



**“Enemy Combatants,”
The Constitution and the Administration’s
“War on Terror”**

**By Kate Martin and Joe Onek
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Introduction

Since the terrible attacks of September 11, the administration has described the U.S. as engaged in a “war on terror.” President Bush has claimed the authority as Commander in Chief to designate individuals arrested in the United States as “enemy combatants” and hold them in indefinite incommunicado military custody, without charges, trial or even access to counsel. U.S. military forces are also holding several hundred foreigners at the military base in Guantanamo Bay, Cuba, who were captured on the battlefield in Afghanistan and elsewhere. The President has declared that none of those detainees are entitled to prisoner-of-war status under the Geneva Conventions and that they may be held indefinitely as “enemy combatants.” The recent release of internal Department of Justice and Department of Defense memoranda revealed that the administration also decided that individuals designated “enemy combatants” do not come within the legal protections against torture or cruel, inhumane or degrading treatment.

Many, including the authors of this memorandum, have challenged the military seizures in the U.S. and indefinite incommunicado detentions as unconstitutional, arguing that individuals found in the U.S., who are alleged to be al Qaeda terrorists, must be charged with a crime. There has also been widespread international criticism of the Guantanamo detentions. The lack of any process, the decision to deny the protections of the Geneva Conventions, the claim that detainees may be held indefinitely and the conditions of confinement, most notably the recently revealed interrogation methods, have all been challenged on both legal and humanitarian grounds.

Underlying all these detention policies is a novel and unsupported legal framework. The administration claims that the conflict with al Qaeda is a war and that therefore reliance on the criminal law is misplaced. It then claims that the conflict is a new kind of war, in which the traditional law of war, including the Geneva Conventions, does not apply. The President further claims, as Commander in Chief, the authority to write new rules for the conflict and to do so without Congressional approval. Finally, the administration claims that because this is a war, the usual role of the courts in enforcing protections against arbitrary deprivations of individual liberty must be suspended.

The administration’s legal framework needs to be examined piece by piece. There are in fact circumstances in the conflict with al Qaeda – e.g. the invasion of Afghanistan – where the use of military force is both lawful and appropriate, and in such cases the law of war governs. But when the courts in the U.S. are open and the U.S. military is not engaged in combat inside the U.S, criminal law is the appropriate, adequate and

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constitutional means for dealing with alleged al Qaeda associates found in this country. In no instance does the Constitution give the President the authority to write new rules for this conflict on his own. And, as the Supreme Court has now decisively declared, the Executive is answerable in court for its post-9/11 detentions of individuals.¹

While the Supreme Court left some key issues unresolved, the crucial thrust of its three June 28 decisions is clear: the brief era of executive branch unilateralism is over. As Justice O'Connor wrote in *Hamdi*, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. ... Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."²

This memorandum provides a summary of the three Supreme Court decisions and then analyzes the issues raised by the government's detention policies. It concludes that, in accordance with the Constitution and the law of war, the government may detain as enemy combatants persons captured on the battlefield, but that, except in the case of a self-proclaimed leader of al Qaeda, it cannot so detain persons arrested in the U.S. Such persons must be charged under existing criminal law.

Summary: Rasul v. Bush.

Rasul and a companion case were brought by two sets of foreign nationals who were captured in Afghanistan, designated as enemy combatants and detained at the U.S. naval base in Guantanamo Bay, Cuba. The detainees filed a habeas corpus petition in federal court, alleging that they were innocent civilians and were being detained illegally. The government successfully argued in the lower courts that, under the Supreme Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the federal courts had no jurisdiction to hear the cases because the detainees were foreign nationals not being held on U.S. soil.

The Supreme Court reversed the lower courts and held 6-3 that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo naval base. The majority opinion by Justice Stevens appeared to rely both on the U.S.'s plenary and exclusive jurisdiction over Guantanamo and on the broad language of the federal habeas corpus statute, 18 U.S.C. § 2241, that courts may hear habeas applications by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." Therefore, as Justice Scalia pointed

¹ *Hamdi et al. v. Rumsfeld, Secretary of Defense, et al.*, No. 03-6696; *Rumsfeld, Secretary of Defense v. Padilla et al.*, No. 03-1027; *Rasul et al. v. Bush, President of the United States, et al.*, Nos. 03-334 and 03-343; all decided June 28, 2004. Briefs for these cases are available at http://www.jenner.com/news/news_item.asp?id=000012520724.

² O'Connor, slip op. at 29.

out in his dissent, the majority opinion at least left open the possibility that habeas claims could be made by detainees in U.S. custody anywhere in the world.

The Court expressly did not address whether the detainees are being held illegally or how that question should be decided. It stated that it had only decided that “the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing” and sent the case back “for the District Court to consider in the first instance the merits of [the detainees’] claims.”³

Summary: Hamdi v. Rumsfeld.

Yaser Hamdi, a Saudi national, was also captured in Afghanistan and brought to Guantanamo. During his interrogation at Guantanamo, the government learned that he was born in the U.S. and was thus an American citizen. He was immediately transferred to a military brig in the U.S. and held incommunicado without charges or a hearing. Hamdi’s father challenged his son’s detention in a habeas petition in federal court. After protracted litigation, the U.S. Court of Appeals for the Fourth Circuit held that Hamdi was entitled to bring a habeas action, but that, because he was captured on the battlefield, the federal courts should give total deference to the government’s decision to hold him incommunicado in military custody.⁴

In the Supreme Court, only Justice Thomas accepted the government’s position that it could hold Hamdi indefinitely as an enemy combatant with no evidentiary hearing. Four Justices (Rehnquist, O’Connor, Kennedy and Breyer) concluded in an opinion by Justice O’Connor that, by enacting the authorization for the use of military force in Afghanistan, Congress had authorized Hamdi’s detention as an enemy combatant, but that he must be given a meaningful opportunity to demonstrate, with the assistance of counsel, that he was in fact an innocent civilian. Justice O’Connor’s plurality opinion left open the possibility that the required evidentiary hearing could be held in “an appropriately authorized and properly constituted military tribunal” rather than a federal court. Two Justices (Souter and Ginsburg) concluded that Hamdi’s detention was barred by the Non-Detention Act, 18 U.S.C. § 4001(a), which provides that “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” They nevertheless concurred in the result of the plurality opinion to provide the basis for a majority decision. Two Justices (Scalia and Stevens) concluded that, as an American citizen, Hamdi could not constitutionally be detained without criminal charges because Congress had not suspended the writ of habeas corpus.

The practical result of the various opinions is that Hamdi will be entitled to an evidentiary hearing, most probably in federal court, and to the assistance of counsel. The plurality opinion described the procedures to be employed as follows:

³ Stevens, slip op. at 17.

⁴ *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *vacated*, *Hamdi v. Rumsfeld*, No. 03-6696 (decided Jun. 28, 2004).

Hearsay ... may need to be accepted as the most reliable available evidence from the Government Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut the evidence with more persuasive evidence that he falls outside the criteria.⁵

Summary: Rumsfeld v. Padilla.

Jose Padilla, an American citizen, was arrested at O'Hare Airport in Chicago on suspicion of plotting acts of sabotage in the U.S. on behalf of al Qaeda. He was first held for several weeks as a material witness in New York. Then, in June of 2002, President Bush designated him an enemy combatant and placed him in military custody. He was held in a brig in South Carolina without access to counsel, family or even the International Committee of the Red Cross (ICRC) and never charged with a crime or given an evidentiary hearing. The U.S. Court of Appeals for the Second Circuit ruled that the President lacked the authority to designate and hold Padilla as an enemy combatant and ordered that he either be charged criminally or released.⁶

The Supreme Court, in a 5-4 decision, avoided the merits of the Padilla case and held that the suit should have been brought in South Carolina, where Padilla was imprisoned, rather than in New York. The dissenters (Stevens, Souter, Ginsburg and Breyer) disagreed with this jurisdictional ruling and, more importantly, made clear that they, like the Second Circuit Court of Appeals, rejected the President's assertion of the power to hold U.S. citizens arrested in the U.S. in protracted incommunicado detention.⁷

Padilla must now refile his habeas petition in federal district court in South Carolina. However, since it appears that at least five Justices (the four dissenters in Padilla and Justice Scalia) believe Padilla's detention is illegal, the government is likely to indict him on criminal charges and end his detention as an enemy combatant.

Analysis of the Issues:

1. Is the U.S. at war with al Qaeda?

In his State of the Union message in January 2004, President Bush declared that the U.S. is at war.⁸ The administration's lawyers argue that because the U.S. is at war

⁵ O'Connor, slip op. at 27.

⁶ *Padilla v. Rumsfeld*, 352 F.3d 695 (2nd Cir. 2003), *rev'd on other grounds*, *Rumsfeld v. Padilla*, No. 03-1027 (decided Jun. 28, 2004).

⁷ *Rumsfeld v. Padilla*, No. 03-1027 (decide Jun. 28, 2004).

⁸ President George W. Bush, Address to a Joint Session of Congress and the American People, Jan. 20, 2004, available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

with al Qaeda, the military may hold several hundred foreigners and at least two American citizens as “enemy combatants” indefinitely under the law of war.⁹

The administration correctly characterizes the September 11 attacks as “acts of war,” and they were so recognized by the international community in the U.N. resolution authorizing military action against Afghanistan.¹⁰ And the September 2001 resolution by Congress authorizing the President to “use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”¹¹ satisfied the constitutional requirement (Art. I, sec. 8, cl. 11) that the subsequent use of military force in Afghanistan against al Qaeda and its Taliban protectors be authorized by the Congress. At the same time, it is clear that the September 2001 resolution did not authorize the use of military force whenever the President determined that this might aid in an unspecified “war on terror.” Thus, the President proposed and the Congress passed a new resolution in October 2002 authorizing the use of military force against Iraq.

2. What does the law of war say about who may be detained as a combatant?

As discussed more fully below, the law of war has long recognized that the military has authority to detain uniformed soldiers in an enemy army and individuals seized on a battlefield fighting with enemy forces until the end of hostilities. The administration argues that this military authority extends to the seizure and detention of individuals found in the U.S. and alleged to be covertly aiding the al Qaeda terrorist group. But the Supreme Court opinions support the conclusion that nothing in the law of war or in the congressional resolution authorizing the use of military force in Afghanistan authorized such detentions. Moreover, the Constitution forbids them.

a. Detentions of Battlefield Captives in Guantanamo.

The authority to detain enemy soldiers in order to prevent their return to the battlefield to take up arms again has always been a “fundamental incident of waging war,” as explained by Justice O’Connor’s plurality opinion in *Hamdi*.¹² The law of war, including the Geneva Conventions, has always recognized that uniformed members of an enemy army may be detained as prisoners of war until the end of the hostilities without charges, trial or access to counsel. The purpose of such detention is to prevent their return to the battlefield and does not depend upon any determination that they have committed any wrongdoing. The law of war also recognizes that there may be individuals captured fighting in an armed conflict who may not be entitled to prisoner of war status because they have not abided by rules, such as wearing uniforms and carrying

⁹ See Remarks by Alberto R. Gonzales before the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004), available at http://www.abanet.org/natsecurity/judge_gonzales.pdf.

¹⁰ United Nations Security Council Resolution 1378 (2001) on the situation in Afghanistan.

¹¹ S.J. Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (2001). The fact that Congress did not speak of “declaring war” in the Resolution is irrelevant to this controversy.

¹² O’Connor, slip op. at 12.

their arms openly, that are intended to allow their identification as enemy soldiers.¹³ Such “irregular” combatants, while they will not be entitled to immunity for acts of killing (unlike enemy soldiers) may also be detained until the end of the conflict.¹⁴

These rules are consistent with both due process and military necessity. Members of enemy armed forces can be detained as combatants without criminal charges or any kind of hearing because they are being detained in order to prevent their continued fighting not because they have done something wrong; it is their status as soldiers, not their conduct, that is determinative, and in general, their status is obvious from their uniforms. Similarly, persons captured on the battlefield are presumed to be combatants and may be detained for the duration of hostilities in order to prevent their continued fighting. While, as discussed more fully below, such persons are entitled to some sort of hearing to demonstrate that, although captured on the battlefield, they are in fact innocent civilians rather than combatants, due process considerations do not require a full-blown trial. They are not being detained for wrongdoing; their presence on the battlefield is enough to establish a presumption that they are combatants, and the exigencies of the battlefield make it impossible for the military to meet criminal standards of proof.¹⁵

Thus, the fact that the U.S. was authorized to and did use military force against Afghanistan is key to determining the extent of its authority to detain individuals as combatants. The Supreme Court has now held – correctly in our view – that the U.S. military does have authority to detain individuals seized during the hostilities in Afghanistan as combatants, and does not need to bring criminal charges against them. (While the government claimed this holding as a “victory,” many civil libertarians had agreed that if an individual was fighting against U.S. forces in Afghanistan, he could be detained without charges until the hostilities there were ended.¹⁶) As Justice O’Connor explained in the *Hamdi* plurality opinion, “Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”¹⁷ Thus, individuals “legitimately determined” to be fighting against U.S. forces in Afghanistan can be held as combatants until the end of hostilities there.¹⁸

¹³ Third Geneva Convention, Art. 4.

¹⁴ Of course, individuals seized on a battlefield who are not wearing uniforms may not in fact be engaged in fighting and therefore should not be detained as combatants. See the discussion below concerning what procedures are necessary to deal with a battlefield captive’s claim that he is an “innocent civilian.”

¹⁵ Due process does require criminal proceedings in order to punish either uniformed or non-uniformed combatants for acts of wrong-doing in violation of the law of war. See the discussion below re military commissions.

¹⁶ See, e.g., Amicus Brief of The Center for National Security Studies and The Constitution Project in *Rumsfeld v. Padilla* in the Supreme Court.

¹⁷ O’Connor, slip op. at 12.

¹⁸ O’Connor, slip op. at 14. Justices Scalia and Stevens, however, do not read the Constitution as countenancing the treatment of American citizens as combatants, even when seized fighting against the U.S. See Justice Scalia’s dissent in *Hamdi*.

b. Detention of Osama bin Laden and other al Qaeda leaders.

Self-proclaimed leaders of al Qaeda like Osama bin Laden can, of course, be tried for crimes such as murder and for crimes against humanity. But they can also be detained as enemy combatants for the duration of hostilities against al Qaeda.¹⁹ In authorizing the use of military force against those persons responsible for the September 11 attacks, Congress authorized their detention should they be captured rather than killed.

There is no due process issue raised by detaining such persons when found anywhere, including the U.S. These leaders are like the uniformed commanders of an enemy army who may be detained under the law of war because their status as combatants is undisputed.²⁰ However, due process problems arise full force when other persons are arrested in the U.S. and held as enemy combatants.

c. Detention of persons arrested in the United States as enemy combatants.

From the standpoint of civil liberties, perhaps the most important issue in the detention cases is whether persons arrested in the U.S. (other than self-proclaimed al Qaeda leaders) can be designated as enemy combatants and thereby be subjected to indefinite incommunicado military custody. Although to date only two persons arrested in the U.S. have been held as enemy combatants, there is a danger that this procedure would be used more widely in the wake of another terrorist attack.²¹ Indeed, given the administration's position that it is entitled to seize people in secret as long as it does not file criminal charges against them, there is no assurance that we will know about individuals being detained as enemy combatants.²² Thus, it is crucial to examine the legality of this procedure.

The Fifth Amendment to the U.S. Constitution provides that "no person shall be deprived of life, liberty or property, without due process of law." This means, among other things, that no person in the U.S. can be detained except pursuant to some law. The primary sources of such law are criminal statutes and statutes providing for the detention of persons who have committed immigration violations or are dangerous due to mental illness. There is no statute providing for the detention as an enemy combatant of a person arrested in the U.S.²³

¹⁹ See the discussion below re the length of detention.

²⁰ It is not clear that it would be consistent with due process principles to extend this analysis to admitted members, as opposed to self-proclaimed leaders, of al Qaeda. Of course, under current law, membership in al Qaeda is a predicate for several criminal charges.

²¹ There is a special danger that non-citizens in the U.S. will be detained by the military incommunicado and without trial because the President's November 2001 order establishing military commissions provides for such detention of any non-citizen, even if unconnected to al Qaeda, merely upon the President's decision that he may be planning an act of terrorism. Military Order of Nov. 13, 2001, § 2(a), 66 Fed. Reg. 57833 (Nov. 16, 2001).

²² See government's opposition to certiorari in *Center for National Security Studies v. Department of Justice*, No. 03-472, available at <http://www.cnss.org/Gov.Opposition.to.Cert.pdf>.

²³ Indeed, in 1971 Congress repealed the Emergency Detention Act of 1950, 50 U.S.C. § 811 *et seq.*, which provided procedures for civilian detention, during times of emergency, of individuals

The congressional resolution authorizing the use of force did authorize detentions pursuant to the law of war. But the law of war applies to members of enemy armed forces and other persons seized fighting on the battlefield; it does not apply to civilians suspected of planning acts of sabotage thousands of miles from the battlefield.²⁴ The government's argument to the contrary rested solely on *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld the military trials of German soldiers captured in the U.S. That case – “not this Court's finest hour” in the words of Justice Scalia – did not hold that the military could rely on the law of war to detain without trial civilians found in the U.S. Perhaps the law of war is outmoded in an age of global non-state terrorism, but the President of the United States cannot unilaterally change it.

Since military detentions of civilians arrested in the U.S. are not authorized by statute or by the law of war, they are, in the most literal sense, lawless. They thus constitute a violation of the Fifth Amendment's protection against deprivation of liberty without due process of law.

Moreover, even if Congress were to enact a statute authorizing the detention of suspected terrorists without criminal charges, such detentions would still be unconstitutional because they would deprive the detainees of the procedural safeguards of the Fifth and Sixth Amendments. As Justice Scalia explained in *Hamdi*, “the whole point of the procedural guarantees in the Bill of Rights is to limit the methods by which the Government can determine facts that the citizen disputes and on which the citizen's liberty depends.”²⁵ In the case of uniformed soldiers or self-proclaimed al Qaeda leaders, the determinative facts on which an individual's liberty depends are undisputed. In the case of civilians arrested in the U.S., the acts that would entitle the government to deprive them of their liberty are in dispute and the procedural guarantees of the Constitution must be afforded. The sole exception is when Congress, “in Cases of Rebellion or Invasion”, suspends the writ of habeas corpus.²⁶ Short of a suspension of the writ, even civilians suspected of spying and sabotage during the Civil War could not be subjected to military jurisdiction and denied trial in civil courts.²⁷

deemed likely to engage in espionage or sabotage because it was concerned that the Act could be used to reprise the Japanese-American internment camps of World War II. See *Hamdi*, O'Connor, slip op. at 7.

²⁴ A battlefield is where military forces are engaged in hostilities. The commission of acts of sabotage or terrorism against civilians does not transform a city into a battlefield under the law of war.

²⁵ Scalia, slip op. at 20 n. 4.

²⁶ Const. Art. I, sec. 9. cl. 2.

²⁷ *Ex parte Milligan*, 71 U.S. 2 (1866). See the discussion in the Amicus Brief of the Center for National Security Studies and The Constitution Project in *Rumsfeld v. Padilla* in the Supreme Court.

These constitutional principles apply to foreign nationals in the U.S. as well as to citizens. The Fifth and Sixth Amendments and habeas corpus are not by their language or history limited to citizens as opposed to persons.²⁸

The prohibition against detention without trial unless the writ of habeas corpus is suspended does not jeopardize national security. There are a wide range of criminal statutes dealing with material support for terrorism and conspiracy that can be employed to detain would-be terrorists long before they commit any dangerous acts.²⁹ Moreover, as Justice Scalia stated in *Hamdi*, “It is difficult to imagine situations in which security is so seriously threatened as to justify indefinite detention without trial, and yet the constitutional conditions of rebellion or invasion [for suspension of the writ of habeas corpus] are not met.”³⁰

In its three recent decisions, the Supreme Court did not yet decide whether or under what circumstances congressionally authorized detention without charge would be constitutional. Nevertheless, there is much in the recent decisions to support our analysis.

First, Justices Scalia and Stevens expressly stated in *Hamdi* that, with respect to citizens, the only options are criminal trials or suspension of the writ of habeas corpus. Although Justice Scalia’s opinion on its face applies only to citizens, its logic would appear to hold true as well for foreign nationals found in the U.S. Second, the four dissenters in *Padilla* (Stevens, Souter, Ginsburg and Breyer) used extremely strong language in condemning the “protracted, incommunicado detention” of Padilla. “Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber.”³¹ Although the dissent referred often to citizens, its logic covers foreign nationals in the U.S. as well.

The first test of how the lower courts will interpret the Supreme Court’s position on the detention of persons arrested in the U.S. is likely to come in the case of Ali al-Marri. Al-Marri, a citizen of Qatar legally in the U.S., was first arrested as a material witness and subsequently charged with a variety of offenses not directly related to terrorism. Then, in June 2003, he was designated as an enemy combatant by the President and transferred to a military brig in South Carolina. His initial habeas petition was tied up in the same jurisdictional issues that arose in *Padilla*, and he has now refiled in South Carolina.³² The district court should hold that al-Marri must either be charged with a crime or released.

²⁸ The Fifth Amendment speaks of “persons” and the Sixth Amendment speaks of “the accused”; both have always protected foreign nationals in the U.S. With respect to the availability of habeas corpus to non-citizens, see Amicus Brief of Legal Historians in *Rasul v. Bush* in the Supreme Court.

²⁹ See Amicus Brief of Janet Reno et al. in *Rumsfeld v. Padilla* in the Supreme Court.

³⁰ Scalia, slip op. at 26 n. 6.

³¹ Stevens, slip op. at 11.

³² See *Al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir 2004), cert. pending; *Al-Marri v. Hanft*, No. 2:04CV2257 (D. S.C. filed Jul. 8, 2004).

d. Detention of non-citizens seized abroad, but not on the battlefields of Afghanistan or Iraq.

While the cases before the Supreme Court all dealt with individuals alleged to be captured as part of the fighting in Afghanistan, some of the individuals being held in Guantanamo were not seized anywhere near the fighting, but were picked up in places like Bosnia and Gambia. In addition, it now appears certain that the U.S. government is also holding individuals seized far from the battlefield at places other than Guantanamo, although the government has refused to officially acknowledge this.³³

The government has not explained what authority supports such detentions. As outlined above, with the exception of uniformed enemy soldiers and, by analogy, self-proclaimed leaders of al Qaeda, the law of war provides no authority for detaining without charge individuals not found on the battlefield. Justice O'Connor's discussion of who may be detained as an "enemy combatant" under the congressional resolution authorizing the use of force in Afghanistan gives no hint that such authority would extend to individuals not found on the battlefield.

Moreover, the government's refusal to even notify the International Committee of the Red Cross (ICRC) that it is holding individuals in various locations is itself a violation of international humanitarian law. Since February 2004, the ICRC has had no response to its formal request to the U.S. government for information about the fate of the unknown number of people being held in undisclosed locations and for eventual access to them.³⁴ There is reason to be concerned, of course, about the methods being used to interrogate such detainees.

Although the law of war does not authorize the detention of suspected terrorists captured far from the battlefield, there is no dearth of authority to detain such individuals under other law. Individuals may be detained under the criminal and other laws of the country where they are found, they may be returned to their home country or, if suspected of plotting against Americans, extradited to stand trial in the U.S.

Whether and how the detentions of suspected terrorists being held abroad may be challenged is not clear. As noted above, Justice Stevens' opinion for the majority in *Rasul* did not definitively bar habeas to persons in U.S. custody abroad, and Justice Scalia's dissent claimed that from now on federal courts will entertain habeas petitions from persons "around the world." Nevertheless, it is unclear how individuals being held incommunicado by agencies like the CIA will be able to retain lawyers to file petitions or

³³ David Johnston, *Uncertainty About Interrogation Rules Seen as Slowing the Hunt for Information on Terrorists*, The New York Times, June 28, 2004, Pg. 8.

³⁴ The fact that the ICRC made public its request indicates an extraordinary level of concern on its part. See ICRC press release re meeting between the President of the ICRC and Secretary of State Powell, National Security Advisor Rice and Deputy Secretary of Defense Wolfowitz, available at <http://icrc.org/Web/eng/siteeng0.nsf/html/5V9TE8!OpenDocument> and Naomi Koppel, *Red Cross Fears U.S. is Hiding Detainees*, Associated Press, July 13, 2004. Available at http://abcnews.go.com/wire/World/ap20040713_348.html.

that the federal courts would entertain the merits of any such petitions. Regardless of the availability of judicial review, however, these detentions must be authorized by law. Otherwise, the U.S. will be appropriately condemned for acting lawlessly.

3. What kind of procedures must be given to non-citizen detainees seized outside the U.S on the battlefield of Afghanistan or fleeing therefrom?

There is much controversy concerning whether the battlefield detainees are entitled to be treated as prisoners of war under the Geneva Conventions, what kind of process they must be accorded to show that they were not fighting against U.S. forces, and how long they may now be held given events in Afghanistan and the continuing threat from al Qaeda.³⁵

a. Are the Guantanamo detainees entitled to POW status?

After the Afghanistan invasion, the President declared that none of the persons captured in Afghanistan would be considered POWs under the Geneva Convention either because they were fighting for a non-state entity (al Qaeda) or were members of a Taliban army that did not conduct its operations in accordance with the laws of war. International law scholars are divided as to whether some or all of the Guantanamo detainees are entitled to POW status under the Third Geneva Convention. Many contend that since Afghanistan was a signatory to the Convention, the Taliban forces were entitled to the presumption that they were prisoners of war, which the military could override only by making individualized determinations. None of the cases decided by the Supreme Court challenged the administration's blanket decision to deny POW status; the detainees in these cases claimed that they weren't combatants at all.

Only Justices Souter and Ginsburg in *Hamdi* raised the issue of whether Hamdi, and by extension the other Taliban detainees, should be treated as POWs. They were unpersuaded on the present record that the blanket policy of automatic denial of POW status to all detainees from Afghanistan is consistent with the Geneva Convention.³⁶ This issue will likely be raised in future court proceedings or military hearings.³⁷

³⁵ Because not all Guantanamo detainees were captured on the battlefield in Afghanistan or fleeing therefrom, this analysis does not apply to all of them. Those individuals who were simply seized in various places around the world are entitled to the regular procedures of extradition and the criminal law, unless they are the acknowledged leaders of al Qaeda.

³⁶ Souter, slip op. at 12.

³⁷ For example, detainees tried before military commissions may allege that they are entitled to POW status; under the Geneva Conventions POWs cannot be tried by the military commissions because U.S. soldiers are not triable by the commissions.

b. What opportunity should be accorded the battlefield detainees at Guantanamo to prove their entitlement to POW status or their innocence?

Article 5 of the Third Geneva Convention, as implemented by U.S. Army Regulation 190-8, provides for military hearings for persons captured on the battlefield to enable them to demonstrate that they are entitled to be held as prisoners of war or that they are in fact innocent civilians.³⁸ The Army regulation gives a detainee the opportunity to testify and to secure the testimony of reasonably available witnesses, but does not afford access to counsel. After the first Gulf War, the military conducted nearly 1200 such hearings, and hundreds of detainees were released as innocent civilians.

After the Afghanistan invasion, however, the U.S. government refused to hold a single Article 5 hearing because the President declared no one was entitled to POW status. As noted above, the President's declaration was sharply criticized by many international law scholars, and may well be unwarranted. But at least it is conceptually possible for a President to make a categorical determination that no detainee captured on a particular battlefield qualifies as a POW. What is not conceptually possible is for a President to make a categorical determination that no detainee is an innocent civilian. Such a factual determination can only be made on a case by case basis.

The U.S. government refused to give the Afghanistan captives a meaningful opportunity to demonstrate that they were innocent civilians. In deciding whom to release, it simply relied on its initial interrogations. But as Justice O'Connor scathingly noted in *Hamdi*, "An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decision maker."³⁹ The military's failure to provide Article 5 hearings, as it did in the first Gulf War, is difficult to understand except as a reflection of disdain for legal process and legal constraints at the highest levels of government. The result was the decision in *Rasul* that federal courts have jurisdiction to hear claims by the Guantanamo detainees.

In the wake of the Supreme Court's decision in *Rasul*, the Department of Defense has stated that it will afford the Guantanamo detainees military hearings similar to those that Army regulations required at the outset of detention.⁴⁰ The Department announced that it was adopting the procedures in response to the suggestion by Justice O'Connor's plurality opinion in *Hamdi* that the hearings under Army Regulation 190-8 might be sufficient to meet the due process standards for U.S. citizens like Hamdi.

³⁸ The Text of U.S. Army Regulation 190-8 is available at http://www.nimj.com/documents/POW_AR_190-8.pdf.

³⁹ O'Connor, slip op. at 31.

⁴⁰ See "Order Establishing Combatant Status Review Tribunal," Jul. 7, 2004, available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. See also "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba," Jul. 26, 2004, available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>.

The new procedures follow Army Reg. 190-8 in many respects, although unlike 190-8 they provide that a personal representative may assist the detainee in the hearing. The hearing will be conducted by three military officers who were not involved with either the capture, interrogation or subsequent review of the status of the detainee. There will be a rebuttable presumption in favor of the government's evidence. While some have criticized this presumption, it is important to note that while the Geneva Conventions establish a presumption that individuals must be treated as POWs, they do not require a presumption that battlefield captives be presumed innocent civilians.

These procedures are in addition to earlier reviews announced by the Defense Department at the time the cases were being argued in the Supreme Court. Those procedures established a process by which various Defense Department panels would review the files of each detainee on an annual basis to determine whether to continue his detention or release him but did not give the detainee any opportunity to be heard.⁴¹ The ultimate decision was to be made by the Undersecretary of Defense, currently Douglas Feith. Those reviews did not persuade the Court that adequate process had been guaranteed the detainees.

The Defense Department also announced that it would inform the detainees that the Supreme Court has decided that they may file habeas claims in federal courts. Those detainees who were represented in the Supreme Court, as well as others, can be expected to pursue their federal court challenges. It is not clear how those challenges will be resolved. The habeas courts could hold that the new military hearings procedures are adequate, particularly since Justice O'Connor stated in *Hamdi* that such hearings might be adequate even when the battlefield captive was a U.S. citizen.⁴²

c. How long can the Guantanamo detainees be held?

It has always been clear that combatants may be held "for the duration of the particular conflict in which they were captured."⁴³ Thus, combatants captured in Afghanistan can be detained for the duration of "active hostilities" there, and the *Hamdi* plurality opinion found "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan."⁴⁴

The more difficult and unresolved question is how long individuals who were seized in Afghanistan, but are determined to be al Qaeda fighters, rather than Taliban fighters, may be detained. Justice O'Connor's plurality opinion in *Hamdi* raises the question whether there is any basis in the law of war to hold them beyond the end of hostilities in Afghanistan because that is the military conflict during which they were

⁴¹ See "Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba," May 11, 2004, available at <http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf>.

⁴² O'Connor, slip op. at 28.

⁴³ *Hamdi*, O'Connor, slip op. at 10.

⁴⁴ O'Connor, slip op. at 13.

captured.⁴⁵ It would make no sense, however, to require the release of al Qaeda detainees before the end of hostilities with al Qaeda, even if the hostilities in Afghanistan are ended. Moreover, if the U.S. succeeded in killing or capturing most of al Qaeda's leadership, hostilities with al Qaeda could well end and, under traditional law of war principles, all al Qaeda detainees should be released. But releasing the captured leaders would pose the risk that they would recommence hostilities.

Under these circumstances, the basis for continued detention must be the possibility of renewed conflict rather than the end of hostilities, even for a prolonged period. Accordingly, new law may be necessary to deal with al Qaeda detainees.⁴⁶ If so, Congress should enact legislation establishing the criteria for the continued detention of al Qaeda members who have been properly detained under the law of war.⁴⁷

4. Interrogations of Enemy Combatants.

The most important consequence of the administration's legal construction of the term "enemy combatant" and its decision to classify all the Afghanistan detainees as such was its impact on the methods of interrogation the government determined could be used against them. As discussed above, whether deemed traditional POWs or labeled enemy combatants, battlefield captives may be detained until the end of active hostilities. But it is now clear that the administration decided that individuals designated as enemy combatants are not entitled to the protections of the Geneva Conventions, the Torture Convention and other laws against cruel, inhumane or degrading treatment, or even torture. The Justice Department advised the President that he could authorize the torture of enemy combatants, should he determine that it would be useful in carrying out his Commander in Chief responsibilities, and that existing U.S. criminal laws simply would not apply.⁴⁸ Further, on the advice of the Justice Department, the Defense Department adopted a policy to read the prohibitions in the Torture Convention and other laws against the intentional infliction of physical or mental pain as narrowly as possible in the case of individuals designated as enemy combatants.⁴⁹ (The effects of these policy decisions on how interrogations were carried out in Guantanamo and other prisons are currently under investigation.)

⁴⁵ O'Connor, slip op. at 12.

⁴⁶ It is important to note that this analysis applies only to al Qaeda detainees captured on the battlefield and not to al Qaeda detainees and other individuals alleged to be members of other associated terrorist groups not captured on the battlefield.

⁴⁷ See Const. Art. I, secs. 1, 8.

⁴⁸ Memorandum for Alberto R. Gonzales, from Assistant Attorney General Jay S. Bybee, re "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," Aug. 1, 2002, available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf>.

⁴⁹ "Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," Mar. 6, 2003, available at http://online.wsj.com/public/resources/documents/military_0604.pdf.

Indeed, it is now clear that the internal administration debates about whether and how the Geneva Conventions applied to the conflict in Afghanistan were driven in large measure by the desire to have a free hand in interrogations. The first reason cited by the White House counsel to the President in his argument that the President should declare that the Geneva Convention does not apply to Afghanistan was that it would further “the ability to quickly obtain information from captured terrorists” because “this new paradigm [in the war against terrorism] renders obsolete Geneva’s strict limitations on questioning of enemy prisoners.”⁵⁰ On the other hand, when Secretary Powell outlined the pros and cons of declaring the Geneva Conventions inapplicable to the Afghanistan conflict he asserted that, in all events, the policy must be to “Treat all detainees consistent with the principles of the [Geneva Convention on the treatment of Prisoners of War].”⁵¹ Unfortunately, the details of this debate were kept secret so that neither the Congress nor the American people understood the full consequences of the decision regarding the applicability of the Geneva Conventions.

The administration contention that individuals who are designated enemy combatants are not protected against abusive interrogations implicitly applies not just to overseas captives but also to U.S. citizens and non-citizens seized in the U.S. Always inherent in the government’s claim that it is entitled to seize a U.S. citizen in Chicago as an enemy combatant is the necessary corollary that it is entitled to use military force to kill or capture him. But it was not known until the recent disclosures of the administration’s memoranda concerning interrogations that the administration’s view is that, even after capture, such individuals are not entitled to the minimum legal protections found in the law of war.⁵² The ICRC, for example, has not been allowed to visit Padilla or al-Marri.

There are now pending investigations and prosecutions regarding the abuse of prisoners and the administration has stated that the U.S. does not engage in torture. Following public disclosure and outcry, the conclusions of the Justice Department memorandum are now under review. But these narrowly focused responses do not address the administration’s larger claim that the President has authority to designate individuals as enemy combatants and imprison them with no legal process or protections in order to interrogate them.

⁵⁰ Memorandum for the President, from Alberto R. Gonzales, re “Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban,” Jan. 25, 2002, available at http://www.watchingjustice.org/pub/doc_250/gonzales_memo.pdf.

⁵¹ Memorandum from Colin L. Powell to Counsel to the President and Assistant to the President for National Security Affairs, re “Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan,” Jan. 26, 2002, available at http://www.watchingjustice.org/pub/doc_250/powell_memo.pdf.

⁵² While the August 2002 Justice Department memo states that it addresses the questions that have “arisen in the context of the conduct of interrogations outside the U.S.,” it nowhere announces any limiting principle and its analysis depends upon enemy combatant status and not on the citizenship or place of seizure of the individual being interrogated.

Significantly, the Court's decision on jurisdiction in *Rasul* and its decision the next day on the Alien Tort Claims Act make clear that the federal courts are open to lawsuits by non-citizens alleging that they were tortured.⁵³ It is likely that current or former detainees will bring such lawsuits in the near future.

5. *The Use of Military Commissions.*

In addition to the procedures for determining whether Guantanamo detainees should continue to be detained, the Defense Department has also announced that it has charged some of the Guantanamo detainees with various offenses and will try them before military commissions. The law has long recognized that combatants may be tried by military courts for offenses against the law of war.⁵⁴ It appears, however, that the current commissions established by the Defense Department may try detainees for offenses not covered by the law of war and are inadequate for other reasons as well.⁵⁵

First, there is a strong constitutional argument that the use of such commissions must be authorized by the Congress, not by the President acting on his own. The Constitution gives the Congress the power to "define and punish ... offenses against the Law of Nations."⁵⁶ Second, unlike the Uniform Code of Military Justice, the current military commission procedures do not provide adequate due process at trial and do not provide for an appeal to a civilian court. Finally, the commission rules do not guarantee public access to the proceedings as required by the First Amendment. These objections could be met if Congress were to authorize the use of commissions with a properly limited scope and with rules that insure due process, including an ultimate appeal to a civilian court.

⁵³ See *Sosa v. Alvarez-Machain*, No. 03-339 (decided Jun. 29, 2004). This opinion, read in conjunction with *Rasul* outlines the possible avenues for aliens overseas to challenge not just the fact of detention, but their treatment during detention.

⁵⁴ This is the holding of *Ex parte Quirin*.

⁵⁵ President Bush authorized the commissions in a military order issued November 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001). Thereafter, after much public controversy and opposition, the Defense Department issued regulations governing such commissions. "Military Commission Order No. 1," Mar. 21, 2002, available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>, see also Military Commission Orders 2-6 at <http://www.defenselink.mil/news/commissions.html>. The Defense Department has now filed charges against several detainees. See Department of Defense News Release, "Presidential Military Order Applied to Nine More Combatants," Jul. 7, 2004. But legal scholars and human rights groups have outlined the flaws in the procedures and the detainees' lawyers have already challenged the proceedings. See "Statement in Opposition to the Use of Military Commissions" by Human Rights Watch and others, available at <http://www.cnss.org/somc.doc> and <http://www.hrw.org>, and "Recommendations for the Use of Military Commissions" by the Liberty and Security Initiative of the Constitution Project, available at <http://www.constitutionproject.org/ls/Military.Com.Recs.pdf>.

⁵⁶ Const. Art. I, sec. 8, cl. 10.

6. What Should Congress Do?

The administration has steadfastly maintained that it needs no authorization from Congress for its treatment of enemy combatants. In November 2001, the administration insisted no authorization was necessary for its decision to establish military commissions to try enemy combatants. It then failed to ask for congressional authorization or even approval of its decisions not to provide the protections of the Geneva Convention to the detainees in Guantanamo, including its decision to deny all of them POW status and the opportunity to demonstrate they were innocent civilians. In the Justice Department memoranda now under review concerning interrogation techniques, the administration's lawyers went further and claimed that congressional prohibitions against torture were not binding on the President's decisions as Commander in Chief regarding interrogations of enemy combatants. Finally, the administration claimed that the President's Commander in Chief authority was sufficient, without congressional action, to authorize indefinite incommunicado military detention of U.S. citizens seized in the U.S as enemy combatants.

Now that the Supreme Court has reaffirmed the role of the judiciary in reviewing these detentions and Congress' role in authorizing detentions, the question arises whether Congress needs to act as well. Of course, Congress cannot responsibly enact legislation on such complex and important issues involving both individual liberty and national security in a few weeks, especially in the midst of a bitter election campaign. However, Congress can engage in an orderly review of the issues, beginning with hearings, and in the next session address the following issues.

-- With respect to persons captured on the battlefield, Congress should consider establishing the procedures for determining their status as POWs, enemy combatants or innocent civilians.

-- With respect to persons captured on the battlefield and determined to be al Qaeda fighters, Congress should consider whether additional authorization is needed to detain them beyond the end of the hostilities in Afghanistan until the end of hostilities with al Qaeda.

-- Congress should determine the appropriate forum and procedures for trying persons for war crimes and related offenses, if such trials are to be conducted by the military. While the Defense Department is moving forward with prosecutions under the President's Military Order, the military lawyers representing the detainees have made clear that they will challenge the commissions as unlawful, because they have not been authorized by statute. The commission procedures also fail to meet constitutional due process requirements. Senators Leahy, Daschle and others have introduced a bill (S. 22) which would provide for congressionally authorized trials by military commissions in accordance with due process requirements.

-- With respect to persons arrested in the U.S and held without trial as enemy combatants, congressional authorization would not meet the constitutional objections to such detentions for the reasons outlined above. However, there is an important need for Congress to examine the conditions under which these individuals were held, especially in light of the disclosures of the interrogation memoranda.

Conclusion

The administration ignored both the law of war and constitutional requirements and established a new legal regime for the treatment of enemy combatants, largely in order to conduct interrogations with minimal constraints. The results have been disastrous. "Guantanamo" has become a symbol throughout the world of U.S. disregard for the rule of law, even though the Afghanistan invasion itself was widely supported as justified and legal, and even though the taking of prisoners is a natural (and humane) consequence of such an invasion. The Abu Ghraib scandal has generated even more ill will, and may help terrorist recruiting efforts for years to come. Disrespect for the law has harmed, not enhanced, our national security.

The Supreme Court has now taken the first steps in restoring constitutional limits on executive branch action and the lower courts should continue that task. The Defense Department has wisely reversed course and will provide Guantanamo detainees with hearings similar to those long required by Army regulations. The administration should now reverse course more generally and act on the recognition that rejection of constitutional and international legal norms undermines rather than aids the war against al Qaeda.