

Also by John Yoo

The Powers of War and Peace

WAR BY OTHER MEANS

AN INSIDER'S ACCOUNT
OF THE WAR ON TERROR

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GUANTANAMO BAY

Before September 11, and without knowing it, we had already captured our first enemy combatant in the war against al Qaeda: Zacarias Moussaoui. Originally held on immigration violations, Moussaoui was soon discovered to be an al Qaeda operative and charged with federal terrorism crimes. After 9/11 and the invasion of Afghanistan, the capture of other al Qaeda and related fighters followed—John Walker Lindh, Yaser Esam Hamdi, Jose Padilla, and several hundred others were soon brought in by U.S. military forces, the intelligence services, and our Northern Alliance allies. After weeks of discussion between the Defense, State, and Justice Departments, the CIA, and the National Security Council, they were sent to the Naval Station at Guantanamo Bay. There, I witnessed the arrival of the first dozen al Qaeda and Taliban in January 2002. At its peak, Gitmo held almost nine hundred detainees. The Defense Department has since released several hundred to the custody of their own governments. As of this writing roughly four hundred remain.

Even as these detainees arrived, critics of the war on terrorism began to demand that the criminal justice system be used to try al Qaeda and

Taliban prisoners. In the criminal justice world, detention promotes punishment of a criminal, his removal from society, and deterrence of other criminal conduct. But 9/11 ushered in a war. The rules of war permit the capture and detention of the enemy without trial, because the purpose of detention is to remove combatants from action. Critics say that the United States has simply made up the term “enemy combatant.” This is untrue. The rules of war have always recognized enemy combatants as those who fight on behalf of the enemy, and warring nations have always been permitted to imprison them. No trial is required because the detainees are not being held as a punishment for a crime; they are held until the end of hostilities, and then released. In the summer of 2004, the Supreme Court recognized this explicitly, when it found that “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.”¹

In no earlier American war has our legal system opened the courtroom doors to enemy prisoners. The only exception was for citizens, and only then for the limited purpose of determining that they were in fact in league with the enemy. Hundreds of thousands of enemy prisoners of war were captured in Vietnam, Korea, and World Wars I or II, and their imprisonment was never reviewed by an American court. Imagine the chaos if lawyers descended en masse, demanding that evidence against enemy detainees be preserved under a rigorous chain of custody and that officers and soldiers be cross-examined about their battlefield decisions.

Human rights lawyers, law professors, and activists who oppose the war on terror nevertheless have filed many lawsuits. They argue variously that the United States is not really at war, that captured terrorists ought to be charged and be given American court hearings, and if not, that the law requires their release. They seek a return to the exclusive use of the criminal justice system to fight terrorism, as was the practice on September 10, 2001. In a sign of the pervasive power of the judiciary in our nation, these contentions have in the past few years been litigated all the way to the Supreme Court.

The very fact that such lawsuits arrived at the Supreme Court’s doorstep was read by some as a defeat for the Bush administration’s

view that the war on terror was actually a war. Administration policies were indeed checked in two Supreme Court cases. In *Rasul v. Bush*, for the first time in history, the federal courts reviewed the grounds for detaining alien enemy combatants held not only inside but outside the United States.² In *Hamdi v. Rumsfeld*, the Court required that American citizens captured abroad must have access to a lawyer and a fair hearing before a neutral judge.³

This was an unprecedented insertion of the federal courts into military affairs, overruling a Supreme Court precedent on the exact point dating from the end of World War II.⁴ But these rulings also confirmed as a matter of law that the war against the al Qaeda terrorist network and the Taliban militia was indeed a war, that it was authorized by Congress, and that it was not solely a criminal justice matter. These rulings in fact left the executive branch with great flexibility. The pleas of administration opponents were not granted and the justices had not turned back the clock. Rather the Court recognized implicitly that the United States can use all of the tools of war to fight this new kind of enemy.

But the Court did assert its power rather than defer entirely to the military and the President on the question of due process for enemy combatants. It did not declare such wartime military decisions to require deference to the President and Congress, as, quite frankly, I would have preferred.

Can the judiciary make good factual and legal judgments in the middle of war? I believe this assertion of power takes courts far beyond their normal areas of expertise and risks conflict with the President and Congress. And indeed both branches would soon partially reverse the Court for pushing into matters where it didn't belong.

In the war against al Qaeda, the United States has captured enemies that fall into several categories. In previous wars, such as World War II, the enemy was defined by citizenship; the enemy was Germany, Italy, and Japan. But al Qaeda is stateless. Our enemies don't wear uniforms, and they are not defined by national identity. Al Qaeda's members are citizens of countries with which we are at peace, including citizens of the United States itself and its allies, such as Saudi

Arabia and Pakistan. Thus they are harder to detect. Al Qaeda's statelessness necessarily means that there will be more uncertainty around detentions, as nationality alone cannot determine enemy status. There must be enough information to know that the individual has acted *in association with* al Qaeda to detain him as an enemy combatant.

Enemy combatants so far have fallen into four types: aliens captured and held outside the United States, such as al Qaeda and Taliban fighters caught in operations abroad; U.S. citizens who are associated with al Qaeda or the Taliban, captured abroad; aliens detained within the United States; and U.S. citizens and permanent resident aliens detained in the United States. The first category includes detainees currently held at the naval base in Guantanamo Bay, Cuba, none of whom are U.S. citizens or resident aliens. John Walker Lindh, an American citizen from the San Francisco Bay Area who was captured in Afghanistan while fighting with the Taliban, and Yaser Esam Hamdi, a Saudi Arabian citizen born in Louisiana and also captured in Afghanistan with the Taliban, fall into the second category. The third category includes Moussaoui, a French citizen convicted of plotting additional 9/11-related terrorist killings. In the fourth category is Jose Padilla, an American citizen who had met with al Qaeda leaders and was captured for attempting to enter Chicago from abroad to explode a radioactive dirty bomb.

Unlike enemies in most previous American wars, al Qaeda is multinational and its reach is global. We fight everywhere. But enemy captures on U.S. soil are hardly unknown. In the Civil War, every enemy combatant was an American citizen. In World War II, some Americans joined the German, Italian, or Japanese armies. When detained, they were not afforded any rights under the American criminal justice system, but instead were treated as enemy combatants. They were never tried for a crime, but were held until World War II had ended.

So why was John Walker Lindh tried? Lindh, a convert to Islam, journeyed in May 2001 to Pakistan to attend a military training camp run by Harakat ul-Mujahideen, an Islamic terrorist group.⁵ He trained in jihad and the use of weapons, and soon expressed a wish to fight with the Taliban against the Northern Alliance in Afghanistan. In June 2001 he arrived at al Farouq training camp outside Kandahar, Afghanistan, a

central al Qaeda hub, the same camp that housed several members of the Buffalo cell as well as David Hicks, an Australian now held at Guantanamo Bay. Lindh received advance arms and explosives training, as well as training in orienteering, navigation, and battlefield combat. On one of three visits to the camp, bin Laden personally spoke with Lindh for about five minutes. Lindh was asked to participate in operations in the United States, Europe, or Israel, but he reiterated his desire to fight in Afghanistan.

Armed with AK-47s, he and 150 compatriots reached the front line with the Northern Alliance shortly before September 11. In November, he retreated with his unit to Kunduz, where he surrendered to the Northern Alliance. On November 24, he was transported to the prison near Mazar-e-Sharif, where he was interviewed by CIA agent Johnny Micheal Spann but refused to say anything. The next day, several prisoners overpowered their guards and killed Spann. Lindh was shot in the melee. After a week, the prisoners surrendered; Lindh was taken into custody and sent to a medical base for treatment. He was interrogated by the military and the FBI in Afghanistan, where he waived his Miranda rights and was flown to the United States for trial.

Lindh's status as an American citizen, and the circumstances of his capture less than three months after the 9/11 attacks, made him the first enemy combatant of the war who received sustained attention at high levels of the government. He was clearly an enemy combatant, detained under the rules of war along with other enemy forces. But there was never any doubt that the Justice Department would take custody of Lindh and conduct a criminal trial. Attorney General Ashcroft believed it important to show that the criminal justice system could still serve an important function in trying terrorists. Neither the Defense Department nor the intelligence agencies protested. They agreed that an American who had joined to fight on the side of the Taliban and al Qaeda, but did not appear to pose an ongoing threat, would be better handled through trial. Deciding to send Lindh to a criminal trial underscored that war and the criminal justice system are not mutually exclusive. Which system to use depends on context and is not prescribed by law.

Lindh's attorneys argued that combatants in the Afghanistan war should be covered by the Geneva Conventions, which would have ruled out criminal sentences such as the death penalty. The trial judge rejected the claim on the grounds that neither al Qaeda nor the Taliban were combatants entitled to POW status.⁶ This ruling confirmed the legal position the Bush administration adopted in January 2002 that Geneva did not apply to al Qaeda or to its allies, the Taliban, who were at best outlaw warlords in Afghanistan.

Lindh could not be tried in a military commission because President Bush had reserved its use only for enemy aliens. As an American citizen Lindh had clearly violated federal laws prohibiting the provision of "material support and resources" to terrorist groups, the federal prosecutor's central tool in domestic antiterror cases after 9/11. Material support includes providing "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials."⁷ Convictions carry sentences up to life. Lindh's service to the Taliban against American forces and his involvement in the prison outbreak that led to the death of Agent Spann also made him subject to the charge of attempting to kill Americans, a violation of federal law that could have justified the death penalty.

The decision to prosecute Lindh was a policy and prosecutorial choice. We might have chosen to detain Lindh and hold him as an enemy combatant, since citizens working for the enemy can be detained. But, as far as I know, every member of the Bush administration in this war assumed that any American captured fighting against the United States would be brought back home either to be tried in federal court or to be held as an enemy combatant in military detention, not kept in detainee camps in Afghanistan or at Guantanamo Bay. Any American al Qaeda would remain a citizen, although some of my Justice Department colleagues professed amazement that our law did

not automatically strip Lindh of citizenship for fighting against his country.

The Justice Department chose to try Lindh in Alexandria, Virginia, known as the "rocket docket" for its reputation of moving cases along at a speedy pace. This is the federal district court, after all, that includes the Pentagon. Judge T. S. Ellis, who presided over the case, had a reputation as a smart, no-nonsense judge who would not tolerate any publicity stunts or courtroom delaying tactics. Nonetheless, Lindh's lawyers—led by colorful and capable San Francisco attorney James Brosnahan—filed various motions that threatened to tie the case up in lengthy battles, notably with their demands to interview various al Qaeda leaders who were, by then, in American custody.

Delays can be costly. Prosecution can create leverage to obtain cooperation as part of a plea bargain, but to have any value the agreement must be struck quickly. After Judge Ellis rejected the most difficult Lindh defense motions in July 2002, a deal was finally reached in October in which he agreed to cooperate. Lindh pled guilty to providing services to the Taliban and carrying explosives during the commission of a felony. Taking responsibility for his actions and expressing remorse at sentencing helped him get only twenty years rather than life. "I made a mistake by joining the Taliban," he told the court. "I want the court to know, and I want the American people to know, that had I realized then what I know now about the Taliban, I would never have joined them."⁸

The second enemy combatant case that demanded high-level attention was that of Yaser Hamdi. Hamdi said he had gone to Afghanistan in the summer of 2000 to fight for the Taliban and, like Lindh, had received weapons training and joined a unit that engaged Northern Alliance forces near Kunduz, Afghanistan, to whom Hamdi surrendered in late 2001. Like Lindh, he was sent at first to the Mazar-e-Sharif prison, then on to another prison in Sheberghan. There he told U.S. intelligence after interrogation that he was a Saudi citizen born in the United States. In January 2002, the military transferred Hamdi to Guantanamo Bay. A birth certificate was

found showing that Hamdi was born in Baton Rouge, Louisiana, where his family had lived temporarily when his father worked in the oil industry. He was transferred to the U.S. Naval Brig in Charleston, South Carolina, on April 5, 2002, a beneficiary of the Bush administration policy decision made at the time of Lindh's capture that all Americans captured in the war on terrorism would be brought back to the United States.

It took the federal public defender in the eastern district of Virginia, who was also defending Zacarias Moussaoui, only a few weeks to file a federal case seeking Hamdi's release. Senior District Judge Robert Doumar was assigned the case. From the start, he seemed determined to make life difficult for the government. Doumar allowed the federal public defender to file an initial habeas corpus petition and ordered that Hamdi meet with a lawyer within days. In the Justice Department, we felt that Judge Doumar was trying to turn the case into his own personal crusade. For one thing, he had allowed the federal public defender to walk into court and claim that Hamdi ought to be freed. Then Doumar found that an enemy combatant had a right to a lawyer and unmonitored communications. We took an emergency appeal. The Court of Appeals for the Fourth Circuit, which includes Virginia, dismissed the case under the doctrine known as "standing," that is, on the grounds that the federal public defender could not represent an enemy combatant because he enjoyed no relationship with Hamdi, did not suffer any personal injury from alleged violation of Hamdi's legal rights, and so could not bring a case on his behalf.⁹

In the meantime, Hamdi's father turned up, perhaps encouraged by lawyers set on challenging the administration's war policies. He filed a habeas petition on behalf of his son, curing the lack of standing. Hamdi's father claimed that his son went to Afghanistan only two months before the 9/11 attacks to perform "relief work," and was trapped in Afghanistan once fighting began.¹⁰ Determined to treat Hamdi like a normal civilian rather than as an enemy combatant, the district judge again immediately ordered that Hamdi have unrestricted access to a lawyer. The Justice Department again

took an immediate appeal and again the appeals judges reversed, saying that the civilian court inquiry into Hamdi's status was to be "limited and deferential" and noting "that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one."¹¹

Michael Mobbs, a special adviser to the undersecretary of defense, submitted a declaration recounting the facts of Hamdi's capture that left Judge Doumar unsatisfied. In an August 2002 hearing, Doumar said he would take the Mobbs Declaration and "pick it apart." Doumar then proceeded to question whether "Hamdi ever fired a weapon" and whether Mobbs was in fact a U.S. government employee. He then ordered the government to produce copies of all Hamdi's statements, the notes taken from any interviews with Hamdi, the names and addresses of all the interrogators who'd questioned Hamdi, statements by members of the Northern Alliance regarding Hamdi, and a list of all dates and locations of Hamdi's detention. War or no war, this judge was clearly bent on nitpicking every aspect of the military's decision-making. When again ordered by the appeals panel to focus on the sufficiency of the Mobbs Declaration, Judge Doumar ruled that it fell "far short" of the standard justifying detention, being "little more than the government's say-so."¹²

The Justice Department immediately appealed. Judge J. Harvie Wilkinson, former professor at the University of Virginia Law School and a jurist on many Republican short lists for the Supreme Court, presided. Frank Dunham, the very able federal public defender, represented Hamdi. Paul Clement, the deputy solicitor general, argued on behalf of the government. Clement was an old friend from the year we had clerked together for Judge Silberman. A Wisconsin native, he had gone to Georgetown and then Harvard Law School, and following our year with Silberman had clerked for Justice Scalia. He had served as Senator Ashcroft's counsel on the Judiciary Committee, and Ashcroft's confidence in his legal judgment was unlimited.

Clement served as Ted Olson's deputy during difficult times. When Hamdi was transferred to South Carolina, I had gone to Olson to brief him about the issues. I told him I was certain his case or a similar one

would go to the Supreme Court, one way or the other, and that it would eventually involve the question of whether the United States was at war with al Qaeda. We discussed the formation of a special group, using the solicitor general's top-flight litigators, joined by OLC, the criminal division, and the civil division, to take control of the detainee cases. After giving it some thought, Olson agreed and delegated primary responsibility to Clement. It is a testament to Clement's legal skills, hard work, and political acumen that he was promoted to succeed Olson as solicitor general at an incredibly young age, even after Gonzales took the helm at the Justice Department.

The case was argued in early October 2002. Three months later, the Fourth Circuit came back with a victory for the government. Hamdi's detention was upheld because it was "undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict." His lawyer had conceded as much at oral argument, which relieved the court of having to hold an evidentiary hearing.¹³ The Fourth Circuit also agreed that the power to detain Hamdi derived directly from the President's and Congress's powers to wage war. It observed that judicial restraint in wartime prohibited a federal court from intrusively inquiring into the details of Hamdi's capture. Judge Wilkinson also concluded that Congress implicitly authorized the power to detain Hamdi with its authorization of the use of force, and that Hamdi's status as an American citizen didn't preclude his detention as an enemy combatant. "One who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such."¹⁴ The Supreme Court, however, agreed to hear the case in 2004. This was a surprise to me, and probably to most of the Justice Department.

Even as the judge in South Carolina was attempting to try Hamdi's case, the third and most serious case appeared. Jose Padilla was an American who was born and raised in the United States. He had gotten involved in Miami drug gangs, was convicted of murder in 1983 as a juvenile, served at least two jail sentences, and in 1998 moved to Egypt. Assuming the name Abdullah al Muhajir, he traveled in

Pakistan, Saudi Arabia, and Afghanistan, where he came into contact with top al Qaeda leaders. In a meeting with Abu Zubaydah, al Qaeda's operational planner, Padilla discussed a plan to detonate a dirty bomb in a major American city. Padilla underwent al Qaeda training and conducted research on wiring explosives at an al Qaeda camp. When the United States and its allies invaded Afghanistan, Padilla moved to different safehouses to avoid capture, and eventually escaped to Pakistan. In Pakistan, Padilla met with Khalid Sheikh Mohammed, one of the al Qaeda leaders who planned the 9/11 attacks, and discussed schemes to destroy apartment buildings, hotels, and gas stations in the United States. On May 8, 2002, Jose Padilla flew to Chicago from Pakistan, with an intermediate stop in Switzerland.¹⁵

Intelligence had provided our agents with not only Padilla's name, but his exact itinerary and plans for attack. Padilla left Pakistan with cash, travel documents, and communications devices. As he stepped off the plane in Chicago, he was arrested pursuant to a material witness warrant issued by a New York federal grand jury investigating the 9/11 attacks. This warrant allows the government to detain an individual who is a witness to a federal crime, but who might attempt to flee. It was widely used in the weeks after the September 11 attacks to detain individuals suspected of ties to al Qaeda. The FBI found no weapons or explosives on him. Government agents transferred Padilla to the maximum security wing of New York City's Metropolitan Correction Center and presented him to Judge Mukasey of the federal district court, which appointed him a lawyer. After meeting with his lawyer, Padilla refused to reveal any information to interrogators and instead moved to have his arrest warrant thrown out.

Of these three cases, Padilla was by far the most important for national security. Lindh and Hamdi could provide information on the structure of al Qaeda and the Taliban, who was in the chain of command, how they recruited and trained, and the identities of other recruits, but their knowledge was limited to operations in Afghanistan and Pakistan. That knowledge turned stale as the invasion of Afghanistan receded further into the past. Ultimately, they were equivalent to privates in al Qaeda.

Padilla, however, was a much greater threat, and an intelligence prize. He came to the United States to carry out a *future* terrorist attack. He didn't enter the country with any equipment or plans, and clearly didn't have the resources or expertise to construct and detonate a dirty bomb on his own. Where was he headed? Who was he to meet? Where would he get the money to buy parts for a dirty bomb? Where would he get the radioactive material? Did he have contacts in a facility with nuclear material? We thought he must have entered the country either to meet with a sleeper al Qaeda cell we had missed in the months after 9/11 or to establish a base of operations for other operatives to follow.

From our reconstruction of the 9/11 attacks, we knew that al Qaeda engaged in meticulous planning, staffed its operations with multiple agents, and spent time and resources to allow its operatives to train, conduct reconnaissance, and move into position. Capturing Padilla opened the possibility that we could roll up a dangerous sleeper cell already in the United States, or use him to lure any operatives following him into the country.

Michael Chertoff, then the head of DOJ's criminal division, was among those who worried that we could lose Padilla if he remained in the criminal justice system. Chertoff was one of those rare combinations in Washington: hypercompetent and intellectually brilliant, with a non-partisan reputation. He had gone to Harvard for college and law school. Legend has it that Chertoff was so intense in law school that he became the model for the type of aggressive, take-no-prisoners students portrayed in the book *One L* by Scott Turow and the movie *The Paper Chase*. He had barely mellowed with age. He had clerked for Justice William J. Brennan, the leading liberal intellectual on the Supreme Court from the 1950s through the 1980s, and then served as a career federal prosecutor in New Jersey. He won a high-profile case against the mob and eventually became the U.S. Attorney for New Jersey. I met Chertoff when I served as Senator Hatch's general counsel on the Senate Judiciary Committee. He worked for Senator Al D'Amato as chief counsel of the special Senate committee investigating the Whitewater scandal. Chertoff is one of the most impressive lawyers I have ever met. He could operate

at all levels of the law, from deposing witnesses to conducting a courtroom trial to debating the niceties of high constitutional theory. His tongue was as sharp as his mind, either in asking questions or tagging someone playfully with his wit. With his obvious political skills and experience, Chertoff was supported by both of New Jersey's Democratic senators in 2003 when President Bush nominated him for a prized seat on the federal appellate court in the state. But after only two years, Chertoff could not sit still as a federal judge, and he accepted Bush's appointment to the cabinet as the secretary of the Homeland Security Department.

We didn't think we could hold Padilla for long. If Padilla knew he had to wait only a few months, he would never reveal his al Qaeda contacts. Over the next few weeks, lawyers at Justice, Defense, the CIA, and the White House worked quickly to develop an alternative to releasing him or charging him with a minor violation of law. After careful thought, we recommended to the President that an American could be taken into custody as an enemy combatant, but only if several agencies independently agreed. OLC reviewed the material on Padilla to determine whether he could qualify, legally, as an enemy combatant, and issued a legal opinion to that effect.¹⁶ Chertoff's criminal division provided a "fact memo" with information on Padilla based on FBI and other sources of information. Based on its own intelligence, the CIA concluded that Padilla should, as a matter of policy, be transferred to military custody as a combatant. Rumsfeld's office conducted its own independent analysis, based on its own sources of information and on the CIA's work. Ashcroft relied on the OLC opinion that the military could legally take Padilla into custody, and also agreed with the CIA and DOD's recommendation that he be held as a combatant. Rumsfeld's office then sent a package of all these memos and findings to the White House, where it was reviewed by Gonzales and his lawyers. Gonzales briefed the President personally.

As the person who worked on the OLC document and had the proper clearances to read the intelligence reports, I not only wrote memos, but also assembled them and carried the growing pile of paper

to its designated stops. I sometimes wondered what would happen if I were hit by a car while walking around Washington, D.C., with my beat-up, government-issue locked blue pouch of classified documents clutched in my arms. I was amazed at the level of paperwork and layers of review that the capture and detention of one enemy combatant generated in the middle of a war, but it signaled the importance placed on Padilla, and the care we all took, knowing both that an American's liberty was at stake and that this case would set a precedent for the future.

On June 9, 2002, President Bush ordered the Justice Department to transfer Padilla to the Defense Department pursuant to his authority as commander in chief and Congress's AUMF. In his order, Bush determined that Padilla "is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;" that he "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism" against the United States; that he "possesses intelligence" about al Qaeda that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States"; that he "represents a continuing, present and grave danger to the national security of the United States"; and that military detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States."¹⁷ Defense transferred Padilla to the brig in Charleston, South Carolina. Ashcroft announced the decision to the American public in an ill-advised television address from Moscow, where he was on a diplomatic trip. His mention of the dirty bomb sent the stock market down several dozen points.

Two days later, Padilla's lawyer filed for a writ of habeas corpus in New York City, arguing that his detention by the military violated the Constitution. While Judge Mukasey agreed that the President had the authority to detain Padilla as an enemy combatant, he also decided that Secretary Rumsfeld was the proper defendant,¹⁸ that Padilla could challenge disputed facts in a habeas proceeding, and that the standard to be used in reviewing the government's facts would be a

relatively generous “some evidence” standard. A court of appeals panel reversed and ordered Padilla released, concluding that neither the President’s commander-in-chief power nor the AUMF authorized detention of an American on American soil, even if he had associated himself with the enemy.¹⁹ The Bush administration filed an appeal with the Supreme Court, which it granted.

Some civil libertarians believe that judges should supervise the military’s detention of enemy combatants not only in the United States, but anywhere in the world. They contend that U.S. citizens like Hamdi and Padilla should be released or tried in civilian courts, and that courts ought to superintend captured enemy *aliens* held abroad, such as at Guantanamo Bay. In the weeks after 9/11, lawyers at State, Defense, the White House, and Justice formed an inter-agency task force to study the issues related to detention and trial of members of al Qaeda. The one thing we all agreed on was that any detention facility should be located outside the United States. Civilian criminal courts might not even be able to handle the numbers of captured terrorists—overwhelming an already heavily burdened system. We researched whether the courts would have jurisdiction over the facility, and concluded that if federal courts took jurisdiction over POW camps, they might start to run them by their own lights, substituting familiar peacetime prison standards for military needs and standards. We were also strongly concerned about creating a target for another terrorist operation.

No location was perfect, but the U.S. Naval Station at Guantanamo Bay, Cuba, seemed to fit the bill. Or, as Rumsfeld remarked at a press conference, Gitmo was “the least worst place” for the detention facility, a phrase the base personnel printed up on T-shirts. Gitmo was well-defended, militarily secure, and far from any civilians. The first Bush and the Clinton administrations had used Gitmo to hold Haitian refugees who sought to enter the United States illegally. One case from that period had concluded that by landing at Gitmo, Haitians did not obtain federal rights that might preclude their return. This suggested that the federal courts probably wouldn’t consider Gitmo as falling within their habeas jurisdiction, which had in any event been

understood to run only within the territorial United States or to American citizens abroad.

Civil liberties lawyers selected several enemy combatants at Guantanamo Bay to test the legality and conditions of detention through a writ of habeas corpus before a federal judge. They lost before a federal district judge in Washington, D.C., and a unanimous panel of the court of appeals upheld the decision. A federal appeals court in California, however, decided that Guantanamo Bay should be considered part of the territory of the United States, ignoring the fact that Guantanamo’s lease, though perpetual, states that the base remains within Cuba’s sovereignty. These cases moved forward to the Supreme Court to be decided along with *Padilla* and *Hamdi*.

The civil libertarians pushing the *Padilla* and *Hamdi* cases fervently believe that the courts need to check the executive branch and Congress to protect individual rights, especially in matters of war when the chances of abuse of executive power might be high. Their position is that the President cannot detain American al Qaeda members other than through the criminal justice system. Columbia law professor Louis Henkin, the nation’s leading international law scholar, and Harold Koh, dean of the Yale Law School, filed a brief declaring: “The indefinite executive detention of U.S. citizen Jose Padilla on United States soil offends the rule of law and violates our constitutional traditions.”²⁰ Their belief was that presidential policy should remain exactly as it was before 9/11. “The existence of war or other armed conflict does not alter the fundamental structure of the Constitution or the constraints it imposes on executive power,” Henkin and Koh wrote. “The U.S. Constitution contains no wartime or emergency exception to the scope of the President’s powers. Indeed, the word ‘war’ appears nowhere in Article II of the Constitution.”²¹

They are mistaken. The taking of prisoners has been a basic feature of war throughout human history, and the United States has captured prisoners in every major war it has fought.²² “Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces,” the Supreme Court observed during World War II, due to “universal agreement and practice.”²³ We captured hundreds

of thousands of prisoners in World War II and thousands in the Korean, Vietnam, and Persian Gulf wars, both lawful and unlawful combatants (those who obeyed the laws of war and those who did not). How we deal with enemy detainees affects other aspects of the war, such as morale, intelligence gathering, and the treatment of American POWs. Resources spent on detention reduce those available for other war needs. Throughout American history, control of prisoners captured in war has rested with military commanders, and ultimately the President. This power is implicitly part of the Constitution's grant of the commander-in-chief power to the executive branch, hardly an aggrandizing Bush power grab, as some like to claim. While Congress has the power to create the military and establish its rules of discipline, it has never sought to dictate a POW policy at odds with the President's.

There is no rule in law, or in history, that American citizens are constitutionally exempt from war. In the Civil War Confederate soldiers were all American citizens; when they were captured, they were held by the military, not the civilian courts. The Constitution has been consistently interpreted to permit our armed forces to detain American citizens as well as aliens fighting on behalf of our enemies. It is well-settled that the President, as commander in chief, has the power to determine how to defeat the enemy. This includes who to detain and how to detain them.²⁴

Should a new President or Congress create a different rule for Americans who are captured fighting for al Qaeda? Some civil liberties lawyers want American citizens to be immune from military detention, even if they fight against us. Nothing in American history supports such a contention. Before 9/11, two cases, one from the Civil War, one from World War II, had reached the Supreme Court involving Americans captured while fighting against their nation. Both hold that Americans who join our enemies have no greater right to be free from detention when captured than alien enemy combatants.

In *Ex Parte Milligan*, Lamdin Milligan, a citizen of the Union and a resident of Indiana, was arrested on October 4, 1865, by the military commander for Indiana.²⁵ According to Union military authorities,

Milligan had joined a secret society known as the Order of American Knights to overthrow the government. Apparently Milligan's group planned to seize munitions stored at Army arsenals, liberate Confederate prisoners, kidnap the governor, and communicate with the enemy. He was tried by a military commission on October 21, and sentenced to hang. Nine days before the sentence was to be carried out, Milligan filed for a writ of habeas corpus, claiming that the military had no jurisdiction over him.

The Supreme Court granted the writ, releasing Milligan on two grounds. Milligan had been apprehended well away from the front, had never communicated with the enemy, and was only a partisan of the Confederate cause.²⁶ The Court concluded that Milligan "was not engaged in illegal acts of hostility against the government." Milligan, in other words, was not an enemy combatant; he was only a Confederate sympathizer. The Court also observed that Milligan was captured behind Union lines, not on the battlefield, where "the courts are open and their process unobstructed."²⁷

Milligan, a 5-4 case with the Chief Justice in dissent, identifies when the military cannot detain citizens: when they have not joined the enemy and are located away from the battlefield, where the civil courts are open. *Milligan* contains much stirring language, often quoted by civil libertarians, about the rule of law and the excesses of wartime zeal. The Court observed that the "Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."²⁸ All quite true. The Court recognized, however, that the Constitution grants the government the power to respond to attack, and that this includes the power to suspend habeas corpus or impose military rule in areas under attack.

Milligan's protections do not reach citizens who have actually joined enemy forces. Nor do they extend to detainees, citizen or not, at the

front or on battlefields abroad. Otherwise, the Union could not have fought the Civil War, because the courts should have ordered President Lincoln to release thousands of Confederate POWs and spies. Obviously, this did not happen during the Civil War, nor afterward. The Court also decided *Milligan* on December 1, 1866, well after the end of hostilities, continuing the judicial practice of waiting until the end of a conflict to do anything that might interfere with ongoing military operations.

Almost eighty years later, the Supreme Court affirmed this understanding of the President's war power, in a case involving Nazi saboteurs. In June 1942, eight Nazi agents secretly landed on Long Island, New York, and in Florida, with plans to attack factories, transportation facilities, and utility plants. All had lived in the United States before the war, and two were American citizens.²⁹ One of the Nazis decided to turn informer. After initially dismissing his story, the FBI arrested the plotters, and their capture was revealed at the end of June. President Roosevelt established a military commission and the Supreme Court ultimately entertained a habeas petition in the case of *Ex Parte Quirin*.³⁰ The captured saboteurs argued that they should be released from military custody because, like Milligan, they were citizens, the civilian courts were open, and they were captured within the United States, far from any battlefield. The Court rejected these arguments and upheld FDR's decision to try them—even those who may have been born in the United States and were presumably American citizens—before a military court.

In doing so, the Court adopted the understanding of *Milligan* outlined above. What is important, the *Quirin* Court said, is not so much the time or place of the enemy combatant's capture, or the manner of capture, or even the combatant's citizenship, but whether in fact he is a member of the enemy's forces. In a unanimous holding, the Court held that individuals, regardless of citizenship, who "associate" themselves with the "military arm of the enemy" and, "with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war."³¹ *Quirin* flatly declared that the government could detain

enemy combatants regardless of whether they were citizens or not: "Citizenship in the United States of an enemy belligerent does not relieve him of the consequences of a belligerency which is unlawful."³² Milligan was not a belligerent because he had never associated with the enemy armed forces.³³

Padilla and Hamdi's lawyers tried to argue that the American military can detain only uniformed members of regular armed forces captured on the battlefield.³⁴ This contention is blind to the realities of the post-9/11 world, tying our hands precisely because our enemy, in disguise, targets civilians on our own soil. This is nothing but an invitation to al Qaeda to stop trying to fight anything resembling a conventional battle. No more Tora Boras—just more World Trade Centers.

As if talking about al Qaeda itself, the *Quirin* Court said that "those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants."³⁵ Legally, the Padilla case is virtually identical to that of the Nazi saboteurs.

Critics of the war also argue that military detention is illegal and unconstitutional because it is "indefinite."³⁶ Military detention is only indefinite because there is no criminal conviction and sentence. "Indefinite" does not mean "forever." The United States has released many Gitmo detainees who have been determined to no longer pose a threat. They have been mostly released to the governments of their countries of origin, once appropriate assurances have been obtained that they will not be released to renew their combat.³⁷

Some critics contend that detention without knowledge of the release date amounts to cruel or inhuman treatment in itself. This claim flies in the face of centuries of wartime practice. Under the rules of war, nations have always held enemy combatants until "the cessation of active hostilities."³⁸ In war there is no requirement of a fixed time period like a criminal sentence to detain the enemy, nor any requirement of a "trial" to fix any such "sentence." At least there was none until the Supreme Court suggested it might create one, for the first time in history, in the *Hamdi* case. This has since been mooted by the

2005 Detainee Act. Combatants have historically been detained until the end of a conflict so they cannot rejoin the fighting. No POW has ever had any idea on what date he would be released. In this, al Qaeda and Taliban fighters detained at Guantánamo Bay are no different.

While the war with al Qaeda has been going on for five years, and while it's hard to imagine a peace treaty, hostilities will end at some point. American wars have been short by historical standards. But FDR did not know in 1942 that World War II would last only three years, nor could Lincoln have predicted in 1861 that the Civil War would last four years. There have been much longer wars, such as the Iran-Iraq war and American involvement in Vietnam, not to mention the Thirty Years' War or the Napoleonic Wars. Just because those wars were long did not mean that nations lost their right to detain captured enemy combatants. Just because the war on terrorism has proven longer and in some ways more difficult than previous American wars does not require that we release or try al Qaeda operatives.

Defeating al Qaeda will take longer than five years, but there is no reason to believe it will go on for a generation. Only those who imagine that the war against al Qaeda is a war against a persistent social problem, like the war on drugs or the war on crime, can honestly believe that the conflict will never end. Our current conflict is with al Qaeda, and we can declare hostilities over when it can no longer attack the United States in a meaningful way. Then the United States can transfer al Qaeda prisoners to the custody of their national governments.

Civil libertarians liken the case of Padilla or Hamdi to FDR's internment of Japanese-Americans.³⁹ There is no parallel with *Korematsu*, the 1944 case in which the Supreme Court upheld the detentions. The Japanese-Americans detained by FDR were American, not enemy, citizens, whose disloyalty was assumed solely because of their ethnicity. Today our military has detained no one because they were Arab or Muslim, but only those who have been caught on a battlefield or working with al Qaeda. Of the three Americans detained as enemy combatants, one was Hispanic, one Caucasian, and one Arab.

Critics also argue that the Anti-Detention Act of 1972, which prohibits the peacetime detention of Americans without criminal charge or other authorization by law, says that only Congress may authorize detentions.⁴⁰ Padilla's lawyers claimed it was enacted specifically to repudiate the Japanese-American internment and emergency detention laws against spies and saboteurs.⁴¹ Thus, they say, if President Bush has the power as commander in chief to detain enemy combatants at war, which they do not concede, this power does not extend to suspects at home, who must be handled under rules set by Congress.

The lesson of September 11, reinforced by the AUMF, the logic of *Hamdi*, and the Patriot Act's removal of the artificial Wall between foreign and domestic intelligence, was that mere geography or even citizenship can no longer divide the powers of war from the powers of peace. Al Qaeda operatives had launched the attacks from within the United States by hijacking American airliners. They had succeeded where the Nazi saboteurs had failed. The Constitution would not have disabled the President and Congress from confronting a threat all the greater when waged by enemy operatives on American soil. Under *Quirin*, the President has clear authority to detain enemy combatants, even citizens, in wartime. But control over the federal criminal laws rests with Congress. Interpreting the law to prevent the President from military detentions merely because the enemy has been found in the United States would provoke a direct conflict between the constitutional authorities of the two branches. With the Anti-Detention Act, Congress hoped to prevent detentions of loyal citizens, not the enemy, in time of war.⁴² Congress's AUMF implicitly included the power to detain enemy combatants.⁴³ Civil libertarians are arguing that Congress authorized the military to shoot to kill enemy combatants, but not to capture and detain them.⁴⁴

Civil libertarians, not the Bush administration, seek a radical re-ordering of our system for making war. They demand a new role for Congress and the courts in overseeing basic military decisions. The most radical deny that the Constitution grants *any* role to the President in conducting war, foreign affairs, and national security policy. Congress, they say, should pass a law on every aspect of the use of

force, not in the AUMF's general terms, but only in declared specifics, such as the power to gather intelligence, to use force, to detain the enemy, to accept surrender, to interrogate, to release detainees, and so on.

As noted earlier, this is an ironic reversal on such critics' usual complaints. When Congress delegates to the President in far less serious matters, such as regulating industry and the environment, they argue the opposite, that everything should be delegated to the agencies within the executive branch.⁴⁵ If the Constitution gave Congress and the President flexibility and discretion in anything, it was the conduct of war. Put differently, Hamdi, Padilla, and their civil libertarian allies want to all the laws and all the historical precedents of war to contain a brand-new exception for everything that occurs on American soil or involves Americans who join the enemy. After enemy combatants have carried out the deadliest attack on American soil in history, an attack the enemy is determined to repeat using covert means, this would make no sense at all. This position takes "rights talk," as author and legal scholar Mary Ann Glendon terms it, to an illogical extreme.

The law is not the same as policy. Whatever the government's legal right or power to detain, it might, if it chose, use the criminal justice system, much as it had prior to 9/11. Had it wanted to, it could have reserved military detention only for members of the Taliban captured fighting in Afghanistan. These are policy decisions for our elected decision-makers. So why did the President and Congress choose otherwise?

Consider first the incentives. Al Qaeda would focus on recruiting American citizens and on conducting covert operations on American soil. The most dangerous covert operations against American civilians would become the easiest for our enemy to carry out. Osama bin Laden offered John Walker Lindh the role of a suicide bomber precisely to exploit his Western identity, cover, and access. Al Qaeda recruited Jose Padilla for the same reasons. The last thing our government should do is give an advantage to operations on American soil for spies and saboteurs to conduct terror attacks.

Al Qaeda members with American citizenship could easily refuse to disclose their secrets by pleading the Fifth. Proof sufficient to meet the probable cause standard would have to be collected before they could be arrested. Americans with no previous criminal record who have carefully refrained from communicating with al Qaeda once in the United States could, for all practical purposes, never be identified and confined, short of pure luck. Luck is not going to protect us from this determined adversary.

Military detention is also one of our most important sources of intelligence, which in turn is our most important tool in this war. We will need to know who they are, where they are, who is helping them, and what they are planning, which will require surveillance, interrogation of captured enemy combatants, captured computers and documents, and undercover agents. And we need to maintain secrecy about the means and details of these captures and what we learn from them.

Should enemy combatants have the right to a lawyer? The demand for access to counsel seems reasonable enough at first glance—it is certainly one of the bedrock rules of due process in the American criminal and civil justice systems, ingrained into the popular imagination by TV cop shows and crime movies. Our criminal justice system assumes that truth emerges from the clash between prosecution and defense. It tilts the playing field against the government and in favor of the suspect. All relevant witnesses and evidence must be publicly presented in court, and lawyers help their clients exercise their right to say nothing that might incriminate them.

Introducing a lawyer right after capture, as Judge Doumar ordered in *Hamdi*, would essentially stop the questioning of enemy combatants. The defense lawyer's first action would be to order his client to say nothing to the government. This is perfectly appropriate in the criminal justice system. Invoking one's right to remain silent and to have access to counsel is protected by the Bill of Rights, which represents society's decision that we want the government to prove with a high level of certainty that someone is guilty, without relying on evidence that comes unwillingly from the defendant. Our society has

decided that it is strong enough to withstand the occasional individual criminal who is set free.

This is not the case in war. Even under the Geneva Conventions, which do not apply to al Qaeda, a POW has no right to an attorney unless he is being tried for violations of the laws of war. The rules of war have never required a standard of "proof beyond a reasonable doubt" for the detention of a suspected member of the enemy. Nor have they ever required a judicial hearing after capture.

The Fifth Amendment's right to remain silent (which we think of today as "Miranda" rights) applies only in the criminal justice system. It declares that no person "shall be compelled in any criminal case to be a witness against himself." Same goes for the Sixth Amendment's right to counsel: "[I]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We impose less burdensome standards in war because the costs of a future enemy attack are far greater than simply allowing a crime that has already been committed to go unsolved. But this flexibility comes at a price. Intelligence obtained in military detention usually can't be used in any kind of criminal prosecution, since it would have been obtained without Miranda rights. We will obtain information that may prevent a future al Qaeda attack, but that information cannot be used to convict the detainee of a crime.

Suppose civil libertarians prevailed in court and enemy combatants each received a trial to test their detention. To prove that a detainee is a member of al Qaeda, the soldiers and officers who captured and processed the enemy combatant would have to be recalled from the field to appear in court, and subjected to direct and cross-examination. Detainees would want access to any information about them in the government's possession. They could cross-examine al Qaeda leaders in U.S. custody who identified them to test the credibility of the government intelligence. These are all standard rights in a criminal proceeding. Not only would these hearings consume a huge amount of resources and time, they would provide enemy combatants with a treasure trove of U.S. intelligence secrets. Al Qaeda could discover what communications were being intercepted, which parts of its network were compromised,

and which plans had been discovered. An open proceeding makes sense when we want to place the burden on the prosecution to prove that a defendant is guilty of a crime beyond a reasonable doubt. It makes little sense when the objective is to preserve our intelligence advantages against an elusive and shadowy enemy.

The Bush administration naturally wanted the courts to provide as much deference as possible to the facts supplied by the intelligence agencies and the military. "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," the justices have observed.⁴⁶ To avoid recalling active-duty American soldiers, commanding officers, and al Qaeda prisoners for trials, we argued that the government had to meet the "some evidence" standard. That is, so long as sufficient evidence existed in the record put forward by the government, a court should uphold the detention. Courts have used this same standard in far less sensitive situations, such as extradition or immigration deportation hearings, where much less is at stake.⁴⁷

In their eagerness to attack the Bush administration, critics ignored the administration's efforts to protect combatant civil liberties. For instance, it never challenged the courts' jurisdiction to review writs of habeas corpus or any other claims involving American citizens; it created a system to annually review the evidence to hold detainees; and it built a fair, due process-rich military commission system to handle war crime trials.

Critics have exaggerated their arguments in the press, claiming that President Bush wants to throw anyone into jail at any time just on his say-so. Not so. The government must prove that the detainee is an enemy combatant by showing affiliation with al Qaeda and hostile activity against the United States. A government official must submit a signed affidavit describing the facts. Any misrepresentations would be punishable, and they would undermine the government's position in future cases. In the Padilla case, the Mobbs Declaration, in addition to a classified memo by Vice Admiral Lowell Jacoby, head of the Defense Intelligence Agency, explained the national security concerns raised by allowing counsel to interfere with efforts to obtain

intelligence from enemy combatants. In future cases, the government must provide the court with evidence detailing a detainee's links to al Qaeda and his hostile actions against the United States.

Civil liberties absolutists say sworn statements by our national security and defense officials aren't enough. Instead, they are eager to use the detainee habeas corpus proceedings to conduct fishing expeditions into the government's intelligence and military operations—they want to grill captured al Qaeda leaders or American agents in the field on their knowledge. Padilla, for example, would demand that the CIA or the NSA explain just how they learned his travel schedule, whether the information was produced by informants or intercepted communications, and how and by whom it was done. All of this, of course, helps defense lawyers test the credibility or trustworthiness of witnesses in criminal cases. At the same time, producing such information in open court or in any way in which it might be transmitted to the enemy would compromise military secrecy and make the job of defeating al Qaeda far more difficult. This tactic is so standard—either give us this information and lose your intelligence advantage, or release our client—it is known in the legal trade as *graymail*. Prosecuted spies, such as an Aldrich Ames or a Robert Hanssen, regularly make such demands, and often win plea bargains as a result. It was this very bind that lawyers for John Walker Lindh hoped to create for the government when they demanded access to captured al Qaeda leaders.⁴⁸

Our laws do not allow the government to detain Americans on fabricated evidence, but they also should not allow detainees to use our own legal system as a weapon against our war effort. Today, the good faith of our government's efforts against al Qaeda is not, or should not be, at issue. No one is using the war on terror as a façade to pursue innocent Americans. We need the right balance between protecting military secrets and ensuring that no innocent people are wrongly detained as enemy combatants.

The right policy would look something like this: Courts can review the detention of enemy combatants found within the United States and develop a definition of their status. The information disclosed in open

court would be limited and closed hearings would protect classified information. An American detainee would receive a lawyer after interrogation by military and intelligence officers. Any information they obtain would be off-limits for any future criminal prosecution. Defense attorneys would have to hold security clearances. For now, both the Supreme Court and Congress seem content to leave the development of such a system up to the executive branch, the military, and the lower courts. They very well might strike the right balance between checks and balances and effectiveness in war, but if they cannot, Congress may have to enact a statute. So far Congress seems satisfied with staying silent and letting the President take the lead and bear the responsibility.

Congressional silence is hardly a warrant for full-blown judicial intervention. If Congress will not act to contain the imperial President, they say, the courts should step in to police our military and our intelligence agencies.⁴⁹ Despite claims to the contrary, no one has questioned the role that the judiciary plays. The administration has not claimed the military could hold Lindh, Hamdi, or Padilla without any recourse to the courts, even though such a claim might have been an option.⁵⁰ The question is how much information must be produced in court, and how much can be discussed in public.

Courts once regarded themselves as having no business reviewing the military detention of enemy aliens outside the United States at all. In *Johnson v. Eisentrager* (1950), the Supreme Court denied a habeas petition brought by German World War II prisoners, captured in China, who challenged their trial and conviction by military commission.⁵¹ The Court declared that only American citizens (anywhere in the world) and aliens who enter American territory could enjoy "the privilege of litigation" in American courts because "their presence in the country implied protection."⁵² The *Eisentrager* Court deferred to the decisions of the political branches because "trials would hamper the war effort and bring aid and comfort to the enemy."⁵³ Judicial proceedings would engender a "conflict between judicial and military opinion," interfere with military operations by recalling personnel to testify, and "diminish the prestige of" a field commander called "to account in his own civil courts" and "divert his efforts and attention from the military offensive

abroad to the legal defensive at home.”⁵⁴ While *Eisentrager* was overruled in 2004 by *Rasul*, which asserted jurisdiction over enemy detentions, Congress essentially restored *Eisentrager* last year in the Detainee Act of 2005.

The constitutional rights of Americans and aliens within the United States certainly require that we develop a process to ensure against mistaken or improper detentions. But the same does not apply to aliens fighting us abroad. In 1990, the Supreme Court found that aliens could not challenge alleged violations of the Bill of Rights occurring outside the country,⁵⁵ precisely because it would make fighting wars impossible. Every dropped bomb would be a taking of property for which compensation would be owed, every detention an unconstitutional arrest, every killing a deprivation of due process. Applying the Fourth Amendment to aliens abroad, Chief Justice Rehnquist wrote for the Court, “could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.”

This is not to say that the military can hold alien enemy combatants arbitrarily. Our armed forces have no desire to hold civilians, nor to hold enemy combatants any longer than necessary. Detention operations place a drain on soldiers and resources that could be better spent on taking the fight to al Qaeda. As Rumsfeld more colorfully put it, the military has no desire to be the world’s jailer.

The military has released scores of captured enemy combatants to the custody of their governments. Detainees are screened and reviewed at multiple levels of military command. Only those with the highest threat profile or the most intelligence value are sent to Guantanamo Bay. In 2004, in response to the Supreme Court’s decisions, the Defense Department created Combatant Status Review Tribunals (CSRTs). Headed by officers, the tribunals use all available information to review annually whether a detainee still qualifies as an enemy combatant. A detainee has a right to appear before the tribunals with the assistance of a military representative.⁵⁶ Those who still pose a threat of further terrorist activity or who might have valuable information will continue to be held. Determining whether a detainee is lying or is in fact a civil-

ian takes time and should be done patiently. These concerns should not be understated. Several suspected al Qaeda and Taliban detainees who were released in 2003 and 2004 have since been recaptured in Afghanistan conducting attacks against coalition forces or engaging in efforts to destabilize the Karzai government.⁵⁷

If the military were required to act like a police force, it would inevitably be at the expense of actual war-fighting, subordinating the fight with the enemy to worries about the litigation to follow. As *Eisentrager* observed, “[I]t would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.”⁵⁸ We cannot expect our soldiers in the field to worry about warrants, lawyers, Miranda, forensic evidence, and chains of custody if we want to win the war on terrorism.

Press reports might give the impression that the Supreme Court rejected all of this in 2004. Actually, the Court confirmed the administration’s basic legal approach to the war on terrorism, while making clear, however, that it would no longer regard military detentions as outside its purview.

Concern for the new challenges of 9/11 might also have led the Court to adopt a “some evidence” standard narrowing judicial inquiry to the facts known to the government and subject to production in court.⁵⁹ But the Court did not choose this route. Rather, it issued a vague order to the lower courts to develop a fair process to review detentions for every detainee under the control of the United States anywhere in the world. It was an unprecedented intrusion into the traditional powers of the President and Congress over war and one that required it to overrule *Eisentrager*. The Court was asserting that judges could make factual and legal judgments, in the midst of war, far beyond what had once been considered their normal areas of expertise.

In 2004, the Supreme Court decided a trilogy of enemy combatant cases. Most Court observers thought that *Padilla* would be the centerpiece. As an American captured outside a traditional battlefield, he

certainly seemed to be the toughest case. Instead, the Court dismissed it because the plaintiff had brought it in the wrong place.⁶⁰ Eventually, a court of appeals unanimously found in late 2005 that “[u]nder the facts as presented here, Padilla unquestionably qualifies as an ‘enemy combatant’” as that term was defined in the Supreme Court’s cases,⁶¹ even though he had been detained in the United States, not in Afghanistan. While Padilla’s case was on appeal to the Supreme Court, the Justice Department concluded it had enough evidence to prosecute Padilla for crimes. On November 22, 2005, a Miami grand jury indicted Padilla on charges of conspiracy to commit murder and to provide material support to al Qaeda as part of a North American terrorist support cell already under prosecution.⁶² The Supreme Court dismissed the appeal as moot since he was now in criminal court.

Instead, *Hamdi v. Rumsfeld* became the central opinion on the war on terrorism. *Hamdi* rejected arguments that terrorism had to be understood solely as criminal activity and that war could only occur between nations. A four-justice plurality, composed of Chief Justice William Rehnquist and Justices Sandra Day O’Connor, Anthony Kennedy, and Stephen Breyer, agreed that the September 11 attacks had initiated a state of war, that the Afghanistan conflict was part of that war, and that enemy combatants could be detained without criminal charge.⁶³ The court plurality found that the September 18 AUMF provided sufficient authority to detain Hamdi and did not question its constitutionality. “There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing” the AUMF.⁶⁴

The four justices agreed with the argument we had developed years earlier that detention was part of the executive’s use of force.⁶⁵ The justices also reaffirmed that individuals, including U.S. citizens, who associate with enemy forces, are enemy combatants who may be detained, and observed that the purpose of detention in the military context is not to punish, but merely to prevent combatants from returning

to the fight.⁶⁶ Its indefiniteness did not make the detention unconstitutional.⁶⁷ Rather, “the United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States.’”⁶⁸

Contrary to the much-publicized views of pundits and professors, the *Hamdi* Court upheld the core of the administration’s approach to terrorism. Chicago’s O’Hare Airport, New York Harbor, and the Mexican and Canadian borders will be the front lines of this war in the future. If the Court had prevented the government from detaining an American al Qaeda, it would have seriously handicapped this nation’s ability to defend itself in the next chapter of this war.

Up to this point, the Court had remained well within the boundaries of tradition by which courts have usually deferred to the President and Congress in matters of war.⁶⁹ Despite the arguments of a coalition of law professors, members of the bar, and commentators, it would have been remarkable for the Court to have disregarded this framework developed over the nation’s long history.⁷⁰ But victory for the administration was far from complete. While rejecting the positions of Hamdi and the government, the Court fashioned a compromise—that an enemy combatant must receive notice and “a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”⁷¹ The Court borrowed an amorphous standard from a case about the termination of welfare benefits, which balanced the private interest affected by government action, the government’s interests, and the costs of providing greater process, to judge whether procedures provided to an enemy combatant comport with fair process.^{72,73}

That the *Hamdi* Court had to resort to a case about procedural due process in a welfare case shows the extent to which it was improvising. On the one hand, Justice O’Connor wrote, an individual citizen’s interest “to be free from involuntary confinement by his own government without due process of law” is fundamental.⁷⁴ On the other hand, the government has a “weighty and sensitive” interest in preventing enemy combatants from returning to fight against the United States.⁷⁵

Requiring the government to reveal intelligence data in court could be fatal. So, then, which is it? The Court gives no clue how courts should balance these interests. Should a court gauge the government's interest in protecting the national security by figuring out the number of lives potentially saved times the probability of an attack, using the average value of a life as measured by the Environmental Protection Agency? And how to measure the individual liberty interest against unwilling detention—in average amount of dollars per hour an average citizen would pay to avoid detention? If effort to monetize these values seem silly, it is because there is no systematic, rational way to strike a balance between these competing values. The Supreme Court punted to the lower courts to make the tough decisions about specific procedures, such as how much evidence the government should provide to a judge.

After the Court's decision *Hamdi* renounced his citizenship and was released to the custody of Saudi Arabia.⁷⁶ But *Hamdi*'s impact was still wide—largely because of the Court's decision in *Rasul v. Bush*. Safiq Rasul and Asif Iqbal were two British citizens captured in Afghanistan and sent to Guantanamo Bay. Through relatives, they filed suits in federal court in Washington, D.C., seeking their release on the ground that they were not enemy combatants and had never fought against the United States. The courts joined their case with those of two Australians and twelve Kuwaitis held at Gitmo who demanded their release because they were not charged with a crime. Both the federal trial courts and appeals court, following governing Supreme Court case law in place since World War II, said they had no jurisdiction to hear cases brought by aliens held abroad.

But the Supreme Court in *Rasul* ruled that Guantanamo Bay lay within the jurisdiction of the federal courts, and that district judges can review habeas corpus challenges regardless of a detainee's citizenship or location. This is something previous Supreme Courts had always avoided, for good reason.⁷⁷ Without saying so explicitly, *Rasul* seemed to overrule, and certainly ignored, *Eisentrager*'s concerns about judicial interference with military operations. It was a wrongheaded decision

that posed the threat of judicial micromanagement of military operations as never before.

Worse, *Rasul* provided no guidance on how the courts were to shoulder this vast new responsibility. How soon should hearings be held? Where? Who could participate? How would classified intelligence remain protected?⁷⁸ What kinds of evidence or witnesses would the government have to produce? How long could it interrogate before giving the detainee access to an attorney? *Rasul* studiously avoided any discussion of what substantive rights enemy detainees might have, no doubt on purpose. But while the Court's ambiguous *Hamdi*'s balancing test might have left the other branches some flexibility on these questions, it also made a struggle between the federal judiciary and the other branches inevitable.

About the only thing it was safe to assume was that if *Hamdi* defined due process for citizens on U.S. soil, its standards ought to suffice for aliens held outside the country too. To avoid further judicial intervention, the Pentagon could adapt its existing review process for Guantanamo prisoners to meet the standards of *Hamdi* (as Justice O'Connor seemed to invite).⁷⁹ Military commissions could be altered to meet the Court's procedural requirements. The Court's ambiguous balancing test for fairness gives the executive branch little choice but to follow all of *Hamdi*'s suggestions in all cases, with further litigation inevitable and judges now charged with interpreting and applying the new vague law in unpredictable ways.

Civil libertarians make a reasonable-sounding argument defending the expansion of the judicial role. We trust courts to make decisions on many of our society's important issues, including abortion, affirmative action, the death penalty, police power, and the place of religion in the public square. It fulfills our Constitution's original design to allow the courts to check and balance the actions of the President and Congress. If the federal courts can potentially review the arrest and sentences of every criminal defendant in the country, should they not also provide a final check on wartime detentions by the President and Congress?

While this is a straightforward and appealing argument, it has no basis in our two-hundred-year history. Until 2004, our courts had never reviewed a single case of the military detention of an enemy alien held abroad during wartime.⁸⁰ Civil libertarian arguments appeal to our traditional American distrust of government power and of standing armies, attitudes recorded even by de Tocqueville. Courts play a significant role to ensure that the people's agents—the government—obey the limits on their delegated powers as expressed in the Constitution. In order to restrict the government and protect individual rights, judges must have as much independence and neutrality from the elected branches of government as possible.

But in the area of national security, the judiciary's strengths become weaknesses. In wartime, we want to expand, not limit, the powers of government against the enemy. But enemy aliens are not part of the American political community and do not have the same constitutional rights as its actual members. The avant-garde effort today is to enact a conception of human rights into law worldwide. While this is a noble goal, we have no workable or legitimate mechanism of world government to legitimize these efforts other than the old-fashioned method of treaties that are domestically ratified in whole or in part—though international lawyer-activists often proclaim otherwise.

In war, our courts should not stand (and historically have not stood) as neutral arbiters between our government and the enemy. Courts viewed their role as helping the other branches conduct the war effectively, which was why only American citizens or aliens on U.S. territory were entitled to the benefits of our Bill of Rights.

The federal judiciary has significant institutional disadvantages in making or carrying out national security policy. Judges are generalists. They are not appointed because of their expertise in any particular topic, but because of their careers as prominent litigators or public officials. With few exceptions, Congress has organized the federal courts into a decentralized system along geographic, not subject matter, lines. In contrast, foreign affairs requires expertise in matters such

as international politics, regions, technologies, or intelligence, subjects in which few judges have experience.

Courts acquire information only through the course of litigation, they make decisions in a formalized way with an inner logic often unrelated to the matter at hand, and they are slow to correct their errors or to change policy in response to new circumstances, because of the years typically needed to complete a case.⁸¹ The enemy combatant cases, in which the legal issues were clear, no discovery was needed, and detainees had significant interest in a swift resolution, still required roughly two to three years of litigation before any hearings could even be held. Appeals to correct errors usually take years to resolve. Judicial mistakes in peacetime will not cost society much in a specific case, and errors can often be fixed over time. By contrast, a judicial error (like any error) in wartime can have an immediate and dramatically higher cost that cannot be reversed.

Some welcomed the Court's intervention because it would prompt Congress to act. When Congress did act at the end of December 2005, it did the opposite of what civil libertarians expected. It overruled *Rasul*. Two months after the Court signaled that it would hear another detainee case from Guantanamo, Congress eliminated federal court jurisdiction over any case from the base. Several hundred cases that had been pending were suddenly moot.⁸² Clearly, the Rehnquist Court had gone too far in expanding the habeas corpus statute, abandoning *Eisentrager*, and intruding into the prerogatives of the political branches in waging war.

A long list of law professors lobbied against the bill's passage. They argued that by overruling *Rasul* Congress had unconstitutionally interfered with the judicial power of the Supreme Court to hear cases under federal law.⁸³ They seriously exaggerated. *Rasul* upset the settled understanding that the right to habeas corpus did not extend to aliens held outside the territorial United States in wartime. Congress was merely restoring the previous interpretation, a kind of statutory error correction. Congress was not removing judicial review over habeas cases that had long been recognized and applied.⁸⁴

However, Congress took the Court's advice in part and added a review process for enemy combatants that had not previously existed. Congress vested jurisdiction in the U.S. Court of Appeals for the D.C. Circuit to hear appeals of the determinations of the Defense Department's CSRTs. Review, however, would be narrow. The D.C. Circuit's review is limited only to whether the tribunals followed the Defense Department's own rules. In other words, the D.C. Circuit does not sit to try an enemy combatant, or to reach its own decision on whether he should be released. The D.C. Circuit may also decide whether those procedures are consistent with the Constitution or federal laws. It does not appear, however, that a finding that procedures are unconstitutional would require the release of an enemy combatant. Rather, the Defense Department would be required to revise the procedures.

While the Detainee Act grants more judicial review than the Bush administration, or indeed any administration, would have liked, it eliminated habeas corpus for alien enemy combatants held outside the sovereign territory of the United States as well as claims of action under other laws, such as the Alien Tort Statute. It said, in other words, that the Supreme Court had gotten it wrong in *Rasul*. It was a rare and extraordinary thing for Congress to checkmate the Supreme Court as it did, and it signals how far the Court had exceeded the traditional practice of the judiciary in wartime. Whether the Detainee Act will serve as a sufficient warning to the courts not to meddle in the business of the political branches remains to be seen.