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# TERRORIST DETENTION: DIRECTIONS FOR REFORM

*Benjamin J. Priester* \*

## I. INTRODUCTION

Counterterrorism efforts by the U.S. government since 2001 have produced numerous legal controversies. One of the most controversial subjects has been the detention of individuals allegedly involved with terrorist organizations or activities. Unlike traditional criminal detainees, such persons are not held pursuant to indictment on charges pending trial or to a verdict of conviction. Unlike traditional military detainees, they are not battlefield captives from combat in a war zone against the military forces of another nation. Rather, terrorist detainees are held based on the individual's alleged connections to terrorist organizations and activities, without more.

Terrorist detention, so defined, is an extraordinary measure departing from traditional criminal and military detention models. Consequently, terrorist detention must be justified by the extraordinary circumstances caused by the threat of terrorism which confound the application of traditional legal models.<sup>1</sup> To date, however, the law governing terrorist detentions has been insufficiently bound to such justifications, and many important legal issues remain unaddressed. Accordingly, terrorist detention is ripe for significant legal reform.

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1. See Benjamin J. Priester, *Who Is A "Terrorist"? Drawing the Line Between Criminal Defendants and Military Enemies*, 2008 UTAH L. REV. 1256–57, 1337 (2008).

## II. WHERE WE STAND: THE STATE OF THE LAW

After more than seven years of post-9/11 counterterrorism efforts, the state of the law governing the detention of alleged terrorists remains filled with uncertainty and open questions. That would no doubt come as a surprise to anyone familiar with the litigious nature of contemporary American civil liberties disputes. In truth, the dearth of answers has not been for lack of trying: litigation over the status and rights of accused terrorists detained as “enemy combatants,” in the United States or at Guantánamo Bay, Cuba, has lasted nearly as long as the “war on terrorism” itself.<sup>2</sup> Despite more than six years of litigation—including at least five significant decisions from the Supreme Court of the United States from 2004 to 2008<sup>3</sup>—the law governing these issues still contains more questions than answers. Before charting a road ahead, it is worth examining where we currently stand.

### A. *Statutory Authorization for Detention*

Unfortunately, the easiest path to legal clarity has not been taken. Congress has not passed legislation specifically authorizing a legal regime for the detention of alleged terrorists, or defining who qualifies as a terrorist eligible for detention under such a regime. Nor has Congress specifically prohibited terrorist detentions. In a hotly contested election year like 2008, it is not difficult to understand why such a politically controversial subject was studiously avoided. But the consequence is that the law remains mired in uncertainty, both procedurally and substantively.

Within the United States, the Non-Detention Act prohibits the detention of any person except pursuant to statute.<sup>4</sup> To the extent alleged terrorists are subject to criminal and immigration pro-

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2. See, e.g., *Hamdi v. Rumsfeld*, 294 F.3d 598, 600 (4th Cir. 2002); *Al-Marri v. Bush*, 274 F. Supp. 2d 1003, 1004–05 (C.D. Ill. 2003); *Padilla v. Bush*, 233 F. Supp. 2d 564, 568–69 (S.D.N.Y. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541, 545 (E.D. Va. 2002) (mem.); *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1037–38 (C.D. Cal. 2002).

3. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); see also *Hanft v. Padilla*, 547 U.S. 1062 (2006); *Hanft v. Padilla*, 546 U.S. 1084 (2006).

4. See 18 U.S.C. § 4001(a) (2006); see also Benjamin J. Priester, *Return of the Great Writ: Judicial Review of the Detention of Alleged Terrorists as Enemy Combatants*, 37 RUTGERS L.J. 39, 56–57 (2005).

ceedings, such statutory authority exists under the ordinary rules of the respective regimes.<sup>5</sup> In addition, the USA PATRIOT Act ("Patriot Act") enacted extraordinary procedures for immigration proceedings mandating the detention of certain persons alleged to have affiliation with terrorist organizations pending their removal from the United States.<sup>6</sup>

None of these provisions, however, authorizes military detention. Accordingly, the government has asserted that the 2001 Authorization for the Use of Military Force ("AUMF") constitutes a statutory authorization for military detention.<sup>7</sup> The courts have interpreted the AUMF on an as-applied basis. To the extent the government invoked the AUMF to justify militarily detaining persons who had taken part in warzone hostilities against U.S. forces on behalf of the Taliban in Afghanistan, the courts in *Hamdi* and *Padilla* found that the AUMF impliedly authorized detention.<sup>8</sup> Given those facts, however, traditional laws of war principles were sufficient to justify military detention, and any allegation of terrorist affiliation was unnecessary to the decision to uphold the government's action.<sup>9</sup>

On the other hand, when the government sought to justify military detention under the AUMF based solely on allegations of Al-Qaeda activities, the en banc Fourth Circuit divided sharply in *Al-Marri v. Pucciarelli*.<sup>10</sup> Five judges concluded that the AUMF authorized domestic military detention of Al-Qaeda operatives,

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5. See, e.g., 8 U.S.C. § 1231 (2006) (providing for release, conditions, or detention of aliens during removal proceedings); 18 U.S.C. § 3142 (2006) (providing for release, conditions, or preventive detention of indicted federal criminal defendants).

6. See 8 U.S.C. § 1226a; see also *Al-Marri v. Pucciarelli*, 534 F.3d 213, 240, 248–49 (4th Cir. 2008) (per curiam) (Motz, J., concurring) (discussing provisions of the Patriot Act), cert. granted, 129 S. Ct. 680 (2008).

7. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

8. See *Hamdi*, 542 U.S. at 519 (O'Connor, J., plurality opinion) ("[D]etention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."); *Padilla v. Hanft*, 423 F.3d 386, 391 (4th Cir. 2005) ("Padilla took up arms against United States forces . . . in the same way and to the same extent as did *Hamdi*."); see also *Al-Marri*, 534 F.3d at 228–29 (Motz, J., concurring) (discussing *Hamdi* and *Padilla*).

9. See *Al-Marri*, 534 F.3d at 229 n.13 (Motz, J., concurring) ("Although our opinion discussed Padilla's association with al Qaeda, we held that Padilla was an enemy combatant because of his association with Taliban forces, i.e., Afghanistan government forces, on the battlefield in Afghanistan during the time of the conflict between the United States and Afghanistan.")

10. See *id.* at 216 (per curiam) (describing two separate 5-4 majorities on two questions before the en banc court).

while four judges concluded that it did not.<sup>11</sup> Yet all nine judges agreed that the definitions of the categories of persons eligible for military detention under the AUMF could not be found in the AUMF itself, but rather must be found in the principles of the laws of war necessarily incorporated into the AUMF.<sup>12</sup> Where the judges parted company was in their analysis of whether and to what extent those principles extended beyond traditional situations like *Hamdi* and *Padilla* to new threats like *Al-Marri*.<sup>13</sup>

The situation is even more complicated outside the United States. To the extent U.S. law is implicated, the authority granted to the President by the AUMF is complemented by the President's greater constitutional powers in foreign affairs.<sup>14</sup> Similarly, the related question of the scope of the rights possessed by individuals detained by U.S. agents abroad is less clear than domestically, as will be discussed below. To the extent international law and treaty obligations govern the power to detain, those sources of law may not provide a claim that can be vindicated directly by a detained individual, rather than through diplomacy.<sup>15</sup> And even the legislation Congress has enacted regarding the prisoners at Guantánamo does not affirmatively authorize detention in the first instance, but merely regulates the treatment or prosecution of the persons who already have been brought there.<sup>16</sup>

In the end, the best solution to all of these difficulties lies in specific legislation addressed to the detention of alleged terrorists at home and abroad. In the recent terrorism cases, the courts

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11. *See id.*

12. *See id.* at 238 (Motz, J., concurring); *id.* at 259–62 (Traxler, J., concurring); *id.* at 285–86 & n.4 (Williams, C.J., concurring in part and dissenting in part); *id.* at 311, 314–17 (Wilkinson, J., dissenting).

13. *Compare id.* at 233–43 (Motz, J., concurring), *with id.* at 259–62 (Traxler, J., concurring), *id.* at 285–87 (Williams, C.J., concurring in part and dissenting in part), *and id.* at 311–24 (Wilkinson, J., concurring in part and dissenting in part).

14. *See generally* H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS* (2002).

15. *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109–366, § 5, 120 Stat. 2600, 2631–32 (codified at 28 U.S.C. § 2241 note (2006)) (providing that Geneva Conventions on laws of war may not be invoked as grounds for individual relief in federal habeas corpus or other proceedings); *Medellin v. Texas*, 128 S. Ct. 1346, 1360–61 & n. 8 (2008) (holding that a violation of the Vienna Convention on Consular Relations did not provide grounds for relief from a state law procedural bar on successive collateral attack to criminal conviction).

16. *See, e.g.*, Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1080 n.2 (2008).

have made clear that the familiar *Youngstown* framework will be used to assess the constitutionality of such legislation.<sup>17</sup> For example, should Congress authorize military detention abroad, supplementing the President's inherent powers, the courts could be expected to uphold the legislation in almost all circumstances.<sup>18</sup> Likewise, should Congress prohibit domestic military detentions, whether of citizens, aliens, or anyone, the courts could be expected to uphold that law as well, and deny the President power to make such detentions.<sup>19</sup>

Most important of all, however, would be the definitional contribution that could be made by specific legislation addressing terrorist detention. Rather than struggling with application of the AUMF and questions of their own authority to apply or adapt the underlying principles of the laws of war,<sup>20</sup> courts could instead focus on interpreting the definitions provided by Congress. For example, even if Congress passed legislation prohibiting military detentions of alleged terrorists based on connections with Al-Qaeda, such as in *Al-Marri*, the same law presumably would not intend to prohibit military detention of battlefield captives from Afghanistan, like in *Hamdi*, much less Iraq. This likely would still leave courts room to interpret the applicability of the law in situations like *Padilla* or *Hamdan*, where categorization might very well be ambiguous.<sup>21</sup>

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17. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring); *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004); *Al-Marri*, 534 F.3d at 249 (Mozt, J. concurring). The framework comes from Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952).

18. See *Al-Marri*, 534 F.3d at 286 (Williams, C.J., concurring in part and dissenting in part) (arguing that because the AUMF authorized detention, the President's action fell into *Youngstown* category one). Presidential exercise of congressionally authorized war powers would be unconstitutional if it violated individual constitutional rights that the political branches, even acting in concert, lack power to overcome.

19. See *id.* at 249 (Mozt, J., concurring) (arguing that Patriot Act detention provisions constitute congressional prohibition on alternative forms of terrorist detention and therefore the claim of presidential power falls into *Youngstown* category three).

20. See, e.g., *id.* at 311, 314–25 (Wilkinson, J., concurring in part and dissenting in part).

21. For example, the circumstances of *Hamdan's* initial capture in Afghanistan are unclear, and the basis of the military commission prosecution against him was exclusively his connections to Al-Qaeda, not any battlefield combat on behalf of the Taliban. See *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005). Similarly, the initial allegations against *Padilla* involved his Al-Qaeda ties; only later did the government allege that he was eligible for detention as a battlefield combatant. See *infra* notes 84–85 and accompanying text.

Thus, much of the indeterminacy in current law is a consequence of Congress's political inaction on this important subject. Perhaps it is too much to hope for legislative action even in 2009, with a new presidential administration and a new Congress. Regardless, it is worth keeping in mind that legislation on these topics is the preferred solution.

### B. *The Great Writ and the Suspension Clause*

To date, petitions for the writ of habeas corpus have been the primary procedural tool used to challenge terrorist detentions. Petitions have contested the existence of authority to make the detentions, asserted violations of detainees' constitutional rights, or both. Although some aspects of the availability of habeas corpus appear to be resolved, others remain unclear.

First, the courts have emphatically indicated that they will not infer either a divestiture of preexisting judicial review by habeas corpus or an invocation of the Suspension Clause,<sup>22</sup> but rather will insist upon clear congressional directives in both instances. Prisoners held pursuant to the AUMF, for example, have been permitted to file petitions because nothing in the AUMF purports to limit or deny judicial review.<sup>23</sup> Congress's first attempt to divest federal courts of habeas review over Guantánamo prisoners, the Detainee Treatment Act of 2005 ("DTA"), was construed to apply only to cases filed after its effective date, and not to pending petitions, due to a lack of sufficient clarity.<sup>24</sup> The second effort, the Military Commissions Act of 2006 ("MCA"), successfully managed to unequivocally divest jurisdiction over all pending habeas petitions.<sup>25</sup> The Supreme Court held the MCA's divestiture unconstitutional, however, because it denied access to the writ without invoking the Suspension Clause.<sup>26</sup> Thus, because Con-

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22. See U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

23. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (O'Connor, J., plurality opinion) ("All agree suspension of the writ has not occurred here."); *id.* at 554 (Scalia, J., dissenting) ("No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause.").

24. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 576–77 (2006).

25. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2242–44 (2008).

26. See *id.* at 2262. The Court also considered and rejected the government's contention that Congress, in the DTA, had provided an adequate substitute for the writ. *Id.* at

gress has not clearly expressed an intent to invoke the Suspension Clause, the constitutional scope of the availability of the writ remains in place in any context to which it applies.

Second, the availability of habeas corpus to U.S. citizens has been reaffirmed. Citizens detained within the United States, as in *Hamdi* and *Padilla*, may petition for the writ and raise due process challenges to their confinement.<sup>27</sup> This is true even if, as alleged enemy combatants, they may be deprived of other constitutional rights, such as proof beyond a reasonable doubt in a criminal jury trial before incarceration.<sup>28</sup> Similarly, in *Munaf v. Geren*, the Supreme Court unanimously held that a U.S. citizen detained abroad in U.S. military custody is entitled to petition for the writ to challenge confinement.<sup>29</sup> This was true even in a foreign nation, Iraq, where U.S. military forces are still deployed in active combat operations assisting the local government with counter-insurgency efforts.<sup>30</sup> The citizen might lose on the merits, as *Munaf* unanimously did,<sup>31</sup> but the availability of the writ was unambiguous.

Third, aliens present in the United States—or at least some of them—also will have the writ available to challenge their detention. Although the en banc Fourth Circuit split sharply in *Al-Marri* on the question of whether he could be detained as an enemy combatant, the court unanimously found that he was entitled to petition for the writ.<sup>32</sup> In doing so, however, the court

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27. See *Hamdi*, 542 U.S. at 524–25 (O'Connor, J., plurality opinion); *Padilla v. Hanft*, 423 F.3d 386, 389–90 (4th Cir. 2005).

28. See, e.g., *Priester*, *supra* note 4, at 89–94.

29. See 128 S. Ct. 2207, 2218 (2008). The Court noted that its holding was limited to the statutory scope of the writ, even for citizens. See *id.* at 2216 n.2. The Court distinguished a prior case, *Hirota v. MacArthur*, on the grounds that the prisoners in that case were held pursuant to the authority of a true international force, led by a U.S. officer but not subject to U.S. chain of command, while the prisoners in *Munaf* were held by U.S. military forces answerable to the President. See *id.* at 2217–18 (citing *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948) (per curiam)).

30. See *id.* at 2213. The allegations against both petitioners in *Munaf* involved crimes relating to insurgent activity and not, for example, mundane street crime. See *id.* at 2214–15 (noting that petitioner Omar was accused of terrorist activity in connection with Al-Qaeda in Iraq and petitioner *Munaf* was convicted of participation in kidnapping of Romanian journalists).

31. See *id.* at 2220.

32. See *Al-Marri v. Pucciarelli*, 534 F.3d 213, 216 & n.\* (4th Cir. 2008) (per curiam) (noting that the government had conceded the court's jurisdiction to hear petition), *cert. granted*, 129 S. Ct. 680 (2008).



seemed to hedge its analysis by emphasizing that al-Marri was a lawful resident alien with substantial connections to the United States—that is, an alien protected by the Due Process Clause.<sup>33</sup> Such a caveat might imply that the court is uncertain whether an alien without due process rights, such as one unlawfully present for only a very brief period, even falls within the scope of the writ.<sup>34</sup> On the other hand, *Munaf* cautions against conflating the scope of the writ and the merits of the substantive claim for relief, even in cases where loss on the merits is clear.<sup>35</sup> At least for aliens who clearly do possess constitutional rights, the availability of the writ would now seem to be undisputed.

Fourth, although the Supreme Court finally determined that aliens detained at Guantánamo fall within the scope of the writ, it remains unclear the extent to which the rationale underlying that determination is an idiosyncratic response to an idiosyncratic situation. In *Rasul v. Bush* in 2004, the Court held that detainees at Guantánamo came within the statutory scope of habeas corpus in federal courts.<sup>36</sup> In 2008 in *Boumediene v. Bush*, the Court employed a similar analysis to hold that the detainees in fact fell within the constitutional scope of the writ.<sup>37</sup> In both cases, the Court refused to give weight to formalistic, technical notions of legal sovereignty and instead focused on de facto control.<sup>38</sup> In *Boumediene*, the Court emphasized that it will not give its imprimatur to the notion of a law-free zone—or perhaps more accurately, a rule-of-law-free zone—where neither U.S. law, nor the law of any other nation, applies.<sup>39</sup> Given the undisputed reality that Cuban law and Cuban courts have no applicability at Guantánamo,<sup>40</sup> the Court refused to countenance the President's claim that neither U.S. law nor U.S. courts could reach Guantánamo. But that reality about Guantánamo is unique. It may follow, then, that the result in *Boumediene*—applying the constitu-

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33. See *id.* at 222 & n.4, 231 n.14.

34. Cf. *infra* note 48 (citing proposal to transfer Guantánamo detainees to Fort Leavenworth, Kansas); *infra* notes 112–13 and accompanying text (discussing alien prisoners of war (“POWs”) held on U.S. soil during World War II).

35. See *Munaf*, 128 S. Ct. at 2219–20.

36. See 542 U.S. 466, 473 (2004) (interpreting 28 U.S.C. § 2241 (2006)).

37. See 128 S. Ct. 2229, 2250–51, 2253, 2259 (2008).

38. See *id.* at 2250, 2252–53, 2258; *Rasul*, 542 U.S. at 471, 474–75, 480–83.

39. See 128 S. Ct. at 2251, 2258–59, 2261.

40. See *id.* at 2251 (“No Cuban court has jurisdiction to hear these petitioners’ claims, and no law other than the laws of the United States applies at the naval station.”).

tional Suspension Clause to the aliens detained there—is likewise unique.

Finally, the Court's rationale in the Guantánamo decisions creates a related conundrum about the availability of the writ to aliens detained in U.S. custody in any place abroad other than Guantánamo. Prior to *Rasul*, cases like *Eisentrager* and *Yamashita* seemed to make clear that aliens detained abroad could not file habeas petitions in federal courts.<sup>41</sup> In fact, the government insisted throughout the Guantánamo litigation that *Eisentrager*'s holding precluded habeas jurisdiction over aliens detained there.<sup>42</sup>

In *Boumediene*, the majority insisted its holding was consistent with *Eisentrager*,<sup>43</sup> while the dissent maintained the majority had essentially overruled it.<sup>44</sup> The majority may be correct if its de facto sovereignty test is, in practice, limited to Guantánamo—and the scope of the writ does not extend to detainees held in U.S. custody in places like U.S. military bases in Germany, where the United States has significant control but not de facto sovereignty.<sup>45</sup> Similarly, *Munaf*'s discussion of the relationship between U.S. military forces in Iraq and the Iraqi government seems to suggest that, notwithstanding the significant power still wielded by U.S. forces in Iraq, application of the *Boumediene* test in that case would identify de facto sovereignty in the U.S. bases there as resting in the Iraqi government, not the United States.<sup>46</sup> On the other hand, the *Boumediene* dissent may be correct if the de facto sovereignty test is given vibrant effect and the scope of the writ is held to extend to places like U.S. military bases in Afghanistan due to the relative impotence of local law and courts compared to the power wielded by U.S. forces. Given the narrow scope of the

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41. See Priester, *supra* note 4, at 76–77 n.165 (discussing the relationship between *Rasul* and the previous understanding of *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *In re Yamashita*, 327 U.S. 1 (1946)).

42. See, e.g., *supra* note 2; see also *Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting) (“The President relied on our settled precedent in [*Eisentrager*] when he established the prison at Guantanamo Bay for enemy aliens. . . . Had the law been otherwise, the military surely would not have transported prisoners there . . .”).

43. See *Boumediene*, 128 S. Ct. at 2257–61.

44. See *id.* at 2302 (Scalia, J., dissenting).

45. See *Munaf v. Green*, 128 S. Ct. 2207, 2222, 2227 (2008) (noting extensive retention of Japanese sovereignty, including authority to prosecute U.S. military personnel who commit crimes in Japan, under a Status of Forces Agreement).

46. See *id.* at 2221–25.

facts before the Court so far, either reading of *Boumediene*—as a narrow exception to *Eisentrager* or a fundamental revision of *Eisentrager*—is plausible.

The significant issue on the horizon of habeas corpus review of terrorist detentions involves these last doctrinal dilemmas. It does not take any great foresight to predict a new round of litigation over the meaning of the *Boumediene* rationale and the corresponding availability or unavailability of the writ to aliens detained abroad anywhere other than the “jurisdictionally quirky outpost” that is Guantánamo.<sup>47</sup> Moreover, courts may yet have to grapple further with the scope of the writ for aliens present in the United States. Given the unanimity on the point in *Al-Marri*, the applicability of the writ to lawful resident aliens appears settled. But not all aliens detained in the United States would be similarly situated: the government might detain an unlawful alien with only a transient presence in the United States prior to capture, or, even more starkly, alien prisoners captured abroad with no preexisting presence in or connection to the United States could be brought here for detention.<sup>48</sup> In such circumstances, the courts would have to decide whether mere detention in the United States provides access to the writ.

### C. Challenges on the Merits, Especially Due Process

Once a detained person is able to get past any procedural hurdles to judicial review of the detention, the court will assess the merits of the challenges to detention. As with the scope of the availability of the writ of habeas corpus, some aspects of these

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47. See *Boumediene*, 128 S. Ct. at 2293 (Roberts, C.J., dissenting).

48. For example, one frequently discussed proposal for closing Guantánamo suggests the prisoners be transferred to Fort Leavenworth in Kansas. See, e.g., Dan Eggen & Josh White, *Debate over Guantanamo's Fate Intensifies*, WASH. POST, July 4, 2008, at A1 (“Lawmakers in Kansas, for example, have already reacted negatively to a proposal from Sen. John McCain, the presumptive Republican presidential nominee, to move some detainees to the military prison at Fort Leavenworth. His Democratic rival, Sen. Barack Obama, has also said he would move detainees to Leavenworth and other civilian and military facilities, and that he would close Guantánamo.”); Mark Gitenstein, *Now, It's Up to Congress: After High Court Ruling, Lawmakers Must Set New Safeguards for Gitmo Detainees*, LEGAL TIMES, June 23, 2008, at 52; Dawn Bormann, *Detainees in Town? Folks Don't Flinch: Talk of Transferring Some from Guantanamo Bay to Leavenworth Stirs Little Fuss*, KAN. CITY STAR, June 23, 2007, at A1. Justice Scalia raised a similar concern in his dissenting opinion in *Boumediene*. See *infra* notes 111–16 and accompanying text.

merits challenges have been addressed, while others remain surprisingly unclear.

One form of merits challenge involves not individual rights, but separation of powers—that is, assertions that the President lacks power to detain the person in the first instance. For example, a separation of powers challenge to the presidentially authorized military commissions succeeded when the Supreme Court held that statutory authorization was necessary.<sup>49</sup> To date, however, the courts have rejected similar challenges to presidential power to impose military detention by relying on the AUMF.<sup>50</sup> Thus, barring a modification or repeal of the AUMF or a major shift in its judicial interpretation, this form of merits challenge to military detention is unlikely to prevail.<sup>51</sup>

The primary merits challenges to detention have come under the Due Process Clause, specifically the claim that the detainee received insufficient process, or insufficient procedural protections within a process, to validate their detention. While the courts have acknowledged the importance of due process claims, they have been unable to reach any definitive conclusions about what due process actually requires in detention cases.

For U.S. citizens and lawful resident aliens, the applicability of the Due Process Clause is clear because they indisputably have constitutional due process rights with respect to the U.S. government.<sup>52</sup> In *Hamdi*, decided by the Supreme Court, and *Al-Marri*, decided en banc by the Fourth Circuit, the only question was the amount and kind of process that must be afforded to a

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49. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 594–95 (2006).

50. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (O'Connor, J., plurality opinion); *Padilla v. Hanft*, 423 F.3d 386, 391 (4th Cir. 2005).

51. In *Hamdi*, Justice Scalia argued that military detention of U.S. citizens was unconstitutional absent a proper invocation of the Suspension Clause, with criminal prosecution providing the only constitutionally valid method for detention. See 542 U.S. at 575 (Scalia, J., dissenting). Only Justice Stevens joined this analysis, however. See *id.* at 554.

52. See *Al-Marri v. Pucciarelli*, 534 F.3d 213, 231 n.14 (4th Cir. 2008) (per curiam) (Motz, J., concurring) (noting the government's concession that a lawful resident alien has the same due process rights as citizens and that any holding in *al-Marri*'s case also would apply to citizens), *cert. granted*, 129 S. Ct. 680 (2008).

detainee.<sup>53</sup> But those courts did not provide clear answers, and we still do not know how much process is due.

In *Hamdi*, the citizen detainee had received no process within the executive branch, but only a presidential order declaring him an enemy combatant; in his habeas proceeding, the government produced only a conclusory, summary affidavit to justify his military detention as an enemy combatant.<sup>54</sup> The Court found a violation of his due process rights and remanded for further proceedings.<sup>55</sup> Yet the Court splintered on the content of the procedural protections to which Hamdi would be entitled. The plurality opinion for four justices suggested that a detention review procedure, including an Article III court on habeas corpus, could make significant accommodations to the government's interest in the secrecy of national security information and the pragmatic considerations involved in reviewing battlefield captures by U.S. military forces in active war zones.<sup>56</sup> The two-justice concurring opinion expressly refused agreement with some of these suggestions, however, and only joined in the remand on a narrower basis.<sup>57</sup> And two more justices rejected any amount of process short of criminal prosecution.<sup>58</sup> Thus, while four justices supported the plurality's approach, an equal number of justices supported substantially more process for citizen detainees.<sup>59</sup>

In *Al-Marri*, the en banc Fourth Circuit similarly splintered on the amount of process due.<sup>60</sup> Four judges concluded that *Hamdi*

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53. See *Hamdi*, 542 U.S. at 509; *Al-Marri*, 534 F.3d at 216. In the Fourth Circuit, the *Padilla* panel opinion involved only a challenge to the President's detention authority under the AUMF, a question which had been decided on summary judgment in the district court; accordingly, the government's allegations were assumed to be true. See *Padilla v. Hanft*, 423 F.3d 386, 390 n.1 (4th Cir. 2005). Likewise, the *Padilla* panel noted in its decision that it was not deciding how much process Padilla was due, but only determining that detention authority existed. See *id.* at 390 n.1, 397. The case was mooted before the due process question could be litigated on remand. See *Al-Marri*, 534 F.3d at 229 n.13 (Motz, J., concurring); *id.* at 259 n.4 (Traxler, J., concurring); see also *Hanft v. Padilla*, 547 U.S. 1062 (2006); *Hanft v. Padilla*, 546 U.S. 1084 (2006); *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005).

54. See *Hamdi*, 542 U.S. at 510–15, 537 (O'Connor, J., plurality opinion).

55. *Id.* at 537–39.

56. See *id.* at 524–39.

57. See *id.* at 553–54 (Souter, J., concurring).

58. See *id.* at 575 (Scalia, J., dissenting).

59. The ninth justice found no due process violation at all. See *id.* at 589–94 (Thomas, J., dissenting). Consequently, he could not resolve the division between the plurality and the other perspectives. See *id.* at 594–99.

60. *Al-Marri* is not a U.S. citizen, but the court noted that its due process analysis

controlled all enemy combatant detention cases.<sup>61</sup> Next, they applied the burden-shifting framework suggested by the *Hamdi* plurality.<sup>62</sup> They went no further with the due process analysis, however. They concluded that a lengthy summary affidavit satisfied the government's initial burden to put forward a justification for military detention, shifting the burden to al-Marri to put forward evidence in rebuttal.<sup>63</sup> Because al-Marri had refused to do so (instead choosing to litigate only legal challenges, not the facts), they found the government's contentions un rebutted and accordingly upheld the detention.<sup>64</sup> The other five judges, however, rejected this analysis. Those five agreed that *Hamdi* was not controlling, but four of them based their conclusion on distinguishing the applicability of the AUMF, not the facts.<sup>65</sup> Only one judge relied on distinguishing *Hamdi* on the facts, arguing that more process was due for detainees seized domestically, like al-Marri, than those seized in foreign war zones, like *Hamdi*.<sup>66</sup> Accordingly, he argued the Government's affidavit was insufficient to shift the burden to al-Marri to rebut anything.<sup>67</sup> This analysis, however, did not garner a majority of the court.<sup>68</sup>

Thus, neither *Hamdi* nor *Al-Marri* provided any controlling guidance on the amount of process to which a person with indisputable Due Process Clause rights is entitled before the courts will sustain an enemy combatant detention. Neither the nine judges on the Supreme Court nor the nine judges sitting en banc in the Fourth Circuit were able to form a five-vote majority for

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would apply identically to citizens. See *supra* note 52.

61. See *Al-Marri v. Pucciarelli*, 534 F.3d 213, 284–87 (4th Cir. 2008) (per curiam) (Williams, C.J., concurring in part and dissenting in part), *cert. granted*, 129 S. Ct. 680 (2008); *id.* at 313–14 (Wilkinson, J., concurring in part and dissenting in part); *id.* at 346–47 (Niemeyer, J., concurring in part and dissenting in part).

62. See *id.* at 291–92 (Williams, C.J., concurring in part and dissenting in part); *id.* at 329, 337–38 (Wilkinson, J., concurring in part and dissenting in part); *id.* at 347–49 (Niemeyer, J., concurring in part and dissenting in part).

63. See *id.* at 291 (Williams, C.J., concurring in part and dissenting in part); *id.* at 332 (Wilkinson, J., concurring in part and dissenting in part); *id.* at 349 (Niemeyer, J., concurring in part and dissenting in part); *id.* at 351 (Duncan, J., concurring in part and dissenting in part).

64. See *id.* at 288, 292–93 (Williams, C.J., concurring in part and dissenting in part); *id.* at 333 (Wilkinson, J., concurring in part and dissenting in part); *id.* at 345–46, 350–51 (Niemeyer, J., concurring in part and dissenting in part).

65. See *id.* at 247 (Motz, J., concurring).

66. See *id.* at 270–74 (Traxler, J., concurring).

67. *Id.*

68. See *id.* at 216 (per curiam); *id.* at 253 (Motz, J., concurring).

any particular due process analysis.<sup>69</sup> In the end, both appellate courts were forced to remand a question of law—the amount of process due—for determination by the lower court. While minimalism may have its merits as a virtue in decisions of constitutional law, these cases take the principle to the point of being completely unhelpful and ineffectual.<sup>70</sup> Moreover, given the subsequent outcomes in *Hamdi* and *Padilla*, which mooted any possibility of further development of due process requirements in the lower courts,<sup>71</sup> one has to wonder about the prospects for developing the law in *Al-Marri*, either.<sup>72</sup> All that can be said with certainty is that such persons are entitled to more process than a government affidavit filed with a federal court. How much more process, however, remains undetermined.

The possible due process rights, or other merits challenges to detention, of other alien detainees are equally mired in confusion.

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69. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004). The en banc Fourth Circuit has ten judges, but Judge Shedd did not participate in the *Al-Marri* case. See *Al-Marri*, 534 F.3d at 216.

70. See *Al-Marri*, 534 F.3d at 295 (Wilkinson, J., concurring in part and dissenting in part) (“While a minimalist method has much to commend it in many circumstances, it has its drawbacks here. This is not an area where *ad hoc* adjudication provides either guidance or limits, and it leaves the most basic values of our legal system—liberty and security—in limbo.”). For further discussion of judicial minimalism, see Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47 (2004), and CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

71. See *Al-Marri*, 534 F.3d at 265 n.6 (Traxler, J., concurring) (discussing subsequent developments in *Hamdi*); *supra* note 53 (discussing subsequent developments in *Padilla*).

72. On December 5, 2008, the Supreme Court granted certiorari to review the Fourth Circuit’s en banc decision. See *Al-Marri v. Pucciarelli*, 129 S. Ct. 680 (2008). Within days of taking office, however, President Obama ordered an immediate review of the propriety of al-Marri’s detention. See Scott Shane, Mark Mazzetti & Helene Cooper, *Obama Reverses Key Bush Policy, but Questions on Detainees Remain*, N.Y. TIMES, Jan. 23, 2009, at A16 (“In a separate directive, Mr. Obama asked for a high-level review of the case of Ali al-Marri—Mr. Obama called him “clearly a dangerous individual”—who is being held without charges as an “enemy combatant” in a military jail in South Carolina.”). In addition, the Obama Administration sought an extension of time to file its merits brief (as respondent) in the Supreme Court case to enable this review to conclude first. See *id.* (“The Justice Department asked the Supreme Court for a 30-day stay in Mr. Marri’s civil case challenging his detention until the new administration decided on its position.”); see also Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/government-to-reconsider-al-marri-case/> (Jan. 22, 2009, 12:14 EST) (“Acting Solicitor General Edwin S. Kneeder on Thursday asked the Supreme Court for a delay until March 23 for the federal government to file its brief on the merits in the *Al-Marri* case. This will allow time for the review of the case ordered by the President, Kneeder wrote . . .”). The Supreme Court granted the request the following day, moving the government’s briefing deadline from February 20 to March 23, 2009. See Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/court-extends-time-for-us-brief-in-al-marri-case/> (Jan. 23, 2009, 13:37 EST) (“The Supreme Court on Friday granted a Justice Department request to delay, until March 23, the filing of the federal government’s merits brief in *Al-Marri v. Spagone* (08-368).”).

Some clarity exists under current precedent regarding the category of alien detainees captured and detained abroad. Existing precedent is clear that such persons lack constitutional rights cognizable in U.S. courts. For example, neither the Fourth Amendment prohibition on unreasonable seizures nor the Fifth Amendment prohibition on deprivations of liberty or property without due process applies to aliens in foreign locations.<sup>73</sup> Similarly, violations of international treaty obligations often are not cognizable in U.S. courts.<sup>74</sup> Thus, to the extent agents of the U.S. government detain or mistreat foreign nationals in foreign locations, they are not violating the Constitution—or any rights, including due process, which the affected persons are entitled to assert.

Another category of detainees includes aliens captured abroad and brought to the United States for detention.<sup>75</sup> To the extent the U.S. government acts against them abroad, they cannot state a claim for violation of constitutional rights for such foreign conduct. To the extent they are prosecuted criminally in federal courts, however, they receive the same procedural protections as any other defendant.<sup>76</sup> The Due Process Clause presumably applies to such persons while they are present within the United States, even involuntarily, but how the scope of their procedural protections in a terrorist detention case might vary from the rights of citizens or lawful resident aliens, as in *Hamdi* and *Al-Marri*, remains an open question.

The final category of alien detainees comprises the problematic situation involving aliens captured abroad and detained at Guantánamo. In *Boumediene*, the majority assessed the procedural sufficiency of the Combatant Status Review Tribunals (“CSRTs”) used to determine the enemy combatant status of Guantánamo prisoners.<sup>77</sup> Yet the majority’s analysis was expressly limited to holding that the CSRTs, as a forum for resolving challenges to the propriety of detention, were not an adequate substitute for the

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73. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273–75 (1990) (Fourth Amendment); *People’s Mojahedin Org. v. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (Due Process Clause).

74. See *supra* note 15.

75. See *supra* note 48 and accompanying text.

76. See, e.g., *Verdugo-Urquidez*, 494 U.S. at 264, 270–71; *id.* at 278 (Kennedy, J., concurring).

77. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2269–74 (2008).



adjudication of a habeas corpus petition in an Article III federal court.<sup>78</sup> The majority emphasized that it was not deciding the merits of the prisoners' challenges to their detention, much less ordering the writ be granted.<sup>79</sup> Perhaps, like *Munaf v. Geren*, this is a situation where the writ runs to the prisoner but relief is foreclosed on the merits<sup>80</sup>—these aliens, by virtue of their capture abroad and lack of any ties to the United States, may have no rights which can be vindicated under U.S. law. Alternatively, if the majority's primary concern is avoidance of rule-of-law-free zones by assessing de facto sovereignty,<sup>81</sup> then perhaps the Due Process Clause, not just the Suspension Clause, reaches Guantánamo. Into which of the two prior categories the Guantánamo detainees fall, then, depends on whether the rationale of *Rasul* and *Boumediene* is really just about habeas or whether it is really about meaningful judicial review. The Court has twice rebuffed the political branches and twice refused to address the merits of the detentions; perhaps the third time is the charm.

#### D. Definitional Difficulties: Eligibility for Terrorist Detention

The final question about terrorist detention is, of course, who is eligible for terrorist detention. That is, assuming lawful authority to impose terrorist detentions and full compliance with applicable procedural protections in the forum adjudicating eligibility for detention,<sup>82</sup> what exactly must the government prove to justify the detention of a particular person? Here again, recent developments have left the law in a state of significant indeterminacy.

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78. See *id.* at 2274.

79. See *id.* at 2277.

80. See *supra* note 31 and accompanying text.

81. See *supra* note 39 and accompanying text.

82. The forum for adjudicating eligibility for detention might be a federal court applying the Great Writ; that is, an initial detention by executive directive, followed by an adversary habeas proceeding before an Article III court which grants the writ and orders release if the government is found to have failed to factually justify the detention. See Priester, *supra* note 4, at 105–06 & n.262. Alternatively, the forum might consist of some form of executive or administrative fact-finding body which takes evidence and renders a decision on eligibility, followed by judicial review of the regularity of that process in a given case—that is, the institutional dynamic contemplated by the DTA. See *Boumediene*, 128 S. Ct. at 2269–74 (describing DTA procedures). The only difference is whether the habeas court itself provides those protections in the first instance in a Great Writ proceeding, or whether the habeas court reviews the sufficiency of compliance by another entity in its prior proceeding. In either scenario, the prisoner would be entitled to the full procedural protections applicable to his or her situation.

One point, at least, can be made with clarity: the courts have come to acknowledge that definitional difficulties can be avoided when the prisoner's ties to terrorists are not actually necessary to justify his detention. This occurs when the prisoner, regardless of any possible connections to terrorism, fits the traditional definition of an enemy combatant in a traditional military setting. In retrospect, *Hamdi* is viewed in this light; Hamdi was alleged to have personally taken part in armed combat against U.S. military forces in Afghanistan.<sup>83</sup> Similarly, although the initial allegations in *Padilla* rested on his activities on behalf of Al-Qaeda,<sup>84</sup> by the time the Fourth Circuit panel reviewed his detention the government's allegations included comparable facts.<sup>85</sup> Thus, in neither case was any connection to Al-Qaeda necessary to justify an enemy combatant detention—engaging in armed conflict on behalf of the Taliban on battlefields in Afghanistan was sufficient to make the men enemy combatants under traditional laws of war principles. An unknown number of detainees at Guantánamo may similarly qualify as traditional enemy combatants.<sup>86</sup> Likewise, although the cases that have arisen so far have involved prisoners from the hostilities in Afghanistan, the rationale is not limited to the military action in that country. Insurgents captured in Iraq, for example, might very well qualify as enemy combatants in the traditional sense, irrespective of whether they happen to be affiliated with Al-Qaeda in Iraq or a non-terrorist Sunni or Shiite militia.<sup>87</sup> In these situations then, there is no definitional difficulty because the detention is not actually a *terrorist* detention.

But the definitional difficulty remains for all other terrorist detentions. In *Al-Marri*, for example, the government proffered ex-

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83. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–13 (2004) (O'Connor, J., plurality opinion).

84. See *Padilla v. Rumsfeld*, 352 F.3d 695, 700–01 (2d Cir. 2003) (describing the factual basis for Padilla's designation as an Al-Qaeda enemy combatant), *rev'd*, 542 U.S. 426 (2004).

85. See *Padilla v. Hanft*, 423 F.3d 386, 389–90 (4th Cir. 2005) (describing the factual basis for Padilla's designation as a Taliban enemy combatant); see also *Al-Marri v. Pucciarelli*, 534 F.3d 213, 229 n.13 (4th Cir. 2008) (per curiam) (Motz, J., concurring), *cert. granted*, 129 S. Ct. 680 (2008).

86. See *Boumediene*, 128 S. Ct. at 2241 ("Some of these individuals were apprehended on the battlefield in Afghanistan . . .").

87. In *Munaf*, petitioner Omar was designated an enemy combatant based on his connections to Al-Qaeda in Iraq. See *Munaf v. Geren*, 128 S. Ct. 2207, 2214 (2008). Petitioner Munaf, on the other hand, was not designated an enemy combatant, but only prosecuted criminally. See *id.* at 2215.

tensive allegations of connections to Al-Qaeda, but no evidence whatsoever of any connection to the conflict in Afghanistan or any other traditional war zone.<sup>88</sup> Similarly, in *Boumediene*, the Court noted that some detainees at Guantánamo were captured in places where no war was being fought.<sup>89</sup> For these detainees, the definitional question will be dispositive. Whatever the definition of terrorists eligible for detention is, only persons who meet that definition are detainable.

In *Al-Marri*, the en banc Fourth Circuit was heavily divided on the definition of terrorists eligible for military detention. Four judges concluded that no legal authority existed for extending enemy combatant detentions to terrorists.<sup>90</sup> They maintained that the existing laws of war could not be applied to make Al-Qaeda members into combatants<sup>91</sup> and that precedent foreclosed the military detention of non-combatants.<sup>92</sup> They also argued that the AUMF did not enact a new definition of enemy combatants or otherwise redefine the laws of war, and therefore did not authorize military detention of terrorists.<sup>93</sup> Four judges took the opposite view, arguing that Al-Qaeda operatives were enemy combatants under the terms of the AUMF.<sup>94</sup> Even if the traditional laws of war might not extend so far, they asserted the enactment of the AUMF recognized a war with Al-Qaeda in which terrorist operatives are the combatants.<sup>95</sup> Finally, one judge relied upon neither the existing laws of war nor the AUMF, but instead called for the

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88. See *Al-Marri*, 534 F.3d at 344–45 (describing evidence presented in “15 pages” of “highly specific details” in Rapp Declaration proffered in the district court habeas proceeding). Compare *id.* at 231–32 (Motz, J., concurring) (distinguishing *Al-Marri* from battlefield detentions in *Hamdi* and *Padilla*), with *id.* at 297, 322 (Wilkinson, J., concurring in part and dissenting in part) (rejecting distinction).

89. See *Boumediene*, 128 S. Ct. at 2241 (“Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia.”).

90. See *Al-Marri*, 534 F.3d at 247 (Motz, J., concurring).

91. See *id.* at 233–35.

92. See *id.* at 236–37 (discussing *Ex Parte Milligan*, 71 U.S. 2 (1866)); *id.* at 242–43 (noting that, in light of positions taken by Supreme Court justices in *Hamdi* and *Padilla*, “it would seem that a majority of the Court not only would reject the new definitions that the dissents propose, but in fact has already done so”).

93. See *id.* at 238.

94. See *id.* at 259–62 (Traxler, J., concurring); *id.* at 285–87 (Williams, C.J., concurring in part and dissenting in part); see also *id.* at 342 (Niemeyer, J., concurring in part and dissenting in part) (joining Part II of Traxler opinion); *id.* at 351–52 (Duncan, J., concurring in part and dissenting in part) (joining Williams opinion).

95. See *id.* at 259–60 (Traxler, J., concurring); *id.* at 285–86 (Williams, C.J., concurring in part and dissenting in part).

courts to adapt laws of war principles to the new dangers posed by Al-Qaeda.<sup>96</sup> Based on the adaptation proposed in the opinion, al-Marri was a paradigm terrorist eligible for enemy combatant detention.<sup>97</sup> Thus, the *Al-Marri* en banc court provided little guidance for future courts. If nothing else, the decision proved how difficult the definitional issue remains under existing law.

Two recent verdicts in high-profile terrorism cases also shed light on the definitional difficulty. In the summer of 2008, Salim Hamdan finally went to trial before a military commission at Guantánamo.<sup>98</sup> Although he was charged with conspiracy to commit war crimes and terrorism and with providing aid for terrorist attacks,<sup>99</sup> he was acquitted on those charges.<sup>100</sup> Instead, he was convicted only on the charges which relied on the theory that he provided material support to Al-Qaeda simply in the form of his own personal services as a driver and bodyguard.<sup>101</sup> As one commentator put it, “the man who admitted to being Osama bin Laden’s driver is found guilty of being Osama bin Laden’s driver.”<sup>102</sup>

Similarly, after his release from military detention, José Padilla was prosecuted in federal court.<sup>103</sup> At trial in the summer of 2007, he was convicted of terrorism offenses—namely, joining a

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96. See *id.* at 293, 297, 321–22 (Wilkinson, J., concurring in part and dissenting in part).

97. See *id.* at 311–25 (proposing a new definition of the enemy combatant concept for application to terrorists, especially Al-Qaeda); see also *id.* at 298 (“It should be clear that al-Marri is the paradigm of an enemy combatant under any reasonable interpretation of the AUMF.”); *id.* at 328 (“Based on the criteria identified and the facts alleged, al-Marri easily qualifies as an enemy combatant.”).

98. See William Glaberson & Eric Lichtblau, *Guantanamo Detainee’s Trial Opens, Ending a Seven-Year Legal Tangle*, N.Y. TIMES, July 22, 2008, at A12.

99. See Charges & Specifications, *United States v. Hamdan*, No. 04-0004 (Military Comm’n, May 10, 2007), available at [http://www.defenselink.mil/news/May2007/Hamdan\\_Charges.pdf](http://www.defenselink.mil/news/May2007/Hamdan_Charges.pdf); see also Posting of Bobby Chesney to National Security Advisors, <http://natseclaw.typepad.com/natseclaw/2008/08/hamdan-breakdow.html> (Aug. 6, 2008, 12:09 EST).

100. See William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1; see also Chesney, *supra* note 99.

101. See Chesney, *supra* note 99.

102. *Countdown with Keith Olbermann*, (MSNBC television broadcast Aug. 6, 2008) (transcript available at <http://www.msnbc.msn.com/id/26074295/>).

103. See Superseding Indictment, *United States v. Hassoun et al.*, No. 04-60001-CR-COOKE (S.D. Fla. Nov. 17, 2005), 2005 WL 5680800. Counts One to Three, the only ones applicable to Padilla, were, respectively, a § 956 conspiracy and a conspiracy to violate, and a substantive violation of, § 2339A. See *id.*; see also Priestler, *supra* note 1, at MS4 n.11 (discussing § 956); *id.* at MS9 n.45 (discussing § 2339A).

conspiracy to commit murder in a foreign country and rendering aid toward the fulfillment of that conspiracy.<sup>104</sup> Yet the verdict is hardly as definitive as it might sound. For one, Padilla was not charged with, or convicted of, any crimes relating to contemplated terrorist attacks within the United States, despite the fact that such a plot was purportedly the basis for detaining him as an enemy combatant in the first place.<sup>105</sup> More importantly, the conspiracy lacked any meaningful specificity as to method, location, target, timing, or other logistical details.<sup>106</sup> Padilla was convicted, in essence, of being a willing terrorist operative without impending involvement in any actual terrorist attack.<sup>107</sup>

These verdicts demonstrate that even in cases of persons with seemingly undeniable Al-Qaeda ties, the government ultimately may be unable to prove little more than the ties themselves.<sup>108</sup> Such individuals may rightly deserve punishment for their activities in facilitating the overall functioning of the Al-Qaeda organization, but they are not in the same league as those involved in specific plots.<sup>109</sup> It is worth considering, then, whether persons like this ought to fall within the definition of terrorists who are eligible for military detention.<sup>110</sup>

Finally, the definitional difficulty is further highlighted by an analogy raised by Justice Scalia's dissent in *Boumediene*. In arguing that the writ does not run to detainees at Guantánamo, Justice Scalia argued that the better comparison was not the prisoners in *Eisenstrager*, who were imprisoned in Germany pur-

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104. See Verdict, *United States v. Hassoun et al.*, No. 04-60001-CR-COOKE (S.D. Fla. Aug. 16, 2007), 2007 WL 2349148. Padilla was convicted on all three counts. See *id.*

105. See Chesney & Goldsmith, *supra* note 16, at 1104 (speculating why the government never filed criminal charges relating to an alleged "dirty bomb" plot).

106. See *id.* at 1105 (quoting and describing the indictment). The trial judge expressly instructed the jury that proof as to contemplated location or victims was not necessary to convict on the conspiracy count. See *id.* (quoting the jury instructions).

107. See *id.* ("Simply put, Padilla was charged with a murder conspiracy based on nothing more than his attempt to become part of the global jihad movement.").

108. In some cases, the government has even had difficulty proving the terrorist ties. For example, the prosecution of the "Liberty City Seven," a group of Miami-area men who allegedly plotted to attack the Sears Tower in Chicago, has so far resulted in the acquittal of one defendant and two mistrials for the other six. See Damien Cave, *Mistrial Is Declared for 6 Men in Sears Tower Terror Case*, N.Y. TIMES, Apr. 17, 2008, at A21; Jay Weaver, *Mistrial Declared in Liberty City Terror Trial*, MIAMI HERALD, Apr. 16, 2008.

109. See, e.g., *United States v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004); *United States v. Reid*, 211 F. Supp. 2d 366, 368 (D. Mass. 2002).

110. See Priester, *supra* note 1, at 1265-67 (discussing facilitation offenses); *id.* at 1328-34 (arguing that facilitation offenses should not be eligible for military detention).

suant to war crimes convictions,<sup>111</sup> but rather “the more than 400,000 prisoners of war detained in the United States alone during World War II.”<sup>112</sup> Justice Scalia claimed that “[n]ot a single one [of the POWs] was accorded the right to have his detention validated by a habeas corpus action in federal court—and that despite the fact that they were present on U.S. soil.”<sup>113</sup> But it is undeniable that the federal courts routinely hear habeas claims challenging the detention of aliens present in the United States when the underlying detention is pursuant to criminal or immigration law.<sup>114</sup> Thus, Justice Scalia’s analogy is only valid to the extent that the Guantánamo detainees—or other terrorist detainees held in the United States on an enemy combatant theory—actually are comparable to World War II POWs, rather than to criminal defendants. Yet as between the prisoners in *Eisentrager* and ordinary alien criminal defendants, the World War II POWs more closely resemble the former. Like the prisoners in *Eisentrager*, the World War II POWs were enemy aliens—that is, nationals of a country with which the United States was engaged in a declared war<sup>115</sup>—who had taken part in hostilities against U.S. forces and were captured in a foreign theater of war.<sup>116</sup> As noted above, Taliban fighters from the battlefields of Afghanistan, like Hamdi, might be close enough to that description to qualify as traditional enemy combatants under the laws of war. But it is another step entirely to justify a *terrorist* detention on the same basis when, like al-Marri, the prisoner may be a national of a friendly nation who never fought on any traditional battlefield and who was not captured in any place resembling a theater of combat. Justice Scalia’s analogy fails because it conflates all

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111. *Johnson v. Eisentrager*, 339 U.S. 763, 766 (1950); see also *Rasul v. Bush*, 542 U.S. 466, 476, 479 (2004) (distinguishing *Eisentrager*); *id.* at 487–88 (Kennedy, J., concurring) (same); Priester, *supra* note 4, at 76–77 n.165.

112. *Boumediene v. Bush*, 128 S. Ct. 2229, 2302 (2008) (Scalia, J., dissenting).

113. *Id.* (citing Curtis A. Bradley, *The Military Commission Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT’L L. 322, 338 (2007)). Justice Scalia does not mention *Quirin*, which was a habeas action brought by German soldiers detained in the United States. See *Ex parte Quirin*, 317 U.S. 1, 18, 23 (1942).

114. See, e.g., Priester, *supra* note 4, at 72 n.148 (citing habeas cases challenging detention pending removal).

115. See generally David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002).

116. See *Rasul*, 542 U.S. at 476 (distinguishing *Eisentrager*). Unlike the *Eisentrager* prisoners and like the Guantánamo prisoners (as construed in *Rasul* and *Boumediene*), the World War II POWs were detained in the United States simply to incapacitate them from returning to battle (which is permissible even for lawful combatants who fully comply with the laws of war), and not pursuant to war crimes convictions.

Guantánamo prisoners into a single class, when in fact not all of them are similarly situated. Nonetheless, the salience of the analogy emphasizes the fundamental importance of resolving the definitional difficulty as part of any terrorist detention framework.

Whatever else might be said about the law governing the detention of alleged terrorists, it is undeniable that substantial reform is necessary. For some, this might mean abolishing terrorist detentions entirely. For others, the solution might be meaningful procedural reform or careful definitional reform of the persons eligible for terrorist detention. Even the strongest claims for broad power to detain terrorist suspects are better served by legal clarity than continuous litigation. Thus, the road forward—regardless of one's position on terrorist detentions—must include significant legal reform.

### III. WHERE WE SHOULD GO FROM HERE: PROPOSALS FOR REFORM

If legal reform of terrorist detention is the goal, there are numerous paths the law might take. One way to move toward a solution is to seek to identify more precisely those aspects of the terrorist threat that implicate the need for detention. A legal regime for terrorist detention could then be designed with those aspects in mind. Such a solution would not only more carefully tailor the law to the specific problems posed by detaining alleged terrorists, but it would also more thoroughly justify the need for terrorist detention in the first place.

Legal reform of terrorist detentions must address each of the issues discussed above. We must define the categories of persons eligible for and prohibited from terrorist detention. We must determine the kinds of procedures that will be provided to those persons sought to be detained pursuant to those classifications. We must consider the scope of eligibility for the writ of habeas corpus. And in the end, we should codify our conclusions in statutes, so that courts can focus on their more appropriate task of interpreting the legal regime, rather than face the challenge of potentially having to create it.

A. *Eligibility for Terrorist Detention: The Problem of the Applicable Model*

Even before we undertake the difficult task of defining the categories of persons eligible for terrorist detention, we must make a crucial decision. Are we applying a familiar, ordinary detention model, with a few minor modifications to account for the slightly different nature of the terrorist threat? Or are we applying a new, extraordinary detention model designed specifically, and exclusively, to counter a fundamentally distinct threat posed by terrorists? It is impossible to circumscribe and calibrate correctly our definitions of terrorists eligible for detention without first deciding the kind of legal regime in which they will be used.

It would be possible, at least theoretically, to apply the two existing detention models to terrorists unchanged. Under the criminal model, we could use indictments and bail hearings followed by incarceration upon conviction. Under the military model, we could detain combatants participating in the hostilities of an armed conflict. And we could calibrate our definitions of terrorists eligible for detention to these two models in their existing, essentially unmodified forms. For example, we could define liability under the substantive criminal law to ensure eligibility for pre-trial and post-verdict detention of accused and convicted terrorists, respectively. Similarly, we could define combatant status under the Geneva Conventions to encompass various forms of participation in terrorism. By pursuing such a course, we would conclude that the terrorist threat is only marginally different from the situations already addressed by the existing models.

Both conceptually and practically, however, such a conclusion is untenable. At the conceptual level, the terrorist threat is simply too divergent from the paradigm problems and baseline assumptions of either of the two existing models.<sup>117</sup> No other threat addressed by the criminal model is even close to as war-like as Al-Qaeda and other transnational terrorist organizations. Perhaps some transnational criminal organizations have features in common with Al-Qaeda, such as being structured, sophisticated, well-funded, and multi-national. But how many of those organizations have as their primary objective the indiscriminate killing of inno-

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117. Priester, *supra* note 1, at 1315; see also Chesney & Goldsmith, *supra* note 16, at 1096.



cent civilians in countries across the globe? Or, to put it more starkly, how many of them would detonate a nuclear weapon in a major American or European city if they had the capability? For that matter, what other criminal organization would even *seek* such capability? Likewise, the terrorist threat is significantly divergent from the core concepts of the laws of war. The closest analogues, rebels and insurgents in civil wars, have some common features with Al-Qaeda, such as shifting (if not ephemeral) battlefields, lack of uniforms, and concealment of fighters among the civilian population.<sup>118</sup> Yet those conflicts are intra-state or regional, not global, and the objective of the conflict is not indiscriminate killing of civilians for its own sake.<sup>119</sup> Simply put, the laws of war, in their current form, were not designed to apply to transnational terrorism of the kind perpetrated by Al-Qaeda.<sup>120</sup>

The practical realities of anti-terrorism efforts have reflected these divergences. In their recent *Stanford Law Review* article, Professors Chesney and Goldsmith convincingly describe a “convergence” of the criminal and military models.<sup>121</sup> In criminal terrorism cases, federal prosecutors have increasingly relied on charging theories emphasizing association and status, rather than the defendant’s own personal conduct.<sup>122</sup> This includes not only the facilitation offenses like material support to a foreign terrorist organization under § 2239B,<sup>123</sup> but, as in *Padilla*, expansively charging a conspiracy to participate in an undifferentiated, general global jihad.<sup>124</sup> Yet such a focus on association and status, rather than personal conduct, is traditionally associated with the military model.<sup>125</sup> Similarly, civilian courts trying terrorism prosecutions have struggled, as in *Moussaoui*, with the necessity for

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118. Priester, *supra* note 1, at 1308.

119. When indiscriminate killing of civilians in such conflicts amounts to ethnic cleansing, it is punished as a serious international crime. See, e.g., Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 IND. INT’L & COMP. L. REV. 53, 53–54 (2001) (discussing the sentencing of criminals convicted of international crimes).

120. See Priester, *supra* note 1, at 1304; cf., Geoffrey S. Corn & Eric Talbot Jensen, Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations 5 (Aug. 25, 2008) (unpublished manuscript, available at <http://ssrn.com/abstract=1256380>) (arguing for a new category of transnational armed conflict to regulate military actions between states and non-state groups outside their own territory).

121. See Chesney & Goldsmith, *supra* note 16.

122. See *id.* at 1101.

123. See *id.* at 1102–03 (discussing the § 2339B prosecution of the “Lackawanna Six”).

124. See *id.* at 1104–05.

125. See *id.* at 1082.

maintaining secrecy about methods and tactics of covert intelligence gathering and the difficulty of dealing with inculpatory and exculpatory evidence from intelligence information and other classified sources.<sup>126</sup> Such problems arise less frequently under the military model, in which lesser procedural protections and the use of ex parte evidence has traditionally been acceptable due to a perceived lower risk of erroneous classifications.<sup>127</sup> Thus, the authors describe a criminal model becoming more tolerant of preventive detention even at the cost of reducing the ability to achieve acquittals.<sup>128</sup>

Likewise, Chesney and Goldsmith describe how the military model has become increasingly bound by procedural protections far closer to the criminal process than ever before. For example, even the much-criticized CSRTs created in response to the *Hamdi* decision provide procedural protections going well beyond the traditional laws of war, or even the U.S. Army's own regulations on determining the status of prisoners of war.<sup>129</sup> Subsequent developments have continued this trend, including the enactment of procedures for military commissions that, although still far short of civilian criminal process, are significantly more rigorous than anything previously known to the military model.<sup>130</sup> And the authors correctly predicted that *Boumediene* would only provide further incentive for convergence,<sup>131</sup> which the decision's sharp criticism of the CSRTs clearly does.

As a descriptive matter, Chesney and Goldsmith may very well be persuasive. But that does not answer the normative question of whether the "convergence" of the criminal and military models provides a desirable framework within which the definitions of eligibility for terrorist detention should be made. There are good reasons to think it does not. Chesney and Goldsmith conclude their article by emphasizing that ad hoc convergence of the two models will not provide a path to sustainable reform.<sup>132</sup> They do not propose a full normative account of terrorist detention eligibility, however. Instead they broadly suggest the need for the

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126. See *id.* at 1097–98, 1106–07.

127. See *id.* at 1088.

128. See *id.* at 1120.

129. See *id.* at 1110–11.

130. See *id.* at 1119–20.

131. See *id.* at 1116–17.

132. See *id.* at 1132.

creation of specific, nuanced detention criteria, which balance the need for preventive detention of terrorists with procedural safeguards to ensure sufficient accuracy.<sup>133</sup>

The normative objection to convergence is that it fails to account for the extraordinary nature of the terrorist threat, and therefore creates two significant problems. First, by failing to account fully for the extraordinary degree of the terrorist threat, convergence fails to address what is actually distinctive about the threat. Second, by failing to be fully extraordinary, convergence potentially undermines the two existing models in their ordinary applications, without any reason to do so. Each of these problems is a significant defect in convergence. Together, they are a compelling demonstration of the need for a truly extraordinary model to deal with an extraordinary threat.

The first normative problem is exemplified by the fact that convergence misses the entire point of defining eligibility for terrorist detention in the first place—to identify those situations which are too far removed from the central concerns of the existing models to be adequately handled by them. The purpose for having terrorist detentions, rather than simply criminal detentions or laws of war detentions, is that there is something distinctive about the terrorist threat. Yet convergence cannot accomplish this purpose. For example, one concern commonly cited about terrorism prosecutions in civilian courts is the need to maintain secrecy about intelligence operations, identities of sources, and methods of intelligence gathering.<sup>134</sup> Surely this is a legitimate concern in at least some terrorism cases.<sup>135</sup> But just as surely, it is not implicated in *all* terrorism cases.<sup>136</sup> The government apparently was able to convict José Padilla of generalized involvement with Al-Qaeda with very little need to resort to classified information or other sensitive material.<sup>137</sup> Similarly, the

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133. See *id.* at 1121–27 & n.224. For example, the authors suggest that not all persons deemed ineligible for military detention should automatically be reverted to the criminal process. See *id.* at 1127 n.223.

134. See, e.g., *Al-Marri v. Pucciarelli*, 534 F.3d 213, 308–09 (4th Cir. 2008) (per curiam) (Wilkinson, J., concurring in part and dissenting in part), *cert. granted*, 129 S. Ct. 680 (2008); Chesney & Goldsmith, *supra* note 16, at 1097–98, 1106–08, 1128.

135. See, e.g., *United States v. Yunis*, 924 F.2d 1086, 1094–95 (D.C. Cir. 1991).

136. See Chesney & Goldsmith, *supra* note 16, at 1107 (“In any given case, it may be that most or all of the relevant information concerning a particular defendant can in fact be shared or disclosed without presenting the dilemmas described above.”).

137. See *id.* at 1108 (describing court rulings limiting cross-examination of one expert

Compulsory Process Clause controversy in the Moussaoui prosecution resulted almost entirely from the government's aggressive over-charging of the case.<sup>138</sup> By seeking to connect Moussaoui directly to the 9/11 conspiracy itself—a necessary predicate to seeking the death penalty because Moussaoui had not personally killed anyone—the government opened the door for Moussaoui's legitimate need to interpose captured Al-Qaeda leaders as defense witnesses to rebut his involvement.<sup>139</sup> Had the government been content to forgo the death penalty and convict Moussaoui for his admitted ties to Al-Qaeda, or even his participation in an airplane-as-weapon plot independent of 9/11 itself, that problem would not have been presented.

Conversely, the concern about not revealing sources, methods, and sensitive information is hardly unique to terrorism cases. In prosecutions of organized crime, street gangs, or drug traffickers and cartels, for example, the government often has equally strong incentives to protect the identity of confidential informants, undercover agents, and the technology used to obtain wiretaps or other recordings.<sup>140</sup> In such cases, the government must make strategic decisions that balance its ability to proceed in ongoing investigations with its desire to prosecute those against whom evidence is already strong. Perhaps it is empirically true that such difficulties will arise much more frequently in terrorism cases, even those comparatively mundane terrorism cases that rely on material support liability or other generalized facilitation theories.<sup>141</sup> But we should reject blanket, overbroad assertions that all terrorism cases implicate all the distinctive aspects of the terrorist threat in the same way. Instead, we should determine when and how the affected terrorism cases truly are distinctive compared to the ordinary criminal model. The normative point, therefore, is that we should write our definitions of eligibility for terrorist detention with exactly those aspects of distinctiveness in

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witness about one aspect of his testimony concerning the nature of Islamic extremism and Al-Qaeda).

138. See *id.* at 1107–08.

139. See *United States v. Moussaoui*, 382 F.3d 453, 471 (4th. Cir. 2004); Chesney & Goldsmith, *supra* note 16, at 1107.

140. For example, in *United States v. Salerno*, the government introduced evidence obtained by wiretaps and the testimony of cooperating witnesses to justify preventive detention pending trial. 481 U.S. 739, 743–44, 755 (1987).

141. See Chesney & Goldsmith, *supra* note 16, at 1106–07 (describing the high degree of problems related to the usage of classified information in terrorism prosecutions).

mind—and that we should limit the scope of eligibility for extraordinary detention to those situations which actually *are* extraordinary.

The second normative problem is that convergence places the law on precisely the wrong slippery slope. The legal developments described by Chesney and Goldsmith amount to, in essence, an increasing “criminalization” of the military model and an increasing “militarization” of the criminal model. On the one hand, it may well be that pressures internal to international law have gradually been leading to greater procedural regularity and increased protection of individual rights within the laws of war, independent of any response to terrorism.<sup>142</sup> On the other hand, for decades civil libertarians have fought long and hard against attempts to lessen the government’s burden in criminal cases, even when confronting the purportedly grave criminality of the day. Whatever else we might say about these trends, we should find them troubling to the extent they are driven by a response to the terrorist threat, rather than factors organic to the models themselves. That is, we should worry when extraordinary circumstances are used to justify a change in ordinary law.

Instead, once we have concluded extraordinary measures are necessary, we should limit their applicability by applying extraordinary law. In the context of terrorist detentions, this means defining eligibility for detention in a manner which limits eligibility to only those situations and persons that truly reflect what is extraordinary about the terrorist threat. By doing so, we avoid the danger that by creating rules to detain terrorists, we make it easier to detain accused criminals in all cases, or make it more difficult to detain battlefield adversaries in traditional wars. Not only may we not intend to do so, but we have no justification to do so, either—precisely because extraordinary terrorist detention is only justified by the extent of its extraordinariness.

Admittedly, the existence of extraordinary law creates a new slippery slope of its own. The definition of what counts as extraordinary will not be fixed for all time, and can be expanded to include other categories or situations not originally contemplated. But as between a slippery slope that undermines traditional

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142. See, e.g., Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 22 (2003) (citing Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239, 266–73 (2000)).

models and ordinary law, and a slippery slope that concerns the scope of what is expressly extraordinary law, the latter is normatively preferable.

*B. Eligibility for Terrorist Detention: Definitional Solutions*

If terrorist detentions are an extraordinary measure to deal with an extraordinary threat, then the real heart of the definitional difficulty is determining which aspects of the terrorist threat are sufficiently distinctive to warrant exceptional treatment. Overbroad generalizations should be rejected in favor of careful, nuanced consideration of which features of the terrorist threat most closely resemble traditional military enemies, which most closely resemble traditional criminal defendants, and which fall within the difficult middle ground between the two models. Only such an approach will produce definitions that accurately identify those aspects of the terrorist threat justifiably warranting extraordinary law in response.

In a recent article in the *Utah Law Review*, I proposed an “integrated” model for defining the terrorist threat.<sup>143</sup> Although the principal focus of that article was defining criminal defendants and military enemies for purposes of jurisdiction and culpability,<sup>144</sup> the same analysis equally applies to the definitional inquiry for purposes of preventive detention. The article’s conclusion applies equally as well: most individuals affiliated with terrorist organizations or involved with their activities should not be subjected to extraordinary detention power, but rather detained or incarcerated pursuant to ordinary criminal law.<sup>145</sup> Only those persons whose direct personal participation in terrorism most closely resembles involvement in traditional warfare should be eligible for *terrorist* detention.<sup>146</sup>

The integrated model begins by examining the basic structures of the criminal and military models generally.<sup>147</sup> It then considers the strengths and weaknesses of each model in addressing the

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143. See Priester, *supra* note 1, at 1257.

144. See *id.* at 1256.

145. See *id.* at 1257.

146. See *id.*

147. See *id.* at 1315.

terrorist threat specifically.<sup>148</sup> Finally, it integrates the two models to create a new model, designed to respond directly to the aspects of the terrorist threat which are distinct from those of the two existing models.<sup>149</sup>

The criminal model punishes a wide range of activity relating to the commission of crimes. On one end, criminal law proscribes direct personal participation in a completed offense or an inchoate offense of attempt and conspiracy.<sup>150</sup> Criminal law also imposes vicarious liability, through complicity and conspiracy doctrines, when the actor has specific intent to render some degree of indirect assistance to crimes directly committed by others.<sup>151</sup> On the other end, criminal law sometimes provides for facilitation liability on a lesser showing of intent, such as knowledge that assistance is being rendered to some form of criminal activity generally, but without knowledge or intent as to any particular offenses.<sup>152</sup> Facilitation liability has become increasingly important in terrorism cases.<sup>153</sup> Most prominent among the facilitation offenses is § 2339B, which punishes knowingly providing “material support” to a designated foreign terrorist organization, regardless of whether the defendant knew where, when, or how—or even if—his support would actually be used to serve particular terrorist objectives or to carry out a certain kind of terrorist attack.<sup>154</sup> Yet even with this range of liability doctrines, the criminal model is not without conceptual difficulties, such as how to define the scope of membership and goals of a conspiracy,<sup>155</sup> or how to address threats like sleeper-cell agents without specific instructions or unaffiliated terrorists without connections to a transnational organization.<sup>156</sup>

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148. See *id.* at 1315–22.

149. See *id.* at 1334.

150. See *id.* at 1258–62.

151. See *id.* at 1258, 1262–65. In complicity, the degree of assistance is aiding and abetting; in conspiracy, it is the conspiratorial agreement itself. While the *Pinkerton* doctrine can impose liability for crimes the defendant did not specifically intend to assist, *Pinkerton* only comes into play when the defendant has specific intent to be an accomplice or conspirator to at least some particular offense. See *id.* at 1262–64.

152. See *id.* at 1265 & nn.45–47.

153. See *id.* at 1266–67; see also Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 428 (2007).

154. See Priester, *supra* note 1, at 1266–67 (citing 18 U.S.C. § 2339B (2006)).

155. See *id.* at 1267–75.

156. See *id.* at 1274–75.

The military model, by contrast, focuses on classifications, which determine status and legal protections of individuals involved in or affected by warfare. The international laws of war, especially the Geneva Conventions, are primarily directed to governing international armed conflicts between nations.<sup>157</sup> Combatants can be targeted by military force and detained to incapacitate them from the battlefield; noncombatants may not be targeted and may be detained only in more limited circumstances.<sup>158</sup> Lawful combatants who comply with the laws of war must be detained as prisoners of war and given the corresponding privileges of that status, including combatant immunity from prosecution for their lawful participation in hostilities; unlawful combatants receive neither the privilege of prisoner of war status nor combatant immunity.<sup>159</sup> Any person, whether combatant or noncombatant, who participates in war crimes may be prosecuted for their involvement, although international law provides more constrained vicarious liability than U.S. criminal law.<sup>160</sup> The Geneva Conventions also govern non-international armed conflicts, such as civil wars, but only through the much less detailed legal framework of Common Article 3.<sup>161</sup> Significantly, in non-international conflicts the distinction between lawful and unlawful combatants is not maintained, and therefore soldiers may be punished for simple participation in hostilities due to the absence of combatant immunity.<sup>162</sup> Yet even on its own terms, unrelated to the terrorist threat, the laws of war have conceptual difficulties.<sup>163</sup> Despite their fundamental importance to the operation of the legal regime, the concepts of combatant and armed conflict are not defined with precision.<sup>164</sup> Similarly, the applicability of the laws of war to spatially and temporally discontinuous battlefields in some non-international armed conflicts has proven problematic.<sup>165</sup>

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157. *See id.* at 1279.

158. *See id.* at 1279–81.

159. *See id.* at 1281. There is some dispute over which provisions of the Geneva Conventions actually apply to unlawful combatants. *See id.* at 1286–90.

160. *See id.* at 1282.

161. *See id.* at 1290–93.

162. *See id.* at 1292.

163. *See id.* at 1304.

164. *See id.* at 1306, 1309.

165. *See id.* at 1312–13.



Ultimately, each model has insights and shortcomings in dealing with the threat of international terrorism.<sup>166</sup> The most useful insights of the criminal model are its contributions to differentiating the kinds and degrees of responsibility for involvement in terrorism.<sup>167</sup> The criminal model demonstrates that not all persons involved with Al-Qaeda are similarly situated, and there is a wide range of participation in terrorist activities, not all of which equally implicate the distinctive aspects of the terrorist threat.<sup>168</sup> On the other hand, the criminal model does not differentiate fully the terrorist threat from other dangerous activity also punished by criminal law.<sup>169</sup> Fortunately, that weakness is the military model's insight—identifying the aspects of the terrorist threat that are most war-like.<sup>170</sup> Al-Qaeda is not simply a transnational criminal enterprise; it also has features similar to a military force, which should be addressed accordingly.<sup>171</sup> But the military model has its own shortcomings derived from the same source—while the terrorist threat has aspects that are war-like, it also significantly diverges from traditional armed conflicts. The military model is not well suited to dealing with those latter aspects.<sup>172</sup>

The integrated model uses the insights of both models to develop a new model designed to address directly the distinctive aspects of the terrorist threat.<sup>173</sup> The most distinctive aspect of the terrorist threat is the nature of terrorism itself: violent, military-grade attacks against civilian populations,<sup>174</sup> carried out indiscriminately in situations that would constitute war crimes if made by traditional armed forces during a traditional war.<sup>175</sup> To the extent this is what the terrorist threat comprises, it is extraordinary compared to the baseline assumptions of the criminal model. To the extent the terrorist threat is posed by transnation-

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166. *See id.* at 1318.

167. *See id.*

168. *See id.*

169. *See id.* at 1319–20.

170. *See id.* at 1320.

171. *See id.* at 1313.

172. *See id.*

173. *See id.* at 1315.

174. Some terrorist attacks are launched against targets which arguably qualify as military, however, such as the missile attack on the U.S.S. Cole in Yemen and the September 11th attack on the Pentagon.

175. Terrorism, however, has not traditionally been defined as a war crime. *See* Priest-er, *supra* note 1, at 1300–01 & nn.221–25.

al, non-governmental organizations striking intermittently across the globe with no pretense of legitimate warfare in compliance with the laws of war, it is extraordinary compared to the baseline assumptions of the military model.

The integrated model defines the categories of terrorist involvement accordingly. The crucial factor justifying extraordinary treatment—including terrorist detention—is personal participation in a particular terrorist plot.<sup>176</sup> Direct involvement in a completed attack, including participation as an accomplice or conspirator to the specific planning and executing of the particular attack, makes the individuals not merely terrorists, but military enemies.<sup>177</sup> The same is true of individuals directly involved in a specific plot to carry out an imminent attack.<sup>178</sup> And of course direct involvement includes not only the “foot-soldier” terrorist operatives preparing for the attack, but also the “officers” of Al-Qaeda: organizers, planners, and leaders up the chain of command who take a personal role in devising or supervising the operations of others.<sup>179</sup>

On the other hand, the integrated model defines all other terrorist affiliations or activity as insufficiently war-like to justify extraordinary treatment, including terrorist detention.<sup>180</sup> This conclusion is probably uncontroversial to the extent it proposes that persons simply affiliated with a terrorist organization are, without more, ineligible for extraordinary detention.<sup>181</sup> It is probably not controversial to the extent it proposes that persons who have only rendered generalized assistance to a terrorist organization, like the charges on which Hamdan and Padilla were actually convicted,<sup>182</sup> should be treated exclusively as criminal defendants and punished for facilitation—and therefore not subjected to military jurisdiction or extraordinary terrorist detention.<sup>183</sup> But it

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176. *See id.* at 1331.

177. *See id.* at 1328, 1333.

178. *See id.* at 1330–33. The integrated model defines an “imminent” attack more broadly than the definition of attempt liability under traditional criminal law. *See id.* at 1332.

179. *See id.* at 1333.

180. *See id.*

181. *See id.* at 1328–29. In fact, simple association with a terrorist organization, without conduct amounting to facilitation, is not even subject to criminal punishment. *See id.* at 1328.

182. *See supra* text accompanying notes 98–110.

183. *See* Priester, *supra* note 1, at 1329. The integrated model therefore rejects the po-

probably is more controversial to the extent it proposes that sleeper cell operatives, like al-Marri, can only be punished for facilitation, and not detained as terrorists.<sup>184</sup> And it is probably most controversial to the extent it proposes that even persons who are affiliated with a terrorist organization and have engaged in activity beyond generalized facilitation, or who may even have begun preparations toward a particular contemplated terrorist attack, nevertheless are ineligible for extraordinary detention.<sup>185</sup> Under the integrated model, only *imminent* uncompleted attacks are sufficiently war-like to justify extraordinary treatment.<sup>186</sup>

Thus, the integrated model would limit extraordinary detention of terrorists to narrow criteria, far more restrictive than persons who would be considered "terrorists" under a more colloquial understanding. Yet this restrictiveness is justified by comparison to the ordinary law applied by the criminal and military models. A more expansive scope for terrorist detentions would undermine the analogy to warfare and fail to reflect the principles of the laws of war to which the analogy is being made. It should go without saying that many persons ineligible for terrorist detention under the integrated model are dangerous, deserving of punishment, and worthy of significant incapacitation. To say that they are *extraordinarily* so, however, is a different matter—and, ultimately, it is a conclusion the integrated model cannot support.

Nonetheless, one caveat should be noted. The integrated model takes as its starting point an analytical comparison of the criminal model to the military model. The integrated model therefore proceeds from the proposition that the extraordinariness of the terrorist threat comes from the extent to which that threat is war-like; that is, the extent to which the insights of the military model can be used to justify exceptional rules for terrorists. It is possible, however, that similarity to warfare and the military model is not the *only* way in which the terrorist threat is exceptional. For example, perhaps the concerns about covert intelligence operations in counterterrorism, and the need to preserve the secrecy of national security information acquired about ter-

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sition reflected in the MCA. See *id.* at 1300–03. Accordingly, the material support charges against Hamdan should have proceeded in civilian court, not a military commission.

184. See *id.* at 1333–34.

185. See *id.* at 1332.

186. See *id.*

rorist organizations and their members and activities,<sup>187</sup> have substantial weight independent of any analogy of terrorism to warfare. If this is true, then extraordinary rules may in fact be necessary to account for those concerns, but the justification for those extraordinary rules must come from the nature and significance of the non-warfare exceptional circumstances on their own merits. Just as with the integrated model itself, the burden of justifying extraordinary treatment falls to the party claiming that the ordinary models are insufficient to address the terrorist threat. It may be that other extraordinary conditions of the terrorist threat justify extraordinary terrorist detention above and beyond the narrow limitations of the integrated model. The integrated model itself, however, cannot justify them.

Finally, it is worth emphasizing that while the integrated model draws analytical insight from the military model, its ultimate analytical conclusions are substantially different from a straightforward application of the military model to Al-Qaeda and other transnational terrorist organizations. The integrated model rejects the claim that the international laws of war can be reflexively applied to the terrorist threat just like a threat posed by the military forces of a foreign country. Accordingly, the integrated model rejects the position taken by the Bush Administration since the earliest days of the war on terrorism,<sup>188</sup> as well as comparable provisions of the MCA.<sup>189</sup> The integrated model also rejects, for example, the positions taken by the dissenting judges in *Al-Marri*. Despite some similarities, the conflict with Al-Qaeda is not the same as a war with a traditional military force, and principles of the latter cannot simply be mapped over to the former jot for jot.<sup>190</sup> Nor is membership in Al-Qaeda, even as a participant in the preliminary stages of preparation for a terrorist attack, fully equivalent to enlistment in the national armed forces of a country

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187. See *supra* note 141.

188. See Priester, *supra* note 1, at 1294–95.

189. See *id.* at 1297–1304.

190. One dissenting opinion argues that the AUMF can simply decree the conflict with Al-Qaeda to be subject to the laws of war. See *Al-Marri v. Pucciarelli*, 534 F.3d 213, 286–87 (4th Cir. 2008) (per curiam) (Williams, C.J., concurring in part and dissenting in part), *cert. granted*, 129 S. Ct. 680 (2008). The opinion therefore concludes that *Quirin*, a case involving members of the German military during World War II, is controlling and makes al-Marri an enemy combatant. See *id.* at 284–85 (applying *Ex parte Quirin*, 317 U.S. 1, 35 (1942)).

engaged in traditional war with another state.<sup>191</sup> The analogy to traditional war has analytical force, but it is only that—an analogy. The integrated model identifies the similarities as well as differences with both the criminal and military models, and structures its principles for defining the terrorist threat accordingly.

### C. Due Process Requirements and Other Procedural Safeguards

Once we have defined the categories of persons eligible for terrorist detention, we must then determine the procedures that will be used to apply those categories to the factual situations posed by actual alleged terrorists. Both legally and pragmatically, there are difficult issues that must be resolved.

In an article in the *Rutgers Law Journal*, I argued that the Due Process Clause requires substantial procedural protections before a U.S. citizen may be indefinitely detained outside the regular criminal process as an enemy combatant.<sup>192</sup> Of course, the criminal process itself can be used to justify indefinite detention, such as a sentence of life imprisonment upon a criminal conviction.<sup>193</sup> But the very premise of extraordinary detention of U.S. citizens—whether as traditional wartime enemy combatants, as in *Quirin*,<sup>194</sup> or as accused terrorists subject to terrorist detention—is that certain extraordinary circumstances permit detention outside the criminal process. Accordingly, the procedures used to justify terrorist detention will be less than the full criminal process; that is, we would not use the procedures for adjudicating guilt under the criminal process to decide whether an adjudication of guilt under the criminal process is even required in the first instance.<sup>195</sup>

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191. Another dissenting opinion concedes that enemy combatant detention of members of non-state organizations (as opposed to national militaries) is limited to those organizations against which Congress has actually and specifically authorized military force. See *id.* at 323 (Wilkinson, J., concurring in part and dissenting in part). In defining which members of such organizations qualify as combatants eligible for enemy combatant detention, however, the opinion concludes that the category is expansive, including, for example, a person who “knowingly plans . . . conduct that . . . aims to harm persons or property,” or “members of an enemy sleeper terrorist cell that have taken steps, even if preliminary in nature, toward an act of destruction.” *Id.* at 324 (emphasis added).

192. See Priester, *supra* note 4, at 42.

193. See *id.* at 43–46.

194. See *id.* at 55–56 (citing *Ex parte Quirin*, 317 U.S. 1, 30–31, 36–46 (1942)).

195. See *id.* at 97.

On the other hand, we ought to reject arguments, such as those asserted by the Bush Administration in early enemy combatant detention cases, that extraordinary terrorist detention can be justified with only minimal procedural protections.<sup>196</sup> It is true that certain forms of detention, such as the custody imposed by an arrest, may be justified by relatively low levels of procedural protection, such as an *ex parte* hearing to determine probable cause to issue an arrest warrant.<sup>197</sup> But in those situations the detention or deprivation of liberty is temporary, not indefinite.<sup>198</sup>

Instead, due process requires procedural protections comparable to those required in other circumstances where the Supreme Court has permitted indefinite, non-punitive detention outside the regular criminal process.<sup>199</sup> The two closest analogies, therefore, are indefinite detention without bail pending a criminal trial and indefinite detention of individuals who are both dangerous and mentally ill.<sup>200</sup> In each of these situations, a person may be detained for purposes of incapacitation through procedures less than a criminal conviction. In both situations, however, the Court requires a significant degree of procedural protection. The burden of proof, for example, was placed at clear and convincing evidence,<sup>201</sup> a high threshold substantially more rigorous than a preponderance of the evidence. Similarly, adversary hearings with representation by counsel are required, and the person sought to be detained must be able to present evidence against detention and rebut the government's evidence in favor of detention.<sup>202</sup> Thus, even though Sixth Amendment criminal trial rights—such as counsel, confrontation, or compulsory process—do not apply of their own force in other detention proceedings, the Due Process Clause, which does apply, requires similar levels of procedural fairness when similar deprivations of liberty are at stake.

To justify an extraordinary terrorist detention of a U.S. citizen, therefore, the government must make its case through the same

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196. See *id.* at 95 (discussing the Bush Administration's position in the *Padilla* litigation); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 548–81 (2000) (Souter, J., concurring) (discussing the Bush Administration's position in the *Hamdi v. Rumsfeld* litigation).

197. See Priester, *supra* note 4, at 44–45.

198. See *id.*

199. See *id.* at 95–99.

200. See *id.* at 46–47.

201. See *id.*

202. See *id.* at 46 (discussing *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

high level of procedural protections. The government must prove the requisite factual allegations for terrorist detention by clear and convincing evidence. The proof must be made in an adversary hearing with representation by counsel, including a vibrant right to challenge, oppose, and rebut the government's factual allegations. Such procedural protections are inconsistent, for example, with heavy reliance on "secret" evidence introduced *ex parte*.<sup>203</sup> Similarly, hearsay affidavits or summary evidence not subject to adversarial testing would be strongly disfavored.<sup>204</sup> This does not necessarily mean such evidence is inadmissible for consideration, as it often would be in a criminal trial. Rather, holding the government to its burden, and taking the required procedural protection seriously, will compel the government to make its case in the strongest, most persuasive possible manner—just as it does when seeking to impose pretrial detention or civil commitment.

Consequently, just as the integrated model rejects a broad definition of persons eligible for extraordinary terrorist detention, the Due Process Clause rejects any significant weakening of the procedural protections due to the alleged terrorists sought to be extraordinarily detained. No matter how threatening some individuals may seem—whether organized crime bosses, sexual predators, or alleged terrorists—due process forbids indefinite detention except upon a highly persuasive showing made through rigorous adversarial testing. Perhaps sometimes the government will be unable to carry its burden, and a dangerous person will fail to be detained. But that problem is no different than any other form of indefinite detention, including the criminal process itself. Moreover, if the government cannot carry its burden, we should question whether its claim that the person is dangerous is even correct in the first place. Under the Constitution, when the balance between liberty and security involves the indefinite detention of a U.S. citizen, the balance favors liberty absent a highly persuasive showing.

Determining the applicable due process protections for foreign nationals is considerably more complicated. In many situations, aliens will not possess due process rights to the same extent as U.S. citizens—if at all. Therefore, the analysis applicable to citi-

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203. *See id.* at 105.

204. *See id.* at 107–08.

zens cannot simply be extended reflexively to cover all possible forms of terrorist detention.

Nevertheless, several aspects of the due process analysis for aliens are relatively straightforward. As emphasized in *Al-Marri*, lawful resident aliens and other foreign nationals with substantial connections to the United States are “persons” protected by the Due Process Clause against deprivations of life, liberty, and property to the same extent as citizens.<sup>205</sup> Unlike citizens, however, aliens can be subject to removal proceedings, including statutory provisions for detention pending the proceeding or detention pending removal.<sup>206</sup> But the Supreme Court has held that these statutes do not authorize indefinite detention, even of aliens finally ordered removed.<sup>207</sup> Thus, immigration law provides no additional analogy for indefinite detention. Accordingly, to the extent aliens with due process rights are subject to extraordinary terrorist detention, they must receive the same procedural safeguards as citizens, described above.

On the other hand, foreign nationals abroad with no connections to the United States are not persons protected by the Due Process Clause.<sup>208</sup> Barring a major shift in the Supreme Court’s jurisprudence of the Constitution’s extraterritorial effect, such persons have no claim on the merits to challenge the constitutionality of their detention abroad by agents or officials of the United States. Any claims they might have against detention abroad would have to come either from international law, such as treaties to which the United States is a party, or from statutory law enacted by Congress.

Foreign nationals captured abroad but brought to the United States for prosecution or detention are in a more complicated position. Like other aliens, they would have no direct constitutional challenge to the circumstances of their capture abroad because they possessed no constitutional rights at that point. Like other criminal defendants, however, they are entitled to the full consti-

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205. See *Al-Marri v. Pucciarelli*, 534 F.3d 213, 231 n.14 (4th Cir. 2008) (per curiam) (Motz, J., concurring), *cert. granted*, 129 S. Ct. 680 (2008); see also Priester, *supra* note 4, at 76 n.165.

206. See *supra* notes 5–6.

207. See *Demore v. Kim*, 538 U.S. 510, 531 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

208. See *supra* note 73 and accompanying text.



tutional protections for trial rights when they are prosecuted in U.S. courts.<sup>209</sup> But it is unclear the extent to which their involuntary presence in the United States provides them with a due process challenge to the factual basis for their detention. As a matter of constitutional law, the courts very well might determine the degree of due process protection to be minimal, or even nonexistent.

Thus, constitutional mandates of due process would seem to permit a stark divergence between the procedural safeguards necessary for the terrorist detention of U.S. citizens and similarly protected aliens on the one hand, and the terrorist detention of all other foreign nationals on the other. As a legal matter of constitutional extraterritorial jurisdiction, such an outcome might make sense. But it does not follow that it would be good *policy* for the United States to undertake terrorist detentions of foreign nationals abroad without meaningful procedural protections. In fact, pragmatic considerations point in the opposite direction.

Two factors which might have consequences in terrorist detention cases are the location of capture and the location of detention. At times, the Bush Administration argued that procedural concessions must be made to account for these factors.<sup>210</sup> Yet the pragmatic differences are overstated, and these factors should not be found to justify as great a divergence in procedural safeguards as the Constitution might allow.<sup>211</sup>

The Bush Administration was correct that the location of capture matters when that location is an actual war zone in the traditional sense, like the battlefields of Afghanistan or Iraq. But this is true, as noted above, because detentions of traditional combatants in traditional war zones are justified by the laws of war, independent of any connection to terrorism. There is no need to invoke terrorism detentions in situations where the Geneva Conventions clearly apply and authorize the detention of enemy combatants, and even noncombatants posing security risks.<sup>212</sup> Foreign nationals captured in war zones by U.S. military forces, therefore, are not without procedural safeguards—they are protected by the applicable provisions of the Geneva Conventions. In

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209. See *supra* note 76 and accompanying text.

210. See *supra* notes 197–98 and accompanying text.

211. See Priester, *supra* note 4, at 100–01.

212. See *supra* text accompanying notes 159–60.

such circumstances, it would be inappropriate to intrude the Due Process Clause into military operation in foreign theaters of traditional war.

But the same reasoning, of course, applies even to U.S. citizens captured in traditional war zones. The Court in *Hamdi* recognized as much. Although the Court splintered on the degree of procedural safeguards required, seven justices agreed that the showing needed to justify a citizen enemy combatant detention was contextually affected, at least to some degree, by the circumstances of a battlefield capture in a traditional war zone.<sup>213</sup> Thus, when a war zone detention is involved, the location of capture matters, regardless of nationality.

When the capture involved is *not* in a war zone, the pragmatic justifications for dramatically reduced procedural safeguards evaporate. For U.S. citizens, the point should be obvious. The territory of the United States is not, in any traditional sense, a war zone subject to martial law or the laws of war. Therefore, the holding in *Ex parte Milligan*, prohibiting military jurisdiction over civilians,<sup>214</sup> controls and the regular criminal process, not military detention or trials, applies.<sup>215</sup> But the same is true of most locations on the rest of the globe. If Chicago and Peoria are not war zones, neither are London or Madrid. What justification is there for categorically lessening the government's burden of proof simply because the location of capture was the geographical territory of another country? If the procedural requirements of criminal trials are not lessened when the charges are terrorist crimes that occurred overseas,<sup>216</sup> why should the procedural safeguards of terrorist detention be categorically lessened when the capture took place abroad? War zones are a special case, but foreign territory generally is not.

Once again, the same reasoning applies to non-war-zone captures regardless of nationality. Peoria is no more a war zone for foreign nationals than it is for U.S. citizens, and Paris is no more

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213. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 527–38 (2004) (O'Connor, J., plurality opinion); *id.* at 553 (Souter, J., concurring); *id.* at 587–88 (Thomas, J., dissenting).

214. *Ex parte Milligan*, 71 U.S. 2, 6, 130 (1866).

215. See *Al-Marri v. Pucciarelli*, 534 F.3d 213, 230–31, 235–36 (4th Cir. 2008) (per curiam) (Motz, J., concurring), *cert. granted*, 129 S. Ct. 680 (2008).

216. See, e.g., *United States v. Yousef*, 327 F.3d 56, 112–14 (2d Cir. 2003) (conspiracy to bomb U.S. commercial airliners in southeast Asia); *United States v. El-Hage*, 213 F.3d 74, 77, 79, 81 (2d Cir. 2000) (1998 embassy bombings in Africa).

a war zone for French nationals than it is for U.S. citizens. Outside the context of traditional wars between nations,<sup>217</sup> nationality of the captive alone does not change the nature of the location where the person was captured.

Consequently, while war zone captures warrant special treatment, the procedural safeguards applicable to all other terrorist detentions should not vary based simply on the location where the alleged terrorist was captured. Nor should the procedural safeguards vary based simply on the nationality of the detainee. While these criteria may have legal significance in some contexts, there is no sound reason—as a matter of the categorical level of procedural safeguards—to distinguish among, for example, an American captured in Peoria, a Qatari captured in Peoria, a Qatari captured in Qatar, and an American captured in Qatar. None of these are war zone captures, and all are equally likely to be eligible, or ineligible, for terrorist detention.

For similar reasons, the location of detention should not categorically alter the applicable procedural safeguards except in war zones. On the one hand, a detainee captured abroad, of whatever nationality, should not receive a windfall simply by virtue of having been brought involuntarily to the United States. On the other hand, the government should not be permitted to manipulate procedural safeguards by selecting the location of detention, which may or may not have anything to do with either the location of capture or the merits of the underlying factual allegations of participation in terrorist activity. Detention of battlefield captives in war zones is a special case, of course, but its relevance is limited. There is no sound reason to distinguish categorically among, for example, a person held in FBI custody in New York, a person held in FBI custody in Paris, a person held in military custody at a U.S. base in Germany, or a person held in military custody at a U.S. base in South Carolina. None of these are war zone detentions, and all are readily subject to procedural safeguards to justify their detention.

The lack of justification for allowing location of capture or detention to *categorically* affect the procedural safeguards applicable to terrorist detentions, however, does not preclude the possibility that, in some situations, *contextual* factors may have an

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217. See generally Cole, *supra* note 115 and accompanying text.

effect. For example, in some cases a significant amount of the evidence against an accused terrorist may have been gathered by investigative or military agents of another country.<sup>218</sup> It may not be pragmatically possible as a matter of foreign relations or expense, or potentially even legally possible as a matter of that country's law, to provide that evidence in a terrorist detention hearing in the same manner as if it had been gathered by agents of the U.S. government. In such cases, a court might tolerate more extensive reliance on hearsay or summary evidence than it normally would. Yet the court should do so only when such concerns have been demonstrated in the specific context of the actual case. Overbroad, categorical assertions of difficulty should be rejected; only particular, contextual difficulties should be considered. And even then, courts should be wary of any argument for reducing the government's overall burden of proof or eliminating the detainee's ability to oppose and rebut the allegations against him. Contextual difficulties can justify marginal modifications to procedural safeguards, but they cannot change the fundamental requirements of due process.

In the end, significant procedural safeguards should be required before *terrorist* detention may be imposed on anyone, regardless of nationality or location. Like military detention under the laws of war, terrorist detention is an extraordinary detention model. Unlike war zone detentions pursuant to the traditional laws of war, constitutional due process requires a significant level of procedural safeguards before extraordinary, indefinite detention may be imposed on U.S. citizens accused of terrorism. And when war zones are not implicated, pragmatic considerations undermine the argument for making a stark distinction between U.S. citizens and foreign nationals, or between persons captured in the United States or abroad. The terrorist threat has war-like aspects, but it is not a traditional war with traditional war zones. The constitutional law and public policy of terrorist detentions must be designed accordingly.

#### D. *Habeas Corpus, Suspension, and Statutory Authorization*

Ideally, Congress should codify principles for terrorist detention in statutory form. These laws should address not only the de-

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218. See Chesney & Goldsmith, *supra* note 16, at 1107.

finitional and procedural issues discussed above, but also the availability of the writ of habeas corpus to challenge terrorist detentions. Most importantly, this will allow the courts to interpret express statutory language, rather than struggle with more difficult controversies over implied meanings and inherent powers.

First, Congress should codify terrorist detention as a separate legal regime of detention—a separate model—from detentions already authorized under the criminal process and the laws of war. This will avoid the normative problems of modifying those models to deal with the divergent challenges posed to each by the terrorist threat. It will instead address the threat of terrorism with a model tailored to its unique features, and allow the other two models to continue to serve their traditional paradigm situations. As described above, Congress should define the categories of persons eligible for this extraordinary terrorist detention model narrowly. All other persons involved in varying degrees with terrorist organizations and activities should be detained and punished under the criminal model, including facilitation liability for many forms of indirect, generalized, or attenuated involvement.

Second, Congress should clarify by statute who may file a habeas action and use the Great Writ to challenge the factual basis for their terrorist detention. The law should provide that U.S. citizens and aliens with clear due process rights may file such a challenge to contest their terrorist detention in all circumstances, regardless of the location of their capture or the location of their detention.<sup>219</sup> Similarly, the law should provide that all persons subject to terrorist detention within the United States may file such a challenge, including aliens captured abroad and brought to the United States for detention. Terrorist detention within the United States is an extraordinary procedure, and anyone subject to it should be permitted statutorily to challenge their designation irrespective of their otherwise applicable constitutional protections.

At the same time, Congress also should specifically clarify a related issue, and provide that petitions by persons detained within the United States pursuant to the ordinary law of either of the other two models would fail to state a claim on which Great Writ

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219. Of course, if the government can demonstrate that the detention is in fact a battlefield detention from a war zone, and not a terrorist detention, then the petition will fail on the merits.

relief can be granted. For persons detained pursuant to the criminal law, the ordinary criminal process provides means for challenging pretrial detention without bail and post-conviction incarceration.<sup>220</sup> For persons detained pursuant to the laws of war, such as prisoners of war or unlawful enemy combatants who are battlefield captures from a traditional war zone, compliance with the provisions of the Geneva Conventions is sufficient to ensure that the detentions are not in violation of any federal rights cognizable in a habeas action.<sup>221</sup> Such a clarification disposes of Justice Scalia's concern about the World War II prisoners of war, who were detainees fully within the military model on its own terms,<sup>222</sup> while distinguishing terrorist detainees as subject to a different, extraordinary model to which different procedural entitlements and habeas challenges exist.

Third, Congress must resolve the difficult policy questions regarding terrorist detentions of foreign nationals abroad. Under presently interpreted constitutional principles, such persons probably lack the protection of either the Due Process Clause or the writ of habeas corpus. As a matter of domestic law, Congress probably is free to legislate any procedures it wants for such detainees. Providing too little procedure, or none at all, might run afoul of international law obligations under treaties to which the United States is a party—but that is a political choice the political branches are free to make.<sup>223</sup> Nonetheless, as a matter of policy, Congress should seriously consider providing statutorily for procedures by which foreign nationals subject to terrorist detention by U.S. agents abroad can contest the factual basis for their detention. Foreign nationals detained abroad pursuant to U.S. criminal jurisdiction, for example, could seek to oppose extradition; foreign nationals detained in a war zone pursuant to U.S. military authority are covered by the various procedural detention provisions of the Geneva Conventions. Even if those procedures would not include access to Article III courts and the writ of

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220. See 18 U.S.C. § 3145(c) (2006) (providing for interlocutory appeals of pretrial detention); 28 U.S.C. § 2255 (2006 & Supp. 2007) (providing for post-conviction challenges to federal convictions).

221. See 28 U.S.C. § 2241(c)(3) (2006) (providing that the writ of habeas corpus is available to a prisoner arguing that he or she is “in custody in violation of the Constitution or laws or treaties of the United States”).

222. See *supra* notes 111–16 and accompanying text.

223. See, e.g., Oona A. Hathaway, *Treaties' End: The Past, Present and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1327 n.270 (2008).

habeas corpus, detainees under a new, extraordinary model should also receive at least some process for challenging their eligibility for terrorist detention with at least some minimal procedural safeguards, if not more.<sup>224</sup>

Finally, Congress should emphasize that none of its statutes relating to terrorist detentions constitute an invocation of its power to suspend the availability of the writ of habeas corpus under the Suspension Clause. This would ensure that the statutory scope of the writ is at least coextensive with the constitutional scope of the writ, allowing courts to construe the statutes accordingly, rather than finding them unconstitutional as in *Boumediene*.<sup>225</sup>

#### IV. CONCLUSION

Legal reform of terrorist detentions is a complicated problem without a simple solution. Nonetheless, there is great opportunity for substantial improvement upon the existing indeterminacies in the law. Reform should come through legislation, not only to expressly authorize terrorist detention, but also to carefully define and circumscribe its scope. In particular, legislation should define the categories of persons eligible for, and prohibited from, terrorist detention, and prescribe the procedures that will be provided to the individuals sought to be detained pursuant to those categories. Controversies over habeas corpus and due process can be resolved, permitting the courts to implement a statutory detention regime, rather than struggle to create one in the first instance. In the end, statutory reform of terrorist detention is the optimal solution for resolving all the difficult issues.

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224. See *supra* text accompanying notes 203–13.

225. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008).