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Symposium: A Discussion of *Boumediene v. Bush*

THE ROLE OF THE COURTS IN THE WAR ON TERROR: THE INTERSECTION  
OF HYPERBOLE, MILITARY NECESSITY, AND JUDICIAL REVIEW

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Abstract: In its recent decision of *Boumediene v. Bush*, the Supreme Court invalidated the collective effort of the President and Congress to limit the ability of “enemy combatants” held by the United States to challenge the legality of their detention in Article III courts. While the majority opinion focused primarily on the scope of the constitutional habeas guarantee, it is impossible to ignore the reality that the issue that lay just below the surface was the legitimacy of subjecting individuals to “generational” detention based on an expansively applied definition of the term “enemy combatant.” Although the Court had four years earlier held that preventive detention based on such a designation was conceptually justified as a “fundamental and accepted incident of war,” it had also suggested that should the scope of that definition become disconnected from the customary concept of an enemy battlefield belligerent, this justification might erode. By providing Guantanamo detainees with the long-demanded opportunity to obtain judicial review of the legality of their detention, the Court has set in motion a process that will almost inevitably force the government to defend the scope of the “enemy combatant” definition it has relied on to justify the preventive detention of individuals who do not fall into the traditional realm of a battlefield belligerent. In so doing, the Court has set in motion a process that will finally bring to a head the legitimacy of applying detention authority derived from the long-established customary law of armed conflict in a context characterized by the hyperbolic designation of a “Global War.” Because the government will almost certainly now be forced to demonstrate \*18 how the scope of the “enemy combatant” definition relied on by the Combatant Status Review Tribunals in Guantanamo remains consistent with the law of armed conflict itself, the *Boumediene* opinion is not a catastrophic blow to the government's authority to detain terrorists who participate in hostilities against the United States. Instead, it has provided the opportunity and impetus for the government to finally reconcile its assertion of detention authority with the law upon which it purports to apply--the law of armed conflict.

### Introduction

The recent Supreme Court decision of *Boumediene v. Bush*<sup>1</sup> will no doubt be viewed as a major development in the reach of constitutional protections and the power of the Court to override the collective judgment of the political branches in national security matters.<sup>2</sup> While the long-term impact of this decision on both the reach of the writ of habeas corpus and doctrines of judicial deference to coordinate branches of government will emerge over time, one immediate impact is certain: detainees will have a judicial venue to challenge their designation as “enemy combatants” and the accordant deprivation of liberty resulting from that designation.<sup>3</sup> As the Supreme Court suggested, these challenges will likely focus on procedural aspects of status determinations, including sufficiency of evidence.<sup>4</sup> However, it is also likely that the definition of “enemy combatant” will find itself in the crosshairs of judicial scrutiny.

Judicial scrutiny of this definition may be considered essential to reconcile the expansive concept of a “Global War on Terror”<sup>5</sup> with the traditional authority to detain enemy belligerents captured in the context of \*19 an armed conflict.<sup>6</sup> The process of defining the critical term of “enemy combatant” actually began at the initial stages of judicial scrutiny of assertions of government wartime authority related to this “war.” In one of the first Supreme Court decisions to test the authority of the government to detain individuals captured in the context of the “Global War on Terror,” the Supreme Court concluded:

that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.<sup>7</sup>

With this conclusion, the Court ostensibly provided legal sanction for the detention of what the United States has labeled as “enemy combatants.”<sup>8</sup> As the Court recognized, detention of enemy belligerents was not, as some had presumed, contingent on establishing these individuals qualified as prisoners of war within the meaning of international law.<sup>9</sup> To the contrary, the Court apparently recognized that detention of a captured enemy warrior was a distinct legal question from that of status determinations. In short, the Court endorsed the invocation of the principle of military necessity as a legal justification for the “preventive detention” of a captured enemy warrior,<sup>10</sup> even one who cannot<sup>11</sup> or does \*20 not<sup>12</sup> qualify for status as a prisoner of war.

This conclusion did not seem troubling to the Court. As noted in the opinion, the majority of Justices were addressing only the detention authority applicable to traditional battlefield warriors. According to Justice O’Connor:

It has made clear, however, that, for purposes of this case, the “enemy combatant” that it is seeking to detain is an individual who, it alleges, was “part of or supporting forces hostile to the United States or coalition partners” in Afghanistan and who “engaged in an armed conflict against the United States” there . . . . We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.<sup>13</sup>

Ironically, by limiting its analysis to the “narrow” category of captured battlefield belligerents, the Court set the stage for future battles between the government and detainees falling outside that definition. The majority obviously understood this possibility and the significance and necessity of a more comprehensive definition of the critical term “enemy combatant,” but expected that such a definition would emerge from subsequent litigation:

Here the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant. The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.<sup>14</sup>

Contrary to this expectation, the lower courts did not provide such clarity in the years following the Hamdi decision. This was in large measure the result of efforts by the political branches to prevent judicial interference in the President’s definitional prerogative.<sup>15</sup> Instead, detainees \*21 and the government waged an ongoing battle over whether these lower courts could even entertain challenges to detention.<sup>16</sup>

These battles ultimately culminated in the Supreme Court’s opinion in *Boumediene v. Bush*.<sup>17</sup> Hailed by some as a seminal ratification of the fundamental rights of detainees in the hands of the government,<sup>18</sup> and derided by others as dangerous and unjustified judicial intervention in wartime detention decisions,<sup>19</sup> the *Boumediene* Court struck down provisions of the

Detainee Treatment Act restricting detainee access to habeas corpus.<sup>20</sup> However, nothing in that decision addressed the fundamental dilemma created when four years earlier the Court endorsed the detention of “enemy combatants.” Contrary to the Court’s expectation that a comprehensive definition of that term would evolve following the Hamdi decision, the definition remained the product of executive fiat and dangerously expansive.<sup>21</sup>

This unresolved issue—who could, as a matter of law, be designated an “enemy combatant” consistent with the law of armed conflict and therefore be subjected to de facto indefinite detention—was not the explicit subject of the Boumediene litigation. But it undoubtedly animated the Court’s treatment of the habeas access issue. As the Court noted, one of the factors that led it to hold the constitutional habeas access extended to the Guantanamo detainees was that many of them had been apprehended:

in places as far away from [the battlefield in Afghanistan] as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States. Each denies he is a member of the al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime \*22 that provided sanctuary for al Qaeda.<sup>22</sup>

These detainees had been designated “enemy combatants” even though they fell outside the narrow definition of “enemy combatant” endorsed in Hamdi. Thus, because that definition had been extended well beyond the traditional notion of battlefield belligerent, the Boumediene majority held that access to judicial review was essential to provide Guantanamo detainees a meaningful opportunity to challenge both the procedures leading to their designation as “enemy combatants,” and perhaps more importantly the definition itself.<sup>23</sup>

The Boumediene Court rejected the government’s assertion that detention of individuals it classifies as “enemy combatants” is beyond the scope of judicial review.<sup>24</sup> In so doing, the Court ostensibly acknowledged that the time had come for the judicial branch to assess whether the understanding of who may be detained in a “Global War” had in fact “unraveled.” In this regard, Boumediene is the manifestation of the prescient observation made in Hamdi:

[W]e understand Congress’ grant of authority for the use of “necessary and appropriate force” to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.<sup>25</sup>

Boumediene has thus set the stage for what may very well be the “final showdown” on the scope of this critical definition. For the first time since Hamdi, Guantanamo detainees have the opportunity to challenge whether the definition of “enemy combatant,” and their accordant detention, is justified as a “fundamental and accepted . . . incident to war.”<sup>26</sup> Detainees can (and undoubtedly will) also challenge the procedures for determining their status. However, the first step in resolving the legal question of the government’s authority to detain these individuals is to define the meaning of “enemy combatant.”

This process has in fact already begun. In the subsequent proceedings in the D.C. District Court triggered by the Supreme Court’s decision, Judge Leon recently tackled this issue head on, and adopted the following definition of “enemy combatant”:

\*23 “[E]nemy combatant” is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>27</sup>

As Judge Leon's order indicates, this definition is adopted from the existing definition promulgated for the Combatant Status Review Tribunal. However, as will be discussed in more detail below, because this definition seems to limit the scope of activity leading to the "enemy combatant" designation to "direct" support, it is arguably more restrictive than the definition that has evolved for use in making an "enemy combatant" designation because it may not include "material" support to these organizations. At a minimum, Judge Leon's order reveals that establishing the scope of this definition is indeed the critical first step to resolving questions of detention legality, and that the courts are now seized of this issue.

The prospect of a judicial determination of the scope of this definition, however, raises several significant concerns. These include not only the procedural issues discussed by the Court, and the separation of powers issues inherent in any judicial decision related to national security affairs, but also the most fundamental issue associated with post 9/11 detentions: what is an "enemy combatant"? This article will discuss this latter issue, and assess how the *Boumediene* decision may have cleared the way for what many observers believe is a long-overdue re-assessment of the legitimacy of the government's asserted authority to detain individuals pursuant to asserted wartime legal authority.

### The "War on Terror" and "Enemy Combatants": Limiting the Effect of Hyperbole

The proposition that an individual captured after engaging in hostile actions against U.S. or coalition forces is subject to detention is not novel. Contrary to a common misconception, the authority to detain such an individual is not derived from the Geneva Prisoner of War Convention.<sup>28</sup> While that treaty certainly implies authority to detain captured enemy \*24 personnel who qualify for status as prisoners of war,<sup>29</sup> it simply does not establish that authority. Instead, the authority to detain such an individual is derived from the customary international law principle of military necessity.<sup>30</sup> As was recently noted by Brigadier General Kenneth Watkin, the Judge Advocate General of the Canadian Defense Forces, "the authority to kill implies the authority to detain."<sup>31</sup> This statement was responsive to the question: "what is the legal basis for detentions in Afghanistan?" The General's simple response to this question reveals, in the opinion of the author, an invocation of the most fundamental principle of the law of armed conflict ("LOAC"):<sup>32</sup> the principle of military necessity.<sup>33</sup> This statement seemed to reflect the premise that detention of an opposition fighter--an individual subject to being killed pursuant to the LOAC--is a necessary incident of war. Accordingly, the authority to detain need not be traced to a statutory grant, a UN mandate, or a specific LOAC treaty provision. Instead, the authority is derived from the basic authority granted by the LOAC to take those measures necessary to bring about the prompt submission of an enemy; in short, from the principle of military necessity.

This logic was apparently at the core of the Hamdi Court's endorsement of detention of alleged "enemy combatants" not qualifying for status as prisoners of war.<sup>34</sup> However, as the Hamdi Court implied, the authority is directly tethered to the historical scope of the principle of military necessity as it applied to battlefield captures.<sup>35</sup> Nonetheless, the definition of "enemy combatant" utilized by the Department of Defense before and after this decision ostensibly extends beyond the type of battlefield belligerent the Court addressed. That definition is:

[A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities \*25 against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>36</sup>

This definition of "enemy combatant" appears to be founded on the notion of the battlefield belligerent central to the *Rasul* holding.<sup>37</sup> If, in application, this were the case, the definition would not seem particularly problematic. However, the first reference to providing "support" has obviously been applied broadly to include individuals providing "material" support to al

Qaeda or associated terrorist organizations. Accordingly, instead of this definition being restricted to battlefield operatives and individuals directly supporting those operatives in their belligerent endeavors on or in close proximity to the battlefield, it has been extended to individuals providing support to al Qaeda in areas far removed from any battlefield--at least in the sense that term has historically been understood--resulting in the detentions highlighted by Justice Kennedy in his opinion.<sup>38</sup>

Of course, if the struggle against transnational terrorism is characterized as a "Global War" and the government views the entire globe as the battlefield, such applications of this definition become theoretically justified. But this seems to be the precise source of the Court's consternation. Thus, the focus on individuals captured in places as distant from the battlefields of Afghanistan and Iraq as Bosnia and Gambia reveals that it is the intersection of the treatment of this struggle as a "Global War" with this definition of "enemy combatant" that is at the core of the Court's concern. In this regard, the majority seems to recognize that while the desire to prevent and punish the provision of such support is a logical government objective in the struggle against terror, this does not ipso facto result in the conclusion that persons providing such support are properly characterized as individuals subject to detention pursuant to the principle of military necessity.

The Boumediene majority focused on this expansive definition which ostensibly contributed to its decision to subject military detentions to the \*26 full scrutiny of judicial review.<sup>39</sup> It is of course possible that through this judicial review process the current expansive definition of "enemy combatant" will be ratified. However, this review process should lead the judiciary to demand that the government establish a logical nexus between the definition and the LOAC upon which it is ostensibly derived. If the government is put to this test, its ability to pass such a definition will depend in large measure on the definition of "material" the government adopts, or perhaps on whether it even commits to a definition. However, because the scope as applied to date **seems to extend far beyond any rational notion** of "battlefield," it is unlikely the government will concede to a narrowly tailored definition. If past practice is an indicator of the future government position, it will be virtually impossible to identify a source of either conventional or customary international law that treats providing general support to a belligerent force as synonymous with operating on behalf of that force.

This government reckoning is long overdue. Perhaps nothing has symbolized the transformation of the hyperbolic designation of a "Global War on Terror" into an operational reality more than the expansive reach of the "enemy combatant" definition. When combined with the indefinite nature of a "war" with a transnational terrorist entity, the result--at least for the Boumediene majority--was a risk of unjustified liberty deprivation incompatible with the fundamental principles of the Constitution.<sup>40</sup> While the Court's opinion focused primarily on procedural safeguards, any status determination review will invariably require assessment of the legality of the definition itself--an assessment the Fourth Circuit recognized several years ago.<sup>41</sup>

Any court called upon to review the legality of this definition will confront the two realities. First, the definition, at least as applied, remains as expansive today as it did at its inception. Second, it remains the product of unilateral executive action. Congress has never attempted to define that term for purposes of establishing who is subject to detention. While the \*27 **Military Commissions Act ("MCA")**<sup>42</sup> did provide a definition of "enemy combatant," it did so for the purpose of establishing jurisdiction of the tribunal, not for establishing who could be detained. Furthermore, that definition simply adopted the then-existing definition established by the President when it provided:

(A) The term 'unlawful enemy combatant' means --

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.<sup>43</sup>

Through this language, Congress essentially endorsed the President's authority to label any person suspected of providing support to al Qaeda as an "enemy combatant." Because the MCA can be viewed as at least implied endorsement of the President's definition of "enemy combatant," it might prove significant in any litigation on the legality of the definition. Unfortunately, the statute provides no insight into the key question related to such legality, namely how this broad definition is derived from the LOAC.

Until *Boumediene*, detainees had no viable means to challenge the legitimacy of this definition.<sup>44</sup> This has now changed. *Boumediene* has unlocked the proverbial courthouse door, and it is almost inevitable that detainees will now challenge not only the procedures that led to their designation as such but also the substantive definition of "enemy combatant" itself. If this process leads the judiciary to critique the scope of the current definition, providing the type of clarity the Hamdi Court anticipated more than four years ago, there is no guarantee that the outcome will alter the current scope of the term. However, there are indications that *Boumediene* has led the way for crafting a narrower definition.

**\*28** The first of these indicators is the Hamdi decision itself. Any court critiquing the permissible scope of the "enemy combatant" definition should logically begin its analysis by reference back to the "battlefield belligerent" definition adopted in Hamdi.<sup>45</sup> That definition was derived from the conclusion that detention of battlefield belligerents is a "fundamental and accepted . . . incident [of] war."<sup>46</sup> Accordingly, this would seem to be the requisite basis to justify any LOAC-based detention. If a reviewing court adopted this same test for assessing the legitimacy of a designation as an "enemy combatant," the government would have to establish that preventive detention based on activity outside the realm of operating as an opposition battlefield belligerent--such as providing support to a terrorist organization far removed from the battlefield--is also a "fundamental and accepted . . . incident [of] war."<sup>47</sup>

This is not to suggest that the definition of "enemy combatant" will likely be restricted to the Hamdi-type battlefield operative. As Judge Luttig noted when he addressed this issue in *Padilla v. Hanft*,<sup>48</sup> the World War II precedent of *Ex parte Quirin*<sup>49</sup> provides support for extending the definition of "enemy combatant" to belligerent operatives entering the United States. This is based on the logical assumption that such an operative becomes no less dangerous--and perhaps becomes even more dangerous--when removed from the conventional battlefield.<sup>50</sup> However, while this logical extension could legitimately apply to operatives, it becomes far more attenuated when applied to supporters. Analysis of this aspect of the current definition will demand a careful focus on the precise question of whether the support in question is tantamount to the type of direct operational or logistical support normally associated with the planning and execution of military operations.<sup>51</sup> **What seems particularly problematic about the \*29 current definition is that it draws its terminology from the criminal prohibition of providing material support to terrorism.**<sup>52</sup> **The scope of that prohibition clearly exceeds the type of operational support to military forces associated with combatant activities.**<sup>53</sup> However, whether the provision of support justifies some type of criminal sanction is not the determinative question for assessing LOAC derived detention authority. If Hamdi's quite proper link between the principle of military necessity and the legality of detention is the starting point, such a focus will make it difficult for the government to justify the expansive "enemy combatant" definition.

The second indicator that suggests a reviewing court will favor narrowing the definition of "enemy combatant" is the approach adopted by the Court when it struck down the President's order creating the military commissions in *Hamdan v. Rumsfeld*.<sup>54</sup>

While that decision did not address the definition of “enemy combatant,” it did provide insight into the Court's treatment of assertions of authority derived from the LOAC. A lengthy discussion of that case is beyond the scope of this Article.<sup>55</sup> However, at the core of that decision was a rejection of the invocation of LOAC \*30 authority without compliance with LOAC obligations.<sup>56</sup> Thus, like Hamdi, the Court was not unwilling to acknowledge the exercise of authority derived from the LOAC, but instead required that when the government invokes such authority, it is bound to comply with the limitations on the exercise of that authority established by the same source of law.

If this same philosophy animates lower courts as they address the scope of the “enemy combatant” definition, it would seem to favor the narrow definition endorsed in Hamdi and disfavor the broad definition currently in force. This is because the LOAC does not justify treating individuals providing the range of support ostensibly captured by the term “material support” as combatants,<sup>57</sup> and by extension as individuals subject to preventive detention. Perhaps another way to consider this is to start with the premise that the authority to kill an enemy belligerent implies the authority to detain. Accordingly, if there is no basis for asserting an authority to kill as a first resort as a means of subduing a suspected terrorist prior to capture, then applying the label of “enemy combatant” to him after capture to justify detention appears unjustified and improper.<sup>58</sup>

\*31 That a court might adopt such an intuitively logical approach to critiquing the scope of the definition of “enemy combatant” is not speculative. During oral argument before the Supreme Court in the case of *Rumsfeld v. Padilla*,<sup>59</sup> Justice Kennedy asserted this logic to challenge the Solicitor General's argument in support of Padilla's classification as an “enemy combatant”: JUSTICE KENNEDY: What rights does Padilla have, if any, in your view, that a belligerent who is apprehended on the battlefield does not have? Is--is Padilla just the same as someone you catch in Afghanistan?

MR. CLEMENT: I think that for the purposes of the question before this Court, the authority question, he is just the same.

It may be that at an appropriate juncture when the Court has before it the question of what procedures should be applied that you would want to apply different procedures in a case like this.

JUSTICE KENNEDY: Can you punish him?

MR. CLEMENT: Could we punish him? Certainly we could punish him if we decided to change the nature of our processing of him. I mean, as this Court made clear in *Quirin* --

JUSTICE KENNEDY: Could you shoot him when he got off the plane?

MR. CLEMENT: No, I don't think we could for good and sufficient reasons of disgression. [sic]

JUSTICE KENNEDY: Well, let me--I assume that you could shoot someone you captured on the field of battle.

MR. CLEMENT: Not after we captured them and brought them to safety. And I think, in every case there are rules of \*32 engagement, there are rules for the appropriate force that should be used and I don't know that there --

JUSTICE KENNEDY: If they're an unlawful belligerent?

MR. CLEMENT: Yes, even if they're an unlawful belligerent, once they're, I mean we couldn't take some belligerent, like Hamdi for example. Once he's been removed from the battlefield and is completely poses no threat unless he's released and use that kind of force on him --<sup>60</sup>

Justice Kennedy's intuition seemed to recognize the necessity of linking the definition of "enemy combatant" to the principle of military necessity. The Solicitor General's answers were non-responsive to the premise of the question, for Mr. Clement mixed pre-capture authority with post-capture treatment. Because of this, the government never answered the critical underlying question: is the authority to detain post-capture coextensive with the authority to kill pre-capture and therefore linked to the principle of military necessity?

It is unsurprising that the fact that this question has remained unanswered and laid just below the surface in Justice Kennedy's Boumediene opinion. Nor will it be surprising if a lower court called upon to adjudicate the legality of the definition of "enemy combatant" adopts the same logic reflected in Justice Kennedy's questions to Mr. Clement. Requiring the government to limit the definition of "enemy combatants" to only those individuals who by virtue of their conduct qualify as lawful military objectives<sup>61</sup> would produce a far more credible foundation for LOAC-based preventive detentions than the current material support standard. While this would not eliminate criticism of treating the struggle with transnational non-state organizations as an armed conflict triggering rights and obligations derived from the LOAC, it would at least exclude from the scope of LOAC-based detentions individuals whose type of support to such organizations was insufficient to render them the lawful objects of military attack.

In the opinion of the author, if the judicial process ignited by the Boumediene decision produces such an outcome, it will not only enhance the credibility of U.S. military detentions, but will respond to the concerns \*33 related to "generational detentions" reflected in Justice Kennedy's opinion. There is no reason why a terrorist operative detained because of his involvement in belligerent acts who is determined to continue to engage in such acts should be immune from such detention. Allowing such an individual to return to the "fight" endangers not only his life, but the lives of U.S. and coalition forces that may have to engage in combat activities against him again in the future. Detention of such an individual is therefore consistent with the principle of military necessity. But individuals whose conduct did not rise to the level of belligerent acts--who were not the lawful objects of attack prior to capture-- should not fall under the same detention authority. While an alternative legal framework for their detention may be necessary, it should be one based on either criminal sanction or a preventive detention regime providing substantially more procedural protections than the process adopted for military detentions.

This distinct treatment of individuals supporting terrorist organizations by different means is totally logical. In the case of the belligerent operative, it is the prior hostile conduct that results in the powerful presumption of the necessity of preventive detention. Therefore more limited procedural safeguards are justified, analogous to those provided to prisoners of war. In the case of the latter "supporting" actor, the presumption of the necessity for long term preventive detention dissipates because there may be other means available to prevent future provision of support, and because the nature of the support might not provide the same powerful inference of a desire to continue such activities in the future. Therefore, a more robust procedural mechanism becomes essential to protect such detainees from unjustified continued detention.

But all of this is contingent on a definition of "enemy combatant" properly linked to the principle of military necessity and derived from the traditional notion of a battlefield belligerent. What the Boumediene opinion exposes is that when these two categories of "terrorist operatives" are conflated into one broad definition of "enemy combatant," the dissipation of the presumption of justified detention for detainees on the periphery of the definition infects the justification for detaining individuals at the core of the definition. As a result, any individual so designated must be entitled to a robust judicial review of that designation in order to ensure that the net has not been improperly cast. One has to wonder whether the outcome of the case might have been different had the Court confronted a more narrowly tailored definition.

The question of who should be subject to military detention as an “enemy combatant” is obviously complex, implicating the powers of both political branches of government. In an armed conflict authorized by \*34 Congress,<sup>62</sup> the authority of the President acting as Commander in Chief to authorize detention of enemy belligerents is almost without dispute.<sup>63</sup> However, the Court has continually distinguished the exercise of that authority in an area of active combat operations with the continuation of detention in a mature detention location far removed from the field of battle, adopting a less deferential approach to the latter context.<sup>64</sup> The authority to detain captured opposition personnel also arguably implicates the congressional power to “make Rules concerning Captures on Land and Water.”<sup>65</sup> This might suggest that a statutory endorsement of the current definition of “enemy combatant” for the purpose of detention authority would produce greater judicial deference to the exercise of that authority. However, *Boumediene* seems to indicate a contrary conclusion because the Court was not in that case dealing with an exercise of unilateral executive authority, but the collective efforts of both Congress and the President.

It is undeniable that judicial scrutiny of the definition of “enemy combatant” and potential “re-definition” raises the complex question of whether this is an appropriate judicial function. While doctrines of judicial restraint such as abstention and political question have had seemingly no impact on the willingness of the Supreme Court to wade into “war on terror” waters, determining who is an enemy belligerent in such context is, in the view of many, far beyond the scope of judicial competence. In *Hamdi* the Court linked its definition to the Authorization for the Use of Military Force,<sup>66</sup> thereby characterizing it as an exercise in statutory interpretation. But since that time, the broad definition of “enemy combatant” used by the government has not only been established as executive policy, but has been implicitly endorsed by Congress in the MCA.<sup>67</sup>

It is therefore unsurprising that many view the “war on terror” decision by the Supreme Court as unprecedented judicial forays into the realm of wartime national security decisions. If there is merit to this argument, *Boumediene* must stand at the epitome of this trend, for it was the first of these cases in which the Court struck down the collective efforts \*35 of both political branches as unconstitutional. While there are competing views on the legitimacy of such a judicial role, it seems apparent that the inclination by the Court to intervene in these issues has been linked to the perceived overreaching by the government in its assertions of legal authority.

*Boumediene* can be understood as a manifestation of this dynamic in relation to the classification of detainees. Because the Court was obviously troubled by both the breadth of the “enemy combatant” definition and the procedures available to detainees to challenge this designation, it injected the judiciary into the classification equation. If this indeed reflects a new trend in judicial intervention in the realm of asserted wartime government decision-making, critique of this trend must begin by understanding the conditions set by the government through its own policies. From *Rasul* to *Boumediene*, the Court has confronted expansive assertions of LOAC authority that have triggered widespread condemnation based on assertions of government overreaching. In this regard, the deviation from historic deference to the political branches in such matters seems both understandable and justified. In large measure, the course of legality in the “war on terror” has been righted by this judicial intervention.

There is no reason to believe this process can't also produce a more legitimate detention authority. Confronting the challenge of striking the proper balance between liberty interests of detainees and national security interests of the government, reviewing courts will inevitably be compelled to turn to the law most applicable to the question of detaining a combatant, and that law is the LOAC. If they do so, they will in all probability gravitate towards the core definition of “enemy combatant” endorsed in *Hamdi*. That definition may ultimately expand to meet certain realities of terrorist operations against U.S. interests, as was recognized by Judge Luttig in his *Padilla* opinion when he noted that a terrorist in the U.S. with a mission of conducting hostile actions is no less an “enemy combatant” than his counterpart captured on a battlefield.<sup>68</sup> But even if this occurs, the key consideration will be evidence of engaging or planning to engage in belligerent action, not merely providing support to such action.

Where this process will lead is uncertain. However, one thing that is certain is that *Boumediene* has set in motion judicial review that will finally require the government to defend the scope of the “enemy combatant” definition used as the legal justification for detentions. Many may see this as an unjustified and dangerous judicial intervention in military affairs. However, it is naive to ignore the reality that the government’s own expansive interpretations of the authorities of war have triggered this backlash.

\*36 Frustration within the political branches to any Supreme Court decision striking down their collective efforts is inevitable. That such judicial action occurs in the realm of national security affairs can only exacerbate such frustration. But perhaps it would be more beneficial for the politicians responsible for crafting national security policy to contemplate the significance of the Court’s decision to strike down such a law. The inevitable uncertainty that has flowed from the decision of the United States to characterize the struggle against transnational terrorism as a “war” has produced two competing forces: the effort of the government to maximize the exercise of power to protect the nation; and the reaction of the courts to assertions of power that conflict with the core principles of our nation. The willingness for the Supreme Court to conclude that even the deference owed to collective action of the political branches is insufficient to justify certain decisions made in the name of national security is a powerful indication that it may be time to develop a more carefully tailored balance between authority and obligation.

A more robust judicial role in the process of establishing a legally acceptable definition of the critical term “enemy combatant” is now a certainty. That role will undoubtedly continue to generate controversy. But those inclined to condemn this role as illegitimate interference with a realm of affairs entrusted to the political branches should at least acknowledge that by acting as a check to government power, the courts are performing a function that has been an essential component of our democracy since its inception. After a six year saga of legal opinions, policy decisions, and ongoing detentions the government might finally be forced by this opinion and continuing judicial oversight to clearly articulate and defend the rationale for the expansive application of the term “enemy combatant” that is at the heart of the concept of a “Global War on Terror.” Such an outcome will only strengthen our efforts to defeat the terrorist threat and the principles of the nation we seek to defend.

#### Footnotes

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<sup>1</sup> 128 S. Ct. 2229 (2008).

<sup>2</sup> See Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 Const. Comment. (forthcoming Feb. 2009) (manuscript at 2, on file with author).

<sup>3</sup> See generally *Abdusemet v. Gates*, No. 07-1509, 2008 WL 4570305 (D.C. Cir. Sept. 12, 2008) (directing the government to release petitioners or grant a “Combatant Status Review Tribunal” immediately, pursuant to *Boumediene*); Respondents’ Motion to Dismiss Improper Respondents, *Kiyemba v. Bush*, No. 08-0442 (TFH) (D.D.C. Oct. 14, 2008) (“Petitioners ... seek[] writs of habeas corpus on grounds that they have been unlawfully detained.”).

<sup>4</sup> *Boumediene*, 128 S. Ct. at 2270.

<sup>5</sup> This term will be used throughout this article as a convenient reference for the variety of military operations conducted by the United States subsequent to September 11, 2001. Use of this term is not intended as a reflection on this author’s position on the legitimacy of characterizing these operations as a “war.” While the author acknowledges the hyperbolic nature of this term, it is intended to refer to combat military operations against armed and organized opposition groups.

<sup>6</sup> See Geneva Convention Relative to the Treatment of Prisoners of War art. 21, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

- 7 [Hamdi v. Rumsfeld](#), 542 U.S. 507, 518 (2004).
- 8 See Memorandum from Paul Wolfowitz, Sec'y of Defense, on Subject: Order Establishing Combatant Status Review Tribunal to the Sec'y of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. This order defines “enemy combatant” as follows:  
For purposes of this Order, the term ‘enemy combatant’ shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.  
Id.
- 9 See GPW, *supra* note 6, at art. 4; see, e.g., *Ex Parte Quirin*, 317 U.S. 1, 35 (1942) (“Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who, though combatants, do not wear ‘fixed and distinctive emblems.’”).
- 10 [Hamdi](#), 542 U.S. at 518. “The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’ The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.” Id. (quoting *Ex Parte Quirin*, 317 U.S. at 28, 30).
- 11 See GPW, *supra* note 6, at art. 4. If a combatant does not meet one of the six bases for prisoner of war status, he does not qualify as a prisoner of war. Id.
- 12 See *id.*
- 13 [Hamdi](#), 542 U.S. at 516 (quoting the record) (emphasis added).
- 14 Id. at 522 n.1.
- 15 See Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-06, 119 Stat. 2739, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_public\\_laws&docid=f:publ148.109.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ148.109.pdf).
- 16 E.g., [Hamdan v. Rumsfeld](#), 548 U.S. 557 (2006); [Parhat v. Gates](#), 532 F.3d 834 (D.C. Cir. 2008).
- 17 128 S. Ct. 2229 (2008).
- 18 See, e.g., Posting of Tony Mauro to BLT: The Blog of Legal Times, <http://legaltimes.typepad.com/blt/2008/06/roundup-of-reac.html> (June 12, 2008, 17:03 EST); Posting of Mourad to Balkinization, <http://balkin.blogspot.com/2008/06/early-summary-of-boumediene.html> (June 12, 2008, 14:22 EST).
- 19 See Paul A. Diller, [When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006](#), 61 SMU L. Rev. 281, 281, 283 (2008); see also [Boumediene](#), 128 S. Ct. at 2293-94 (Scalia, J., dissenting).
- 20 [Boumediene](#), 128 S. Ct. at 2275, 2277.
- 21 See Peter Jan Honigsberg, [Chasing “Enemy Combatants” and Circumventing International Law: A License for Sanctioned Abuse](#), 12 UCLA J. Int'l L. & Foreign Aff. 1, 1 (2007).
- 22 [Boumediene](#), 128 S. Ct. at 2241.
- 23 See *id.* at 2259-60, 2262.
- 24 Id. at 2261.
- 25 [Hamdi v. Rumsfeld](#), 542 U.S. 507, 521 (2004) (emphasis added).

- 26 *Id.* at 518.
- 27 *Boumediene v. Bush*, Civ. No. 04-1166 (RJL), at 3-4 (D.D.C., Oct. 27, 2008), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/10/boumediene-order-10-27-08.pdf>.
- 28 The actual title of the treaty is: The Geneva Convention Relative to the Treatment of Prisoners of War. See *supra* note 6, reprinted in Department of the Army, *Treaties Governing Land Warfare* (DA Pam. 27-1) (Dec. 1956) [hereinafter DA Pam. 27-1], available at [http://www.apd.army.mil/pdffiles/p27\\_1.pdf](http://www.apd.army.mil/pdffiles/p27_1.pdf).
- 29 See *id.* art. 118 (requiring that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities”). This article clearly infers that prisoners of war may be detained until the termination of hostilities. See *id.*
- 30 See generally A.P.V. Rogers, *Law on the Battlefield* 3-4 (2d ed., Juris Publishing 2004) (1996).
- 31 Brigadier Gen. Kenneth Watkin, J. Advocate Gen. for the Can. Def. Forces, Statement Delivered During a Symposium Held at the Naval War College in Newport, R.I. (July 2008).
- 32 The law of armed conflict, also known as the law of war or international humanitarian law, refers to the body of international treaty and customary law regulating the methods and means of warfare and establishing protections for the victims of war.
- 33 See Army Reg. 27-10, *Legal Services--Military Justice* (Nov. 26, 1968). See generally Rogers, *supra* note 30, at 3-4.
- 34 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 534-35 (2004).
- 35 See *id.* at 535.
- 36 See *supra* note 8, § (a).
- 37 *Rasul v. Bush*, 542 U.S. 466, 481 (2004).
- 38 Of course, it is conceivable that an individual captured in a place far removed from a battlefield is detained because of activities in an area of active hostilities. Such an outcome seems thoroughly consistent with both *Rasul* and *Quirin*. There is no reason why an individual established to have previously been engaged in active combat against U.S. or coalition forces should be immune from the designation as an “enemy combatant” merely because he or she was not captured until a later date in a different location. However, this is a far cry from detention on the basis of providing support to belligerent forces.
- 39 See *Boumediene v. Bush*, 128 S. Ct. 2229, 2259-62 (2008).
- 40 *Id.* at 2244. “[G]iven that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.” *Id.* at 2270.
- 41 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004). Judge Luttig identified the necessity of a judicially sanctioned comprehensive definition of “enemy combatant,” and he anticipated that this issue would reach the Supreme Court. *Padilla v. Hanft*, 432 F.3d 582, 585 (4th Cir. 2005); see also *Padilla v. Hanft*, 423 F.3d 386, 394 (4th Cir. 2005). His expectations were dashed when the government chose to transfer *Padilla* to civilian criminal jurisdiction, a move condemned by Judge Luttig as an effort to avoid resolution of this important issue. *Padilla*, 432 F.3d at 586.
- 42 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.
- 43 *Id.* at § 948(a).
- 44 See *Boumediene*, 128 S. Ct. at 2275-76 (holding that while detainees could challenge the evidence in support of their designation at the CSRT, there is no indication that the CSRT were empowered to entertain challenges to the definition of “enemy combatant” they were instructed to apply).

- 45 An example of this is Judge Luttig's opinion in *Hanft*. See generally *Hanft*, 423 F.3d at 392. Despite Judge Luttig's hopes, this case never reached the Supreme Court because of the government's decision to remove Padilla from military custody and try him for violations of the federal criminal code.
- 46 *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).
- 47 *Id.*
- 48 *Hanft*, 423 F.3d at 393.
- 49 317 U.S. 1 (1942).
- 50 See *Hanft*, 423 F.3d at 393.
- 51 See generally Nils Melzer, International Committee of the Red Cross, TMC Asser Institute, Third Expert Meeting on the Notion of Direct Participation in Hostilities 17-40 (2005), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-in-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2005\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-in-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf). The Drafters of the Commentary underlined that any interpretation of the notion of "direct participation" in hostilities should be narrow enough to protect civilians and maintain the meaning of the principle of distinction, while broad enough to meet the legitimate need of the armed forces to effectively respond to the means and methods of warfare that might be used by civilians. *Id.* In an attempt to balance these legitimate though opposing interests, the Commentary on the Additional Protocols of June 8, 1977 to the Geneva Conventions of Aug. 12, 1949 states that "[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place." Int'l Comm. of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 516 (Yves Sandoz et al. eds., 1987), available at <http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=470&t=com>; Jean-Francois Queguiner, Direct Participation in Hostilities Under International Humanitarian Law 2-3 (Program on Humanitarian Policy and Conflict Research at Harvard Univ., Working Paper, November, 2003), available at <http://www.ihlresearch.org/portal/ihli/alabama.php>. In other words, the behavior of a civilian must constitute a direct and immediate military threat to the adversary.
- 52 See 18 U.S.C. §2339B (Supp. 2008) (defining the offense for providing material support or resources to designated foreign service terrorist organizations); *id.* at §2339A (Supp. 2008) (defining the offense for providing material support to terrorists).
- 53 See generally *In re Terrorist Attacks of September 11, 2001*, 349 F. Supp. 2d 765, 799-801 (S.D.N.Y. 2005); *United States v. Lindh*, 212 F. Supp. 2d 541, 545-47 (E.D. Va. 2002).
- 54 548 U.S. 557, 567 (2006).
- 55 For a more detailed discussion of *Hamdan* see generally Geoffrey S. Corn, *Taking the Bitter with the Sweet: A Law of War Based Analysis of the Military Commission*, 35 *Stetson L. Rev.* 811 (2006); Amy Quimby, *Hamdan v. Rumsfeld: Reviewing the Geneva Convention Rights of the Unlawful Enemy Combatants Detained at Gitmo*, 17 *Widener L.J.* 317 (2007); Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 *Sup. Ct. Rev.* 1 (2007); Julia Y. Capozzi, *Hamdan v. Rumsfeld: A Short-Lived Decision?*, 28 *Whittier L. Rev.* 1303 (2007).
- 56 *Hamdan*, 548 U.S. at 628-33.
- 57 See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, at art. 44, available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>. See generally Geoffrey S. Corn, *Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions*, 2 *J. Nat'l Security Law & Pol'y* 257 (2008) (discussing distinction and civilian contractors).
- 58 It is a fundamental principle of the law of armed conflict that only members of the enemy armed forces and those places and things sufficiently associated with those armed forces may be made the lawful objects of attack by virtue of being military objectives. Pursuant to this same principle, civilians and civilian objects are presumptively immune from attack. This presumption is not,

however, conclusive, but rebuttable. When a civilian takes a “direct part in hostilities,” that immunity is divested and the civilian becomes a lawful object of attack for such time as he or she is a participant in hostilities. While the law of armed conflict is unclear on what acts constitute a direct part in hostilities, there is no uncertainty whatsoever that individuals who do not cross this line may not be made the objects of attack. See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 44, available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>.

Accordingly, civilians may, by virtue of their conduct, become military targets. In such circumstances, the use of deadly force against such an individual as a measure of first resort is legally permissible. If such an individual is subdued without the use of deadly force, detention is justified pursuant to the principle of military necessity, because the conduct that resulted in the divestment of immunity indicates the individual poses a threat of returning to hostile activity if released. In short, because the individual acted as an “enemy combatant,” detention is justified as a lesser form of restraint than the use of deadly force authority triggered by the participation in hostilities. This reveals why the prima facie “targetability” is a logical predicate for subsequent preventive detention based on the “enemy combatant” characterization. See generally Geoffrey S. Corn & Eric T. Jensen, Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror, *Temp. L. Rev.* (forthcoming 2008), available at <http://ssrn.com/abstract=1083849>; see also Geoffrey S. Corn and Eric T. Jensen, Transnational Armed Conflict: A 'Principled' Approach to the Regulation of Counter-Terror Combat Operations, *Israel L. Rev.* (forthcoming) (manuscript at 25-29, on file with author), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1256380](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1256380).

- 59 542 U.S. 426, 451-55 (2004) (Kennedy, J., concurring).
- 60 Transcript of Oral Argument, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), available at [http://www.oyez.org/cases/2000-2009/2003/2003\\_03\\_1027/argument/](http://www.oyez.org/cases/2000-2009/2003/2003_03_1027/argument/).
- 61 See Geoffrey S. Corn & Eric T. Jensen, Transnational Armed Conflict: A 'Principled' Approach to the Regulation of Counter-Terror Combat Operations, *Isr. L. Rev.* (forthcoming) (manuscript at 38, on file with author), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1256380](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1256380).
- 62 Authorization for Use of Military Force, *Pub. L. No. 107-40*, § 2, 115Stat.224 (2001).
- 63 *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004); *Ex parte Quirin*, 317 U.S. 1, 48 (1942).
- 64 *Boumediene v. Bush*, 128 S. Ct. 2229, 2258 (2008); *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004).
- 65 U.S. Const. art I, § 8, cl. 11.
- 66 Authorization for Use of Military Force § 2.
- 67 Military Commissions Act of 2006, *Pub. L. No. 109-366*, § 948(a), 120 Stat. 2600 (2006).
- 68 *Padilla v. Hanft*, 423 F.3d 386, 391-92 (4th Cir. 2005).