

Center for National Security Studies

Protecting civil liberties and human rights

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Enemy Combatants and Military Commissions: *What Should Congress Do?*

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(This memorandum is adapted from a longer article, “‘Enemy Combatants,’ The Constitution and the Administration’s ‘War on Terror’” published by the American Constitution Society and available at <http://www.acslaw.org/pdf/enemycombatants.pdf>)

Since the attacks of 9/11, the U.S. has seized hundreds of individuals – including two U.S. citizens – and claimed the power to hold them indefinitely, without charges, as “enemy combatants.” In June 2004, the Supreme Court decided three cases involving the two citizens and the detainees being held at Guantanamo Bay. While the Court did not answer all questions concerning the propriety of the detentions, it strongly reaffirmed the role of the judiciary in reviewing these detentions and Congress’ role in authorizing detentions.¹

The question now arises whether Congress needs to act as well. Of course, Congress cannot responsibly enact legislation on such complex and important issues involving both individual liberty and national security in a few weeks. However, Congress can engage in an orderly review of the issues, beginning with hearings, and address the following issues.

-- With respect to persons captured on the battlefield, Congress should consider establishing the procedures for determining their status as POWs, enemy combatants or innocent civilians.

-- With respect to persons captured on the battlefield and determined to be al Qaeda fighters, Congress should consider whether additional authorization is needed to detain them beyond the end of the hostilities in Afghanistan until the end of hostilities with al Qaeda.

-- Congress should determine the appropriate forum and procedures for trying persons for war crimes and related offenses, if such trials are to be conducted by the military. While the Defense Department is moving forward with prosecutions under the President’s Military Order, the military lawyers representing the detainees have made clear that they will challenge the commissions as unlawful, because they have not been authorized by statute. The commission

¹*Hamdi et al. v. Rumsfeld, Secretary of Defense, et al.*, No. 03-6696; *Rumsfeld, Secretary of Defense v. Padilla et al.*, No. 03-1027; *Rasul et al. v. Bush, President of the United States, et al.*, Nos. 03-334 and 03-343; all decided June 28, 2004. Briefs for these cases are available at http://www.jenner.com/news/news_item.asp?id=000012520724.

procedures also fail to meet constitutional due process requirements. Senators Leahy, Daschle and others introduced a bill in the last Congress (S. 22) which would provide for congressionally authorized trials by military commissions in accordance with due process requirements.

-- Congress should not take the constitutionally dubious step of authorizing that persons arrested in the U.S. be held without trial as enemy combatants. However, there is an important need for Congress to examine the conditions under which these individuals were held, especially in light of the disclosures of the interrogation memoranda.

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