

**THE LAW OF WAR, THE NON-STATE ACTOR, AND DUE PROCESS:
DID THE ILLEGAL COMBATANT KILL THE ENEMY ALIEN?**

THOMAS STENSON*

I. INTRODUCTION

Recent dramatic statements from federal courts all over the United States, most notably, in the United States Supreme Court in the past term, about the rights of people held in the context of the war on terror have rewritten the judicial understanding of habeas corpus, due process, and the powers of the executive in a national security context.¹ Nevertheless, one could not blame a diligent reader of the *Rasul* and *Hamdi* cases if the opinions left her with more questions than answers. Courts interpreting *Rasul* know that non-citizens held at Guantanamo have a statutory habeas right to be heard in federal court, but have little idea what claims they can hear or how much relief they may grant them. Courts interpreting *Hamdi* know that citizens held in the United States as enemy combatants are entitled to due process rights, but do not know exactly how much process these alleged enemy combatants are entitled to.

II. NEW BATTLEFIELDS, NEW LAW

The focus of this paper will be to sketch answers to these questions, but, in order to do so, I will have to explain how the Supreme Court reached the results in *Rasul* and *Hamdi*. In *Hamdi*, the Supreme Court did not vote in its traditional liberal/conservative blocs. When one considers the votes of the justices in *Rasul* and in *Hamdi* at the same time, one sees that only Justices Souter and Ginsburg (in one pair) and Justices O'Connor and Breyer (in a second pair) joined the

* J.D. Candidate, University of Pennsylvania Law School. J.D. anticipated, May 2005. B.A. in Linguistics, Swarthmore College, May 2000.

¹ See, e.g., *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

same opinions in both *Rasul* and *Hamdi*. The remaining five Justices found they could not agree with even one Justice on the ruling of both cases. Something strange is afoot in these opinions.

I think the answer lies in the changed nature of the legal question posed today compared to the questions posed in the War of 1812, the Civil War, and World War II. The cases cited for precedent in *Rasul* and *Hamdi* simply do not reflect the kind of conflict facing the world today; the presuppositions made by the courts years ago have become outdated. The cases cited by the Court answered very different questions from those questions the Court is called upon to answer today. The older cases considered a world where conflict was waged by one state against another state. The non-state actor had little, if any, role in that earlier world. Today, the war on terrorism pits the world's most powerful state, as well as a number of allied states, against an actor without uniforms, without insignia, without a capital, without a homeland, and without a state.

The precedent of *Johnson v. Eisentrager*,² then, with its reliance on the status of the petitioners as “enemy aliens” is made quaint by the passing of the notion that a person’s nationality generally determines their allegiance. In a conflict between a non-state actor and a state, a combatant against the state may be from an enemy state, a friendly state, or even the state itself. In a traditional state-against-state conflict, only in a rare case would a combatant come from a friendly state or the state under attack. These rare cases would be handled by exceptions to the typical law of war rules. The exceptional nature of those cases in the context of interstate

² 339 U.S. 763 (1950).

[O]ur law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and non-resident enemy aliens who at all times have remained with, and adhered to, enemy governments.

Id. at 769 (footnote omitted).

warfare is evident in that only four cases from the Civil War or later deal with the question of non-enemy alien combatants.³

Oddly, the decision in *Quirin*, though written earlier than *Eisentrager*, was more progressive in recognizing the changing world of warfare and the changing nature of combatants.⁴ The Court ruled that the one American citizen among a larger group of Nazi saboteurs fell into the category of “enemy belligerent” or “unlawful combatant,”⁵ status unrelated to his condition as an American citizen, but instead determined by his conduct and state of mind, concepts borrowed from criminal law. The Court cited as authority numerous military cases from the Revolution, the War of 1812, and the Civil War in which the military had tried either citizens or British soldiers for offenses such as sabotage, espionage, and other

³ *Ex parte Milligan*, 71 U.S. 2 (1866) (proclaiming that an Indiana resident Confederate sympathizer could not be tried in a military tribunal while the courts were still open); *Ex parte Quirin*, 317 U.S. 1 (1942) (denying the habeas petitions of ten Nazi saboteurs, including one U.S. citizen, held for war crimes); *In re Territo*, 156 F.2d 142 (9th Cir. 1946) (holding that an American citizen captured fighting for the Italian fascist forces and held as a prisoner of war had no habeas right to be heard); *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956) (holding that an American citizen held at Fort Leavenworth after trial by military commission for espionage offenses in Europe during World War II had no right of habeas).

⁴ In doing so, the Court departed from the dualistic view of the Court in *Milligan*. The Court in *Milligan* held that one was either a civilian or a prisoner of war, and ignored the existence of an intermediate category such as unlawful combatant. See *Milligan*, 71 U.S. at 117 (“It is not easy to see how [Milligan] can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war.”).

⁵ See *Quirin*, 317 U.S. at 36-37 (“[E]ntry upon our territory in time of war by enemy belligerents . . . is a hostile and warlike act.”); *id.* at 31 (“Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”). The Court also uses the term “unlawful belligerent”; from the Court’s usage, it seems that all these terms are interchangeable. *Id.* at 31 & 35. The Court also used the typical *mens rea* and *actus reus* formulation of criminal law in defining an unlawful combatant. *Id.* at 35 (“[T]hose who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission.”) (emphasis added). The phrase “for the commission of hostile acts” suggests that an intentional *mens rea* defines who is an unlawful combatant.

offenses against military law by military commission.⁶ The Court also looked to the definition of offenses against the laws of war as promulgated by the War Department.⁷

The Court in *Quirin*, however, still adhered to certain notions of warfare and the laws of war that have not endured in the modern era. Namely, the Court in *Quirin* manifests a very territorial view of war, one where each combatant has designated “lines” and “territory.”⁸ The Court even relies in large part on the actions of the citizen petitioner in leaving and reentering the country.⁹ It is not obvious from the opinion that, had the citizen remained at all times within the United States and attempted attacks on the infrastructure, he would have been held as an enemy combatant.¹⁰

The notion that war is territorial, that there are clearly drawn lines and friendly and enemy territory, has not simply been undermined by the concept of a war on terror, but is more generally undermined by the experience of war in other contexts, such as an insurgency. Usually, before the modern era, this was handled by declaring local military law, which eliminated many civil rights protections, including the availability of habeas.¹¹ Certainly by the time of U.S. military action in Vietnam, the notion that war naturally entailed battlefield “lines” and territory clearly adhering to one side or another was severely undermined. This conclusion

⁶ *Quirin*, 317 U.S. at 31 n.9 & n.10.

⁷ *Id.* at 34 (citing the Rules of Land Warfare of 1914 and 1940).

⁸ *Id.* at 36-38 (defining in several places as offenses against the laws of war, acts behind enemy “lines,” in enemy “territory,” and against the fortifications of the United States).

⁹ *Id.* at 37-38 (“Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction *enter* this country bent on hostile acts, are enemy belligerents. . . . It is as an enemy belligerent that petitioner Haupt is charged with *entering* the United States. . . .”) (emphasis added).

¹⁰ The same territorial mindset is reflected in other cases in this vein. See *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (quoting the same section from *Quirin* and citing another volume for the proposition that “a neutral, or a citizen of the United States, domiciled in the enemy country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation”); *Colepaugh v. Looney*, 235 F.2d 429, 431 (10th Cir. 1956) (noting that the charges against the petitioner were that he had snuck across American lines and lurked about bases there for espionage purposes).

¹¹ See, e.g., *Hamdi*, 124 S.Ct. at 2665 (Scalia, J. dissenting) (noting that the governor of the Philippines declared martial law and the suspension of habeas in 1905).

has hardened in recent conflicts, such as Chechnya, Afghanistan, and Iraq, which began as relatively straightforward conflicts but devolved into insurgencies, in which the occupying force found itself under occasional, low-grade assault by insurgents in almost every corner of the occupied territory. The question of whether a given Afghan or Iraqi is an “enemy alien” is probably irrelevant today. The traditional question has been replaced by a new one. *Hamdi* and *Rasul* gave us only the barest sketch of what this new question is.

III. DUE PROCESS ABROAD

The discussion of the application of due process to alleged enemy combatants in the United States, in Guantanamo Bay, or abroad must start with *Johnson v. Eisentrager*.¹² *Eisentrager* was the first Supreme Court case to debate the merits of offering Constitutional protections, specifically the right of habeas corpus, to foreign soldiers detained by the United States. The petitioners in *Eisentrager* contested the legality of their detention in Germany; they had been captured in China, while working for the Nazi government during World War II.¹³ The Court, before rejecting the Constitutional right to habeas for the petitioners, reasoned that the offenses of war by enemy combatants were excepted from the protections of the Fifth Amendment, which specifically denied due process in “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” The Court based its conclusion on the reasoning that the Founders would have been unlikely to provide protection to alien soldiers that it would deny to its own soldiers.¹⁴

¹² 339 U.S. 763 (1950).

¹³ *Id.* at 766-68.

¹⁴ U.S. CONST., amend V; *Eisentrager*, 339 U.S. at 783. A similar discussion of initial intent in drafting the Fifth Amendment came in *Quirin* and in the dissent in *Milligan*. See 317 U.S. at 40; 71 U.S. at 138-39 (Chase, C.J. dissenting).

The *Eisentrager* holding was widely interpreted as stripping all non-citizens without contacts with the country of any claim of Constitutional rights. Subsequent decisions made clear that citizens abroad¹⁵ and non-enemy aliens (even illegal aliens) within the country¹⁶ retained constitutional rights. The first notice of a weakening of *Eisentrager*'s interpretation came in *United States v. Verdugo-Urquidez*.¹⁷ *Verdugo-Urquidez* appears on its face to be just a reiteration of *Eisentrager*, solidifying the apparent premise that non-citizens had no constitutional claims abroad.¹⁸ The meaning of the case is obscured, however, when one considers that Justice Kennedy provided the fifth vote for the majority opinion while writing a concurrence that undermined much of the majority's apparent premise.¹⁹ Considering that the only other concurrence was Justice Stevens's,²⁰ who concurred on a narrower, if similar, ground, the meaning of the case ought to be construed in light of Justice Kennedy's concurrence.²¹ Thus, even though the Court in *Verdugo-Urquidez* seemed to have upheld *Eisentrager*'s apparent

¹⁵ See, e.g., *Reid v. Covert*, 354 U.S. 1 (1955) (upholding the due process challenge of two women convicted by military tribunals of killing their respective spouses).

¹⁶ See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”).

¹⁷ 494 U.S. 259 (1990) (holding that a Fourth Amendment challenge to evidence taken in Mexico without a warrant would not stand).

¹⁸ *Id.* at 269 (characterizing *Eisentrager* as a rejection of the claim “that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States”); *id.* (holding that in the absence of some “voluntary attachment to the United States” by a non-resident non-citizen, a search of foreign premises did not invoke Fourth Amendment protection).

¹⁹ See *id.* at 275-78 (Kennedy, J. concurring) (holding that the Fourth Amendment applied to the actions of the United States government everywhere in the world, but that the scope of the Fourth Amendment's restriction would be determined by the context of the events in question) citing *In re Ross*, 140 U.S. 453 (1891); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

²⁰ *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J. concurring) (holding that defendant was lawfully, though not voluntarily, in the United States, so he retained Fourth Amendment rights; the search, however, was reasonable, so no violation of the Fourth Amendment occurred).

²¹ The majority would have only been a plurality without Justice Kennedy's vote, leaving Justice Kennedy's understanding controlling, had Justice Kennedy not decided that “[a]lthough some explanation of my views is appropriate given the difficulties of this case, I do not believe they depart in fundamental respects from the opinion of the Court, which I join.” *Id.* at 275.

limitation of rights to those in the territory of the United States, the opposite outcome in fact took hold.

The clearer, though still murky, undoing of the territorial view of non-citizen's constitutional rights attributed to *Eisentrager* came in *Rasul*.²² The majority opinion seemed to take careful steps not to upset *Eisentrager* by ruling on *statutory* rather than *constitutional* habeas grounds.²³ While this may be attributed to the Supreme Court's general willingness to bend over backwards to avoid overruling itself, more likely it stems from the Court's duty to decide a case on statutory rather than constitutional grounds, if the statutory grounds are sufficient. The Court, it seems, could not resist leaving a hint as to its thoughts on the constitutional habeas question:

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." 28 U.S.C. § 2241(c)(3). *Cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990) (Kennedy, J., concurring), and cases cited therein.²⁴

Even if one should bother to read the footnote, its meaning is not clear unless one has a prior knowledge of Justice Kennedy's concurrence in *Verdugo-Urquidez*. The citation to Justice Kennedy's concurrence and the cases he cites can mean only one thing: the petitioners *do* have constitutional rights, although the extent of their rights will be determined by the context of

²² *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

²³ The ultimate holding of the case made no reference to any constitutional right of *habeas*. *Id.* at 2698 (holding "that [28 U.S.C.] § 2241" allows district courts to hear habeas petitions from Guantanamo detainees).

²⁴ *Id.* at 2698 n.15; *cf.* *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1356 (7th Cir. 2004) (holding that Takings Clause of the Fifth Amendment applies to all government action, including military action abroad, up to the point "where the United States appropriates the property of its enemies").

enforcement.²⁵ In the context of “war on terror” detentions, foremost among these constitutional rights will likely be the Fifth Amendment right to due process.²⁶ The Due Process Clause will apply both substantive and procedural due process to any U.S. detainees, anywhere in the world. Of some import, though not the focus of this paper, will be the substantive due process right against torture and other mistreatment. Also of great importance in this context will be the procedural due process guarantee, which will be the focus of the remainder of the paper.

Presumably, Justice Kennedy’s conclusion that the Fourth Amendment did not apply to the search in *Verdugo-Urquidez* will likely mean that the Fourth Amendment will have little application abroad. Considering that a service member or CIA agent will have no one from whom he might seek a valid warrant while abroad, nor will the circumstances likely be conducive to seeking a warrant (such that many, if not most, circumstances would fall under the “exigent circumstances” exception), the Fourth Amendment is likely to have almost no application to non-citizens abroad.

Similarly, I imagine the court will likely hold that non-citizens have few if any Sixth Amendment rights overseas; the court in *Hamdi* seemed unwilling to require a jury trial. A right to counsel, whether under the Fifth or Sixth Amendment, does seem to attach, at least at the point

²⁵ While one could extensively outline the holdings of the cases I mention in note 19 *supra* as cited in Justice Kennedy’s *Verdugo-Urquidez* concurrence, the cases all relate to application of the Constitution to non-citizens beyond the borders of the United States. Justice Kennedy cites them to this purpose. *Id.* at 277 (“These authorities . . . stand for the proposition that we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad.”). As an example, in *Hawaii v. Mankichi*, the Supreme Court addressed a challenge to convictions obtained in Hawaii between its annexation as “the Republic of Hawaii” in 1898 and its statutory creation as a territory of the United States in 1900, when those convictions were obtained without a unanimous jury and without indictment by a grand jury, neither of which were features of traditional Hawaiian law. 190 U.S. 197, 210-212 (1903). The Court held that the Constitution was intended to apply to the republic of Hawaii during that two-year period, but that the Fifth and Sixth Amendment requirements of grand juries and petit jury unanimity were of lesser importance and could be waived in the name of the efficiency of the justice system at that transitional time. *Id.* at 217-18.

²⁶ It is worth noting here that Justice Kennedy concurred in *Rasul*, not adopting the statutory findings of the majority, but proceeding to rule in favor of the detainees on constitutional habeas grounds alone. *Rasul*, 124 S. Ct. at 2699-2701 (Kennedy, J. concurring). Though counting heads may be a crass interpretative technique, it seems that six members of the Court (the five in the majority in *Rasul* and Justice Kennedy) support extending at least some Constitutional rights to non-citizens beyond the borders of the country.

of beginning major proceedings, under *Hamdi*.²⁷ The right against self-incrimination will probably attach, at least as far as not being required to testify against oneself in court; one could easily make an argument that *Miranda* warnings are impractical in the context of most overseas detentions, especially as counsel may not be readily available for a matter of days in many circumstances. First Amendment rights are probably a discussion for another paper, except insofar as reasonable religious practice should not be denied to those in custody. The Second, Third, and Seventh Amendment rights seem inapplicable. Eighth Amendment rights come into play in sentencing by a military commission, tribunal, court-martial, etc., since Eighth Amendment rights against cruel and unusual punishment do not attach to punishment or other governmental action in the absence of a conviction.²⁸

In short, I think the procedural due process rights will be the most important in litigation regarding detainees abroad, though some constitutional rights guaranteeing them minimal standards of decency in captivity will prove important as well. Habeas rights seem to be available statutorily,²⁹ but even should the statute be repealed, constitutional habeas protections would likely apply as well.

IV. THE NEW DUE PROCESS INQUIRY

²⁷ *Hamdi*, 124 S. Ct. at 2652 (“He unquestionably has the right to access to counsel in connection with the proceedings on remand.”).

²⁸ *See, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (“An examination of the history of the [Eighth] Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes.”). Instead, in actions abroad by the military or other branches of the federal government, a right against torture or inhumane conditions should arise under the Due Process clause of the Fifth Amendment. *See, e.g.*, *Chavez v. Martinez*, 538 U.S. 760, 773 (2003) (noting that, where an officer tortures a suspect but does not seek to use testimony gained at trial, the Due Process Clause of the Fourteenth Amendment, rather than the right against self-incrimination is implicated).

²⁹ The statutory *habeas* rights established in *Rasul* have been expanded even further, to encompass cases where a citizen is held by a foreign government at the behest of the U.S. Government. *See Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C 2004) (permitting a habeas claim by a person detained by Saudi Arabia, reportedly at the request of the U.S. government).

The *Hamdi* case lays out what little we know of future due process analysis of the claims of detainees. The plurality outlines the analysis of a due process claim: weighing the private interests of the party in obtaining fairness from a given measure on one hand, against the government's asserted interests and the burdens imposed on the government by the measure on the other.³⁰ The advantage of the test in the terrorism context is that it readily responds to the peculiar conditions of a particular detention.

In considering the due process rights of alleged illegal combatants, one must remember the changes in warfare described in Part II. Previously, the illegal combatant and the citizen soldier fighting for the enemy side were remarkable exceptions to warfare largely conducted by nationals of one state against nationals of another state across relatively well-defined battle lines. These battle lines were so well-defined, in fact, that few of the factual matters relating to illegal combatants were ever in question: only one case out of all the cases cited tending to restrict the rights of illegal combatants involved any factual contention about the behavior of the illegal combatant.³¹ The remainder of the cases all entailed conceded facts, challenging only the government's legal authority for detention and punishment.³² Most importantly, the factual

³⁰ *Hamdi*, 124 S. Ct. at 2646, citing *Mathews v. Eldridge*, 424 U.S. 319 (1976). It is faintly absurd, one must admit, to use as primary authority for deciding one of the most important and contentious issues on the Court's docket, a case about suspension of disability benefits. See 124 S. Ct. at 2672 (Scalia, J. dissenting). However, the balancing test seems accurate in describing the typical due process inquiry.

³¹ See *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (noting that detainee alleged he had changed his mind about betraying his country after arriving in Germany and had decided to pretend to continue with the mission in order to expose it to Allied authorities). Beyond the fact that this contention was out of the scope of the court's inquiry in *Colepaugh*, the assertion is incredibly self-serving and impossible to verify. Even if true, the assertion would be insufficient, if brought in a criminal context, to rebut culpability for an attempt or conspiracy. Traveling to Germany and meeting military authorities there likely satisfies the "substantial step" requirement for an attempt, as well as the act requirement of a conspiracy; by his own allegation, he had the intent, at least until his arrival in Germany, to perform espionage. Until the petitioner took action to thwart the conspiracy, he had not renounced it; a latent intent to thwart it in the future would not properly defend him against criminal charges, let alone equivalent military charges.

³² See *Quirin*, 317 U.S. at 47 (referring to petitioners as "admitted enemy invaders"); *Eisentrager*, 339 U.S. at 778 (noting that lenity was often shown to alien enemies because of the inaccuracy of the "fiction" that all alien enemies will act to undermine the United States; this concern did not arise in the case of the petitioners who were actual enemies, with "no fiction about their enmity"); *Territo*, 156 F.2d at 144 (stating that the petitioner only contested the conclusions of law made by the district court, not the facts relating to his service in the Italian fascist forces).

allegations in *Milligan*, where the Court did find cause to grant habeas, were under serious debate.³³ The Court in *Hamdi* took notice of the importance of the distinction between conceded and contested facts in the cases cited for authority;³⁴ the plurality attempted to resolve this concern by noting that detention of enemy combatants would only be appropriate where status as an illegal combatant had been made “sufficiently clear . . . whether that is established by concession or by some other process.”³⁵ Here, the notion of what process is due to an alleged illegal combatant may have been informed by the content of the Geneva Conventions.³⁶

In contrast to the previously-embraced concept that a person’s loyalty was easily shown by their nationality or that unlawful combatant cases would arise in undisputed contexts, the war on terror presents a conflict where a need to demonstrate a detainee’s actual participation in combat or war crimes will be the *rule* rather than the exception.³⁷ Detainees will likely have been captured in a zone of conflict, but without uniform. Some, like Hamdi, may have been armed; in many zones of conflict, however, carrying a Kalashnikov is hardly indicative of an intent to fight

³³ *Milligan*, 71 U.S. at 108 (noting that a grand jury had been impaneled to consider bringing charges against Milligan, then dismissed months later finding no cause to bring charges).

³⁴ *Hamdi*, 124 S. Ct. at 2647 (“[A]t this stage in the Mathews calculus, we consider the interest of the erroneously detained individual.”).

³⁵ *Hamdi*, 124 S. Ct. at 2643 (discussing the relevance of contested and uncontested allegations); *id.* at 2670 (Scalia, J. dissenting) (contrasting the uncontested allegations in *Quirin* with Hamdi’s dispute as to his purpose in Afghanistan).

³⁶ See Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, Art.5 (1950) (“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”) available at <http://www.unhcr.ch/html/menu3/b/91.htm>; see also *Hamdi*, 124 S. Ct. at 2651 (“Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.”).

³⁷ It is instructive to note that the other “exceptions” to the Fifth Amendment cited in *Quirin*, the prosecution of contempt and petty offenses, are similarly subject to little if any discussion of matters of fact. See *Quirin*, 317 U.S. at 41. In the case of contempt, the offense will either occur directly before a magistrate (in the case of contempt inside a courtroom) or by a well-documented failure to appear or produce evidence or comply with a lawful order (in the case of contempt outside the courtroom). Similarly, petty offenses will bear administrative penalties and will be almost exclusively observed and reported by government employees whose word will likely be believed beyond the word of the individual charged. The behavior of the individual in both circumstances will likely be conceded in most cases. Also informing these exceptions to the Fifth Amendment is the burden otherwise placed on the enforcement body to disprove every self-serving denial of culpability, which would far outweigh the minimal interest of the individual in conviction for a petty offense.

allied forces. The *per se* rules tending to designate someone as a combatant are clearly inapplicable in this new conflict.³⁸ For this type of conflict, the courts, the law, and the international community were completely unprepared. *Hamdi* can best be seen as an attempt to drag the traditional law of war, largely unsuited to new wars, into the twenty-first century.

Justice Scalia plays the unexpected role of defender of civil liberties in *Hamdi*; however, when considered in light of his originalist and textualist philosophy, his dissent makes sense. Justice Scalia is arguing that the concept of habeas and due process as outlined by the Founders would easily and obviously reach a person in Hamdi's place. Scalia argues that the appropriate response to the threat of terrorism should be Congress's decision, not the Court's.³⁹ Scalia suggests that, if an adjustment to criminal process is necessary, Congress ought to rescind habeas, and that the Court should not act as "Mr. Fix-it."⁴⁰ Rescinding the habeas right, however, would not be a simple process at all, and might turn out to be self-defeating.

One way to rescind habeas rights would be simply to remove the right entirely for all petitioners to all courts. This would be burning down the proverbial house to roast the pig. It would severely foreclose the rights of all Americans serving a criminal sentence, almost all of whom have no connection to terrorism, to challenge their detention. The problem of terrorism is not limited to one particular region of the United States, so that the Congress could restrict the right in one geographic area but not in another, as it was able to do during the Civil War and Reconstruction. The only means seemingly appropriate to measure the denial of habeas would be to deny the writ to a certain class of people. One way to classify this group would be to deny

³⁸ See *Hamdi*, 124 S. Ct. at 2644 (rejecting outright the government's assertion that Hamdi can be considered an enemy combatant as a matter of law on conceded facts, as he was captured in a zone of conflict). Such a zone of conflict appears to extend throughout the country of Afghanistan, and such an argument would seemingly allow the arrest of any adult found anywhere in the country. Even a *per se* rule permitting the arrest and detention of any person found in a zone of conflict while armed would allow the arrest of literally millions of Afghan adults, considering the high incidence of gun possession. Such *per se* rules seem laughably overbroad in this context.

³⁹ See *Hamdi*, 124 S. Ct. at 2660-61 (Scalia, J. dissenting).

⁴⁰ *Id.* at 2673 (Scalia, J. dissenting).

habeas to any person arrested on suspicion of terrorism. Making the accusation of terrorism a *per se* qualification for denial of the writ, however, would seem to implicate due process; a conclusory statement about suspicion does not amount to due process. Such a qualification of the denial of habeas would also create serious risks of abuse. The denial of habeas would then have to be premised on some fact-finding relating the suspect to terrorism, as by a military or administrative commission, with some due process provided. Unless Justice Scalia is seriously proposing a suspension of habeas for everyone, his proposal would not likely lead to a different conclusion and would merely prolong the creation of a sensible system for dealing with combatants like Hamdi.

The plurality recognizes that Congress's authority to suspend the writ is a clumsy weapon in the war on terror. Since the members of the plurality do not generally share Justice Scalia's aversion to innovation in construing the law, it is not surprising that they found this "third option" in the margins between the two parts of Scalia's dualistic view of the choice before the Court.⁴¹ However, while Scalia's view of domestic detention from a "law" model rather than "war" model suffers from an unwillingness to consider the changing environment in rendering his decision,⁴² the plurality opinion also demonstrates the impossibility of completely applying

⁴¹ *Hamdi*, 124 S. Ct. at 2643:

Justice Scalia envisions a system in which the only options are congressional suspension of the writ of habeas corpus or prosecution for treason or some other crime. He does not explain how his historical analysis supports the addition of a third option -- detention under some other process after concession of enemy-combatant status -- or why a concession should carry any different effect than proof of enemy-combatant status in a proceeding that comports with due process.

⁴² Justice Scalia would likely respond that he acts out of judicial humility and a sense that Congressional action and Constitutional amendment are the appropriate means of making such a policy decision. Ignoring the difficulty of amending the Constitution and the general unwillingness of Congress to interfere in national security matters (and its general ineptness when it does) will not promote the interests of the nation. The limited discretion of justices should not present a barrier to action when the country's interests, particularly in relation to individual liberties, are before the Court.

the “war” model.⁴³ Hamdi is a resident of a friendly state, Saudi Arabia, and has not worn the uniform of an enemy state, nor carried arms at the direction of another state’s military branch.⁴⁴ If he is an illegal combatant, his status as such can only be determined by the consideration of his purpose and his actions, the typical venue of criminal law inquiry. The Court suggests a special procedure of combined “war” model and “law” model procedures. This “third option” is intended to provide the flexibility for appropriate prosecution and restraint while limiting the potential for abuse and error.⁴⁵

This new procedural due process, in the Court’s estimation, will require, first and foremost, notice and a meaningful opportunity to be heard.⁴⁶ The opinion also requires access to counsel for those in Hamdi’s place.⁴⁷ The Court rejects the notion that the government must make only the minimal showing of “some evidence.”⁴⁸ The Court’s decision is unclear as to whether due process requires a presumption of innocence as to all matters of evidence, but my interpretation of the opinion is that a presumption of innocence is required in illegal combatant proceedings.⁴⁹ The opinion suggests hearsay will be admissible in such proceedings.⁵⁰ The

⁴³ Cf. Matthew Hay Brown, *U.S. Conduct of Terror War Draws Review in Congress*, ORLANDO SENTINEL, Dec. 3, 2004 (quoting Stephen Dycus, terrorism expert, professor at Vermont Law School, and textbook author, “There’s a fairly wide consensus now that, in dealing with the threat of terrorism, the rules about law enforcement really don’t work very well, and neither do the rules about war”).

⁴⁴ See, e.g., *Quirin*, 317 U.S. at 37-38 (“Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents. . .”).

⁴⁵ The dangers inherent in the executive’s proposed system of detention without review were verified this fall, when the government, instead of subjecting Hamdi to the review outlined by the Court, released him from its custody entirely. See Joel Brinkley, *From Afghanistan to Saudi Arabia, via Guantanamo*, N.Y. TIMES, Oct. 16, 2004, at A4 (interviewing recently released detainee Yaser Hamdi). The government’s initial argument of Hamdi’s dangerousness was seriously undermined by his release. More likely, Hamdi was in detention, not to prevent dangerous acts, but in an effort to obtain intelligence from him. *Id.* (quoting Lt. Cmdr. Flex Plexico, “Hamdi was no longer considered a threat to the United States and did not possess any further intelligence value”). The military did not elaborate on what about Mr. Hamdi’s case had changed the estimation of his dangerousness.

⁴⁶ *Hamdi*, 124 S. Ct. at 2648.

⁴⁷ *Hamdi*, 124 S. Ct. at 2652.

⁴⁸ *Id.* at 2645.

⁴⁹ Compare *id.* at 2647 (“[A]t this stage in the *Mathews* calculus, we consider the interest of the erroneously detained individual.”) with *id.* at 2649 (discussing the imposition of rebuttable presumptions that would shift the burden onto the defendant after the government produced a modicum of evidence). It should be noted that Justice

ruling is unclear as to whether proceedings before a military tribunal represent an acceptable means of establishing a person's status as an illegal combatant with sufficient clarity.⁵¹

V. THE IMPLICATIONS OF *HAMDI* FOR NON-RESIDENT NON-CITIZEN DETAINEES

The *Hamdi* inquiry on procedural due process weighs of the respective private interests of detainees against the government's interests in enforcement and restraint and the impediment caused by due process measures to normal government function.⁵² However, if one understands *Rasul* as admitting of constitutional rights for non-resident non-citizens, it is not clear that the procedural due process owed to non-resident non-citizens is any less than that owed to citizens. The kind of inquiry that Justice Kennedy outlined in his concurrences in both *Rasul* and *Verdugo-Urquidez*, which was apparently adopted by the majority in *Rasul*,⁵³ takes into consideration similar questions of burdens imposed on the government and the private interests of parties claiming constitutional rights.⁵⁴

O'Connor's opinion is only a plurality, and the concurrence of Justices Souter, joined by Justice Ginsburg will actually define the interpretation of the due process standard. The concurrence disapproves of imposing a rebuttable presumption on those in Hamdi's place. *Id.* at 2660. However, should a similar matter come before the court again on the specific question of rebuttable presumptions, Justice Thomas would likely concur with the plurality to limit the scope of due process available to the detainees. The ruling of the court is ambiguous as to how it should be interpreted. In a strict legal sense, the precedential value of *Hamdi* is determined by the concurring opinion of Justice Souter, but subsequent opinions on the scope of due process are more likely to take the form of the plurality opinion of Justice O'Connor.

⁵⁰ See *id.* at 2649. The concurrence, though disapproving of other exceptions to standard criminal procedure made by the plurality, does not mention admission of hearsay statements as one of the unacceptable concessions of the plurality. It is unclear whether the concurrence's silence on hearsay suggests that use of hearsay should be lumped with other unacceptable procedures, including rebuttable presumptions and military tribunals, or construed as an acceptable procedure by its omission from the list of unacceptable procedures.

⁵¹ The plurality states that a military tribunal would comport with due process in this context. *Id.* at 2651. The concurrence opposes such a construction of due process. *Id.* at 2660. The same confounding interpretive difficulty discussed *supra* note 49 would apply here.

⁵² *Id.* at 2646 (describing the *Mathews* balancing test for procedural due process).

⁵³ See *supra* notes 17 through 26 and accompanying text.

⁵⁴ See e.g., *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J. concurring) ("The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country."); *Rasul*, 124 S. Ct. at 2700 (Kennedy, J. concurring) (noting that the long-term detention at Guantanamo "suggests a weaker case of military necessity").

Essentially, a court asking whether a non-resident non-citizen detainee has *any* constitutional rights and a court asking about the scope of procedural due process owed to one accused of being an “illegal combatant” detainee will confront the same questions: the burden on the detainee and the interests of and burden on the government.⁵⁵ Citizenship will not weigh heavily, if at all, on either side of the scale. It is just as intrusive, for instance, to demand an attorney for a non-citizen detained in Afghanistan as to demand one for a citizen detained in Afghanistan; similarly, it will be just as obstructive to U.S. military interests to demand that a military officer testify at a hearing, tribunal, or trial of a non-citizen, as for that officer to testify at proceedings relating to a citizen. On the other side of the scale, a non-citizen has no lesser interest in avoiding indefinite detention than a citizen has.

Some citizenship-related factors may bear minimal weight on one side or the other of the scale. Insofar as a citizen may be more effective than a foreigner at carrying out terrorist attacks within the United States because of his familiarity with the culture and language, the government may have some larger interest in detaining citizens compared with non-citizens. Still, this will vary from case to case rather than presenting a *per se* rule; it is not the citizenship itself which creates the greater danger, but the cultural acclimatization. Jose Padilla, as a citizen and long-time resident of the country, could present a much greater risk to national security than Yaser Hamdi, who, while a citizen, possessed only minimal English skills until his confinement, and had not visited the country since infancy.⁵⁶ The point of this analysis is not to say that in *every instance* the non resident non-citizen will be treated just like the citizen when both are accused of

⁵⁵ See *Verdugo-Urquidez*, 494 U.S. at 276 (“The restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend, as a consequence, on *general principles of interpretation*, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of ‘the people.’”) (emphasis added). The court in *Hamdi* outlined the “general principles of interpretation” of the guarantee of procedural due process.

⁵⁶ See Brinkley, *supra* note 45, at A4 (noting that Hamdi acquired English fluency in prison from conversing with guards).

being an illegal combatant, but that the non-resident non-citizen should not be *categorically* treated differently under *Rasul* and *Hamdi*.

While this kind of equality between citizens and non-citizens may seem breathtakingly novel, in many ways the ground for such a concept was laid by the cases that stripped citizens of the kind of protections they had previously enjoyed, establishing a parity of treatment between citizens and non-citizens and erasing the distinctions between the two groups.⁵⁷ While the erasure of the citizen/non-citizen distinction in that context tended to reduce the protections of citizens, in the context of Justice Kennedy's constitutional analysis in *Verdugo-Urquidez*, adopted by the majority in *Rasul*, that conflation of the citizen and non-citizen in the illegal combatant context has made it impossible to elevate the constitutional protection of citizens without simultaneously elevating the protection of non-citizens.

VI. PROSECUTION OF ILLEGAL COMBATANTS BY THE GOVERNMENT

This understanding of the opinions in *Rasul* and *Hamdi* might make many people concerned that the country has a limited ability to defend itself or that prosecution of illegal combatants will simply become impractical in the face of their constitutional rights. Generally, these concerns will be overblown. Where concerns hold, the appropriate action is to propose speedy legislation to Congress to deal with the problem, an action that will enhance the powers of the executive.⁵⁸

Primary among the concerns of many in government will be the required speed of response by authorities to claims of constitutional rights. However, judging by Justice

⁵⁷ *Quirin*, 317 U.S. at 44 (“[The Fifth and Sixth Amendments] present no greater obstacle to the trial in like manner of citizen enemies who have violated the law of war applicable to enemies.”).

⁵⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Douglas, J. concurring) (holding that presidential powers are at an apogee when acting pursuant to a decision of Congress).

Kennedy's opinions in *Verdugo-Urquidez* and *Rasul*, the requirements of due process as will not arise until the detainees are removed from the zone of hostilities and, once removed, the speed required by due process will be manageable.⁵⁹ More importantly, should Congress take action on this point to create a statutory period of detention, the courts are likely to stretch the limits of due process further.⁶⁰ Limiting the access to habeas for a period of up to six months might even be an appropriate response in light of *Zadvydas* and Scalia's dissent in *Hamdi*.⁶¹ The Court in *Rasul* and *Hamdi* clearly objected to the potentially indefinite nature of the detention of the alleged illegal combatants, because the government's "war" model of their detention asserted that the detainees need only be released at the cessation of hostilities in the war on terror; a day which was far off and likely indefinite.⁶²

⁵⁹ See, e.g., *Rasul*, 124 S. Ct. at 2700 (Kennedy, J. concurring) ("Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.").

⁶⁰ See *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (upholding a statutory six-month period for removal of deportable aliens). The Court there contemplated 8 U.S.C. § 1231(a)(6), which authorizes the detention of deportable aliens for 90 days, and, if the INS is unable to find a country to accept the detainee, for a longer period. The court read into the statute a requirement that the period must be "reasonable" that at the end of six months, the burden fell on the government to demonstrate a reasonable likelihood of removal in the near future. The Court ruled that the Fifth Circuit's shifting of the burden to the defendant to show that deportation would prove "impossible" exceeded the apparent Congressional intent in drafting the statute (which was rooted in Congress's perception of the restrictions of due process). *Id.* at 701-02.

⁶¹ *Zadvydas*, 533 U.S. at 701 (holding six months to be the maximum "reasonable" period of detention of a deportable alien without a showing by the government); *Hamdi*, 124 S. Ct. at 2662-63 (Scalia, J. dissenting) (observing that the historical practice of habeas would lead to a standard maximum of six month's detention without charge). I cite to cases such as *Zadvydas* regarding the constitutional rights of illegal immigrants within the United States, since they are, after non-citizens abroad, those who have the least claim to constitutional rights.

⁶² See Laurence McQuillan & Jonathan Weisman, *Bush Seeks 'Cooperation' of Afghan People*, USA TODAY, Sept. 26, 2001, at 5A (quoting Secretary of Defense Donald Rumsfeld, regarding the war on terror: "I'm sure there will not be a signing ceremony on the Missouri. . . ."); see also *Hamdi*, 124 S. Ct. at 2641 ("We take Hamdi's objection to be not to the lack of certainty regarding the date on which the conflict will end, but to the substantial prospect of perpetual detention. We recognize that the national security underpinnings of the "war on terror," although crucially important, are broad and malleable. . . . The prospect Hamdi raises is therefore not far-fetched."); *Rasul*, 124 S. Ct. at 2699 ("What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's *potentially indefinite* detention of individuals who claim to be wholly innocent of wrongdoing.") (emphasis added); *id.* at 2700 (Kennedy, J. concurring) ("The second critical set of facts is that the detainees at Guantanamo Bay *are being held indefinitely*, and without benefit of any legal proceeding to determine their status.") (emphasis added); cf. *Rosales-Garcia v. Holland*, 238 F.3d 704, 715 (6th Cir. 2001) (holding that indefinite detention, *even of an excludable alien*, violated substantive due process).

Jurisdictional questions might also be high on the list of authority to provide via statute. The statute might specifically stipulate that military authorities have proper jurisdiction over alleged illegal combatants and that the first recourse of a detainee is to military authorities and require exhaustion of military remedies before resorting to habeas.⁶³ A statute combining a defined a statutory period of detention and limited access to habeas during that period would likely withstand review.⁶⁴

A statutory scheme with a provision for subsequent and continuing review of a particular detainee's dangerousness might also meet the requirements of due process.⁶⁵ Since the conflict challenging the nation is not the same as prior conflicts, the presumption that each detainee will remain duty-bound to return to "the battlefield" is not nearly as reasonable as presuming that a soldier in a national army, who would likely face desertion charges if he did not return to service on release, would return to the literal battlefield. This is not to derogate from the dangerousness of many detainees or the appropriateness of holding them; this is simply to state that conclusively presuming their continued dangerousness is neither completely reasonable nor likely to comport with due process.

⁶³ The need for this stipulation was seen in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004) (holding that the military authorities may not hold jurisdiction over petitioner and that abstention is not appropriate). The propriety of such an exhaustion requirement is appropriate when the procedures are defined by statute and do not impede the bringing of a claim. See *Tyson v. Jeffers*, 115 Fed. Appx. 34, 39 (10th Cir. 2004) (holding that failure to raise a claim in a deportation review on direct appeal barred the bringing of it in a habeas petition and discussing the ramifications of limiting habeas appeal until after the exhaustion of remedies).

⁶⁴ See *Khotosouvan v. Morones*, 386 F.3d 1298 (9th Cir. 2004) (holding that petitioner excludable aliens could not seek habeas relief within the ninety day statutory period, even though there was no likelihood of deportation in the foreseeable future).

⁶⁵ See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997) (upholding as comporting with due process a state's sexual offender detention which was not punitive in nature, and required annual review of the dangerousness of the offender); *Foucha v. Louisiana*, 504 U.S. 71, 80-83 (1992) (ruling that preventive detention of person acquitted for reason of mental illness who was not currently mentally ill and whose detention included no periodic review of dangerousness violated due process).

Finally, one government interest in detention that seems to be barred entirely by *Hamdi* is the prefacing of detention strictly for the purpose of interrogation.⁶⁶ Punishment and prevention of harm are the two interests that the Court seems to allow to the government. Since punitive interests are vindicated exclusively by criminal procedures, the framing of the statute, should Congress draft one, ought to be limited to the purpose of preventing the release of the dangerous detainee.⁶⁷ This is not a tremendous bar to holding illegal combatants, as their dangerousness will likely be arguable in most cases.

VII. CONCLUSION

Considering the new type of war waged in the modern era, the Supreme Court's decisions in *Hamdi* and *Rasul* should be understood primarily as an effort to accommodate the novel characteristics of modern warfare, particularly the war on terror. This understanding of the novel modern war on terror informed the new procedures surrounding the detention of illegal combatants. Because the Court in *Rasul* subtly adopted Justice Kennedy's understanding that constitutional rights extend in at least minimal form to non-resident non-citizens, and because the Court has adopted a similar test as to the due process rights of citizens held as illegal combatants, little difference should be seen in the procedural due process rights of citizens and non-citizens accused of acting as illegal combatants. Despite this pronouncement, the consequences of the rulings in the two cases will not likely constrain the efficacy of the war on terror. Should doubts persist, Congress can take affirmative statutory steps to streamline the process owed to detainees.

⁶⁶ *Hamdi*, 124 S. Ct. at 2641 (“Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.”).

⁶⁷ See *United States v. Salerno*, 481 U.S. 739, 746-48 (1987) (outlining a test for administrative incarceration as requiring 1) a finding of legitimate non-punitive Congressional intent 2) that the detention is not excessive in relation to the non-punitive goal) citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963); see generally Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001) (discussing the importance of distinguishing detention of a person simply for dangerousness from the detention of a person deserving punishment for wrongs done).