

## *The War Against Terrorism and the Rule of Law*

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**Abstract**—The War Against Terrorism has put into issue two tenets of the American constitutional tradition. The first denies the government the power to imprison anyone unless that person is charged with a crime and swiftly brought to trial. The other requires the government to abide by the Constitution's restrictions on its power no matter where or against whom it acts. This article, based on the 2005 H.L.A. Hart lecture, examines the Supreme Court's first encounter with the Administration's conduct of the War Against Terrorism and explains how the Supreme Court's rulings badly compromised these foundational principles.

All the world sighed. On 28 June, 2004, the Supreme Court handed down its decisions arising from the so-called 'War Against Terrorism' and they were greeted with a deep sense of relief. We had been braced for the worst of all possible outcomes—an endorsement of the Administration's position. Such a result would have betrayed the most elementary principles of American constitutionalism, and left vulnerable many of the constitutional courts around the world that had built upon American principles to make certain that their governments fought terrorism within the terms of the law. The Supreme Court must be credited with having avoided that result, and yet faulted for doing less than it should have.

The Court rendered three decisions. All three involved individuals who were imprisoned by the United States—in fact held incommunicado for two years, with no access to family, friends, or counsel. All three cases put into question a fundamental tenet of the American Constitution—what I will call the principle of freedom. This principle denies the United States the authority to imprison anyone unless that person is charged with a crime and swiftly brought to trial. This principle is rooted in section 9 of Article I, guaranteeing the writ of habeas corpus<sup>1</sup>—the historic means of testing the legality of detention—and perhaps

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<sup>1</sup> U.S. CONST. art 1 § 9, cl. 2 ('The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it').

even more fundamentally, in the Fifth Amendment guarantee that no person shall be deprived of liberty without due process of law.

Over the years, the principle of freedom has been qualified to permit civil commitment proceedings, which allow the state to confine to a hospital or mental institution persons who are a threat to themselves or others. More recently, the principle has been adjusted to allow the United States to detain persons who might serve as material witnesses in a criminal prosecution or before a grand jury but who are likely to flee the jurisdiction. Presumably, such detention would be of limited duration. An even more fundamental qualification—and the one invoked by the government in these cases and recognized by international law—allows the armed forces to capture and imprison enemy combatants during ongoing hostilities.

All three cases before the Court were removed from the battlefield. One involved an American citizen—Jose Padilla—who was first arrested at O'Hare Airport in Chicago as he alighted from a plane.<sup>2</sup> He had arrived in Chicago from Pakistan via Switzerland. He was immediately taken to New York and then transferred to a naval brig in Charleston, South Carolina. The second case also involved an American citizen—Yaser Esam Hamdi.<sup>3</sup> He was first arrested in Afghanistan, taken to Guantánamo Naval Station, later transferred to a naval brig in Norfolk, Virginia, and finally, after the grant of certiorari by the Supreme Court, brought to the same naval brig in Charleston in which Padilla was being held. The third case involved a group of Australians and Kuwaitis who were first seized in Afghanistan and Pakistan and then imprisoned at Guantánamo.<sup>4</sup>

In all three cases, the prisoners, acting through various representatives, some self-appointed, others appointed by the trial courts, sought writs of habeas corpus to challenge the legality of their detention, and in doing so invoked the principle of freedom. The government maintained that the prisoners were enemy combatants—one was allegedly affiliated with Al Qaeda and the others were said to be soldiers of the Taliban. All the prisoners denied the government's charges and demanded a meaningful opportunity to contest the factual basis of their detention. Admittedly, if the government failed to prove that they were enemy combatants, the government might still be able to detain them. The principle of freedom is not an absolute or unconditional protection of freedom, but rather tightly identifies the circumstances under which an individual may be deprived of his or her freedom. If the prisoners were not enemy combatants then the government would have the burden of charging them with a crime. Requiring the government to proceed in this way would bring into play the protections of the Sixth Amendment that specifically govern criminal prosecutions, including a speedy trial, trial by jury, the right to cross examination, proof beyond a reasonable doubt, and the right to counsel. A criminal prosecution would also fully

<sup>2</sup> *Rumsfeld v Padilla*, 542 US 426 (2004).

<sup>3</sup> *Hamdi v Rumsfeld*, 542 US 507 (2004).

<sup>4</sup> *Rasul v Bush*, 542 US 466 (2004).

reveal, beyond the numbing drumbeat of war, the gravity of what the government had in mind for these individuals—incarceration for a substantial period of time.

By the time these cases reached the Supreme Court, the government was prepared to recognize the right of the two prisoners who were American citizens—Padilla and Hamdi—to seek a writ of habeas corpus. The government sought to reduce this right, however, to a mere formality. The government insisted that there should be no evidentiary inquiry into the prisoners' claim that they were not enemy combatants; an affidavit from some official in the Administration attesting to Padilla's and Hamdi's status as enemy combatants was, according to the government, in and of itself a sufficient basis for denying the writ. The demand for unlimited power on the part of the Executive was even more extreme in the case of the Australians and Kuwaitis. The government insisted that those prisoners had no right even to apply for a writ of habeas corpus, or put differently, no federal court had jurisdiction to grant the writ. Although the Supreme Court did not embrace all these audacious and somewhat startling demands for executive power, it failed to vindicate what I have called the principle of freedom.

Padilla's habeas petition struck a note of urgency. The government held him as an enemy combatant, but the war that the government had in mind was not the kind that had been fought in Afghanistan and for which international law allows the belligerents to detain enemy combatants. Rather, it was the vast, ill-defined, and never ending 'War Against Terrorism'. Political rhetoric had been confused with a rule of law. Moreover, by the time the Supreme Court ruled on his petition in June 2004, Padilla had been imprisoned for more than two years. For most of that period he was held incommunicado, without access to family or counsel. Only after the grant of certiorari did the government allow Padilla access to counsel. The purpose of such extended isolation had long been manifest. In an affidavit filed in open court, Vice Admiral Lowell E. Jacoby, the Director of the Defense Intelligence Agency, explained that the total isolation of Padilla for such an extended period—at the time Jacoby filed the affidavit it had already been eight months—was necessary to cultivate in Padilla a complete sense of dependency on his interrogators and to convince him of the hopelessness of his situation.<sup>5</sup>

According to the government, Padilla was associated with Al Qaeda and was planning to engage in terrorist acts in the United States, including the detonation of a device—known as a dirty bomb—that would disperse radioactive material. The government's claim was supported by nothing more than an affidavit of an official in the Department of Defense, which, of course, contained multiple layers of hearsay. The federal district court in New York ruled that Padilla had a right to an evidentiary hearing to contest the veracity of the affidavit, and provided him with access to counsel for that purpose. The judge did not ground the

<sup>5</sup> *Padilla v Rumsfeld*, 243 F Supp 2d 42, 49–50 (S.D.N.Y. 2003).

right to counsel in the Bill of Rights, either the due process clause of the Fifth Amendment or the Sixth Amendment guarantee of the right to counsel in criminal prosecutions. Rather, he gave Padilla access to counsel simply as an exercise of his power to hold a hearing on Padilla's habeas petition.<sup>6</sup> The Court of Appeals went even further. Concluding that Padilla was being unlawfully detained, it ordered his release unless he was transferred to civilian authorities and either held as a material witness before a grand jury or charged with a crime.<sup>7</sup>

The Supreme Court failed to address the lawfulness of Padilla's detention in any way. The Court simply ruled that Padilla's lawyer had filed the habeas petition in the wrong district court. Padilla had been brought from Chicago to New York on a material witness warrant requiring him to testify before a grand jury. The district judge in New York who had issued the material witness warrant appointed counsel to represent Padilla before the grand jury. Padilla in fact consulted with counsel, but two days before a scheduled hearing on a motion to contest his arrest on the warrant, the Department of Defense took custody of him and transferred him to the naval brig in South Carolina—all without prior notice to Padilla's counsel. Upon learning that Padilla was in the custody of the Department, Padilla's lawyer immediately filed a habeas petition in New York in order to contest the legality of his detention, naming the Secretary of Defense as the respondent. In an opinion by Chief Justice William Rehnquist, the Supreme Court held that under the relevant statute the habeas application should have been filed in South Carolina, not New York, and that the proper defendant was not the Secretary of Defense, but rather the commander of the Charleston brig. Padilla remained imprisoned, and his lawyer was required to begin the habeas proceeding once again.

The commander of the Charleston brig is a subordinate of the Secretary of Defense and fully subject to his control and discretion. The requirement that the commander be named as the respondent to the habeas petition is of no independent significance, but rather is derived from the more general rule requiring a prisoner to bring a habeas petition in the district in which he is confined. This rule allocating work among the federal district courts seeks to assign the habeas petition to the court where a hearing might be most conveniently held and also to prevent forum shopping by prisoners. On previous occasions exceptions had been made to this rule, but Chief Justice Rehnquist insisted that those exceptions were not applicable in Padilla's case. Although this might indeed be true, the Chief Justice did not explain why the Court could not create yet another exception. As the dissenters bitterly complained, the facts of Padilla's situation—the surreptitious transfer of custody from civilian to military authorities—were

<sup>6</sup> *Padilla v Bush*, 233 F Supp 2d 564, 605 (S.D.N.Y. 2002).

<sup>7</sup> *Padilla v Rumsfeld*, 352 F3d 695, 699 (2d Cir. 2003).

sufficiently unique to allow the Court to create another exception without enabling prisoners to shop for the most hospitable judge and without threatening the overall aims of Congress in distributing the responsibility for habeas writs among the district courts.

The responsibility of the Court to address the merits of Padilla's claim to freedom stands, however, independent of whether an exception should have been made to the rule for allocating habeas petitions among the district courts. The choice between the South Carolina and New York district courts did not raise any issue of subject-matter jurisdiction,<sup>8</sup> which necessarily implies that the issue presented by the petition is within the province or competence of the federal judiciary. As a result, the Supreme Court had full authority to rule on the merits of Padilla's claim for freedom, even if the habeas proceeding had been commenced in the wrong district court. Even more, Padilla's claim would remain the same no matter in which district court the case was commenced. It is therefore difficult to perceive how justice was served by requiring Padilla's lawyer—after Padilla had been confined incommunicado for two years—to start the proceedings afresh. Sometimes we accept the Court's forbearance as a matter of judicial statesmanship, but here my sentiments are of another sort. Given the stakes for the individual and the nation, the failure of the Court even to address the merits of Padilla's claim of freedom was, pure and simple, an act of judicial cowardice.

The institutional failure of the Court was manifest at the moment of decision. Subsequent developments only aggravated the offence. Following the Court's decision, Padilla's lawyers filed a new habeas petition in the South Carolina district court. The South Carolina district court granted Padilla's petition, but the Fourth Circuit reversed, affirming the summary power of the government to detain Padilla as an enemy combatant. With that victory in hand, and only days before it had to respond to Padilla's petition for a writ of certiorari, the government reversed its strategy. It filed a petition in the Fourth Circuit declaring its intention to transfer Padilla from military to civilian custody and to try him on criminal charges in a district court in Florida.

This stunning turn of events occurred on 22 November, 2005. On that day—almost three and a half years after his initial arrest (8 May, 2002) and 16 months after the Supreme Court declined to rule on the merits of Padilla's petition (28 June, 2004)—the principle of freedom was vindicated. The government took upon itself the burden of charging Padilla with a crime, and by that act brought into play all the strictures of the Bill of Rights, including the provision guaranteeing Padilla access to counsel and a speedy trial. Of course, justice delayed is better than no justice at all, but the government never satisfactorily explained why it took this action so belatedly—only just before it would have had, for a second time, to justify its position before the Supreme Court. Could it be, as the

<sup>8</sup> As acknowledged by Justice Kennedy in his concurrence. *Padilla*, 542 US at 451 (Kennedy, J., concurring).

author of the Fourth Circuit opinion denying the government's petition later charged, that the government feared a reversal by the Supreme Court?<sup>9</sup>

The decision of the government to downgrade the charges against Padilla was also puzzling. The Secretary of Defense had initially charged Padilla with plans to detonate a radioactive device in the United States. The Secretary maintained that stance and supported it with affidavits from subordinates throughout Padilla's protracted efforts to secure his freedom—which had lasted over three years and involved the Southern District of New York, the Second Circuit, the Supreme Court, the District Court for South Carolina, and the Fourth Circuit. The indictment against Padilla filed in November 2005 made no mention of his alleged plan to detonate a radioactive device in the United States. The charges now against him were 'conspiracy to murder, kidnap, and maim persons in a foreign country', and providing 'material support for terrorists'. Before the press, the government defended its shift on the ground that pursuit of the original charge would have jeopardized vital intelligence sources, but many in the United States questioned the truthfulness of that explanation.

In his habeas petition, Padilla maintained that his confinement violated a 1971 federal statute known as the Non-Detention Act. This statute could be viewed as a watered-down version of what I have called the principle of freedom. It is aimed at avoiding a repetition of the horrors arising from the detention during World War II of persons of Japanese origin then resident in the western United States. I say 'watered-down' because the statute applies only to citizens (the Japanese interned in World War II included non-US citizens as well as citizens) and because it required not that the prisoners be charged with a crime, but only that the detention be authorized by Congress—it appears more concerned with unilateral action by the Executive than vindicating the principle of freedom. The Act provides that 'no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress'.<sup>10</sup>

In the original habeas proceeding the Second Circuit held that Padilla's confinement in fact violated the Non-Detention Act. This was a bold advance over the decision of the District Court for the Southern District of New York, which did not put the government to the burden of filing criminal charges against Padilla, required only an evidentiary hearing on the question of whether he was an enemy combatant, and allowed indefinite detention if that charge were proved. The Second Circuit ruling was still limited, however, as it only governed situations like Padilla's, where a citizen was seized in the United States. The Second Circuit specifically declined to address whether

<sup>9</sup> *Padilla v Hanft*, 432 F3d 582, 585 (4th Cir. 2005). On 4 January, 2006, The Supreme Court granted the Government's application to transfer Padilla from Military to Civilian custody to face criminal charges, adding that it 'will consider [Padilla's] pending petition for certiorari in due course'. *Hanft v Padilla*, 163 L Ed 2d 721 (2006). In response to the petition for certiorari, the government has insisted that the transfer of Padilla to civilian authority has rendered moot the question of whether he can be detained as an enemy combatant.

<sup>10</sup> Non-Detention Act of 1971, 18 U.S.C. § 4001(a) (2000). On 3 April 2006, the court denied Padilla's petition.

the Non-Detention Act had any force for American citizens captured on the battlefield.<sup>11</sup>

Yaser Hamdi—the prisoner in the second of the terrorism cases—also relied on the Non-Detention Act, but there was a crucial difference between him and Padilla. Although Padilla, much like the Japanese who were interned, was taken prisoner in the United States, Hamdi was seized in Afghanistan, which, at the time of his capture (October 2001), was a zone of active combat. Yet Justice Sandra Day O'Connor, writing for herself and three other Justices (William Rehnquist, Anthony Kennedy, and Stephen Breyer), held in *Hamdi* that even assuming the 1971 Act applied to American citizens captured on the battlefield, the specific requirement of the Act—that the detention be authorized by statute—was satisfied. To that end, she relied upon a statute ('Authorization for the Use of Military Force') that was passed by Congress one week after September 11, and used by the Executive as the declaration of war against Afghanistan. It authorized the President to use all necessary and appropriate force against nations, organizations, or persons associated with the September 11 terrorist attacks.<sup>12</sup>

In a separate opinion in *Hamdi*, Justice David Souter, joined by Justice Ruth Bader Ginsburg, insisted that the requirement of the Non-Detention Act was not satisfied—the statute authorizing the use of military force against terrorism was far too general to count as the requisite statutory authorization for the detention. (Justice Souter also concluded that the 1971 Non-Detention Act governed prisoners taken on the battlefield and did not improperly interfere with the responsibilities of the President as Commander-in-Chief.) Yet in the interest of forming a majority, Justice Souter joined Justice O'Connor's opinion. Justice Souter said that by providing Hamdi with an opportunity to contest the factual predicate of the government's theory, the plurality's remand order was 'on terms closest to those [he] would impose'.<sup>13</sup> Justice Clarence Thomas embraced the government's position in its entirety, virtually denying any judicial review of the government's decision to detain Hamdi indefinitely,<sup>14</sup> while Justice Antonin Scalia and Justice John Paul Stevens took the opposite view—because Hamdi was an American citizen, the only options for the government were to prosecute Hamdi in federal court for treason or some other crime or to let him go.<sup>15</sup>

In the United States and abroad, Justice O'Connor's opinion is best known for her statement that 'a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens'.<sup>16</sup> In accordance with that aphorism, she did in fact place limits—procedural limits—on the President's capacity

<sup>11</sup> *Padilla*, 352 F3d at 711.

<sup>12</sup> Authorization for the Use of Military Force, 107 Pub. L. No. 107-40, 115 Stat. 224. In its decision of 9 September, 2005, rejecting Padilla's bid for freedom, the Fourth Circuit relied on the same reasoning.

<sup>13</sup> *Hamdi*, 542 US at 545-553 (Souter, J., concurring).

<sup>14</sup> *Ibid* at 579 (Thomas, J., dissenting).

<sup>15</sup> The Justice Scalia and Justice Stevens opinions come close to endorsing the principle of freedom, but fall short of doing so by restricting their rule to American citizens and providing that American citizens cannot be held as enemy combatants. *Ibid* at 554 (Scalia, J., dissenting).

<sup>16</sup> *Ibid* at 535.

to detain citizens who had been captured on the battlefield and later detained in the United States.<sup>17</sup> She required that Hamdi be given the opportunity to contest the government's claim that he was a soldier of the Taliban and thus an enemy combatant. This charge had been supported by an affidavit from the same official in the Department of Defense (Michael Mobbs) who gave the affidavit in *Padilla*, although Hamdi's father denied this allegation and said that his son went to Afghanistan in August 2001 to do relief work.

Justice O'Connor spoke to Hamdi's particular situation, but in effect crafted a more general procedural scheme. With that purpose in mind, she explained that the procedural rights of prisoners held as enemy combatants must be carefully tailored 'to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict'.<sup>18</sup> Accordingly, she allowed the government to support its charge that a prisoner is an enemy combatant by submitting an affidavit based on records maintained by the military of battlefield detainees. Such an affidavit would create a presumption, she said, that the prisoner is an enemy combatant and can be held on that basis. Then the prisoner would be given the opportunity to present evidence to rebut the presumption and to show that he is not an enemy combatant. The standard of proof Justice O'Connor contemplated remains unclear, but she did say that at this hearing Hamdi would have the assistance of counsel.

Justice O'Connor took up the counsel issue at the very end of her opinion. The entire discussion of this issue is one short paragraph following a sentence that, because of its emotional tone, reads as though it was to be the conclusion of her opinion. In that sense, the counsel paragraph seems like a postscript—as though all the hard issues had already been resolved. Most of the paragraph is devoted to explaining why the right to counsel issue is moot: although Hamdi was denied access to counsel, or for that matter anyone else, for a period of almost two years, following the grant of certiorari the government allowed Hamdi to meet with counsel without conceding any obligation to do so. Then this sentence appears, without any elaboration whatsoever: 'He unquestionably has the right to access to counsel in connection with the proceedings on remand'.<sup>19</sup>

A casual reader might think that the sentence was purely descriptive of Hamdi's situation and that the right to counsel to which Justice O'Connor referred might be the right the government already allowed him as a discretionary matter. On reflection, however, it may well be that this 'right' to counsel

<sup>17</sup> In *Hamdi*, Justice O'Connor says, 'Certainly, we agree that indefinite detention for the purposes of interrogation is not authorized'. *Ibid* at 520. This sentence does not fit into the overall structure of the opinion, which is to impose procedural limitations on the government. But Ronald Dworkin reads it as imposing a substantive limitation, also rooted in due process, on the capacity of the government to detain enemy combatants who, like Hamdi, are American citizens. According to Dworkin, American citizens can be held, not for coercive interrogation, but only to prevent them from returning to fight against the United States. Ronald Dworkin, *What the Court Really Said*, New York Review of Books, 12 August, 2004, at 26, 29, available at <http://www.nybooks.com/articles/17293>.

<sup>18</sup> *Hamdi*, 542 US at 533.

<sup>19</sup> *Ibid* at 539.



applies more generally and has constitutional roots, not in the Sixth Amendment, which only applies to criminal prosecutions, but in the due process clause of the Fifth Amendment. The remand required the concurrence of Justice Souter, and he spoke of the plurality's 'affirmation' of Hamdi's right to counsel.<sup>20</sup> I therefore assume that Justice O'Connor and the three other Justices who joined her opinion intended to avoid a ruling on the right to counsel issue, but that they added the crucial sentence at the very last moment to secure Justice Souter's and Justice Ginsburg's votes.

Bargaining among the Justices had a less felicitous outcome with respect to the nature of the tribunal that must determine whether Hamdi is an enemy combatant. Throughout her opinion, Justice O'Connor made clear that the hearing must be held before 'a neutral decisionmaker'<sup>21</sup> or 'an impartial adjudicator'.<sup>22</sup> Clearly that standard would be satisfied by a federal district court passing on an application for habeas corpus. Indeed, the case before the Supreme Court had begun in such a manner—Hamdi's father acting as next friend filed a habeas petition in the federal district court with jurisdiction over the Norfolk brig. But Justice O'Connor created another alternative: a hearing before a military tribunal that would not be a prelude, but rather a substitute, for the hearing on the habeas petition in the federal district court. She wrote: 'There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal'.<sup>23</sup> She could not, however, obtain a fifth vote for this proposition. Justice Souter was explicit that in joining Justice O'Connor's plurality opinion he did not mean to imply 'that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas'.<sup>24</sup>

Doubts can, of course, be raised as to whether a military tribunal can ever, no matter how it is constituted, have the 'neutrality' or 'impartiality' that fair procedure requires. After all, it is an act of the military that must be judged and a military tribunal is, as the name implies, staffed by members of the military. But Justice O'Connor's proposal—and that is all it is—can be faulted on more basic grounds. She does not fully grasp the significance of the issue to be resolved by the tribunal: the narrow technical issue is, as she says, whether the government has made a mistake in classifying Hamdi as an enemy combatant, but the stakes are much greater than she allows, because the classification of Hamdi as an enemy combatant is the basis for depriving him of the freedom that the Constitution guarantees. It is the basis for allowing the government to incarcerate

<sup>20</sup> *Ibid* at 553 (Souter, J., concurring).

<sup>21</sup> *Ibid* at 533, 537.

<sup>22</sup> *Ibid* at 535.

<sup>23</sup> *Ibid* at 538. Justice O'Connor did not rely upon *Ex Parte Quirin* for that proposition, and with good reason. *Quirin* involved seven German soldiers who were captured within the United States, which they had entered for purposes of sabotage. One of them claimed to be an American Citizen. The Supreme Court allowed all seven prisoners to be tried by military tribunal, but in contrast to *Hamdi*, in *Quirin* it was undisputed that the prisoners were German soldiers and thus enemy combatants. *Ex Parte Quirin*, 317 US 1 (1942).

<sup>24</sup> *Ibid* at 553 (Souter, J., concurring).

Hamdi without charging or convicting him of a crime. Accordingly, Hamdi's claim that he was not an enemy combatant should have been tried by a federal court, not simply because such a court can achieve a measure of neutrality unavailable to a military tribunal, but also and more fundamentally because under our constitutional scheme it is the federal judiciary that has the responsibility of determining whether some individual has been deprived of a constitutionally guaranteed right, like the right to freedom. Federal judges are nominated by the President and confirmed by the Senate, and under our constitutional scheme are endowed with the authority to speak for the nation on the meaning of the Constitution.

The root of Justice O'Connor's error is clear. Much to the surprise of everyone, including the lawyers on both sides and some of her colleagues, she applied the *Mathews v Eldridge*<sup>25</sup> formula to determine Hamdi's procedural rights. This formula was devised in the mid-1970s to determine whether an individual faced with the termination of welfare or disability benefits is, as a matter of due process, entitled to a hearing and what the character of that hearing must be. This formula requires a consideration of the benefits and costs of the proposed procedures and conceives of procedure as an instrument to arrive at correct decisions.<sup>26</sup> Although this formula has not been applied in recent decades to require elaborate procedural protections for welfare recipients, it has always been assumed that if a hearing were required before benefits were terminated that hearing need not be held before a federal judge. A supervisor in the welfare department would not suffice as a decisionmaker, because such an official would not possess the neutrality that fair procedure requires, but the hearing could be held before a member of the state civil service.<sup>27</sup> In the case of Yaser Hamdi, however, the issue is entirely different from that presented in *Mathews v Eldridge*: not the fairness of a procedure to determine whether the state was correctly classifying the individual as it did, but rather whether the prisoner is entitled to the substantive right to freedom guaranteed by the Constitution.

In saying this, I am not faulting Justice O'Connor, as some have, for eliding property and liberty. She understood that what is at stake is not a welfare cheque, disability benefits, or some other form of property, but rather Hamdi's liberty. Her error was to ignore the distinction between two types of liberties—those that are guaranteed by the Constitution itself, as for example, by the First Amendment or by what I have called the principle of freedom, and those liberties that people enjoy in society, but which are not constitutionally protected (one type of liberty can be called a constitutional liberty, the other a personal or social liberty).

A liberty of the latter type might be the liberty a parent has with respect to the control of his or her children. The Supreme Court had previously used the

<sup>25</sup> *Mathews v Eldridge*, 424 US 319 (1976).

<sup>26</sup> Owen Fiss, *The Law as It Could Be* (2003), 211.

<sup>27</sup> *Goldberg v Kelly*, 397 US 254 (1970).

*Matthews v Eldridge* formula to determine what procedures should be applied to deprive a person of such a personal liberty, as in *Lassiter v Dept of Soc. Servs. of Durham County*.<sup>28</sup> Although I disagree with the result in that case—appointed counsel need not be provided to an indigent person whose parental rights are to be terminated—I acknowledge the applicability of the formula. Similarly, I would say that if all that were involved in Hamdi's case were a personal liberty, the *Matthews v Eldridge* formula would be applicable, and from that perspective a hearing before a military tribunal might suffice, once again assuming that the tribunal possessed the requisite impartiality. The formula only requires fair procedures.

But for liberties of the first type—liberties guaranteed by the Constitution itself—the individual is entitled to a hearing before a federal court on his or her claim. Imagine a tenured professor being fired by a state university for criticizing some public official. He can challenge that action as a violation of the First Amendment and is entitled to have that action judged by a federal court, not simply some administrative tribunal within the university structure.<sup>29</sup> He is entitled to something more than fair procedure. Likewise, I maintain that Hamdi was entitled to a hearing before a federal court, not a military tribunal, on his claim that he was being denied the liberty provided by the principle of freedom—a liberty that can be traced to the due process clause of the Fifth Amendment read in its substantive guise and the provision of Article I limiting the suspension of the writ of habeas corpus.<sup>30</sup>

The Supreme Court's failure in Hamdi's case is important but measured. Although the Court did not require a hearing before a federal court and thus did not honour the principle of freedom, it at least granted the prisoner some rights—an evidentiary hearing on the government's contention that he was an enemy combatant and access to counsel for such a hearing. The Court must also be credited for grounding these rights in the due process clause, understood unfortunately not as a substantive guarantee of liberty, but only as a requirement of procedural fairness. In the third decision handed down on 28 June, 2004, *Rasul v Bush*, the Supreme Court also granted procedural rights to prisoners captured in the theatre of war and accused of having fought for the Taliban, but these rights were even more limited than in *Hamdi*.

Although the *Rasul* Court ruled that the prisoners had a right to file a habeas application in a federal district court and to require a response by the government, it did not specify what further rights—procedural or substantive—they had before that court. Even more significantly, the Court grounded the limited right it did provide in the federal habeas statute, not the Constitution, and left uncertain whether the prisoners had any constitutional rights that might be

<sup>28</sup> 452 US 18 (1981); see also *MLB v SLJ*, 519 US 102 (1996).

<sup>29</sup> See *Perry v Sindermann*, 408 US 593 (1972); *Bd. of Regents v Roth*, 408 US 564 (1972).

<sup>30</sup> After the Supreme Court's ruling, lawyers for Yaser Hamdi and the government began negotiations. On 11 October, 2004, Hamdi was released from custody and transferred to Saudi Arabia. The release agreement requires Hamdi to renounce any claim to United States citizenship and to obey travel restrictions preventing him from travel to the United States, Afghanistan, Iraq, Israel, Pakistan, Syria, and the West Bank and Gaza Strip.

vindicated in the habeas proceeding it allowed. The Court simply granted the prisoners the right to file a piece of paper.

The first and most crucial difference between *Hamdi* and *Rasul* is that, unlike Yaser Hamdi, the prisoners in *Rasul* were not American citizens. Two were Australians and 12 were Kuwaitis (at one point, two British citizens were involved in the litigation, but due to intense diplomatic pressure, they were released after the grant of certiorari). All the prisoners denied that they took up arms against the United States and insisted that they were in the region for personal or humanitarian reasons. The second difference, which becomes of constitutional significance only because of the first difference, is that they were not held in Charleston or Norfolk, but rather were moved from the battlefield to the Guantánamo Naval Station and imprisoned there.

The Guantánamo Naval Station is a forty-five square-mile area on the south-eastern coast of Cuba. It has been in the possession of the United States ever since the Spanish-American War of 1898, when Spanish dominion over the island was brought to an end. As a purely formal matter, the United States has possession of the territory by virtue of a 1903 lease (later modified in 1934). The lease reserves 'ultimate sovereignty' in Cuba, but also provides that 'so long as the United States of America shall not abandon the said naval station of Guantánamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has'. The Guantánamo arrangement is a lease without a term, and given the allocation of power between the two nations, there is no doubt that the Naval Station is property within the exclusive control of the United States. Each year the United States tenders the rent, approximately \$4,000. For the last 40 years the Castro government has refused to accept it. The Naval Station is separated from the rest of Cuba by an extensive fencing system. It has its own stores, including a McDonald's and a Baskin-Robbins. With the exception of a handful of elderly Cuban employees, holdovers from another era, who enter the base for work, there is no exchange between the base and the rest of the island.

The federal habeas statute (28 U.S.C. §2241) provides that the district courts can only grant habeas petitions 'within their respective jurisdictions'. The government argued that this statutory language means that a district court can only hear habeas petitions from prisoners being held within its jurisdiction and that because the prisoners were being held at Guantánamo they were not within the jurisdiction of the federal district court in which the habeas petition had been filed (the District of Columbia), nor indeed, the jurisdiction of any district court. The Supreme Court, in an opinion by Justice Stevens, rejected this argument and established the following scheme for §2241: prisoners being held within the jurisdiction of a district court must apply for the habeas writ within the jurisdiction of that court. However, prisoners held outside the jurisdiction of any district court, such as those held in Guantánamo, can apply for a writ from any district court that has jurisdiction over their custodian.

Justice Stevens was helped to his conclusion by the spectre of having Americans citizens held at Guantánamo. As he put it, '[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under §2241'.<sup>31</sup> Drawing a linkage between American citizens and aliens seems entirely appropriate as a technique of statutory interpretation: given that §2241 does not distinguish between the petitions of citizens and those of non-citizens, a construction of §2241 that accommodates the petitions of American citizens at Guantánamo should accommodate the petitions of non-citizens being held there. What the linkage overlooks, however, is that the right to file a habeas petition is meaningless unless the prisoner has constitutional rights, and the constitutional rights of aliens and citizens are, under established doctrine, conceived of in quite different terms.

Citizens can claim the protection of the Constitution no matter where they are held by United States agents—South Carolina, Guantánamo, or even, for example, Yemen. The situation with aliens is quite different. Location is all important. If the aliens live in South Carolina or any other state, they have the same constitutional rights as citizens. If they are being held in the South Carolina brig that contained Hamdi and Padilla, then presumably they too would be entitled to a due process right to a determination of their claim that they are not enemy combatants. Conversely, if they are being held by the United States government in a foreign country, for example, Yemen, they have, under established doctrine, no constitutional rights—not even a right to a due process hearing before some neutral tribunal to ascertain whether they are in fact enemy combatants.

Where does Guantánamo fit in this scheme? The Court put Guantánamo closer to the South Carolina side, and was quite right in this judgment. The 45 square-mile area occupied by the Naval Base may, in some formal sense, belong to Cuba, but it is a territory over which the United States has exercised exclusive control for a century and has the right to do so forever. It is almost part of the United States. If the Court did not conceive of Guantánamo in this way, it is not clear to whom the prisoners might turn to challenge their detention. Their representatives might bring a legal proceeding in the country of their citizenship, but because they are being held in Guantánamo, not Kuwait or Australia, the courts of the countries of which they are citizens would not have the power or jurisdiction over the United States to order their release. As one Law Lord, writing extra-judicially, put it, a legal black hole would have been created.<sup>32</sup>

The Supreme Court discussed the status of Guantánamo in the context of interpreting the habeas statute. The Court of Appeals, which had held that the district court did not have jurisdiction to hear the prisoners' petitions, approached the problem from another perspective. Instead of starting with the

<sup>31</sup> *Rasul v Bush*, 542 US 466, 480 (2004).

<sup>32</sup> Johan Steyn 'Guantánamo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 1.

statutory question of jurisdiction, the Court first looked to whether the prisoners had any underlying constitutional rights. The Court of Appeals read the prevailing Supreme Court precedents to mean that if the prisoners were held by United States agents in another country—even one that was not a battlefield, say Yemen—they would have no constitutional rights. The Court of Appeals was also of the view that Guantánamo was not part of the sovereign territory of the United States, but rather was like Yemen. Having reached this point in its analysis, the habeas proceedings made little sense to the Court of Appeals, even if the prisoners were, as a purely technical matter, deemed to be within the jurisdiction of the district court. As the Court of Appeals explained, ‘We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not’.<sup>33</sup> In contrast, the Supreme Court first examined the statutory jurisdiction of the habeas court and in that context concluded that Guantánamo should be treated as part of the United States. It never reached the issue of what constitutional rights the prisoners enjoy and thus failed to engage the major premise of the Court of Appeals and the government. Seen in this way, Justice Stevens’s opinion is not a tribute to judicial minimalism, but rather a contrived effort to make the case seem easier than it is—as though all that is at stake is a technical dispute over the jurisdictional requirements of § 2241.<sup>34</sup>

Justice Stevens was fully aware that in order to issue the writ under § 2241, the district court must not only have jurisdiction over the petition but must also determine that the detention violates the Constitution or laws of the United States. Of course, for the prisoners to have their constitutional rights violated, they must have constitutional rights in the first place. If the suit were filed by a United States citizen detained in Guantánamo, this would not be much of an issue because American citizens enjoy the protection of the Bill of Rights no matter where they are held, whether it be Guantánamo or Yemen or maybe even Afghanistan or Iraq (though in the latter cases exceptions could be made for the needs of the battlefield). But what about the constitutional rights of aliens, like the petitioners in *Rasul*, who never resided in the United States and had no other connection to it?

<sup>33</sup> *Al Odah v United States*, 321 F 3d 1134, 1141 (D.C. Cir. 2003).

<sup>34</sup> On 6 January, 2006, § 2241 was amended to deny the federal courts jurisdiction to hear the habeas petition of any alien detained by the Department of Defense at Guantánamo Bay. The new statute contemplates, however, that the claims of detainees at Guantánamo will be heard by a bureaucratic structure already in place: a Combatant Status Review Tribunal will determine whether a prisoner is an enemy combatant, a Detainee Administrative Review Board will review on an annual basis the need to continue the detention of an enemy combatant, and a Designated Civilian Official, acting on the recommendation of the review board, will make the final decision on continuing detention. Although the new statute abolishes habeas jurisdiction of such decisions, it vests in the United States Court of Appeals for the District of Columbia exclusive jurisdiction over the decision of the Designated Civilian Official that an alien is properly detained as an enemy combatant. The statute also prescribes the scope of review to be used in such proceedings (allowing it to determine, for example, whether the proceedings and standards used by the Guantánamo tribunals are consistent with the United States Constitution). Relying on the narrow scope of the *Rasul* decision, the new statute only affected § 2241, and but did not purport to restrict the right to habeas corpus that emanates from the Constitution itself.

Justice Stevens addressed this question only in the most incidental way. In a footnote (n 15) he lists five allegations that, if true, would render the detention of the prisoners before him, as he put it, 'unquestionably' unconstitutional or otherwise a violation of the laws or treaties of the United States: (1) the prisoners were not enemy combatants; (2) they were imprisoned for more than two years; (3) they were held in a territory subject to the long term, exclusive jurisdiction of the United States; (4) they had no access to counsel; and (5) they were not charged with a crime.<sup>35</sup>

The meaning of this footnote is not at all clear. Not surprisingly, when the case returned to the trial level, two judges in the District Court for the District of Columbia, each presiding over different proceedings, read it differently. One judge granted the government's motion to dismiss the habeas petitions, concluding that the prisoners' reliance on footnote 15 was 'misplaced and unpersuasive'.<sup>36</sup> According to this judge, the Supreme Court 'had not concerned itself with whether the petitioners had any independent constitutional rights'.<sup>37</sup> He further concluded that based on prior doctrine, the prisoners had no underlying constitutional rights. This meant that although the prisoners had a statutory right to file a habeas petition—they had the right to file a piece of paper—the legal proceeding was of no practical import. The other district judge denied the government's motion to dismiss.<sup>38</sup> On her reading, footnote 15 established that the prisoners had the same constitutional rights that they would have had if they were being held in Charleston—not a right to have a federal court ascertain their status as enemy combatants, for even Hamdi did not have that right, but presumably a right to a hearing before some impartial tribunal with the assistance of counsel. On this interpretation the prisoners in Guantánamo—nationals of Australia and Kuwait—would be given the same rights as Hamdi.

This latter reading of footnote 15 would move the law in the right direction, but even with this gloss, the footnote remains troubling. First, it does no more than give the nationals of foreign countries a right to fair procedure to ascertain whether they are in fact enemy combatants—it does not afford them any of the substantive protections of the Constitution, including the right to freedom or any other rights embraced within the Bill of Rights, most notably the protection against cruel and unusual punishment. Second, this reading of footnote 15 makes location crucial—specifically the fact that the prisoners are being detained in Guantánamo, which has been under the exclusive control of the United States for more than a century. The *Rasul* prisoners are granted some protection, but those who are being held abroad—in Yemen, not to mention countries we are now occupying by force of our military power, like Iraq—could not claim the protection of the Constitution.

Sadly, this limitation in the law would mean that the prisoners abused and tortured by the United States military authorities at Abu Ghraib—fully disclosed to

<sup>35</sup> *Rasul*, 542 US at 483.

<sup>36</sup> *Khalid v Bush*, 355 F Supp 2d 311, 323 (D.D.C. 2005).

<sup>37</sup> *Ibid* at 322.

<sup>38</sup> *In re Guantánamo Detainee Cases*, 355 F Supp 2d 443 (D.D.C. 2005)

the world only weeks before the Supreme Court's decision in *Rasul*—could make no constitutional claims against the United States. In the months following this disclosure, Congress and the President apologized to the victims of torture at Abu Ghraib. The line officers immediately responsible for the torture have been disciplined. Victims of such abuses might even advance claims under various federal statutes.<sup>39</sup> But they cannot, within the terms of settled doctrine, claim that officials of the United States violated the basic law of the nation—and that, in my view, is most unfortunate. Although it was no part of the business of the Supreme Court in *Rasul* to address the abuses in Abu Ghraib—the Court left the law where it found it—those events throw into bold relief the limitations of what the *Rasul* Court did in fact decide.

Footnote 15 ends with a reference to *United States v Verdugo-Urquidez*<sup>40</sup>—one of the defining decisions of the modern period, and one of the cases upon which the Court of Appeals placed significant weight. *United States v Verdugo-Urquidez* was decided in 1990—more than a decade before the Administration launched its 'War Against Terrorism' and invaded Afghanistan and then Iraq. The immediate context was a war of another type—the 'War Against Drugs'. But Chief Justice Rehnquist, the author of the Court's opinion, also expressed an interest in freeing the Executive from the shackles of the Bill of Rights in foreign military operations.<sup>41</sup> To that end, he denied the protection of the Fourth Amendment and perhaps the Bill of Rights in general to aliens living abroad.

René Martín Verdugo-Urquidez was a citizen of Mexico and the alleged violation of his rights occurred in Mexico. Federal drug enforcement agents, working with Mexican officials, searched his home in Mexico without a warrant and in the course of those searches seized certain documents. Prior to the search

<sup>39</sup> These claims might be made under the Alien Torts Claims Act, 28 U.S.C. § 1350 (2000), on the theory that torture violates various treaties or international norms prohibiting torture. The Act, dating from the earliest days of the Republic, grants the district courts original jurisdiction of civil actions by aliens for torts committed in violation of the law of nations or a treaty of the United States. On 30 December, 2005, a federal statute was passed providing: 'No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment'. Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2739 (2006). The means of enforcing this prohibition were not specified in the statute, and upon signing the legislation the President stated that he did not view the statute either to give rise to a private cause of action or to be enforceable through habeas corpus. The President further insisted that he will construe the statute in a manner consistent with his authority as Commander In Chief and the constitutional limitations on the judicial power. Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 42 Weekly Comp. Pres. Doc. 1918 (Dec. 30, 2005). The new statute defines 'cruel, inhuman, or degrading treatment or punishment' as consisting of those punishments prohibited by the Fifth, Eighth, and Fourteenth Amendments of the Constitution. The statute further provides that the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment shall be determinative of which punishments proscribed by those constitutional provisions are within the reach of the statute.

<sup>40</sup> *United States v Verdugo-Urquidez*, 494 US 259 (1990).

<sup>41</sup> *Ibid* at 273 ('The United States frequently employs armed forces outside this country—over 200 times in our history—for the protection of American citizens or national security. Congressional Research Service, *Instances of Use of United States Armed Forces Abroad, 1798–1989* (E. Collier ed. 1989). Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest').



Verdugo-Urquidez had been arrested by Mexican authorities, transported to the Border Patrol station in southern California, and then turned over to United States Marshals. He was charged with being one of the leaders of an organization in Mexico that smuggled narcotics into the United States and was placed on trial in the United States for violating federal criminal statutes. In the course of the trial, Verdugo-Urquidez moved, on the basis of the Fourth Amendment, to exclude the evidence seized in the raid on his Mexican residence. The Supreme Court held that the Fourth Amendment does not apply to a search by United States agents of a residence that is located in a foreign country and owned by an alien who did not reside in the United States and who did not otherwise voluntarily attach himself to the national community.

On a purely technical level, the Court's ruling was presented as a construction of the phrase 'the people' as it appears in the Fourth Amendment. The Fourth Amendment provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'. Although the term 'the people' seems to be of universal scope, permitting no distinction between citizens and aliens, Chief Justice Rehnquist construed the phrase as a term of art that embraced only (a) citizens and (b) those aliens who have developed a sufficient voluntary connection with the United States to be considered part of the national community. Granted, Verdugo-Urquidez was being imprisoned in the United States, and tried in federal court for violating federal statutes, but this was not sufficient for the Chief Justice to place him within the scope of 'the people' protected by the Fourth Amendment.

Justice William Brennan dissented. In his dissent he convincingly showed that no evidence, either in the debates or in the general history surrounding the adoption of the Bill of Rights, indicates that the phrase 'the people' in the Fourth Amendment was meant to delineate a class of beneficiaries who would be protected by the Amendment. The phrase 'the people' was not a term of art, but rather, he insisted, merely a rhetorical device to underscore the importance of the protection being granted. Justice Brennan also advanced a more cosmopolitan view of the Constitution, according to which the actions of the United States would be governed by the Constitution no matter where or against whom the United States acts. The Justice acknowledged that the meaning of the Constitution may vary from context to context; what the Fourth Amendment ban on unreasonable searches means in a suburban community in the United States differs from what it means on the battlefield, or for that matter, in a country that we occupy by virtue of our military power. But the actions of American officials would, according to Justice Brennan, always and everywhere be judged by the standards of the Constitution.

To defend his cosmopolitanism, Justice Brennan relied on the principle of mutuality: 'If we expect aliens to obey our laws, aliens should expect that we will

obey our Constitution when we investigate, prosecute, and punish them'.<sup>42</sup> Such a principle seems unable to encompass all that Justice Brennan wanted—he was explicit that the Fourth Amendment applies to military activities abroad (though in such cases he would drop the warrant requirement and test the government's action only by the reasonableness requirement, which is necessarily sensitive to context). The principle of mutuality also suffers from a circularity, for the question is whether the government's action constitutes a violation of the Constitution. Justice Brennan may well be right in proclaiming that 'lawlessness breeds lawlessness',<sup>43</sup> but we cannot invoke that axiom to determine whether the government has acted lawlessly.

A more plausible account of Justice Brennan's cosmopolitanism, of great sway in the Warren Court era, identifies the nation with the Constitution and underscores the constitutive nature of that all-important law: the Constitution creates the structure of government and defines the limits of its authority.<sup>44</sup> The constitutive view of the relationship between the nation and the Constitution not only reflects the self understanding of the founders, but also and perhaps more importantly accords with the practice of constitutional adjudication over the last two hundred years. The doctrine of enumerated powers, the keystone of constitutional adjudication in the nineteenth century, was premised on the view that Congress had no authority other than that granted to it by the Constitution. In the twentieth century, the first question of constitutional adjudication shifted from whether the Constitution had granted the power to Congress to whether Congress or some other officer of the United States violated a particular constitutional prohibition. Still, it was assumed that the prohibitions on the government defined the outer limits of its authority, and that as a juridical entity, the United States has no existence outside of the Constitution.<sup>45</sup>

The limits on government authority can be derived from the terms upon which power was conferred on the new government, from certain prohibitions on the government contained in the body of the Constitution, notably Article IV, and above all, from the amendments to the Constitution adopted in 1791 and known as the Bill of Rights. For the cosmopolitan, the Bill of Rights is conceived not as a testamentary document distributing a species of property to specific and limited classes of persons, but rather as a broad charter setting forth the norms that are to govern the operation of government. 'No person shall be deprived of life, liberty, or property without due process of law'. 'Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech'. 'Cruel and unusual punishment shall not be inflicted'. For the cosmopolitan, rights are not property

<sup>42</sup> *Ibid* at 284 (Brennan, J., dissenting).

<sup>43</sup> *Ibid* at 285 (Brennan, J., dissenting).

<sup>44</sup> See generally *Reid v Covert*, 354 US 1 (1957).

<sup>45</sup> *Downs v Bidwell*, 182 US 244 (1901) (Harlan, J., dissenting). See generally Owen Fiss, *Troubled Beginnings of the Modern State, 1888–1910* at 225–56 (The Oliver Wendell Holmes Devise, History of the Supreme Court, Vol. VIII, 1993).

belonging to particular people, but the concretization of these sweeping prohibitions of the Constitution.

This view of rights does not necessarily give the protections of the Constitution the universal scope that Justice Brennan demands. It still remains for the Court to apply the norm in some concrete case, and that necessarily entails a process of interpretation. The history or wording of the norm may delimit its scope, and the context will also determine the content of the right. All that can be said is that this way of viewing rights—as norms, not property—more easily accommodates cosmopolitanism and is more conducive to that orientation. It makes it more difficult for a justice to claim, as Chief Justice Rehnquist did in *Verdugo-Urquidez*, that the Fourth Amendment affords protection only to citizens or those who voluntarily associate themselves with the national community. It renders the effort to limit the Bill of Rights in this way more implausible, and suggests that those limits are not based on a strict interpretation of the text, but on more extraneous or political considerations, like giving the Executive the flexibility Chief Justice Rehnquist believes is necessary to conduct foreign affairs effectively.

Chief Justice Rehnquist ended his opinion in *Verdugo-Urquidez* by proclaiming, '[f]or better or for worse, we live in a world of nation-states'.<sup>46</sup> The importance of the nation-state cannot be denied, even today, in the face of ever increasing globalization. The cosmopolitan view of the Constitution would not, however, deny the importance of the nation-state, but rather offer an alternative, and in my view, more appealing way of understanding the relation between the Constitution and the nation. Of course, non-citizens do not vote, and thus are not politically empowered to demand that the government justify its actions to them. But that does not mean that the government owes them no duties, as is indeed clear from the treatment of non-citizens who are residents of the country. They too cannot vote, but are protected by the Constitution. Similarly, although the government does not act in the name of non-citizens, those in whose name it does act—'we the people'—may demand that it proceed in a certain way whenever it acts and regardless of against whom it acts.<sup>47</sup> The key provisions of the Bill of Rights—including but in no way limited to the Fourth, Fifth, and Eighth Amendments—present themselves as universal prohibitions, and as such may be read as an expression of the demands by the founding generation as to the way the government they were creating must act.

Everyone who resides in the United States, aliens and citizens alike, are expected to obey the laws of the United States, and can be called upon to lend support to the government, through, say, the payment of taxes and perhaps even serving in the military. Yet as evident from the rules regarding the rights of those who flaunt the law, and who we can assume are justly convicted of doing so, the

<sup>46</sup> *Verdugo-Urquidez*, 494 US at 275.

<sup>47</sup> But see Thomas Nagel, *The Problem of Global Justice*, 33 *Phil. & Pub. Aff.* 113 (2005) (discussing 'the political conception of justice', which asserts that 'justice is something we owe through our shared institutions only to those with whom we stand in a strong political relation'). *Ibid.* at 121.

protection of the Constitution is not in any way limited to those who obey the laws or otherwise support the government. The obligations imposed on the government by the Bill of Rights are not a quid pro quo offered to its subjects, but the expression of principles of right behaviour.<sup>48</sup>

Chief Justice Rehnquist and Justice Brennan occupied polar positions in *Verdugo-Urquidez*. Justices Scalia, Thomas, and O'Connor joined Chief Justice Rehnquist's opinion without comment. Justice Thurgood Marshall joined Justice Brennan's opinion in a similar fashion. The remaining three justices—John Paul Stevens, Harry Blackmun, and Anthony Kennedy—were arrayed between the poles. None of these three believed that only those persons who voluntarily affiliated themselves with the national community were protected by the Fourth Amendment. Justices Blackmun and Stevens stressed the fact that Verdugo-Urquidez had been placed on trial in the United States for violating its criminal laws and as a result the Fourth Amendment was applicable. Justice Blackmun dissented because, although he agreed with Chief Justice Rehnquist that there was no need for a warrant to search the residence of an alien outside the country, he insisted that to be valid under the Fourth Amendment the search must be reasonable, and thought that the case should be remanded to the lower court to make the reasonableness determination. Justice Stevens, like Justice Blackmun, applied the reasonableness standard, but on the record before him thought there was sufficient basis to conclude that the search of Verdugo-Urquidez's house was reasonable. He concurred in the judgment.

The position of Justice Kennedy—then a very recent appointee to the Court—is harder to characterize. He was the crucial fifth vote that Chief Justice Rehnquist needed to endow his opinion with the status of law, and Justice Kennedy obliged him. Justice Kennedy began his separate concurrence by announcing that he joined the Chief Justice's opinion. He also said that his views did not depart in 'fundamental respects' from those expressed by the Chief Justice,<sup>49</sup> but one is left to wonder whether this was in fact the case. Although he rejected the view that the Fourth Amendment's warrant requirement should be applied to the search of a foreign home of a non-resident alien, his reason was quite different from Chief Justice Rehnquist's. He did not read the phrase 'the people' as a restriction on the universe of persons protected. As he put it, 'explicit recognition of "the right of the people" to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it'.<sup>50</sup> In contrast to Chief Justice Rehnquist, Justice Kennedy simply posited that adherence to the Fourth Amendment warrant requirement abroad would be 'impracticable and anomalous'.<sup>51</sup>

<sup>48</sup> But see Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 54–6 (1996) (discussing the Federalist's argument that aliens have no constitutional rights as they are not parties to the Constitution).

<sup>49</sup> *Verdugo-Urquidez*, 494 US at 275 (Kennedy, J., concurring).

<sup>50</sup> *Ibid* at 276 (Kennedy, J., concurring).

<sup>51</sup> *Ibid* at 278 (Kennedy, J., concurring).

Even more importantly, Justice Kennedy seemed to give a certain measure of extraterritorial force to the Constitution. He began from the proposition that 'it is correct ... that the government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic'.<sup>52</sup> Yet, building on a view articulated by the second Justice John Harlan, he maintained that this does not require that the government necessarily apply each and every provision of the Constitution abroad. Rather, the constitutionality of the government's actions abroad should be judged by a flexible standard based on some notion of fundamental fairness. In conducting searches of the homes of non-citizens abroad the Constitution does not require federal agents to obtain a warrant, as the Fourth Amendment might be read to require, but only that non-citizens be treated fairly. Justice Brennan's constitution would also allow adjustments to be made as to how the Bill of Rights is applied abroad, but, as with the doctrine of selective incorporation, always within the disciplining force of the text of the amendments themselves. Justice Kennedy's constitution is more flexible, and thus less clear. My hunch is that Justice Brennan's approach would yield results more approximating justice than Justice Kennedy's, but both describe a constitution without borders.

Such a view of the Constitution makes an appearance in *Rasul*, though in the most oblique way. When Justice Stevens cited *Verdugo-Urquidez* in footnote 15 in *Rasul*, he referred only to Justice Kennedy's concurring opinion in that case, not Chief Justice Rehnquist's opinion for the Court. The significance of that selective reference is not clear to me. Perhaps Justice Stevens meant to embrace Justice Kennedy's constitutional cosmopolitanism. Or, conceivably the reference was offered as an inducement for Justice Kennedy to join the majority opinion. As it turned out, however, Justice Kennedy did not join Justice Stevens's opinion, but wrote a short separate concurrence. In it, he applied the same flexible approach outlined in his concurrence in *Verdugo-Urquidez*, again expressing unease with creating 'automatic' rules.<sup>53</sup>

Like Justice Stevens, Justice Kennedy acknowledged the unique status of Guantánamo—that for all practical purposes it was a territory of the United States. Yet he refused to treat the case as though it were nothing more than an exercise in statutory interpretation. Justice Kennedy understood that the petitioners had to have some constitutional rights in order for there to be any point in the habeas proceeding at all. Although he cautioned against judicial interference with the rightful prerogatives of the President acting as Commander-in-Chief, Justice Kennedy recognized that 'there are circumstances in which the courts maintain the power and the responsibility to protect *persons* from unlawful detention even where military affairs are implicated' (emphasis added).<sup>54</sup> The touchstone for Justice Kennedy was 'military necessity'<sup>55</sup>—only exigencies of war would prevent the

<sup>52</sup> *Ibid* at 277 (Kennedy, J., concurring).

<sup>53</sup> *Rasul v Bush*, 542 US 466, 488 (2004) (Kennedy, J., concurring).

<sup>54</sup> *Ibid* at 487 (Kennedy, J., concurring) (emphasis added).

<sup>55</sup> *Ibid* at 488 (Kennedy, J., concurring).

exercise of the judicial power implicit in the writ of habeas corpus. He also believed that the government's insistence on military necessity in the case at hand was contradicted by the fact that prisoners were being held indefinitely (justified by the government on the theory that they were illegal enemy combatants, comparable to members of irregular militias, and thus not entitled to the usual protections of the Third Geneva Convention for prisoners of war, including repatriation at the end of the hostilities). Justice Kennedy wrote, '[p]erhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker'.<sup>56</sup> Such a flexible or variable approach has its pitfalls, all of which are well known, but at least one can see within it the possibility of confronting on a constitutional basis possible government abuse of alien prisoners who are not American citizens, such as occurred at Abu Ghraib, provided of course that Justice Kennedy's insistence upon fundamental fairness is not conditioned upon the anomalous territorial status of Guantánamo.

No one else joined Justice Kennedy's opinion. The timidity of the majority in *Rasul*, as well as that of the majorities responsible for *Padilla* and *Hamdi*, is no accidental quality, but largely a product of the situation in which the Justices found themselves. Faced with the events of September 11, and then the invasions of Afghanistan and Iraq and the military occupations of these countries, the demands for power by the President and his Administration must have pressed heavily on the Justices. Although the Justices are committed to the rule of law and the protection of the Constitution, they also see themselves as responsible for protecting the interests of the nation they serve. The Justices are practical people. So they searched for ways to honour the Constitution without compromising vital national interests. As a result, they told Jose Padilla to start over in another court, provided Yaser Hamdi with an opportunity to contest the legality of his classification but made it possible for that hearing to be conducted by a military tribunal, and allowed the prisoners in Guantánamo to begin habeas proceedings without telling them in any clear way what rights they might assert in those proceedings. What is missing from this calculus, and in my judgment from all three of these much celebrated cases, however, is a full appreciation of the value of the Constitution—as a statement of the ideals of the nation and as the basis of the principle of freedom—and even more, a full appreciation of the fact that the whole-hearted pursuit of any ideal requires sacrifices, sometimes quite substantial ones. It is hard for the Justices, or for that matter anyone, to accept that we may have to risk the material well-being of the nation in order to be faithful to the Constitution and the duties it imposes. Still, it must be remembered that the issue is not just the survival of the nation—of course the United States will survive—but rather the terms of survival.

<sup>56</sup> *Ibid* at 488 (Kennedy, J., concurring).