes in invoking the law of war to justify indefinite, possibly perpetual, preventive detention in the “war on terror”. First, it fails to see that under the law of war, the “war on terror” as a whole does not count as a war. Second, it fails 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 the justification for detention requires more than CSRT hearings.

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 interstate 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 Conven-

merely helping the Karzai government fight an insurgency, an example of a non-international armed conflict.

³¹ 542 U.S. at 520.

³² To speak with the Supreme Court we use the phrase “law of war” where many authors would instead use “laws of armed conflict”.

tion (“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.³³

The Supreme Court cited GC III, Article 118, for the proposition that “detention [in the war on terror] may last no longer than active hostilities”.³⁴ This provision is only triggered under Common Article 2, which provides that certain provisions of law are applicable to (1) “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 (2) “cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.³⁵ 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 are at this time. But Common Article 3 provides minimum standards for humane treatment and fair trial;³⁶ 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 conflicts.

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 was trying to justify detention that could go on as long as the “war on terror” lasts.³⁷ Since much of

³³ 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; 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; 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. The U.S. is a signatory on the Geneva Conventions, but not the AP I. Nevertheless, the articles of the AP I that we rely on, notably Article 75 on minimum guarantees are generally regarded as customary international law. See former Deputy Legal Advisor, Department of State, Michael J. Matheson, *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”); former Legal Advisor, Department of State, William H. Taft, IV, *The Law of Armed Conflict after 9/11: Some Salient Features*, 28 *Yale J. Int’l L.* 319, 322 (“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.”).

³⁴ 542 U.S. at 520.

³⁵ GC III and IV, Article 2, §§ 1 & 2. This was also adopted by reference in AP I, Article 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.”).

³⁶ See *Hamdan*, 126 S.Ct. at 2795.

³⁷ See *supra* notes 30 and 31, and accompanying text.

the “war on terror” extends beyond such interstate conflicts, 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 ongoing acts of terrorism and the U.S.’s ongoing efforts to combat them.³⁸

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 are combatants. Doing so will add weight to our argument that it is legally unsound to apply the concept of “active hostilities” as a limit to the permissible duration of preventive detention in the “war on terror”.

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

Another mistake in the Court’s reasoning in *Hamdi* was to treat the detainees in the “war on terror” as though they are 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.³⁹ But the opinion is meant 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

³⁸ We do not mean to imply that the law regarding when active hostilities have ceased is entirely clear. A good sense, a good sense for the problem, at least in U.S. law, can be gained by comparing the majority and the dissenting opinions in *Ludecke v. Watkins*, 335 U.S. 160 (1948).

³⁹ The government relied on a declaration by Michael M o b b s, according to which *Hamdi* “‘affiliated with a Taliban military unit and received weapons training’ ... ‘remained with his Taliban unit following the attacks of September 11’ and ... 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.” *Hamdi*, 542 U.S. at 513. If the U.S. 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. *Id.* at 511.

combatants.⁴⁰ Terrorists 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 fairly clearly 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."⁴¹ The relevant paragraphs of GC III, Article 4 (A) read:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

...

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Finally, AP I, Article 43, concerning armed forces, reads in relevant part:

(1) The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which,

⁴⁰ 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 evident when one recalls 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 Article 6, § 5 of the Additional Protocol to the Geneva Conventions of 12 August 1949, and *Relating to the Protection of Victims of Non-International Armed Conflict*, December 7, 1978, 1125 U.N.T.S. 609.

⁴¹ AP I, Article 50, § 1.

inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

(2) Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

There are a few things worth highlighting in these definitions. First, with one exception, all combatants must be linked to a Party, i.e. a signatory state.⁴² 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.⁴³ 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.⁴⁴ Third, the definitions are exhaustive. A civilian is anyone who is not a combatant.⁴⁵ Fourth, terrorists who operate through organizations such as al Qaeda, or who operate on their own, are civilians. These organizations do not have a link to Parties to the conflict. This last is the most important point: 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 [in the ‘war

⁴² The exception is GC III, Article 4 (A), § 6, which endorses the concept of *levée en masse*, a spontaneous rise of the people in self-defense against the invading army.

⁴³ The right to engage in hostilities is explicitly mentioned at the end of AP I, Article 43, § 2. See also Gerald L. Neuman, *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.”); Knut Ipsen, in: Dieter Fleck (ed.), *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.”).

⁴⁴ See, e.g., Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy*, HPCR Occasional Paper Series, 12 (2005) (“Combatancy is assessed in terms of ... its intimate and continuing link to legitimacy.”).

⁴⁵ 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); Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War 51 (Jean Pictet [ed.], 1958) (“There is no intermediate status; nobody in enemy hands can be outside the law.”); The Public Committee against Torture in *Israel v. The Government of Israel*, HCJ 769/02 (Israeli Supreme Court, Dec. 13, 2006) § 26 (“That definition [of civilians] is ‘negative’ in nature. It defines the concept of ‘civilian’ as the opposite of ‘combatant.’”); id. at §§ 37-8 (“The state asked us to recognize a third category of persons, that of unlawful combatants. ... as far as existing law goes, the data before us is not sufficient to recognize this third category.”). See also International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Blaskic* (2000) Case IT-95-14-T, § 180 (“[civilians are persons] who are not, or no longer, members of the armed forces.”).

on terror'] may last no longer than active hostilities".⁴⁶ What Article 118 actually says is that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities".⁴⁷ The term "prisoners of war" applies only to captured combatants and certain specifically defined civilians.⁴⁸ 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 to cite 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 is covered under a number of provisions of GC IV and AP I. We focus, however, only on those clauses that would cover the rights of nonresident aliens, and in particular on two GC IV provisions that deal with the detention of aliens in countries that have been occupied during or after a war.⁴⁹ The most significant of these provisions is GC IV, Article 78: "If 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."⁵⁰ What is noteworthy here is how high the barrier to detention is. 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".⁵¹ As we will see in section D at the end of this

⁴⁶ 542 U.S. at 520.

⁴⁷ 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, Article 119.

⁴⁸ A general 6-item list of types of people who can become prisoners of war if captured is given in GC III, Article 4 (A). Paragraphs 4-6 concern specific categories of civilians who are due the protections of prisoners of war. Whether these civilians should also be treated as combatants with regard to release conditions is a question we do not address here.

⁴⁹ AP I, Article 75, § 3 reinforces these GC IV passages, but adds nothing new with regard to when a detainee must be released: "Except in cases of arrest or detention 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." 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.

⁵⁰ GC IV, Article 78, § 1.

⁵¹ Int'l Comm. of the Red Cross, Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter "Commentary GC IV"] 368 (Jean S. Pictet [ed.], 1958). See also ICTY, *Delalić* (IT-96-21-A), Judgment, Appeals Chamber, Feb. 20, 2001, at § 320 ("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

Part, this approach to preventive detention as exceptional conflicts with the use of CSRTs as currently configured.

Another important implication of the language of Article 78 is that it is meant to imply that detainees should be treated individually. As the official comment also states: “Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately.”⁵² This too is relevant to understanding the difference between combatants and civilians. Combatants can be detained, as a group, until the cessation of hostilities. Civilians may not be so detained. A civilian can be detained only if he poses a particular threat such that it is necessary to detain him for imperative reasons of security. Again, we will see that this approach to preventive detention, paying attention to the details of each individual case, conflicts with the use of CSRTs as currently configured.

There is one Article of GC IV that may seem to link the detention of civilians with that of combatants. Article 133 reads: “Internment shall cease as soon as possible after the close of hostilities.” This article is based on the premise that “hostilities are the main cause for internment”;⁵³ accordingly when they cease, it can be generally presumed that the need for preventive detention will cease as well. 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. It provides simply another reason to limit 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”. Again, the assessment must be individual; the cessation of hostilities primarily serves to set a maximum period for detention under the law of war.

These provisions show that the *Hamdi* Court misapplied the law when 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.⁵⁴ This can be seen, for example, in the remarks of the Legal Advisor

... [T]he involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary will be unlawful.”).

⁵² Commentary GC IV, *supra* note 51, at 368.

⁵³ *Id.* at 515.

⁵⁴ 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 according to his actions

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."⁵⁵ 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.⁵⁶

Some might object that the label "unlawful combatant" dates back, in U.S. law, at least to 1942 and the case of the German saboteurs, *Ex parte Quirin*.⁵⁷ Indeed, the *Hamdi* Court cites *Quirin* for exactly this point, hoping thereby to show that the "capture, detention, and trial of unlawful combatants" is legally well grounded both for combatants, such as the Taliban was when the U.S. invaded, and for civilians, such as members of al Qaeda.⁵⁸ But the *Hamdi* Court was being sloppy here. The *Quirin* Court was discussing only what international law now refers to as combatants:

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.⁵⁹

The *Quirin* Court's use of the term belligerents reflects the language of the 1907 Hague Convention, Article 3 of which uses the term "belligerent" to cover what is now meant by "combatant".⁶⁰ Citing, among other things, that Convention, it said: "By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants."⁶¹ The unlawful combatants the Court

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).

⁵⁵ Opening Statement by John B. Bellinger III, in a digital video conference with German journalists in Berlin, Cologne and Hamburg, on March 13, 2006. Available at <http://www.usembassy.de/germany/bellinger_dvc.html>.

⁵⁶ See *supra* notes 43 and 44, and accompanying text.

⁵⁷ 317 U.S. 1 (1942).

⁵⁸ 542 U.S. at 518. We assume that the Court was not trying to distinguish al Qaeda from the Taliban, despite the fact that in this passage the Court was discussing only the Taliban, because 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". *Id.* In other words, the AUMF lumped combatants and non-combatants together, the Court happily followed along, using the term "enemy combatant" to cover both.

⁵⁹ 317 U.S. at 31.

⁶⁰ Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277, T.S. No. 539, Article 3.

⁶¹ *Id.* at 30-31. (Note, the *Hamdi* Court wrongly cites this *Quirin* text as being 317 U.S. at 28. 542 U.S. at 518.)

mentioned were combatants acting unlawfully: the spy or the combatant who sheds his uniform to slip through enemy lines to attack life or property. There is no reason, therefore, to take *Quirin* as precedent for treating civilians who unlawfully use force as combatants in the modern, legal sense of the word.

It might still be objected that the U.S. is right to blur the distinction between civilians and combatants given the exigencies of the “war on terror”. But this is just to say that the law of war, as it now stands, cannot accommodate the security concerns that give rise to the “war on terror”. It would be more honest and respectable to make that claim than to misapply legal terms and pretend to be applying them in an accepted fashion.

Nonetheless, if it were true that the U.S. could not successfully defend itself against terrorism while respecting the current international law regarding the detention of civilians, then the U.S. should object to the relevant parts of international law, should push for reform of the same, and should certainly not model its constitutional law on those unserviceable clauses. But before deciding whether this is true, one must first have a clearer sense for what international law can do to accommodate the exigencies of the “war on terror”. We turn in the next two sections to this issue.

C. The Law of War and International Human Rights Law

In order to understand just when preventive detentions are legal under international law, we need to distinguish detentions under the law of war pertaining to international armed conflicts, which is the concern of the substantive provisions we have been discussing so far, from detentions in other conditions, those involving non-international armed conflict and law enforcement outside any armed conflict. 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. This may seem surprising, as one might think that the need for preventive detention should, if anything, go down when international armed conflict is not an issue. But for whatever reason, international law provides less substantive guidance on when preventive detention is legally justifiable outside of the context of international armed conflict than inside it. Despite this fact, however, an argument can be made that the law of war for international armed conflict presents a basic floor.

When a state of international armed conflict does not exist,⁶² the only limits on

⁶² The only provision of the law of war that applies after wars and occupations end, but not generally in peace time as well as war, is AP I, Article 75, § 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.” Note also that only selected provisions of GC IV cover for the length of an occupation; others end one year after “general close

when detentions are legally permissible in international law are those found in international human rights law, most pertinently and universally, from the International Covenant on Civil and Political Rights (“ICCPR”).⁶³ The relevant language for our discussion from the ICCPR is found in Article 9. Paragraph 1 states: “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.” Paragraph 4 states: “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.”

Notice that 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 preventative detentions on the grounds that a preponderance of the evidence shows that an individual was engaged in hostilities against the U.S. or its allies. 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).⁶⁴

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.⁶⁵ It could be argued that the appeal right is too limited, and that detainees also need to have a right to habeas.⁶⁶ But unless there were some substantive legal problems with the sorts of preventive detentions that the U.S. 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 U.S. were to conclude that it is legally more at liberty to put nonresident aliens in possibly perpetual preventive deten-

of military operations”. GC IV, Article 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 1, Article 3(b) eliminates this one year restriction, but the U.S. is not a signatory to the AP 1.

⁶³ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

⁶⁴ See *supra* note 14.

⁶⁵ DTA, 10 U.S.C. § 10005(e)(2)(A).

⁶⁶ This is the argument the Court decided to entertain when it granted certiorari, after initially denying it, in the case of *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. granted, 2007 WL 1854132 (U.S. June 29, 2007) (NO. 06-1195).

tion if it captures them after a period of occupation of another country ends – a period that would count as a period of international armed conflict – than if it captures them during a period of occupation. The solution to this anomaly is to be found in the link we argue should be made between international law 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 4), and that international law provides substantive guidance on how to interpret this constitutional norm for the case of nonresident aliens (Part 5). The standards deployed in the Geneva Conventions provide an appropriate baseline for balancing the U.S.’s 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 should not give the U.S. license to change the balance between its security interests and liberty interests of individuals. It is not as if international human rights law provides a different substantive norm for balancing state security interests against individual liberty interests when international armed conflicts are not ongoing. International human rights law simply does not address the substantive 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. An International Law Standard for Balancing Security and Liberty

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.

Some considerations that go into that balance are obvious enough as a matter of common sense.⁶⁸ If security in a region or for a nation as a whole is already precarious, then the case for preventive detention will be easier to make. On the other hand, 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 de-

⁶⁷ GC IV, Article 78, § 1.

⁶⁸ One should note, in any event, that 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.

tainees if they can come up with a reliable “sponsor” within the community provides a way of protecting security while also promoting liberty.⁶⁹ In addition, it should matter how strong the evidence is that someone is committed to engaging in terrorism. If an individual was caught engaging in terrorist acts or other forms of illegal belligerent acts, then there is good reason to believe this person is indeed a terrorist. His detention until external circumstances change so that he is unlikely to find support for such activities would be easier to justify than the detention of someone for whom there is only hearsay evidence of involvement with a terrorist group like al Qaeda.

The U.S. may claim that the CSRT procedure provides the right balance, as it allows detention only when appropriate under the standards just sketched.⁷⁰ Ongoing preventive detention is allowed only after it has determined by a preponderance of the evidence that those detained are “enemy combatants”.⁷¹ 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.⁷²

But there are at least three problems with relying on CSRTs.⁷³ 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 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”.⁷⁴

Second, though the hearing is individualized, the resulting decision with regard to detention is not. 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 U.S. is no longer concerned about terrorist attacks. This is individual assessment only in terms of sorting people into bins, after which they are treated categorically. “Enemy combatants” may simply be detained until the cessation of “active hostilities”. Even with an annual review of his case, the presumption once an

⁶⁹ The existence of this practice was pointed out to us by Charles G a r r a w a y .

⁷⁰ This may only be true of detainees in Guantanamo, 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. 10 U.S.C. 1005(a). But we are uncertain how much they resemble the procedures for Guantanamo. Importantly, the DTA covers detainees only in Guantanamo, Afghanistan or Iraq. If the U.S. holds detainees elsewhere, those detainees are not covered by the DTA.

⁷¹ See *supra* notes 14-19, and accompanying text.

⁷² See DTA, 10 U.S.C. § 1005(a)(1)(A). Interestingly, the DTA has different clauses covering detainees in Guantanamo, 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 Guantanamo. Contrast 10 U.S.C. § 1005(a)(1)(A) with § 1005(a)(1)(B).

⁷³ For further discussion of how limited and problematic CSRTs are, see Judge R o g e r s , dissenting in *Boumediene*, 476 F.3d at 1005-1006.

⁷⁴ See *supra* note 19.

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 involves more than an annual review to see if new facts have surfaced showing that his detention was a mistake. 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 Military Commissions Act of 2006 (“MCA”) defines an “unlawful enemy combatant”, 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 “supporting” hostilities against the U.S., however, is an awfully expansive term that may have little to do with a person being too dangerous to release.⁷⁶

We do not deny that many detainees in the “war on terror” are committed to fighting the U.S. and to using terrorist means in doing so. That there are doubtless such detainees does show the need to have a category of preventive detention for those civilians for whom there is strong evidence that they are terrorists, and for whom there is no less restrictive treatment that would serve the security interests of the U.S. and its allies.⁷⁷ But such cases will presumably be rare, and the process that the U.S. must provide to ensure that a detainee falls into this category would have to be much more searching than the process provided by a CSRT hearing.

To follow the norms of international law, then, the U.S. 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 U.S. has to sacrifice its legitimate security interests. Measures necessary to protect its security can legally be taken under international law. What is a violation of international law is treating civilians like combatants who can be detained until the “war on terror” is either “won” or abandoned.

We now turn to the question of whether nonresident aliens can benefit from this argument as a matter of constitutional law. That argument proceeds in two parts. First, can nonresident aliens benefit from constitutional protections? Second, can the law of

⁷⁵ Pub. L. No. 109-366, 120 Stat. 2600. 10 U.S.C § 948(a)(1)(A)(i)(emphasis added).

⁷⁶ This claim is also supported in case law dealing with international law. “[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.” ICTY, *Delalić* (IT-96-21-T), Judgment, Trial Chamber, 16 Nov. 1998, at § 577.

⁷⁷ Civilian 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 (D.D.C. Dec. 22, 2005).

war and related international law really play a role in determining what constitutional protections exist for nonresident aliens?

4. Extraterritorial Application to Nonresident Aliens of the Core Constitutional Right Not to Be Deprived of Their Liberty Without Due Process of Law

A. *Rasul v. Bush* (2004)⁷⁸: A Headcount

When the Supreme Court most recently addressed the question whether nonresident aliens have enforceable constitutional rights,⁷⁹ six of the nine Justices took the position that they do. Five took that position in footnote 15 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.⁸⁰

Starting then with footnote 15, 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 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”.⁸¹

This text clearly 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”.⁸² 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.

⁷⁸ 542 U.S. 466.

⁷⁹ It is not redundant to describe constitutional rights as enforceable. For brevity, however, we assume that all constitutional rights are enforceable.

⁸⁰ We draw no inferences from the initial denial of certiorari in *Boumediene*, nor from the Courts subsequent decision to grant certiorari.

⁸¹ 542 U.S. at 484.

⁸² This phrase comes from the federal habeas statute, 28 U.S.C. § 2241(c)(3). We say “normally” because the MCA has stripped federal courts of habeas jurisdiction over these detainees.

The supporting citation is Justice Kennedy's concurring opinion in *United States v. Verdugo-Urquidez*,⁸³ 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 U.S. is searched by U.S. authorities. Justice Kennedy's concurring opinion rejected the thought that the holding followed from the more 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".⁸⁴ In so framing the question he extended a point Justice Harlan had made concurring in *Reid v. Covert*:⁸⁵ 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".⁸⁶ Justice Harlan's point concerned only U.S. citizens; by citing it in this case, however, Kennedy was extending it to aliens as well. Kennedy concurred with, and indeed also joined, the majority opinion because he agreed that the Fourth Amendment's protections do not require "United States agents to obtain a warrant when searching the foreign home of a nonresident alien".⁸⁷ But this was only because doing so would be "impracticable and anomalous",⁸⁸ not because nonresident aliens do not benefit from constitutional rights against agents of the United States. 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*. *Eisentrager* endorsed the view that the constitutionally guaranteed right to habeas "is a subsidiary procedural right that follows from possession of substantive constitutional rights".⁸⁹ Thus to find that the detainees in Guantanamo 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 Guantanamo. He found that was the case both because "Guantanamo Bay is in every practical respect a United States territory",⁹⁰ and because "the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to

⁸³ 494 U.S. 259 (1990).

⁸⁴ *Id.* at 277.

⁸⁵ 354 U.S. 1 (1957).

⁸⁶ 494 U.S. at 277, citing 354 U.S. at 74 (Harlan, J., concurring) (emphasis in original).

⁸⁷ 494 U.S. at 278.

⁸⁸ *Id.*

⁸⁹ 339 U.S. at 781.

⁹⁰ 542 U.S. at 487.

determine their status”.⁹¹ 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 U.S. 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”.⁹² Justice Kennedy’s reasoning in *Verdugo-Urquidez* was not in the same way tied to U.S. controlled territory, and that provides some reason to think that the majority would extend constitutional rights to aliens held by the U.S. outside U.S. controlled territory. But just how the remaining members of the *Rasul* majority and Kennedy would handle extending constitutional rights to nonresident aliens held by the U.S. outside of U.S. controlled territory cannot be predicted with great confidence.

B. The Case Law: An Open Question

The question now is whether the majority approach, interpreted to be expansive enough to cover nonresident aliens outside U.S. controlled territory, is sound. There is no settled case law to answer this question. Those who oppose extending constitutional rights to nonresident aliens can cite cases that say that the Constitution does not apply to them. But these cases say so only in dicta. The structure of their reasoning does not support that conclusion, nor is that conclusion necessary for their holding. Likewise, the cases that the majority and Justice Kennedy concurring in *Rasul* rely on also do not show that their position is well settled in the case law. Thus what the Court confronts is really a choice between two different policies, and the only honest approach to the choice is to examine the underlying reasons. We demonstrate in this section that the case law is not yet settled on this matter. In the next section we take up 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. For example, in *Boumediene* the majority declared: “Precedent in ... the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States.”⁹³ There are two Supreme Court cases that are primarily relied on for

⁹¹ 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.

⁹² *Supra* note 81.

⁹³ 476 F.3d at 991. Disappointingly, even Judge Rogers, in dissent in *Boumediene*, buys the majority line about what the precedent actually says. Id. at 1011 (“[T]he Supreme Court in *Eisentrager* held that the

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, seemed to claim that aliens outside the U.S. or U.S. controlled territory do not benefit from constitutional rights. But 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 onto 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.”⁹⁴ He took this position in part because no one was contesting that normal Fifth and Sixth Amendment trial rights applied to the defendant’s U.S. based trial. But he also took it 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.⁹⁵ In other words, at most four Justices in *Verdugo-Urquidez* embraced the strong position that aliens outside the U.S. 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.”⁹⁶ This statement of what the case law shows is not quite accurate, however. As he showed in an earlier part of the discussion, analyzing the so-called “*Insular Cases*,”⁹⁷ aliens outside the U.S., but in territories controlled by the U.S., benefit from constitutional rights, even if only from “fundamental” ones.⁹⁸ Nevertheless, taken together, the cases he reviewed establish that aliens benefit from constitutional rights only insofar as they live in territory controlled by the U.S. They do not establish that aliens outside U.S. controlled territory have constitutional rights.

Constitution does not afford rights to aliens in this context. 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 *Eisentrager*, 542 U.S. at 475-479, 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.

⁹⁴ 494 U.S. at 278.

⁹⁵ Id. at 275.

⁹⁶ Id. at 271.

⁹⁷ *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).

⁹⁸ 494 U.S. at 268.

Rehnquist also examined the case that did the most to disconnect constitutional protection from living in territory governed by the U.S.: *Reid*. He noted correctly that the plurality and concurring opinions in *Reid* were all couched in terms of how the Constitution would cover U.S. citizens abroad.⁹⁹ Thus, connecting this with what was shown about aliens, we see that no case law establishes that aliens living outside U.S. governed territory benefit from constitutional rights.

But, 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".¹⁰⁰ This would be very significant, if true, for it is the Fifth Amendment that guarantees that a person shall not be deprived of life, liberty or property without due process of law. If such protections do not apply, then it is unclear why any others should. But Rehnquist's reading of *Eisentrager* is sloppy and exaggerated.

The first thing to notice is that 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".¹⁰¹ 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".¹⁰² In other words, the text is not even about the Fifth Amendment's Due Process clause.

Second, 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 there emphatically rejected only a rather extreme view, namely that nonresident aliens benefit from all the same rights as resident civilian citizens. The argument actually left open 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 ap-

⁹⁹ See *id.* at 270.

¹⁰⁰ See *supra* note 2 (emphasis added).

¹⁰¹ 494 U.S. at 270, quoting *Eisentrager*, 339 U.S. at 784.

¹⁰² 339 U.S. at 784.

ply to nonresident aliens.¹⁰³ But neither the explicit language of the case nor the reasoning of the case supports this claim. The explicit language of the case never says that nonresident aliens as a category do not benefit from constitutional rights. It always frames the issue more narrowly in terms of the “nonresident enemy alien, especially one who has remained in the service of the enemy”.¹⁰⁴ As the Court put it in concluding its discussion of the application of the Fifth Amendment to the petitioners in that case: “We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.”¹⁰⁵ Notice how different this holding is from Justice Rehnquist’s gloss. The *Eisentrager* Court did not reject the extraterritorial application of the Fifth Amendment to aliens *per se*. It rejected the claim to protection only of a specific set of nonresident aliens, those who are (a) citizens of enemy countries (those at war with the U.S.), and (b) engaged in hostile actions on behalf of the enemy government. And it rejected only two specific rights: the right of “personal security” (whatever that is; the Court does not define it) and “immunity from military trial and punishment”. This is (or seems, given the uncertainty about “personal security”) reasonable. We have no objection to the claim that nonresident aliens can be tried, in times of war, by military commissions, and then punished if convicted.¹⁰⁶ But admitting that much is a far cry from admitting that nonresident aliens benefit from no Fifth Amendment protections at all.

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”.¹⁰⁷ 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 guar-

¹⁰³ 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”. Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror, Harvard L. Rev. (forthcoming) (draft page 40).

¹⁰⁴ 339 U.S. at 776 (emphasis added).

¹⁰⁵ Id. at 785.

¹⁰⁶ This is not to say that we have no objection to the MCA’s procedures for military commissions and its list of crimes triable by military commissions. But whatever objections we have of that nature are beyond the scope of this paper.

¹⁰⁷ Id. at 783.

anted to enemies”.¹⁰⁸ It would be a mistake to infer from this argument that the Court meant to say that nonresident aliens benefit from no Fifth Amendment rights. Indeed, it was only sloppiness on the part of the Court that led it to suggest that conscripted American citizens are stripped of all of their Fifth Amendment rights. It is a peculiarity of the opinion that neither of the cases the Court cites on this point show any stripping of Fifth Amendment protection. *Wade v. Hunter*,¹⁰⁹ actually holds that the Fifth Amendment’s Double Jeopardy Clause does apply to conscripted American citizens. And while *Humphrey v. Smith*¹¹⁰ upheld a court-martial prosecution without a grand jury indictment, this is no exception to the Fifth Amendment, as that Amendment explicitly exempts “cases arising in the land or naval forces”, from the requirement of indictment by grand jury. Thus neither case illustrates the Court’s point. And 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 it would be perverse to extend greater coverage to nonresident aliens than to resident aliens.¹¹¹ 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”.¹¹² 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”.¹¹³ Again, Harlan said this in a discussion of what was due American citizens overseas, but our point is that the arguments in *Eisentrager* are fully consistent with extending Harlan’s point to nonresident aliens.

We conclude, then, that *Eisentrager* did not “emphatically” reject any and all application of the Fifth Amendment to nonresident aliens, no more than it “emphatically” rejected the application of any and all Fifth Amendment protections to conscripted

¹⁰⁸ Id.

¹⁰⁹ 336 U.S. 684 (1949).

¹¹⁰ 336 U.S. 695 (1949).

¹¹¹ See 339 U.S. at 784.

¹¹² See *supra* note 102. This is the part of the *Eisentrager* argument that most impressed the majority in *Boumediene*. See 476 F.3d at 991.

¹¹³ 354 U.S. at 75.

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.

Likewise, we can see the validity of Justice Kennedy's claim that, in effect, any strong claims in *Verdugo-Urquidez* about nonresident aliens having no constitutional rights was also dicta (and dicta of only four Justices at that). All the Court needed to establish in that case was that nonresident aliens whose property outside the U.S. was searched without a warrant did not suffer the violation of any Fourth Amendment rights. Justice Rehnquist tried to strengthen that position by arguing that "[i]ndeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States".¹¹⁴ But that claim, which we see was unfounded, was also unnecessary for his argument.

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".¹¹⁵ But this was in 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".¹¹⁶ 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 U.S. only to U.S. citizens. And the *Insular* cases extend (fundamental) constitutional rights to aliens only in territories controlled by the U.S. Thus to resolve the issue, and to do so honestly, we must look to the underlying justifications for adopting one policy or another.

¹¹⁴ 494 U.S. at 269.

¹¹⁵ 533 U.S. 678, 693 (2001).

¹¹⁶ *Id.* (emphasis added).

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

There has been a longstanding fight in U.S. jurisprudence between, on the one hand, those who take a “membership” position, who would extend constitutional protections only to U.S. citizens or those legally in U.S. territory, and, on the other hand, those who take a “responsibility” position, according to which whenever the U.S. exercises authority over people it acquires a responsibility to those people, a responsibility that is to be understood in terms of those people having constitutional rights against the U.S.¹¹⁷ We argue here that the only reasonable position is the responsibility position. This approach gives due weight to the idea that with authority comes responsibility. The responsibility position also reflects the important principle that the U.S. government is a creature of law, and accordingly 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.¹¹⁸ This is not to say that the government 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 heart of the Constitution.

Importantly, this principle that the government may not do whatever it wants with nonresident aliens is legally well grounded in a number of ways. It is reflected in the civil war amendments, which ended slavery and the legacy of categories of people subject to unchecked power.¹¹⁹ It is manifest in the idea “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”.¹²⁰ (Note: this reference to “all men”, or, in less sexist terms, all people, should be taken literally as a reflection of the dignity that aliens enjoy just as well citizens, both at home and abroad.) Lastly, it is at the core of international human rights law which not only binds government’s in rela-

¹¹⁷ We draw this distinction from Gerald L. Neuman, Closing the Guantanamo Loophole, 50 Loy. L. Rev. 1, 7 (2004), only he calls these two positions “membership” and “mutuality of obligation”.

¹¹⁸ 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 ... The question ... becomes what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations.” 494 U.S. at 277. See also *Reid*, 354 U.S. at 5-6 (plurality opinion) (“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.”); and Neuman, *supra* note 117, at 44-45.

¹¹⁹ U.S. Const. amend’s. 13, 14, and 15.

¹²⁰ U.S. Declaration of Independence.

tion to their constituencies, but in their actions towards all of humanity under their jurisdiction.¹²¹

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 a Constitution as a compact between members of a society. This notion of the Constitution as a compact goes back to the earliest days of the nation, as witnessed by the language of *Chisholm v. Georgia*, from 1793: “The Constitution of the United States is ... a compact made by the people of the United States to govern themselves as to general objects, in a certain manner.”¹²² But an appreciation for the limits of the idea of a compact also goes back to the earliest days. Justice Kennedy quotes Justice Story’s Commentaries, dating from 1833, as follows:

A government may originate in the voluntary compact or assent of the people of several states, or of a people never before united, and yet when adopted and ratified by them, be no longer a matter resting in compact; but become an executed government or constitution, a fundamental law, and not a mere league.¹²³

Justice Kennedy glosses this as saying that “[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”.¹²⁴ In other words, a 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.

Nonetheless, 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

¹²¹ See ICCPR, *supra* note 63, Article 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.”) 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). 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 the arguments against the responsibility position, which provides a principled reason to extend constitutional protections to all those subject to U.S. power, do not succeed.

¹²² 2 U.S. 419, 471.

¹²³ *Verdugo-Urquidez*, 494 U.S. 276, quoting from I Commentaries on the Constitution § 365, p. 335.

¹²⁴ *Id.*

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.¹²⁵ Yet it is the people or persons in general who benefit from the various rights. Indeed, it has been clear for a long time that aliens as well as citizens benefit from these protections.¹²⁶ Thus this notion of a membership community is implausible.

One might appeal to a slightly broader membership community, however, namely that composed of 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. This approach to membership would cover both resident aliens and aliens in territories like Puerto Rico, who are duty bound to obey laws that would be invalidated if contrary to the U.S. Constitution. It would also cover U.S. citizens abroad who can be prosecuted by U.S. prosecutors, such as the defendants in *Reid* (two wives of U.S. servicemen who murdered their husbands while living on military bases in England and Japan, respectively).

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 every detainee in the "war on terror" also benefits from constitutional rights. For every detainee is at least in principle subject to prosecution by a military commission for violations of US laws. The MCA makes this especially clear, as it lists 28 crimes that, according to its own terms, have traditionally been tried by military commissions.¹²⁷ The claim that nonresident aliens can be punished for commission of these crimes implies that they had a duty not to commit them. But that means that they were under a duty to respect U.S. law. As a consequence, the U.S. has to recognize that nonresident aliens have constitutional rights.

It could be responded that the laws the U.S. claims the right to prosecute are actually not, fundamentally, U.S. laws, but are rather international law, or, as the Constitu-

¹²⁵ 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.

¹²⁶ As early as 1886, in *Yick Wo v. Hopkins*, 118 U.S. 356, the Supreme Court held that the protections of the Fourteenth Amendment protected resident aliens as well as citizens.

¹²⁷ Regarding the claim that these are crimes traditionally tried by military commissions, see MCA, 10 U.S.C. § 950p; regarding the list of 28 offenses, see MCA, 10 U.S.C. §§ 950v(b)(1)-(28). Whether this claim is true or not is immaterial to our purposes here.

tion puts it, “offenses against the law of nations”.¹²⁸ As the Supreme Court said in *Quirin*:

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.¹²⁹

The roots of prosecution under a military tribunal, then, are not U.S. law, but the law of nations. Still, it would be implausible to suggest that military tribunals simply and directly prosecute “offenses” against the law of nations. Such a natural law position is no longer plausible in this age of positive law.¹³⁰ Rather, U.S. military tribunals prosecute violations of the law of nations as “defined” by the U.S. Congress. In other words, the offenses which nonresident aliens have a duty not to commit are not only offenses against the law of nations, but also, and in their details, offenses against U.S. law.

Thus we conclude that whether one starts with a responsibility position or a membership position, one comes to the same thing: if the U.S. is going to exercise its authority over nonresident aliens, it has to grant them constitutional rights as well.

We can think of only one other argument for the membership position that would limit constitutional rights to those who are U.S. citizens or who live in territory generally governed by U.S. law, and that is one that appeals to the notion of sovereignty.¹³¹ The thought is that where the U.S. is sovereign, as it is over its territories, its Constitu-

¹²⁸ U.S. Const. Article 1, § 8, § 10.

¹²⁹ 317 U.S. at 27-28.

¹³⁰ See *Erie v. Tompkins*, 304 U.S. 64, 79 (1938) (“[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State ...”) (quoting Justice Holmes, *Black & White Taxicab*, etc., *Co. v. Brown & Yellow Taxicab*, etc., *Co.*, 276 U.S. 518, 533 [1928]).

¹³¹ 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 Guantanamo, even despite the U.S. having unchecked effective control. See, e.g., *Al Odah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2003) (reading *Eisenrager* “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 Guantanamo Bay.”) (emphasis added).

tion rules; but where the U.S. is not sovereign, there some other country must be sovereign. Where another country is sovereign, that country's 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 treats 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 resident aliens, 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. But clearly, that is not the case. Guantanamo itself represents a living counter-example, as Cuba has sovereignty but exercises neither executive powers nor jurisdiction over Guantanamo. Moreover, it would be a mistake to fixate on the special status of Guantanamo as a place where the U.S. can exercise control as long as it chooses. The same problem arises, even if not indefinitely, whenever one country invades and occupies another. This was recently illustrated in Afghanistan and Iraq, where the U.S. and its allies were the only source of organized authority in both countries for some period after the U.S.-led invasions. 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.¹³² The position articulated here would allow the U.S. to exploit the moral and legal degradation of regimes that show no respect for human rights. The behavior of the U.S. should not be allowed to sink to the lowest common denominator, especially not when the U.S. has the economic and military clout to influence other states and cause them to sink lower than they themselves might independently be willing to go. As noted above, the U.S. is a creature of law, and no executive's desire to act lawlessly should be licensed on the ground that the law of the country in question is being respected. If the U.S. can expect individuals to adhere to such international legal standards as are contained in the criminal laws listed in the MCA, even if the acts that would count as criminal under the MCA are legal in the country where they are performed, then the U.S. must itself abide by the basic norms of respect contained in constitutional law.

¹³² Consider, for example, the many reports of the U.S. 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*, Posted Feb. 2, 2005, available at <http://www.newyorker.com/printables/fact/050214fa_fact6>.

Some might hear this as saying that the U.S. has to accord nonresident aliens every constitutional right it accords residents (whether alien or citizen). But, again, that is not what we are saying. 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’”.¹³³ 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. Likewise, the worries expressed by Justice Jackson, that the U.S. 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.¹³⁴ The Constitution is not a suicide pact,¹³⁵ and such rights would not be “due”. However, “[t]he time has long passed when ‘no quarter’ was the rule on the battlefield”.¹³⁶ 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 protections under the U.S. Constitution.

D. Freedom from Detention Without Due Process Is a Core Right

So far, we have argued only that nonresident aliens benefit from some constitutional rights, whatever rights are “due” in the situation in which they find themselves. Now the question is, what rights are they “due”? Our thesis in this section is that whatever other rights nonresident aliens are due, they must certainly benefit from the Fifth Amendment protection against the deprivation of liberty without due process of law. In the next Part, we will argue that the norms of international law, as discussed in Part 3 above, provide fundamental guidance for interpreting the application of the Fifth Amendment to nonresident aliens.

The argument that, at a minimum, nonresident aliens benefit from Fifth Amendment protections of their liberty is a two-step argument. First, the consistent position of the Court for more than 100 years has been that when the Constitution applies, but does not apply fully, it still guarantees, at a minimum, “fundamental rights”. Second, the Fifth Amendment’s protection of liberty is as strong a candidate for a fundamental right as exists in the Constitution.

¹³³ See *supra* note 113.

¹³⁴ See *supra* note 102.

¹³⁵ See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

¹³⁶ William Winthrop, *Military Law and Precedents* 788 (rev. 2d ed. 1920) (quoted by the Court in *Hamdi*, 542 U.S. at 518).

The claim that the U.S. Constitution at least protects “fundamental” rights goes back at least to 1901, to Justice White’s concurring opinion in *Downes v. Bidwell*. He held that even when there is no express limitation on the power of Congress, “there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed ...”¹³⁷ The view that fundamental rights applied in the “unincorporated territories” – those not clearly destined to become states – then became the established doctrine three years later in *Dorr v. United States*.¹³⁸ If our position in the previous section is accepted, and it is agreed that constitutional rights apply to nonresident aliens, then surely they must benefit from at least this same minimum.

There are numerous aspects of U.S. law that support the claim that the Fifth Amendment’s protection from detention without due process of law is fundamental. Consider, first, the writ of habeas corpus. Habeas is an old common law writ used to examine the detention of prisoners, and to free those who had been unlawfully detained.¹³⁹ As the Supreme Court noted, “Habeas corpus is ... ‘a writ antecedent to statute, ... throwing its root deep into the genius of our common law’”.¹⁴⁰ Blackstone called it “the great and efficacious writ”.¹⁴¹ The American colonies brought it with them as part of their English legal heritage, and at the time of the American Revolution the writ could be issued in all thirteen colonies.¹⁴² Its importance at that time is reflected in the fact that it was not only preserved in the U.S. Constitution, it was “the only common-law writ to be explicitly mentioned”.¹⁴³ And what is the purpose of this great writ? Nothing other than to prevent the deprivation of liberty without due process of law, and in particular “to relieve detention by executive authorities without judicial trial”.¹⁴⁴

¹³⁷ 182 U.S. at 291.

¹³⁸ 195 U.S. 138, 148 (1904) (cited as the established doctrine by Justice Rehnquist in *Verdugo-Urquidez*, 494 U.S. at 268); see also Neuman, *supra* note 117, at 10.

¹³⁹ The full name of the writ is “*habeas corpus ad subjiciendum*”, which was issued “to the person detaining another, and commanding him to produce the body of the prisoner, or person detained. This is the most common form of the habeas corpus writ, the purpose of which is to test the legality of the detention or imprisonment ... This is the well-known remedy in England and the United States for deliverance from illegal confinement.” Black’s Law Dictionary, 6th ed., at 709-710.

¹⁴⁰ *Rasul*, 542 U.S. at 473, quoting *Williams v. Kaiser*, 323 U.S. 471, 484 n. 2 (1945).

¹⁴¹ William Blackstone, *Commentaries on the Laws of England* 129 (1765). While Blackstone also likened the Habeas Corpus Act of 1679 to a second *magna charta*, he did not, however, say that it was “a second *magna charta*, a stable bulwark of our liberties”. Nor did he discuss habeas in the first volume of his *Commentaries*. Both errors appear in Scalia’s dissent in *Hamdi*, 542 U.S. at 557.

¹⁴² William F. Duker, *A Constitutional History of Habeas Corpus* 98, 115 (1980).

¹⁴³ *Hamdi*, 542 U.S. at 558.

¹⁴⁴ *Rasul*, 542 U.S. at 474, quoting *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result).

Consider, also, the next paragraph of Article I, also constituting a core limitation on the power of Congress: “No Bill of Attainder or ex post facto Law shall be passed.” These prohibitions, along with the protection of habeas, all attest to the fundamental importance of protecting liberty, ensuring that it is not deprived without due process of law.

The Supreme Court’s decision in *Hamdi* reinforces the constitutional priority of the protection of liberty, and in particular of the freedom from detention without due process of law. Justice O’Connor, writing for the majority, noted that Hamdi’s interest in freedom from physical detention “is the most elemental of liberty interests”.¹⁴⁵ Justice Scalia, writing in dissent, put the point even more starkly: “The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.”¹⁴⁶ Thus the concern of the detainees in the “war on terror” falls into the “very core” of the liberty that the Fifth Amendment protects. Before they can be so detained, they must be accorded due process of law.

The last issue to resolve, then, is how should the U.S. understand the Fifth Amendment due process rights of nonresident aliens. We discussed in Part 3 what international law – specifically the law of war as represented in the Geneva Conventions and the Additional Protocol 1 – has to say about the process due civilians in the current “war on terror”. We also argued in Part 2 that the Court’s citation to the law of war in *Hamdi* had constitutional significance. Now we want to tie these loose ends together and argue that U.S. constitutional law should properly take guidance from international law when devising norms of due process for nonresident aliens.

5. The Link Between Constitutional Norms and International Law

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”. Article I, section 8, of the U.S. Constitution lists among the enumerated powers of the Congress “To define and punish ... Offenses against the Law of Nations”.¹⁴⁷ And as early as 1804, the Supreme Court treated international law as a constraint on the inter-

¹⁴⁵ 542 U.S. at 530. Granted, Justice O’Connor framed this liberty interest as one “against one’s own government”. *Id.* But this qualification relates only to the sorts of legal claims one can press – “enemy aliens” in time of war can press weaker claims than citizens – not to whether freedom from physical detention is “the most elemental of liberty interests”.

¹⁴⁶ *Id.* at 554-555.

¹⁴⁷ See the quotation from *Quirin*, *supra* note 129.

pretation 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.”¹⁴⁸

Nonetheless, in recent years there has been a chorus of complaint 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”.¹⁴⁹ His complaint seems to be that consulting the views of other nations would somehow undermine the sovereignty of the U.S. 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. The suggestion is only that these standards may be relevant for the light they cast on the best possible interpretation of U.S. constitutional norms.¹⁵⁰

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”.¹⁵¹ These are norms such as “cruel and unusual punishment”¹⁵² or “due process of law” that invoke standards that are shared by many nations. There has indeed been 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,¹⁵³ for juveniles,¹⁵⁴ and for the mentally retarded.¹⁵⁵ So too has the Court looked to international legal opinion in matters of “substantive due process” liberty rights. In *Bowers v. Hardwick*, Chief Justice Burger concurred that the Constitution’s protection of privacy did not protect the right

¹⁴⁸ *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118.

¹⁴⁹ *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting).

¹⁵⁰ To be fair to Scalia, his real concern is that Justices on the Supreme Court would use their own judgment to settle issues (a) where there is not a settled consensus, and (b) 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 *A Matter of Interpretation* (1997). We disagree with his jeremiad against judicial judgment, but do not press the argument here.

¹⁵¹ *International Law as Part of Our Law*, 98 Am. J. Int’l L. 43, 45 (2004).

¹⁵² U.S. Const. amend. 8.

¹⁵³ *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1976).

¹⁵⁴ See *Thompson*, 487 U.S. at 830; and *Roper v. Simmons*, 543 U.S. 551, 575-578 (2005).

¹⁵⁵ *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002).

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”.¹⁵⁶ 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”.¹⁵⁷

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’”.¹⁵⁸ 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 particularly strong when the U.S. is taking actions in an international context. In such cases the idea that the U.S. is bound by “the law of nations” is particularly apt. As Justice John Jay said in 1793, the U.S. had “by taking a place among the nations of the earth, become amenable to the law of nations”.¹⁵⁹

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 4, 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”.¹⁶⁰ Our suggestion is that among the best sources for determining what process is due are the international law sources discussed in Part 3 above.

¹⁵⁶ 478 U.S. 186, 196 (1986).

¹⁵⁷ 539 U.S. 558, 572 (2003).

¹⁵⁸ *Supra* note 151, at 56.

¹⁵⁹ *Chisholm v. Georgia*, 2 U.S. 419, 474.

¹⁶⁰ See *supra* note 113.

B. Defending Against Fairness Objections

To be clear, we are not suggesting that the U.S. is constitutionally bound to follow the dictates of international law. The international law we discuss above is offered merely as a reasonable starting point, and a default position if there are no good reasons to deviate from it.¹⁶¹ If following international legal norms on the detention of civilians were to put the U.S. at an unreasonable disadvantage in combating international terrorism, then that would be strong reason to depart from it. Moreover, a fairness principle as articulated in *Eisentrager* would also surely be relevant: it would be constitutionally anomalous to have to offer nonresident aliens more protections than those offered U.S. citizens or resident aliens.¹⁶²

We do not engage the empirical argument that the standards for preventive detention in the law of war would disable the U.S. from effectively protecting itself against international terrorism. We think the balance struck there allows the U.S. to do what it would need to do to protect itself, while also respecting the importance of liberty as that importance is reflected in domestic law. If it were truly imperative to strike a new balance in the war on terror, the reasons for doing so would be just as strong in the domestic case, or when dealing with nonresident citizens, as when dealing with nonresident aliens. Since there is no significant push to rewrite constitutional protections domestically or for U.S. citizens, we infer that there is probably no good reason to embrace a different balance when extending constitutional protections to nonresident aliens.

We do, however, provide a brief discussion of what might be called the *Eisentrager* test: that fairness cannot require guaranteeing greater rights to nonresident aliens than to resident aliens or citizens. We examine this argument 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

¹⁶¹ If due process rights for nonresident aliens were modeled on the rights contained in GC IV, would that imply that the U.S. 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 U.S. were to withdraw from the treaty, it would be in violation of customary international law were it to act contrary to its provisions.

¹⁶² See *supra* note 107 and accompanying text. However, it should be pointed out that the anomaly here is not actually unheard of. For example in European community law we find the well established term of "Inländerdiskriminierung" (i.e., discrimination against national residents). This can be illustrated with the example of a French beer brewer who gains a superior position to his German competitor in Germany. The French brewer could sell beer in Germany which does not meet the German "Reinheitsgebot" of 1516, which limits the ingredients to water, hops and malt, because he benefits from fundamental freedoms of EU Community Law. A German could not do so.

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.”¹⁶³ The process so described seems more or less akin to what would be 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 three responses that can be made to this argument, however. The first response is that *Eisentrager* spoke of determining whether the U.S. is in a state of war. It is not at all clear that the U.S. is in a state of war, despite its ongoing engagement in Iraq and Afghanistan. It certainly would be politically shocking (even given other things the Bush administration has already done), were the Bush administration to claim it could detain or deport any resident alien from Iraq or Afghanistan at this point in time. And legally, even if it were to cite the AUMF, it is not clear that this application of the Alien Enemy Act would be upheld.¹⁶⁴ Thus at least under current conditions we do not seem to have a case in which resident aliens are subject to harsher treatment than nonresident aliens.

What if the U.S. were engaged in a war under which a President could legally invoke the Alien Enemy Act? There are still two problems with pushing the *Eisentrager* test this way. 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 and Naturalization Service, and who were being held indefinitely (beyond the 90 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 U.S. now must either deport them to their home country or release them, perhaps under some program of supervised release.¹⁶⁵ In addition, the U.S. 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: “The in-

¹⁶³ 339 U.S. at 775.

¹⁶⁴ One might cite *Ludecke*, *supra* note 38, for the proposition that whether a war is ongoing for the purposes of using the Alien Enemy Act is a political matter.

“It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come.”

335 U.S. at 170. But even that Court admitted, though with great reluctance, that a Court could in principle address the question whether a war was being kept alive formally when it “had in fact ended”. *Id.* at 169. The same would apply to wars that had never formally begun.

¹⁶⁵ On supervised release as an option, see *Zadvydas*, 533 U.S. at 700.

ternment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.”¹⁶⁶ This is more limiting than the free hand granted the President under the Alien Enemy Act.

Lastly, 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 U.S. They are already effectively deported, and thus the same cause for detention is not present in their case.¹⁶⁷ A stronger presumption against preventively detaining nonresident aliens should therefore pass the *Eisenrager* 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 U.S., 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”.¹⁶⁸ If habeas were suspended in the U.S., no one would benefit from Fifth Amendment due process liberty rights, not even citizens. By analogous reasoning, if equally drastic conditions, amounting to a “rebellion or invasion”, apply outside the U.S. where the U.S. is nonetheless trying to impose order and provide for the public safety, then Fifth Amendment rights should not apply.

This is an important argument. We concede that if the security situation in a region where the U.S. is operating is sufficiently insecure, then it 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 be and should be read to apply in a limited manner.¹⁶⁹

There are not many historical examples to work with, but those that exist show that habeas can be suspended only where it is important to do so. Habeas has been suspended a total of four times in the history of the U.S. The first time, was during the Civil War, where habeas seems to have been suspended broadly.¹⁷⁰ The next time it

¹⁶⁶ GC IV, Article 42, § 1 (emphasis added).

¹⁶⁷ 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.” Commentary GC IV, Article 78.

¹⁶⁸ U.S. Const. Article 1, § 9, § 2.

¹⁶⁹ 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 v. Harvey*, 2007 WL 420137 (D.C. Cir. 2007). But it is not clear that habeas cannot be allowed to some and denied to others. See Gerald Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 976-978 (1998).

¹⁷⁰ *Hamdan*, 464 F. Supp. 2d at 14.

was suspended, in 1871, President Grant suspended it for only ten counties of North Carolina in his effort to combat the Ku Klux Klan.¹⁷¹ 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.¹⁷² Finally, it was suspended in what was then the territory of Hawaii in 1941.¹⁷³ 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 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 U.S. is engaged in trying to quell insurrections, it would be appropriate for the executive to suspend habeas in only those areas where the need for public safety requires its suspension, and only for as long as the violence necessitated such a suspension.¹⁷⁴ 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 3 above should be a default position for U.S. constitutional law unless it can be shown that adhering to these norms disables the U.S. from effectively fighting international terrorism, or is unfair to others whose constitutional rights can be taken as fixed

¹⁷¹ See Duker, *supra* note 142, at 149, 178 n.190. 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.

¹⁷² See *Fisher v. Baker*, 203 U.S. 174, 179 (1906).

¹⁷³ See *Duncan v. Kahanamoku*, 327 U.S. 304, 307 (1946).

¹⁷⁴ 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 180-181.

points. There is no reason to think these exceptions apply. Therefore, the international legal norms discussed in Part 3 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”.

6. 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 the “war on terror” has been resolved. It categorizes these people as “enemy combatants”, thereby lumping together combatants whose lawful military acts against the U.S. would be immunized by international law and civilians whose military acts would have been illegal. And following the Supreme Court’s opinion in *Hamdi*, it has offered these detainees only the thinnest legal process, 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. International law – and in particular the law of war dealing with international armed conflict – is relevant not just in its own right, but as a guide to the proper interpretation of the U.S. Constitution.

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