

## DOES 9/11 JUSTIFY A WAR ON THE JUDICIAL BRANCH?

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About a month ago, Dean John Farmer invited me to participate in proceedings of the *Rutgers Law Review* Symposium entitled *Unsettled Foundations, Uncertain Results: 9/11 and the Law, Ten Years After*. The Symposium, he suggested, would identify the ways in which our nation's response to the attacks of 9/11 have unsettled, or otherwise left unclear, the legal foundations of our national security and will seek to prepare resolutions consistent with the rule of law. He suggested that I should address how the attacks, and our responses to them, have challenged the courts. As all of you probably know, I have had courtroom experience on both sides of the bench, from time to time both as advocate and as judge. Since early 2000 that experience has been overwhelmingly shaped by my law firm's commitment to its Gibbons Fellowship program, in which lawyers, recruited nationally, have agreed to work at the firm exclusively on public interest issues. The Gibbons Fellows were among the first—perhaps the very first—lawyers who, following the aircraft attacks on September 11, 2001, undertook representation of persons detained by the executive branch of the federal government. The clients on whose behalf judicial intervention by the Fellowship and other courageous lawyers was sought included: (1) hundreds of suspected illegal immigrants held incommunicado in facilities such as the Passaic County, New Jersey jail; (2) hundreds of non-citizens detained in the Guantánamo Naval Base who had been transferred there from other places of confinement outside the United States; many of the more than 600 Guantánamo detainees had been captured in Europe and West Africa, as well as in Pakistan and Afghanistan; (3) fifteen detainees initially detained outside the United States in Central Intelligence Agency (“CIA”) secret locations but later transferred to Guantánamo (for five of these detainees, the executive branch eventually sought to have a military commission impose the death penalty); (4) citizens and one non-citizen detained

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in the Navy Brig in Charleston, South Carolina; and (5) an unknown number of persons still detained in CIA interrogation centers around the world.

As can be seen by the categories of detainees, the list included citizens, resident aliens, and non-resident aliens. It included places of confinement inside and outside of the United States. It included persons who had never been in Afghanistan or Pakistan. But significantly, from the outset of hostilities in those countries, the executive branch never contended that any detainee was a member of the armed forces of any internationally recognized state.

The reason for executive branch silence with respect to the military status of the detainees became obvious as a result of Freedom of Information Act litigation conducted by the Gibbons P.C. firm and others.<sup>1</sup> Those reasons are found in the four treaties commonly referred to as the Geneva Conventions. Geneva III protects prisoners of war and is commonly referred to as the POW Convention.<sup>2</sup> Geneva IV protects persons not members of the armed forces of a signatory member state, and thus, is commonly referred to as the Civilian Convention.<sup>3</sup> As explained by the International Committee of the Red Cross, a human rights organization explicitly recognized in the Conventions, “[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a Civilian covered by the Fourth Convention . . . . *There is no* intermediate status; nobody in enemy hands can be outside the law.”<sup>4</sup> And of course, these treaties, made by the United States, “shall be the supreme Law of the Land.”<sup>5</sup>

However, shortly after September 11th then White House Counsel Alberto Gonzales described the Geneva Conventions as “quaint” and “obsolete.”<sup>6</sup> He suggested that the President could

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1. *E.g.*, *ACLU v. Dep’t. of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005).

2. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

3. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

4. Int’l Comm. of the Red Cross, Commentary of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, ¶ 4 (1958) [hereinafter Fourth Geneva Convention Commentary].

5. U.S. CONST. art. VI.

6. Draft Memorandum from Alberto R. Gonzales, Counsel to the President, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002) [hereinafter Application of the GCPOW] (“As you have said, the war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for [the Geneva Convention III on the Treatment of Prisoners of War]. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to

unilaterally determine that both the Geneva Conventions and the implementing federal statutes, such as those containing the prohibitions against torture, did not apply.<sup>7</sup>

Thus, the White House instructed both the military and the CIA that they were not bound by Common Article 3 of the Geneva Conventions, which dealt with the ill treatment of detainees. They were, on the authority of the Chief Executive, free to disregard not only the Conventions but the explicit criminal statutes implementing them that prohibited torture of detainees, both military and non-military detainees.

This executive position was reinforced by the now infamous “torture memo” prepared by Jay Bybee and John Yoo in the Justice Department on August 1, 2002, in response to Mr. Gonzales’ request. The memo addressed what forceful interrogation techniques could be used by the CIA in questioning detainees without violating 18 U.S.C. §§ 2340-2340A or 18 U.S.C. § 2441—statutes prohibiting torture.<sup>8</sup> Bybee and Yoo were attorneys in the Office of Legal Counsel in the Department of Justice. In the torture memo, that office purported to confine the reach of the anti-torture statutes to:

(1) severe beatings using instruments such as iron barks, [sic] truncheons and clubs; (2) threats of imminent death, such as mock executions; (3) threats of removing extremities; (4) burning, especially burning with cigarettes; (5) electric shocks to genitalia or threats to do so; (6) rape or sexual assault, or injury to an individual’s sexual organs, or threatening to do any of these sorts of acts; and (7) forcing the prisoner to watch the torture of others.<sup>9</sup>

Only these severe interrogation techniques were torture, and even these would not constitute torture unless the torture Bybee and Yoo hypothesized had been the “precise objective” of the interrogator. Moreover, even if the interrogator had the “express purpose” of violating the anti-torture law, he would still be immune from prosecution if his actions were directed by the President. The President, in other words, was exempt from the prohibitions against

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avoid further atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians. In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring that captured enemy be afforded such things as commissary privileges, scrip (i.e., advances of monthly pay), athletic uniforms, and scientific instruments.”)

7. *See id.*

8. *See* Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, at 1 (Aug. 1, 2002) [hereinafter *Torture Memo*]; *see also* Philippe Sands, *Analysis: Bogus Advice and a Dismal Moment for Democracy*, THE GUARDIAN, Nov. 10, 2010, at 14 (stating that Jay Bybee and John Yoo authored the “torture memo”).

9. *Torture Memo*, *supra* note 8, at 24.

torture.

The executive departments were not unanimously in support of the White House's position that the military and the CIA were not bound in their treatment of detainees by the provisions of the Geneva Conventions and implementing statutory prohibitions. In February 2002, the State Department's Chief Legal Advisor sent a memorandum to the White House legal staff explaining why the Geneva Conventions, and in particular Common Article 3, which deals with the treatment of all detainees, applied to the conflict in Afghanistan.<sup>10</sup> Thus, it is clear that the White House's decision to defy the Supreme Court's announcement in *Rasul v. Bush* and *Al Odah v. United States*<sup>11</sup> was made with full knowledge of the controversial nature of that decision. The State Department's particular responsibility for enforcement of treaties should be disregarded in favor of the Gonzalez, Bybee, and Yoo view of presidential power to render treaties and statutes unenforceable.

And of course, the White House view prevailed. For example, at the time the Supreme Court acted in *Rasul* and *Al Odah*, the United States Army Field Manual on Intelligence Interrogation carefully outlined the limits of lawful interrogation for intelligence gathering.<sup>12</sup> After September 11, 2001, the Department of Defense reviewed and reaffirmed those limitations.<sup>13</sup> A clear purpose of the Manual is to assure compliance with two criminal statutes: 18 U.S.C. §§ 2340-2340A and 18 U.S.C. § 2441.<sup>14</sup> The first compliments the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment Punishment, making it unlawful for army personnel to engage in torture outside the United States.<sup>15</sup> The second makes it a crime for a national of the United States to violate specific provisions of the Geneva Conventions.<sup>16</sup> Thus, White House Counsel's view was that these statutes could be ignored if the President said so, and as was soon learned from publication of the

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10. Memorandum from William H. Taft IV, Legal Advisor, Dep't of State to Counsel to the President, on Comments on Your Paper on the Geneva Convention (Feb. 2, 2002).

11. 542 U.S. 466, 484-85 (2004) (holding that U.S. district courts have jurisdiction to consider challenges to the legality of detention of foreign nationals).

12. See DEP'T OF THE ARMY, INTELLIGENCE INTERROGATION FIELD MANUAL, NO. 34-52 (1992); see also DEP'T OF THE ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS FIELD MANUAL, NO. 2-22.3 (2006) (superseding FM 34-52) [hereinafter HICO Army Field Manual].

13. Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to Donald Rumsfeld, Sec'y of the Navy, on Order Establishing Combatant Status Review Tribunal 1-4 (July 7, 2004) [hereinafter Order Establishing Combatant Status Review Tribunal].

14. See HICO ARMY FIELD MANUAL, *supra* note 12.

15. See 18 U.S.C. §§ 2340-2340A (2006).

16. See 18 U.S.C. § 2441 (2006).

Abu Ghraib photos of torture of detainees, they were.

When *Rasul v. Bush*<sup>17</sup> was argued on April 20, 2004, and *Hamdi v. Rumsfeld*<sup>18</sup> and *Rumsfeld v. Padilla*<sup>19</sup> were argued on April 28, 2004, the Gonzales and Bybee-Yoo memoranda were not known to counsel for the petitioners in those cases, and neither Solicitor General Olson, who argued *Rasul*, nor Deputy Solicitor General Clement, who a week later argued *Hamdi* and *Padilla*, made specific arguments advocating the extreme positions those memos contained.<sup>20</sup> Indeed, Mr. Clement, in response to a question from Justice Ginsberg about presidential authorizations of torture, stated unequivocally that our Executive does not authorize torture.<sup>21</sup>

Thus, when the arguments were made in the Supreme Court in April 2004, counsel for the petitioners were still completely unaware of the extreme executive branch opinion that the Geneva Conventions were not binding on that branch and that even congressional statutory enactments implementing them did not bind the President. Rather, throughout the lower court litigation preceding the grant of certiorari in those cases, it was the executive branch's position that claims made on behalf of people detained outside the territorial limits of the United States were simply non-justiciable because the United States lacked sovereignty over the places of confinement. In the Supreme Court, the government elected not to defend the White House and Justice Department's extreme positions on executive branch authority to ignore the law but rather chose to challenge the judicial power to enforce it. Thus, I opened my argument to the Court:

What is at stake in this case is the authority of the Federal courts to uphold the rule of law. Respondents assert that their actions are absolutely immune from judicial examination whenever they elect to detain foreign nationals outside our borders. Under this theory, neither the length of the detention, the conditions of their confinement, nor the fact that they have been wrongfully detained makes the slightest difference. Respondents would create a lawless enclave insulating the executive branch from any judicial

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17. Transcript of Oral Argument at 1, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334) [hereinafter *Rasul Transcript*].

18. Transcript of Oral Argument at 1, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) [hereinafter *Hamdi Transcript*].

19. Transcript of Oral Argument at 1, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027) [hereinafter *Padilla Transcript*].

20. See generally Application of GCPOW, *supra* note 6; Torture Memo, *supra* note 8; Memorandum from John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Williams J. Haynes II, Gen. Counsel, U.S. Dep't of Def., on Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 9, 2002) [hereinafter Application of Treaties]; *Rasul Transcript*, *supra* note 17, at 24-44; *Hamdi Transcript*, *supra* note 18, at 26-54; *Padilla Transcript*, *supra* note 19, at 3-28, 56-60.

21. *Padilla Transcript*, *supra* note 19, at 22-23.

scrutiny now or in the future.<sup>22</sup>

Many times since the *Rasul* argument I have wondered whether, had I known that the executive branch's contentions were actually substantive rather than jurisdictional, an emphasis on substance would have made for a more effective argument. After all, the Gonzales, Bybee, and Yoo position was that even U.S. citizens detained in the United States could be tortured if the President said so.<sup>23</sup> Ultimately, however, I concluded that by framing the first detainee cases to reach the Supreme Court as a challenge to the judicial branch's power to enforce the law rather than a defense of executive branch power to disregard the law, the Department of Justice made a tactical error. The proposition that the judicial power of the United States does not reach to a territory the size of Manhattan Island that the United States had occupied for a century, under a perpetual lease that no temporal power other than the United States can terminate, was not likely to receive anything but a skeptical response from most members of the judicial branch.

The Supreme Court's mandates in *Rasul* and *Al Odah* were unmistakably clear; these petitioners must have a habeas corpus hearing in the district court.<sup>24</sup> The executive branch reaction was prompt. Initially that branch promulgated a regulation establishing Combat Status Review Tribunals—not authorized by any statute, with severely circumscribed procedural safeguards—to hear claims of Guantánamo detainees contesting their status as enemy combatants.<sup>25</sup> That order was not applied in the remanded *Rasul* and *Al Odah* cases, for the petitioners in these cases “were promptly repatriated to the countries of their citizenship.”<sup>26</sup> With no judicial inquiry into their status or their treatment, “[b]oth Great Britain and Kuwait promptly released them from custody.”<sup>27</sup> The government's obligation announced in the Supreme Court's mandate to provide evidence to a court that would justify such long incarceration was

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22. *Rasul Transcript*, *supra* note 17, at 3.

23. See Application of GCPOW, *supra* note 6, at 1 (outlining the Secretary of State's request to make the Third Geneva Convention applicable to al-Qaeda and Taliban detainees but allow them not to be determined prisoners of war on a “case-by-case basis”); Torture Memo, *supra* note 8, at 46 (concluding that only “extreme” acts rise to level of torture and acknowledging justifications for using extreme measures that would “eliminate any criminal liability”); Application of Treaties, *supra* note 20, at 1 (concluding that Geneva Conventions do not apply to al-Qaeda and Taliban militia).

24. 542 U.S. 466, 484-85 (2006).

25. See generally Order Establishing Combatant Status Review Tribunal, *supra* note 13.

26. John J. Gibbons, Commentary, *Commentary on the Terror on Trial Symposium*, 28 REV. LITIG. 297, 304 (2008-09).

27. *Id.*

thereby mooted.

The attempted administrative creation, on July 7, 2004, of the Combat Status Review Tribunal Commissions—which would take the place of existing statutory military tribunals applicable to detained members of the armed forces of every nation state and of the habeas corpus review by the district courts, which the Supreme Court had ordered on behalf of non-military detainees—was a bold way of informing the Supreme Court that the executive branch had no intention of complying with the law announced by the Court as to non-military detainees.

Congress initially reacted to the presidential creation of a non-statutory Combat Status Review Commission by enacting part of the Intelligence Authorization Act for Fiscal Year 2008, a blanket adoption of the manual's prohibition of torture and other forms of mistreatment.<sup>28</sup> President Bush vetoed it.<sup>29</sup> Announcing his veto he explained that since the September 11, 2001 attacks, some of the interrogation techniques prohibited by the manual had been used to obtain useful information from detainees, and such techniques would be similarly useful in the future.<sup>30</sup> Thus, the President made it clear that the White House had, in the recent past, and would in the future, authorize interrogation methods that were explicitly prohibited, not only by the Manual but the Geneva Conventions and the criminal statutes enforcing those binding treaties. That is not what Mr. Clements told the Supreme Court during the *Hamdi* and *Padilla* argument.<sup>31</sup>

Shortly after the President's veto message, in an interview on BBC radio, Justice Scalia was questioned about the President's position and responded, "Is it really so easy to determine that smacking someone in the face to determine where he has hidden the bomb that is about to blow up Los Angeles is prohibited by the Constitution?"<sup>32</sup> He was referring to the "Cruel and Unusual Punishment" prohibition in the United States Constitution.<sup>33</sup>

The President's veto message was that if he approves an interrogation technique, it is legal and should remain legal because it

28. See H.R. 1082, 110th Cong. (2008); Dan Eggen, *Senate Passes Ban on Waterboarding, Other Techniques*, WASH. POST, Feb. 14, 2008, at A03.

29. See generally INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2008 – VETO MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 110-100 (2008), reprinted in 154 CONG. REC. H1419-20 (daily ed. Mar. 10, 2008) (statement of Rep. Loeback) (LEXIS) [hereinafter INTELLIGENCE ACT VETO MESSAGE].

30. *Id.* at H1420.

31. See generally *Hamdi Transcript*, supra note 18, at 28-40; *Padilla Transcript*, supra note 19, at 21-27.

32. *Law in Action: Scalia in Uncompromising Form* (BBC Radio 4 broadcast Feb. 12, 2008).

33. U.S. CONST. amend. VIII.

is effective.<sup>34</sup> Justice Scalia's position was that in the face of necessity, torture is not prohibited by the "Cruel and Unusual Punishment" provision in the Constitution.<sup>35</sup> Both positions, I suggest, are logically defective.

Let us first consider Justice Scalia's usual, challenging hypothetical; that is, the mistreatment produces information about the location of the hidden bomb, which is successfully defused. I suspect that most of us would agree that a CIA agent obtaining information that prevented thousands of deaths should not be prosecuted even though he clearly violated both the Constitution and several criminal statutes. But of course, he would not be, because the Constitution also provides that the President "shall have the Power to grant Reprieves and pardons for offenses against the United States."<sup>36</sup> That explicit power assumes the illegality of the conduct in question and recognizes that any President can prevent some punishments for illegal acts, but it does not authorize the President to legalize conduct such as torture that is plainly and explicitly illegal.

When a court is asked to determine whether an act, plainly and explicitly illegal, can be excused because it serves a higher end, the court does not have the option of pardoning the offender. The beauty of the pardon power is that it must be exercised in public by an elected public official, and thus it is subject to the political restraints inherent in the electoral process. The ugliness of the executive branch assertion that the President can secretly authorize violations of both the Geneva Conventions and of criminal law prohibitions against torture—or indeed violations of any criminal law—is that prior presidential authorization of such violations is intended to remain secret. Had the Abu Ghraib disclosure of torture, a disclosure clearly unintended by President Bush, not occurred, we would not know to this day that the White House approved in advance the illegal treatment so graphically displayed.<sup>37</sup>

The existence of the pardon power should strengthen the resolve of the courts to uphold the rule of the law. The Framers of the Constitution had the foresight to recognize that some illegal conduct may ethically be excused by a sovereign, though not condoned, by pretending the conduct was legal. The power to excuse illegal conduct is not, however, vested in the judicial branch. That branch of our government must always faithfully uphold the law, even when another branch would prefer to disregard the law's command. The

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34. See INTELLIGENCE ACT VETO MESSAGE, *supra* note 29.

35. *Law in Action: Scalia in Uncompromising Form*, *supra* note 32.

36. U.S. CONST. art II, § 2.

37. Frank Rich, Op-Ed., *The 'Good Germans' Among Us*, N.Y. TIMES, Oct. 14, 2007, § 4, at 13.

Supreme Court did so when in *Rasul* and *Al Odah* it reversed the District of Columbia Circuit's decision in those cases and remanded to the district court for a hearing on the habeas corpus petitions.<sup>38</sup>

It did so again in the case of Yasser Hamdi, an American citizen who in 2001 was captured in Afghanistan by Afghan forces and was handed him over to the U.S. military.<sup>39</sup> The U.S. military transferred Hamdi to Guantánamo Bay, but upon realizing he was an American citizen, transferred him to a U.S. military base in Virginia and then to another in South Carolina.<sup>40</sup> Hamdi was then detained without charge or hearing and without the right to meet with an attorney.<sup>41</sup> A habeas corpus petition was filed by his father challenging his prolonged detention.<sup>42</sup> Opposing a petition for certiorari, the Justice Department asserted that any interference, even on behalf of an American citizen detained in the United States, would hamper the President's ability to wage war.<sup>43</sup> This was a proposal for a considerable extension of the limitation of judicial power asserted by the executive branch in the *Rasul* and *Al Marri* cases. In June 2004, the Supreme Court ruled eight-to-one that a U.S. citizen captured in Afghanistan, not a member of a military organization of any state and labeled an "enemy combatant," could not be held in the Charleston Navy Brig indefinitely without due process.<sup>44</sup> Due process required at least the assistance of a lawyer and the opportunity to contest before a neutral arbiter.<sup>45</sup> As with the *Rasul* and *Al Marri* habeas corpus petitioners, Hamdi never received such a hearing.<sup>46</sup> He was never charged but was released and deported by consent to Saudi Arabia on October 11, 2004.<sup>47</sup> Thus, as with the *Rasul* and *Al Marri* petitioners, the executive branch succeeded in mooting his habeas corpus petition.

Thus, it is fair to say that when the Supreme Court term expired on June 30, 2004, the Supreme Court had not tolerated any serious invasion of the legal foundations of our national commitment to legal protection of individual personal liberty. Even at that time, however,

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38. *Rasul v. Bush*, 542 U.S. 466 (2004); *Al Odah v. United States*, 551 U.S. 1161 (2007).

39. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

40. *Id.* at 510.

41. *Id.* at 511.

42. *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

43. Brief for Respondent at 2, *Hamdi v. Rumsfeld*, 524 U.S. 507 (2004) (No.03-6696).

44. *Hamdi*, 542 U.S. at 509.

45. *Id.* at 533.

46. *See id.* at 511.

47. Joel Brinkley, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15.

as a former teacher of federal jurisdiction, I could not help pondering the lessons taught by Professor Hart's famous "dialogue" article, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*.<sup>48</sup>

As Professor Hart pointed out, if the federal government must resort to a court before it acts on or against an individual, the court is of necessity empowered to enforce the law on that individual's behalf.<sup>49</sup> It cannot be made to enter what it knows to be an illegal judgment. But if the executive branch acts against that individual by detaining or torturing him and Congress were to enact a statute eliminating jurisdiction to adjudicate that person's claim for relief, what would be left of the rights recognized in those wonderful cases handed down in June 2004? Is not the suspension of habeas corpus in Article I, Section 9, clause 2 of the Constitution a limitation of congressional power to eliminate judicial power to protect against plainly illegal federal detention?

Certainly there are members of Congress and persons in the executive branch who, although they may never have read Professor Hart's justly famous article, are well-aware of the congressional power to manipulate outcomes by curtailing federal court jurisdiction. The history of detainee legislation since the high water mark assertion of judicial authority in June 2004 amply demonstrates as much. It is fascinating that more than half a century after Professor Hart published his famous "dilemma" article, the paradox he set before legal scholars—that control over jurisdiction may mean control over the meaning of the Constitution—is once again a live issue.

I mentioned earlier that President Bush had vetoed the first congressional effort to become involved in detainee torture issues in the Intelligence Authorization Act for Fiscal Year 2008, which would have applied the *Army Field Manual on Interrogation* to pending cases.<sup>50</sup> Other detainee cases were pending in federal courts, including that of Jose Padilla, a U.S. citizen, who had been seized and detained in the United States,<sup>51</sup> when, in June 2004, the prohibition on torture cases came down.<sup>52</sup> A majority in both houses of Congress soon sided with the President's ongoing resistance to those decisions. On December 30, 2005, the Detainee Treatment Act

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48. Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

49. *See id.* at 1393-94.

50. *See Law in Action: Scalia in Uncompromising Form*, *supra* note 32.

51. *Rumsfeld v. Padilla*, 542 U.S. 426, 430-31 (2004); *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004) (pending in June 2004).

52. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

of 2005 amended the Habeas Corpus Statute<sup>53</sup> to enact the very jurisdiction stripping legislation that so alarmed Professor Hart a half a century earlier.<sup>54</sup> The Detainee Treatment Act of 2005, passed December 30, 2005, amended the Habeas Corpus Statute to provide:

(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

(A) is currently in military custody; or

(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit [which has exclusive jurisdiction] in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.<sup>55</sup>

The Supreme Court held that this challenge to judicial power was not applicable to pending cases.<sup>56</sup> The executive branch went back to Congress and, with no serious debate and without a mention of Professor Hart's dilemma, passed a new statute overruling both *Rasul/Al Odah* and *Hamdan*.<sup>57</sup> That bill, among other features, stripped all courts of jurisdiction to consider claims of detainees held at Guantánamo as unlawful enemy combatants.<sup>58</sup>

My firm and other lawyers representing Guantánamo detainees filed certiorari petitions hoping to persuade the Supreme Court that the statute violated the Suspension of the Writ Clause.<sup>59</sup> After initially denying certiorari, the Court granted a petition for rehearing, and on June 12, 2008, the Court held that Congress had indeed violated the Suspension of the Writ Clause.<sup>60</sup>

The Court's opinion in *Boumediene v. Bush* preserved some life in the Suspension of the Writ Clause, but those who believe that

53. 28 U.S.C. § 2241 (2006).

54. See Detainee Treatment Act of 2005, § 1005(e)(1), Pub. L. No. 109-148, 119 Stat. 2742.

55. *Id.*

56. *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006).

57. Military Commission Act of 2006, 10 U.S.C. §§ 948a-950w (2006).

58. See *id.* § 948(d) (giving exclusive jurisdiction over unlawful enemy combatants back to military commissions).

59. See generally *Boumediene v. Bush*, 549 U.S. 1328 (2007) (petitions were denied in this decision).

60. *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

access to the courts of the third branch is essential to the preservation of the rule of law have little to be hopeful about. January 2011 was the two-year anniversary of newly elected President Obama's announcement that by January 10, 2010, he would close Guantánamo.<sup>61</sup> In May 2009, he outlined in a speech the available options for closing Guantánamo, including the release of detainees to their home countries or third countries, the use of military commissions rather than Article III courts for trials, and for some prisoners, indefinite detention, somewhere, without trial.<sup>62</sup> Today, although 126 of the remaining 240 Guantánamo detainees were cleared for transfer, only sixty-seven of them have actually left for another country.<sup>63</sup> Of the detainees identified as triable before a military commission, only five commission detainees have been tried and convicted before such a tribunal.<sup>64</sup> When Attorney General Holder announced that some detainees would be tried in a federal court in Manhattan—the most secure federal courthouse in the United States—the executive branch yielded to objections from New York City politicians, and few, if any, detainees will be tried there.<sup>65</sup> Ahmed Ghailani was tried there and convicted on a single count.<sup>66</sup> In federal courts outside Manhattan, since the 9/11 attacks, nearly 450 alleged terrorists have been tried in the federal courts, and the conviction rate is 87 percent.<sup>67</sup>

The *Boumediene* decision, remanding cases to the U.S. district courts in the District of Columbia, has afforded the executive branch an opportunity to refine its argument against meaningful habeas corpus review. The government has filed an opposition brief to a certiorari petition filed by Al-Odah and others seeking review of district court rulings admitting evidence offered by the government of hearsay intelligence reports not under oath, and determining that these were sufficient to satisfy the government's claimed mere "preponderance of evidence" standard of proof.<sup>68</sup> Habeas corpus

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61. Barack Obama, Remarks by the President on National Security (May 21, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/).

62. *Id.*

63. *Guantanamo Transfer Policy and Recidivism: Hearing Before the Subcomm. on Oversight and Investigations of the Armed Service Committee*, 112th Cong. 3 (2011) (statement of Wittman, Chairman, S. Comm. on Oversight and Investigations).

64. See Clyde Haberman, *Verdict Replies to Terrorists and to Critics*, N.Y. TIMES, Jan. 28, 2011, at A24.

65. See Charles Savage, *Accused 9/11 Mastermind to Face Civilian Trial in N.Y.*, N.Y. TIMES, Nov. 14, 2009, at A1.

66. See Haberman, *supra* note 64, at A24.

67. *Id.*

68. See Brief for Respondent at 59, *Al Odah v. United States*, No. 06-1196 (D.C. Cir. 2007).

cases are ordinarily before the district court on the authority of 28 U.S.C. § 2241, and in such proceedings the Federal Rules of Evidence are applicable.<sup>69</sup> If those evidence rules apply, the government cannot rely on pure hearsay. The government has persuaded district court judges in the District of Columbia that these statutes are irrelevant because the *Boumediene* decision was not predicated on the existence of statutory habeas corpus jurisdiction—Congress had repealed those statutes to the extent that they applied to Guantánamo detainees—and thus, the habeas corpus hearings the Supreme Court had ordered depended solely on the Suspension of the Writ Clause in the Constitution.<sup>70</sup> Thus, the district courts are free, the government contends, to disregard the Federal Rules of Evidence and to adopt a mere preponderance burden of justification for detention. The briefs on the *Al-Odah* certiorari petition were delivered to chambers on February 18, 2011, but as of March 9, 2011, they have not been acted upon.<sup>71</sup>

The government's pending argument is an intriguing one. Jurisdiction of all U.S. federal courts except for the Supreme Court has always been regarded as statutory.<sup>72</sup> The logical next step is for the executive branch to urge that for detainees only the Supreme Court itself can entertain a "Constitutional" petition for habeas corpus relief. Such a step would certainly be an escalation in the ongoing war by the executive and legislative branches upon the third branch. Given the recent history of challenges by the other two branches to what those branches regard as third branch intrusion into their exclusive domain, do not be surprised if resistance in Congress to judicial protection of detainees escalates.

During World War II, the United States Supreme Court inflicted upon itself the most serious reputational wound of its twentieth century history, when in *Korematsu v. United States* it upheld the criminal conviction of a minor American citizen of Japanese ancestry for disobeying a military order excluding such American citizens from the west coast area in which his home was located.<sup>73</sup> The executive branch, the judiciary, and finally the Congress years later all acknowledged that *Korematsu's* conviction was one of our "national mistakes."<sup>74</sup> What can be said in support of the World War

69. See 28 U.S.C. §§ 2241, 2246.

70. See *Boumediene v. Bush*, 553 U.S. 723 (2008).

71. Gibbons, P.C. has filed an amicus brief in *Al Odah* on behalf the National Association of Criminal Defense Lawyers in support of the petitioners.

72. See, e.g., Gordon C. Young, *A Critical Reassessment of Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132 (1995); Laurence G. Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

73. 323 U.S. 214, 215-24 (1944).

74. Proclamation No. 4417, 3 C.F.R. 8 (1977); *Korematsu v. United States*, 584 F.

II Supreme Court majority is that it left open to Korematsu, and other defendants facing a criminal charge, the option of challenging in court—albeit in Korematsu’s case unsuccessfully—the government’s oppressive charge against them. Since the 9/11 attack, the effort that continues in Congress is to strip Article III courts of jurisdiction to entertain such challenges. Whether, when the other two branches agree to strip those courts of jurisdiction to entertain challenges such as those of the post-9/11 detainees, the Court will find the courage to continue resistance remains to be seen.

What is clear is that the war by the executive branch and the legislative branch against the authority of the judicial branch to uphold the rule of law did not end, as I once hoped it would, with the Supreme Court decisions in the cases it decided in favor of my clients in June 2004.

If the congressional jurisdiction stripping effort continues, which seems likely at least through the next presidential election cycle, what, if anything, can lawyers for detainees do to resist it? I would—assuming I have a client, which is not unlikely—do two things.

First, I would file a petition for habeas corpus in a state court. That would confront the Justice Department lawyers with the dilemma of either attempting removal of the petition to a U.S. district court and insisting that the jurisdiction stripping law did not affect removal jurisdiction, or of litigating in the state court and seeking Supreme Court review arguing either that Congress can prohibit state court jurisdiction or that the frequently criticized *Tarbell v. Case*<sup>75</sup> is still the law despite the congressional decision to eliminate statutory federal habeas court jurisdiction.

Second, I would simultaneously file an original proceeding in the U.S. Supreme Court and request that, as is customary, the Court appoint a master to hear the case and report. That would confront the Justice Department with dealing with its recent Supreme Court brief in *Al Odah*, conceding that Supreme Court jurisdiction in habeas corpus cases is constitutional, not statutory.<sup>76</sup>

What seems clear to me, and I hope to you, is that members of the legal profession must continue to resist congressional and executive branch efforts to create no law zones inside or outside the United States.<sup>77</sup>

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Supp. 1406 (N.D. Cal. 1984) (setting aside petitioner’s conviction based on government misconduct during Japanese internment); Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified as amended at 50a U.S.C. § 1989b (2006)) (acknowledging the “fundamental injustice” of internment of Japanese Americans).

75. 80 U.S. 397 (1871).

76. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

77. See generally Judith Resnick, *Detention, The War on Terror, and The Federal Courts, An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579 (2010) (thoroughly and persuasively explaining the vital role of judicial review of executive

Any doubt that this war is far from over was dispelled in a recent hearing before Judge Hellerstein in the Southern District of New York involving the destruction of videotapes and other records of the interrogation of detainees by CIA agents.<sup>78</sup> The district court had earlier ordered that these materials should be preserved for possible use in later judicial proceedings; however, the materials were not preserved.<sup>79</sup> The executive branch simply disobeyed the court's order.<sup>80</sup> The ACLU, represented by Gibbons P.C., moved before Judge Hellerstein for an order holding the responsible executive branch officials in contempt of court.<sup>81</sup>

Fortunately, occasions of presidentially approved defiance of Article III decrees, although sometimes threatened, have not thus far in our history actually occurred. There is a legend that President Jackson said of the Marshall Court's decision in *Worcester v. Georgia*, holding that Georgia had no legislative authority over Cherokee Nation lands,<sup>82</sup> "John Marshall made his decision; now let him enforce it."<sup>83</sup> In fact, however, the litigation was abandoned before any call for executive branch enforcement assistance arose.<sup>84</sup>

The only other threat of executive branch non-enforcement of an order directing that branch to produce documents in court occurred when President Nixon moved in a pending criminal case to quash a third-party subpoena directed to him seeking tape recordings and documents.<sup>85</sup> Then, the President resorted to a federal court in the first instance for such an order, rather than, as in the case before Judge Hellerstein, engaging in self-help.<sup>86</sup> Any threat that if the subpoena was not quashed it would be disobeyed was mooted when President Nixon resigned from office rather than face a possible impeachment. Thus, *United States v. Nixon* teaches nothing about cases in which the executive branch defies a court order and a majority in Congress approves of such defiance.

One may hope that Congress does not attempt to use the matter pending before Judge Hellerstein to continue the war against the

branch detentions).

78. See *ACLU v. Dep't of Def.*, 389 F. Supp. 2d 547, 568-69 (S.D.N.Y. 2005).

79. *Id.*

80. *Id.* at 569.

81. *Citing Destruction of Torture Tapes, ACLU Asks Court to Hold CIA in Contempt*, ACLU (Dec. 12, 2007), <http://www.aclu.org/national-security/citing-destruction-torture-tapes-aclu-asks-court-hold-cia-contempt>.

82. See 31 U.S. 515, 561-62 (1832).

83. Henry J. Sage, *The John Marshall Project*, ACADEMIC AMERICAN (Nov. 26, 2008), <http://www.academicamerican.com/research/democracy/marshall/index.html>.

84. See Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 527 (1969).

85. *United States v. Nixon*, 418 U.S. 683, 686 (1974).

86. *Id.*

courts, and that the Supreme Court, when the case is decided, can act free from congressional pressure to decide in favor of executive branch power to defy court orders.