Enemy Combatants and Guantanamo: The Rule of Law and Law of War of Post–9/11

by Leonard Cutler

After the unprecedented acts of destructiveness undertaken by Al-Qaida against the United States on September 11, 2001, President George W. Bush indicated that we are facing a new and different type of enemy in the twenty-first century. "This enemy is nameless, this enemy is faceless, this enemy has no specific borders. This enemy is terrorism whose front is here in America."[1]

Such large-scale terrorism directed at the World Trade Center, the symbol of global finance and capitalism, and the Pentagon, the heart of America's national security command, caused a catastrophic loss of human life and an unprecedented threat to our national sense of well-being. For the first time in our nation's history, a non-state organization carried out its terrorist attacks on such a scale as to be recognized as acts of war, and as a result, the United States is now engaged in a legally cognizable armed conflict to which the laws of war apply.[2] President Bush's objective to eradicate the evils of the war on terrorism meant that the conflict did not end with Al-Qaida or the Afghan campaign against the Taliban for neither had been defeated. It also included other terrorist militant organizations in Iraq, Lebanon, Palestine, Chechnya, Indonesia, Pakistan, Iran, the Philippines, and elsewhere where suspected terrorists presumably came within its potential scope of attack.[3]

Given the nature of Al-Qaida and other transnational organizations equipped with covert cells of operatives capable of infiltrating into nation-states to target and kill innocent civilian populations, it is safe to assume that there exists a very real possibility that we will be living with the war on terror for the foreseeable future, if not indefinitely. It is also safe to say that the scope and duration of the war on terror is expandable, based upon the determination of the President and Congress. The principal question then is not whether the war on terror is justifiably considered a war, but whether it is of such a nature as to warrant expansion

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of the exercise of war power by the political branches of our government and if so, at what cost to individual liberty?

This paper examines the critical long-term issues that must be addressed by Congress and the Executive as we seek to balance civil liberties and the Rule of Law for enemy combatants with national security policy and the Law of War at Guantanamo post–September 11.

THE SEPARATION OF POWERS AND NATIONAL SECURITY

Since actual hostilities began post–9/11 the Executive branch has identified, captured, and detained nearly 650 alleged members of Al-Qaida, the Taliban, and their supporters and held them incommunicado at the United States Naval Air Station in Guantanamo Bay, Cuba. These prisoners were captured after the war in Afghanistan and neighboring Pakistan during Operation Enduring Freedom. The President designated these war detainees as enemy combatants who do not qualify for prisoner of war status and treatment under the Geneva Conventions. For nearly three years many of the detainees have remained in a legal, political, and geographical state of limbo because they have been held without formal charges having been presented against them, and they have been denied access to counsel.

The President justified his actions as part of an effort to successfully prosecute the war on terrorism. Congress, agreeing with the President that the attacks constituted acts of war, enacted legislation that authorized him to use military force to respond accordingly.[4] A whole host of actions were undertaken to ensure that enemy captives held in detention would no longer be able to take up arms against the United States, and that valuable intelligence information could be obtained from them in a timely fashion. Because of the unusual national security situation the United States faced, the President specifically wanted the option of a process that was distinct from the processes in the Federal Court and the Military Court system under the Uniform Code of Military Justice. Despite the fact that each distinct provision of the military detention and trial process created for enemy combatant detainees did not compare to all of the provisions of the federal court system or the court martial system, the Executive insisted that as a whole, the rules and procedures were designed to be fair, impartial, and balanced and served the needs of justice in their application.[5]

Although the Supreme Court historically has been most deferential to the President when he has exercised his war power in a military

emergency situation, judicial power does not disappear in times of war. In the last week of its 2004 term the U.S. Supreme Court decided a pair of landmark cases which addressed the President's policies of declaring American citizens as enemy combatants while detaining them indefinitely without trial, and holding noncitizen combatants at Guantanamo without providing them the opportunity to challenge the basis for their detention in any court of the United States.[6]

Justice Sandra Day O'Connor ruled in *Hamdi* that "during our most challenging and uncertain moments our courts are critical in enforcing due process principles ... even though the judiciary is not ideally positioned to judge the Executive's particular military strategies or conduct of war."[7] The Court then determined that while the President did have the authority to designate citizens as enemy combatants, his policy of indefinite detention was invalid based upon provisions of the Constitution and statutory law. The Court further ruled in *Rasul* that federal law permits U.S. courts to consider petitions for writs of habeas corpus from noncitizen detainees who argue that they are being unlawfully held at Guantanamo Bay.

In a separate concurring opinion in *Hamdi*, Associate Justice David Souter expressed his concern that in a government of separated powers, "deciding finally on what is a reasonable degree of guaranteed liberty, whether in peace or war, is not well entrusted to the Executive Branch of government, whose particular responsibility is to maintain security."[8] The Administration sees civil liberties as too costly for detainees including such elements as a presumption of innocence, the right to counsel, and the right to compulsory process for calling witnesses. Except in the most pressing of emergency circumstances, there must be room to balance individual liberties with national security concerns, and to achieve that proper balance a separate branch of government is necessary to assess whether citizens and noncitizens are subjected to excesses in prosecuting the war on terror. Because the nature of such policy decisions is political, it is for Congress and not the courts to provide the express authorization that weighs the interests of due process with national security.

THE CURRENT ROLE OF CONGRESS

To date, Congress has failed to demonstrate a leadership role in the war on terrorism post–9/11. It has facilitated presidential actions in this area by approving most directives introduced by the Administration, and generally it has stood on the sidelines when the President claimed his

powers to act were pursuant to the Commander-in-Chief clause or were already available under existing law. As a body that tends to be far more sensitive to parochial interests than institutional concerns, individual members of Congress have been overwhelmed by the public support for most of the President's wartime limitations on civil liberties for enemy combatants, particularly those of noncitizens at Guantanamo Bay.

Congress's limited and largely deferential role to the President is most clearly demonstrated by the issuance of the President's Military Order (PMO) establishing Military Commissions in November 2001, and the Military Commission Order No. 1 issued in March 2002 by the Department of Defense (DOD Order).[9] The initial Order, among other things, provided that an enemy combatant could be convicted and sentenced to death based upon secret evidence, and on a vote of two-thirds of the members of the commission, and that trial proceedings might not be public. The March 2002 regulations and instructions that were issued by the Department of Defense responded to several of the due process complaints identified in the PMO including a presumption of innocence, a right to counsel, a right to cross-examine witnesses, and a right not to testify during trial with no adverse inferences to be drawn. The DOD Order allowed for public hearings and required that the death penalty be by unanimous vote, with guilt proven beyond a reasonable doubt.[10] Although several Fundamental Fairness Issues related to due process and civil liberties were not addressed,[11] the DOD Order was a marked improvement over the PMO.

Congress was not the principal catalyst for modification of the initial proposals. While oversight hearings were held by a few legislative committees, and isolated television and newspaper interviews were given by congressional leaders, the hue and cry of former judges and military officials, civil liberties groups, editorial writers, law professors, and members of the European Union provided the principal impetus for change.

In general, Congress has been generously responsive and supportive of the President's terrorism initiatives. In addition to approving the military interventions and detentions of enemy combatants, Congress passed the USA PATRIOT Act that gave the Executive most of its wish list priorities concerning expanded wiretap authority, detention of immigrants, nationwide search warrants, and access to e-mail.[12] Despite criticism from civil liberties groups the final version of the USA PATRIOT Act essentially demonstrated that national security concerns far outweighed civil liberties interests with one notable exception, indefinite detention.

The original Administration proposal would have authorized the Attorney General to detain indefinitely any noncitizen whom he had reason to believe might commit or facilitate acts of terrorism. Senior leadership of Congress from both parties opposed this provision, and in Senate and House Judiciary Committee hearings strong concerns were expressed about the constitutional validity of indefinite detention. In negotiations between Senator Leahy, Chair of the Judiciary Committee, and the Department of Justice, the following language was agreed to: "The Attorney General shall place an alien detained in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention."[13] The full Congress imposed this limitation on detainment authority granted to the Attorney General in Section 412 of the USA PATRIOT Act, which President Bush signed into law on October 26, 2001.[14] Ironically, although Attorney General Ashcroft was denied statutory authority to detain indefinitely any noncitizen suspected of terrorism, this explicit power was subsequently granted to the Secretary of Defense by the President when he issued the November 13, 2001, Military Order.[15]

For the most part Congress clearly deferred to the Executive on the USA PATRIOT Act because it was presented by the Department of Justice just one week after the September 11 attacks, and was overwhelmingly adopted by both houses of Congress on October 24, 2001. The President's political support for such measures was at its peak during this time period.[16] Notwithstanding Congress's rejection of the Executive's proposal for indefinite detention, to the extent that members of Congress valued civil liberties, it was simply too difficult to launch a frontal challenge to a popular president before the practical results of his policies were known.[17]

LONG-TERM ISSUES TO BE ADDRESSED BY CONGRESS

What the recent Supreme Court decisions have determined is that the Executive, with proper Congressional authorization, can detain terrorism suspects as enemy combatants, and whether they are held at home or at an offshore U.S. base, they must be provided access to public review of that detention by an independent judicial authority. Additional concerns, not addressed by the Court, must be considered if continued detention of enemy combatants is to be utilized as a principal weapon in the war on terror. A long-term legal framework is essential for our democratic society as we confront a new type of enemy and new

kind of war in which we seek to properly balance civil liberties with national security interests.

Legislation is warranted to establish standards and procedures for detaining U.S. citizens and noncitizens as enemy combatants.[18] Among the relevant issues that Congress needs to address are the following:

- **What is the threshold level of terrorist activity that warrants detention by the government?** Should it apply only to those who are directly engaged in terrorist hostilities against the United States or should it be extended to those who provide support for a terrorist organization as the Executive has consistently argued? It would appear that the Court in *Hamdi* considered the threshold level of activity as a narrow limited one of "fighting against the United States in Afghanistan as part of the Taliban."[19]
- **What standard of proof must the government meet before an impartial adjudicator to justify detention?** The Court in *Hamdi* rejected the government's position that a citizen is determined to be an enemy combatant under a very deferential "some evidence" standard.[20] Justice O'Connor for the plurality proposes a schema whereby the government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria for detention, then the onus shifts to the detainee to rebut that evidence with more persuasive evidence that he falls outside the criteria. This burden-sharing scheme, in her view, would effectively balance the Executive's needs during a period of ongoing combat against terrorists with that of avoiding the risk of erroneous deprivation of a civil liberty interest for the detainees.[21] The Department of Defense in establishing its Combatant Status Review Tribunal post *Hamdi* and *Rasul* operates with the presumption in favor of the government's evidence and a preponderance of evidence standard to determine whether a detained suspect is properly classified as an enemy combatant. Should Congress adopt a more demanding standard of proof for the government to justify, e.g., probable cause or the clear and convincing standard, which is higher than the usual civil evidentiary standard of preponderance of the evidence, but somewhat lower than the standard beyond a reasonable doubt?
- **What type of hearing must the impartial adjudicator conduct to determine the government's position for classifying a detainee an enemy combatant?** Although a majority of the Court in *Hamdi* supported a "fair opportunity to rebut the government's factual

assertion of detention as an enemy combatant before a neutral decision maker,"[22] only the plurality advocated a proceeding tailored to alleviate any potential burden to the Executive in time of combat, and one which could be met by an appropriately authorized and properly constituted military tribunal.[23] The Department of Defense's Combatant Status Review Tribunal, established by Military Order, is comprised of three neutral military officers who had no role in capturing, interrogating, or determining the status of the detainee before them. Although detainees who choose to appear before the tribunal are permitted to call witnesses, it must be deemed a reasonable request by the reviewing authority. Detainees are permitted a personal representative to assist them in the proceeding, however that individual is appointed by the convening authority and may not be a lawyer. In addition to being denied access to legal counsel, the detainee may be excluded from all proceedings where his presence may compromise national security interests as determined by the Review Tribunal, and rules of evidence do not apply. The convening authority provides the final review of Tribunal decisions as to whether detainees were properly classified as enemy combatants. This process calls into serious question elements of fairness and balance.

- **For how long and for what purposes can the detention be continued, and what standard of proof applies to such a showing by the government?** An eight-member majority of the Court in *Hamdi* concluded that indefinite detention for the purpose of interrogation is not authorized; however, the plurality ruled that the United States may detain for the duration of hostilities those who are engaged in an armed conflict against the United States, provided that the right to notice and an opportunity to be heard is granted at a meaningful time and in a meaningful manner.[24] What does meaningful time and meaningful manner mean?

The Department of Defense by military rule has established an annual administrative review process to reassess the need to continue to detain an enemy combatant at Guantanamo Bay Naval Base. The process involves an Administrative Review Board which may sit in panels of three military officers, who are to make a written assessment as to whether the enemy combatants continue to be a threat to the national security of the United States, and if not whether it is in the interest of the United States and its allies to release them.[25]

Prior to the enemy combatant's hearing, the Review Board is required to provide notice to him. The enemy combatant is entitled to appear personally before the Review Board to explain why he is no longer a threat to American national security interests. The process permits him to be aided by an Assisting Military Officer in preparing his presentation to the Board, and the designated military officer may, if the enemy combatant chooses, present information to the Review Board on his behalf. The Assisting Military Officer is entitled to see all information and documentation provided to the Review Board as part of the assessment procedure. The enemy combatant is not entitled to representation by counsel during this process.

Upon completion of its review the Board makes a written assessment concerning the enemy combatant's continued threat potential to the United States and, based upon that assessment, the Review Board provides to the presidentially appointed designated civilian official (DCO) a written recommendation as to whether detention should be continued. The determination to continue to detain, release, or seek the transfer of the enemy combatant to another government rests exclusively with the DCO, who is required to give full consideration to the written assessment and recommendation of the Review Board.[26]

The Administration has proclaimed that this nonadversarial fact-based administrative proceeding is designed to be deliberate and thoughtful in balancing the security needs of our nation with the human rights of detained individuals at Guantanamo. Although the Department of Defense met with and requested input from the Department of State, the Department of Justice, the CIA, and the Department of Homeland Security for developing this "comprehensive process," Congress was never formally consulted. Congressional leaders were briefed once the system was in place.

The denial of legal representation for detainees creates a gap in the process that potentially taints the entire review system. It is of interest to note that accused terrorists are guaranteed by statute the right to appointed counsel in proceedings under the Alien Terrorist Removal Act,[27] and in other Western democracies, most notably Britain and Israel, detainees must have access to counsel to contest their status and respond to allegations against them. The review system put in place by the Executive for continued detention of enemy combatants at Guantanamo falls far short of an effective balancing of national security interests with that of assuring civil liberties for the detainees. There is clearly established a preferred position for the Executive in these proceedings. Congress

must act to not permit national security to prevent it from subjecting military authority to legitimate oversight and review. Congress must also ensure that the rule of law and not the law of war as unilaterally determined by the Executive provides the standards and procedures for detention review.

- **Do enemy combatants have the right to an appeal, and if so where and to whom?** The Department of Defense in creating the Combatant Status Review Tribunal and the Administrative Review Board for continued detention of enemy combatants placed both systems under the jurisdiction of the Secretary of the Navy, Gordon England, who serves as DCO for the Administrative Review Board and Appointing Authority for the Combatant Status Review Tribunal. Rear Admiral James M. McGarrah, convening authority for the combatant status Review Tribunals, is appointed by Secretary England. The appeal buck stops there. Under the current system established by the Executive, there is no built-in appeal to a higher civilian authority, including the judicial system. Additionally, the noncitizen detainee subject to these administrative proceedings at Guantanamo must face an Executive that serves as investigator, prosecutor, judge, and jury in determining whether he is properly designated an enemy combatant and whether continued detention is warranted.

This same lack of independent review outside of the military system exists with respect to the rulings of military commissions that try enemy combatants for violations of the laws of war. Under the Defense Secretary's Rules and Instructions, an Appellate Review Panel comprised of three members of the military is exclusively responsible for appellate jurisdiction subject to any final action taken by the President or Secretary of Defense. The President's Military Order specifically bars any appellate review by any state or federal court. The availability of an appeal to an independent civilian body, which is part of American court martial proceedings, is crucial to ensure the integrity and impartiality of the commission process as well as providing venues of relief by defense counsels seeking to maximally protect the interests of their accused clients.[28] In the regular military justice system, a case proceeds through three levels of appellate review, a Court of Criminal Appeals in each service, the United States Court of Appeals for the Armed Forces, which is located within, but is independent of, the Department of Defense, and, in some instances, review by the United States Supreme Court.

This concern is well illustrated in an exchange between Attorney General John Ashcroft and Senator John Edwards, at a Senate Judiciary Committee hearing on the President's Military Order where attention was given to developing a potential framework for appeals of military commission decisions. Attorney General Ashcroft believed, according to the Order, that the President and Secretary of Defense constituted the appellate authorities and that "those appellate authorities are consistent with systems that provide the kind of justice that is less likely to have error."[29] Senator Edwards, in response, suggested that the President and Secretary of Defense "are the people who decided the prosecution should be brought in the first case."[30] He believed that in the interest of justice and fairness, an objective third party should look at the trial, the conviction, and the imposition of the death penalty, if it was decided. Although Attorney General Ashcroft did not refute or reject Senator Edwards' independent appeal procedure, he observed that the Secretary of Defense had "the authority to develop appellate procedures under the order, and if he chooses to confer with me, I'll provide advice to him about that."[31]

WHY CONGRESS MUST ACT

Undoubtedly at some point in the not-too-distant future the entire enemy combatant review and trial process will become the grist for judicial review with respect to weighing the interests of due process and national security policy. While the Administration suggested that the Joint Congressional Resolution, the Authorization for Use of Military Force, and Title 10 of the U.S. Code provide the legal and practical ratification for the President's November 13, 2001, Military Order establishing military commissions, legal scholars and members of Congress have expressed their collective wisdom that the Military Commissions contemplated by the President's Order are legally deficient. Article I of the Constitution provides that Congress, not the President, has the power to "define and punish ... offenses against the Law of Nations" and absent specific congressional authorization, the Order undermines the tradition of Separation of Powers.

It would, therefore, be far more advantageous for our system of government if Congress stepped up now, to review, debate, and decide whether the standards and procedures put in place by the Executive for military trials of enemy combatants are acceptable rather than having the courts do their work for them. When the President issued his Military

Order, both the Senate Judiciary and Armed Forces Committees held hearings with administrative officials and experts to assess the Executive's approach. What we learn from the testimony provided in those hearings is that (a) the administration had not yet promulgated the procedures and standards to be employed by military commissions; (b) the Secretary of Defense was charged with drafting the procedures and standards; (c) the procedural safeguards and trial proceedings for the detainees would be full and fair; (d) it was premature to try to anticipate exactly what the framework and safeguards would be; (e) there was interest from members on both sides of the aisle to work with the Executive to establish a congressional authority for military tribunals in a certain framework; and (f) by having a congressional mandate and framework for military tribunals the position of the Executive would be strengthened in its ability to act effectively.[32]

THE EXECUTIVE AS LAWMAKER, LAW ENFORCER, AND LAW ADJUDICATOR

Under the President's Military Order the Executive is lawmaker, law enforcer, and law adjudicator. As lawmaker, the President delegates to the Secretary of Defense the power to promulgate orders and regulations. As law enforcer the Executive has the power to detain and prosecute enemy combatants, and as law adjudicator the President or the Secretary of Defense, if so designated by the President for that purpose, provides for review and final decision of the military commission.[33]

Under both systems of punishment created to deal with enemy combatant terrorists, detention, and military commissions, the Executive assumes unilateral lawmaking, enforcing, and adjudicating power by order, rule, and instruction. That is the very concern that James Madison warned about in Federalist No. 47 when he wrote: "The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."[34]

No one branch in a constitutional system of government has a total monopoly of authority, nor should it. In successfully pursuing our nation's antiterrorism efforts, Congress should be recognized as a full partner in taking tough action on the terrorists while being true to the principles of the Constitution. That does not mean that Congress should exercise its deliberative and oversight role to the point that it becomes counterproductive. It must perform its legitimate constitutional role in

assuring that the Executive is effectively protecting our national security interests while sufficiently assuring our civil liberties.

Congressional authorization is necessary for the establishment of procedures, standards, and military commissions to detain, adjudicate, and punish offenses arising from the September 11, 2001, attacks or future Al-Qaida terrorist attacks against the United States and to provide a clear and unambiguous legal foundation for such proceedings. While Congress has authorized the President to use all necessary and appropriate force it has yet to expressly authorize the use of detention or military commissions. Congressional action would make it abundantly clear that detention and military commissions are the appropriate venues for treating enemy combatants. Spelling out in detail the requirements for detention and military commissions and the procedural protections afforded to enemy combatant detainees[35] would ensure that decisions when handed down survive judicial scrutiny.

INDISPENSABLE SAFEGUARDS IN A DETENTION AND MILITARY COMMISSION SYSTEM

Some may think that it is not only inevitable but entirely proper for liberty to give way to security in times of national crisis, but that view has no place in the application of a constitution which is designed precisely to confront war and, in a manner that accords with principles of due process, accommodate it.[36] There are certain indispensable safeguards to civil liberty that must be preserved even during periods of military emergency.

The writ of habeas corpus cannot be infringed since it is a critical tenet of our justice system. As Justice Scalia recognized in the *Hamdi* case, the very core of liberty served by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive. This basic tenet dates back to 1215 when it stood in the Magna Carta as a critical individual right against arbitrary arrest and imprisonment.[37] Military tribunals, boards, and commissions cannot deny detained individuals the privilege of seeking a remedy in an appropriate court jurisdiction of the United States. The right to file a writ of habeas corpus provides access to the federal courts to test the legality of a detention. This principle is certainly reaffirmed in the *Hamdi* and *Rasul* decisions of the Supreme Court.

For the right of access and the right to a hearing to have substance, legal representation is a virtual necessity. The right to be heard is of far

less significance in many instances if it is not accompanied by the right to be heard by counsel.[38] In *Hamdi*, Justice Sandra Day O'Connor wrote that the accused was entitled to receive notice and be provided a fair opportunity to rebut the government's position, adding that he unquestionably had the right to access to counsel.[39]

A fatal flaw that exists in the Executive's entire detention review process is denial of legal representation for the accused. Any detainee faced with extended periods of physical custody has a due process right to counsel to legitimately challenge the legality of that detention, because as a practical matter, if he loses in the hearing process, he essentially loses his physical liberty.

Finally, there must be built into the punishment systems an independent appeals process beyond the Secretary of Defense. In legislation introduced by Representative Schiff and Senator Leahy, the United States Court of Appeals for the Armed Forces would be available as an appellate body to review all detention proceedings, convictions, and sentences of military commissions. The Supreme Court would be available as a court of last resort through writ of certiorari.[40] By Congress providing for an appeal to an independent entity, it will ensure that due process is protected, and the accused detainee is afforded basic protection.

CONCLUSION

Although there is no explicitly articulated language in the Constitution and minimal language in statutory code that refers to military commissions, there is rich historical precedent for their application that has been authorized by Congress and upheld by the United States Supreme Court. Such commissions have been employed by the President to meet urgent governmental responsibilities relating to war without Congress specifically declaring war.[41]

The detention power, which includes the authority to incarcerate or restrain enemy combatants and suspected terrorists beyond their initial capture on the battlefield or within the United States, deprives the detainees of their freedom and normal procedural protection for judicial review. Such a power, invoked in emergency situations, has always belonged to Congress, to delegate to the Executive, or to restrain, as it sees fit.[42]

Prior to September 11, the power to detain was clearly the province of Congress, which was critically reinforced by the enactment of Title 18, §4001(a) of the U.S. Code which provides that "[n]o citizen shall

be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." After September 11, in *Hamdi*, the Court ruled that by enacting the Joint Congressional Resolution Authorizing the Use of Force (AUMF) Congress had authorized Hamdi's detention, and satisfied §4001(a)'s requirement that a detention be pursuant to an Act of Congress.[43] As the text of the AUMF clearly demonstrates, there is nothing said about the detention of anyone in connection with the use of military force, and particularly the detention of United States citizens.

As we face continuing threats from global terrorism, as well as demands for our government to respond in the interest of national security, more responsibility and authority will be placed in the President's arsenal as preeminent decision maker. It is essential that Congress, as the President's decision-making partner in the war on terrorism, perform its critical deliberative role in properly balancing national security interests with civil liberties rights of citizens and noncitizens alike. As Alexander Bickel argues, "singly either the president or Congress can fall into bad errors ... So they can together too, but that is somewhat less likely and in any event, together they are all we've got."[44]

SUMMARY

After the unprecedented and devastating attack of September 11, 2001, President Bush indicated that the enemy we face, terrorism, is one that we may be living with for the foreseeable future. A principal question to be considered is whether the war on terror is of such a nature to warrant expansion of war power by the political branches of government and if so, at what cost to individual liberty?

The courts have historically been most deferential to the President as Commander-in-Chief when he exercises his war power in a military emergency situation, and it is at its peak when Congress specifically authorizes his actions. Such was the case post–9/11 when the President prioritized a series of security measures to be undertaken to ensure that enemy combatants held in detention at Guantanamo would no longer be able to take up arms against the United States, and that valuable intelligence information could be obtained from them in a timely fashion. Congress, agreeing with the President that the terrorist attacks constituted acts of war, enacted legislation that authorized him to use military force to respond accordingly.

The Supreme Court in *Hamdi* concluded that the President, with proper congressional authorization, can detain terrorism suspects as

enemy combatants; however, they cannot be detained indefinitely, and they must be afforded access to public review of that detention by an independent judicial authority.

Additional questions not fully addressed by the Court must be considered as we utilize detention as a principal weapon in the war on terror. A long-term legal framework is essential for our democratic society as we confront a new type of enemy and new kind of war in which we seek to properly balance civil liberties and national security interests. The nature of such policy considerations is political and essentially is for the President and Congress to determine, not the courts.

To date, Congress has failed to demonstrate a leadership role in the war on terrorism as it relates to the treatment of enemy combatants. In light of the *Hamdi* and *Rasul* decisions, Congress must step forward as the Executive's partner in establishing appropriate standards and procedures for detention and trial of U.S. citizen and noncitizen detainees. Among the relevant issues to be addressed are:

1. determination of the threshold level of terrorist authority that warrants detention by the government;
2. the standard of proof required of the government to justify detention;
3. the type of hearing conducted to determine the government's position for classifying a detainee an enemy combatant;
4. the length, purpose, and standard of proof required for continued detention;
5. the type of trial for the enemy combatant; and
6. the right of appeal for an enemy combatant.

The Supreme Court decision in *Hamdi* provides the following guidelines:

- It would appear that the threshold level is a narrow limited one of "fighting against the United States in Afghanistan as part of the Taliban."[45]
- The government puts forth credible evidence that the habeas petitioner meets the enemy combatant criteria for detention, then the onus shifts to the detainee to rebut the evidence with more persuasive evidence that he falls outside the criteria.[46]
- A hearing is provided before a neutral decision maker which supports a fair opportunity to rebut the government's factual assertion of detention.[47]

- Indefinite detention for the purpose of interrogation is not authorized; however, the government may detain for the duration of hostilities those engaged in armed conflict against the United States, provided the right to notice and an opportunity to be heard is granted with access to counsel, at a meaningful time in a meaningful manner.[48]

The Executive in response to the *Hamdi* and *Rasul* decisions established Combatant Status Review Tribunals to permit detainees at Guantanamo to contest their status as enemy combatants.[49] The following rules are provided:

- It would appear the threshold level is expansive as it applies to those directly engaged in terrorist activities against the United States and those who provide support for terrorist organizations.
- The presumption is in favor of the government's evidence and a preponderance of evidence standard is employed to determine whether a detained suspect is properly classified an enemy combatant.
- A neutral tribunal of three military officers presides, affording the detainee the opportunity to appear if his presence does not compromise national security interests; the detainee is permitted witnesses to be called, if it is deemed a reasonable request; and he is permitted a personal representative to assist him in the proceeding although that individual is not permitted to be a lawyer.
- The tribunal determines that the detainee should be classified an enemy combatant and reports to the appointing authority who decides whether that classification is accepted, or requires additional deliberation.

Additionally, the Executive has created administrative review boards to determine annually whether each Guantanamo detainee enemy combatant remains a threat to the United States and its allies.[50] The following guidelines apply:

- Each detainee enemy combatant will have a formal opportunity each year to appear before a board of three military officers and explain why he believes that he should be released. The burden of proof is on the detainee.
- He is provided a military officer who is not a lawyer to assist him in his appearance.
- The review board accepts written information from the family and national government of the enemy combatant detainee.

- The review board assesses the current threat posed by the enemy combatant detainee and recommends to a designated civilian defense official (DCO) whether he should remain in detention.
- The DCO then decides whether the detainee remains in detention.

Finally, the Executive has established military commissions to prosecute non-U.S. citizens who have allegedly participated in international terrorism against the United States, for war crimes and other offenses.[51] The following guidelines apply:

- Each military commission is composed of three to seven members, all of whom are current or retired members of the U.S. armed forces.
- The enemy combatant must be represented by an assigned defense counsel, but is permitted to hire a civilian defense lawyer at his own expense.
- A presumption of innocence exists for the accused.
- Hearsay evidence can be admissible.
- The government must establish proof beyond any reasonable doubt.
- Decisions are based on a two-thirds majority of commission members, except in death penalty cases where a unanimous verdict is required.
- Cases are reviewed by a military review panel, but there is no appeal to a civilian court.
- Final review rests with either the Secretary of Defense or the President.

Detention and trial procedures of detainee enemy combatants under the Combatant Status Review Tribunals, Administrative Review Boards, and Military Commissions permit the Executive to act as a unilateral lawmaker, law enforcer, and law adjudicator. No one branch in a constitutional system of government has a total monopoly of authority, nor should it. Congress should exercise its legitimate constitutional role in assuring that the Executive is effectively protecting our national security interest while sufficiently assuring our civil liberties.

While Congress has authorized the President to use all necessary and appropriate force, it has yet to expressly authorize the use of detention or military commissions. Spelling out in detail the requirements for detention and military commissions and the procedural protections afforded to detainee enemy combatants would ensure that decisions when handed down survive judicial scrutiny.

Under our Constitution, there are certain indispensable safeguards to civil liberty that must be preserved even during periods of national crisis and military emergency. Military tribunals, boards, and commissions cannot deny detained individuals the privilege of seeking a remedy in an appropriate court jurisdiction of the United States. The right to be heard, which is certainly reaffirmed in *Hamdi* and *Rasul*, must be accompanied by the right to be heard by counsel. Any detainee enemy combatant facing extended periods of physical custody has a basic right to counsel to legitimately challenge that detention, because as a practical matter, if he loses in the hearing process, he essentially loses his physical liberty. Finally, there must be built into the punishment system an independent appeal process beyond the Secretary of Defense. By Congress providing for an appeal to an independent entity, it will ensure basic fairness and protection for the accused detainee enemy combatant.

As we face continuing threats from global terrorism, as well as demands for our government to respond in the interests of national security, more responsibility and authority will be placed in the President's arsenal of decision making. It is essential for Congress, as the President's decision-making partner in the war on terrorism, to perform its critical deliberative role in properly balancing national security interests with civil liberties rights of citizens and noncitizens alike.

NOTES

1. Remarks by the president at the signing of HR 5005, the Homeland Security Act of 2002, http://www.whitehouse.gov/news/releases/2002/11/20021125-6.html, November 25, 2002.

2. See also, John C. Yoo, "Perspectives on the Rules of War," www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/06/15/EDGKJ66AM1.DTL, June 15, 2004. See also, David B. Rivkin and Lee A. Casey, "The Law and War," http://www.washingtontimes.com/op-ed/20040125-103747-9111r.htm.

3. U.S. Department of State Press Statement, October 3, 2003.

4. See Joint Resolution Authorizing the Use of Military Force (AUMF) Public Law 107-40, 115 Stat. 224 September 18, 2001. See Appendix B (available from author).

5. See Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. See Appendix A (available from author).

6. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) No. 03-6696, and *Rasul v. Bush* and *al-Odah v. United States*, 542 U.S. 466 (2004).

7. See *Hamdi* at 25.

8. Op. cit., Souter opinion, at 7.

9. See A and Appendix C (available from author) for full discussion of each document. Additional Military Commission Orders and Instructions were issued into 2004.

10. See Appendix C1 (available from author).

11. Those rights include habeas corpus relief, unrestricted access to civilian counsel, and independent civilian review of military commission decisions.

12. Pub. L. No. 107-56, 115 Stat. 272 (2001).

13. S 1510, 107th Cong. 412 (2001), reprinted at 147 Cong. Rec. S10621.

14. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 412(a) 115 Stat. 272, 351 (2001).

15. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (November 16, 2001).

16. The House voted 357 to 66 and the Senate voted 98 to 1 in support of the USA PATRIOT Act. In a survey by the *Washington Post* and ABC News, six in ten Americans agreed with President Bush that suspected terrorists should be tried in special military tribunals and not U.S. criminal courts. In addition, seven in ten Americans believed that government was sufficiently protecting the civil rights of suspected terrorists; nine in ten believed the United States was justified in detaining foreign nationals for violating immigration laws and 89 percent supported President Bush's war in Afghanistan. See Richard Morin and Claudia Deane, "Most Americans Back U.S. Tactics: Poll Finds Little Worry Over Rights," *Washington Post*, November 29, 2001.

17. Neal Devins, *Congress, Civil Liberties, and the War on Terrorism*, 11 Wm. and Mary Bill of Rights J. 1139 (2003) at 1145. See also, Elizabeth A. Palmer and Adriel Bettelheim, "War and Civil Liberties: Congress Gropes for a Role," *Congressional Weekly* 59 (December 1, 2001): 2820.

18. Rep. Adam Schiff (D-CA) introduced HR 5684, "The Detention of Enemy Combatants Act" on October 16, 2002. Section 4 of the bill entitled Procedural Requirements provides for the promulgation of rules with "clear standards, and procedures" governing detention of a United States person or resident, and provides that such rules shall guarantee timely access to judicial review to challenge the basis for a detention, and permit the detainee access to counsel. Other bills introduced include S 1941, 107th Cong. (2002); HR 3468,

107th Cong. (2001); HR 4035, 107th Cong. (2002). They all have specific limitations placed on military commissions to try alleged war crimes.

19. The Court plurality in *Hamdi* held that Congress authorized the detention of combatants in a narrow sense, namely being part of or supporting forces hostile to the United States or coalition partners in Afghanistan, and who engaged in an armed conflict against the United States there. The President's Military Order applies to noncitizens who engage in terrorist acts against the United States or who *aid* and *abet* in terrorist acts against the United States (emphasis added). What of rank and file members of terrorist organizations who do not bear arms, and what of American citizens who live in the United States and donate money to a terrorist organization or network? Are these classes of individuals to be detained?

20. See *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) No. 03-6696, O'Connor at 9, 10.

21. Ibid., at 27 citing *Mathews v. Eldridge*, 424 U.S. 319 (1976) at 335.

22. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) No. 03-6696, Souter (concurring in part) at 16.

23. Ibid., O'Connor opinion, at 31.

24. Ibid., O'Connor at 26, citing *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) quoting *Baldwin v. Hale*, 1 Wall 223, 233 (1864); *Armstrong v. Manzo* 380 U.S. 545, 552 (1965).

25. The Military Order, Administrative Review Procedures for Enemy Combatants in Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba, stated that similar administrative review procedures would be issued for enemy combatants in the control of DOD in the United States. See Appendix D (available from author).

26. Ibid., see Section 3, E, at 7–8.

27. See 8 U.S.C. §1534 (c)(1) and The Association of the Bar of the City of New York Committee on Federal Courts. *The Indefinite Detention of Enemy Combatants: Balancing Due Process and National Security in the Context of the War on Terror*, March 18, 2004, at 24.

28. See Appendix A (available from author), The Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (November 13, 2001), 66 Fed. Reg. 57, 833 (November 16, 2001).

29. See the Department of Justice and Terrorism: Hearing Before the Senate Committee on the Judiciary, 107th Cong. (2001) at 52.

30. Ibid., 52.

31. Ibid., 52

32. See the Department of Justice and Terrorism: Hearing Before the Senate Committee on the Judiciary, 107th Cong. (2001); To Receive Testimony

on the Department of Defense's Implementation of the President's Military Order on Detention, Treatment, and Trial by Military Commission of Certain Non-Citizens in the War on Terrorism: Hearing Before the Senate Committee on Armed Services, 107th Cong. (2001). As a direct result of the Judiciary Committee hearings testimony, Senator Patrick Leahy introduced S 1941, Military Tribunal Authorization Act of 2002, 107th Cong. (2002), which would provide the Executive with specific authorization to use extraordinary tribunals to try members of the Al-Qaida terrorist network and those who cooperated with them. Senator Leahy's proposed legislation would circumscribe military detainment and military trials very narrowly. It would have exempted from military trial or detainment individuals arrested while in the United States, since the civilian court system was well equipped to handle such cases, and it would also have exempted aliens lawfully admitted for permanent residence from detainment and military trial. It would have authorized for military detainment and trial only those persons "apprehended in Afghanistan fleeing from Afghanistan, or in fleeing from any other place outside the United States where there is armed conflict involving the Armed Forces of the United States." [S 1941, 3(a)(3)]

In addition to imposing these limitations on the scope of the Executive to detain persons and try them in military commissions, Senator Leahy's proposal would have provided individuals who were subject to these extraordinary powers significant procedural protections which neither the Bush Order nor the subsequent DOD Order implementing the directive afforded. Most relevant was the provision that subjected detentions under its authority to the supervision of the United States Court of Appeals for the District of Columbia Circuit. [S 1941, 5(d)] The suggested measure would have provided for appellate review of military tribunals' judgments in the United States Court of Appeals for the Armed Forces—an all-civilian court comprised of judges whom the President appoints, with Senate advice and consent, to 15-year terms—as well as further review in the United States Supreme Court through writ of certiorari. [S 1941, 4(e)(2) & (3)] The bill introduced by Senator Leahy was referred to the Senate Armed Services Committee, which took no further action on the measure.

33. For a full discussion of this approach see Appendix C (available from author).

34. See Neal K. Katyal and Laurence H. Tribe, "Waging War, Deciding Guilt: Trying the Military Tribunals," *Yale Law Journal* 111 (2002): 1277. See also, *Reid v. Covert*, 354 U.S. 1, 11 (1957) (declaring that the "blending of executive, legislative, and judicial powers in one person or even one branch of government is ordinarily regarded as the very acme of absolutism"); *Duncan v.*

Kahanamoku, 327 U.S. 304, 322 (1946) (Burton, J. Dissenting) (proclaiming that the Founders "were opposed to governments that placed in the hands of one man the power to make interpret and enforce the laws"); and *Hamdi v. Rumsfeld*, 542 U.S. 507, (2004) No. 03–6696 at 291 (O'Connor, J.) (rejecting the government's position that separation of powers mandate a heavily circumscribed role for the courts in such circumstances ... "because such an approach serves only to condense power into a single branch of government").

35. The rights of the accused included in Military Commission Order No. 1 provide an initial basis upon which fair, impartial, and balanced proceedings can occur. There are several rights that are omitted that are counter to fundamental fairness guarantees that should be considered.

36. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) No. 03-6696, Scalia (dissenting) at 27.

37. Ibid., 3.

38. See *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

39. It was left to the lower courts and the government to resolve areas of procedural controversy including the timing and type of hearing to be afforded to detainees. See *Hamdi*, O'Connor at 29–32.

40. See discussion in n.18 and n.32.

41. See *generally*, W. Winthrop, Military Law and Precedents (2ed. 1920 reprint); Michael D. Lacey, Military Commissions Historical Survey, Army Law 4, (March 2002); John Dean, Military Tribunals: A Long and Mostly Honorable History, Find Law's Writ, December 7, 2001; and *Ex Parte Quirin*, 317 U.S. 1 (1942).

42. In *Ex Parte Quirin*, the Court read the President's power to detain combatants, be they unlawful or otherwise, on his power to enforce the Article of War, a statutory authorization, 317 U.S. 1 (1942) at 26–27; in *Ex Parte Endo*, the Court, in a discussion released on the same day as *Korematsu*, ordered Endo's discharge from confinement because Congress had not explicitly authorized her detention, 323 U.S. 214 (1944) at 300–02.

43. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) No. 03-6696 O'Connor at 12.

44. See Ely, John Hart *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, Princeton, NJ: Princeton University Press (1993) at 5.

45. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) No. 03-6696, O'Connor at 3 cited in n.19.

46. Ibid., O'Connor at 27, cited in n.21.

47. Ibid., cited in n.22.

48. Ibid., O'Connor at 26, cited in n.24.

49. See Appendix E (available from author) for full discussion of the document.

50. See Appendix D (available from author) for a full discussion of the document.

51. See Appendixes A & C, C1 (available from author) for a full discussion of the Order, and Instructions.