

**AS NECESSITY CREATES THE RULE: *EISENTRAGER*,
BOUMEDIENE, AND THE ENEMY—HOW STRATEGIC REALITIES
CAN CONSTITUTIONALLY REQUIRE GREATER RIGHTS FOR
DETAINEES IN THE WARS OF THE TWENTY-FIRST CENTURY**

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I. INTRODUCTION: AT THE INTERSECTION OF THE STRATEGIC AND THE
CONSTITUTIONAL

To read a detainee decision is to confront a parade of horrors destined to occur if courts are allowed to second-guess the battlefield decisions of the commander and the President. “It would be difficult to devise more effective fettering of a field commander,” Justice Jackson wrote for the *Johnson v. Eisentrager* majority, “than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.”¹

More recently, in *Hamdi v. Rumsfeld*, Justice Thomas invoked Justice Jackson to similarly expound upon the dangers of “judicial interference” in foreign policy:

The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. . . . They are delicate, complex, and involve large elements of

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¹ 339 U.S. 763, 779 (1950).

prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.²

In the Court's latest detainee decision, *Boumediene v. Bush*, Justice Scalia wrote a scathing indictment of judicial interference on the battlefield, arguing that the majority's decision "will almost certainly cause more Americans to be killed"³ and forebodingly concluding that:

[M]ost tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

The Nation will live to regret what the Court has done today. I dissent.⁴

While Justices Thomas and Scalia are writing in dissent, what is strikingly absent, even in cases which uphold restrictions on presidential discretion, is any parallel parade of horrors of what is likely to occur if commanders and presidents are *not* answerable to the courts.

But in counterinsurgencies and the types of conflicts the United States will increasingly face in the so-called Fourth Generation,⁵ adherence to law has become a strategic imperative. "Most thoughtful military and intelligence professionals," a former Clinton State Department official has noted, "have come to believe that compliance with legal norms is a strategic as well as a moral necessity."⁶

Nowhere is this view more prominent than in the *U.S. Army/Marine Corps Counterinsurgency Field Manual*, published in December 2006 by General David Petraeus and his Marine counterpart, Lieutenant General James Amos.⁷ The *Field Manual* officially notes the eviscerating strategic effects of "illegitimate actions . . . involving

2 Hamdi v. Rumsfeld, 542 U.S. 507, 582 (2004) (Thomas, J., dissenting) (citing *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)); *see also* *Hamdan v. Rumsfeld*, 548 U.S. 557, 691 n.6 (2006) (Thomas, J., dissenting) ("[T]he President's ability to address this 'new paradigm' of inflicting death and mayhem would be completely frozen by rules developed in the context of conventional warfare.").

3 *Boumediene v. Bush*, 128 S. Ct. 2229, 2294 (2008) (Scalia, J., dissenting).

4 *Id.* at 2307.

5 *See generally* THOMAS X. HAMMES, *THE SLING AND THE STONE: ON WAR IN THE 21ST CENTURY* (2004) (discussing the evolved nature and characteristics of fourth-generation warfare).

6 Tom Malinowski, *Restoring Moral Authority: Ending Torture, Secret Detention, and the Prison at Guantanamo Bay*, 618 ANNALS AM. ACAD. POL. & SOC. SCI. 148, 148 (2008).

7 U.S. ARMY-MARINE CORPS, *COUNTERINSURGENCY FIELD MANUAL* (Univ. of Chicago Press 2006) [hereinafter *FIELD MANUAL*].

the use of power without authority,” including “unlawful detention, torture, and punishment without trial.”⁸

The *Field Manual* not only represents the first time since the end of the Vietnam War that the United States has thought systematically about, and developed doctrine to cover, the complex, asymmetric warfare that will define much of the twenty-first century, but it also represents the first major attempt to realize the strategic value of law.

This conception of law as strategic imperative is a radical departure from the conceptions of self-styled realists, neoconservatives, and others who believe that the changing nature of warfare requires new and more permissive rules unregulated by the Constitution and by the courts.⁹ Just prior to the second Gulf War, General Charles Horner wrote to the American commander General Tommy Franks:

In the end, if we are going to lead then we must be considered the madmen of the world, capable of any action, willing to risk any thing to achieve our national interests. . . . If we are to achieve noble purposes we must be prepared to act in the most ignoble manner.¹⁰

But now included in the primary actions the *Field Manual* deems inimical to the success of counterinsurgency operations (“COIN”) are those that cut against the impartial application of the law and the use of power without authority. Arbitrariness, inconsistency, and other examples of legal double standards “reduce[] credibility and undermine[] COIN efforts.”¹¹

But so far, no recent Supreme Court or appellate court decision has weighed the strategic value and function of law in its constitutional calculus. No law review article, federal opinion, or even federal court brief has yet to even mention the *Field Manual*—despite myriad “strategic” arguments leveled against the application of, and adherence to, law in the global war on terror. The arguments before the Court in *Boumediene v. Bush* also did not seize the opportunity that the official doctrine affords to reveal a theory whereby the presumption shifts from one in which the Court must justify its oversight to one in which the Government must justify the Court’s exclusion.

⁸ *Id.* at para. I-132.

⁹ As Sarah Sewall, Director of the Carr Center on Human Rights at Harvard University, explains, the *Field Manual* “challenges much of what is holy about the American way of war. . . . Those who fail to see the manual as radical probably don’t understand it, or at least understand what it’s up against.” Sarah Sewall, *Introduction to the University of Chicago Press Edition: A Radical Field Manual*, in FIELD MANUAL, *supra* note 7, at xxi.

¹⁰ MICHAEL R. GORDON & BERNARD E. TRAINOR, COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ 517 (2006).

¹¹ *Id.* at para. I-140.

This Article provides just such a theory.

Ultimately, the legal community needs to understand that the Constitution is a strategic document. It was born of war, grew up in war, and can still successfully steer the nation through the wars of the twenty-first century. But all three constitutional branches of government must fulfill their roles. To fully defend the country against all enemies foreign and domestic, the courts must satisfy their constitutional responsibility to ensure that expansive battlefield accommodations to military necessity are available only when necessary.

And the strategic environment of today has shifted. Contrary to Justices Scalia and Thomas's protestations and General Horner's madmen-of-the-world-tactic, due process rules are required for a successful strategy in the global war on terror. In fact, one of the most influential defense strategists considers American leadership of "new rule sets" a central pillar of an effective twenty-first century national security strategy.¹² If that situation arises, and the political balances fail to acknowledge the shift, the courts should unapologetically step in.

None other than *Johnson v. Eisentrager*,¹³ traditionally the Government's chief precedent in support of the draconian restrictions of detainee rights, best articulates the strategic and pragmatic nature of the Constitution. It does not stand for the proposition that the Constitution compels exclusion of habeas rights simply because the defendants were aliens held in Germany. Rather, it restricted these rights because the aliens were: (1) "actual enemies,"¹⁴ defined in the Constitution's "primary meaning" as "subject[s] of a foreign *state* at war with the United States"¹⁵; and (2) because those aliens lacked sufficient contacts with the United States to make extension of habeas pragmatic and strategic. As Justice Jackson wrote: "[T]he nonresi-

¹² See generally THOMAS P.M. BARNETT, *THE PENTAGON'S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY* (2004). Barnett writes that what was

scariest about the rule-set misalignment of the 1990s was that the world was trying to administer a very complex system using tools designed for another era. The package of new rule sets America forged after WWII was . . . designed to prevent war among great powers, not necessarily to deal with rogue regimes and transnational terrorist networks.

Id. at 32–33. But rather than do away with rules, Barnett proposes new rule sets to cope with the new era. He is not specific on what those rules should be, but he focuses on the objective of politically and economically integrating disconnected or periphery nations into the core through a common, mutually-agreed upon set of rules, or "global adherence to protocols." *Id.* at 356.

¹³ 339 U.S. 763 (1950).

¹⁴ *Id.* at 778.

¹⁵ *Id.* at 769 n.2 (emphasis added).

dent *enemy* alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, *for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy.*¹⁶

In other words, the strategic value of constitutional adherence is a two-part test. This Article will demonstrate: (a) that only if an individual fits into the tightly circumscribed constitutional category of “the enemy” is he eligible for indefinite detention without trial as a prisoner of war (“POW”); and (b) that he can be deprived of no more due process than is pragmatic or strategic. If the individual is a nonstate actor, he is not eligible for imprisonment without trial as a prisoner of war because war exists only between states and legal enemies are always state actors. There are ways to constitutionally target nonstate actors,¹⁷ but expanding the definition, and treatment, of enemies beyond its foundational state nexus subverts core elements of the Constitution, including the principle of the separation of powers and the ban on bills of attainder. It also proves strategically deleterious in the battles of the twenty-first century.

II. *EISENTRAGER* AND “THE ENEMY”

In *Eisenrager*, the Supreme Court held that Germans convicted of war crimes by a military tribunal in China and imprisoned in Germany could not bring a writ of habeas corpus to challenge the legitimacy of their confinement.¹⁸ While they were civilian employees of the German government in China, the petitioners were found guilty of aiding the Japanese war effort after the German surrender on May 8, 1945.¹⁹

The Supreme Court’s *Boumediene* decision is the most recent case to analyze *Eisenrager* in depth, but while rightfully spending a great deal of time on *Eisenrager*’s functional prong, the majority nonetheless skipped over the prerequisite determination. They never examined whether *Boumediene* was an enemy in the first place. Only over properly defined enemies does the Constitution permit a class-based, and nearly complete, denial of due process rights without valid suspension of habeas corpus.

¹⁶ *Id.* at 776 (emphases added).

¹⁷ *See infra* Part II.G.

¹⁸ 339 U.S. at 790–91.

¹⁹ *Id.* at 765–66.

This Part of the Article deals with the precise nature of being an “enemy.” It demonstrates that consistent with practice up to and including *Eisentrager*, an individual must have a connection with a state engaged in hostilities against the United States before he can qualify for the limited category of persons subject to the most minimal due process protections. As will be discussed in Part II.G, this constitutional principle does not imply that the military, with the President as Commander in Chief, cannot target nonstate actors like Al Qaeda in the right circumstances, but it means that any captured survivors are not prisoners of war, and thus must be afforded greater due process protections.

A. *Defining War*

In the Constitution, there is no enemy without war; and there is no war without states. “From the time when the first modern states began to emerge,” the legal and political scholar Philip Bobbitt writes, “only states have made war.”²⁰ While Bobbitt correctly asserts that, in a practical sense, “[w]e are at war no less than when a conventional state surprised the United States with an attack in 1941,”²¹ he recognizes that for the Constitution, war exists only between sovereign nations.

Children and animals may fight, but they cannot make war. When crime syndicates fight—often lethally—they do not make war and their crimes are not war crimes. Since the Renaissance, brigands, pirates, feudal and religious orders, even corporations (like the Dutch East India Company) might fight but only states could sanction violence as war.²²

With this history as their backdrop, the Framers derived the constitutional framework for war and the use of force. They provided that, absent invasion, Congress brings the state of war into being,²³

20 PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 125 (2008).

21 *Id.* at 177.

22 *Id.*

23 U.S. CONST. art. I, § 8, cl. 11. The authorization to use force does not have to take the form of a declaration. *See, e.g.*, Harold Hongju Koh, Comment, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122, 126 (1991) (arguing that in practice Congress does not need to issue a formal declaration in order to “constitutionally manifest its understanding and approval for a presidential determination to make war”); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2062 (2005) (“In sum, in light of the longstanding political branch practice of initiating war without a formal declaration of war, consistent judicial approval of this practice, changes in international law that render war declarations less relevant, and general scholarly consensus, it seems clear that Congress need not issue a formal dec-

and the President has the power—though not *carte blanche* power²⁴—to prosecute the war and deal with the enemies. They did not explicitly define “war” in the Constitution, but those that greatly influenced the Framers’ thinking on the matter—including Hugo Grotius, Samuel von Pufendorf, Emmerich de Vattel, Jean Jacques Rousseau, and Jean Jacques Burlamaqui²⁵—all considered war a contest between states. Rousseau, for example, wrote that:

War is not therefore a relationship between one man and another, but a relationship between one state and another. In war private individuals are enemies only incidentally: not as men or even as citizens, but as soldiers . . . each state can have as enemies only other states and not men . . .²⁶

For the Framers, the magnitude of the threat or attack did not render it a war, only the source of it did. Burlamaqui, the Swiss jurist whose works joined the pantheon of international law texts that crowded the personal libraries of many of the Framers,²⁷ considered the magnitude of the conflict to be a subcategory of war, which only existed between sovereign nations:

A perfect war is that, which entirely interrupts the tranquillity of the state, and lays a foundation for all possible acts of hostility. An imperfect war, on the contrary, is that, which does not entirely interrupt the peace, but

laration of war in order to provide its full authorization for the President to prosecute a war.”).

- 24 David Barron and Martin Lederman, in their magisterial two-part study of presidential war powers in relation to Congress, forcefully argue that original understanding and long-standing practice demonstrate that even once a war has been declared, Congress can restrict the President’s ability to prosecute the war. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 693 (2008) (“[W]e disclaim the traditional assumption that Congress has ceded the field to the President when it comes to war, and proceed from a contrary premise: that even when hostilities are underway, the Commander in Chief often operates in a legal environment instinct with legislatively imposed limitations.”); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 946–48 (2008) (discussing the three branches of government’s views of presidential war-making powers from 1789 to 2008, and concluding that Congress has taken a more active role in the past and that the President has traditionally accepted congressional limitations on his power).
- 25 See Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 689–97 (1972) (arguing that European and English ideas and philosophers shaped eighteenth century American ideas about war).
- 26 JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT: DISCOURSE ON THE ORIGIN OF INEQUALITY, DISCOURSE ON POLITICAL ECONOMY 21–22 (Donald A. Cress ed., trans., Hackett Publ’g Co. 1983) (1762).
- 27 See Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely’s War and Responsibility*, 34 VA. J. INT’L L. 903, 909 (1994) (book review) (asserting that Burlamaqui’s writing was popular among the educated American class).

only in certain particulars, the public tranquillity being in other respects undisturbed.

This last species of war is generally called reprisals, of the nature which we shall give here some account. By reprisals then we mean that imperfect kind of war, or those acts of hostility, which sovereigns exercise against each other, or, with their consent, their subjects, by seizing the persons or effects of the subjects of a foreign commonwealth, that refuseth to do us justice²⁸

Accordingly, this distinction between perfect and imperfect war found its way into Article I of the U.S. Constitution's distinction between the power to "declare War,"²⁹ which denotes a perfect war, and the power to "grant Letters of Marque and Reprisal,"³⁰ which denotes imperfect war.

But war, in whatever form and whatever the magnitude, existed exclusively between two nations.

The early Supreme Court decisions perfectly reflected this understanding. Justice Washington in *Bas v. Tingy*, for example, stated: "It may, I believe, be safely laid down, that *every* contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war."³¹

Sixty-three years later, during the Civil War, President Lincoln commissioned the first codification of the rules of war, which retained the state-centric construct, and made no mention of magnitude. In Article 20 of Lincoln's General Orders No. 100, originally drafted by Francis Lieber, the President simply defined public war as a "state of armed hostility between sovereign nations or governments."³²

In the Civil War *Prize Cases*, "war" was again "well defined" as the "state in which a *nation* prosecutes its right by force."³³ In a public war, the belligerent parties are exclusively "independent nations."³⁴

28 2 J. J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 180 (Thomas Nugent trans., 5th ed. 1807) (emphasis omitted).

29 See U.S. CONST. art. I, § 8, cl. 1, cl. 11 ("The Congress Shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . .").

30 *Id.*

31 *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800) (emphasis added).

32 FRANCIS LIEBER, WAR DEP'T, ADJUTANT GENERAL'S OFFICE, GENERAL ORDERS NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 20 (1863), in LIEBER'S CODE AND THE LAW OF WAR (Richard Shelly Hartigan ed., 1995).

33 *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 666 (1863) (emphasis added); see also *Bas*, 4 U.S. (4 Dall.) at 40 (defining "public war" as "every contention by force between two nations, in external matters, under the authority of their respective governments").

Over 150 years after *The Prize Cases*, the Supreme Court in *Hamdan v. Rumsfeld* left the Framers' state-centric definition of war intact despite the severity of the 9/11 attacks and Al Qaeda's continuing threat. The *Hamdan* Court held that the conflict between Al Qaeda and the United States in Afghanistan did not fall under the Geneva Conventions' definition of an international armed conflict,³⁵ a term that has come to replace "war" in the modern era, precisely because it was not a "conflict between nations."³⁶

The only exception to this state-on-state construct is not really an exception at all, but simply a recognition that entities which possess all the characteristics of states (to include holding territory), but merely lack formal recognition, are nonetheless states for whom war is a possibility. As the *Prize* Court explained of the U.S. South during the Civil War:

A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.³⁷

³⁴ *The Prize Cases*, 67 U.S. (2 Black) at 666.

³⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 628–30 (2006) (holding that the Geneva Conventions' protections do not apply to a conflict with Al Qaeda on the grounds that Al Qaeda is not a signatory to the Conventions); *see also id.* at 641–42 (Kennedy, J., concurring) (noting that the law of war allows military commissions to try individual offenders).

³⁶ *Id.* at 630.

³⁷ *The Prize Cases*, 67 U.S. (2 Black) at 666–67. In international law, the criteria are slightly different, but the end result is the same—to be a lawful belligerent, a fighting force must possess sufficient elements of sovereignty to wage "war." The Third Geneva Convention, for example, allows soldiers of non-state militias or of "other volunteer corps" to qualify for prisoner of war status normally reserved to regular soldiers of the High Contracting Parties, so long as they fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly; and
- (d) that of conducting their operations in accordance with the laws and customs of war.

Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2), *first signed* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *see also* *Coleman v. Tennessee*, 97 U.S. 509, 517 (1897) ("The doctrine of international law on the effect of military occupation of enemy's territory upon its former laws is well established. Though the late war [i.e., the Civil War] was not between independent nations, but between different portions of the same

B. *But What About “Slave Traders, Pirates, and Indian Tribes”?*

Modern international law theorists have consistently considered without demur that war remains a “contention between two or more States through their armed forces”³⁸ Even post-9/11, “[o]ne element seems common to all definitions of war,” Yoram Dinstein notes in the fourth edition to his leading treatise. “In all definitions it is clearly affirmed that war is a contest between states.”³⁹

Jack Goldsmith, former Deputy Assistant Attorney General, Office of Legal Counsel under President George W. Bush, has been at the forefront of the charge to consider hostilities between states and non-state actors as war; but his view rightfully remains in the minority,⁴⁰ and his arguments conflate the constitutional ability of the President to use force against nonstate actors with the constitutional consequences of a state of war.⁴¹ For example, he and Curtis Bradley write that “a number of prior authorizations of force have been directed at non-state actors, such as slave traders, pirates, and Indian tribes.”⁴²

But “Indian tribes” were as much Native American nations as any other nation-state.⁴³ In fact, in Article I, the Constitution effectively

nation, yet having taken the proportions of a territorial war, the insurgents having become formidable enough to be recognized as belligerents, the same doctrine must be held to apply.”)

38 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 202 (H. Lauterpacht ed., 7th ed. 1952).

39 YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 5 (4th ed., Cambridge University Press 2005) (quoting Clyde Eagleton, *The Attempt to Define War*, 291 INT’L CONCILIATION 236, 281 (1933)). See also the United Nations Charter, to which the United States is a signatory: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of *any state*, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, para. 4 (emphases added). Accordingly, the United Nations General Assembly’s definition of aggression is also confined to states: “Aggression is the use of armed force *by a State* against the sovereignty, territorial integrity or political independence of *another State*” G.A. Res. 3314 (XXIX), Annex art. 1 ¶ 4, U.N. Doc. A/RES/29/3314 (Dec. 14, 1974) (emphases added).

40 See, e.g., Mary Ellen O’Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT’L L. 349, 350 (2004) (concluding, after scouring the legal literature since 9/11, that the claim of a global war on terrorism “is a radical departure from mainstream legal analysis”).

41 See *infra* Part II.G.

42 Bradley & Goldsmith, *supra* note 23, at 2066.

43 And these Indian tribal nations were often in alliance with United States foes such as England and France. See BOBBITT, *supra* note 20, at 35. During the French and Indian War, the French, along with other European powers, enlisted Native American tribes to fight alongside colonial forces. *Id.*; see also THE FEDERALIST NO. 24, at 156–57 (Alexander Hamilton) (Clinton Rossiter ed. 2003) (“Though a wide ocean separates the United States from Europe, yet there are various considerations that warn us against an excess of

equates the “Indian tribes” with other sovereign entities, i.e., to “foreign Nations” and “the several States.”⁴⁴

And war was never declared against slave traders or pirates. In fact, the Framers specifically understood that executive force would be employed against piratical, nonstate actors *outside of warfare*. After all, the constitutional piracy provision is separate from the “declare war” clause: “The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”⁴⁵ The Framers knew that a pirate, as opposed to a privateer, plied the high seas as a rhetorical *hostis humani generis*, an enemy of all mankind.⁴⁶ Any nation had a right and obligation to repress pirates, with their warships, wherever on the seas they were found—a rule still in effect today.⁴⁷

But once pirates were captured, the Framers knew that rhetoric did not a legal status make. Pirates could not be detained indefinitely as prisoners of war, but were to be prosecuted according to domestic piracy statutes and criminal procedures. In a Supreme Court case two years after the Constitution was ratified, the Court asked: “Whence is it that pirates have not the rights of war? Is it not because they act without authority and commission from their sovereign?”⁴⁸

confidence or security. On one side of us, and stretching far into our rear, are growing settlements subject to the dominion of Britain. On the other side, and extending to meet the British settlements, are colonies and establishments subject to the dominion of Spain. . . . The savage tribes on our Western frontier ought to be regarded as our natural enemies, their natural allies, because they have most to fear from us, and most to hope from them.”).

⁴⁴ U.S. CONST. art. I, § 8, cl. 2.

⁴⁵ *Id.* at art. I, § 8, cl. 1, cl. 10.

⁴⁶ See Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT’L L. 1, 9–16 (2007) (explaining the history of piracy and universal jurisdiction).

⁴⁷ See United Nations Convention on the Law of the Sea art. 105, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (permitting every state to seize a pirate ship or aircraft, arrest persons and confiscate property onboard, and to decide and impose penalties through its courts). Though the United States has not yet ratified UNCLOS, these provisions are considered customary international law. Moreover, the United States is a party to the Geneva Convention on the High Seas art. 19, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82, which has an identical provision.

⁴⁸ *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.) 1, 4 (1781); see also LIEBER CODE, *supra* note 32, at art. 82 (“Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, *without commission*, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war,

Congress immediately exercised the constitutional powers the Framers provided to punish piracies and other felonies at sea by enacting the still-existing 18 U.S.C. § 1651, which provides that: “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”⁴⁹

War could, however, be waged against privateers, i.e., pirates who operated on the basis of a commission or letter of marque granted by a sovereign.⁵⁰ This letter transformed the pirate into a state actor, and thereby gave him the right to use force against ships with immunity from charges of piracy.⁵¹ Thus, when the United States went to war against the Barbary pirates, it actually warred against Tripoli and its privateers.⁵²

but *shall be treated summarily as highway robbers or pirates.*” (emphasis added)); Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1 (Winter 2008) (demonstrating that piracy is generally outside the laws of war and captured pirates are not POWs).

49 Predecessor statute to 18 U.S.C. § 1651 (2006); *see also id.* §§ 1652–61 (enumerating acts which qualify as piracy and associated punishments); *id.* §§ 381–84 (conferring authority on the President and the U.S. courts having admiralty jurisdiction for the defense against piratical vessels and for their seizure and condemnation). Other countries have their own statutes. *See, e.g.*, The Penal Code, (1970) Cap. 63 § 69. (Kenya) (outlining actions which constitute piracy); Courts of Judicature Act § 22(1)(a)(iv) (1964) (Malaysia), *available at* http://www.kehakiman.gov.my/legislation/Court_Of_The_Judicature_Act.shtml (granting the High Court jurisdiction over piracy offenses).

50 *See, e.g.*, Douglas R. Burgess, Jr., *The Dread Pirate Bin Laden: How Thinking of Terrorists as Pirates Can Help Win the War on Terror*, LEGAL AFFS. 32, 34 (July–Aug. 2005) (“Queen Elizabeth viewed English pirates as adjuncts to the royal navy, and regularly granted them ‘letters of marque’ (later known as privateering, or piracy, commissions) to harass Spanish trade.”).

51 *Id.* Burgess further explains that while issuing these letters of marque, the queen of England, for example, could preserve the vestiges of diplomatic relations, reacting with feigned horror to revelations of the pirates’ depredations:

Witness, for example, the queen’s disingenuous instructions saying that if Raleigh “shall at any time or times hereafter robbe or spoile by sea or by lance, or do any acte of unjust or unlawful hostilities [he shall] make full restitution, and satisfaction of all such injuries done.” When Raleigh did what Elizabeth had forbidden—namely, sack and pillage the ports of then-ally Spain—Elizabeth knighted him.

Id.

52 President Jefferson, without authority from Congress, sent the American Fleet into the Mediterranean, where it engaged in a naval battle with the Tripolitan fleet. He sent a message to Congress on December 8, 1801, in which he said:

Tripoli, the least considerable of the *Barbary States*, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean . . . with orders to protect our commerce against the threatened attack. . . . Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. . . . One of the Tripolitan cruisers having fallen in with and engaged the small schooner *Enterprise* . . . was captured, after a heavy slaughter of her

As will be discussed further below, the fact that military force can be constitutionally used against nonstate actors, such as pirates, outside the war context is critical for a successful legal and military strategy in the war on terror. Force and war are not synonymous, nor is the difference mere semantics. War and the enemy connote a legal regime at the constitutional level which, if expanded beyond its original understanding, swallows essential pillars of the remaining constitutional structure.

C. *Defining the Enemy*

Underlying *Eisentrager* is the centuries-old conception that to be an enemy, one must be connected to a war, that is, to a state engaged in hostilities with the United States. As Justice Jackson wrote, the defendants before him were “actual enemies, active in the hostile service of an enemy power.”⁵³ He defined the “enemy” in its “primary meaning” as “the subject of a foreign state at war with the United States.”⁵⁴

Jackson grounded this conception of the enemy in historical practice:

American doctrine as to effect of war upon the status of nationals of belligerents took permanent shape . . . following our first foreign war. Chancellor Kent, after considering the leading authorities of his time, declared the law to be that “. . . in war, the subjects of each country were enemies to each other, and bound to regard and treat each other as such.”⁵⁵

Professor George Fletcher accurately noted that *Eisentrager* represents a triumph of the “nineteenth-century conception of warfare,” for being an enemy required only a residential or legal connection with a state engaged in hostilities with the United States.⁵⁶

men . . . Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.

First Annual Message, 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 314–15 (Dec. 8, 1801) (first emphasis added).

⁵³ *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950).

⁵⁴ *Id.* at 769 n.2.

⁵⁵ *Id.* at 772 (quoting *Griswold v. Waddington*, 16 Johns. (N.Y.) 438, 480 (1819)).

⁵⁶ George P. Fletcher, *Black Hole in Guantánamo Bay*, 2 J. INT’L CRIM. JUST. 121, 127 (2004).

During the quasi-war with France between 1798 and 1800, the U.S. Supreme Court defined war as only existing between states in order to derive the meaning of the enemy.⁵⁷ It held that any time two nations engage in a policy of armed hostilities, individuals within those states can become enemies of each other. In a perfect war, all residents of the belligerent nations become enemies. In an imperfect, or limited war, only the opposing individuals, authorized or commissioned by the opposing nation, become enemies. As Justice Paterson explained:

The national armed vessels of *France* attack and capture the national armed vessels of the *United States*; and the national armed vessels of the *United States* are expressly authorised and directed to attack, subdue, and take, the national armed vessels of *France*, and also to re-capture *American* vessels. It is therefore a public war between the two nations, qualified, on our part, in the manner prescribed by the constitutional organ of our country. In such a state of things, it is scarcely necessary to add, that the term "*enemy*," applies; it is the appropriate expression, to be limited in its signification, import, and use, by the qualified nature and operation of the war on our part.⁵⁸ The word enemy proceeds the full length of the war, and no farther.

If this conception "was ever something of a fiction," *Eisenrager* affirmed in 1950, "it is one validated by the actualities of modern total warfare."⁵⁹ For example, during the Civil War, often considered the first example of the total warfare experienced in World Wars I and II,⁶⁰ President Lincoln decreed that all individuals within the territory of the enemy states are enemies.⁶¹ In Articles 20 and 21 of his General Order No. 100, Lincoln incorporated Francis Lieber's definition of war and of the enemy:

Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live

⁵⁷ *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

⁵⁸ *Id.* at 45–46.

⁵⁹ *Eisenrager*, 339 U.S. at 772.

⁶⁰ See Russell F. Weigley, *American Strategy from Its Beginnings Through the First World War*, in *MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE* 408, 443 (Peter Paret ed., 1986) ("But the undercurrent of the influence of [General] Sherman and his destructive marches also persisted; and while a [General] Grant-style strategy pointed toward Operation Overlord and the great campaign of 1944–1945 across Europe, the memory of Sherman led toward the strategic bombing of Germany and Japan and eventually to Hiroshima and Nagasaki.").

⁶¹ Lincoln also considered the South sovereign for purposes of warfare. As the Court in *The Prize Cases* stated: "The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 670 (1863).

in . . . states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war.⁶²

The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.⁶³

In *The Prize Cases*, decided during the war over which Lincoln presided, Justice Nelson similarly articulated this collective conception of the enemy in a case involving Union seizure of neutral ships in Confederate ports. He stated that:

The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other⁶⁴

In *Ex parte Milligan*,⁶⁵ “one of the great landmarks in [the] Court’s history,”⁶⁶ the Court struck down the legality of the court martial of Lambdin Milligan, a civilian who had lived in Indiana for twenty years, precisely because he lacked the connection to a state involved in hostilities with the United States. The Government alleged that Milligan had communicated with the Confederacy, had conspired to “seize munitions of war,” and had “join[ed] and aid[ed] . . . a secret society known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government . . . of the United States.”⁶⁷ The Court recognized that during wartime Milligan had likely committed “an enormous crime”⁶⁸ at a place “within the . . . theatre of military operations . . . constantly threatened to be invaded by the enemy.”⁶⁹ But it found no support for subjecting Milligan to military jurisdiction as an enemy combatant because he never joined the Confederacy, was never directed by it, and never lived in the South. Although he was a “dangerous enem[y]” of the

62 LIEBER CODE, *supra* note 32, at art. 20.

63 *Id.* at art. 21. Of course, just because all residents within a hostile country were enemies, it did not follow that civilian and combatant alike could be *targeted* in the same fashion. See Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 455 (2008) (describing the evolution of the principle of distinction).

64 *The Prize Cases*, 67 U.S. (2 Black) at 687 (Nelson, J., dissenting).

65 71 U.S. (4 Wall.) 2 (1866).

66 *Reid v. Covert*, 354 U.S. 1, 30 (1957).

67 *Milligan*, 71 U.S. (4 Wall.) at 6.

68 *Id.* at 130.

69 *Id.* at 7.

nation in a rhetorical sense, he did not meet the definition of the enemy in the legal sense.⁷⁰

Later, in a controversy arising out of the Spanish-American War, the Supreme Court again remarked that under the rules governing the conduct of war between two nations, Cuba, being a part of Spain, was enemy territory, and all persons living there, regardless of their nationality, were considered enemies of the United States and of all its people.⁷¹

The Trading with the Enemy Act,⁷² passed during the First World War, represents legislative concord with the judiciary's and the executive's state nexus conception of the enemy. It stated that an enemy was:

Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.⁷³

During World War II, the state nexus requirement persisted.⁷⁴ The Court concluded that even a petitioner claiming American citizenship had been properly classified as an enemy combatant precisely because "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents [combatants] within the meaning of . . . the law of war."⁷⁵ In doing so, the Court upheld that part of President Roosevelt's July 2, 1942 Proclamation which defined the enemy in terms of its affiliation with a bel-

⁷⁰ *Id.* at 130; *see also Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (No. 9,487) (holding that Merryman's status as a civilian from Maryland precluded the military from exercising judicial authority over him).

⁷¹ *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909); *see also Lamar v. Browne*, 92 U.S. 187, 194 (1875) (discussing a claim for cotton arising out of the North's seizure of Southern cotton pursuant to the Abandoned and Captured Properties Act during the Civil War, the Court stated that: "In war, all residents of enemy country are enemies").

⁷² Pub. L. No. 91, 40 Stat. 411 (1917).

⁷³ *Id.* § 2(a).

⁷⁴ *Ex parte Quirin*, 317 U.S. 1 (1942). *See also In re Territo*, in which the Ninth Circuit upheld the indefinite detention of Gaetano Territo, an American citizen who fought for, and at the direction of, Italy during World War II, precisely because Territo met the state-centric definition of an enemy combatant. 156 F.2d 142, 145 (9th Cir. 1946).

⁷⁵ *Quirin*, 317 U.S. at 37-38.

ligerent state.⁷⁶ The Court distinguished its determination from *Milligan*'s on the basis of the state nexus, explaining that while the petitioners before it were affiliated with the armed forces of an enemy nation and thus were enemy belligerents, *Milligan* was a "non-belligerent" and so "not subject to the law of war."⁷⁷

While the atrocities of World War II gave birth to modern international humanitarian law, further codifying the distinction between enemy civilians and enemy combatants,⁷⁸ the post-9/11 Supreme Court still holds true to this state-centric tradition. In *Hamdi*, the plurality tellingly noted that *Milligan* "turned in large part on the fact that *Milligan* was not a prisoner of war" and suggested that "[h]ad *Milligan* been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different."⁷⁹ Accordingly,

76 The Proclamation states:

WHEREAS the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the law of war;

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and the statutes of the United States, do hereby proclaim that all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; [and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.]

Proclamation No. 2561, 7 Fed. Reg. 5101. The portion of the text denoted in brackets was rendered invalid by *Quirin*, 317 U.S. at 25, which recognized the capacity of the petitioners to seek a review of the applicability of the Proclamation to their case and to test its constitutionality.

77 *Quirin*, 317 U.S. at 45.

78 Article 48 of the First Protocol to the Geneva Convention states: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 25 [hereinafter Protocol I].

79 *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 (2004) (plurality opinion).

the plurality had no problem with considering Hamdi an enemy combatant because he was affiliated with Afghanistan's Taliban.⁸⁰

In *al-Marri v. Wright*, the initial three-judge panel of the Fourth Circuit refused to classify the petitioner as an enemy combatant, no matter how dangerous a terrorist he was, because the Government could not meet this constitutional state nexus requirement:

For unlike Hamdi and Padilla, al-Marri is not alleged to have been part of a Taliban unit, not alleged to have stood alongside the Taliban or the armed forces of any other enemy nation, not alleged to have been on the battlefield during the war in Afghanistan, not alleged to have even been in Afghanistan during the armed conflict there, and not alleged to have engaged in combat with United States forces anywhere in the world.⁸¹

In other words, for that panel, Al Qaeda, no matter how dangerous, was not a state.⁸²

D. Al Qaeda May Be an "Unconventional Enemy Force," but Is It Not an "Enemy Force Nonetheless"?

But if someone, or some nonstate organization, has the capacity to wreak great destruction against the United States, why should the legal status not accord with the capacity to destroy? Indeed, in a 5-4 decision, the Fourth Circuit issued an en banc opinion which refused to endorse the three-judge panel's state-based conception of the en-

⁸⁰ But the *Hamdi* plurality chose not to pronounce a definition of an "enemy combatant," opting instead to confine itself to the facts of the case, namely to "an individual who . . . was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." 542 U.S. at 516 (plurality opinion) (emphasis added) (quoting Brief for Respondents at 3, *Hamdi*, 542 U.S. 507 (No. 03-6696)). The plurality also suggested that further elaboration of the category could be left to future cases: "There is some debate as to the proper scope of [the] term [enemy combatant], and the Government has never provided any court with the full criteria that it uses in classifying individuals as such." *Hamdi*, 542 U.S. at 516. The opinion only addresses "the narrow question" of "whether the detention of citizens falling within that definition [quoted in the text] is authorized." *Id.*

⁸¹ *al-Marri v. Wright*, 487 F.3d 160, 183 (4th Cir. 2007), *vacated en banc sub nom.*, *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *cert. granted*, 129 S. Ct. 680 (Dec. 5, 2008) (No.08-368).

⁸² The Israeli Supreme Court comes at the question from a slightly different angle, but the result is essentially the same. In *The Public Committee Against Torture in Israel v. Israel*, 46 I.L.M. 375, 382, 388 (Isr. S. Ct. 2007), the majority held that the Israeli conflict with the Palestinian terrorists in the disputed areas was of an international character; but it concurred with Cassese that there is no "third category." Rather, it found that civilians could temporarily lose targeting immunity for such time as they directly participate in hostilities—but they remain civilians. *Id.* at 391. Unless an individual is part of the armed forces of a state or otherwise fits the definition of a combatant under the Hague and Geneva Conventions, he can only be prosecuted under civilian law, with all the attendant rights afforded civilian defendants.

emy.⁸³ The panel fell one vote short of rejecting the assertion that the August 18, 2001 Authorization for Use of Military Force, in particular, had substantially expanded and redefined the legal category of enemy combatant. As Judge Traxler wrote, “In my view, al Qaeda is much more and much worse than a criminal organization. And while it may be an unconventional enemy force in a historical context, it is an enemy force nonetheless.”⁸⁴

Operating after 9/11, the Bush administration grappled with this question and sought to define the enemy more broadly wherever it could. On July 7, 2004, in a memorandum to the Secretary of the Navy, the Deputy Secretary of Defense issued an order (“DOD Order”) establishing Combatant Status Review Tribunals (“CSRTs”).⁸⁵ Two weeks later, the Secretary of the Navy, whom the DOD Order had designated “to operate and oversee” the CSRT process, issued a memorandum (“Navy Memorandum”) that established the standards and procedures for those Tribunals.⁸⁶ Both the DOD Order and the Navy Memorandum define an “enemy combatant” as:

[A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.⁸⁷

The most recent federal case to look at the CSRTs declined to review the constitutionality of this definition, choosing instead to base its ruling against the government on the insufficiency of the evidence.⁸⁸

But such an unbounded definition is constitutionally incongruous⁸⁹ and can be strategically deleterious in today’s conflicts. The le-

⁸³ *al-Marri*, 534 F.3d 213.

⁸⁴ *Id.* at 260.

⁸⁵ Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to the Sec’y of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> [hereinafter DOD Order] (regarding the “Order Establishing Combatant Status Review Tribunal”).

⁸⁶ Memorandum from Gordon England, Sec’y of the Navy, at 2 (July 29, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> [hereinafter Navy Memorandum] (regarding the “Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba”).

⁸⁷ DOD Order, *supra* note 85, at 1; see also Navy Memorandum, *supra* note 86, at Enclosure 1 § B.

⁸⁸ *Parhat v. Gates*, 532 F.3d 834, 835–36 (D.C. Cir. 2008).

⁸⁹ Judge Motz writes that an expansive definition of enemy combatant renders the term “utterly malleable” and “presents serious constitutional concerns.” *al-Marri*, 534 F.3d at 243 (Motz, J., concurring).

gal, political and strategic hurdles which thwarted the Bush administration's efforts to deal with detainees in the war on terror over the past seven years indicate how pragmatically difficult it is to detach the enemy from its historical moorings. As will be discussed in Part II.F, releasing "the enemy" from its connection to a state engaged in hostilities is not only unconstitutional in particular, but it more generally subverts the original design of the Constitution by overwhelming the crucial separation of powers and by instituting an open-ended exception to the ban on bills of attainder. It is also constitutionally unnecessary. As will be discussed in Part II.G and Part V, there already exist ways to target nonstate actors using executive authority, as well as to legislatively (if not judicially) revise the rules of due process to accommodate battlefield realities.

Ultimately, since the Constitution is a pragmatic document attuned to wartime realities, it should come as no surprise that policies which subvert it consequently subvert the war effort itself.

E. Restricting the Rights of "the Enemy"

Before looking at the constitutionally subversive nature of an expansive enemy definition, it is important to realize first that detaching "the enemy" from its state moorings would enable deprivations of individual constitutional rights without any limiting principle. Once someone is properly considered an enemy, like Eisentrager and his compatriots, he or she falls into a narrow constitutional category in which due process, as well as commercial rights, may legally be restricted. Importantly, these constitutional limitations are not motivated by spite or vengeance; rather, they are essential tactical elements in the overall effort to win the nation's wars.

In *The Rapid*, for example, Justice Johnson upheld the seizure of a British ship and her cargo during the War of 1812 on the grounds that no American had a right to commerce with, and thereby increase the material well-being of, the British enemy.⁹⁰ Even the right to transport goods purchased *prior* to the outbreak of hostilities was swept away in wartime. As "[e]very individual of the one nation must acknowledge every individual of the other nation as his own enemy—because the enemy of his country,"⁹¹ the Court concluded that:

In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The

⁹⁰ 12 U.S. (8 Cranch) 155 (1814).

⁹¹ *Id.* at 161.

individuals who compose the belligerent states, exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat.⁹²

During the Civil War, the Court deprived neutral ships in a Confederate port of their property rights because their affiliation with a belligerent nation rendered them enemies: “All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners.”⁹³

Earlier, in two private law cases coming out of the War of 1812, the Court affirmed the proposition that alien enemies have no right to sue in American courts while the war is in progress.⁹⁴ At the resumption of the peace, those rights, however, are re-established. “It is also admitted by the best modern authorities, on the law of nations, that the plea of alien enemy is only a temporary bar to the recovery of private debts, and that the right of action returns with the return of peace.”⁹⁵

These temporary limitations on commercial intercourse made strategic sense. Thucydides once remarked that “war is not so much of arms as of money, by which arms are rendered of service.”⁹⁶ In *The Prize Cases*, the Court remarked: “The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, *as the source of its wealth and strength*, are always regarded as legitimate prize”⁹⁷ In the modern era, Paul Kennedy similarly underscored the importance of economics to the outcome of the great battles of history.⁹⁸ To allow trade would be to increase the abilities of the enemy.⁹⁹

However, once the war was over, those practical or strategic necessities would fall away, and the normal channels of commerce and law would resume.

92 *Id.* at 160–61.

93 *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 674 (1863).

94 *See* *Jackson v. Decker*, 11 Johns. 418 (N.Y. Sup Ct. 1814) (barring an alien enemy, residing in the enemy’s country, from maintaining an action of ejectment during war); *Bell v. Chapman*, 10 Johns. 183 (N.Y. Sup. Ct. 1813) (discussing the suspension of an alien enemy’s right of action during war).

95 *Bell*, 10 Johns. at 185.

96 THUCYDIDES, 1 HISTORY OF THE PELOPONNESIAN WAR 27 (William Smith trans., 1852).

97 *The Prize Cases*, 67 U.S. (2 Black) at 674 (emphasis added).

98 *See generally* PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000 (Vintage Books 1989) (1987) (describing the correlation between a Great Power’s economic growth and military empire).

99 No doubt appreciating this fact during World War I, the United States passed the Trading with the Enemy Act, Pub. L. No. 91, 40 Stat. 411 (1917). *See supra* note 72 (providing definitions under the Trading with the Enemy Act).

Eisentrager follows in this nineteenth-century conception of the enemy. This landmark case does not create a class-based “categorical rule” that individuals detained abroad have no due process rights,¹⁰⁰ but rather stands for the proposition that enemies, properly defined in relation to a state engaged in hostilities against the United States, can be deprived of habeas for as long as the deprivation makes practical and strategic sense:

[T]he nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy.¹⁰¹

Eisentrager instructs that what matters as a threshold concern is whether the individual in question is an “enemy alien,” defined in its “primary meaning” as the “subject of a foreign state at war with the United States,”¹⁰² before the executive can deprive him of the great privilege of habeas. Even if international humanitarian law appropriately separates enemy civilian from enemy combatant, *Eisentrager* is still good law on this point because its defendants were not just subjects of a foreign state at war with the United States, but were, in Justice Jackson’s words, “actual enemies, active in the hostile service of an enemy power.”¹⁰³

When deciding the appropriate level of due process deprivation for the detainees held in Guantanamo Bay, the Supreme Court’s *Boumediene* decision neglected to address the proper “enemy” prerequisite and moved prematurely (albeit extensively) to *Eisentrager*’s pragmatic prong.¹⁰⁴

The plurality in *Hamdi*, however, while declining to explicitly define “enemy combatant,” explained that the Government cannot invoke an exception to the Constitution’s due process entitlements for habeas protection if the individual falls outside the narrow category of persons to whom the exception applies. Under the habeas procedure prescribed in *Hamdi*, if the Government asserts an exception to

100 Fletcher, *supra* note 56, at 126–27.

101 Johnson v. Eisentrager, 339 U.S. 763, 776 (1950).

102 *Id.* at 769 n.2.

103 *Id.* at 778.

104 Justice Kennedy wrote that, based on *Eisentrager*, “at least three factors” are relevant in determining the reach of the Suspension Clause: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008). But he skipped over the status of the detainee.

the usual criminal process by indefinitely detaining as an “enemy combatant” an individual with constitutional rights, it must proffer evidence to demonstrate that the individual “qualif[ies]” for this exceptional treatment.¹⁰⁵ In other words, the United States cannot seize and indefinitely detain an individual unless the government demonstrates that he “qualif[ies]” for this extraordinary treatment because he first fits within the “legal category” of enemy combatant.¹⁰⁶

F. The State Nexus Requirement of “the Enemy” Forms a Non-Severable Element of the Constitutional Structure

Attempts to expand the definition of enemy combatant create far greater problems than they supposedly solve, because doing so subverts key underpinnings of the constitutional structure.

George Fletcher has noted a fundamental and historical difference between an enemy and a criminal, which hints at the dangers of expanding the definition of the enemy and severing the state nexus:

We should be clear about the differences between the pursuit of justice and the execution of war. In matters of justice, we should be focused on the individual culprits. In matters of war, the individual culprits are beside the point. War is waged against a collective, typically a nation-state. No one cared about the individual Japanese pilots who returned safely from the attack on Pearl Harbor. They were not criminals but rather agents of an enemy power. They were not personally ‘guilty’ of the attack, nor were their commanders, who acted in the name of the Japanese nation.¹⁰⁷

Were the category of enemy not narrow, it would incongruously blur the constitutional distinction between crime and war by swallowing essential constitutional provisions, including the proscription against bills of attainder and the separation of powers structure.

First, if the president, using his inherent powers, were to use force against nonstate actors, such as pirates, without congressional authorization, but treated the targets as “enemies” subject to indefinite detention and other restrictions, it could render a dead letter “the constitutional plan that allocated powers among three independent branches,” a design which makes the government accountable and secures individual liberty.¹⁰⁸ Without the Congress or the courts, the

¹⁰⁵ Hamdi v. Rumsfeld, 542 U.S. 507, 516, 534 (2004).

¹⁰⁶ *Id.* at 516, 522 n.1.

¹⁰⁷ George P. Fletcher, *The Law of War and Its Pathologies*, 38 COLUM. HUM. RTS. L. REV. 517, 521 (2007).

¹⁰⁸ *Boumediene*, 128 S. Ct. at 2246. Furthermore, as Justice Brandeis explained:

President could consider someone or some organization an enemy of the state without any limiting principle and without any check.¹⁰⁹ For example, what is to keep the executive from considering blond-haired people enemies of the state and treating them as such? What is the *constitutional* distinction between treating Oklahoma City bomber Timothy McVeigh as a criminal with due process rights, and Al Qaeda as enemies without due process rights? Both successfully targeted U.S. citizens in horrific terrorist attacks, and neither citizenship nor alienage alone provides a constitutional limiting principle. While McVeigh is a citizen and Al Qaeda members may not be, *Ex parte Quirin* demonstrates that being a citizen is no bar to being, and being treated as, an enemy.¹¹⁰ On the other side, the Supreme Court has consistently held that non-enemy aliens legally in the United States are entitled to the same Fifth Amendment protections as are citizens.¹¹¹ Thus, if the President could unilaterally detain a non-enemy alien unrestrained by the Due Process Clause of the Fifth Amendment, so too could he detain an American citizen for whom the same Clause equally applies.

Second, even if the limiting principle is congressional concurrence with presidential action,¹¹² as is arguably the case with the Authoriza-

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting); *see also* *Loving v. United States*, 517 U.S. 748, 756 (1996) (noting that “[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny”); *cf.* *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”); *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“[T]he Constitution diffuses power the better to secure liberty . . .”).

109 The reciprocal nature of warfare’s breakdown in the legal, economic, and social relations between nations—another original check on the tendency for nations to go to war—would also vanish. *See* discussion *supra* Part II.E.

110 317 U.S. 1, 31 (1942).

111 *See* *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348–50 (2006); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *see also* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *id.* at 278 (Kennedy, J., concurring) (observing that “[a]ll would agree . . . that the dictates of the *Due Process Clause of the Fifth Amendment* protect” an alien lawfully within the United States (emphasis added)).

112 *See* *Bradley & Goldsmith, supra* note 23, at 2070 (“When, as here, both political branches have treated a conflict as a ‘war,’ and that characterization is plausible, there is no basis for the courts to second-guess that determination based on some metaphysical conception of the true meaning of war.”); *see also* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 123 (Oxford Univ. Press 1996) (“When the President acts by Congressional authority he has the sum of the powers of the two branches, and can be

tion for Use of Military Force against “those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,”¹¹³ *legislatively* treating nonstate actors as enemies runs up against the ban on bills of attainder,¹¹⁴ a clause which has never been found inapplicable against any non-enemy, alien or otherwise.¹¹⁵

In *Mendelsohn v. Meese*, for example, the Southern District of New York confronted a bill of attainder challenge to the Anti-Terrorism Act (“ATA”), which sought to legislatively place certain restrictions on the Palestinian Liberation Organization (“PLO”).¹¹⁶ The court found that “[o]n its face” the ATA is an “accusatory document penalizing PLO employees by closing their offices and effectively terminating their activities in the United States.”¹¹⁷ The court further explained:

Having been effectively singled out by Congress, they are left without any right of reply or appeal, without right to confront their accusers or submit evidence in an adversarial proceeding. They are terrorists by statutory implication but without the slightest proof of their involvement in terrorism. In short, they are subjected to penalties without the panoply

said ‘to personify the federal sovereignty,’ and in foreign affairs, surely, the President then commands all the political authority of the United States.” (quoting *Steel Seizure*, 343 U.S. at 636 (Jackson, J., concurring)).

113 Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

114 U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); *see also* U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder . . .”). Note that the “Bill of Attainder” has not been held to apply to the executive. In a case involving an air traffic controller whom the Office of Personnel Management (“OPM”) deemed unsuitable for federal employment pursuant to President Ronald Reagan’s directive indefinitely banning air traffic controllers who went on strike from federal employment, the Federal Circuit dismissed the controller’s bill of attainder challenge. *Korte v. Office of Pers. Mgmt.*, 797 F.2d 967, 972 (Fed. Cir. 1986). The court reasoned that the Bill of Attainder Clause was intended “as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.” *Id.* at 972 (quoting *United States v. Brown*, 381 U.S. 437, 442 (1965)). “The clause,” the court added, “is a limitation on the authority of the legislative branch.” *Id.* The controller “has cited no authority, and we are aware of none, holding that the clause applies to the executive branch.” *Id.*

115 *See, e.g.*, *Mendelsohn v. Meese*, 695 F. Supp. 1474, 1488 n.24 (S.D.N.Y. 1988) (“The language prohibiting bills of attainder is sweeping, and the Supreme Court’s interpretations of it have been expansive. We believe there is little doubt that the ban applies to bills of attainder directed at non-citizens.” (citing *Flemming v. Nestor*, 363 U.S. 603, 612–21 (1960)).

116 *Id.* (involving a constitutional challenge to the Anti-Terrorism Act brought by sixty-five American citizens and organizations who sought declaratory judgment).

117 *Id.* at 1487.

of protective shields vouchsafed even to criminal aliens by the federal courts in criminal trials.¹¹⁸

But, while the ATA would have thus presented a “classic Bill of Attainder,” the court nonetheless found the ATA permissible. Why? Because the Court equated the PLO to a state, and by extension, its members to formal enemies.

According to its *stated* reasoning, the court found the ATA a valid exercise of Congress’s foreign affairs powers, even though the portions of the PLO structure that would be affected included an official observer mission to the United Nations in New York City. The court explained that the Bill of Attainder is a means to maintain the separation of powers,¹¹⁹ which is not necessary in the field of international relations.¹²⁰ Citing Laurence Tribe’s classic constitutional law treatise, the court explained that the “value of a ban on bills of attainder to a system of separated powers . . . [reflected] ‘not only the judgment of the Framers that the legislative branch of government presented the greatest potential threat to liberty, but also the further conviction that *no* branch should be empowered unilaterally to inflict a serious hardship on particular individuals or groups.’”¹²¹ But because the PLO, “as a foreign entity, stands outside the structure of our constitutional system,” there is no reason, according to the court, to protect the separation of powers.¹²²

But the court’s stated reasoning suffers from two major flaws. *First*, the bill of attainder does not *only* protect separation of powers concerns. After all, the first clause of Professor Tribe’s cited passage states that the bill of attainder proscription reflected “the judgment of the Framers that the legislative branch of government presented the greatest potential threat to liberty.”¹²³ So long as the text of the Constitution and the interpretation of the Supreme Court both indicate a broad reach of the bill of attainder clause, there is scant reason to believe that non-enemy, nonstate actors who are foreigners slip into a broad class of individuals who can, for whatever reason, be sin-

118 *Id.* at 1487–88.

119 “A basic tenet of our constitutional government is that the three branches of our government should be kept separate and independent of each other without encroachment of one upon the other and without the delegation of power from one to the other. The ban on bills of attainder can be viewed as an implementation of the doctrine of separation of powers.” *Id.* at 1488.

120 *Id.* at 1488–89.

121 *Id.* at 1488 (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 657 (2d ed. 1988)).

122 *Id.* at 1488–89.

123 TRIBE, *supra* note 121, at 657.

gled out for punishment regardless of any individual actions and judicial findings.

Second, and most important, the judge's actual reasoning effectively equates the PLO to a state organization, even though the same judge had earlier concluded that the PLO had "none of the usual attributes of sovereignty"¹²⁴:

The PLO is the subject of this legislation. It effectively penalizes individuals only in prohibiting them from acting in an official capacity as representatives of the PLO. Congress must have the power to do that, since the PLO, as a *foreign political entity*, stands outside our constitutional structure. See [Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 515–34 (1987)]. Severing diplomatic relations with any *nation*, or declaring war against any *nation*, works hardships on American citizens employed by the foreign *power* or acting as its official representatives. But Congress may force an American citizen to choose between the full panoply of protections offered by the Constitution and voluntarily taking on an official role in the operations of a *foreign power*. See U.S. Const. art. I, § 9, cl. 8 (prohibiting U.S. citizens from accepting titles, presents or emoluments from *foreign governments* without the consent of Congress); 18 U.S.C. § 959 (1982) (criminalizing enlistment in *foreign governmental service*). See also 8 U.S.C. § 1481(a)(4)(B) (Supp. IV 1986) (mandating loss of U.S. citizenship for accepting, serving in or performing the duties of an office under a *foreign government* for which an oath of allegiance is required); *Vance v. Terrazas*, [444 U.S. 252, 263 (1980)] (statutorily defined voluntary act of expatriation, accompanied by intent to relinquish citizenship, sufficient to terminate U.S. citizenship).¹²⁵

Because the PLO had an observer mission to the United Nations, considered itself to be the representative government of a people, and had its own forces, the court effectively equated it to a nation, and therefore upheld its treatment as an enemy.

Mendelsohn thus stands only for the proposition that the bill of attainder clause does not apply to enemies, i.e. individuals and organizations associated with a state or its functional equivalent. Without this functional state nexus, however, nonstate actors cannot fall into that limited, wartime category of individuals excepted from the general proscription against bills of attainder.

G. A Brief Note: Permissible Presidential Uses of Force Against Nonstate Actors

While only individuals connected to states engaged in hostilities with the United States can be legal enemies, and only those individu-

¹²⁴ United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1459 (S.D.N.Y. 1988).

¹²⁵ *Mendelsohn*, 695 F. Supp. at 1490 (emphases added).

als who also take up arms can be considered enemy combatants, it is important to state that force can still be constitutionally used against nonstate actors. Military planning and assets can (and should) be used—in conjunction with traditional law enforcement assets and procedures—to forge an effective counterterrorism strategy.¹²⁶ Nothing in this Article suggests that the United States cannot legally target certain nonstate actors, even though the United States cannot wage war against them or detain them indefinitely as POWs.

It is beyond the scope of this Article to discuss in depth the instances in which force may be used against nonstate actors, but in advance of a subsequent paper,¹²⁷ suffice it to say that the U.S. military, with the President as its Commander in Chief, can engage nonstate actors who: (a) take a direct part in hostilities;¹²⁸ (b) commit violent attacks on the high seas or outside the jurisdiction of any state;¹²⁹ or (c) engage in action sufficiently hostile to warrant immediate measures in individual or unit self-defense.¹³⁰

Of course, so long as the nonstate actors are located in the territory of another state, the United States would have to clear the *ius ad*

126 See, e.g., BOBBITT, *supra* note 20, at 140 (“The solution for the twenty-first century is to integrate legal practices with action by the armed forces.”). See generally Bahar, *supra* note 46, (proposing a “constabulary” model for naval anti-piracy and counterterrorism missions).

127 Michael Bahar, *Power Through Clarity: How the “Old Fashioned” State-Based Laws Can Reveal the Strategic Power of Law for the Future*, 30 U. PA. J. INT’L L. (forthcoming 2009).

128 Article 51(3) of the First Protocol to the Geneva Convention, adopted in 1977, states that: “Civilians shall enjoy the protection afforded by this Section, *unless and for such time as they take a direct part in hostilities.*” Protocol I, *supra* note 78, art. 51(3) (emphasis added); see also Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 629 (Sept. 2, 1998) (concluding that there is no difference in practice between “direct” and “active” involvement in hostilities), available at <http://trim.unictr.org/webdrawer/rec/15154/view/AKAYESU%20-%20%20JUDGEMENT.pdf>; Hostages Trial (Trial of Wilhelm List and Others), No. 47 (U.S. Military Trib., Nuremberg July 8, 1947–Feb. 19, 1948), reprinted in 8 UNITED NATIONS WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 58 (1949) (“We think the rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the laws of war.”). While the United States has not ratified the First Protocol, it has formally endorsed this definition of a permissibly targeted civilian in signing (in 2000) and ratifying (in 2002) the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 25, 2000, 2173 U.N.T.S. 236.

129 If terrorists commit a violent act from the high seas, outer space, or some other location outside the jurisdiction of any state, including a failed state, then those acts can constitute piracy for which state repression is permissible. See Bahar, *supra* note 46.

130 See, e.g., Chairman of the Joint Chiefs of Staff Instruction 3121.01A, Standing Rules of Engagement for U.S. Forces, Enclosure A (Jan. 15, 2000) (noting that actions in self-defense may be taken in response to a “Hostile Act” or “Hostile Intent” with hostile act defined as an “attack or other use of force” and hostile intent defined as a “threat of imminent use of force”).

*bellum*¹³¹ hurdles as well, either through obtaining state consent or a Security Council Resolution, or by finding state complicity¹³² or a complete lack of a state's ability to control the dangerous elements within its borders.¹³³

These *ius ad bellum* considerations introduce yet another fundamental problem with expanding the targets of war to nonstate actors. Unless the nonstate actors are on the high seas or in some truly failed state, how can the United States attack them without invading another sovereign country? For example, since the 9/11 hijackers planned their attacks in Germany, could it be legal for the United States to launch cruise missiles against remaining Al Qaeda terrorist cells in Hamburg without German consent or without evidence that Germany harbored or supported the hijackers? Would it be legal for the Germans to launch a cruise missile into Miami if they had actionable intelligence that a terrorist was plotting an attack against Germany in the middle floor of a high-rise, waterfront condominium?

131 The United States has signed and ratified the United Nations Charter, which outlaws the "use of force against the territorial integrity or political independence of any other state." U.N. Charter art. 2, para. 4.

132 In its 1986 decision, *Nicaragua v. United States*, the International Court of Justice ("ICJ") noted that armed attacks by ostensibly nonstate actors could trigger a right of self-defense under Article 51 of the United Nations Charter provided that their conduct could be attributed to a state. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 194 (June 27). The standard they announced was one of "effective control." *Id.* ¶ 115. Even if a state does not direct the actors to attack another state, so long as that state had effective control over the nonstate actors, the victim-state's retaliation into the offending state's sovereign territory was justified. See also *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, ¶ 146–47 (Dec. 19) (finding that Uganda did not have a right to self defense against the Democratic Republic of Congo because there was "no satisfying proof of the involvement in these attacks, direct or indirect, of the Government of the DRC"); *Prosecutor v. Du[Ko Tadi]*, Case No. IT-94-I-A, Judgment, ¶¶ 120, 122, 123, 131 (July 15, 1999) (holding that a State will be held accountable for military acts of its groups even if the State does not issue specific instructions for the direction of individual operations or selects concrete targets if that State has "overall control" of those groups).

133 See the *Corfu Channel* case in which states are required "not to allow knowingly its territory to be used for acts contrary to the rights of other States." *Corfu Channel Case (U.K. v. Alb.) (merits)*, 1949 I.C.J. 4, 22 (Apr. 9). To justify cross-border attacks on insurgents in Syria, administration officials to President George W. Bush cited his September 2008 speech before the United Nations General Assembly which invoked this *Corfu Channel* principle: "As sovereign states, we have an obligation to govern responsibly, and solve problems before they spill across borders . . . We have an obligation to prevent our territory from being used as a sanctuary for terrorism and proliferation and human trafficking and organized crime." Eric Schmitt & Thom Shankar, *Officials Say U.S. Killed an Iraqi in Raid in Syria*, N.Y. TIMES, Oct. 28, 2008, at A1.

H. Conclusion

The line of cases running through *Milligan*, *Quirin*, and *Eisentrager* affirms that a state-centered conception of the enemy is a prerequisite for the removal of habeas and other due process protections (save the right to contest one's status as an enemy). After all, *Eisentrager*'s stated holding is quite clear and narrow: "We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an *alien enemy engaged in the hostile service of a government at war with the United States*."¹³⁴

Boumediene skipped this critical determination and prematurely moved to the pragmatic prong. But only with the enemy block checked does *Eisentrager* support a pragmatic or strategic assessment of the extent of that restriction—up to and including a denial of habeas. For non-enemies, however, the pragmatic tradition that runs through *Bas*, *Milligan*, *Quirin*, *Eisentrager*, *United States v. Verdugo-Urquidez*,¹³⁵ *Rasul v. Bush*,¹³⁶ and *Boumediene* allows us to define what is "reasonable" and "legitimate" to strike the constitutionally and strategically appropriate balance between preserving rights and keeping the nation safe from its horrific foes. But for nonstate actors, it does not support the complete denial of habeas absent formal suspension or the indefinite detention without trial.

III. EISENTRAGER, BOUMEDIENE, AND THE PRAGMATIC TRADITION

The object of warfare has changed, and so must the means of conducting it. In Fourth Generation warfare and counterinsurgencies, in which hearts and minds are now the military objectives,¹³⁷ not

¹³⁴ Johnson v. Eisentrager, 339 U.S. 763, 785 (1950) (emphasis added).

¹³⁵ 494 U.S. 259 (1990).

¹³⁶ 542 U.S. 466 (2004).

¹³⁷ See FIELD MANUAL, *supra* note 7, at para. I-153 ("Arguably, the decisive battle is for the people's minds; hence synchronizing [Information Operations] with efforts along the other [logical lines of operations] is critical."); see also U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY 8 (2008), available at <http://www.defenselink.mil/news/2008%20National%20Defense%20Strategy.pdf> ("This conflict is a prolonged irregular campaign, a violent struggle for legitimacy and influence over the population."); Thomas X. Hammes, *Insurgency: Modern Warfare Evolves into a Fourth Generation*, 214 STRATEGIC FORUM 1, 2 (2005), available at <http://www.ndu.edu/inss/stforum/SF214/SF214.pdf> ("Fourth-generation warfare attempts to change the minds of enemy policymakers directly. But this change is not to be achieved through the traditional first- through third-generation objective of destroying the enemy's armed forces and the capacity to regenerate them. . . . More relevant is the way in which specific messages are targeted toward policymakers and those who can influence them.").

granting certain rights (and not training soldiers to adhere to those rights) undercuts those objectives. According to Defense Secretary Robert Gates:

The use of force plays a role, yet military efforts to capture or kill terrorists are likely to be subordinate to measures to promote local participation in government and economic programs to spur development, as well as efforts to understand and address the grievances that often lie at the heart of insurgencies.¹³⁸

Disparate legal treatment is one of those chief grievances.¹³⁹

Yet many modern-day theorists still hold fast to Eisentrager's World War II admonitions on extending legal rights to the nation's foes.¹⁴⁰ For Justice Jackson:

To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals.¹⁴¹

Both *Eisentrager's* progeny and its predecessors fundamentally turn on this negative pragmatic proposition, i.e., that it would be impractical and/or detrimental to the war effort to permit the extension of legal rights to enemies. *Boumediene* most fully acknowledges the pragmatic strain within *Eisentrager* and constitutional law in general, but it only goes so far, taking a neutral or defensive position that there is nothing "impracticable or anomalous" about granting habeas

¹³⁸ U.S. DEP'T OF DEF., *supra* note 137, at 8.

¹³⁹ For the *Field Manual*, "Security Under the Rule of Law is Essential," and "[i]llegitimate actions" by U.S. counterinsurgents—whether committed by government officials, security officers, or military members—include "unlawful detention, torture, and punishment without trial." FIELD MANUAL, *supra* note 7, at paras. I-131, I-132.

¹⁴⁰ See, e.g., John Yoo, Op-Ed., *Congress to Courts: 'Get out of the War on Terror,'* WALL ST. J., Oct. 19, 2006, at A18 ("Courts are ill-equipped to decide whether vast resources should be devoted to reviewing military detentions. Or whether military personnel's time should be consumed traveling back to the U.S. for detainee hearings. Or whether we risk revealing information in these hearings that might compromise the intelligence sources and methods that may allow us to win the war.")

Justice Scalia, in his *Boumediene* dissent, took the admonitions to another level of vehemence. *Boumediene v. Bush*, 128 S. Ct. 2229, 2294 (2008) (Scalia, J., dissenting) (describing in detail the "disastrous consequences" of the Court's decision).

¹⁴¹ *Johnson v. Eisentrager*, 339 U.S. 763, 778–79 (1950).

rights to detainees held in a location over which the United States exercises control.¹⁴²

What they lack, however, is the recognition of a positive pragmatic principle; i.e., that: (a) when strategically valuable and pragmatically viable, due process rights should be constitutionally extended, even, perhaps, to formal enemies; and (b) that courts can, and should, review executive claims of necessity. Times have changed, but the Constitution is an intentionally pragmatic wartime document, designed to accommodate changing battlefield realities.

A. *The Historical Evolution of the Positive Pragmatic Principle: Milligan, Winthrop, and Yamashita*

Contrary to Justice Scalia's *Boumediene* dissent, the pragmatic principle that is critical to setting the appropriate level of due process rights for those who oppose the United States is central to *Eisentrager*. In fact, its roots exist in the early decisions and comments on the rights of detained individuals in the United States.

In *Milligan*, the Supreme Court in 1866 upheld the principle that when it comes to war, courts can evaluate executive claims of necessity to distinguish between wartime pragmatics and executive convenience.¹⁴³ The Court noted that, as a constitutional matter, wartime necessity justifies deviations from normal, constitutional protections, but only in precise and limited circumstances.¹⁴⁴ Explaining the exclusion of the armed forces from the Sixth Amendment's guarantee of a jury trial, for example, the *Milligan* majority explained: "The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts"¹⁴⁵

Of the suspension of habeas corpus, the Court stated:

In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests,

142 *Boumediene*, 128 S. Ct. at 2262 (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

143 *See generally Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (discussing the necessity of military tribunals during the late Civil War).

144 *See, e.g., id.* at 40–41 (identifying the constitutional provision allowing for the suspension of habeas corpus as a limitation, and not a grant, of power).

145 *Id.* at 123.

should not be required to produce the persons arrested in answer to a writ of *habeas corpus*.¹⁴⁶

And of the permissibility of martial law, the Court again found wholly pragmatic triggers for its application.

If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.¹⁴⁷

But the important implication is that courts, if open and functional, can constitutionally review government claims of necessity, and “[a]s necessity creates the rule, so it limits its duration.”¹⁴⁸ For the Court, unless an individual is a proper enemy,¹⁴⁹ military trials and the denial of habeas, absent formal suspension, can “never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.”¹⁵⁰ Importantly, the Court added that “[i]t is also confined to the locality of actual war.”¹⁵¹

In contrast to many war on terror cases which have been marked by parsing of precedent to determine how the Framers must have historically understood the extension of habeas protections to aliens prior to the time of ratifying the Constitution, *Milligan* views the Framers as pragmatic men framing a pragmatic document for war-time. While it was “not without precedents in English and American history illustrating our views of this question,” the Court explained, it was “hardly necessary to make particular reference to them.”¹⁵² It would have been enough for the *Milligan* majority to strike down the Executive’s attempt to try a civilian by military commission to observe that the Framers knew that the nation “cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution.”¹⁵³

146 *Id.* at 125–26.

147 *Id.* at 127.

148 *Id.*

149 Or, at that time, a member of the “land or naval forces, or in the militia” of the United States. *Id.* at 118–19.

150 *Id.* at 127.

151 *Id.*

152 *Id.* at 128.

153 *Id.* at 125.

If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war . . . and that unlimited power, wherever lodged at such time, was especially hazardous to free-men.¹⁵⁴

Upon review, the Court determined that the post-Civil War Government's actions failed to meet the precise standards of necessity that the Framers foresaw and enshrined, and it rejected the executive's attempt to try Milligan, a civilian nonstate actor, as an enemy.

The nineteenth century's "Blackstone of Military Law," Colonel Winthrop,¹⁵⁵ similarly interpreted restrictive battlefield rules as springing from limited battlefield necessities, and emphasized the role of the courts. Colonel Winthrop recognized that indefinite detention for enemy combatants was "neither a punishment nor an act of vengeance, but merely a temporary detention which is devoid of all penal character," necessary for successful prosecution of war.¹⁵⁶ But, as his fifth condition for the proper exercise of jurisdiction by a tribunal, Winthrop echoes *Milligan* in stating that "the *trial* must be had within the theatre of war . . . ; that, if held elsewhere, and where *the civil courts are open and available*, the proceedings and sentence will be *coram non judice*."¹⁵⁷ For both *Milligan* and Winthrop, it is military necessity on the actual battlefield that justifies deviations from normal rules.¹⁵⁸ But as necessity creates the rule, so it limits its duration—and courts have a role in determining whether that necessity exists.

154 *Id.*

155 *See Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957) (plurality opinion) (citing the work of Colonel Winthrop, whose treatise, *Military Law and Precedents*, has become the touchstone for many recent detainee decisions). *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006), and *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), both of which quote works written by Colonel Winthrop.

156 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 788 (2d rev. ed. 1920) (1896) (citation omitted) (internal quotation marks omitted).

157 *Id.* at 836 (second emphasis added).

158 Despite the explicit removal from U.S. military members of constitutional provisions like the right to a jury trial, service members today are entitled to juries, in addition to Miranda-type rights and other due process protections, because eighteenth- and nineteenth-century necessities are no longer the rule. *See* Robert S. Poydasheff & William K. Suter, *Military Justice?—Definitely!*, 49 TUL. L. REV. 588, 591 (1975) (summarizing due process protections afforded accused service members and noting that, for example, the right to counsel is only excepted in "rare circumstances, such as on an isolated ship on the high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and at that place" but that "[m]ere inconvenience does not constitute a physical condition or military exigency" (citing DEP'T OF THE ARMY, *MANUAL FOR COURTS-MARTIAL*, UNITED STATES para. 153a (rev. ed. 1969))); Francis A. Gilligan,

Even though the continuing validity of *In re Yamashita*¹⁵⁹ has recently been called into serious question,¹⁶⁰ it is nonetheless instructive on the role of pragmatics and of judicial checks on executive claims of necessity. It represents the only Supreme Court decision on detainees in which pure “legalism”¹⁶¹ trumped pragmatics. In *Yamashita*, the Court held that a military commission had jurisdiction to try a Japanese commander for failing to prevent troops under his command from committing atrocities in the Philippines.¹⁶² The *Hamdan* majority, in discrediting *Yamashita*’s precedential value, turned to *Yamashita*’s dissenting opinions to explain that “[a]mong the dissenters’ primary concerns was that the commission had free rein to consider all evidence ‘which in the commission’s opinion “would be of assistance in proving or disproving the charge,” without any of the usual modes of authentication.’”¹⁶³

However, the *Yamashita* dissenters had other concerns as well, which dealt with pragmatics and questioned the executive’s claims of necessity. In fact, the thrust of Justice Murphy’s dissent was how the majority’s legal reasoning deviated from the strategic reality:

In other words, read against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: “We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. . . . In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part.”¹⁶⁴

The Bill of Rights and Service Members, 1987 ARMY LAW. 3, 9 (discussing the rules of evidence and jury procedures applied to military trials).

159 327 U.S. 1 (1946).

160 See, e.g., *Hamdan*, 548 U.S. at 617–18 (“The procedures and evidentiary rules used to try General Yamashita near the end of World War II deviated in significant respects from those then governing courts-martial. The force of that precedent, however, has been seriously undermined by post-World War II developments.” (citation omitted)).

161 *Yamashita*, 327 U.S. at 30 (Murphy, J., dissenting).

162 The majority found that General Yamashita, as military governor of the Philippines and the commander of Japanese forces there, had “an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.” *Id.* at 16.

163 *Hamdan*, 548 U.S. at 618 (citing *Yamashita*, 327 U.S. at 49 (Rutledge, J., dissenting)).

164 *Yamashita*, 327 U.S. at 34–35 (Murphy, J., dissenting).

Similarly, Justice Rutledge lambasted the majority for not appreciating that “[m]ore is at stake than General Yamashita’s fate.”¹⁶⁵ While wartime considerations necessitate legal restrictions under *Milligan*, once the hostilities have ceased, as they had in the Pacific, Justice Rutledge explained that “there is no longer the danger which always exists before surrender and armistice. Military necessity does not demand the same measures.”¹⁶⁶ In other words, for the dissent, as military necessity creates the rule, so must it limit its duration.

For the majority, at least they rejected the government’s “obnoxious” assertion that restraints of liberty resulting from military trials of war criminals are political matters completely outside the realm of judicial review.¹⁶⁷ By doing so, they reaffirmed the proposition that courts have a role in evaluating presidential and military claims of necessity and that, at a minimum, detainees have the right to contest their status as enemies.

But the *Yamashita* majority nonetheless stuck to its “false legalism,”¹⁶⁸ and left the dissent to sound the alarm on ignoring the positive pragmatic considerations. Presaging the arguments General Petraeus would make in the *Field Manual*, Justice Murphy writes:

At a time like this when emotions are understandably high it is difficult to adopt a dispassionate attitude toward a case of this nature. Yet now is precisely the time when that attitude is most essential. While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. . . . Indeed, an uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit. The people’s faith in the fairness and objectiveness of the law can be seriously undercut by that spirit. The fires of nationalism can be further kindled. And the hearts of all mankind can be embittered and filled with hatred, leaving forlorn and impoverished the noble ideal of malice toward none and charity to all.¹⁶⁹

165 *Id.* at 41 (Rutledge, J., dissenting).

166 *Id.* at 46.

167 *Id.* (Murphy, J., dissenting).

168 *Id.*

169 *Id.* at 40–41 (Rutledge, J., dissenting).

B. *The Modern Pragmatic Tradition: Quirin, Eisentrager, and Boumediene*

Pragmatics lost out in *Yamashita*, but the principle survived with the advent of *Eisentrager* four years later. As discussed above, *Eisentrager* pronounced a two-part test:

[T]he nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy.¹⁷⁰

Constitutionally, therefore, an enemy falls into a narrow legal category in which due process rights—up to and including the right of habeas corpus—can be curtailed to a degree pragmatically and strategically determined. Functionally, these rights have always been limitable because failing to do so would hamper the war effort and because there would be no reciprocity from the enemy.

How *Eisentrager* differs from *Quirin* reveals that it was the pragmatic element that proved dispositive. In *Quirin*, the Court granted habeas review but upheld military commissions for eight German saboteurs who landed along the East Coast of the United States. Underlying the Court's decision to uphold military commissions was first that the defendants were actual enemies, and second that by stashing their uniforms, the Germans were violating the principle of distinction and were thus "subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."¹⁷¹ Looking to the Hague Regulations and the 1940 Rules of Land Warfare promulgated by the U.S. War Department, the *Quirin* Court found the eight saboteurs in violation of the distinction principle by "passing our boundaries for such [unlawful] purposes without uniform or other emblem signifying their belligerent status."¹⁷²

¹⁷⁰ Johnson v. Eisentrager, 339 U.S. 763, 776 (1950) (emphasis added).

¹⁷¹ *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

¹⁷² *Id.* at 37; see also William H. Ferrell, III, *No Shirt, No Shoes, No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 128 (2003) (concluding that "[t]hus, the Court based its decision, in part, on the principle of distinction"). Ferrell also notes, however, that technically the *Quirin* holding conflicts with the Hague Regulations upon which it "at least in part, rested" because the eight saboteurs could have been guilty of espionage, which while a violation of domestic laws, is permissible under international law. *Id.* at 129.

Incidentally, this principle of distinction derives from the pragmatic decision among the negotiating states to limit superfluous suffering and destruction in the midst of hostilities. As Robert Sloane makes clear, the principle is "not a moral one" but one born of a negotiated-for, pragmatic desire. Sloane, *supra* note 63, at 458–59. See also Daphné Richemond, *Transnational Terrorist Organizations and the Use of Force*, 56 CATH. U. L. REV.

But, while the *Quirin* and *Eisentrager* defendants were both subject to military trial as enemy combatants, the reason the former were extended habeas rights and the latter were not was because of pragmatics.¹⁷³ The *Eisentrager* dissent accurately noted that “[s]ince the Court . . . disavows conflict with the *Quirin* . . . decision[,]” the Court “must be relying not on the status of these petitioners as alien enemy belligerents but rather on the fact that they were captured, tried and imprisoned outside our territory.”¹⁷⁴ Essentially, the dissent was noticing (while not agreeing) that something about their location and captors, contrary to the defendants in *Quirin*, would make it more helpful to the enemy to extend legal rights. Unlike the *Eisentrager* defendants, the *Quirin* defendants were well within reach of the open and functioning federal courts, and the witnesses and captors were FBI agents versus soldiers. As Justice Jackson stated for the majority:

Reliance on the *Quirin* case is clearly mistaken. Those prisoners were in custody in the District of Columbia. One was, or claimed to be, a citizen. They were tried by a Military Commission sitting in the District of Columbia at a time when civil courts were open and functioning normally. They were arrested by civil authorities and the prosecution was personally directed by the Attorney General, a civilian prosecutor, for acts committed in the United States. . . . None of the places where they were acting, arrested, tried or imprisoned were, it was contended, in a zone of active military operations or under martial law or any other military control, and no circumstances justified transferring them from civil to military jurisdiction. None of these grave grounds for challenging military jurisdiction can be urged in the case now before us.¹⁷⁵

Yet, while pragmatics proved the decisive difference, the pragmatic element in *Eisentrager* had been overshadowed by the belief that *Eisentrager* pronounced a categorical rule denying nonresident aliens due process rights.¹⁷⁶ With the 1990 decision in *United States v. Ver-*

1001, 1017–18, 1027–33 (2007), for a discussion on the historical and philosophical underpinnings of the principle of distinction.

173 Although, of course, the Supreme Court did entertain *Eisentrager*’s challenge and issued a detailed ruling.

174 *Eisentrager*, 339 U.S. at 795 (Black, J., dissenting).

175 *Id.* at 779–80.

176 See *Boumediene v. Bush*, 128 S. Ct. 2229, 2298 (2008) (Scalia, J., dissenting) (“The Court purports to derive from our precedents a ‘functional’ test for the extraterritorial reach of the writ which shows that the Military Commissions Act unconstitutionally restricts the scope of habeas. That is remarkable because the most pertinent of those precedents, *Johnson v. Eisentrager*, conclusively establishes the opposite.” (citations omitted)); see also Fletcher, *supra* note 56, at 127 (explaining that *Eisentrager* “leaves us . . . with two arguments for the government’s position”: one predicated on “war as a conflict between nations,” and one emphasizing the “inefficiency of applying the rule of law in the battlefield”).

Verdugo-Urquidez,¹⁷⁷ however, Justice Kennedy began to unearth the pragmatic prong underlying *Eisenstrager*. In the majority opinion, Justice Rehnquist drew on *Eisenstrager* to warn of the legal implications of expanding Fourth Amendment protections outside the United States, which, he wrote, could “plunge [American officials] into a sea of uncertainty.”¹⁷⁸ Noting that the United States “frequently employs Armed Forces outside this country . . . for the protection of American citizens or national security,” Justice Rehnquist concluded that applying the Fourth Amendment to those circumstances “could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.”¹⁷⁹

But Justice Kennedy’s concurrence—widely and correctly viewed as the controlling opinion regarding extraterritorial application¹⁸⁰—explained that what matters most for *any* extension of constitutional rights are actually the practical implications of that extension. There is no hard and fast proscription on constitutional extension, he wrote, but “there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place.”¹⁸¹ For Justice Kennedy, the basic teaching of *In re Ross*¹⁸² and the *Insular Cases*¹⁸³ is that,

there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.¹⁸⁴

He then extended this pragmatic assessment to non-Americans. He concurred in the judgment restricting Fourth Amendment application over a Mexican defendant whose home in Mexico was searched by American officials for primarily practical reasons. “The conditions and considerations of this case would make adherence to

177 494 U.S. 259 (1990).

178 *Id.* at 274.

179 *Id.* at 273–74.

180 *See, e.g.*, United States v. Boynes, 149 F.3d 208, 211 n.3 (3d Cir. 1998) (citing Justice Kennedy’s separate concurrence); Lamont v. Woods, 948 F.2d 825, 835 n.7 (2d Cir. 1991) (same); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 974 (1991) (same).

181 *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (citing *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

182 140 U.S. 453 (1891).

183 The cases that are collectively known as the *Insular Cases* are *Balzac v. Porto Rico*, 258 U.S. 298 (1922), *Dorr v. United States*, 195 U.S. 138 (1904), *Hawaii v. Mankichi*, 190 U.S. 197 (1903), and *Downes v. Bidwell*, 182 U.S. 244 (1901).

184 *Verdugo-Urquidez*, 494 U.S. at 277–78 (Kennedy, J., concurring) (citing *Reid*, 354 U.S. at 74 (Harlan, J., concurring)).

the Fourth Amendment's warrant requirement impracticable and anomalous."¹⁸⁵ Specifically, he stated:

The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.¹⁸⁶

Based on this reasoning and the pragmatics of the global war on terror, however, Justice Kennedy found in 2008 that there is nothing impractical or anomalous about extending constitutional protections to aliens or citizens either captured in the United States or detained in an area where the United States exercises de facto sovereignty and control.¹⁸⁷

The next step in this progression should be to understand that when pragmatics require fuller extension of detainee rights, even for formal enemies like those in *Quirin*, the Constitution similarly requires it; for if the necessity of the deviation goes away, so too does the restrictive rule.

IV. THE STRATEGIC VALUE OF LAW

As the Army and Marine Corps' own doctrine now makes clear, military necessity in counterinsurgency ("COIN") campaigns of the type fought in Iraq and Afghanistan now require "[e]stablishing the rule of law" over there,¹⁸⁸ as well as the impartial application and respect for the law in the United States. As one of its key "unsuccessful practices" of counterinsurgencies, the *Field Manual* lists: "Ignore peacetime government processes, including legal procedures."¹⁸⁹ The *Field Manual* also wisely warns that "[a]ny human rights abuses or legal violations by U.S. forces quickly become known throughout the local populace and eventually around the world."¹⁹⁰ These actions "undermine" the war effort, both in the "long- and short-term."¹⁹¹

Each of the major U.S. Supreme Court decisions on the extension of rights to enemies have thus far turned on the dangers involved in extending rights, even while they more recently have resisted at-

185 *Id.* at 278.

186 *Id.*

187 *See Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (holding that detainees "are entitled to the privilege of habeas corpus to challenge the legality of their detention").

188 FIELD MANUAL, *supra* note 7, at app. D, para. D-38.

189 *Id.* at tbl.I.I.

190 *Id.* at para. I-132.

191 *Id.*

tempts to curtail those rights. It has been left to the dissents, as in *Yamashita*, to sound the alarm of what will happen when rights are not extended:

The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure.¹⁹²

Even the Israeli Supreme Court, which upheld restrictions on its military despite powerful arguments of necessity, acknowledged that the restrictions it was imposing handcuffed the military.¹⁹³ “That is the fate of democracy,” Justice Barak wrote in a 1999 case involving interrogation methods, which he then cited in a 2007 case involving targeted killings.¹⁹⁴ “[I]n [democracy’s] eyes not all means are permitted, and . . . not all the methods used by her enemies are open.”¹⁹⁵ At times, “democracy fights with one hand tied behind her back.”¹⁹⁶

Justice Barak comes closest to realizing the affirmative value of law, but his peroration stops short of recognizing the positive pragmatics or the strategic value of law:

Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitute an important component of her security stance. At the end of the day, they strengthen her spirit, and allow her to overcome her difficulties.¹⁹⁷

The *Field Manual*, written by military officers including the general who would go on to lead the U.S. war in Iraq and would ultimately be selected to assume military responsibility over the entire region, demonstrates that upholding the law not only reminds the counterinsurgents of who they are and what they are fighting for, but it accomplishes a strategic imperative. American generals are not alone in this view. For example, British general Sir Rupert Smith, former commander of the British Armoured Division in the first Gulf War in

192 *In re Yamashita*, 327 U.S. 1, 28 (1946) (Murphy, J., dissenting).

193 See *The Public Committee Against Torture in Israel v. Israel*, 46 I.L.M. 375 (Isr. S. Ct. 2007) (limiting the ability of the Israeli military to engage in targeted strikes against Palestinian terrorists); HCJ 5100/94 *The Public Committee Against Torture in Israel v. Israel* [1999] 53(4) PD 817 (limiting the interrogation methods used by the Israeli military).

194 *The Public Committee Against Torture in Israel*, 46 I.L.M. at 402 (quoting HCJ 5100/94 *The Public Committee Against Torture in Israel*, 53(4) PD 817).

195 *Id.*

196 *Id.* at 402–03.

197 *Id.* at 403.

1991 and later the leader for UNPROFOR, the U.N. Protection Force in Bosnia, states that “if we are to operate amongst the people . . . we must do so within the law. To do otherwise is to attack the essence of our own strategic objective, which is to establish and uphold the law.”¹⁹⁸

A. *Lawyers as Tactical Commanders?*

Legal adherence, as many prominent commentators have argued, does not necessarily attach a yoke on America’s power. In his *Foreign Affairs* review of General Wesley Clark’s book on the Balkan Wars, Richard Betts, for example, decried the role of law and lawyers in the Kosovo campaign as well as in military interventions in general.¹⁹⁹ He asserts that “[t]he hyperlegalism applied to NATO’s campaign made the conflict reminiscent of the quaint norms of premodern war.”²⁰⁰ Further, he alleges that “lawyers constrained even the preparation of options for decisive combat” and declares:

One of the most striking features of the Kosovo campaign, in fact, was the remarkably direct role lawyers played in managing combat operations—to a degree unprecedented in previous wars. . . . The role played by lawyers in this war should also be sobering—indeed alarming—for devotees of power politics who denigrate the impact of law on international conflict. . . .

. . . .

198 Andy Salmon & Mary Kaldor, *Principles for the Use of the Military in Support of Law Enforcement Operations: Implementing the European Security Strategy*, in A HUMAN SECURITY DOCTRINE: PROJECT, PRINCIPLES, PRACTICALITIES 231, 234 (Marlies Glasius & Mary Kaldor eds., 2005), available at <http://www.lse.ac.uk/depts/global/publications/humansecurityreport/principlessalmonkaldor.pdf>; see also David Scheffer, Comment, *The Legal Double Standards of Bush’s War*, FIN. TIMES (London), May 6, 2004, at 21 (“The brutality at Abu Ghraib, rapidly assuming the heritage of the My Lai massacre by US troops in Vietnam, will doubtless scar the American psyche and cripple US influence in the Arab world for years. US government investigations into detainee abuse in Iraq and elsewhere will probably not be sufficient to restore credibility.”).

199 Richard K. Betts, Review Essay, *Compromised Command: Inside NATO’s First War*, 80 FOREIGN AFF. 126, 129–30 (2001) (reviewing WESLEY K. CLARK, *WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT* (2001)); see also Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1844–45 (2007) (“Civilian leaders should remain aware that the growth in JAG influence can have a detrimental impact on the nation’s ability to win wars. Leaders have allowed a regime to arise in which the JAGs advise, within the confines of the law, the best means of achieving military objectives. American combat officers must now seek out JAGs for rulings on the incorporation of the law of armed conflict into their ongoing operations. It is no coincidence that this unprecedented role for JAGs developed at the same time that severe problems in civilian control over the military occurred in the wake of the Cold War.”).

200 Betts, *supra* note 199, at 129–30.

. . . NATO's lawyers . . . became, in effect, its tactical commanders.²⁰¹

In his thoughtful and balanced analysis of “lawfare”—i.e., the use of law as a weapon of war against the United States—Major General Charles Dunlap is less pessimistic about the law of armed conflict’s ability to limit U.S. power, but he concludes that while the role of the law and lawyers in the U.S. military exists for practical and altruistic reasons, “there is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself.”²⁰²

While law no doubt constrains the tactical use of American power—and America’s enemies certainly can use its respect for the law against it in the short term—the *Field Manual* demonstrates that the top military commanders now understand law to be essential to maximizing the strategic use of American power in twenty-first century conflicts. Force is still necessary, but it must be used with restraint, discrimination, and in strict compliance with the laws of war, or it “risks generating popular resentment, creating martyrs that motivate new recruits, and producing cycles of revenge.”²⁰³ While the *Field Manual* is not the last word in twenty-first century military strategy,²⁰⁴ and while warfare will always evolve and great power struggles will rise again, the time for knee-jerk antipathy towards law on a strategic level is over.²⁰⁵

B. *The Fuller Range of Benefits*

And even the *Field Manual* itself does not fully account for the full range of benefits adherence to law provides. For example, law and legal procedures force actors to think; they allow actors to practice pre-planned responses or “PPRs”; they force actors, including the

²⁰¹ *Id.*

²⁰² CHARLES J. DUNLAP, JR., CARR CTR. FOR HUMAN RIGHTS, LAW AND MILITARY INTERVENTIONS: PRESERVING HUMANITARIAN VALUES IN 21ST CENTURY CONFLICTS 6 (2001), available at <http://www.ksg.harvard.edu/cchrp/WebWorkingPapers/UseofForce/Dunlap2001.pdf>.

²⁰³ FIELD MANUAL, *supra* note 7, at para. I-128.

²⁰⁴ See, e.g., Charles C. Dunlap, Jr., Op-Ed., *We Still Need the Big Guns*, N.Y. TIMES, Jan. 9, 2008, at A19 (providing a thoughtful argument for “old-fashioned force” in addition to the new counterinsurgency manual).

²⁰⁵ Perhaps beginning to appreciate this fact, the Government in *al-Marri v. Pucciarelli* did not “seek[] judicial deference to decisions of ‘military officers who are engaged in the serious work of waging battle,’ [but rather asked for deference] to the ‘multi-agency evaluation process’ of government bureaucrats in Washington made eighteen months after al-Marri was taken into custody.” 534 F.3d 213, 232 (2008) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 531–32 (2004)), *cert. granted*, 129 S. Ct. 680 (Dec. 5, 2008) (No. 08-368).

President, to internalize costs of their actions; and of course, they restrain all actors from going too far. Law is also a trip wire, signaling to actors that some value is worth protecting, and if they continue on that path, it better be for a good reason. Historically, this country has looked back in shame and horror at some of its wartime excesses, be they the internment of Japanese-Americans during World War II²⁰⁶ or the thousands of Americans who lost their livelihoods, reputations, and even freedom during the McCarthy era. Courts could have prevented these baleful and counterproductive events by interposing themselves more to enforce the appropriate legal hurdles.²⁰⁷

Finally, while high-level Bush administration lawyers like David Addington²⁰⁸ and influential commentators like Robert Kagan²⁰⁹ still view “law and force as antonyms,”²¹⁰ and while many still assert that the United States can operate independently of allies, the realities of Iraq, Afghanistan, and the overall war on terror have proven otherwise. Adherence to the law is key to obtaining partners. As Stephen Walt has persuasively argued, “[w]hen foreign populations disapprove of U.S. policy and are fearful of U.S. dominance, their governments are less likely to endorse Washington’s initiatives and more likely to look for ways to hinder them.”²¹¹ The experiences of Matthew Waxman, one of the Bush administration’s key national security lawyers and now a professor at Columbia Law School, reinforce this point. Using the Guantanamo Bay detention facility as an example, he writes that the “widespread perception that it exists simply to keep detainees forever beyond the reach of the law” is “a drag on America’s . . . global counterterrorism efforts,” hampering “cooperation

206 See, e.g., *Korematsu v. United States*, 323 U.S. 214, 236 (1944) (Murphy, J., dissenting) (discussing the reasons given for the Japanese internment).

207 See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957 (2002) (arguing that a “double standard” or impartial application of the law on the basis of citizenship is detrimental for three reasons: “It is normatively and constitutionally wrong; it undermines our security interests; and it will pave the way for future inroads on citizens’ liberties”).

208 See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 130 (2007) (describing “lawyers’ unusual influence on terrorism policy,” especially that of Vice-President Cheney’s lawyer, David Addington, and ascribing as one of the causes of that phenomenon “that the war itself was encumbered with legal restrictions as never before”).

209 See generally ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* 3 (2003) (arguing that Europe is becoming “a self-contained world of laws” while the United States is a place “where international laws and rules are unreliable”).

210 STEPHEN HOLMES, *THE MATADOR’S CAPE: AMERICA’S RECKLESS RESPONSE TO TERROR* 76 (2007).

211 Stephen M. Walt, *Taming American Power*, 84 FOREIGN AFF. 105, 109 (2005).

with our friends on such critical counterterrorism tasks as information sharing, joint military operations and law enforcement.”²¹² “I know,” he continues, “[a]s a State Department official, I often spent valuable time and diplomatic capital fruitlessly defending our detention practices rather than fostering counterterrorism teamwork.”²¹³

The United States may be able to topple a country by itself with shock and awe, but it cannot win the peace, or keep its borders safe, without international involvement.²¹⁴ Germany’s summer 2007 arrest of Islamic militants allegedly planning to target the United States demonstrates this point.²¹⁵ The *Field Manual* and high-level national security documents also recognize the essential force multiplier of coalition involvement. As President George W. Bush’s National Strategy for Maritime Security rightly concludes:

[E]ven an enhanced national effort is not sufficient. The challenges that remain ahead for the United States, the adversaries we confront, and the environment in which we operate compel us to strengthen our ties with allies and friends and to seek new partnerships with others. Therefore, international cooperation is critical to ensuring that lawful private and public activities in the maritime domain are protected from attack and hostile or unlawful exploitation.²¹⁶

Maximizing coalition involvement requires maximizing adherence to U.S. and international law.

²¹² Matthew Waxman, *The Smart Way to Shut Gitmo Down*, WASH. POST, Oct. 28, 2007, at B4.

²¹³ *Id.*; see also Samantha Power, *Our War on Terror*, N.Y. TIMES, July 29, 2007, § 7, at 8 (Book Review) (“While our allies still share intelligence with us in order to combat domestic terrorism, our disavowal of international law has made it harder for our friends to contribute military and even financial resources to shore up failing states like Afghanistan, which is portrayed by the opposition in countries like Canada and the Netherlands as one of Bush’s wars. Many of our friends believe that too close an association with American objectives will make them electorally vulnerable and their cities potential targets.”).

²¹⁴ See, e.g., HOLMES, *supra* note 210, at 79 (arguing that Robert Kagan’s view that Europe “has had little to offer the United States in strategic military terms’ . . . [is] fallacious [to say] the very least” (internal citations omitted)). Professor Holmes also quotes Steve Simon and Daniel Benjamin to emphasize the importance of Europe:

The rise of Islamic radicalism in the West is not something the United States can deal with militarily. At least as the world exists now, Washington will not be dispatching troops to fight in the Paris suburbs. But the growth of radicalism in Europe does require that the United States and its allies deepen their intelligence and law enforcement cooperation to the greatest possible extent to thwart terrorist operations.

Id. (quoting DANIEL BENJAMIN & STEVEN SIMON, *THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT* 202 (2005)).

²¹⁵ See, e.g., Mark Landler, *Germany Seizes 3 It Says Planned Terror Attacks*, N.Y. TIMES, Sept. 6, 2007, at A1 (describing international cooperation to prevent an attack against German and American targets).

²¹⁶ DEP’T OF DEF. & HOMELAND SEC., *THE NATIONAL STRATEGY FOR MARITIME SECURITY* 25 (2005).

V. THE BATTLEFIELD PRESUMPTION

With the *Field Manual*, law and strategy are now officially and doctrinally aligned. In Guantanamo Bay, facts of sovereignty and modern technology indicate that there is nothing impractical or anomalous about at least giving detainees the right to contest their status as enemies. The Constitution requires that courts recognize strategic and pragmatic realities and, where appropriate, expand the application of certain constitutional provisions to U.S. enemies and those the government captures in the global struggle against terrorism.

But this is not to say that the constitutional extension should be in constant flux, or that a court should scrutinize the nature of a conflict too soon or interject itself too much. Rather, this Article posits a careful battlefield presumption within the context of a general wartime jurisprudence. Instead of debating whether law should apply in the “new paradigm,” as Justice Thomas puts it,²¹⁷ it is better to design appropriate rules to maximize the chances for peace based on the best possible American terms, which includes optimizing the extension of constitutional principles.

Boumediene explicitly opened the door for this battlefield jurisprudence. Justice Kennedy stated:

In cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody. If and when habeas corpus jurisdiction applies, as it does in these cases, then proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time. Domestic exigencies, furthermore, might also impose such onerous burdens on the Government that here, too, the Judicial Branch would be required to devise sensible rules for staying habeas corpus proceedings until the Government can comply with its requirements in a responsible way.²¹⁸

217 Dissenting in *Hamdan v. Rumsfeld*, Justice Thomas wrote:

Indeed, respecting the present conflict, the President has found that “the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war.” Under the Court’s approach, the President’s ability to address this “new paradigm” of inflicting death and mayhem would be completely frozen by rules developed in the context of conventional warfare.

548 U.S. 557, 691 n.6 (2006) (Thomas, J., dissenting) (citation omitted).

218 *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008).

At the far end of the spectrum, enemies captured on the battlefield should have a constitutional right to contest their status as enemies and combatants.²¹⁹ But even battlefield captures and seizures should not necessarily be subject to a categorical denial of all other constitutional privileges since, as the top military officers make clear, U.S. military policy is better off with a certain degree of law. Rather, precedent dictates that the United States should adjust the extension of rules based on the strategic and practical implications of doing so. And, as the detained individual moves away from the constitutional, state-based understanding of an enemy, his level of due process protections should increase the further away he is from the battlefield.

Professors Fallon and Meltzer have produced a magisterial work which provides a sound analytical framework for sorting out “the tangle of jurisdictional, substantive, procedural, and scope-of-review issues that habeas cases often present.”²²⁰ Much of that framework turns on the individual’s status as an alien or citizen, and on his or her place of capture and detention. Methodologically, their article also advocates a common law-like approach to habeas adjudication under which courts must exercise responsible judgment in adapting both statutory and constitutional language to “novel circumstances.”²²¹

What they do not fully appreciate, however, is that a common law-like approach is not necessary because the original understanding of the Constitution and the precedent permit strategic and pragmatic assessments. Decision-making in this context comes closer to what Fallon and Meltzer call the “Agency Model,”²²² as strictly “applying the law, not making it”²²³ permits the evaluation of pragmatic and strategic circumstances.

Fallon and Meltzer also do not fully appreciate the paradigmatic shift in the strategic realities which can accommodate a larger expan-

219 As a matter of U.S. treaty obligations, captured enemies already have this right under the Geneva Conventions:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Third Geneva Convention, Geneva Convention Relative to the Treatment of Prisoners of War art. 5, 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

220 Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2031, 2031 (2007).

221 *Id.* at 2033.

222 *Id.* (“The Agency Model seeks to restrict courts to applying the law, not making it.”).

223 *Id.*

sion of rights than they anticipate. They view *Eisentrager* as rightly decided so long as it stands for the proposition that aliens detained abroad “generally” have no constitutional right to habeas, but that the possibility is left open that “a *small subset* of aliens might have sufficient contacts with the United States to possess both substantive constitutional rights and a constitutional right of access to a court to assert those rights.”²²⁴ As an extension of that argument, they proffer a battlefield *rule* with regard to citizens. They write that “[w]ithout attempting to anticipate every imaginable scenario, we would follow this general principle: the central distinction for purposes of appraising the legality, and ultimately the constitutionality, of executive detentions of American citizens is between battlefield and nonbattlefield contexts, not between seizures at home and those abroad.”²²⁵ Bowing to the stories of battlefield exigencies, they posit that “[i]n all nonbattlefield cases, seizure and detention of citizens should rest on evidence that has been carefully assembled and is reasonably capable of being maintained.”²²⁶

But this principle can be extended even further. Fallon and Meltzer operate under the implicit assumption that the military is distinct from the police force, in both function and capacity. Their position that, in “all nonbattlefield cases,” the seizure and detention of citizens should rest on evidence that has been carefully assembled and is reasonably capable of being maintained, implies that such careful assembly is not possible in the military context. “Imagine moving detainees, witnesses, or lawyers around in Baghdad today to develop evidence for a habeas proceeding,”²²⁷ they ask.

But this sharp divide between military and police actions is not necessarily true on the twenty-first century battlefield. As the *Field Manual* states: “In counterinsurgencies, warfighting and policing are dynamically linked.”²²⁸ While “[t]here is a clear difference between warfighting and policing . . . [counterinsurgency] operations require that every unit be adept at both and capable of moving rapidly be-

224 *Id.* at 2056 (emphasis added).

225 *Id.* at 2081.

226 *Id.* Accordingly, they would not read the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), as authorizing the indefinite executive detention of an American citizen seized anywhere other than on a battlefield. Fallon & Meltzer, *supra* note 220, at 2081–82 (“Even if Congress were plainly to state its intention to authorize a broader range of executive detentions, we believe that the purported authorization should be deemed unconstitutional absent a valid suspension of the writ.”).

227 *Id.* at 2057.

228 FIELD MANUAL, *supra* note 7, at para. 7-26.

tween one and the other.”²²⁹ The *Field Manual* also reminds operators that every insurgent is a “criminal suspect[]” and thus evidence must be properly documented and preserved.²³⁰

In the asymmetric battlefield of this century, the traditional military functions are being increasingly fused with the police functions, even outside of the strict counterinsurgency context. As I have demonstrated elsewhere, the Navy, for example, is being increasingly called upon to police the seas against pirates, maritime terrorists, and traffickers in illicit materials by sea.²³¹ Given this reality, and drawing on my own experiences capturing and detaining Somali pirates, I have argued that the United States should design procedural rules for the at-sea or battlefield capture rather than either assume, or take the position, that no procedural rules apply.²³²

While the Patriot Act²³³ is highly controversial, and many of its provisions have not been fully tested in the courts, it nevertheless demonstrates that the United States is already tailoring procedural rules to accommodate certain realities. For example, the Patriot Act authorizes the Attorney General to detain any alien whom he “has reasonable grounds to believe” is “described in” certain sections of United States Code.²³⁴ These code sections “describe” aliens who: (1) “seek[] to enter the United States” to “violate any law of the United States relating to espionage or sabotage” or to use “force, violence, or other unlawful means” in opposition to the government of the United States; (2) have “engaged in a terrorist activity;” or (3) the Attorney General believes are “likely to engage after entry in any terrorist activity,” have “incited terrorist activity,” are “representative[s]” or “member[s] of a terrorist organization” or are “representative[s]” of a group that “endorses or espouses terrorist activity,” or have “received military-type training” from a terrorist organization.²³⁵

But, it requires that the Attorney General step through procedural checks. The Act expressly prohibits unlimited indefinite detention

²²⁹ *Id.*; see also *id.* at paras. 6-90 to 6-105 (addressing in detail the role, organizing, and training of police forces in counterinsurgency operations).

²³⁰ *Id.* at para. D-15.

²³¹ See generally Bahar, *supra* note 46.

²³² *Id.* at 44–56 (discussing the application and tailoring of fourth and fifth amendment protections to captures at sea).

²³³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA PATRIOT”) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

²³⁴ 8 U.S.C. §§ 1226a(a)(3), 1226a(a)(3)(A) (2006).

²³⁵ 8 U.S.C. §§ 1182(a)(3)(A), 1182(a)(3)(B) (2006); see also 8 U.S.C. §§ 1227(a)(4)(A)(i)–(iii), 1227(a)(4)(B) (2006) (authorizing deportation of aliens for subversive activities).

and requires the Attorney General to begin removal proceedings “not later than 7 days after the commencement of such detention.”²³⁶ If a terrorist alien’s removal is “unlikely in the reasonably foreseeable future,” he may be detained for additional periods of up to six months if his release will “threaten the national security of the United States.”²³⁷

Regardless of one’s views on the overall constitutionality (or advisability) of the Patriot Act, it is worth pointing out that many rules of criminal procedure are prophylactic rules designed to protect the underlying constitutional provision. They can be adjusted.

Take, for example, the rules requiring a warrant prior to arrest, or a forty-eight-hour probable cause determination subsequent to an arrest without a warrant. These rules were designed to ensure the full protection of the Fourth Amendment.²³⁸ In the military, these rules are slightly different to reflect military necessities, but they are still designed to protect an individual’s Fourth Amendment rights. The military has a forty-eight-hour probable cause determination,²³⁹ a seventy-two-hour requirement for a command memorandum detailing the probable cause for pretrial restraint,²⁴⁰ and the initial review officer’s (“IRO’s”) independent determination of probable cause.²⁴¹

If the rules can be constitutionally adjusted to reflect military necessities at home, they can be adjusted to reflect military necessities on the expanding battlefield. After all, in addition to rejecting the

²³⁶ 8 U.S.C. § 1226a(a)(5) (2006).

²³⁷ *Id.* § 1226a(a)(6).

²³⁸ See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (“[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*.”); *Gerstein v. Pugh*, 420 U.S. 103, 111–19 (1975) (holding as unconstitutional Florida procedures under which persons arrested without a warrant could remain in police custody for thirty days or more without a judicial determination of probable cause).

²³⁹ Rule for Courts-Martial 305(i)(1), in *MANUAL FOR COURTS-MARTIAL UNITED STATES* (2005) [hereinafter R.C.M.]; see also *United States v. Rexroat*, 38 M.J. 292, 295 (C.M.A. 1993) (“The purpose of RCM 305 was to comply with *Gerstein* and *Courtney* and their progeny.”); *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976) (holding, in reference to *Gerstein*, that “those procedures required by the Fourth Amendment in the civilian community must also be required in the military community,” unless military necessity required a different rule). The court also held that, since bail does not exist in the military, “a neutral and detached magistrate must decide more than the probable cause question. A magistrate must decide if a person could be detained and if he should be detained.” *Courtney*, 1 M.J. at 271.

²⁴⁰ Rule for Courts-Martial 305(h)(2)(A)-(C), in R.C.M., *supra* note 239.

²⁴¹ Rule for Courts-Martial 305(i)(2), in R.C.M., *supra* note 239. Note that the IRO does not review the commander’s decision for an abuse of discretion; rather, he makes an independent decision of probable cause and necessity.

proposition that a probable cause hearing is *only* prompt under *Gerstein* when provided “immediate[ly]” upon completion of the “administrative steps incident to arrest.”²⁴² *McLaughlin* allows the Government to demonstrate “the existence of a bona fide emergency or other extraordinary circumstance” which caused it to hold a probable cause determination beyond forty-eight hours.²⁴³ The fact that a detention may take place on the high seas, for example, could qualify as an “extraordinary circumstance.” Accordingly, the military has a specific “at sea” exception to its normal procedural requirements.²⁴⁴

Most importantly, however, there is a precise constitutional provision which specifically authorizes the Congress not only to declare war, to wage imperfect or limited warfare via letters of marque and reprisal,²⁴⁵ but also to “make Rules concerning Captures on Land and Water.”²⁴⁶

Fallon and Meltzer are correct that exigencies and practical considerations should afford a more tailored, if not tiered, jurisprudence. Their argument, however, misses the fact that this tailoring does not require a shift to a common law-like approach to judging because it is already required by the Constitution and such precedent as *Eisentrager*, *Milligan* (which also confirms the Framers’ original, pragmatic intentions), and *McLaughlin*. Their argument also misses the practical and strategic shift in which battlefield realities now increasingly require greater expansion of rights.

Matthew Waxman has correctly called for an end to the debate between “those who say that only traditional habeas corpus rights to a fair hearing can sort out these cases and those who say that noncitizen enemy fighters captured abroad in wartime have never been entitled to their day in court.”²⁴⁷ We would “all be better off,” he urges, “forging a broad agreement about the *minimum* acceptable conditions for any long-term detention process, firmly within the rule of law.”²⁴⁸ The positive pragmatic principle is the vehicle through which we can forge this new agreement, firmly within the rule of law.

242 *McLaughlin*, 500 U.S. at 53–54.

243 *Id.* at 57.

244 *See* Rule for Courts-Martial 305(m)(2), *in R.C.M.*, *supra* note 239.

245 U.S. CONST. art. II, § 8, cl. 11; *see also* discussion *supra* notes 25–28.

246 U.S. CONST. art. II, § 8, cl. 11.

247 Waxman, *supra* note 212, at B4.

248 *Id.*

VI. CONCLUSION

In *Eisentrager*, the majority spoke of “inherent distinctions” justifying differential treatment between enemies and non-enemies, aliens and residents:

Modern American law has come a long way since the time when outbreak of war made every enemy national an outlaw, subject to both public and private slaughter, cruelty and plunder. But even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.²⁴⁹

The question is, why are there these “inherent distinctions”? *Eisentrager* ultimately answers that question with pragmatics. Read strictly, the enemies in *Eisentrager* lost habeas rights not because they were enemy aliens alone, but also because they lacked “comparable claims upon our institutions” and because, as enemies, their access to U.S. courts could have proven “helpful to the enemy.”²⁵⁰ The battlefield pragmatics have changed in the modern era, and thus *Eisentrager* requires a different outcome for today’s detainees than it did for its defendants.

On September 6, 2006, I sat down in Donald Rumsfeld’s office in the Pentagon with a senior military officer. The small table around which we sat contained a glass top which protected and displayed three pieces of paper. One of those papers was a satellite image of the Korean peninsula at night, with the bottom half aglow and the upper half completely in darkness save for a pinprick of light at Pyongyang. Secretary Rumsfeld, I was told, called this image his “sociological experiment,” “proving the value of democracy and freedom.”²⁵¹ But as the Harvard Law School graduation creed reminds, it is the law that provides the “wise restraints that make men free.”²⁵²

Law may frustrate at times, but it is ultimately empowering, and for the battlefields of the twenty-first century, strategically necessary. Fortunately, the Constitution and the Supreme Court accommodate the changing realities. The guiding principles should be that a formal enemy, defined as “a subject of a foreign state at war with the

²⁴⁹ Johnson v. Eisentrager, 339 U.S. 763, 768–69 (1950).

²⁵⁰ *Id.* at 776.

²⁵¹ Interview with Anonymous Senior Military Officer, U.S. Dep’t of Def., in Wash., D.C. (Sept. 6, 2006).

²⁵² JOHN T. BETHELL ET AL., HARVARD A TO Z 239 (2004) (emphasis omitted).

United States,”²⁵³ should continue to have minimal due process protections, but no fewer rights than those commensurate with strategic and pragmatic viability. Enemy combatants may be targeted, indefinitely detained, and subject to military commission, but they must be allowed to assert habeas protections under the Constitution when doing so would be not be “impractical or anomalous.”²⁵⁴

Hostile nonstate actors, on the other hand, are not eligible for imprisonment without civilian trial, but the strategic nature of the Constitution can allow their targeting, as well as the tailoring of due process protections to accommodate the modern battlefield.

Finally, as necessity creates and limits the restrictive rules, courts should review executive claims to it—certainly with judicious deference, but also with less trepidation and apology. In all but the legal sense of the word, the United States is certainly at war, but prevailing in the Fourth Generation conflicts requires greater application of, and adherence to, the law. The Constitution not only continues to provide a bulwark for the nation in its struggles, but enables a finely-tuned arsenal to prevail in them as well.

²⁵³ *Eisenstrager*, 339 U.S. at 769 n.2.

²⁵⁴ *See, e.g.*, *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008) (citing *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring) (citing *Reid*, 354 U.S. at 74).