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RULE OF LAW

Judicial Overreach

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The basic principles of the law of war are immutable. Civilians should be protected in battle and cannot be deliberately attacked. Postwar occupation should shelter ongoing civilian life. And, of course, captured enemy personnel must be treated humanely, and given a fair trial on any charge of war crimes.

But major conflicts also pose new problems. Western democracies have had to update war's regulatory rules to fit new circumstances, by interpretation, distinction, or amendment. In World War II, the trial procedures used at Nuremberg were in tension with Arts. 63 and 64 of the 1929 Geneva Convention. The Allies were put to argue that an unconditional surrender was different from wartime capture, and so the Nazi leaders would not be covered by the 1929 pact. The postwar rebuilding of Germany and Japan, with new democratic institutions, was arguably in tension with the 1907 Hague Convention. But the collapse of the Axis, said the Allies, created a legal condition of debellatio -- or total defeat -- to which Hague occupation law should not apply.

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The interpretive problem for law-abiding democracies is how to hold true to the core principles that animate a treaty regime while working within a text that may not anticipate new problems. It would not surprise historians to discover that the treaty rules crafted for state-to-state wars do not always easily fit an unconventional conflict against a nonstate actor such as al Qaeda.

It has suddenly become an urgent question to ask who should make these necessary adaptations of the law of war. Last June, the Supreme Court ruled that the statutory writ of habeas corpus should extend to the Guantanamo Naval Station in Cuba. The right to petition a federal district court was accorded any captured prisoner who alleges that he was not a combatant at all, and that he was wrongly swept up in allied operations in Afghanistan or elsewhere. In the companion case involving Yaser Hamdi, a plurality of the Justices, led by Sandra Day O'Connor, seemed to invite the administration to convene military tribunals that could handle these questions of identity.

In compliance with the Court's ruling, the Bush administration has created a new Combatant Status Review Tribunal, to provide formal review of the identity and status of persons captured on the Afghan battlefield or elsewhere. A captured detainee can question witnesses before the Tribunal, call his own witnesses, and testify if he wishes. The decision on whether he is an enemy combatant is to be made by a "preponderance" of the evidence -- a traditional legal standard for status determinations. In addition, the administration has put in place a second Administrative Review Procedure to re-examine, at least annually, whether an adjudicated combatant can nonetheless safely be released. The combatant has the right to present and gather information,

including from his relatives and home state, to show that he poses no continuing threat, and he is given a summary of the government's information about future dangerousness.

This brings us to Salim Ahmed Hamdan, a Yemeni citizen captured in Afghanistan in late 2001. In a hearing on Oct. 3, 2004, Hamdan was found by a three-officer Combatant Status Review Tribunal to have been an enemy combatant who was "either a member of or affiliated with al Qaeda." Hamdan is also separately charged before a military commission with one count of war crimes, namely, criminal conspiracy to attack civilians and commit murder as an unprivileged belligerent. The criminal charge alleges that Hamdan was a bodyguard, driver and weapons handler for Osama bin Laden, and agreed to al Qaeda's criminal purposes to mount attacks against civilians and U.S. military targets.

Hamdan allegedly transferred weapons to the head of al Qaeda's security committee in Kandahar, and delivered weapons and ammunition to other al Qaeda members. He allegedly drove in the convoy that shepherded bin Laden out of harm's way on Sept. 11, 2001, and during the attack on the U.S. Embassies in East Africa in August 1998 helped the al Qaeda leader escape expected American retaliation. He allegedly trained at the al Farouq camp in Afghanistan, in the use of handguns, rifles and machine guns.

Hamdan's trial was slated to begin in December 2004. But a federal district judge in the District of Columbia has now used the writ of habeas corpus to enjoin the government from trying Hamdan on any criminal charge, arguing that procedures of the military commissions do not conform to the Third Geneva Convention because they are not the same as courts-martial.

The Commission's procedural rules respect the presumption of innocence, place the burden of proof on the government, require proof beyond a reasonable doubt, permit the defendant to call witnesses, require the government to produce any exculpatory evidence, and forbid any adverse inference to be drawn from a defendant's silence at trial. The Commission rules, revised in March 2002, were endorsed at the time by a panel of legal luminaries including former Nuremberg prosecutor and University of Chicago law professor Bernard Meltzer and former White House Counsel Lloyd Cutler. And the military commissions have an appellate panel that includes former Attorney General Griffin Bell and former Secretary of Transportation William T. Coleman Jr. -- who are among "the most distinguished civilian lawyers in the country," as the federal court concedes.

Yet the federal district court is unwilling to wait to see how the commission procedures are applied at trial, and how the appellate panel of the commission system opines on the matter.

The judge does not dispute that the Geneva Conventions draw an important distinction between lawful and unlawful combatants. Irregular combatants (such as saboteurs, spies and guerrillas) are accorded different protections because they fail a four-part test: They disguise themselves as civilians without distinguishing uniforms or insignia, fail to carry their arms openly, lack a responsible commander, and as a group, deliberately flout the laws of war. Lawful belligerency is also limited to combatants fighting for a state, rather than a private sponsor. At least in its attacks in East Africa and the U.S., al Qaeda was fighting as a private terrorist network.

The district judge finds no inherent fault with the procedure by which the administration's Status Review Tribunal designated Hamdan as an enemy combatant belonging to or affiliated with al Qaeda. But he cavils that the tribunal did not add a final phrase to say that Hamdan was an "unlawful" combatant.

A democracy is bound to respect the role of the judiciary. Still, judges sometimes get things wrong. In this case, the district judge's ruling is either wordplay, or a misunderstanding of the role of status review panels under the Third Geneva Convention.

The district court, which did not take any testimony on the point, may be unaware that only three countries have ever convened administrative status review panels under the Convention -- Canada, Britain and the U.S. It is thus difficult to pin down any "general international understanding" of Art. 5 of the Convention. U.S. Army regulation 190-8, used in conventional interstate wars, goes beyond the requirements of Art. 5. The Geneva Convention asks only for a "competent tribunal" to resolve any case of doubt about an individual's status. In Canada, a single military lawyer (or "judge advocate") sitting alone has been deemed sufficient to constitute such a tribunal. In the U.S.'s Combatant Status Review Procedure, the review panel requires three officers, including a judge advocate.

It is true that the individual combatant status review panels have not been invited to countermand the president's treaty interpretation that al Qaeda fighters do not qualify as lawful combatants under the Geneva Conventions. But this deference to the treaty interpretation of the commander in chief is accepted in conventional wars as well -- Geneva status tribunals look at the facts and circumstances of an individual case, but are bound by the executive's general understanding of treaty categories. In Vietnam, for example, the tribunals were given guidance by the Military Assistance Command on how to categorize combatants found to be Viet Cong irregulars, self-defense forces, and secret self-defense forces. It would be inappropriate to have varying groups of majors and colonels offering varying readings of the same treaty, if one values regular treatment.

Adam Roberts, professor of international relations at Oxford, makes a suggestion that a district judge might note. "In a struggle involving an organisation that plainly does not meet the criteria" of lawful combatants, he wrote in 2002, "and especially where, as with Al Qaeda, it is not in any sense a State, it may be reasonable to proclaim that captured members are presumed not to have PoW status." The judge may equally wish to take account of the advice of British law-of-war authority Col. GIAD Draper, who wrote in 1970 that "the Detaining Power seems to be the sole arbiter, in good faith, of whether a doubt occurs as to the status of the individual concerned." Francophone scholar Ameur Zemmali, now with the Red Cross, takes the same view in his scholarly work.

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Last June, in its habeas ruling, the Supreme Court delivered the message that executive power has limits, even in wartime, and that courts may seek to provide a remedy should things go badly out of balance. But there is a companion lesson of prudence. There are limits to what judges should seek to do. Applying and adapting the law of war to meet unprecedented challenges will depend upon sensible judgments that often must be made by the president. Changes in state practice, as much as formal negotiating processes, are the way in which customary law and treaty law are adapted to unanticipated circumstances.

Constitutional law scholar Alexander Bickel once famously remarked that the courts are the "least dangerous branch." In the common effort to prosecute a war, while respecting the fundamental rights of enemy combatants, one hopes that the courts abide by that assumption.

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