In the Shadow of War

OWEN FISS*

Teaching is a difficult profession. I refer not to the hours we need put in, which are not so long, or even the pay, which I have always regarded as generous, but to the emotional burdens we shoulder.

Like most teachers, I spend hours on end preparing for class. I reread the assigned material, trying to identify the most pressing dilemmas within it. In class I address those dilemmas with all the force and energy I can muster and try to engage the students in the inquiry. After an hour or two, or maybe, I confess, a little more, I walk out of the classroom, wondering to myself: Have I helped my students understand the issues better? Have I stirred their imaginations? Have I enabled the class to see the law for all it could be? I amble back to my office, usually alone, full of hope, but uncertain of the answers to these questions. The void or emptiness I experience is shared, I imagine, by most law teachers, and it haunts us in our quietest moments.

This symposium and the events surrounding it cannot fill the void – nothing really can – but they help, indeed they help enormously. I am thus most grateful to those responsible for organizing it, above all, Professor Irwin Stotzky of the University of Miami School of Law, and Allyson duLac, Michael Huber, and their colleagues on the Law Review. The many friends who participated in the symposium must also be thanked. I have been moved by their willingness to take my ideas seriously, even to the point of telling me, of course, in the most felicitous manner possible, where I went wrong.

Breaking with academic tradition, my family attended the meetings out of which this volume grew and graciously sat through the presentations and participated in the festivities. As a result, the meetings turned out to be a cross between academic conference, memorial service, and Bar Mitzvah. As evident in my teaching, I have the broadest conception of family, and it includes Lorraine Nagle, my secretary for over twenty-five years, who has brought a special warmth and decency to her work. My sisters, Estelle May Ezratty and Ann Valerie Zeiger, and their families, have always been there for me and were present at the symposium. So were my daughters, Caitlin, Emily, and Gina, and their families.

* Sterling Professor of Law, Yale Law School. Michael Gerber and Jamal Greene made many important contributions to this Essay. I also wish to thank Stewart Rhodes and Sergio Campos and the other members of my spring 2003 seminar on metaprocedure for sometimes bracing but always enlightening discussions of the cases of most concern to me here.

Like the children of all teachers, they have had a hard time sharing me with my students and have always been slightly mystified by what I do for a living. Somehow they managed to give me their love, each in her own way, to which I responded in kind. I also need to thank Irene, my wife. She has given me support when I needed support, pushed me when I needed to be pushed, and told me when it was necessary to stand up and be counted. She has been my muse.

Not only is Irwin Stotzky a true friend, but he is also an organizational wizard. He decided to hold the meetings, not in the law school itself, but nearby at the Biltmore Hotel in Coral Gables. The Biltmore is a magnificent hotel, originally built in the 1920s, and partakes of the elegance of that era. It is a National Historic Landmark, set among grounds and courtyards lush with palm trees and crowned by a bell tower that is a replica of the famed Giralda of Seville.

The glamour of the setting added to the joyousness of the occasion. It also introduced an element of unreality to what we were doing. Our meetings took place on Friday and Saturday, March 21 and 22, 2003. For two full days we were ensconced in the beauty of the Biltmore, talking about issues of great importance to me and presumably to the academics present – school desegregation, free speech, civil procedure, the history of the Supreme Court. Reason reigned supreme, lightened by the camaraderie among the participants and the presence of my family. The world, however, was in a very different place. It was dark and tragic. On Wednesday, March 19, only two days before, the United States had invaded Iraq.

The war was on our minds. One of the panelists, Aharon Barak, was unable to travel to Coral Gables from Israel because of the outbreak of the war. His absence was a constant reminder of the events occurring in Iraq. Moreover, all of us carried within ourselves the tragic losses of September 11 and knew full well the significance of the ongoing war on terrorism. We were also mindful of the war in Afghanistan. It had begun in October 2001, shortly after the terrorist attacks on the World Trade Center and the Pentagon, and though the Taliban already had been ousted and the Northern Alliance had assumed power, sporadic fighting continued, as did the search for the leadership of Al Qaeda.

Although everyone at the symposium was aware of these developments, they were not publicly discussed. Neither the Iraq nor the Afghanistan war, nor even the war on terrorism, was the subject of any of the panels or formal presentations, perhaps because the issues they raised seemed far removed from my teaching or scholarship. Yet I felt the need to break this unwitting pact of silence and used – seized? – the opportunity for closing remarks for that purpose. For me, the Iraq war

was a gross violation of international law and put into bold relief the default in law that has so marked the post-September 11 era.

International law is a fragile enterprise. Based part on custom, part on the consent given in treaties, and part on the actions and the processes of international organizations, the authoritative character of international law, both as a descriptive and normative matter, is always in dispute. Yet the rules regarding the use of force seem clear. The Charter of the United Nations, adopted by the United States and thus binding on it as a treaty, prohibits the use of force with two exceptions, one for self-defense and the other when the Security Council determines that the use of force is needed to secure world peace.[1] The Afghanistan war may have been consistent with the Charter, but this could not be said of the war that had just begun in Iraq.

Although the Security Council adopted a resolution condemning the September 11 attacks and in general terms affirmed the right of self-defense, it did not in so many words authorize the United States to invade Afghanistan either to overthrow the Taliban or suppress Al Qaeda.[2] The defense of the legality of the war had to be based on the right of self-defense. The United States determined that Al Qaeda was responsible for the attacks of September 11, and that the war against the Taliban in Afghanistan was justified because of the symbiotic relationship between the Taliban and Al Qaeda.

By permitting the use of force for self-defense, the Charter creates a measure of unilateralism. Power is vested in an individual nation-state to determine whether it has been attacked, who is responsible for the attack, and even whether the relation between a state and some terrorist organization, such as Al Qaeda, is such as to justify an armed attack against another state. Only the strong are truly able to enjoy the freedom to make these judgments and to decide whether in fact to use armed force, as opposed to less violent and more targeted alternatives, in response to an aggressive attack.

Law requires impersonality, so that the applicability of norms does not turn on the personal identity of the subject, but every system of law operates in a way that allows the rich and powerful greater enjoyment of protected rights than that experienced by the poor and weak. Consider,

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1. *See* U.N. CHARTER art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.").

2. *See* S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).

for example, the provisions of the Bill of Rights guaranteeing free speech or the assistance of counsel. We may seek to enhance the prerogatives of the poor or weak in order to minimize the difference in the experience of these rights, but such an endeavor is driven more by egalitarian concerns – everyone should enjoy the blessings of liberty – than by a belief that these reforms are required to turn the First or Sixth Amendment into law.

In the domestic sphere, independent tribunals, backed by the power of the state, have the authority to determine whether an act of violence that is justified in the name of self-defense fully respects the bounds of that right. Such an institutional arrangement is lacking in the international sphere. This distinguishes the law of the nation-state from that of the world community, but it does not mean that the United Nations Charter and international conventions are not law. In the international context, law consists of the norms and principles that a nation-state is duty bound to respect and obey, and in the case of the Charter, this duty arises from the solemn consent given to it by a nation-state. Those aggrieved by an alleged violation of the Charter may not be able to turn to an independent tribunal to determine whether those norms have been fully respected; nor can they rely on some world policeman to enforce a judgment of such a tribunal. But they can address the world community and demand that it make a judgment for itself and, if appropriate, impose on the party violating those norms whatever sanctions lie within the community's lawful grasp. Sometimes the only sanction may be shame. The responsibility devolves on each of us, as members of the world community, to make a disinterested judgment as to whether the norms of the Charter have been honored.

Understanding law in these terms, I venture to say that a strong, and in my view, a convincing case could be made for the legality of the Afghanistan war. No such case, however, could be made for the war in Iraq. The invasion of Iraq was not precipitous. It was the product of a long and sustained buildup, and in the course of that buildup various defenses were offered on behalf of the use of force. None was persuasive. On occasion, the legality of the war was defended on the basis of a series of Security Council resolutions. The first, adopted in 1990, authorized the use of force against Iraq to eject it from Kuwait.[3] The second, adopted in 1991, imposed a disarmament obligation on Iraq after it was in fact ejected from Kuwait and a cease-fire was instituted.[4] The third – Resolution 1441, adopted in the fall of 2002 – declared that Iraq

3. *See* S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990).

4. *See* S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

remained in material breach of its disarmament obligations.[5] It also gave Iraq a "final opportunity" to comply with those obligations and warned Iraq of "serious consequences" if it did not comply.

Warning of "serious consequences" is not, however, the same as authorizing the use of military force against Iraq, either by the United States or any other nation. It also seems far-fetched to assume that the determination in Resolution 1441 that Iraq was in material breach of the disarmament obligations imposed by the second resolution revived the authorization of force contained in the first resolution, since that resolution authorized the use of force only to eject Iraq from Kuwait. Bent on war, the United States sought yet another resolution to authorize the invasion of Iraq. Once it became clear that it would not obtain this authorization, the United States proceeded without Security Council approval and invaded Iraq.

Unlike the Afghanistan war, the invasion of Iraq could not be justified as falling within the right of self-defense granted in the Charter. There were no ties between Iraq and Al Qaeda. The administration claimed that Iraq possessed weapons of mass destruction and that one day they might be turned upon the United States or other nations we are duty-bound to protect. However, the evidence supporting the claim that Iraq possessed weapons of mass destruction was thin; one year after the invasion, no such weapons have been found. Even if the evidence were otherwise, the concept of self-defense would have to be broadened to include a preemptive war. At the very least, such preemptive action requires that the feared Iraqi attack, against which the United States was purportedly defending itself, be imminent in order to qualify as an act of self-defense. Because no such claim could be made in the case of Iraq, the concept of self-defense would have to be stretched still further – beyond the breaking point – to sanction a preventive, as opposed to a preemptive, war.[6]

The administration also claimed, all the more so once no weapons of mass destruction were found, that it was intent on ending the tyranny of Saddam Hussein and thus bringing freedom and democracy to the Iraqi people. In support of this claim, reference has been made to the use of force by NATO in Kosovo in the spring of 1999, and the precedent that it set for what has been called humanitarian intervention. This use of force also lacked Security Council authorization. Because the Kosovo intervention violated the Charter and the system of law that it establishes, the status of that precedent as law remains uncertain. In any

5. *See* S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/RES/1441 (2002).

6. *See* Neta C. Crawford, *The Best Defense: The Problem with Bush's Preemptive War Doctrine*, BOSTON REV., Feb.-Mar. 2003, at 20.

event, even if it were viewed as law, a crucial distinction must be made between military intervention designed to stop large-scale ongoing carnage or a genocide in progress—the case of Kosovo—and the use of force intended to topple a tyrant such as Saddam Hussein. Granted, Hussein, like most tyrants, came to power through brutal and violent means, but the death and destruction that war inevitably entails, followed by military occupation, can never be justified as a means of ending a tyranny such as Hussein's. Other less deadly and less destructive alternatives always exist. The war in Iraq may have been within the strategic or economic interests of the United States – that remains to be seen – but it signaled a contempt for the most elementary precepts of international law.

At the time of our meeting in Coral Gables, the Iraq war was so fresh and so immediate that no judgment could be made as to how that war would be conducted and what strains, if any, it would place on principles of law in the domestic realm. But the record already established by the Afghanistan war and, more generally, by the war on terrorism was disturbing. The USA Patriot Act, proposed by the administration shortly after September 11, and immediately enacted by Congress, vastly increased the surveillance powers of the government.[7] The administration also subjected many non-citizens, especially those of Middle Eastern origin, to relentless questioning. Some were even arrested on the weakest of grounds and detained or deported.[8]

Most disturbing of all, the administration decided to treat prisoners of the Afghanistan war in ways that challenge the authority, indeed the responsibility, of the judiciary to safeguard the Constitution. These practices touch on themes central to my work and central to all the papers in this symposium, and more significantly, threaten one of the most cherished and elementary tenets of our legal system. The administration adopted a detention policy that puts the rule of law into question, and much to my astonishment, in a number of key tests this policy has been endorsed by the judiciary.

Habeas corpus is the historic means by which prisoners contest the constitutionality of their imprisonment. When the prisoner is being held by the United States government, the habeas writ must be sought in a federal court. On March 11, only ten days before we convened in Coral Gables, a unanimous panel of the Court of Appeals for the District of Columbia Circuit declared in *Al Odah v. United States* that no federal court could entertain the writ on behalf of a group of prisoners from the Afghanistan war who were held by the United States at Guantánamo

7. *See* Elaine Scarry, *Resolving to Resist*, BOSTON REV., Feb.-Mar. 2004, at 6.
8. *See* DAVID COLE, ENEMY ALIENS (2003).

Bay Naval Station.[9] The court denied them any opportunity whatsoever to contest the legality of their imprisonment by the United States.

All of the prisoners were captured by or turned over to the United States forces in the course of the Afghanistan war. Most were seized in Afghanistan, some in Pakistan. With the possible exception of one, who played no role in the court's reasoning, all the prisoners denied that they were soldiers of the Taliban or Al Qaeda, or that they committed any violent acts against the United States. They claimed that they were present in the region either for personal reasons (for example, to visit relatives or arrange for a marriage) or to provide humanitarian aid. They insisted that they were improperly seized, sometimes in a sweep of a village, sometimes by bounty seekers, who then turned them over to the Northern Alliance or the United States. The Court of Appeals assumed, as it must when considering objections to jurisdiction, that these factual claims were true. Thus, although all were aliens – the prisoners were nationals of either Australia, Britain, or Kuwait, all allies of the United States in the Afghanistan war – the court assumed that none was a combatant or even an enemy alien (a citizen of a nation with which the United States is at war).

The Court of Appeals viewed litigation challenging the constitutional validity of detention as a privilege, and limited the exercise of the privilege by aliens to those imprisoned within the territorial limits of the United States. It also ruled that Guantánamo was not within those limits. I find it odd to view litigation of this sort as a privilege. More is at stake than the liberty of the individual seeking the habeas writ. The United States is a government constituted by law, and a habeas corpus proceeding is a way of making certain that the government is acting within the limits of the law. Habeas serves a public, not just a private function. Accordingly, access to a court capable of granting the writ should not be viewed as a privilege belonging to some individual or class of individuals, but rather as a means of enabling the judiciary to perform a solemn duty – ensuring that the government is acting within the terms of the Constitution.

The circuit court also erred when it ruled that Guantánamo was not within the territorial limits of the United States. The limits of the United States extend to the territories over which it exercises sovereignty, and surely the United States exercises practical, if not formal, sovereignty over the territory occupied by the Guantánamo Bay Naval Station. Sovereignty means supreme dominion, and that is precisely what the United States has in Guantánamo.

9. *See* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

The Guantánamo Bay Naval Station is a 45-square-mile area on the southeastern coast of Cuba. It has been in the possession of the United States ever since the Spanish-American War of 1898, when Spanish dominion over the island was brought to an end. As a purely formal matter, the United States was given possession of the territory in a 1903 lease (later modified in 1934), but it is a lease without a term. The lease provides that "so long as the United States of America shall not abandon the said naval station of Guantánamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has . . . ."[10] Each year the United States tenders the rent, approximately $4000, but the Castro government has refused to accept it for the last forty years. The naval station is separated from the rest of Cuba by an extensive fencing system. It has its own stores, including a McDonald's and a Baskin-Robbins. With the exception of a handful of elderly Cuban employees, holdovers from another era, who enter the base for work, there is no exchange between the base and the rest of the island.

In support of its decision, the Court of Appeals drew an analogy between aliens in Guantánamo and those held in some foreign country. It noted that habeas proceedings in a federal court could not be commenced on behalf of an alien who might be held by agents of the United States in a foreign country because the Bill of Rights affords no protection to such persons. It then concluded that the same rule should apply to aliens held at Guantánamo. Because I view the Constitution more as a constraint on the government than as a scheme that distributes benefits to certain privileged categories of persons, I question the premise upon which the analogy rests. But even accepting that premise, the Court of Appeals erred in overlooking a crucial distinction between the prisoners in Guantánamo and those held by United States agents in, for example, France or Mexico. The alien held by the United States in a foreign country may seek relief in the courts of that country and may invoke its laws or even those of the United States to contest the validity of his detention. To what courts might the prisoners in Guantánamo turn if not to those of the United States?

Al Odah denied aliens held in Guantánamo the right ever to make their case – that they were not soldiers but humanitarian workers or in the region for purely personal reasons and thus were being held illegally – in the only court that might have jurisdiction to hear that claim. *Al Odah* created what an English jurist has called a "legal black hole."[11]

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10. Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934, U.S.-Cuba, art. III, T.S. No. 866.

11. *See* R. on the Application of Abbasi & Anor. v. Sec'y of State for Foreign &

The court's position, I suspect, was not derived from a proper regard for the notion of sovereignty but rather sprang from a fear of interfering with the executive in the conduct of the Afghanistan war or, for that matter, any war. A similar dynamic led the Court of Appeals for the Fourth Circuit in *Hamdi v. Rumsfeld*, decided only two months before, on January 8, 2003, to shield the government from having to explain and justify its detention of another prisoner seized in the course of the Afghanistan war.[12] This time, however, the prisoner – Yaser Esam Hamdi – was an American citizen who was held not in Guantánamo, but in Norfolk, Virginia.

Hamdi was born in Baton Rouge, Louisiana, and at the time of his capture in Afghanistan was in his twenties. He was seized by the Northern Alliance and then turned over to the United States forces. He was initially held by the United States in Kandahar, then transferred to Guantánamo, and finally moved to the United States Naval Brig off the coast of Norfolk. Like the prisoners in Guantánamo, he was held incommunicado, but Hamdi's father learned of his detention and, acting on his behalf, brought a habeas proceeding to contest the legality of the detention. Hamdi was not charged with a crime. Although the United States held him as an enemy combatant, the petition filed on his behalf denied that he had fought for the Taliban or Al Qaeda and maintained that it was a denial of due process of law to detain him. Not everyone in Afghanistan, not even every American in Afghanistan, is an enemy combatant. As the petitioners explained in *Al Odah*, some go for personal or humanitarian reasons and may be improperly seized by the United States or its allies.

According to the government, anyone who fights against the United States stands outside the protection of the Constitution. He can be held incommunicado, denied the assistance of counsel, and interrogated in ways manifestly coercive. He need never be charged with a crime. Some may question whether the United States can ever treat an American citizen or, for that matter, any human being in such a way. Before even reaching that question, however, some judgment needs to be made as to whether the person being held – citizen or not – is in fact an enemy combatant, for that is the fact upon which the right of the government to detain him hinges. Hamdi's status as a combatant – contested in the habeas petition – is akin to a jurisdictional fact, and must be decided by a federal court in its role as the ultimate guardian of the Constitution. A

Commonwealth Affairs, [2002] EWCA Civ 1598, para. 64 (U.K. Sup. Ct. Judicature, (C.A.), Nov. 6, 2002), http://www.bailii.org/ew/cases/EWCA/Civ/2002/1598.html.

12. *See* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

federal court must assume responsibility for Hamdi's status and hear facts sufficient for it to assume responsibility for that judgment.

Initially, the government refused to respond on the merits to Hamdi's petition. This was deemed unacceptable by both the District Court and the Court of Appeals.[13] On remand, the government filed a motion to dismiss the petition and attached an affidavit that addressed the question of Hamdi's status as a combatant. The affidavit was sworn to and signed by an official in the Department of Defense named Michael Mobbs, who was Special Advisor to the Undersecretary of Defense for Policy. Mobbs did not indicate the sources of his information. He nonetheless declared that the military determined that Hamdi had traveled to Afghanistan in July or August 2001 and that he thereafter affiliated with the Taliban and received weapons training. Mobbs also stated in his affidavit that Hamdi had been engaged in a battle with the Northern Alliance and that he was taken into custody, with an AK-47 in his possession, when his unit surrendered. The affidavit described the transfer of Hamdi from one prison to another, and concluded by saying that interviews with Hamdi confirmed the details of his capture.

A hearing was then held before District Judge Robert G. Doumar on the sufficiency of the Mobbs affidavit. In the course of that hearing, Judge Doumar expressed his view – the basis for that view is not at all clear to me – that Hamdi had a firearm at the time of his capture and that he had originally gone to Afghanistan in July or August 2001 to join the Taliban. Judge Doumar made no written findings on these issues and, even more significantly, expressed no view as to whether Hamdi had fought against the United States following the invasion in October 2001. Judge Doumar believed that the claim of the government that Hamdi had fought against the United States was still very much in dispute, and ruled that some kind of hearing on that issue was necessary. He also ruled that in preparation for that hearing, the government had to turn over copies of Hamdi's statements and notes taken from interviews, the names and location of all those who questioned Hamdi, and any statements made by members of the Northern Alliance concerning the capture of Hamdi.

The Court of Appeals would have none of this. In an opinion by Chief Judge J. Harvie Wilkinson, the court held that the Mobbs affidavit is in and of itself sufficient to establish that Hamdi is an enemy combatant and that no further inquiry is necessary. Accordingly, it refused to allow Hamdi to appear in court to contest Mobbs's affidavit. It relieved Mobbs of the obligation to take the witness stand, either to repeat his sworn statement in open court or to be questioned by Hamdi's lawyers

13. *See* Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002).

or the trial judge. It did not allow Hamdi's lawyers to engage in any discovery whatsoever or to consult with Hamdi himself. Although the Fourth Circuit in *Hamdi* went a step beyond the D.C. Circuit in *Al Odah* – it at least took jurisdiction and required a response to the habeas petition by the government – it also repudiated the most elementary understanding of the judiciary's responsibility under the Constitution.

War is a perilous undertaking for all involved, and requires swift and decisive action by those in charge of field operations. Some deference must be given to the executive in the conduct of war, including its judgment as to whom to detain as a prisoner of war. This deference can be reflected in the kind of hearing that is held, the scope of discovery, and perhaps most significantly, the standard of review that is applied to judge the government's action. The executive might be required to show only, as the government itself proposed, that there is some evidence for detaining the individual as an enemy combatant. However, the Fourth Circuit specifically rejected even this lax standard of review because it presupposes some factual inquiry as to the prisoner's status. Without such an inquiry, it is impossible to determine whether there is any evidence to detain the prisoner.

Although affidavits are often used in civil litigation, the Mobbs affidavit could not be regarded as supplying the kind of evidence that might justify imprisonment. Commonly, affidavits are used in summary judgment practice, but only to show that there is no genuine issue of material fact, never to resolve a contested issue of fact. Moreover, the party opposing the motion for summary judgment always has an opportunity to respond to whatever affidavit may be filed in support of the motion. The affidavits used in support of a motion for summary judgment are generally confined to statements that would be admissible as testimony at trial – hardly a standard that the Mobbs affidavit, in part based on unknown sources and multiple levels of hearsay, could satisfy.

Similarly, although interlocutory injunctions are often based on affidavits, such a practice is premised on the assumption that there is no opportunity whatsoever to hold an evidentiary hearing. In addition, interlocutory injunctions are strictly limited as to time – as a general matter temporary restraining orders last for ten days, plus one renewal, and preliminary injunctions are in force only for the pendency of the trial for permanent relief. The Mobbs affidavit – seeking to justify the continued imprisonment of Hamdi and sworn to by an official readily available to testify – cannot reap the benefit of these rules, even by analogy. Oddly, the government proposed that its action be judged by the some evidence rule, but because it stood entirely on the Mobbs affidavit it could not have met that standard.

Admittedly, the line between a highly deferential standard of review – some evidence – and the position of the Fourth Circuit – essentially no review at all – may seem slight. There may be little difference in outcome. Yet I believe that there is a fundamental principle at stake. Under the some evidence standard, the executive is held accountable for its action and the judiciary discharges its basic responsibility to hold the government to the Constitution. Ideally, a court should make the determination whether Hamdi is an enemy combatant, for that is the justification the government offers for holding him and denying him the protection of the Bill of Rights. At the very least the government's claim should be tested in an evidentiary hearing. Requiring a finding that there is some evidence that Hamdi is an enemy combatant would be a step in the right direction. In contrast, under the no-review standard of the Fourth Circuit, which makes the unexamined affidavit of a government official in and of itself sufficient to deny the habeas writ, there is no basis within the law for responding to Hamdi's grievance and for justifying his continued detention.

Chief Judge Wilkinson stressed that Hamdi was seized in "a zone of active combat in a foreign theater of conflict."[14] This fact is undisputed, but it does not justify the refusal of the court to require a meaningful inquiry into Hamdi's status. Not everyone in Afghanistan, even those with guns, fought for the Taliban or Al Qaeda against the United States. Recognizing, however, that Hamdi was captured in an active war zone does require a more precise formulation of the limits of judicial responsibility, and an acknowledgment that the jurisdiction of federal courts does not extend to the battlefield. Although a person captured and held in a combat zone can contest the legality of his or her detention before, in the terms of the Third Geneva Convention, a competent tribunal, the tribunal can be a military one governed by military rules. A combat zone is ruled by a military government. Federal judges need not hold court in Afghanistan or any other battlefield. Nor can the relatives or friends of prisoners held in a combat zone seek habeas relief from a federal court sitting in the United States.

When, however, an individual is captured in an active combat zone, but later brought and held within the United States – which I contend includes Guantánamo – then the determination of his status as a combatant can and must be made by a federal court. Off hand, this may seem an arbitrary distinction, turning on the happenstance of where the prisoner is detained, but I do not think it is. Rather, it reflects the theory of our Constitution. Although the Bill of Rights does not rule the battlefield, the actions of the United States are governed by the whole of the

14. *Hamdi*, 316 F.3d at 459.

Constitution, including the Bill of Rights, wherever the government has absolute dominion. The task of the federal judiciary is to safeguard the Constitution, and to discharge this responsibility it must make judgments about the facts and hold the hearings necessary for this purpose.

The contested issue in *Hamdi* and *Al Odah* is whether the persons detained were soldiers of the Taliban. Put another way, the immediate issue in these cases is whether the prisoners were enemy combatants or, more simply, combatants. The Afghanistan war also brought into play a distinction between two types of combatants — lawful and unlawful. The distinction between lawful and unlawful combatants has its roots in the early twentieth century and customary international law, and was later codified in two international conventions – the Third and Fourth Geneva Conventions, both adopted in 1949.[15]

A lawful combatant is the ordinary soldier engaged in an international armed conflict, who, once captured, is given prisoner-of-war status. The Third Geneva Convention provides that a lawful combatant has no obligation to give any information to his captors other than his name, rank, date of birth, and serial number. A lawful combatant can be prosecuted for any war crimes he may commit, but not for the ordinary acts of war, for example, killing soldiers of a hostile army. Lawful combatants can expect to be repatriated at the end of the war. In contrast, the protections for unlawful combatants, for example, members of an irregular militia or volunteer corps, are significantly less extensive. The Fourth Geneva Convention provides that they be treated humanely, that their religious practices be respected, and that they not be tortured or mutilated, but they lack the strict protections of the Third Convention for lawful combatants. Even the minimal protections of the Fourth Convention are not, by the terms of the Convention itself, available to prisoners who are nationals of the party holding them.

At the time of the symposium, it was uncertain whether the unlawful combatant designation would be used by the administration in the conduct of the Iraq war. After all, the war was only two days old. This uncertainty lingers, especially in the case of Saddam Hussein, captured by United States forces in November 2003. However, the administration has not declared the prisoners of the Iraq war to be unlawful combatants. A different policy was pursued in the Afghanistan war, in which the President determined that all who fought for the Taliban or Al Qaeda are unlawful combatants.[16] This decision applied to the petitioners in *Al*

15. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

16. *See* Press Release, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), http://

Odah and *Hamdi*, and more generally, to all the prisoners – some 600 – who have been held in Guantánamo. Many have been interrogated relentlessly, some for sixteen hours a day, and plans have been set in motion to try them before military tribunals. The judges in these tribunals will be chosen by military authorities; defense counsel will be members of the armed forces (those who can afford to do so may also retain civilian counsel); and conversations with counsel will be monitored, presumably just for purposes of getting information about terrorism that the interrogation has not yielded or to prevent communications between the prisoner and terrorist organizations.

The legal tests of the unlawful combatant designation have been fragmentary. One test involved the detention of an American citizen – Jose Padilla – who is accused of planning, on behalf of Al Qaeda, to engage in terrorist acts in the United States, including the detonation of a device that would disperse radioactive material (a so-called dirty bomb). Upon arriving in Chicago from Pakistan on May 8, 2002, Padilla was arrested under a warrant requiring him to appear as a material witness before a grand jury convened in the Southern District of New York. He was transferred from Chicago to New York, and counsel was appointed to represent him. Soon after Padilla consulted with counsel, and the day before his court appearance, the Department of Defense took custody of him without notifying his counsel and transferred him to a naval brig in Charleston, South Carolina, where he was held incommunicado on the theory that he is an unlawful combatant.

Acting as Padilla's next friend, the counsel who had previously been appointed to represent him sought a writ of habeas corpus in the Southern District of New York. The government responded with an affidavit once again signed by Michael Mobbs. This time, Mobbs's affidavit detailed the basis of the claim concerning Padilla's affiliation with Al Qaeda and his plans to engage in acts of terrorism. As a substantive matter, District Judge Michael B. Mukasey was willing to assume that all operatives of Al Qaeda, even those who are American citizens, are not entitled to the protection afforded to lawful combatants. According to Mukasey, neither the Third Geneva Convention nor general principles of international law confer prisoner-of-war status on members of ter-

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www.whitehouse.gov/news/releases/2002/02/20020207-13.html. Al Qaeda is not a state, and thus not a party to the Geneva Conventions. For that reason, the President decided that the Al Qaeda fighters could not receive any of the protections of the Third Geneva Convention. The Convention is binding only if both parties to a conflict are signatories. Afghanistan is a party to the Geneva Conventions, and thus the Taliban, although never recognized by the United States as the lawful government of Afghanistan, is covered by the Conventions. But the President determined that the Taliban army did not satisfy the specific criteria established under the Third Convention for prisoner-of-war status.

roroist organizations such as Al Qaeda. They could be treated as unlawful combatants and could be detained indefinitely without ever being charged with a crime. But he insisted on the need to hold a hearing to determine whether Padilla was in fact an operative of Al Qaeda. In contrast to the Fourth Circuit in *Hamdi*, Judge Mukasey was not prepared to make the Mobbs affidavit dispositive. The deference that the executive properly deserved was to be reflected in the standard of review – once again, some evidence. Judge Mukasey required that an evidentiary hearing be held on the habeas corpus petition and that counsel be given access to Padilla for purposes of preparing for that hearing.

This order was first entered on December 4, 2002.[17] By March 11, 2003, shortly before the symposium, Judge Mukasey found it necessary to reissue that order. The government had not yet allowed counsel to consult with Padilla. Defending its recalcitrance, the government submitted an affidavit by the Director of the Defense Intelligence Agency, Vice Admiral Lowell E. Jacoby, claiming that the total isolation of Padilla for this extended period – he had already been held incommunicado for ten months – was necessary to cultivate in Padilla a complete sense of dependency upon his interrogators and to convince him of the utter hopelessness of his situation. The District Court was unwilling to acquiesce to this demand – certainly an affront to the basic American tradition against coerced confessions. Judge Mukasey once again explained why Padilla had a right to present facts at the habeas corpus hearing and why access to counsel was necessary for that purpose. He reissued his previous order.[18]

The government immediately appealed. On December 18, 2003, the Second Circuit went one step beyond Judge Mukasey.[19] It repudiated Judge Mukasey's substantive theory and held that even if the government's allegations concerning Padilla were true, he could not be detained as a prisoner without being formally charged with a violation of some federal criminal statute. The Second Circuit relied on 18 U.S.C. § 4001(a), which provides that no United States citizen can be detained without specific authorization by Congress. Disagreeing with Judge Mukasey, the Second Circuit held that the resolution permitting the use of force to fight the war on terrorism – the resolution that had been treated as constituting the declaration of war against Afghanistan – did not provide the authorization required by Section 4001(a). Although this ruling denied the government the prerogatives it sought by classifying Padilla as an unlawful enemy combatant, it should be emphasized

17. *See* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

18. *See* Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

19. *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003).

that Padilla is an American citizen captured not in the battlefield but at a Chicago airport and held in South Carolina. The Second Circuit's ruling does not apply to non-citizens, or even to Americans captured in Afghanistan or any other battlefield.

A second test of the government's position regarding unlawful combatants occurred in the case of another American citizen – John Walker Lindh – who was seized in Afghanistan.[20] Unlike Hamdi or the petitioners in *Al Odah*, Lindh acknowledged that he was a soldier of the Taliban. He denied that he had anything to do with Al Qaeda, and the government concluded that little was to be gained by interrogating him in the style of Padilla, Hamdi, or the detainees in Guantánamo. Instead, the government chose to try him for various federal crimes – most notably, conspiracy to kill American nationals – and selected as its venue the United States District Court for the Eastern District of Virginia. Eventually, he was allowed to consult with counsel.

In this case, the government deployed the unlawful combatant category to get out from under the principle that "it is no 'crime' to be a soldier"[21] – lawful combatants cannot be tried for ordinary acts of violence during military operations, but unlawful combatants can. Attorneys for Lindh denied that he was an unlawful combatant, and on that ground moved to dismiss the charge of conspiring to kill American nationals. The motion was denied. Lindh then pleaded guilty to lesser charges – providing services to the Taliban and carrying explosives during the commission of a felony – and was sentenced to twenty years in prison.[22]

Like Damocles's sword, the unlawful enemy combatant designation and the judicial endorsement of it will remain over Lindh's head until the day he dies. The predicate for the criminal charge was that Lindh is an unlawful combatant. So if the plea agreement is challenged and set aside, or if it is determined that Lindh breached his obligations under the agreement and the government is thus freed of its obligations under it, the government can pursue the options it originally had by virtue of Lindh's status as an unlawful combatant. It can go forward with the criminal prosecution for his combat activities in Afghanistan, try him for those activities before a military tribunal at risk of execution, or hold him incommunicado indefinitely.

Similar dangers are present even if the plea agreement remains in

20. *See* United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002).

21. Johnson v. Eisentrager, 339 U.S. 763, 793 (1950) (Black, J., dissenting) (citing *Ex parte* Quirin, 317 U.S. 1, 30-31 (1942)).

22. Plea Agreement, United States v. Lindh, (E.D. Va. 2002) (No. 02-37A), http://www.usdoj.gov/ag/pleaagreement.htm.

force. In paragraph 21 of the agreement, the government renounced any right it has to treat Lindh as an unlawful combatant, but that provision contains one notable, indeed astonishing, limitation. It permits the government to treat Lindh as an unlawful combatant for his combat activities in Afghanistan if, at any time during the rest of his life, Lindh violates either of two federal criminal statutes. One statute, the scope of which was enlarged by the USA Patriot Act, defines the federal crime of terrorism; the other prohibits trade and financial transactions with a nation against whom the President has declared a national emergency and imposed a boycott. The determination that Lindh has violated either of these statutes, and the resultant reinstitution of his unlawful combatant status, is, according to paragraph 21, to be made by the government, not a court. Even after the government makes this determination, presumably Lindh cannot be prosecuted in federal court for his combat activities in Afghanistan; under the plea agreement, all the charges other than the ones for which he was sentenced were dismissed. But the government can pursue the other strategies it had previously agreed to forgo – trying Lindh before a military tribunal at risk of execution for having fought for the Taliban or, perhaps more plausibly, holding him incommunicado indefinitely.

In denying Lindh's initial motion to dismiss, District Judge T.S. Ellis, III invoked the definition of lawful combatants set forth in Article 4 of the Third Geneva Convention.[23] He operated on the premise that a combatant who does not meet this definition would be deprived of the protection of that Convention and treated as an unlawful combatant, thereby receiving only the minimal protection of the Fourth Convention.

Actually, Article 4 of the Third Convention establishes several cat-

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23. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 135. The pertinent provisions of Article 4 are:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.
>
> (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

egories of lawful combatants. According to Section 1 of Article 4, members of the armed forces of a party to a conflict are, without anything more, treated as lawful combatants. In Section 3, the same rule is applied even when the state detaining the prisoners does not formally recognize the government to which the prisoners give their allegiance. Four criteria are, however, set forth in Section 2 of Article 4 for determining whether members of a militia or volunteer corps not part of the armed forces of a party to a conflict are lawful combatants. That section provides that members of a militia or volunteer corps not part of the armed forces shall be treated as lawful combatants if the militia or volunteer corps (1) is commanded by a person responsible for his subordinates; (2) wears uniforms or an insignia recognizable at a distance; (3) carries arms openly; and (4) conducts its operations in accordance with the laws and customs of war.

Off-hand, it would seem that Lindh was a lawful combatant simply by virtue of the fact that he was a member of the Taliban army. Under this approach, he would fall within Section 3, as opposed to Section 1, because the United States never recognized the Taliban. In any event, there would be no need to make the inquiry called for in Section 2. But Judge Ellis rejected this approach. He held that "all armed forces or militias, regular and irregular, must meet the four criteria" of Section 2 if their members are to be treated as lawful combatants, thereby obliterating the distinction between Sections 1 and 3 on the one hand, and Section 2 on the other.[24] Not only does this ruling violate the express terms of the Third Convention, but it is also at odds with the humanitarian purposes of the Convention. The Third Convention seeks to establish a general rule endowing the members of the armed forces of a party to a conflict or militias that are part of the armed forces of that party with lawful combatant status. Granted, a militia that otherwise would fall within Section 2 should not be entitled to the benefit of Sections 1 or 3 simply by calling itself an armed force. But the responsibility is on the court to determine whether the combatants in fact fall into those sections. It is precisely this inquiry that Judge Ellis failed to undertake.

When it came time to apply the four criteria of Section 2, Judge Ellis did not make his judgment on the basis of what Lindh or his unit or the militia of which he was a part did. Rather, he made a judgment about what the Taliban army did in its entirety, and then applied that judgment to everyone who fought for the Taliban, including Lindh. This blanket approach compounds Judge Ellis's initial error – subjecting regular armed forces to the four criteria of Section 2 – for it does not permit

24. *Lindh*, 212 F. Supp. 2d at 557 n.35 ("Thus, all armed forces or militias, regular and irregular, must meet the four criteria if their members are to receive combatant immunity.").

any distinction among the various units that comprise the fighting force of a nation at war. Once again, such an approach contravenes the humanitarian purposes of the Geneva Convention.

The evidence that Judge Ellis marshaled in support of his conclusion about the Taliban also seems questionable. There was no contention that the Taliban carried concealed weapons. Based on two secondary sources, one a book published in 1999, the other an October 26, 2001, article in *The Wall Street Journal*, Judge Ellis concluded that Taliban soldiers did not typically wear uniforms or insignias and further that the Taliban army had no internal system of military command and control. This last conclusion does not seem entirely plausible, but putting that concern to one side, the case for classifying the entire Taliban army as consisting of unlawful combatants because they lacked uniforms or a command structure still seems strained.

As a purely formal matter, the Section 2 criteria are stated in the conjunctive, which means that by proving that the Taliban fail to satisfy any single criterion – no uniform or no command structure – grounds would be established for classifying the Taliban as unlawful combatants. This wording, however, is derived from the fact that Section 2 seeks to determine whether a militia that is not part of the armed forces should be given the same status that the armed forces receive under either Section 1 or 3. But if, as Judge Ellis holds, the criteria are to be used more globally, to determine whether members of any armed forces are to be treated as lawful combatants, then it would be more appropriate to apply the criteria set forth in Section 2 in a way that reflects the underlying purposes of the Third Convention and a proper understanding of what turns on the classification. As used by the United States, the unlawful-combatant designation gives the nation holding the prisoner vast, almost boundless power over him, and it would seem odd that such power can derive simply from the fact that the Taliban lacked uniforms or an appropriate command and control system. It must also presuppose that the Taliban army failed to conduct their operations in accordance with the laws and customs of war or, put more simply, that they were guilty of war crimes.

Judge Ellis did in fact conclude that "the Taliban regularly targeted civilian populations."[25] Yet he cites as his only evidence two books not about the conduct of the war or how the Taliban fought, but about how the Taliban came to power. Such an approach has broad and sweeping implications – probably every tyrant targets civilians in his drive to seize and maintain power – and is alien to the very purposes of the Geneva Conventions, which were intended, after all, to temper the treatment of

25. *Id.* at 558.

prisoners. At the heart of the Geneva Conventions is a concern with the way wars are fought, not how the governments at war obtained their power. Under Section 2, lawful combatant status requires that the militia conduct its "operations" in accordance with the laws and customs of war, and the word "operations" should have been construed with this purpose in mind.

What moved Judge Ellis was not, I believe, his tortured and strikingly unpersuasive application of the Third Geneva Convention, but the determination of the President that all those who resisted the United States in Afghanistan were unlawful combatants. Judge Ellis acknowledged the President's decision, and said that it was entitled to great deference, though he was meticulous in declaring a limit to this deference. As he put it, "Conclusive deference, which amounts to judicial abstention, is plainly inappropriate."[26] Yet I am left with the unmistakable impression that Judge Ellis did exactly what he said he should not do. He allowed the President's decision to serve as a substitute for his own independent judgment. He treated the President's decision, much like the Mobbs affidavit in *Hamdi*, as sufficient in itself to determine the legality of the executive action. In doing so Judge Ellis in *Lindh*, much like the Fourth Circuit in *Hamdi*, abdicated his responsibility under the Constitution.

Such abdication has not been confined to the disposition of claims by persons captured on the battlefield. In October 2002, the Third Circuit acquiesced in a new deportation program of the Attorney General that was justified in terms of war needs, though this time it was simply the ill-defined war on terrorism. The specific issue in this case – *North Jersey Media Group, Inc. v. Ashcroft*[27] – was whether newspapers or the public or even family or friends would be given access to deportation proceedings that had been designated by the Attorney General as "special interest" cases. The Attorney General feared that the access of the the press or public might alert terrorists to the investigative tactics of the government or betray the precise knowledge that the government possessed.

The newspapers acknowledged that the right of access they claimed was only a qualified right that can be defeated by a special showing. In this context, acknowledging a right of access as a qualified right would allow the government to make a showing before the presiding judge in the deportation proceeding that special circumstances – including national security concerns – warranted closure. The presiding judge might of course agree with the government, but even if he or she did, the

26. *Id.* at 556-57.

27. 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

judge would be assuming responsibility for the closure. The Third Circuit, however, took that decision away from the individual judge by holding that the very designation of a national security interest defeated the right of access. The blanket judgment of the Third Circuit endowed the Attorney General with the power to close deportation proceedings whenever he saw fit. There could be no particularized inquiry by a judge into the national security justification for closure in a specific case. Much like the Mobbs affidavit in *Hamdi* or the transfer of prisoners to Guantánamo, the Attorney General's designation brought the reason of the law to an end.

The tide may yet turn – let's hope so. The Sixth Circuit has reached a different conclusion than the Third Circuit on the question of public access to "special interest" deportation proceedings.[28] In the months following the symposium in Coral Gables, the Supreme Court agreed to review the *Al Odah*, *Hamdi*, and *Padilla* decisions.[29] On December 2, 2003, the day before filing its memorandum opposing the grant of the writ of certiorari in the *Hamdi* case, the government announced that it would, as a matter of discretion, allow the prisoner access to counsel subject to appropriate security restrictions.[30] It pursued a similar strategy in the *Padilla* case, though in that instance it made the announcement on February 11, 2004, when it filed its reply brief in support of its application for the writ of certiorari.[31] After the grant of the writ of certiorari in the *Al Odah* case, a panel of the Ninth Circuit found that Guantánamo was, in fact, within the sovereign jurisdiction of the United States.[32] Moreover, although it remains to be seen what the capture of Saddam Hussein and the occupation of Iraq will bring, it is noteworthy that the administration has not yet moved the Iraqi prisoners it has captured to Guantánamo or chosen to designate them en masse as unlawful combatants.

Still, the challenge to law in the post-September 11 era is unmistakable. The Iraq war stands as an affront to the international legal system, and as is evident in the cases upon which I remarked, a number of good and able judges have renounced their most basic responsibilities under the Constitution. War always poses a challenge to law. It involves a

28. Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

29. 124 S. Ct. 534 (2003) (Nos. 03-334, 03-343) (*Al Odah*); 124 S. Ct. 981 (2004) (No. 03-6696) (*Hamdi*); 124 S. Ct. 1353 (2004) (No. 03-1027) (*Padilla*).

30. News Release, DoD Announces Detainee Allowed Access To Lawyer (Dec. 2, 2003), http://www.defenselink.mil/releases/2003/nr20031202-0717.html.

31. News Release, Padilla Allowed Access To Lawyer (February 11, 2004), http://www.defenselink.mil/releases/2004/nr20040211-0341.html.

32. Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3568 (U.S. Mar 03, 2004) (No. 03-1245).

pursuit of interests through violence rather than reason and often excites base fears and passions. The wars in Afghanistan and Iraq, and the most shapeless of all wars – the war on terrorism – are not exceptions. A practice of lawlessness has grown in the shadow of these wars, and it poses a challenge for every law teacher.

The wars of the last two years have provoked protests and petitions, and, like the war in Vietnam, the Iraq war is likely to become the subject of national political contests. As citizens, we need to attend to such contests and make our views known, but never in a way that relieves us of our obligations as teachers of the law: We must stand within the law and test the government's actions by the law. Such an endeavor may lack the drama that the events of the day call for – it is detailed, patient work, fully based on reason – yet it may be our most enduring contribution.

Upon retiring from the Supreme Court, Thurgood Marshall was asked by a reporter how he wished to be remembered. Marshall answered with a spontaneity and immediacy that attested to the truth of what he was about to say: "He did what he could with what he had."[33] He understood himself and the magnitude of his achievement, and provided a lesson for us all.

33. *Excerpts from Marshall News Conference*, L.A. TIMES, June 29, 1991, at A23.