4. Judicial Baby-Splitting and the Failure of the Political Branches

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I.

The day the Supreme Court handed down what have collectively become known as the enemy combatant cases—June 28, 2004—was both widely anticipated and widely received as a legal moment of truth for the Bush administration's war on terrorism. The stakes could not have been higher. The three cases came down in the midst of election-year politics. They each involved challenges by detainees being held by the military without charge or trial or access to counsel. They each divided the Court. And they appeared to validate or reject core arguments that the administration had advanced—and had been slammed for advancing—since the fight against al Qaeda began in earnest after September 11, 2001.

The dominant view saw the cases as a major defeat for President George W. Bush—and with good reason. After all, his administration had urged the Court to refrain from asserting jurisdiction over the Guantanamo Bay naval base in Cuba, and it did just that in unambiguous terms: "Aliens held at the base, no less than American citi-

zens, are entitled to invoke the federal courts' authority."[1] The administration fought tooth and nail for the proposition that an American citizen held domestically as an enemy combatant has no right to counsel and no right to respond to the factual assertions that justify his detention. The Court, however, held squarely that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[2] It held as well that "[h]e unquestionably has the right to access to counsel" in doing so.[3] These holdings led the *New York Times* to call the cases "a stinging rebuke" to the administration's policies, one that "made it clear that even during the war on terror, the government must adhere to the rule of law."[4]

A dissident analysis of the cases, however, quickly emerged as well and saw them as a kind of victory for the administration dressed up in defeat's borrowed robes. As David B. Rivkin Jr. and Lee A. Casey put it: In the context of these cases, the court accepted the following critical propositions: that the United States is engaged in a legally cognizable armed conflict with al Qaeda and the Taliban, to which the laws of war apply; that "enemy combatants" captured in the context of that conflict can be held "indefinitely" without criminal trial while that conflict continues; that American citizens (at least those captured overseas) can be classified and detained as enemy combatants, confirming the authority of the court's 1942 decision in *Ex Parte Quirin* (the "Nazi saboteur" case); and that the role of the courts in reviewing such designations is limited. All these points had been disputed by one or more of the detainees' lawyers, and all are now settled in the government's favor.[5]

1. *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004).
2. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004).
3. *Id.* at 2652.
4. Editorial, "Reaffirming the Rule of Law," *New York Times*, June 29, 2003, A26.
5. David B. Rivkin Jr. and Lee A. Casey, "Bush's Good Day in Court," *Wash-*

Even among those who celebrated the administration's defeat, this analysis had some resonance. Ronald Dworkin, for example, began his essay on the cases by triumphantly declaring, "The Supreme Court has finally and decisively rejected the Bush administration's outrageous claim that the President has the power to jail people he accuses of terrorist connections without access to lawyers or the outside world and without any possibility of significant review by courts or other judicial bodies." But he then went on to acknowledge that the Court had "suggested rules of procedure for any such review that omit important traditional protections for people accused of crimes" and that the government "may well be able to satisfy the Court's lenient procedural standards without actually altering its morally dubious detention policies."[6] How big a rebuke could the cases really represent if they collectively entitle the president to stay the course he has chosen?

In my view, both strains of initial thought have considerable merit. The administration clearly suffered a "stinging rebuke" in rhetorical terms. But Dworkin, Rivkin, and Casey (an unlikely meeting of the minds if ever there were one) were quite correct that, in the long run, the president's actual power to detain enemy combatants may not have been materially damaged either with respect to citizens domestically or with respect to enemy fighters captured and held abroad. In a profound sense, the Supreme Court, despite delivering itself of 178 pages of text on the subject of enemy combatant detentions, managed to leave all of the central questions unanswered. In fact, if a new front in the war on terrorism opened tomorrow and the military captured a new crop of captives, under the Court's rulings, the administration would face very nearly the same questions as it did in 2002. Can the military warehouse foreign citizens captured

ington Post, August 4, 2004, A19. The quotation refers to *Ex parte Quirin*, 317 U.S. 1 (1942).

6. Ronald Dworkin, "What the Court Really Said," *The New York Review of Books*, August 12, 2004.

overseas at a military base abroad without intrusive interference by American courts keen to protect their rights under either American or international law? What process must the military grant to an American citizen it wishes to hold as an enemy combatant, and is that process different if the citizen is detained domestically by law enforcement, rather than overseas by the military? Must such a person be granted immediate access to a lawyer or can he be held incommunicado for intelligence-gathering purposes? And if he can be so detained, for how long? The answers to these questions are only a little clearer today than they were a few months ago. The Court has only begun to forge the regime that, in the absence of congressional intervention, will govern the detention of enemy combatants. Until that regime comes into clearer focus, it will be too early to determine the real winners and losers in this landmark struggle.

It is not, however, too early to begin assessing the performance of the responsible institutions of American government and civil society with respect to the forging of this regime—that is, to look seriously at the engagement so far among the courts, the administration, Congress, and the civil liberties and human rights groups that have opposed the administration's policies. The exercise, in my judgment, flatters none of the aforementioned institutions. Congress has simply abandoned the field, leaving a series of questions, which obviously require legislative solutions, to a dialogue between the executive and judicial branches. The administration has encouraged this abdication by, instead of seeking legislative input, consistently asserting the most needlessly extreme vision of executive power to resolve novel problems unilaterally. By doing so, it has all but guaranteed a skeptical reception for even its stronger arguments. The courts, meanwhile, have proven uneven in the extreme both at the lower court level and at the Supreme Court. For their part, the human rights and civil liberties communities have responded to the cases with an almost total lack of pragmatism, advancing a reading of federal and international law no less selective and convenient than the administra-

tion's own and consistently failing, over the three years since these cases arose, to offer a plausible alternative to the administration's proposed regime.

Writing in the august company of a storied former appellate judge, a former solicitor general of the United States, and noted law professors and experts on the laws of war and executive power, I will be the first to confess myself outclassed in this volume where debating the relevant doctrines is concerned. Neither actually having been to law school nor remotely possessing the appropriate accent for the role, I cannot even claim to be a mere country lawyer—a status that entitles one to surprise a jury and opposing counsel with one's actual sophistication. What I can claim, being a journalist who has covered these cases almost since the day they were filed, is a unique vantage point on the way they developed and the institutional failures that caused them to develop as they did. Throughout the cases' histories, I have spoken at length with officials of all three branches. I have watched as different individuals within those branches struggled—often in vain—to point their institutions in more constructive directions,[7] and I have been in frequent communication with counsel for the detainees. I have, as a consequence, an unusually comprehensive view of the cases.

In the end, the enemy combatant cases—at least so far—stand as a kind of case study of the consequence of abandoning to the adversarial litigation system a sensitive policy debate in which powerful and legitimate constitutional concerns animate both sides. By nearly universal agreement, these cases were submitted to common-law decision making in the face of almost-as-universal agreement that the extant body of law did not fully address the novel conditions of the war on terrorism. As a result, as I shall attempt to show, nuance was lost, flexibility and imagination in envisioning an appropriate

7. I detail some of the struggle within the Justice Department, for example, in Benjamin Wittes, "Enemy Americans," *The Atlantic Monthly*, July/August 2004, 127.

regime were jettisoned, and the courts were left to split the difference between polar arguments to which few Americans would actually sign on and which should not have defined the terms of the discussion. It needn't have been this way. But until Congress assumes responsibility for crafting a system to handle enemy combatants, the regime necessarily will remain a crude, judge-made hybrid of the criminal and military law traditions that will, I suspect, satisfy nobody save the judges who—piece by piece, bit by bit, question by question—will decree it into existence.

II.

It overstates the matter to say that the enemy combatant cases were full of sound and fury and signifying nothing, but they certainly signified a great deal less than their sound and fury portended. It is worth, therefore, beginning by examining exactly what the Court did, what it didn't do, and what questions it left unaddressed.

To begin with the least consequential case, in *Rumsfeld v. Padilla*, the Court did virtually nothing at all—clarifying only that a habeas petitioner in military custody must bring suit in a court with jurisdiction over his immediate physical custodian.[8] Although this holding was in considerable tension with the Court's ruling concerning Guantanamo—where it divined jurisdiction for seemingly any federal court in the country—it was neither especially surprising nor substantively important. It affects, after all, not one jot the procedural rights an accused enemy combatant will enjoy, nor does it alter at all the substantive standard the government must satisfy in order to justify the combatant's detention. It affects only the question of what court he must appear in to challenge that detention.

The only feature of *Padilla* that seems important at all is a footnote in the dissent, in which four members of the Court appear to

8. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

address the case's merits head on and dismiss the government's substantive position that President Bush could, under current authorities, designate Jose Padilla—a citizen suspected of planning terrorist attacks on al Qaeda's behalf—as an enemy combatant and hold him as such. "Consistent with the judgment of the Court of Appeals," wrote Justice John Paul Stevens, "I believe that the Non-Detention Act, 18 U.S.C. § 4001(a), prohibits—and the Authorization for Use of Military Force Joint Resolution, 115 Stat. 224, adopted on September 18, 2001, does not authorize—the protracted, incommunicado detention of American citizens arrested in the United States."[9] This language, though certainly dicta, suggests that a majority on the Court may exist for the proposition that someone in Padilla's position, a suspected al Qaeda operative arrested domestically, must either be charged criminally and prosecuted or else released—at least in the absence of a more explicit congressional authorization for enemy combatant detentions. Justice Antonin Scalia wrote in dissent in *Hamdi* that he did not believe a citizen could be detained as an enemy combatant at all, an opinion Justice Stevens joined.[10] Combine the two opinions, and you may have a glimmering of the Court's future direction on this question. So far, however, *Padilla* stands for nothing but a perfectly pedestrian jurisdictional point: that an enemy combatant detained domestically has to go to his local federal court for relief. Which court should hear the claims of detainees was hardly the question that animated the spirited public discussion of enemy combatants over the past three years. So clearly, *Padilla* answers nothing.

The Court said a lot more in *Hamdi*, and in important respects it did repudiate the military's position. The government, after all, had argued that the courts should show nearly total deference to the executive branch's determinations concerning citizens alleged to be

9. *Id.* n. 8 at 2735.
10. *Hamdi*, 124 S. Ct. at 2660.

enemy combatants: They should rely entirely on the government's factual allegations, as laid out in a hearsay affidavit by a midlevel Defense Department official. The detainee need not have any ability to contest these allegations or any assistance of counsel in challenging his detention. And the standard of review itself should be trivial, merely whether the material in the cursory, page-and-a-half affidavit would, if presumed true, support the designation. Eight members of the Court rejected each of these suggestions. The controlling plurality opinion insisted that Yaser Esam Hamdi had a right to contest his designation and to submit evidence to the court in doing so, that he had a right to the assistance of counsel, and, it insisted, that the government's designation be supported with "credible evidence."[11] Rivkin's and Casey's contention that the decision was really a victory is belied by the fact that the plurality opinion in *Hamdi* tracks closely with—indeed, in critical respects, is less favorable to the government than—the district court's opinion in *Padilla*, an opinion the government aggressively appealed.

But if *Hamdi* establishes that the executive's hand is not entirely free, it by no means clarifies that judicial review—even in cases involving citizens—will function as a meaningful, as opposed to a symbolic, restraint on executive behavior. For starters, the government won on a truly fundamental point in the case: The plurality reaffirmed the power in principle of the president to detain a citizen as an enemy combatant—a power it articulated in *Ex parte Quirin*—writing that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant."[12] In other words, the plurality allowed the military to exempt an individual from the full protections of criminal process on the basis of a finding that he has enlisted in a foreign military struggle against the United States in the context of a use of force authorized by Congress. The Court's acceptance of this basic premise of the government's argument is no small matter.

11. *Id.* at 2649.
12. *Id.* at 2640.

Moreover, Justice Sandra Day O'Connor was a bit cagey on the subject of Hamdi's access to counsel, and what she doesn't hold is as important as what she does. "Hamdi asks us to hold that the Fourth Circuit also erred by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney," she noted at the end of the plurality opinion. "Since our grant of certiorari in this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel *in connection with the proceedings on remand*. No further consideration of this issue is necessary at this stage of the case"[13] (emphasis added). The language granting Hamdi access to counsel is ringing. It is framed in the language of constitutional rights, not—as the district courts in both *Hamdi* and *Padilla* envisioned it—as a discretionary grant of access for the purpose of airing all the issues in the case fully. But as the italicized language indicates, the "right" is only clear prospectively. Justice O'Connor did not address the question of whether Hamdi had this right from the outset of the litigation, when the right attached, or whether it was appropriate for the government—in the interests of interrogating him for intelligence—to have withheld it for two years.

What's more, Justice O'Connor left open the possibility that her due process concerns could be satisfied by tribunals within the military and that had such military process been available to Hamdi, judicial review would have been far more deferential as a consequence. "Plainly, the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause," she wrote. But "[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already

13. *Id.* at 2652.

provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. . . . In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved."[14] The tribunals to which she refers are, historically speaking, cursory affairs that do not involve a right to counsel or contemplate a great deal of factual development. If the import of *Hamdi* is that the military can, in the future, buy the total judicial deference it sought in this case by affording citizens alleged to be enemy combatants the limited process contemplated by Article 5 of the Third Geneva Convention, then the military has lost little and gained much in its apparent defeat this time around.

In short, although the government was rebuked by the Court, it is by no means clear that the next time an American citizen is captured abroad while apparently fighting for the other side, the military will not be able to behave very nearly as it behaved toward Hamdi—that is, hold him incommunicado for an extended period of time while interrogating him for intelligence. Nor are we likely to find out the answer to this question any time soon. The *Hamdi* case, after all, has been settled, and Hamdi himself released. Although clarity could come as a consequence of future developments in *Padilla*, there is a substantial possibility that it too will become moot, not because of Padilla's release but because of his criminal indictment.[15] The ques-

14. *Id.* at 2651.

15. Padilla's habeas case was refiled in South Carolina in light of the Supreme Court's ruling and was argued in federal district court there early in 2005. U.S. District Judge Henry F. Floyd, on February 28, 2005, found in favor of Padilla and issued a writ of habeas corpus. The government immediately announced plans to appeal. Even as the habeas case has progressed, however, there has been some indication that Padilla is now a cooperating witness in a case unrelated to the circumstances of his arrest, a status that implies that a plea may be in the works. See Dan Christensen and Vanessa Blum, "Padilla Implicated in Florida Terror Case," *Legal Times*, September 20, 2004, p. 18.

tion of whether enemy combatant detention is a legally tenable approach for the government toward citizens remains, despite the cases, very much an open one.

The high court's pronouncements with respect to the detainees at Guantanamo Bay, Cuba, were just as Delphic. The justices, by a 6–3 vote, declared that the federal courts had jurisdiction to consider habeas petitions filed on behalf of inmates at the facility. Indeed, the justices formulated the question posed by the case in language emphasizing the stakes for liberty and the rule of law: "What is presently at stake is only whether 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," Justice Stevens wrote.[16] The assertion of jurisdiction necessarily cast the Bush administration's conduct in a negative light, implying that there were substantial questions to litigate concerning the legality of the detentions—questions that rendered the Court's jurisdiction significant. And, to be sure, Justice Stevens's language did nothing to dispel this impression. He noted at one point in a footnote, for example, that "Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"[17]

Heartless as it may sound, however, this apparently unobjectionable statement may not actually be true. That is to say, even if all of the Guantanamo inmates were completely innocent of any wrongdoing—which they most assuredly are not—and, more important,

16. *Rasul*, 124 S. Ct. at 2699.
17. *Id.* n. 15 at 2698.

even were they all demonstrably not combatants, it would remain something of a puzzle what, if any, judicially enforceable law would be implicated by such reckless executive behavior. Indeed, the court has not generally held that the protections of the Bill of Rights apply to aliens overseas.[18] The Geneva Conventions have not traditionally been regarded as self-executing, and Congress has never explicitly given the courts power to enforce the terms of the conventions, which have been generally guaranteed by diplomatic pressures and reciprocity, not by litigation.[19] Exactly what does American law promise a suspected Taliban soldier—much less an al Qaeda operative—that a court in this country can ensure he gets?

Since only the jurisdictional question was before it, the Court avowedly declined to answer this question. "Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need

18. See, e.g., *U.S. v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950). Although the latter decision has been called into question by *Rasul*, the former has not. And there still exists no authority for the proposition that the Bill of Rights limits government action against aliens operating in foreign theaters of warfare. The Court, however, has applied the Bill of Rights to some degree in American territories overseas. So, in the wake of *Rasul*, the Court will have to decide whether Guantanamo is truly foreign territory or whether it is analogous to such overseas possessions.

19. In the wake of *Rasul*, this premise has come into considerable doubt. In *Hamdi v. Rumsfeld* (D.D.C. 04-CV-1519, Nov. 8, 2004), U.S. District Judge James Robertson held that the Third Geneva Convention was self-executing. See, in particular, pages 25–26. "Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty." The opinion, under appeal as of this writing, can be found at http://www.dcd.uscourts.gov/04-1519.pdf. See also *In re Guantanamo Detainee Cases* (D.D.C. 02-CV-0299, Jan. 31, 2005), pages 70–71, which can be found at http://www.dcd.uscourts.gov/02-299b.pdf.

not address now," Justice Stevens wrote.[20] And this coyness can, I suppose, be reasonably defended as judicial restraint—an unwillingness to address questions before they are fully presented and briefed. But the result is that nobody knows today what the great rebuke to the executive branch that the Court delivered in *Rasul* means in practice. Detainees have filed numerous claims since the decisions, alleging treaty, statutory, and constitutional deprivations. The great rebuke could be a giant nothing. If the Court has, in fact, asserted jurisdiction in order to determine later that no judicially cognizable rights have been violated, the executive will have lost nothing save a certain embarrassment and the inconvenience of having to brief and argue the subsequent legal questions.[21] Civil libertarians and human rights groups—not to mention the detainees—will have won nothing more than the satisfaction of having lost on the merits, rather than on a jurisdictional point. The litigation will have rendered the executive branch barely more accountable than had it won on the jurisdictional point—indeed, the administration will have had its legal position actively *affirmed*, not just deemed unreviewable. The detainees will certainly be no freer as a consequence of their victory. On the other hand, if the Court is truly prepared to act as the enforcer of legal rights toward alien detainees who have never set foot in this country, *Rasul* heralds a sea change in judicial power in wartime, an

20. *Id.* at 2699.

21. The first of the rash of detainee suits to follow *Rasul* played out in exactly this fashion at the district court level. In *Khalid v. Bush* (D.D.C. CV 04-1142, Jan. 19, 2005), U.S. District Judge Richard Leon held that notwithstanding *Rasul*, "no viable legal theory exists by which [a federal court] could issue a writ of habeas corpus under these circumstances." The decision can be found at http://www.dcd.uscourts.gov/04-1142.pdf. On the other hand, less than two weeks later, Senior Judge Joyce Hens Green of the same court handed down *In re Guantanamo Detainee Cases*, in which she held precisely the opposite: The Fifth Amendment applies in Guantanamo and confers due process rights that are violated by the government's review procedures, and the Geneva Conventions are self-executing and confer individual litigable rights as well.

earthquake of untold magnitude and importance. The Court could also attempt some kind of intermediate step.

But the fog does not even end there. For the Court was less than clear about precisely what it was holding, even with respect to mere jurisdiction. At times, the majority opinion seemed to depend on the unique legal status of Guantanamo Bay, which is leased on an indefinite basis to the United States and subject during that time to the "exclusive jurisdiction and control" of the United States.[22] At other times, however, the decision appears to rest on no such gimmick, relying instead only on the allegation of an illegal detention and the Court's proper jurisdiction over the Pentagon: "Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. . . . [The habeas statute], by its terms, requires nothing more."[23] So although it is clear, after the court's decision, that the federal courts have the power to decide legal questions concerning the Guantanamo detainees, it is no clearer than before that decision whether the detentions at Guantanamo are in fact legally defective, nor is it clear whether the executive could still evade federal court oversight altogether by simply avoiding detention facilities abroad that happen to be formally leased to exclusive, indefinite American jurisdiction. Once again, the Court left all of the fundamental questions unanswered.

In short, although it is indisputable that the administration suffered a major atmospheric defeat at the hands of solid, though shifting, majorities of the Court, it remains premature to describe the true winners and losers in the cases. One cannot, at this stage, say—with Rivkin and Casey—that the administration has won the fight. But one has to acknowledge the possibility that the doctrinal seeds of its ultimate victory are germinating in the Court's decisions, and one

22. *Rasul*, 124 S. Ct. at 2693.
23. *Id.* at 2698.

cannot dismiss the possibility that, in the long run, the true import of the decisions will lie more in what they permit than in what they forbid.

III.

Even in this moment of uncertainty as to the ultimate significance of the cases, however, one can attempt to assess the performance of the institutions, governmental and other, that have brought us to this point. The one that has attracted the most attention—criticism, controversy, and defense—is the executive branch. This is natural enough given the president's necessary leadership role in moments of national crisis, his control over the military, and, in this instance, his personal responsibility for many of the policies in question. Padilla was, after all, plucked out of the criminal justice system on the personal order of President Bush. It is right and proper that President Bush should be held accountable for the detention policies practiced by his administration. Still, in my judgment, the centrality of executive branch decisions in the public discussion of detention policies seems slightly too forgiving of the failures of other institutions. What's more, the criticism seems, in a fundamental sense, misdirected. For the president's original sin lay not simply—or even chiefly—in the substance of the positions he took with respect to captured enemy fighters. It lay, rather, in his utter unwillingness to seek legal sanction from Congress for those positions.

When you step back and examine the detention policies of the war on terrorism from the highest altitude, the administration's posture is not quite as outrageous as it seems from the ground. After all, countries at war detain the enemy. They interrogate those captured enemy fighters not entitled to privileged treatment. They don't usually provide foreign fighters with lawyers, except when those fighters are tried for war crimes. And they claim the right to hold those fighters until hostilities end. In the broadest sense, therefore, there is nothing

exceptional about the Bush administration's position toward those it has detained. What's more, the civil liberties intrusion of these policies is quite constrained compared with past wars. The affected universe of detainees is limited to those the military believes to be fighters for the other side—neither large civilian populations (like the Japanese Americans interned during World War II) nor opponents of the war (like socialists during World War I). And in contrast to the Civil War, the writ of habeas corpus has not been suspended, so the courts remain at least formally open for business in judging any challenges to detentions. There is, quite simply, nothing intrinsically unreasonable about the administration's desire to use the traditional presidential wartime power to detain enemy combatants in this particular conflict.

What is unreasonable, however, is the pretense, almost since the beginning of the conflict, that the proper altitude for considering this problem is that of a jetliner. For zoom in only a little, and the differences between this conflict and those that have preceded it make the clean application of prior law and precedent nearly impossible. What does it mean to detain combatants for the duration of hostilities in a conflict that may never end? In a conflict with a shadowy, international, nonhierarchical, nonstate actor as enemy, what would victory look like if we achieved it? If we then released detainees, as international law requires, wouldn't that act merely restart the conflict? More immediately, given that al Qaeda does not fight along a front but seeks to infiltrate American society and destroy it from within, how can one reliably distinguish between combatants and mere sympathizers or even uninvolved parties caught in the wrong place at the wrong time? These differences are not mere oddities of the current conflict. They are fundamental challenges to the legal regime that governs traditional warfare, which presupposes clearly defined armies and a moment of negotiated peace, after which those captured will be repatriated as a consequence of diplomatic negotiation. The premise of detention in traditional warfare is that the war-

ring parties have no issue with the individual soldier detained, who is presumed to be honorable. That premise is simply false in the current war, in which America's battle is very much with the individual jihadist. After all, unlike, say, Germany or Japan, al Qaeda is nothing more than the sum of its members.

Given the profound differences between the war on terror and past conflicts, there was no good reason for the administration to treat the resolution of questions as simple matters of executive discretion. They are essentially legislative in character—for notwithstanding the administration's pretenses, they go far beyond questions of how to apply old law to new circumstances. Rather, they represent the questions that will define the legal regime we, as a society, create in order to govern a situation never fully imagined, let alone encountered, in the past. As such, it was sheer folly for the Bush administration to attempt to answer them on its own—and that folly was as profoundly self-destructive as it was injurious to liberty and fairness.

The simple truth is that the administration could have gotten almost anything it wanted from Congress in the way of detention authority for enemy aliens abroad in the wake of September 11. If the debate over the USA Patriot Act proved anything, it was that Congress had little appetite for standing in the way of the most robust response the executive could muster. The administration would likely have had to stomach a certain amount of process for the detainees, particularly for citizens held domestically. One can imagine that Congress might have required some eventual provision of counsel for some detainees, perhaps even mandated a forum in which the evidence against them in some form could be tested. The administration may even have been forced to provide the process contemplated by Article 5 of the Third Geneva Convention for distinguishing between lawful and unlawful combatants—a process it certainly should have been granting in any event. In my estimation, however, it is simply inconceivable that Congress would have crafted a regime that did not amply accommodate the president's wartime needs, particularly if

President Bush had been clear about what he needed, why he needed it, and what the stakes were if he didn't get it. Going to Congress would have required two things of President Bush: a willingness to accept certain minimal limits on executive conduct imposed from the outside and, more fundamentally, a recognition that the wartime powers of the president, while vast, are not plenary—an acceptance that the presidential power to wage war can be enhanced by acknowledging the legislature's role in legitimizing it. Had Bush proceeded thus—as presidents often have in past conflicts—he would have entered his court battles with clear statutory warrant for his positions. Had this happened, I believe the deference he sought from the Supreme Court would have been forthcoming and very nearly absolute.

But Bush did not take this approach. His administration's insistence on what might be termed Article II fundamentalism caused him to take maximalist positions that are genuinely troubling: The president's judgment that a person is an enemy combatant is essentially unreviewable. The courts should defer to the executive, even in the absence of an administrative record to which to defer. Long-term detentions without trials of hundreds of people are entirely outside the purview of the courts. They all amount to the same basic position: Trust us. Trust the executive branch, in a wholly new geopolitical environment, acting with the barest and most general approval from the other political branch, to generate an entirely new legal system with the power of freedom and liberty and life and death over anyone it says belongs in that system. The executive branch learned last spring that exactly one member of the Supreme Court—Clarence Thomas—trusts President Bush that much. The court's skepticism seems to me to have been an entirely foreseeable result that competent counsel advising the president ought to have hedged against. When the history of this period is written, I feel confident that Bush will be deemed exceedingly ill-served by his top legal advisers.

IV.

But the president's responsibility, however heavy, is not exclusive. Congress, after all, has its own independent duty to legislate in response to problems that arise in the course of the nation's life. And in a system of separated powers, Congress is not meant to legislate simply for the executive's convenience or at its beck and call. Indeed, if the executive branch sought to shunt the legislature aside in this episode, the legislature certainly proved itself a most willing shuntee. Congress institutionally seemed more than content to sideline itself and let the executive branch and the courts sort out what the law should be.

This abandonment of the field is disturbing on several levels. At the most analytical, America's constitutional design presupposes that each branch of government will assert its powers, that those powers will clash, and that this clash will prevent the accumulation of power in any one branch. This is the famous premise of Federalist 51: "[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition." Yet in the war on terrorism, Congress has done very nearly the opposite of countering the executive's ambition. It has run from its own powers on questions on which its assertion of rightful authority would be helpful, and it sloughed the difficult choices onto the two branches of government less capable than itself of designing new systems for novel problems.

The problem of congressional abdication of its responsibilities during wartime is not exactly new. It is most remarked upon in the context of the decision to go to war in the first place, which migrated in the twentieth century almost entirely to the executive branch. John

Hart Ely noted, "It is common to style this shift a usurpation, but that oversimplifies to the point of misstatement. It's true our Cold War presidents generally wanted it that way, but Congress (and the courts) ceded the ground without a fight. In fact . . . the legislative surrender was a self-interested one: Accountability is pretty frightening stuff."[24] Ely's remedy for this problem—treating war powers as presenting justiciable questions with which the courts should be actively engaged—presents substantial difficulties on its own terms. Judges, after all, are not foreign policy experts, and decisions concerning war and peace are quintessentially political judgments, not principled legal ones. But even a robustly activist judiciary that was eager to explore such uncharted territories would have difficulty designing an appropriate regime for enemy combatants, because, to put it bluntly, the terms of any debate presented by litigation are destined to be too narrow.

Having no legislative involvement quite simply cuts off policy options. Once you consider the problem of enemy combatant detentions as a set of policy questions, a world of options opens. This world necessarily remains elusive to those who insist on finding in the doctrinal space between *Ex parte Milligan*[25] and *Ex parte Quirin* the answer to the question of how a Louisiana-born Saudi picked up in Afghanistan must be treated in a world in which a hegemonic United States has to consider nuclear terrorism a possibility. To cite only one conceivable example, the Constitution allows the civil commitment of mentally ill citizens who pose a danger to themselves or others. For a reasonably imaginative Congress, this might be a far better model for the alleged al Qaeda operative captured domestically than either the traditional laws of war or the criminal justice apparatus. A regime of civil commitment, after all, would recognize the preventive nature of the arrest, and it would co-opt the use of a process that

24. John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton, N.J.: Princeton University Press, 1993), ix.

25. *Ex parte Milligan*, 71 U.S. 2 (1866).

American society already tolerates as adequate for indefinite detentions in another context. Surely, al Qaeda operatives pose at least as great a threat to society as do schizophrenics.

One can imagine other models as well. Immigration law tolerates long detentions based almost entirely on executive branch process. Various forms of military tribunals might be attractive as well, as *Hamdi* intimates. The point is that the terms of the debate are today artificially constrained by the unwillingness of the one branch with the capacity to imagine a system from scratch to engage the problem at all. Although individual members of Congress have raised the issue,[26] the congressional leadership—perhaps out of an unwillingness to publicly second-guess the Bush administration, perhaps out of sheer laziness, most likely out of a combination of the two—has shown no interest in actually legislating. Congress, in short, has concurred in the executive's unilateralism, offering neither legal support for its positions nor redirection of them. By the consent of both political branches, in other words, the design of the detention regime is being determined in a dialogue between the president and the courts.

Perhaps the most peculiar aspect of this decision is that it sparked so little controversy. The fact that few observers even comment upon Congress's absence from the discussion says a great deal about how Americans have come intuitively to weigh the responsibilities and contributions of the three branches of government. To be sure, many critics of the administration complain of the absence of specific congressional authority for detentions or military commissions by way of arguing against the legality of the administration's course. But the critics, by and large, are not urging congressional intervention, much less are they describing what a constructive intervention would look like. They have merely cited its absence as a bar to whatever action the administration proposes. Somehow, everyone seems to agree that

26. See, e.g., House Resolution 1029, the Detention of Enemy Combatants Act, introduced by Rep. Adam Schiff (D-CA) on February 23, 2003.

the initial crack at writing the rules should be left to common-law jurisprudence.

v.

This agreement—which remains, frankly, inexplicable to me—has put a considerable premium on the performance of a nongovernmental actor: the human rights and civil liberties groups that opposed the military in these litigations. Although Padilla, Hamdi, and the Guantanamo plaintiffs all had counsel to argue their cases, these groups greatly magnified the arguments against the administration's course, both in amicus filings and in the broader realm of public debate. Consequently, they became, in some sense, the "other side" of the debate—the organized force whose arguments marked the major alternative to the direction the administration chose. Unfortunately, they did not provide the Court with a useful alternative to the administration's vision, for their arguments were marked at once by failures of pragmatism and weak and selective understanding of doctrine. This is forgivable in the case of defense lawyers, who are obliged to advance the arguments most likely to aid their individual clients. And in the human rights and civil liberties groups, the decision was undoubtedly as much strategic as it was driven by conviction. By staking out a hard line, the groups ensured that they had not conceded key points even before any compromises took place. But the result of their wholesale adoption of the defense arguments was to present the court with a strategy for preserving liberty that was as unembracable as the administration's strategy for ensuring security.

Doctrinally, the ground staked out by the human rights community made fetishes of certain components of the laws of war and American constitutional law, even while ignoring other countervailing components of the same bodies of law. The human rights groups generally elided the importance of *Ex parte Quirin*, for example, which quite unambiguously endorses the premise that the American

citizen can be detained by the military as an unlawful combatant.[27] Though their briefs were usually more careful than to make this error, they often seemed to deny in public statements that a detainee could be held as an unlawful combatant at all—a position flatly at odds with long-standing traditions of warfare. They nearly uniformly denied that the congressional authorization for the use of force against al Qaeda and its state sponsors necessarily implied the lesser power to detain combatants.[28] And all regarded it as self-evident that federal courts should supervise the detentions of noncitizens abroad—something they have never done previously in American history.[29]

One doesn't have to be a raging enthusiast for executive power to worry that these positions, particularly cumulatively, are simply inconsistent with any serious attempt to wage war against al Qaeda—even an attempt that does not partake of the excesses in which the Bush administration so indulged. In the rather fanciful regime the human rights groups appear to contemplate (and I acknowledge here that I am blending different arguments into a mélange that might reflect no single group's precise position), the citizen is entitled to criminal process even if caught on a battlefield. The courts are engaged in day-to-day monitoring of executive compliance with the Geneva Conventions—though those treaties are not self-executing and have not historically been enforced through judicial action. Even the unlawful combatant—that is, a combatant not entitled to the

27. The briefs in *Hamdi* can be found at http://www.jenner.com/news/news_item.asp?id=12551224. Those in *Padilla* can be found at http://www.jenner.com/news/news_item.asp?id=12539624. The amicus filings of the American Civil Liberties Union, the Center for National Security Studies, Human Rights First, and other human rights and civil liberties groups, for example, all deny that current law authorizes enemy combatant detentions in at least one of the two cases, even if the detainee is granted a meaningful ability to contest his designation.

28. See, again, the amicus filings in both *Hamdi* and *Padilla*. Interestingly, the brief of the libertarian Cato Institute presents a notable exception.

29. The briefs in *Rasul* can be found at http://www.jenner.com/news/news_item.asp?id=12520724. The range of institutional support for the assertion of jurisdiction is dramatic.

status of prisoner of war—is nonetheless entitled to the same criminal procedure, the court-martial, as both the lawful combatant and the American soldier accused of misconduct. It is a beautiful vision, but it does not happen to be the vision encapsulated in either international law or American law. And it's hard even to imagine fighting a war within its constraints. Should someone like Khalid Sheikh Muhammad be entitled to immediate access to counsel upon capture in Pakistan? Should he be able immediately to file a habeas corpus action alleging deprivations of his constitutional and treaty rights? There is embedded in this vision a very deep discomfort with the premise that the war on terrorism is, legally speaking, a war at all.

The consequence of the human rights groups staking out such unflinching ground was that the courts were faced, in all three cases, with a choice between extremes. Instead of confronting a well-constructed—or even a badly constructed—statutory scheme that sought to balance the competing constitutional values at stake in these detentions, it confronted a choice between total deference to the executive, aided only by the most general support from Congress, or total rejection of its claims, including its legitimate claims. In other words, it faced a choice between throwing the baby out with the bathwater and drinking the bathwater. The unifying theme of the Supreme Court's action in the enemy combatant cases is the refusal to choose—that is, the insistence on splitting the difference, even where prior precedent gave it scant leeway to do so.

VI.

The performance of the courts in this endeavor was enormously uneven. Unlike the executive, which ultimately takes a unitary position on virtually all issues, and the Congress, which essentially took no position on the enemy combatant questions, the different courts, not to mention the different judges within individual courts, took several positions. And these ran the gamut in terms of quality and seriousness.

For example, the district court that handled Padilla's case in New York produced—notwithstanding its ultimate reversal on the jurisdictional question on which the Supreme Court decided the case—the single most compelling judicial opinion yet written on the due process rights of citizens held as enemy combatants.[30] Chief Judge Michael Mukasey's handling of Padilla's case was a model of the combination of deference and skepticism that judges need to show in the war on terrorism, and it clearly became the model for Justice O'Connor's plurality opinion at the Supreme Court level. Judge Robert Doumar in Virginia, by contrast, was completely out of his depth in *Hamdi*. His rulings served to muddy, not clarify, the issues, as did his petulance toward government counsel.

More particularly for our purposes, in both appellate courts in the domestic cases—in the Fourth Circuit in *Hamdi* and in the Second Circuit in *Padilla*—the majority opinions simply adopted one or the other of the ultimately untenable hard-line positions, either the government's or that of the human rights groups and defense bar. In *Hamdi*, the Fourth Circuit declared the government's submission adequate to consign a citizen to his fate, at least where it is "undisputed" that he was captured in a "zone of active combat operations abroad."[31] To render beyond dispute the question of whether Hamdi was, in fact, captured in a zone of active combat abroad without hearing from Hamdi himself, the court found putative factual concessions in court filings, which the man had never seen or approved and which were written by lawyers with whom he had never been permitted to meet.[32] The Second Circuit, meanwhile, declared Padilla's detention unlawful, buying in its entirety the notion that Congress's authorization to use force had not triggered the traditional war power of detaining the enemy until hostilities were at an end.[33] In

30. *Rumsfeld v. Padilla*, 233 F. Supp. 2d 564 (2002).
31. *Hamdi v. Rumsfeld*, 316 F. 3d 450, 476 (2003).
32. *Id.* at 471, 473, and 474.
33. *Rumsfeld v. Padilla*, 352 F. 3d 695 (2003).

both cases, dissenting judges showed considerably more sophistication, taking approaches that approximated the one the high court plurality ultimately adopted.[34] But because these were dissents in both courts of appeals, both *Padilla* and *Hamdi* came before the high court with stark stakes indeed: One court had held that the appropriate process was no process at all, while the other had held that—at least absent a neurotically specific act of Congress—nothing short of full criminal process could satisfy the Constitution.

The Guantanamo case approached the courts with the battle lines drawn similarly sharply, albeit for a different reason. The Supreme Court's own opinion in *Johnson v. Eisentrager* left little room for argument at the lower court level as to the jurisdiction of the federal courts over habeas petitions from the base. The Court wrote baldly at that time that "[w]e are cited to no instance where a court, in this or any other country where the writ [of habeas corpus] is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes."[35] Any lower court tempted to assert jurisdiction over the base consequently had a high bar to clear in terms of binding precedent. In the *Rasul* litigation, no judge even attempted it. The district court wrote, "Given that under *Eisentrager*, writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States, this Court does not have jurisdiction to entertain the claims made by Petitioners."[36] The D.C. Circuit Court of Appeals unanimously affirmed, and not a single judge voted for en banc review.[37] In other words, when the

34. See Judge Motz's dissent from denial of rehearing en banc in *Hamdi*, reported at 337 F. 3d 335, 368 (2003). See also Judge Wesley's dissent in *Padilla*, reported at 352 F. 3d 695, 726 (2003).

35. *Eisentrager*, 339 U.S. at 763, 767.

36. *Rasul v. Bush*, 215 F. Supp. 2d 55, 72 (2002).

37. *Al Odah v. United States*, 321 F. 3d 1134 (2003). The decision denying

Court considered the petition for certiorari, the justices were facing—as a consequence of the fidelity of the lower courts to what *Eisentrager* plainly said—the prospect of being wholly shut out of the discussion of enemy combatants held abroad. (It should be noted that an attempt was made by the Ninth Circuit to assert jurisdiction over the base, but this was after certiorari had already been granted in *Rasul*.[38] Had the Court declined to consider *Rasul*, it would likely have had to jump to settle the conflict between the two circuits that developed as a result of this decision.)

As can probably be gleaned from these remarks, I am far more sympathetic to the high court's handling of *Hamdi* than to its resolution of *Rasul*. But critically, I believe the instinct behind both decisions was a similar one: the desire to split the baby between the claims of liberty and the claims of military necessity.

The plurality opinion in *Hamdi*, with all its vagueness and uncertainty, seems to me a creditable job of balancing constitutional values, and one that gets the big picture just about right. It acknowledges, first, the fact that the war on terrorism is not a metaphorical war like the war on drugs or the war on cancer—that is, it is not a statement of seriousness of purpose on a policy question but an actual state of military hostilities authorized by Congress and triggering traditional presidential war powers. Second, it acknowledges that implicit in Congress's authorization to use force is an authorization to detain those using force on the other side, even if they are American citizens. For different reasons, Justices Stevens, Scalia, Ginsburg, and Souter would have refused to recognize even this basic premise. Finally, the plurality recognizes that a citizen so detained is, by virtue of his citizenship, differently situated from a foreign national and entitled to a fair and impartial hearing should he choose to contest his status. These three basic premises seem to me all correct, whether

rehearing en banc is reported at *Al Odah v. United States*, 2003 U.S. App. LEXIS 11166.

38. *Gherebi v. Bush*, 374 F. 3d 727 (2003).

they ultimately work to the government's advantage or to that of the detainees. In the absence of guidance from the legislature, I do not think American society could have expected more from the high court than finding this middle road and taking it.

Finding a middle course was naturally harder in *Rasul*. For jurisdiction, like pregnancy, is not a gray area; it either exists, or it doesn't exist. In this instance, the legal argument for jurisdiction was exceptionally weak. To get around *Eisentrager*, the Court had to argue that the famous holding had effectively been overruled in 1973—at least on the question of statutory jurisdiction in habeas cases—in a decision that does not even mention *Eisentrager*.[39] As noted above, the Court left unclear whether its assertion of jurisdiction applied only to Guantanamo or whether any detainee anywhere has access to American courts. For anyone with a sense of judicial restraint, *Rasul* should properly induce some embarrassment, for it is as dismissive of the Court's own precedent as it is disrespectful of the executive branch's reliance on that precedent in designing its detention policies. As Justice Antonin Scalia put it for the three dissenting justices,

> This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied. The Court's contention that *Eisentrager* was somehow negated by *Braden v. 30th Judicial Circuit Court of Ky.*—a decision that dealt with a different issue and did not so much as mention *Eisentrager*—is implausible in the extreme. This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change [the habeas statute], and dissent from the Court's unprecedented holding.[40] (internal citations omitted)

But if *Rasul* is an embarrassment, it is one that illuminates the

39. See Justice Stevens's discussion in *Rasul* at 2695 concerning *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484. See also Justice Scalia's rebuttal concerning *Braden*'s relevance, which begins at 2703.

40. *Id.* at 2703.

same baby-splitting instinct as the plurality opinion in *Hamdi*. For although the Court could not split the difference between the administration and its critics in this case—the substantive issues not being before it yet—it could preserve its ability to split the difference in the future. The result may be a cheap, cynical opinion, but it is one that keeps the justices in the discussion without promising anything tangible. Its vagueness, I believe, is part of its point—a shot across the executive's bow, warning that if it doesn't get its act together, the Court will force it to do so by divining some cognizable rights, just as it divined its own power to consider the detainees' fates in the first place. If the executive behaves responsibly, by contrast, my guess is that the plaintiffs will find that *Rasul* proves an empty vessel for pushing the military toward greater liberality for detainees. In other words, by finding jurisdiction in *Rasul*, however implausibly, the Court positioned itself to play exactly the role it played in *Hamdi*, though admittedly on what will inevitably prove thinner legal reeds.

The baby-splitting instinct evident in these cases is, I suspect, a vision of the future of the legal war on terrorism in the absence of congressional intervention. The courts have positioned themselves not to impose particular processes but, rather, like figure-skating judges at the Olympics, to hold up signs granting marks to the players as they struggle to carve their own way: This process gets a 5.6; this one is inadequate because it lacks a bit more of this value or has too much of that value at the expense of some other one. Because the court is allergic to simply letting one side win—an instinct which, in and of itself, deserves some sympathy given the exceedingly harsh choices posed by the parties—the result is likely to be ongoing uncertainty, the absence of a legal safe harbor for executive conduct, and a big legal question mark hanging over the fates of all detainees held by the military domestically or abroad.

There is, of course, an alternative: a serious and deliberative legislative process that would design a regime within the confines of the Court's dictates to date—a regime to which the courts could defer

in the future and which could define the role they should play going forward. This alternative, however, would require two developments: The administration would have to assume a modicum of humility in its dealings with the other branches of government. The administration's foes, meanwhile, would have to accept that war is a reality, not a metaphor, and that, consequently, not everyone detained in the war on terrorism is going to be rushed in front of a magistrate and encouraged to hire Plato Cacheris or Ramsey Clark to handle an immediate habeas action. At this stage, it's hard to say which necessary precondition for a more constructive approach seems a remoter possibility.