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Section 1: The Executive Power & the War on Terror

Institute of Bill of Rights Law, William & Mary Law School

I. THE EXECUTIVE POWER AND THE WAR ON TERROR

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"Justices Reject Gitmo Tribunals"

USA Today
June 30, 2006
Joan Biskupic and Laura Parker

The fate of more than 400 detainees at Guantanamo Bay, Cuba, was thrown into question when the Supreme Court rejected President Bush's plan to hold military tribunals for foreign terrorism suspects.

In a 5-3 vote Thursday that brought a dramatic end to the court's term, the justices said Bush exceeded his authority by setting up the trial system without authorization from Congress. The justices said Bush's plan—which would not allow a detainee to see all the evidence against him or attend all court hearings in his case—lacked sufficient protections for detainees. The court said the plan violated the U.S. Military Code of Justice and the Geneva Conventions dealing with prisoners of war.

The five-justice majority led by John Paul Stevens also said a congressional resolution passed just after the Sept. 11, 2001, attacks did not grant Bush as much authority to fight terrorism as his administration claimed. The administration has said the resolution gave Bush the power to impose the tribunal system. The court's finding could have repercussions for other Bush policies, including a secret surveillance program overseen by the National Security Agency.

The ruling came in a case involving Salim Hamdan, a Yemeni accused of being a guard for Osama bin Laden and delivering weapons to al-Qaeda. It forces the administration to devise another way to try foreign terror suspects and possibly to seek Congress' approval.

Bush and Pentagon officials said they were reviewing the ruling. It was unclear what would become of the 14 Guantanamo detainees who have been designated for tribunals at the prison that has spurred international controversy. Bush said he would work with Congress on whether "military tribunals will be an avenue" for terror suspects. Absent action by Congress, Bush could court-martial detainees under military law.

"This is a blockbuster decision," said Sen. John Cornyn, R-Texas, a supporter of Bush. "But (the court) opened the door to a legislative remedy."

Critics of Bush's moves to hold foreigners in Cuba indefinitely and keep them out of civilian courts suggested the prison could be closed. It was set up "to evade the jurisdiction of federal courts," said Gene Fidell of the National Institute of Military Justice. "The whole purpose has been undercut."

Stevens, a World War II veteran, emphasized that Bush cannot go it alone in the war on terrorism. After Stevens read the ruling, Justice Antonin Scalia read an acerbic dissent. Justice Clarence Thomas then read a dissent, noting it was the first time in 15 years on the court he had been moved to announce his dissent. He said Bush, as commander in chief, could form the tribunals.

Scalia and Thomas were joined by Justice

Samuel Alito. Chief Justice John Roberts did not participate; he had been on a lower court that upheld Bush's plan. Stevens' majority included Anthony Kennedy, David Souter, Ruth Bader Ginsburg and Stephen Breyer.

"Analysis: Constitutional Issues, Post-*Hamdan*"

SCOTUSblog
September 24, 2006
Lyle Denniston

The Supreme Court decided the war-on-terrorism military commission case (*Hamdan v. Rumsfeld,* 05-184) on June 29. Sometime in the next week or two, Congress is expected to vote on a bill crafted by the White House and key Senate Republicans in reaction to *Hamdan.*

The Supreme Court's *Hamdan v. Rumsfeld* decision left at least two constitutional questions lingering, finding no need to respond to them. Both are now lurking in the background as Congress prepares to consider legislation that would narrow the rights of terrorism suspects being held at the military prison at Guantanamo Bay, Cuba—a dozen or two facing war crimes charges, hundreds facing no charges.

The first question is whether Congress has the authority, under its control of federal court jurisdiction, to deny the Supreme Court an opportunity to hear a habeas challenge to detention and to potential trial of Guantanamo detainees on war crimes charges. More specifically, the question is whether a detainee could pursue an "original writ of habeas" directly in the Court, even if Congress passed the pending compromise White House-Senate Republican post-*Hamdan* bill (introduced last week as S. 3930 and as part of S. 3929, a sweeping bill that also includes new restrictions on court review of foreign intelligence wiretapping that reaches Americans using the telephone or Internet connections in the U.S.)

The second question is whether Congress can suspend the writ of habeas corpus altogether, by simply denying any judge—including any Supreme Court Justice—the authority to hear any habeas case brought by a detainee captured since the terrorist attacks of September 11, 2001.

Both questions were put before the Court in *Hamdan,* but the Court concluded "we find it unnecessary to reach either of these arguments" (made by Salim Ahmed Hamdan's lawyers). It interpreted the Detainee Treatment Act, by its own language, as not taking away the courts' authority (including the Supreme Court's authority) to decide the *Hamdan* case, since it was pending before the DTA was passed late last year. The Court did note, though (in footnote 15), that interpreting a law to "entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."

It appears that that is exactly what S. 3930 (and Title I of S. 3929) would do. Section 6, "Habeas Corpus Matters," strikes out the language of the DTA upon which the Supreme Court found the *Hamdan* case to be still within its reach, and presumably, still within reach of the lower courts in Washington, D.C.

In place of that version, the new bill states: "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed on or behalf of an alien detained by the United States who (A) is currently in United States custody; and (B) has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." The provision

goes on to say that "any other action" brought by a detainee would have to be brought in the D.C. Circuit Court, but that would be open to a narrower range of issues than a normal habeas petition. (Note that these provisions are not limited to detainees now at Guantanamo.)

To make explicit that previously pending cases (including, presumably, Hamdan's continuing case), the White House-GOP leadership bill includes a new effective date provision, reading: "The amendments made . . . shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending or after the date of the amendment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."

That would seem clearly to apply to hundreds of pending habeas cases by detainees, now awaiting a decision in a packet of two appeals in the D.C. Circuit, and in the continuing consideration of the *Hamdan* case in the wake of the Supreme Court ruling. Thus, if Congress passes the bill as presently written, the D.C. Circuit presumably would be the first to resolve the issue, although it is conceivable that some detainees' counsel would attempt to bring a new habeas challenge in District Court to test the new provisions, and perhaps an original habeas in the Supreme Court for a more direct test.

The timing of Senate and House consideration of the new measure is not fixed at this point, but it is understood to be imminent.

"What Rights for Terrorists? *Hamdan v. Rumsfeld*"

The San Diego Union-Tribune
August 6, 2006
Glen Sulmasy and John Yoo

In its decision in *Hamdan v. Rumsfeld* rejecting President Bush's military commissions for the trial of al-Qaeda terrorists, the Supreme Court made a number of missteps.

Justice John Stevens, writing for Justices David Souter, Ruth Bader Ginsburg, Stephen Breyer and the wandering Anthony Kennedy, evaded Congress' order that the court not decide any cases arising from the detention of enemy combatants at the Guantánamo Bay, Cuba, camp. They narrowed Congress' authorization for the president to use all necessary and appropriate force against those responsible for the Sept. 11 attacks. They overlooked centuries of American history in which presidents from George Washington to FDR used military commissions to try enemy combatants for war crimes. They essentially overruled the central lessons of three Supreme Court decisions from World War II upholding the use of military commissions.

But believe it or not, these are not the worst aspects of the court's decision. In an effort to interfere with the way the elected branches of our government have chosen to wage war against al-Qaeda, they interpreted a law recognizing military commissions to require the United States to follow what is known as "Common Article 3" of the Geneva Conventions. While limited only to military trials, *Hamdan* suggests the possibility that the courts will order the United States to apply Common Article 3 to other operations against jihadists who do not wear uniforms nor display any distinctive signs, systematically flout the laws of war, and are neither parties nor signatories to the Geneva Conventions. *Hamdan* has the potential to straight-jacket our armed forces well beyond the narrow issue of war crimes trials.

A Stretch? You Bet.

It is critical to clarify where Common Article 3 really applies and what it actually demands. Under the Geneva Conventions, prisoner of war status is reserved for captured soldiers in the regular armed forces of nations that have signed the treaties. POWs receive the gold standard of treatment: they cannot be placed in cells, they need only provide name, rank and serial number, and they are entitled to a great many privileges and benefits, such as retaining their uniform, unit structure and chain of command.

These rules have in mind the conflicts between the large conscript armies of World Wars I and II. It provides protections to those who follow the laws of wars: do not target civilians deliberately and restrict violence to combatants.

The major purpose of these provisions is to ensure, through treaty, that reciprocity be afforded to all nations and their armed forces once engaged in combat. Al-Qaeda did not exist at the time of the drafting of the Geneva Conventions, and affording such protections was never in the minds of the signatories—certainly not the United States. Al-Qaeda is not a nation state and could not be, nor will it ever be party to such treaties. It has no intention of following any of the

laws of war. In fact, its primary tactics—targeting and killing civilians, taking hostages and executing prisoners—are designed specifically to violate any standards of civilized warfare.

Our conflict with al-Qaeda cannot trigger the general POW protections of the Geneva Conventions, because al-Qaeda is not a party to the treaties.

Common Article 3 applies to certain fighters who do not meet the standards for a POW. It sets minimum standards "in the case of armed conflict not of an international character." Its inclusion in 1949 cured a major gap in the Geneva Conventions. The original conventions did not set rules for internal civil wars between a government and resistance or rebel groups. Common Article 3 extended minimum protections to detainees who were not fighting on behalf of the armed forces of another nation, but not those due to POWs. It requires, for example, that "persons taking no active part in the hostilities," including the sick, wounded and captured, "be treated humanely." They are to be protected against "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture."

The basic purpose of Common Article 3—humane treatment—is already the policy of the United States. But Common Article 3 also contains some ambiguous provisions. It prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment," which it does not define. It only allows the use of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," which it again leaves undefined.

An example from *Hamdan* itself illustrates how ambiguous these terms can be. Under the Pentagon's rules on the procedures for military commissions, a court may exclude the defendant from the courtroom if classified information is to be presented. His defense attorney may be present, but not the defendant. This makes a great deal of sense. We would not want al-Qaeda operatives directly learning the sources and methods used by American intelligence to track and capture them. Al-Qaeda has shown that it quickly adapts to outsmart our strategies and tactics. Does preventing an al-Qaeda defendant access to such information constitute a violation of "judicial guarantees that are recognized as indispensable by civilized peoples?"

The Supreme Court seemed to think so, but we believe many would agree that the military commission rule is a reasonable compromise that allows for the defendant's interests to be represented but without harming national security during an ongoing war.

Our conflict with al-Qaeda does not fit within the general Geneva Convention rules for wars between nation-states. Al-Qaeda terrorists are not legally eligible for the rights granted to POWs. But the war on terrorism does not fall within Common Article 3 either. The United States is not fighting an internal civil war. As Justice Clarence Thomas notes in his vigorous *Hamdan* dissent, the war against al-Qaeda and its supporters is clearly one of an "international character." The battlefield reaches beyond Afghanistan and Iraq, to New York City, Washington, D.C., London, Bali and Madrid. The war that began with the attacks on the World Trade Center and the Pentagon on 9/11 is certainly nothing like the internal civil wars in the minds of Common Article 3's drafters in 1949. We are not fighting a liberation movement of Americans who want to overthrow the

government. We are fighting something that lay completely outside the experience of those who wrote Geneva after World War II: an international terrorist organization with the power to inflict destruction on a par with the armed forces of a nation.

Hamdan also disregards the distinctions between lawful and illegal combatants. The enemy we now fight, and will fight for the foreseeable future, does not abide by the laws of war. Any incentive to follow the rules of civilized warfare is removed if they receive the same rights as those who scrupulously obey the Geneva Conventions. In applying Common Article 3 to the jihadists, we now equate illegal combatants to ordinary armed forces. By affording Geneva Convention protections to al-Qaeda, we would be legitimizing their form of warfare.

This is a dangerous path to follow. Al-Qaeda uses our laws and treaties against us while violating the same humane principles we hold dear. Al-Qaeda and those who hate the Western way of life are using our respect for the laws of war against our armed forces and are trying to open the door to claims of war crimes based on ambiguous terms. It is telling that the week after the decision was handed down, al-Qaeda in Iraq offered a video on an Islamist Web site of the two U.S. soldiers captured in Iraq—showing them beheaded and their chests cut wide open. Can we ever expect humane treatment and reciprocity from terrorists? Never.

In trying to force Common Article 3 onto a conflict that stretches beyond national borders—but with an international terrorist organization rather than a nation—the Supreme Court is trying to force a round peg into a square hole. We can have a legitimate debate on whether to update the Geneva Conventions to ensure humane principles are applied in conflicts with terrorist organizations such as al-Qaeda. But as it stands now, as a matter of both law and policy, such application to al-Qaeda only hurts the United States in its efforts to protect the nation against international terror—both now and in the foreseeable future.

"Will the Supreme Court Shackle New Tribunal Law?"

Christian Science Monitor
October 17, 2006
Warren Richey

The terror legislation set to be signed into law Tuesday by President Bush sits atop an ideological fault line that sharply divides the U.S. Supreme Court and highlights the emerging power of Justice Anthony Kennedy.

The new law rejects at least five key holdings by the liberal wing of the court and sets the stage for what many analysts believe will be yet another historic showdown between the courts, the president, and Congress.

Mr. Bush's authorization of the Military Commissions Act of 2006 will trigger a barrage of challenges asking judges to strike down the law as illegal, unconstitutional, or both. And it has sparked a heated debate among legal scholars and lawmakers.

Senate Judiciary Committee Chairman Arlen Specter (R) of Pennsylvania, who voted for the law, nonetheless told his colleagues just prior to its passage that he doubted the Military Commissions Act would survive judicial scrutiny. Others disagreed. "I bet you dollars to doughnuts when the Supreme Court gets hold of our work product, they are going to approve it," Sen. Lindsey Graham (R) of South Carolina said in a speech on the Senate floor.

The Military Commissions Act of 2006 establishes rules for trying Al Qaeda suspects for war crimes before special military tribunals. It somewhat narrows the protections of the Geneva Conventions available to detainees in the war on terror. And it tosses several hundred detainee lawsuits out of the federal courts, replacing rigorous habeas corpus review with a more constrained and streamlined appeals process.

The sharp divide at the Supreme Court is driven by a fundamental disagreement over the proper level of judicial oversight of the war on terror. Liberal justices seek more aggressive oversight to protect individual liberties. Conservatives favor granting more deference and flexibility to the president/ commander in chief during times of war.

Kennedy's Key Role

Although the votes of specific justices have sometimes been difficult to predict, there are signs that a familiar pattern is emerging in cases dealing with the war on terror. Just as in hot-button social issues like affirmative action and so-called partial-birth abortion, the balance of power in potential landmark national-security cases appears increasingly to rest in the hands of Justice Kennedy.

Of the three major high-court precedents dealing with the war on terror—the *Hamdi* and *Rasul* decisions announced in 2004 and the *Hamdan* decision in June 2006—Kennedy voted in the majority in all three. Most important, his was the least restrictive opinion of the five-justice liberal majority that struck down Bush's military commission process in June. That is, Kennedy was reluctant to go as far as Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer in limiting Bush's options in the war on terror.

However, he was even more reluctant to grant the president the broad discretion that analysts say would have resulted in the approach favored by Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito.

Instead, Kennedy joined the liberal wing in the *Hamdan* decision, but once there, he adopted a more centrist stance. He invited Congress to strike the proper balance between protecting national security while also upholding international human rights treaties. "Congress, not the court, is the branch in the better position to undertake the sensitive task of establishing a principle not inconsistent with the national interest or international justice," Kennedy wrote in his concurrence to the *Hamdan* decision.

The Republican-controlled Congress eagerly accepted the invitation. But if Justice Stevens's *Hamdan* decision was a rebuke of Bush's terror policies, as many analysts have opined, the Military Commissions Act is a counterrebuke of the liberal wing of the high court—including Kennedy.

The new law rejects much of the liberal wing's approach in the *Rasul* and *Hamdan* decisions.

* It rejects the high court's view (in the *Rasul* decision) that suspected Al Qaeda members detained at Guantanamo Bay, Cuba, must be afforded the right to file habeas corpus challenges in U.S. courts.

* It rejects Stevens's majority opinion (in the *Hamdan* decision) that the Detainee Treatment Act of 2005 did not retroactively strip the Supreme Court (and other federal courts) of jurisdiction to hear habeas corpus challenges filed by Guantanamo detainees.

* It rejects the conclusion of four justices in the liberal wing (in *Hamdan*) that Al Qaeda defendants on trial before military commissions must be allowed to attend their entire trial and confront all evidence being used against them—even when the evidence is classified.

* It rejects the conclusion of the Stevens plurality in the *Hamdan* decision that conspiracy is not a war crime and thus cannot be the basis of a trial before a military commission operating under the Law of War.

* And it rejects the liberal wing's more expansive view (in *Hamdan*) of the applicability of Common Article 3 of the Geneva Conventions to Al Qaeda suspects. That provision gives a base line of human rights protections for detainees.

Although Congress and the Bush administration acknowledge that Common Article 3 applies in the war on terror, the Military Commissions Act interprets the treaty in a way that narrows its protections and retroactively provides a defense for U.S. officials who engaged in harsh interrogation tactics such as simulated drowning and induced hypothermia.

Human rights workers say such harsh tactics violate the treaty. Administration officials deny that U.S. personnel have engaged in torture or unlawfully cruel conduct during interrogations.

What a New Case Could Revolve Around

Ultimately, if the Military Commissions Act winds up before the high court, the outcome may turn on how Kennedy interprets a single paragraph in the 2004 *Hamdi* decision. At issue in that case was whether a U.S. citizen could be held indefinitely as an

enemy combatant. Justice Sandra Day O'Connor (who has since retired) wrote a plurality opinion joined by Kennedy. It said that a citizen-detainee accused of being an enemy combatant must be able to examine the factual basis for his detention and be given a fair opportunity to rebut the government's allegations before a neutral decisionmaker.

Allowing a detainee to file a habeas corpus petition to a federal judge would satisfy this standard, the court said. But the *Hamdi* opinion continues: "There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." The opinion cites Army Regulation 190-8 as an appropriate substitute.

In the aftermath of both the *Hamdi* and *Rasul* decisions, the Defense Department was searching for a way to avoid a flood of habeas corpus petitions filed on behalf of Guantanamo detainees to federal judges in Washington. Defense officials relied on that key paragraph in the *Hamdi* decision and created the Combat Status Review Tribunal system, modeled on Army Regulation 190-8. It involves three officers who review evidence supporting a detainee's designation as an enemy combatant.

The thinking was that if the Supreme Court endorsed such a system as a constitutional alternative to habeas corpus review for U.S. citizens in the *Hamdi* case, the same system should provide more than enough due process to noncitizen enemy combatants being held at Guantanamo.

If Kennedy agrees with this position, the Military Commissions Act would probably survive its most serious legal challenge. But Kennedy's stance on this issue is unclear.

Lawyers for Guantanamo detainees say that Combat Status Review Tribunals (CSRT) fall far short of the fair procedures required in the *Hamdi* case. "They are a sham," says Thomas Wilner, one of the lead Guantanamo defense lawyers who won the *Rasul* case and is continuing to litigate related issues at the federal appeals court in Washington. "They did not give what *Hamdi* said you have to give—the minimal basic due process requirement."

The requirement includes that a detainee receive prior notice of all accusations being made against him and a fair opportunity to confront those charges before a neutral decisionmaker.

When the evidence is classified, a declassified summary doesn't always provide enough information to enable a detainee to defend himself, defense lawyers say.

In one CSRT hearing, the detainee was accused of associating with a known Al Qaeda operative in Bosnia.

"Give me his name," the detainee said.

The tribunal president said he didn't know the name.

"How can I respond to this?" the detainee asked.

"Did you know of anybody who was a member of Al Qaeda?" the tribunal president asked.

"No, no."

The detainee added, "This is something the

interrogators told me a long while ago. I asked the interrogators to tell me who this person was. . . If you tell me the name, then I can respond and defend myself against this accusation."

Defense lawyers say that unlike previous wars, most of the U.S. detainees at Guantanamo Bay weren't captured by U.S. soldiers on a battlefield. Many were "sold" to the Americans by Pakistanis and Afghans seeking payment of U.S. bounties for Al Qaeda members even when their Al Qaeda involvement was less than clear. Defense lawyers say this is why there may be a significant number of innocent detainees among those being held at Guantanamo.

This is complicated by the widely held assumption that most bona fide Al Qaeda members will falsely insist during hearings that they are innocent goatherders or hapless students rather than holy warriors.

Key Parts of the Military Commissions Act

* Establishes special rules for military-commission trials for Al Qaeda suspects accused of committing war crimes. The rules permit the exclusion of a defendant from his trial if classified evidence is being presented, and the admission of hearsay and coerced statements as evidence.

* Authorizes a three-officer military panel to determine a detainee's status as an enemy combatant eligible for indefinite detention in U.S. custody. This is in lieu of the ability to file a habeas corpus petition challenging the legality of the detention in federal court.

* Creates a retroactive legal defense for U.S. personnel who engaged in harsh interrogation tactics from September 2001 to December 2005. Also narrows the range of activities that might constitute a violation of Common Article 3 of the Geneva Conventions outlawing torture and cruel treatment.

* Expands the definition of an unlawful enemy combatant to provide that anyone who offers "material support" to someone engaged in hostilities against the U.S. can be held indefinitely in military detention, regardless of whether he or she actually engaged in hostilities. Also provides that only noncitizens held as unlawful enemy combatants may be tried by a military commission.

"Guantanamo Back in the Courts"

The National Journal
June 16, 2007
Corine Hegland

At 9 p.m. on Sunday, June 3, Judge Peter Brownback III met with counsel in his chambers at Guantanamo Bay, Cuba. Brownback, an Army colonel and Vietnam War veteran, was presiding over the military commission trial of Omar Ahmed Khadr, a Canadian accused of murder, attempted murder, providing material support for terrorism, conspiracy, and spying—an impressive rap sheet, considering that Khadr was 15 years old when he was apprehended in Afghanistan.

The lawyers who were defending and prosecuting Khadr thought the judge had called them in to briefly discuss what would happen the next morning when Khadr was scheduled for arraignment. So did Brownback. But he had a different idea of what would unfold. "I intend to raise jurisdiction," he told the stunned lawyers. In lay language, Brownback was saying he wasn't sure he was authorized to proceed.

Contrary to press reports, the jurisdiction issue didn't come entirely out of the blue. Last year's Military Commissions Act, passed after the Supreme Court struck down the Bush administration's previous attempt at military commissions, gave the Pentagon authority to try "unlawful enemy combatants," as designated by Combatant Status Review Tribunals. But the tribunals, mostly conducted between 2004 and 2005, had determined that detainees were "enemy combatants."

They did not touch on the nature, lawful or otherwise, of that designation.

The missing word looks like a drafting oversight: The term "unlawful" appears in the Bush administration's first proposed military commissions legislation in 2006, and nobody, proponent or opponent, called attention to the discrepancy until military defense lawyers raised it last month in front of Navy Capt. Keith Allred. He was presiding over another commission proceeding, that of Salim Ahmed Hamdan, who the government says was Osama bin Laden's driver. Since Hamdan, like the other detainees, had been designated as simply an "enemy combatant," his attorneys argued that the commission, limited by the law to trying "unlawful enemy combatants," could not proceed.

Khadr's attorneys hadn't raised the "unlawful" question. But Brownback and Allred share the same support staff. The military commissions' chief prosecutor and chief defense counsel speculate that the staff alerted Brownback to the issue.

So on Monday morning everybody gathered in the courtroom for oral arguments. By that time, the Bush administration had been trying to complete a detainee trial—any trial—for nearly three years. Shortly after 11 a.m., Brownback announced a recess. Fifteen minutes later, apparently having given the matter quite some thought before the arguments began, he returned with a 17-page opinion.

Charges Dismissed.

A few hours later, Allred followed suit on

Hamdan's case. Charges dismissed.

For want of a single word, the military commissions might be lost—again. On Friday, June 8, prosecutors asked the judges to reconsider their decisions. "If we're unsuccessful, we'll file an appeal to the Court of Military Commissions Review, and whoever loses there will appeal to the D.C. Circuit, and so we're back into the federal civilian courts," sighed Air Force Col. Moe Davis, the commissions' chief prosecutor.

Federal civilian court, of course, is exactly where opponents of the commissions say the cases should be. Arguing that the military commission proceedings are stacked against defendants, their attorneys tried to persuade the Supreme Court to stop Hamdan's and Khadr's trials, but the Court turned them down in April. "Unless there's a really cogent reason why these cases could not be tried in federal District Court . . . that's where they ought to be tried," said Eugene Fidell, president of the National Institute of Military Justice. "The federal District Courts are the jewel in the crown of our legal system. Why would you use costume jewelry when you have the real thing?"

A week later, the news got even worse for the Bush White House. On June 11, a divided federal Appeals Court panel of three judges in the conservative 4th District ruled against the administration in a separate case that turned on yet another clause of the Military Commissions Act, one which sought to deny habeas corpus rights—the ability to challenge one's detention in court—to enemy combatants.

The case doesn't directly affect Guantanamo detainees: The enemy combatant in question, Qatari citizen Ali Saleh Kahlah al-Marri, was a legal resident of the United States who was arrested in Peoria, Ill., in 2001. But in rejecting the government's argument, the court cited not only al-Marri's rights as a legal resident of the United States but also his absence from an actual battlefield. That logic, say human-rights advocates, could carry over to the cases of other Guantanamo detainees, many of whom were not captured in battle, or even accused of participating in hostilities.

"A significant number of detainees . . . could be found to be improperly classified as enemy combatants, but they would need another route into the courts," said Jennifer Daskal, U.S. advocacy director for Human Rights Watch. The Justice Department immediately announced that it would petition the ruling to the full Appeals Court, which has 12 judges serving.

The two Mondays' worth of rulings, combined with former Secretary of State Colin Powell's June 10 statement that he would close Guantanamo immediately, have supplied ammunition to Democrats who want to amend the Military Commissions Act and the legal procedures at the Guantanamo prison. "I'm pretty sure both Houses will be voting on habeas issues before the fall," said Christopher Anders, senior legislative counsel for the American Civil Liberties Union.

At least one Guantanamo-related bill is already slated for the Senate floor in June. Senate Armed Services Committee Chairman Carl Levin, D-Mich., inserted a provision into the 2008 Defense Authorization Act that would reform the military commissions and the Combatant Status Review Tribunals to bring them in line with military justice standards. Levin would give detainees facing tribunals the right to a lawyer. Under his language, a military judge, rather than an active-duty military officer with no legal training, would

preside; evidence would no longer be weighted in favor of the government; and tribunals could designate detainees as unlawful enemy combatants only if they had actually engaged in hostilities against the United States, purposefully and materially supported those hostilities, or were a knowing and active participant in an organization engaged in hostilities.

Many current detainees would not fit that definition of an unlawful combatant, but a senior Democratic aide pointed out that Levin's proposal doesn't actually mandate anyone's release. The committee marked up the bill on May 25; it is slated for floor action later this month. "We assume there will be amendments," the aide said. "Until we get there, we don't know how it plays out."

The defense authorization bill could become a vehicle for other Guantanamo-related legislation. Senate Judiciary Committee Chairman Patrick Leahy, D-Vt., and ranking member Arlen Specter, R-Pa., have co-sponsored a bill to restore habeas corpus rights to Guantanamo detainees. The committee passed the bill on June 7, and a Democratic aide said that Senate Majority Leader Harry Reid, D-Nev., has promised floor time.

Meanwhile, Sens. Dianne Feinstein, D-Calif., and Tom Harkin, D-Iowa., have introduced separate bills to close Guantanamo altogether. Feinstein's bill, which has four co-sponsors, would force the president to shutter the prison within a year, transferring detainees either to their home countries or to U.S. facilities for prosecution or, in some cases, continued detention. Harkin's version would require the president to release or charge detainees within four to eight months; those charged would be sent to Fort Leavenworth in Kansas. Harkin is currently making a push for co-sponsors, and he has secured the support of the ACLU, Amnesty International, Human Rights First, and Human Rights Watch.

Anders noted that Harkin's bill, which would close Guantanamo by cutting off its funds, could easily ride on an appropriations bill, and he pointed out that the Appropriations Committee, on which Harkin serves, has several other members who have expressed their unease with Guantanamo, including Leahy, Feinstein, and Specter.

Of course, if any of the Senate bills make it successfully through Congress, a presidential veto looms. A straightforward restoration of habeas rights has the most support in Congress, but even that idea doesn't necessarily command two-thirds of the votes in either chamber. "There's majority support, but nothing approaching a veto-proof majority," Anders said. With a year and a half of the Bush presidency remaining, everyone can settle in for another long legal fight.

"Circuit Puts Hamdan Case on Hold"

SCOTUSblog
July 25, 2007
Lyle Denniston

The D.C. Circuit Court has put off any action on an appeal by detainee Salim Ahmed Hamdan, until after the Supreme Court decides other Guantanamo prisoners' cases next Term. In a one-paragraph order issued Tuesday, the Circuit Court, acting on its own, deferred a petition for initial *en banc* review of *Hamdan v. Gates* (Circuit docket 07-5042), "pending further order of the court."

Hamdan has an appeal pending there, along with his two requests pending at the Supreme Court seeking review by the Justices ahead of review in the Circuit Court (Supreme Court dockets 06-1169, rehearing request, and 07-15, new petition for review). Attorneys for Hamdan notified the Supreme Court on Wednesday of the Circuit Court deferral in [a] letter, with the Circuit Court order attached. Hamdan's challenge is based on arguments that he has a legal right to challenge the military commission that is schedule to try him on war crimes charges, and to pursue that challenge in a habeas case despite Congress' move to scuttle all detainee habeas claims.

The Circuit Court told both sides to file motions to govern further proceedings 30 days after the Supreme Court decides the cases of *Boumediene v. Bush* (06-1195) and *Al Odah v. U.S.* (06-1196), granted review by the Justices on June 29.

When the Justice Department on July 20 urged the Supreme Court not to hear Hamdan's new appeal, it argued that the Court should await a decision by the D.C. Circuit in the case pending there. The issues *Hamdan* raises both at the Circuit Court and in the Supreme Court, the government brief said, "would benefit from the normal decisional process that a case undergoes before receiving plenary review by this Court." In the wake of the Circuit Court's deferral of the *Hamdan* appeal there, it appears that there would be nothing for the Supreme Court to review until some time after the Supreme Court decides *Boumediene* and *Al Odah*.

Hamdan's counsel has contended that the Justices should go ahead and grant review of his new case, on a schedule parallel to that being followed in *Boumediene* and *Al Odah*.

"Senate Committee Approves Bill for Detainee Hearings"

The Washington Post
June 8, 2007
Josh White

The Senate Judiciary Committee yesterday approved a bill that would give detainees at Guantanamo Bay, Cuba, the right to challenge their detention in U.S. courts, part of a renewed effort by the Democratic-controlled Congress to challenge the Bush administration on its wartime policies.

Sen. Arlen Specter (R-Pa.) joined all 10 Democrats on the committee in approving the Habeas Corpus Restoration Act, which aims to counteract a law passed hastily in October that stripped detainees of their ability to bring their cases to court under the centuries-old legal principle of habeas corpus.

The Republican majority passed the Military Commissions Act in October over strong objections that it was unconstitutional and that it inappropriately allowed the government to hold detainees at Guantanamo indefinitely without court challenge.

The bill will head to the Senate floor as part of the Defense Authorization Bill. That legislation also includes measures to dramatically change military tribunals and military courts designed to deal with "enemy combatants" captured in the Bush administration's anti-terrorism campaign.

Though voting was largely split on partisan lines, yesterday's passage of the bill is among the first bold rebukes of the administration's detention policies by a Congress that vowed to make changes when elected in November. Habeas corpus, one of the bedrock elements of U.S. law, has long been a target for lawmakers who feel its suspension was a dramatic move toward abridging basic freedoms.

"We must make clear that our laws do not permit the government to detain people, including people on U.S. soil, indefinitely without court review," said Sen. Russell Feingold (D-Wis.). "This bill is an important first step in reasserting the primacy of American values in our law."

Although there was no debate of the bill yesterday, many Republican lawmakers have praised existing law because it provides for court review of a detainee's enemy combatant status and because they maintain that foreign nationals held at Guantanamo should not have the same rights as U.S. citizens. U.S. officials have opposed giving habeas corpus rights to detainees, and the new bills to alter the legal systems at Guantanamo could meet similar resistance from the Bush administration.

Democratic efforts gained steam this week when two U.S. military judges at Guantanamo threw out charges of war crimes against two detainees because of the way the Military Commissions Act is written. They ruled that the law requires detainees to be "unlawful enemy combatants" to go to trial. Detainees there are currently designated "enemy combatants."

Critics of the law cited the error as evidence that the legal system is a failure; supporters called it a technicality.

"Military Judges Dismiss Charges for 2 Detainees"

The New York Times
June 5, 2007
William Glaberson

The government's new system for trying Guantanamo detainees was thrown into turmoil Monday, when military judges in separate decisions dismissed war crimes charges against two of the detainees.

The rulings, the latest legal setbacks for the government's effort to bring war crimes charges against detainees, could stall the military's prosecutions here.

The decisions did not turn on the guilt or innocence of the detainees, but rather made essentially the same determination that the military had not followed procedures to declare the detainees "unlawful enemy combatants," which is required for the military commission to hear the cases.

Pentagon officials described the rulings as raising technical and semantic issues, and said that they were considering appeals. If appeals failed, they said, they could go through the process of redesignating the detainees.

But military lawyers said the rulings exposed a flaw that would affect every other potential war-crimes case here. And the rulings brought immediate calls, including from some on Capitol Hill, for Congress to re-examine the system it set up last year for military commission trials and, perhaps, to consider other changes in the legal treatment of Guantanamo detainees.

In an interview, Senator Arlen Specter of Pennsylvania, the senior Republican on the Judiciary Committee, said after the first of the two rulings Monday that the decision raised significant issues and could prompt Congress to re-evaluate the legal rights of detainees, including Congress's decision last year to revoke the rights of detainees to file habeas corpus suits to challenge their detentions.

"The sense I have is that there's an unease, an uncomfortable sense about the whole Guantanamo milieu," Mr. Specter said, adding, "There's just a sense of too many shortcuts in the whole process."

Whatever the ultimate legal ramifications of Monday's rulings, they are another in a string of unexpected detours in the government's five-year effort to establish a special legal system for trying foreign terrorism suspects. The current commission system was approved by Congress after the Supreme Court last June struck down the administration's first plan for holding war crimes trials.

The military judges said Congress authorized the bringing of war-crimes charges against detainees who had been declared by military tribunals to be "unlawful enemy combatants." But they said the tribunals held at Guantanamo, known as combatant status review tribunals, or C.S.R.T.'s, had determined only that the detainees were enemy combatants, without making the added determination that their participation was "unlawful."

The international law of war defines unlawful combatants as fighters who, for

example, do not wear military uniforms and conceal their weapons.

Monday's rulings came in the cases of the only Canadian detainee, Omar Ahmed Khadr, and a Yemeni detainee, Salim Ahmed Hamdan. Mr. Hamdan's appeal of a prior effort to prosecute him led to a Supreme Court decision last June in which the justices struck down the administration's first system for war-crimes trials.

The military judge in Mr. Hamdan's case, Capt. Keith Allred of the Navy, said the Pentagon had failed to obtain the necessary enemy combatant classification of Mr. Hamdan, who is accused of being the [al] Qaeda driver for Osama bin Laden.

Mr. Hamdan's longtime military lawyer, Lt. Cmdr. Charles Swift said that, though his client was unlikely to obtain freedom because of the decision, "It was once again a victory for the rule of law."

The judge in Mr. Khadr's case, Peter E. Brownback III, an Army colonel, said since the detainee had not been declared an unlawful enemy combatant, the military court did not have jurisdiction over the case and the proceedings could not continue. "A person has a right to be tried only by a court which he knows has jurisdiction over him," Judge Brownback said from the bench in the military courtroom here.

Mr. Khadr, who was 15 when he was captured in Afghanistan, is charged with killing an American soldier, spying, supporting terrorism and other charges.

The White House declined on Monday night to comment on the decisions. Beth G. Kubala, an Army major who is the spokeswoman for the Office of Military Commissions at the Pentagon, said that the day's ruling demonstrated that the military judges operated independently. But she suggested that the military did not view the double defeat as paralyzing to its prosecutions of war crimes.

"The public should make no assumptions," Ms. Kubala said, "about the future of military commissions."

A Pentagon statement said: "We believe that Congress intended to grant jurisdiction under the Military Commissions Act to individuals, like Mr. Khadr, who are being held as enemy combatants under existing C.S.R.T. procedures."

But Mr. Specter said it was "dead wrong" to assert that Congress intended to permit prosecution of detainees who had not been declared unlawful enemy combatants.

So far, three detainees have been charged with war crimes under the law passed last year, including Mr. Khadr and Mr. Hamdan. The third detainee, David Hicks, pleaded guilty earlier this year and was sent to his native Australia. Prosecutors have said they may file such war crimes charges against about 80 of the 380 detainees here.

Under directives from President Bush and senior Defense Department officials, military officials here have held detainees after finding simply that they were "enemy combatants."

Those procedures have long drawn criticism, with some opponents of administration policies saying they appeared to ignore principles of the international law of war, which sanctions the violence of battle without classifying it as a war crime.

The military could repair the problem raised by the judges Monday by holding new

combatant status review hearings to determine if each of the detainees slated for war-crimes charges was an unlawful combatant.

But the chief military defense lawyer here, Col. Dwight Sullivan of the Marines, said he viewed the decision as having broad impact because it underscored what he and other critics have described as a commission process that lacks international legitimacy and legal authority.

"How much more evidence do we need that the military commission process doesn't work?" asked Colonel Sullivan.

Some experts on military law said the new tangle of legal challenges would almost certainly cause extensive delays at a time when the administration has been pressing to show that its legal proceedings at Guantanamo were moving forward.

David W. Glazier, a retired Navy commander who is an associate professor at the Loyola Law School in Los Angeles, said it would be cumbersome for the military to get new determinations that the detainees were unlawful combatants.

"All the individuals that the government wants to charge will have to go through the C.S.R.T. process again," Mr. Glazier said.

Some legal experts said subjecting the detainees to new combatant status hearings could create additional problems for the administration. The combatant status panels have been among the most criticized features of the Pentagon's legal system here, in part because detainees are not permitted lawyers and are not allowed to see much of the evidence against them.

In a recent case in federal appeals court in Washington, the Justice Department acknowledged that in some cases, Pentagon officials disagreed with findings from combatant status panels that detainees were not enemy combatants. In some of those cases new hearings were ordered and those detainees were determined to be enemy combatants after all.

AL-MARRI

"Judges Rule Against U.S. on Detained 'Combatant'"

The Washington Post
June 12, 2007
Carol D. Leonnig

A federal appeals court ruled yesterday that President Bush cannot indefinitely imprison a U.S. resident on suspicion alone, ordering the government either to charge Qatari national Ali Saleh Kahlah al-Marri with his alleged terrorist crimes in a civilian court or release him.

The opinion is a blow to the Bush administration's assertion that the president has exceptionally broad powers to combat terrorism, including the authority to detain without charges foreign citizens living legally in the United States.

It is the first time a court has said that Marri cannot be held forever without facing formal charges, but it is a symbolic victory—Marri will continue his detention in a naval brig in Charleston, S.C. The government said that it was disappointed by the 2 to 1 decision, handed down by a panel of the U.S. Court of Appeals for the 4th Circuit, and that it will appeal to the full court.

The appeals panel ruled that Bush had overreached his authority and that the Constitution protects U.S. citizens and legal residents such as Marri from unchecked military power. It also rejected the administration's contention that it was not relevant that Marri was arrested in the United States and was living here legally on a student visa.

"The President cannot eliminate constitutional protections with the stroke of a pen by proclaiming a civilian, even a criminal civilian, an enemy combatant subject to indefinite military detention," the panel found.

Justice Department spokesman Dean Boyd said that Marri posed a significant threat, and that imprisoning enemy fighters is necessary to stop future attacks.

"The president has made clear that he intends to use all available tools at his disposal to protect Americans from further al-Qaeda attack, including the capture and detention of al-Qaeda agents who enter our borders," Boyd said.

U.S. District Judge Henry E. Hudson, a Bush appointee, dissented from the opinion. Hudson contended that Bush had the power to detain enemy combatants under Congress's authorization to use military force.

"Although al-Marri was not personally engaged in armed conflict with U.S. forces, he is the type of stealth warrior used by al Qaeda to perpetrate terrorist acts against the United States," Hudson wrote. "There is little doubt," the judge maintained, that al-Marri was in the country to aid in hostile attacks on the United States.

Marri's case is one of several involving the rights of suspected enemy combatants that have reached the appellate level of the federal courts and are likely to be decided by

the Supreme Court.

Marri was a university student in Peoria, Ill., when he was arrested in December 2001 as a "material witness." The government said that Marri—who was identified as part of an al-Qaeda sleeper cell by Khalid Sheik Mohammed, architect of the Sept. 11, 2001, attacks—came to the United States to prepare for a second wave of terrorist strikes. Marri was initially held in prisons in Illinois and New York, then was deemed an enemy combatant by Bush and transferred to the brig, where he has been held for the past four years.

Marri is the last of three U.S. citizens or residents in the Charleston brig. Yaser Esam Hamdi, a U.S. citizen captured on the battlefield in Afghanistan, was held for almost three years by the military without charges. He was released and sent to his native Saudi Arabia after the Supreme Court ruled in 2004 that U.S. citizens must be afforded court trials.

Jose Padilla, another U.S. citizen, was originally accused by the government of attempting to explode a radiological "dirty bomb" in the United States. He was released before a Supreme Court hearing on the case. The government filed less-serious criminal charges against him in November 2005 and transferred him to a civilian prison in Miami in January 2006. He is currently on trial.

The 4th Circuit, based in Richmond, is considered one of the most conservative in the country, but the three-judge panel that heard the case was not. Two judges known as moderates, both appointed by President Bill Clinton, made up the majority in the decision.

The panel found that the 2006 Military Commissions Act, which prohibits enemy combatants from challenging the basis for their imprisonment in U.S. courts, does not apply to a person living legally in the United States. The judges also doubted the legality of classifying someone as an enemy combatant who was not caught on the battlefield or was not carrying arms.

Civil libertarians who championed Marri's case had warned that if the administration prevailed in its argument, the military could next round up U.S. citizens and jail them without trial. The court appeared to agree.

"To sanction such presidential authority to order the military to seize and indefinitely detain civilians . . . would have disastrous consequences for the constitution—and the country," U.S. Circuit Judge Diana Gribbon Motz wrote for the majority

The panel tailored its opinion to Marri's circumstances; it does not directly apply to the more than 300 foreign nationals held as enemy combatants in the military prison at Guantanamo Bay, Cuba. But lawyers for some captives noted that the same flaws the court found in the administration's classification of Marri were true for Guantanamo detainees.

"Government Calls Al-Marri Ruling a Threat to Security"

SCOTUSblog
June 27, 2007
Lyle Denniston

The Justice Department, denouncing as "radical" a Fourth Circuit Court ruling rejecting presidential authority to seize and detain a civilian captured inside the U.S., asked the Circuit Court on Wednesday to rehear the case *en banc*, and to overturn it swiftly. . . . It said that the decision "poses an immediate and potentially grave threat to national security."

The case appears ultimately headed for the Supreme Court, whatever the Fourth Circuit does with it now.

Describing Ali Saleh Kahlah Al-Marri as "an Al Qaeda fighter" who entered the U.S. the day before Sept. 11, 2001, "to act as a 'sleeper agent' with the intent to commit war-like acts," the petition argued that the panel ruling on June 11 "warrants swift reconsideration and repudiation." Much of the government's description of his background appears to have come from Khalid Sheikh Mohammad, the captured "mastermind" of the 9/11 terrorist attacks.

The panel decision "radically circumscribes the President's authority to wage the ongoing military conflict against Al Qaeda and impairs his ability to protect the Nation from further Al Qaeda attack at home," according to the document filed by U.S. Solicitor General Paul D. Clement.

In the 2-1 ruling, the panel barred military detention of any civilian captured inside the U.S., but the decision was explicitly limited to those who are in the country legally and have established connections here. Al-Marri, a Qatar national, was arrested at his home in Peoria, Ill., where he was attending Bradley University. The government was ordered to release him from military custody, but the Court also said he could be transferred to civilian authority to face criminal charges, subjected to deportation procedures, held as a witness for a grand jury investigation, or held for a limited period of time under the Patriot Act.

The panel majority also ruled that Congress has not taken away the legal rights of Al-Marri to challenge his detention, thus limiting the reach of the Military Commissions Act's court-stripping provisions. It found he had a right of habeas corpus protected by the Constitution.

Al-Marri's lawyers can reply to the government's rehearing request only if the Circuit Court asks them to do so. It will take the votes of a majority of the Court's 12 active judges to grant review before the full bench.

The case, the government's petition said, "raises questions of exceptional importance concerning the authority of the President to detain alien enemy combatants in the ongoing conflict with Al Qaeda."

"The panel majority's construction of the [9/11 Resolution] leads to the absurd conclusion that when Congress authorized the use of military force to respond to the September 11 attacks, it did not intend to reach individuals identically situated to the September 11 hijackers, none of whom had

engaged in combat operations against our forces on a foreign battlefield," the petition declared.

At the conclusion of the petition, the Justice Department briefly argued that the Circuit Court had no jurisdiction over the case because of the court-stripping provisions of the MCA passed by Congress last October. "The scope of the MCA is an important question in its own right," the Department said. It urged the full Court to vacate the panel ruling, rehear the case then send it back to the District Court for dismissal for lack of jurisdiction.

The government petition put heavy stress on identifying Al-Marri with the "Al Qaeda agents who waged the deadly September 11 attacks." It said that he was "identically situated" to those "Al Qaeda fighters," and yet the Circuit Court decision "paradoxically" interprets the government's authority to seize terrorists as applying to any suspected "enemy combatant" except those agents.

Al-Marri was seized in Peoria in December 2001. He was not turned over to the military until June 2003, when President Bush designated him an "enemy combatant." He has been held since then at the U.S. Navy brig in Charleston, S.C. He has been seeking his release in a habeas challenge since July 2004.

Military detention of Al-Marri was defended by the Justice Department filing on the basis of the 9/11 Resolution that Congress passed after the 2001 terrorist attacks, and on the president's "inherent authority" under the Constitution's Article II to "detain enemy combatants in the context of an armed conflict." It also contended that, because Congress had passed the Resolution supporting a presidential response to the Sept. 11 attacks, "the President was acting at the zenith of his powers" under the Supreme Court's decision in 1952 in *Youngstown Sheet & Tube v. Sawyer.*

The petition asserted that the Supreme Court and the Fourth Circuit Court already have upheld presidential authority to seize and detain even U.S. citizens who are suspected of terrorism, and thus the panel decision in Al-Marri's case directly conflicts with those rulings in barring the military detention of a non-citizen. The Supreme Court decision it cited was *Hamdi v. Rumsfeld* in 2004, and the Fourth Circuit ruling was *Padilla v. Hanft* in 2005. "The panel decision in this case cannot be reconciled with *Hamdi* and *Padilla*," the petition said.

"Impunity for al-Qaeda: The Implications of a Bad Ruling on 'Unlawful Enemy Combatants'"

The Washington Post
July 2, 2007
David B. Rivkin Jr. and Lee A. Casey

The federal appeals court in Richmond should quickly grant the Justice Department's request that it reconsider last month's decision in the case of *Al-Marri v. Wright*—a decision that denied the existence of the legal category "unlawful enemy combatant" in America's conflict with al-Qaeda. (This question is not, it should be noted, at issue in the Guantanamo detainee cases that the Supreme Court has just agreed to hear in the fall.)

The reasoning in the *Al-Marri* case was deeply flawed, and if widely adopted it would undermine a fundamental purpose of the laws of war: avoiding impunity for war crimes. The ruling not only weakened America's national security but opened the possibility that no body of law applies to conflicts between non-state actors—which would make it impossible, for example, to prosecute the Hamas gunmen who recently murdered Fatah fighters and wantonly killed Palestinian civilians in Gaza.

The case involved the detention of Ali Saleh Kahlah al-Marri, a man the United States believes to be an al-Qaeda agent and has held since 2003 as an enemy combatant. Two of three 4th Circuit judges concluded that because al-Qaeda is not a state, Marri must be treated as a civilian criminal defendant. They claimed this position was supported by the Supreme Court's statement in *Hamdan v. Rumsfeld* that the war in Afghanistan is only an internal conflict—and further claimed that the legal classification of enemy combatant, as opposed to civilian, does not exist in such conflicts.

Their sole authority for this conclusion was a 2005 statement by the International Committee of the Red Cross (ICRC), a persistent critic of America's war on terror, that "[i]n non-international armed conflict combatant status does not exist." Ironically, for years the ICRC tried to achieve some type of combatant status for non-state participants in internal conflicts, fearing that most countries would treat them far more harshly as civilian criminal defendants. Moreover, its 2005 assertion that combatant status does not exist in internal conflicts—especially as construed in *Al-Marri*—is inconsistent with its own earlier (and more authoritative) commentary on the Geneva Conventions.

In 1960 the ICRC addressed Geneva's "Common Article 3" on internal armed conflicts and acknowledged that "the conflicts referred to in Article 3 are [generally] armed conflicts, with armed forces on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country." "Armed forces" and "hostilities" are legal terms that imply—indeed, require—recognition that the category of enemy combatant exists in internal armed conflicts.

The court made an equally serious error in suggesting that the United States can be at

war with al-Qaeda only when that group is affiliated with a foreign government. Although nations rarely invoke the laws of war with regard to non-state actors, the legal basis of such conflicts is well established. The Supreme Court has held that the United States could be at "war" with non-state entities such as Indian tribes. It also recognized during the Civil War—another conflict between the United States and a non-state—that whether the United States is at war, and with whom, is a question reserved to the political branches, in particular to the president. Under the Al-Marri reasoning, everyone fighting for the South during the Civil War was a civilian because none was "affiliated with recognized nation states."

To distinguish Al-Marri from its earlier decision involving alleged al-Qaeda operative Jose Padilla, who was an enemy combatant, the court asserted that Padilla fought alongside the Taliban—and characterized the Taliban as the "de facto" government of Afghanistan. This is a type of diplomatic recognition that the United States (and the international community generally) denied to that barbaric militia. The Constitution, of course, gives the president the right to grant or withhold such recognition. More important, under the 4th Circuit's rationale, the United States is not now engaged in a legally cognizable armed conflict with al-Qaeda—with its Taliban patrons on the run, al-Qaeda has no governmental affiliation, except the self-styled "Islamic State of Iraq."

The implications are profound. Application of the laws of war governs the detention of enemy combatants but also creates the legal justification for the initial use of armed force. Only if the laws of war apply can the United States lawfully take the offensive against al-Qaeda, seeking out and attacking with deadly force its operatives in Afghanistan, Iraq and elsewhere. Congress's post-Sept. 11 authorization for the use of military force properly invoked this legal regime. Moreover, if the laws of war do not apply to conflicts involving non-state actors, there is no legal regime governing conflicts between groups in areas—such as Gaza—where there is no recognized state authority. This is true impunity.

By substituting its will for that of Congress and the president, the court's decision would strip the initiative from U.S. forces and transform the war on terror into a reactive policing function—exactly the posture America was in on the morning of Sept. 11, 2001. As Justice Robert Jackson wrote long ago, for all its obvious virtues the Constitution is not a suicide pact. The court should quickly overturn this decision so that Jackson's words will continue to be true.

"When 'Enemy Combatants' Aren't"

St. Petersburg Times
June 17, 2007
Robyn Blumner

The indignance emanating from the right wing over the *Al-Marri* decision is over the court's labeling Ali Al-Marri, an alleged al-Qaida operative, as a civilian rather than an enemy combatant.

"By (the court's) lights, even 9/11 ringleader Mohamed Atta wasn't a combatant. Despite his enlistment in an organization waging war on America that had trained him and sent him here, he was just a civilian," wrote the National Review in an editorial blasting the 4th U.S. Circuit Court of Appeals ruling.

What seems to be getting their camouflage-colored boxers in a knot is the nomenclature. The term civilian seems to imply moral innocence while "enemy combatant" is freighted with aggressive action and evil intent. This is an improper reading of these terms.

The case of Al-Marri involves a national of Qatar who was a legal U.S. resident studying at Bradley University in Peoria, Ill., and living with his wife and five children before being imprisoned without charge in a 9-by-6-foot cell.

Al-Marri was detained in 2001 and eventually charged with a series of crimes involving fraudulent credit cards. Then, in June 2003, he was unilaterally designated an enemy combatant by the president and spirited to a military brig in South Carolina, where he was held in solitary confinement for the next four years. The military says Al-Marri was serving as a "sleeper agent" in the United States and was on a mission to disrupt the country's financial system through computer hacking. It says that because of these suspicions, it can hold him indefinitely without charge.

In ringing language, the court refused to go along: "The president cannot eliminate constitutional protections with the stroke of a pen by proclaiming a civilian, even a criminal civilian, an enemy combatant subject to indefinite military detention." Al-Marri is not fighting for a nation with which we are at war and therefore he must be tried as a civilian in accordance with the due process guarantees of the Constitution, the court said.

Judge Diana Gribbon Motz, the opinion's author, goes out of her way to recognize the "grave threat international terrorism poses to our country and our national security," and the potential harm Al-Marri may pose.

But she clearly draws a line between war and everything else.

A civilian can be guilty of horrendous crimes against our nation. The court pointed to the Unabomber and the conspirators in the Oklahoma City bombing. In those cases, terrorism was the goal and the crimes were motivated by a warped ideology. Add to that any number of Islamic terrorist cases that have already been successfully prosecuted—including Zacarias Moussaoui, convicted as part of the 9/11 conspiracy, and the men who participated in the first World Trade Center bombing—and it is clear that the term civilian has nothing whatever to do with guilt or innocence. It is also apparent that the criminal justice system is perfectly

capable of dealing with monsters, even those who are well-organized and supremely armed.

Meanwhile, the term "enemy combatant" is what, under the law of war, the enemy soldier is called—the Japanese, German, Korean and Vietnamese soldiers we captured during wartime. Enemy combatants can fight us with lethal force, be captured, and then released at the end of hostilities.

Eric Freedman, a law professor at Hofstra University, made this distinction clear in the *New York Times* when he said it makes no sense to say we are at war with a group of terrorists.

"The Colombian drug cartel has airplanes and bombs and boats, and it shoots down American airplanes," Freedman said. "They're criminals." Otherwise, Freedman said, "They'd have combat immunity."

What President Bush has been pushing for is a rubric that does not follow the law of war or the civilian system. He has been blazing a new path for America. One of presidential tyranny, where the commander in chief has dominion over the battlefield, defined as the entire planet, and may designate anyone an enemy to be thrown into detention, tortured into talking and never heard from again. The prisoners wouldn't be soldiers in war or civilians. They would be America's disappeared.

If the court approved what happened to Al-Marri, there would be no legal principle that prevented the president from doing the same to any American.

The *Al-Marri* ruling noted that Congress, in passing the Patriot Act, outlined provisions for suspected alien terrorists. They could be held for seven days before charges had to be filed or deportation commenced. In disregarding Congress' rather generous grant of executive power, Bush has said that charges don't have to be brought at all.

Unchecked executive detention is not a new response to a new kind of threat. It is a very old response used historically by kings, dictators and despots, and its acceptance here would change everything.

NSA WIRETAPPING

"Domestic Wiretaps Ruled OK"

Chicago Tribune
July 7, 2007
Henry Weinstein

A sharply divided federal appeals court in Cincinnati handed the Bush administration's warrantless surveillance program a major legal victory Friday, ruling that the American Civil Liberties Union and several other plaintiffs did not have standing to challenge the program.

The 2-1 decision by the 6th U.S. Circuit Court of Appeals sent the case back to a federal trial judge in Detroit and ordered her to dismiss the case, reversing a ruling the judge had issued last year that the program was unconstitutional.

Justice Department lawyers had urged the panel to throw out the case, saying that a full-fledged review of the government initiative launched after the Sept. 11, 2001, attacks would violate the "state secrets" doctrine. Established in 1953, it bars the discovery or admission of evidence that would expose information that the government maintains would harm national security.

At oral arguments in late January, Justice Department lawyer Gregory Garre argued that without such privileged information, none of the plaintiffs could establish standing to sue.

U.S. District Judge Anna Diggs Taylor had rejected the argument, saying that three publicly acknowledged facts about the government's surveillance program were sufficient to establish standing.

Taylor noted that the government had acknowledged, after the program was disclosed in a *New York Times* article in 2005, that it was eavesdropping on international telephone and e-mail communications in which at least one of the parties was suspected of having ties to Al Qaeda and that the surveillance was being conducted without warrants.

Taylor also ruled that the 4th Amendment prohibition against illegal searches and seizures was an absolute rule that required the government to obtain a warrant before conducting such surveillance.

But the 6th Circuit Court ruled that the plaintiffs had failed to show that they had been individually injured by the program, and therefore did not have standing to challenge the program in court.

Judge Alice Batchelder said the plaintiffs, who also included several lawyers and writers, could not "produce any evidence that any of their own communications have ever been intercepted" by the National Security Agency under the surveillance program.

Rather, Batchelder said, the plaintiffs had asserted "a mere belief" that their overseas contacts were the types of people being targeted by the NSA and consequently they had been subjected to illegal eavesdropping, and that the surveillance had led the NSA to discover and possibly disclose privileged information.

Justice Department lawyers also argued that the program was legal. They contended that

when Congress authorized the use of military force after Sept. 11, it clearly contemplated that the president could conduct counterintelligence surveillance of the type used in the NSA program.

Garre asserted at the Jan. 31 oral argument in the 6th Circuit Court that it would be unprecedented for a U.S. court to say that a president did not have such power.

The plaintiffs said they had been injured by the surveillance program in three ways. They said it had hampered their ability to communicate with their overseas contacts because of their fear that the illegal surveillance might harm such contacts. The plaintiffs, particularly lawyers, said that made communicating with clients overseas more burdensome and costly, requiring them to travel overseas to meet with their contacts or to refrain from talking to them at all.

The plaintiffs also said the program had a "chilling effect" on their overseas contacts' willingness to talk to them.

And the plaintiffs asserted that the NSA had directly invaded their privacy.

But Batchelder, joined by Judge Julia Gibbons, said the plaintiffs conceded that "no single plaintiff can show [that he or she had been wiretapped]."

"Moreover, due to the State Secrets Doctrine, the proof needed . . . to make such a showing is privileged," and therefore unavailable to the plaintiffs, Batchelder wrote.

The majority also rejected the plaintiffs' claims that their 1st Amendment rights had been violated. Judge Ronald Gilman dissented.

In a concurring opinion, Gibbons said the plaintiffs "can show nothing more than a fear [of] being subject to a government policy of surveillance." But Gilman's dissent said that the attorney plaintiffs in the case had "articulated an actual or imminent harm" flowing from the surveillance program. The program, Gilman wrote, "forces them to decide between breaching their duty of confidentiality to their clients and breaching their duty to provide zealous representation. Neither position is tenable."

ACLU legal director Steven Shapiro said the organization was "deeply disappointed by [Friday's] decision that insulates the Bush administration's warrantless surveillance activities from judicial review and deprives Americans of any ability to challenge the illegal surveillance of their telephone calls and e-mails. . . . The Bush administration has been left free to violate the Foreign Intelligence Surveillance Act, which Congress adopted almost 30 years ago to prevent the executive branch from engaging in precisely this kind of unchecked surveillance."

Brian Roehrkasse, a Justice Department spokesman, said the department was pleased with the ruling, "which confirms that plaintiffs in this case cannot seek to expose sensitive details about the classified and important" surveillance program.

The White House also applauded the ruling, saying the administration had believed all along that Judge Taylor in Detroit had "wrongly decided the case."

Sen. Patrick Leahy (D-Vt.), chairman of the Judiciary Committee, said he was troubled by the ruling.

"The court's decision is a disappointing one that was not made on the merits of the case, yet closed the courthouse doors to resolving it," he said. "I hope the Bush administration

will finally provide the information requested by Congress regarding the constitutional and legal questions about this program so that those of us who represent the American people can get to the bottom of what happened and why."

Several other cases challenging the program are pending in federal court in San Francisco.

"Wiretap Subpoenas Prod Administration"

Los Angeles Times
June 28, 2007
Josh Meyer

A Senate committee investigating the Bush administration's domestic wiretapping program subpoenaed the White House, Vice President Dick Cheney's office and the Justice Department on Wednesday for information regarding their legal justification for the warrantless secret surveillance.

The subpoenas by the Judiciary Committee set the stage for another legal and political battle between Senate Democrats and the Bush administration over its counterterrorism and law enforcement policies. Earlier subpoenas issued by Democratic lawmakers to current and former White House officials have essentially been ignored.

Legal experts suggested Wednesday that the administration would fight or ignore these subpoenas, too, throwing the issue into federal court, perhaps even the Supreme Court. The ultimate outcome, they said, could be an out-of-court compromise that gives lawmakers at least some insight into the legal machinations surrounding the top-secret National Security Agency program.

President Bush authorized the domestic surveillance program soon after the Sept. 11, 2001, terrorist attacks, allowing the NSA to monitor international phone calls and e-mails to or from the United States involving people that authorities suspected of having links to terrorists.

In letters accompanying the subpoenas, Judiciary Committee Chairman Sen. Patrick Leahy (D-Vt.) said the panel had made at least nine formal requests for such documentation from the White House and the Justice Department, but all were rebuffed.

Moreover, Leahy said in the letters that attempts to get senior administration officials to testify before Congress on the legality of wiretapping "have been met with a consistent pattern of evasion and misdirection."

Leahy noted that the Judiciary Committee was not seeking operational details of the program, which remains highly classified. But he said the committee was charged with oversight of the executive branch in the areas of constitutional protections and the civil liberties of Americans.

"The warrantless electronic surveillance program directly impacts those responsibilities," Leahy wrote. "We cannot conduct this oversight without knowing the legal arguments the Administration has used to justify interception of the communications of Americans without a warrant."

Leahy said he was issuing the subpoenas in consultation with the ranking Republican on the panel, Sen. Arlen Specter of Pennsylvania. Two other senior Republicans on the committee, former chairman Orrin G. Hatch of Utah and Charles E. Grassley of Iowa, also voted with Democrats last week to give Leahy the power to issue the subpoenas.

Leahy gave those receiving the subpoenas until July 18 to comply.

White House spokesman Tony Fratto condemned the subpoenas as an act of

political partisanship, and did not say whether the administration would comply with them.

"We're aware of the committee's action and will respond appropriately," Fratto said. "It's unfortunate that congressional Democrats continue to choose the route of confrontation."

Fratto said the so-called terrorist surveillance program is "lawful, limited, safeguarded and—most importantly—effective in protecting American citizens from terrorist attacks. It's specifically designed to be effective without infringing Americans' civil liberties."

After the existence of the surveillance program was disclosed in December 2005, Bush defended it as necessary to fight a shadowy terrorist enemy with expertise in shrouding its plotting and communications in secrecy. Bush also said the program was legal, approved by at least some members of Congress, and that he had authority to authorize the eavesdropping as commander-in-chief, using expanded war powers granted to him by Congress.

The White House initially claimed that the program did not require court approval, but was challenged in court. The administration agreed earlier this year to allow it to be reviewed by the Foreign Intelligence Surveillance court.

The president still claims the power to order warrantless spying.

A Judiciary Committee staffer said the senators want documents that could shed light on internal deliberations and disputes within the administration over the legality of the program, including who in the Justice Department expressed concerns about it, and when.

Former Deputy Atty. Gen. James Comey testified last month before the committee that he, former Atty. Gen. John Ashcroft and FBI Director Robert S. Mueller III threatened to resign after the White House tried to override their objections to the program in 2004.

Comey said that effort included a nighttime visit by the current attorney general, Alberto R. Gonzales, who was then White House counsel, and Andrew H. Card Jr., then the White House chief of staff, to the hospital bed of an ailing Ashcroft, to get him to reverse course and recertify the program.

Ashcroft refused and Bush ultimately made changes to the program that the senior Justice Department officials demanded.

No one involved has commented publicly on what those changes were or what kind of domestic spying had been going on previously.

"After we learned from Jim Comey about the late-night hospital visit to John Ashcroft's bedside, it was even more imperative that we find out the who, what, how and why surrounding the wiretapping of Americans without warrants," another Judiciary Committee member, Sen. Charles E. Schumer (D-N.Y.), said Wednesday.

The subpoenas also seek information about the apparent shutdown of an investigation into the eavesdropping by the Justice Department's Office of Professional Responsibility.

"This bumps up the stakes by threatening a court showdown," said Richard Ben-Veniste, a former Watergate prosecutor who also served on the commission that investigated the Sept. 11 attacks.

Ben-Veniste said such a court battle could be

drawn out, and that "perhaps the intention of the White House is to run the clock on the remainder of this administration's term in office."

But, he added, "I think there is a strong likelihood that eventually a compromise will be worked out which affords some review by the judiciary."

"Court to Oversee U.S. Wiretapping in Terror Cases"

The New York Times
January 18, 2007
Eric Lichtblau and David Johnston

The Bush administration, in a surprise reversal, said on Wednesday that it had agreed to give a secret court jurisdiction over the National Security Agency's wiretapping program and would end its practice of eavesdropping without warrants on Americans suspected of ties to terrorists.

The Justice Department said it had worked out an "innovative" arrangement with the Foreign Intelligence Surveillance Court that provided the "necessary speed and agility" to provide court approval to monitor international communications of people inside the United States without jeopardizing national security.

The decision capped 13 months of bruising national debate over the reach of the president's wartime authorities and his claims of executive power, and it came as the administration faced legal and political hurdles in its effort to continue the surveillance program.

The new Democratic-led Congress has pledged several investigations. More immediately, Attorney General Alberto R. Gonzales is expected to face hostile questioning on Thursday from the Senate Judiciary Committee on the program. And an appellate court in Cincinnati is scheduled to hear arguments in two weeks on the government's appeal of an earlier ruling declaring the program illegal and unconstitutional.

Some legal analysts said the administration's pre-emptive move could effectively make the court review moot, but Democrats and civil rights advocates said they would press for the courts and Congress to continue their scrutiny of the program of wiretapping without warrants, which began shortly after the terrorist attacks of Sept. 11, 2001.

Democrats praised the administration's decision, but said it should have come much sooner.

"The announcement today is welcome news," said Senator John D. Rockefeller IV, the West Virginia Democrat who leads the Intelligence Committee. "But it is also confirmation that the administration's go-it-alone approach, effectively excluding Congress and the courts and operating outside the law, was unnecessary."

Mr. Rockefeller added, "I intend to move forward with the committee's review of all aspects of this program's legality and effectiveness."

Since the surveillance program was publicly disclosed in December 2005 by *The New York Times,* the White House has maintained, in scores of court filings, policy papers and press statements, that the president has the inherent power to conduct wiretaps without a court warrant even though a 1978 law put intelligence surveillance under judicial review. The administration failed to win Congressional approval for the program last year after months of lobbying, and some Democrats are still trying to ban it outright.

The administration continued to assert on Wednesday that the N.S.A. program had operated legally, but it also said the time had come to allow the intelligence surveillance court, known as the FISA court, to review all warrants on all wiretaps in terrorism investigations.

"There's obviously an advantage to having all three branches involved," said a senior Justice Department official, who briefed reporters on the decision on condition of anonymity. "This issue of the terrorist surveillance program is one that has been under intense public debate and scrutiny on the Hill, and just considering all these circumstances, the president determined that this is the appropriate course."

President Bush has authorized the continuation of the N.S.A. program every 45 days by executive order to allow the N.S.A. to conduct wiretaps on international communications without a court warrant. When the current order expires, however, President Bush has decided not to reauthorize the program, officials said.

The Justice Department said Wednesday that it had obtained multiple orders, or warrants, a week ago from the FISA court allowing it to monitor international communications in cases where there was probable cause to believe one of the participants was linked to Al Qaeda or an affiliated terrorist group.

"As a result of these orders," Mr. Gonzales told leaders of Congressional Intelligence and Judiciary Committees in a letter dated Wednesday, "any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court."

Justice Department officials said that the FISA court orders, which were not made public, were not a broad approval of the surveillance program as a whole, an idea that was proposed last year in Congressional debate over the program. They strongly suggested that the orders secured from the court were for individual targets, but they refused to provide details of the process used to identify targets—or how court approval had been expedited—because they said it remained classified. The senior Justice Department official said that discussing "the mechanics of the orders" could compromise intelligence activities.

Justice Department officials would not describe whether the court had agreed to new procedures to streamline the process of issuing orders or accepted new standards to make it easier for the government to get approval to monitor suspect e-mail and phone communications.

But the officials suggested that the effort to obtain the court's approval for orders on Jan. 10 was not easy. "These aren't some sort of advisory rulings," one official said. "These are orders issued by the FISA court, not some cookie-cutter order. These orders are complex. It took a long time to work on this."

The officials said the new approach was based on evolving legal interpretations of the foreign surveillance law by the Justice Department, changes in the foreign surveillance statute in recent years and precedents set by the FISA court in approving specific requests to conduct electronic monitoring.

The N.S.A., which has run the program of surveillance without warrants since Mr. Bush secretly approved it in October 2001,

is known to have used broad pattern analysis in tracking terrorist communications and identifying possible terrorists.

But senior lawmakers said they were still uncertain Wednesday, even after the administration's announcement, about how the court would go about approving warrants, how targets would be identified, and whether that process would differ from the court's practices since 1978.

The administration said it had briefed the full House and Senate Intelligence Committees in closed sessions on its decision.

But Representative Heather A. Wilson, Republican of New Mexico, who serves on the Intelligence committee, disputed that, and some Congressional aides said staff members were briefed Friday without lawmakers present.

Ms. Wilson, who has scrutinized the program for the last year, said she believed the new approach relied on a blanket, "programmatic" approval of the president's surveillance program, rather than approval of individual warrants.

Administration officials "have convinced a single judge in a secret session, in a nonadversarial session, to issue a court order to cover the president's terrorism surveillance program," Ms. Wilson said in a telephone interview. She said Congress needed to investigate further to determine how the program is run.

Democrats have pledged to investigate the N.S.A. program and other counterterrorism programs they say may rely on excessive presidential authority. Senator Charles E. Schumer of New York said the announcement appeared to be intended in part to head off criticism Mr. Gonzales was likely to face at Thursday's judiciary committee hearing.

"I don't think the timing is coincidental," Mr. Schumer said in a telephone interview. "They knew they had a very real problem, and they're trying to deflect it."

But Justice Department officials said the timing of the announcement was driven solely by the FISA court's notification in recent days that it had approved the new orders. The officials said the orders were the result of two years of discussing with the court how to bring the eavesdropping program under court review, a process they said began long before the program become public.

A Justice Department official said the department would file a motion with the Court of Appeals for the Sixth Circuit in Cincinnati, arguing that the court's review of the issue in a lawsuit brought by the American Civil Liberties Union "is now moot" in light of this week's developments.

But several legal analysts said the issue might not be resolved that simply.

Bruce Fein, a Justice Department official in the Reagan administration who has been critical of the program, said the appellate court was likely to send the issue back to the trial court to re-examine the issue.

Anthony D. Romero, executive director of the A.C.L.U., said the appellate court should still examine the legality of the program and whether the it had violated intelligence law for the last five years.

"It's not academic when the president violates the law," Mr. Romero said.