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Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists

Peter Raven-Hansen*

On November 13, 2001, President George W. Bush sent tremors through the United States legal establishment by issuing an order authorizing military detention and trial by military commission of individuals whom the President believes to be members of Al Qaeda, international terrorists, or persons who have aided, abetted, or harbored such terrorists.¹ The November 13 Order contemplates detention without criminal indictment or any charges of wrongdoing, and trial by military commission without many of the protections afforded in criminal trials by the Fourth, Fifth, and Sixth Amendments (including trial by jury, open hearings, confrontation, and a neutral magistrate), and without any review by a civilian court. Since the November 13 Order appeared to create a parallel military universe in which individuals could be detained and tried inside the United States but outside its criminal justice system, and arguably outside the Constitution, it was greeted with alarm by civil libertarians as an assault on the rule of law.²

But the November 13 Order and its progeny challenge the rule of law not only by asserting rules for the detention and trial of alleged terrorists. Broadly conceived, the rule of law embodies not only rules of law, but also how such rules are made, what might be called the *rule of lawmaking*.³ The form of the November 13 Order (styled a

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1. Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism, Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001) (hereinafter Nov. 13 Order).

2. See, e.g., Memorandum from Timothy H. Edgar, Legislative Counsel, American Civil Liberties Union, to Interested Persons, Re: President Bush's Order Establishing Military Trials in Terrorism Cases (Nov. 29, 2001), available at <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9265&c=111>; Alliance for Justice, et. al., Statement in Opposition to the Use of the Military Commissions Authorized By President Bush and the Department of Justice (Jan. 2003), available at <http://www.cnss.org/somc.doc>; Report, Comm. on Military Affairs and Justice, Ass'n of the Bar of the City of New York, *Inter Arma Silent Leges: In Times of Armed Conflict, Should the Laws Be Silent?* (Dec. 2001), available at http://www.abcny.org/pdf/should_the_laws.pdf.

Three cases decided by the United States Supreme Court last term involved challenges to military detention of alleged combatants. See, e.g., *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004). The November 13 Order was not addressed in *Rasul*, and was not directly at issue in *Hamdi* or *Padilla*, but it rests on the same legal reasoning as the detentions challenged in the latter cases.

3. See, e.g., William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett,

“Military Order”), the way it was promulgated (without prior notice, or opportunity for legislative or public deliberation), and the procedures it spawned (by the subsequent promulgation of “Military Commission Orders” and “Instructions”) all posed challenges to the rule of lawmaking. Even if the November 13 Order’s rules for military detention and trial are lawful,⁴ a serious question remains whether any government that operates under the rule of law should make and declare such rules by military order, rather than by laws that are publicly deliberated, transparent, published, and judicially reviewable.⁵

In this essay, I assert that ours should not. Further, I suggest that the war on terrorism provides no reason to depart from the conventional rule of lawmaking—the procedure a government under the rule of law conventionally follows in making law. Instead, I argue that the exigencies of that war *especially* require observance of the rule of lawmaking when the executive asserts liberty—and life-threatening military powers at home.

Part I of this essay traces the procedural history of the Military Order and other closely related assertions of military authority, building on the excellent history compiled by Eugene Fidell through the summer of 2003.⁶ Part II briefly speculates how the November 13 Military Order, Military Commission Orders, and Military Commission Instructions might have been promulgated had the Administrative Procedure Act (APA) applied. Finally, Part III addresses two rebuttals to this line of thought: that military orders and their progeny are exempt from the APA procedures and that, in

Legislation and Statutory Interpretation 175–81 (2000) (explaining “due process of lawmaking”); Hans Linde, *Due Process of Lawmaking*, 55 Neb. L. Rev. 197 (1976); Laurence Tribe, *Structural Due Process*, 10 Harv. C.R.-C.L. L. Rev. 269 (1975).

4. The Court has not yet ruled on the legality of the November 13 Order, but the reasoning of *Hamdi* suggests that the Court would uphold the Order.

5. The Administrative Procedure Act sets out procedures for the making of legislative regulations by administrative agencies that have been delegated rulemaking authority. These include prior published notice, public comment, publication of a final rule with a statement of basis and purpose, delayed effective date, etc. 5 U.S.C. § 553(b) (2000). See *infra* Part II. Congress itself does not follow these same procedures, of course, but its process is substantially transparent, it often allows for public input, and its law is published.

6. Eugene R. Fidell, *Military Commissions & Administrative Law*, 6 Green Bag 379 (2003). My debt to Fidell will be apparent to anyone who reads his article. He has also continued to collect pertinent military authorities and commentary on the website of the National Institute of Military Justice, www.nimj.org, which remains the best single source for viewing all pertinent public information about asserted post 9/11 military detention and military commission authority. See also National Institute of Military Justice, *Military Commission Instructions Sourcebook* (2003).

any case, normal lawmaking procedures are impracticable in the national security emergency created by the 9/11 attacks.

I. THE MAKING OF THE MILITARY ORDER AND ITS PROGENY

A. *The November 13, 2001, Order*

The November 13 Military Order was issued without prior notice or opportunity for public comment. The internal administrative process for its issuance is still unknown, but reportedly two former senior officials in the Department of Justice first suggested that military commissions be used to try suspected terrorists.⁷ The Office of Legal Counsel was tasked with advising about the legality of this option, although its opinion has not yet been publicly disclosed.⁸ It would have been logical to have given military lawyers the same charge, if for no other reason than to take advantage of their extensive firsthand experience with courts-martial and to help them define the role that they would presumably be required to play under the November 13 Order. But after the Order was promulgated, media reports stated that their advice had either gone unsolicited or ignored in its drafting.⁹ In any case, it is also likely, based on the procedures used in formulating subsequent legally controversial Administration counter-terrorist initiatives, that any legal advice from the Office of Legal Counsel and the Department of Defense was channeled through and synthesized in the office of White House Counsel and former judge Alberto R. Gonzales.¹⁰

7. Steven Brill, *After: How America Confronted the September 12 Era* 125–26 (2003).

8. Memorandum from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, for Alberto R. Gonzales, Re: Legality of the Use of Military Commissions to Try Terrorists (Nov. 6, 2001). As far as I have been able to determine, this memorandum has not yet been made public, and I have confirmed its existence only from a footnote in another, recently leaked draft memorandum by the Office of Legal Counsel. See Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A 36 n.19 (Aug. 1, 2002).

9. John Mintz, *Extended Detention in Cuba Mullied; Officials Indicate Guantanamo Bay Could Hold Tribunals, Carry Out Sentences*, Wash. Post, Feb. 13, 2002, at A16.

10. Recent disclosures about the Administration's adoption of interrogation policies in the war on terrorism indicate, for example, that an extensive legal opinion from the Office of Legal Counsel was directed to Judge Gonzales, who synthesized it in a memorandum and presumably a briefing for the President. See *Document Trail: A Look at How Interrogation Policy Evolved Within the Bush Administration*, Wash. Post, June 24, 2004, at A6.

As noted above, the November 13 Order drew immediate and sustained criticism from civil libertarians, the bar, and academia. In response, Judge Gonzales offered three rebuttals on behalf of the Administration.¹¹ First, he emphasized that the Order expressly applied only to non-citizens.¹² Criticism was “based on misconceptions,” explained Judge Gonzales, among them presumably the misconception that the President had ordered the military to detain Americans.¹³ Moreover, it was “totally unfounded” for critics to assert that the November 13 Order would be applied to “green card holders,” Judge Gonzales told a bar association meeting.¹⁴ Treating permanent resident aliens (to whom green cards are issued) like United States citizens and therefore outside the Military Order is consistent with existing national law governing surveillance and intelligence collection,¹⁵ which gives such aliens the same protections as United States citizens in recognition of their substantial and permanent connections to the United States. Yet nothing in the text of the November 13 Order exempts permanent resident aliens. The Order applies without differentiation to “any individual who is not a United States citizen” who otherwise meets its requirements.¹⁶ Thus, Judge Gonzales’ explanation effectively amended the Order.

Second, Judge Gonzales emphasized that the November 13 Order applied only to “enemy war criminals,” persons “chargeable with offenses against the international laws of war, like targeting civilians or hiding in civilian populations and refusing to bear arms openly.”¹⁷ The implication was that critics who raised the specter of military arrests and trial for ordinary crimes or for nothing at all were thus again irresponsibly wide of the mark. The November 13 Order, however, expressly declares it necessary for individuals subject to it to be tried “for violations of the laws of war *and other applicable laws* by military tribunals.”¹⁸ Judge Gonzales’ explanation, therefore, again verbally amended, or at least narrowed, the Order.

11. Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. Times, Nov. 30, 2001, at A27.

12. *Id.*

13. *Id.*

14. Author’s Notes, Conference of the American Bar Ass’n, Standing Comm. on Law and Nat’l Sec. (Nov. 30, 2001) (attributing to Judge Gonzales the statement that criticism that the Nov. 13 Order was “targeting green card holders is totally unfounded”). To be fair, Judge Gonzales did not mention permanent resident aliens *per se*, but his protest presumably referred to them.

15. Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(I) (2000); Exec. Order No. 12,333, § 3.4(I), 46 Fed. Reg. 59,941 (1981).

16. Nov. 13 Order, *supra* note 1, at § 2(a).

17. Gonzales, *supra* note 11.

18. Nov. 13 Order, *supra* note 1, at § 1(e) (emphasis added).

Third, the Administration responded vigorously to criticism that the November 13 Order prohibited judicial review. The November 13 Order provides that an individual subject to it

shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.¹⁹

The peculiarly archaic formalism, "privileged to seek," appears in no current statutory provision regarding judicial review. Instead, it was drawn from a World War II order by President Franklin Roosevelt issued in response to the capture of eight German saboteurs in the United States. After he told Attorney General Francis Biddle, "I want one thing clearly understood, Francis. I won't hand them over to any United States Marshal armed with a writ of habeas corpus,"²⁰ Roosevelt signed a proclamation entitled *Denying Certain Enemies Access to the Courts of the United States* and authorizing their trial by military commission under the laws of war.²¹ The proclamation's statement that such enemies "shall not be privileged to seek any remedy" was an unmistakable reference to the Suspension Clause of the Constitution, which speaks of "[t]he *Privilege* of the Writ of Habeas Corpus."²² Indeed, Biddle told Roosevelt that this language in the proclamation would have "the same practical results" as suspending the writ of habeas corpus without actually taking such action.²³ Given this lineage, President Bush's November 13 Order unmistakably purports to deny individuals subject to it the privilege of seeking the writ of habeas corpus or any other remedy "directly or indirectly" in any court.²⁴

Despite the Order's text and this lineage, however, Judge Gonzales flatly asserted that "[t]he order preserves judicial review in civilian courts."²⁵ This Orwellian assertion may have been based on

19. *Id.* at § 7(b)(2).

20. See Gary Cohen, *The Keystone Kommandos*, *The Atlantic Monthly*, Feb. 2002, at 53; Louis Fisher, *Bush Can't Rely on the FDR Precedent*, *L.A. Times*, Dec. 2, 2001, at M3.

21. Proclamation No. 2561, *Denying Certain Enemies Access to the Courts of the United States*, 7 Fed. Reg. 5101 (July 2, 1942), reprinted at 10 U.S.C. § 906 (2000).

22. U.S. Const. art. I, § 9, cl. 2 (emphasis added) ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it.").

23. George Lardner, Jr., *Nazi Saboteurs Captured!*, *Wash. Post Magazine*, Jan. 13, 2002, at 16.

24. Nov. 13 Order, *supra* note 1, at § 7(b)(2).

25. Gonzales, *supra* note 11.

the fact that the United States Supreme Court had *rejected* Roosevelt's effort to head off habeas review in the saboteurs' case,²⁶ and that the Bush Administration therefore anticipated that the present Supreme Court would likewise reject the November 13 Order's denial of any judicial remedy.²⁷ If so, surely a more direct textual path existed to admitting judicial review. The Administration's explanation was tantamount to asserting, "We are confident that the courts will ignore our futile effort to deny habeas just as the Supreme Court did last time."

While these "verbal amendments" cumulatively may have given some reassurance to the November 13 Order's critics, they also created a sizable gap between what the Order said and what the Administration claimed it meant, calling to mind the (slightly paraphrased) assertion made by former Attorney General John Mitchell's during the Nixon Administration, "Watch what we do, instead of what we say."²⁸

B. The Procedures for Implementing the November 13, 2001, Order

The Administration stressed that the regime of military detention and trial was still a work in progress, with implementing details and procedures yet to come. Their evolution, however, was itself an adventure in executive lawmaking.

At first, Secretary of Defense Donald Rumsfeld reportedly sought advice about procedures from nine prominent civilian lawyers and law professors, including Newton Minnow, formerly Chair of the Federal Communications Commission; Lloyd Cutler, former White House Counsel to President Bill Clinton; William Webster, former federal judge and Director of the Federal Bureau of Investigation; and several retired General Counsels of the Department of Defense.²⁹ What they seemed to have in common was that they were civilians, out of the government, and known to Secretary Rumsfeld. They may well have had some moderating effect on the first set of procedures for military commissions (which seemingly backed off some of the

26. *Ex parte Quirin*, 317 U.S. 1, 63 S. Ct. 2 (1942).

27. See Michael Chertoff, *Law, Loyalty, and Terror: Our Legal Response to the Post-9/11 World*, 9 *Weekly Standard* 16 (2003) ("[T]he Bush administration made it clear in issuing the order that the administration anticipated courts would exercise habeas jurisdiction over commission defendants . . ."). Chertoff was head of the Criminal Division in the Department of Justice when the November 13 Order was issued. *Id.*

28. *Respectfully Quoted: A Dictionary of Quotations* 4 (Suzy Platt ed., 1989).

29. Brill, *supra* note 7, at 240–41, 266; Charles Lane, *Terrorist Tribunal Rights Are Expanded; Draft Specifies Appeals, Unanimity on Death Penalty*, *Wash. Post*, Dec. 28, 2001, at A1.

more severe provisions of the November 13 Order).³⁰ But we do not presently know, because their advice, if any, was solicited and received in secret. They were not designated as an advisory committee; their communications, if they were in writing, have not been published; and the Administration did not discuss them in any subsequent public disclosure. Nor was any public notice of proposed procedures or opportunity for public comment ever given, despite calls for it from Fidell and the President of the American Bar Association.³¹

Instead, the first set of procedures for military commission trials pursuant to the November 13 Order were issued as final on March 2002,³² though not published in the *Federal Register* for another year when they were finally published together with Military Commission Instructions that had been subsequently issued to carry them out.³³ “[T]he need to move decisively and expeditiously in the ongoing war against terrorism” was cited by the Department of Defense as a justification for issuing final procedures without involving the public in the lawmaking process.³⁴

Any need for expedition, however, was belied by the snail’s pace of the actual lawmaking process. Although the first set of procedures was developed in just under four months, the eight sets of “Military Commission Instructions” that implemented them were developed over the course of the ensuing thirteen months. This left ample time to solicit and consider public comments. In fact, the Department of Defense did issue an informal press release inviting comments by fax on Military Commission Instruction No. 2, setting out the crimes to be tried by military commissions and their elements.³⁵ We know that some organizations accepted this invitation because they posted their comments on the internet or otherwise publicized them. The Department of Defense, however, refused to disclose the comments it received or to acknowledge whether and, if so, how it had considered them.³⁶

In any event, the Department seems not to have appreciated this experience with public comments. It declined to invite even informal

30. So Fidell speculates. Fidell, *supra* note 6, at 381–82 & n.12.

31. *Id.* at 382 n.14 (citing letters).

32. Department of Defense, Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism* (March 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

33. 68 Fed. Reg. 39,374 (July 1, 2003).

34. Fidell, *supra* note 6, at 382 n.16 (citing Letter from William J. Haynes, General Counsel, Dep’t of Defense, to Robert E. Hirshon, President, American Bar Ass’n, March 19, 2002).

35. *Id.* at 383.

36. *Id.*

comments for seven other Military Commission Instructions. It simply issued them internally as final in April 2003, and then made them public several days later by posting them on the Department's website and conducting a press briefing.³⁷ Again, the Department was in no rush to publish them more officially in the *Federal Register*. That happened only two months later,³⁸ just before the Administration announced the selection of the first six detainees for possible military trial.³⁹ The published instructions made no effort to explain their basis and purpose, let alone to make any mention of public comments or acknowledgment of public concerns and critiques.

Yet even the published instructions, it turned out, were not final. Military Commission Instruction No. 5 proposed restrictions on defense counsel in military commission trials so severe that the National Association of Criminal Defense Lawyers unanimously opined it would be unethical for a defense lawyer to accept them.⁴⁰ In preparing an annual supplement to my casebook on national security law, I therefore quoted from the most controversial of these instructions in order to flag the issue in a proposed note.⁴¹ When my co-author read my draft, however, he telephoned to advise me that I had misquoted the instruction. I placed the instruction published in the *Federal Register* before me; he took out the same instruction he had downloaded from the Department of Defense website in front of him; and *we were both right*. The Department had apparently changed the instruction on its website to meet some of the objections of the defense bar, but had neither identified the changes on the website, changed the original date of the instruction on the website, nor made any effort to reflect the changes in the formally published version in the *Federal Register*. Such "e-tampering," in Fidell's nice phrase,⁴² ironically confirms the potential contribution of public comment on the instructions, but it also leaves academics who study or teach the Military Commission Instructions, and more seriously, defense lawyers who may have to operate under them, unable to trust the *Federal Register* or even materials posted on the Department of Defense website without rereading them continuously for undisclosed changes.

37. *Id.* at 383–84.

38. 68 Fed. Reg. 39,374 (July 1, 2003).

39. Fidell, *supra* note 6, at 384.

40. Nat'l Ass'n of Criminal Defense Lawyers, Resolution of the NACDL Board of Directors Regarding Participation in Military Tribunals, (Aug. 2, 2003), *available at* <http://www.nacdl.org/public.nsf/0/81b7ab77954cb03385256e4a0052e6fa?OpenDocument>.

41. See Steven Dycus, Arthur L. Berney, William L. Banks, and Peter Raven-Hansen, 2003–2004 Supplement: National Security Law 97–98 (3d ed. Supp. 2003).

42. Fidell, *supra* note 6, at 384.

C. *The “Order” for Military Detention of Hamdi and Padilla*

At least the latest Military Commission Instructions, the procedures in Military Commission Order No. 1, and, of course, the November 13 Military Order itself were published *either* in the *Federal Register* or on the Department of Defense website. Incredibly, the same cannot be said at this writing of the President’s subsequent order for the military detention of two United States citizens whom he has determined are members of or associated with.⁴³ Despite the Administration’s sometimes indignant correction of its critics’ “misconception” of the November 13 Military Order by its insistence that the Order would not be applied to United States citizens, just six months after the Order was issued President Bush directed the military to detain United States citizens Yaser Hamdi and Jose Padilla without charges or indictment, initial access to lawyers, any trial date, or prior judicial authority. Technically, this detention was not ordered under the November 13 Order, because it still applies on its face only to non-citizens.

But then, what law is it authorized under? None that has been published, even in the form of a military order. In fact, when Padilla eventually challenged his detention, the government produced a redacted written directive by President Bush directing Secretary Rumsfeld to take Padilla into military custody. But, unlike the November 13 Military Order and its procedural progeny, the June 9 directive does not purport to declare any general rules for the military detention of United States citizens or to apply to anyone but Jose Padilla. As to him, if the bare directive constitutes its own legal authority on some bootstrapping theory, it is tantamount to saying that a United States citizen can be held in military detention just because the President says so.

43. Yaser Essam Hamdi was captured by Northern Alliance forces in Afghanistan and turned over to United States military custody. When it was discovered that he was a United States citizen, he was moved to the United States in April 2002, where he is being confined in the Norfolk Naval Brig. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). In October 2004, Hamdi was released to Saudi Arabia after almost three years of military detention. See Jerry Markon, *Hamdi Returned to Saudi Arabia*, Wash. Post, Oct. 12, 2004, at A2. Jose Padilla, an American citizen, was arrested in Chicago and detained as a material witness before being transferred to military custody on June 9, 2002, for detention as an enemy combatant. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). Hamdi and Padilla are the only United States citizens known to be in military detention as enemy combatants at this writing. The Administration has disclosed that one non-citizen arrested in the United States, Qatar national Ali Saleh Kahlal al-Marri, has also been designated an enemy combatant and transferred to military custody. See Eric Lichtblau, *Bush Declares Student an Enemy Combatant*, N.Y. Times, June 24, 2003, at A15.

In short, for all that has been disclosed to date, there is no published law or even military order specifically authorizing the military detention of United States citizens or setting out procedures for such detention. This is not to say that such detention is unlawful. In *Hamdi*, five Justices found that the Authorization for the Use of Military Force Joint Resolution passed immediately after the 9/11 attacks, authorizing the President to “use all necessary and appropriate force” against the perpetrators of the attacks and those who aided or harbored them,⁴⁴ was sufficient to authorize even the detention of a United States citizen if he is an enemy combatant. Whether the same statute authorizes detention of a citizen in Padilla’s shoes is unclear. The November 13 Order cites two other statutes, title 10, section 821, saving the jurisdiction of military commissions over offenses that by statute “or by the law of war may be tried by military commissions,” and title 10, section 836, authorizing the President to prescribe procedures for military commissions. But these statutes beg the question of the authority and content of the common law of war, which is unwritten, unclear, and certainly, as applied to the detention of United States citizens, largely unelaborated anywhere but in the “post-hoc rationalization” by counsel⁴⁵ in briefs filed by the government in response to challenges by the citizen-detainees. Even after *Hamdi*, it is arguably still fair to assert that together these authorities do not add up to an *express* and *specific* legal rule regulating the military detention of United States citizens in the United States. It is still true, as a circuit court judge who agreed with the government that the President has authority to order military detention of Padilla lamented, that “[o]ne of the more troubling aspects of Mr. Padilla’s detention is that it is undefined by statute or Presidential Order.”⁴⁶ Instead of law which you “can look up,” we were presented with law by *ipse dixit*. The *Hamdi* decision has not cured the problem because its splintered and guarded reasoning still leaves the legal scope of military detention of United States citizens unclear.

D. Designating United States Citizens as Enemy Combatants

Acknowledging that the process for detaining United States citizens may have looked like a “black box that raises the specter of arbitrary action,” Judge Gonzales recently decided to disclose to a bar

44. Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

45. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69, 83 S. Ct. 239, 245-46 (1962).

46. *Padilla v. Rumsfeld*, 352 F.3d 695, 733 (2d Cir. 2003) (Wesley, J., concurring in part and dissenting in part).

meeting how United States citizens are selected for military detention.⁴⁷ He then described an impressively elaborate inter-agency process for designating a citizen an “enemy combatant” who could be subjected to military detention, that incorporated information developed by the Department of Defense, the Central Intelligence Agency, and the Department of Justice, written assessments by the same agencies, a formal legal opinion by the Office of Legal Counsel, recommendations by the Attorney General and the Secretary of Defense, and a final recommendation to and briefing for the President by the White House Counsel. At the same time, however, Judge Gonzales cautioned that “there is no rigid process for making such determinations—and certainly no particular mechanism required by law. Rather, these are the steps that we have taken in our discretion to ensure a thoroughly vetted and reasoned exercise of presidential power.”⁴⁸ The process he disclosed, in other words, is provided by executive grace, not by law.

II. HOW THE RULES WOULD HAVE BEEN MADE UNDER THE APA

So what? One answer is to consider how the rules governing military detention and trial by military commission of United States citizens would have been made if the APA had applied.

First, the public—a public that includes present and former military lawyers with a highly relevant expertise in the subject, many of whom were reportedly ignored, at least initially, in the making of the November 13 Orders and instructions—would have had notice that such rules were being considered. A general notice of proposed rulemaking would have been published in the *Federal Register*, time permitting.⁴⁹ The notice would have stated the terms or substance of the proposed rule. In addition, it would have identified “the legal authority under which the rule is proposed.”⁵⁰ Of course, that identification would not necessarily have been any more illuminating than the citation in the November 13 Order of the Authorization for the Use of Military Force Resolution and title 10, sections 821 and 836, but even a comparably conclusory identification of authority for detaining United States citizens would be more than we presently can find outside of government litigation briefs.

47. Alberto R. Gonzales, Counsel to the President, Remarks at the American Bar Ass’n Standing Comm. on Law and Nat’l Sec. 11 (Feb. 24, 2004) (transcript available at http://www.abanet.org/natsecurity/judge_gonzales.pdf).

48. *Id.*, at 7.

49. 5 U.S.C. § 553(b) (2000).

50. *Id.* § 553(b)(2).

Interested persons would have been afforded “an opportunity to participate in the rule making” by submitting comments.⁵¹ The administration, in turn, would have been obliged to consider relevant comments.⁵²

The administration then would have had to prepare and incorporate into the final rules a concise general statement of basis and purpose.⁵³ It is possible that such a statement would be no more elaborate than the “findings” which the President reported in his November 13 Order, but it is also quite possible that they would be informed and altered by the public comments and attendant consideration. It is even possible that the “basis” would have included a reasoned explanation of the authority for military detention and trial by military commission of United States citizens, for which we must now search the government’s litigation briefs without comparable assurance that they are authoritative. This possibility carries added importance in the field of national security, which has comparatively few judicial precedents to draw upon. In this field, the executive’s own legal explanations often have to substitute for judicial precedents in articulating the law.

The resulting rules for detention and trial by military commission, with the accompanying statement of basis and purpose, however elaborate, would have been published in the *Federal Register* either before, or on their effective date, if there were good cause for waiving the normal thirty-day delay.⁵⁴

Just as important, any changes to the rules would have had to have been made in the same way, absent good cause. Even if the notice-and-comment procedures could be waived for good cause, the changes would have had to be published in the *Federal Register*. You *could* “look it up” without having to deconstruct e-tampering on the Department of Defense website to confirm what rules are currently in effect.

Finally, the rules would presumptively be subject to some level of judicial scrutiny.⁵⁵ As shown by the evolution of the pending litigation challenging military detentions, the courts have stepped into the breach anyway, but the APA and modern administrative law reminds us that judicial review is ordinarily the *sine qua non* of executive discretion. Without it, we lose the judicial check on arbitrary executive action, weaken the legislative check, and come to rely undependably on the executive to check itself.

51. *Id.* § 553(c).

52. *Id.*

53. *Id.*

54. *Id.* § 553(d).

55. *Id.* §§ 702, 706 (2000).

III. BUT THE APA DOES NOT APPLY AND THIS IS WAR

My foregoing speculation is a ringing, if simplistic, homage to modern American administrative procedure, but it is vulnerable to at least two serious rebuttals. The first is that the APA expressly exempts “military commissions,” generally,⁵⁶ and “military . . . function[s],” specifically, from its rulemaking procedures.⁵⁷ Echoing others, I argue below, echoing others, that perhaps it should not, but more importantly, that its procedures, or ones very like them, are required by the rule of lawmaking in any case. The second and more serious rebuttal is that, while APA-like rules of lawmaking are well-suited to making laws to regulate sulphur dioxide emissions or medicare benefits, they are impracticable, if not dangerous, when the President acts “for reasons of national security” in a war on terrorism. I respond that this proposition depends on what those reasons are and conclude that the war power the President asserts is reason to insist on, and not to suspend, the rules of lawmaking.

A. *The APA Does Not Apply . . . (But Its Rules of Lawmaking Should)*

This rebuttal is unquestionably correct.⁵⁸ The Administration was not required to follow the APA’s rulemaking requirements or its provisions for judicial review for the “military function” of detaining and trying United States citizens by military commission. The published Military Commission Instructions expressly invoke this exemption from rulemaking,⁵⁹ and even the November 13 Order strategically uses the term “military function” to characterize the promulgation of procedures by the Secretary of Defense which the Order authorizes.⁶⁰

One answer to this argument is that the exemption always was overbroad and that its abolition was recommended at least as early as 1972 by administrative law experts,⁶¹ and again in 1974 by the widely

56. *Id.* §§ 551(1)(F) (excluding military commissions from definition of agency), 701(b)(1)(F) (same for purposes of judicial review provisions).

57. *Id.* § 553(a)(1).

58. *But see* Fidell, *supra* note 6, at 380–81 & n.5 (raising a textual issue concerning the scope of the “military commission” exemption, but finding that the broader “military function” exemption probably makes the issue moot).

59. 68 Fed. Reg. 39,374 (July 1, 2003) (“It has been certified that 32 CFR part 9 [the Instructions] is a military function of the United States and exempt from administrative procedures for rulemaking”).

60. Nov. 13 Order, *supra* note 1, at §§ 4(b), 6.

61. *See* Arthur E. Bonfield, *Military and Foreign Affairs Function Rule-making Under the APA*, 71 Mich. L. Rev. 221 (1972); *see also* Project: *Federal Administrative Law Developments—1969, 1970* Duke L.J. 67, 109–10 (the solution

respected Administrative Conference of the United States.⁶² Those who urged the repeal of the exemption reasoned that it was unnecessary and unwarranted because the APA provided other exemptions from following rulemaking procedures when it was “impracticable, unnecessary or contrary to public interest” to follow the procedures.⁶³ In fact, the Department of Defense followed this reasoning in important rulemakings, voluntarily adopting notice-and-comment procedures to issue some regulations that it finds have a substantial and direct impact on the public.⁶⁴ Most notably, the Department has also voluntarily edged towards using APA-like notice-and-comment procedures for making changes to the *Manual for Courts-Martial*.⁶⁵ Thus, the Department itself has set the precedent for using such procedures in the making of procedures for military trial and rules which substantially impact the public, as surely would the military detention and trial of United States citizens.

But the better answer to the APA-does-not-apply argument is that the Administration should use APA-like procedures in making the rules of military detention and commission trial of terrorist suspects not because they are required by the APA, but because they are required by the rule of lawmaking and good sense. I speculated above about how the Military Order and its progeny might have been made under the APA not to make a case for applying the APA or rescinding its military function exemption,⁶⁶ but to illustrate what the procedure should look like in any case.

to eliminating exemptions to rulemaking lies in the “good cause” provision of 5 U.S.C. § 553(b)(3)(B)); see generally Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1373 (1992) (agencies should observe rulemaking procedures whenever “feasible and appropriate”).

62. Admin. Conference of U.S., *Elimination of the “Military or Foreign Affairs” Exemption from APA Rulemaking Requirements*, 39 Fed. Reg. 4847 (Feb. 7, 1974). The Administrative Conference is now defunct, but it was so well regarded and useful that Justice Antonin Scalia, himself a former professor of Administrative Law, recently urged Congress to bring it back. See *Hearing on the Reauthorization of the Admin. Conference of the U.S. Before the Subcomm. on Commercial and Admin. Law of the H.R. Judiciary Comm.*, 108th Cong. (May 20, 2004) (statement of Antonin Scalia, Supreme Court Justice).

63. 5 U.S.C. § 553(b)(3)(B) (2000).

64. See 32 C.F.R. Pt. 336 (2002).

65. See Fidell, *supra* note 6, at 386; Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 Mil. L. Rev. 237 (2000).

66. Although that case is a good one. It was the very same chaos of unpredictable administrative lawmaking, secret law, casual and undisclosed changes in the law, inconsistency, and general sloppiness that describes the history of the Military Order and its progeny that prompted the enactment of the Federal Register Act and the APA. The recent chaos is more evidence that the exemption should be rescinded in substantial part.

It therefore is useful to raise the level of abstraction and consider the rule of lawmaking as such. Although reasonable lawyers will differ on the details,⁶⁷ I suggest that the following principles are basic. First, the rule of lawmaking insists ideally on the executive's identification of express and specific statutory lawmaking authority. Such authority anchors executive lawmaking in a representative consensus and brings an element of definiteness, if not clarity, to the subsidiary lawmaking process. The Military Order's identification of title 10, section 836, delegating authority to the President to prescribe by regulations the procedures for military commissions is one such anchor, but, as noted above, begs the antecedent question of whether the President enjoys authority to order military detention and trial by military commission of United States citizens in the United States, whatever procedures he employs. Even assuming that he has derived that authority by inference from some amalgam of the unwritten common law of war, the common law savings clause in section 821, and the Authorization for the Use of Military Force Joint Resolution (a conclusion that is premature for Padilla's detention, at this writing), this foundational principle of the rule of lawmaking counsels in favor of his seeking express and more specific statutory authority from Congress for such an extraordinary power over American citizens.

Second, the rule of lawmaking requires procedural regularity—clear, consistent and predictable procedures consistently followed for making the rules. This is especially true when the resulting rules are as controversial as those declared by the November 13 Order and implicated in the subsequent military detention of United States citizens. When the substantive rules of law are so controversial and debatable, as a matter of policy, that we cannot tell if they are right, procedural regularity in their making provides some compensating assurance.⁶⁸ Judge Gonzales therefore is wrong in one important sense when he blithely asserts that “no rigid process . . . [or]

67. See Dianne P. Wood, *The Rule of Law in Times of Stress*, 70 U. Chi. L. Rev. 455, 457–58 (2003) (comparing rule-of-law principles identified by scholars); Eskridge, Frickey, & Garrett, *supra* note 3; Linde, *supra* note 3; Tribe, *supra* note 3.

68. Captain Kevin J. Barry has made the same argument for modernizing the rulemaking procedures for the *Manual of Courts-Martial*:

Individual rules, once adopted, may not always be viewed as the “best” rules possible: the same rule might be viewed as overly harsh or overly intrusive by some, while others may view it as not being sufficiently rigorous to preserve the commander's authority and good order and discipline. Accordingly, it is of crucial importance that the *process* used for adopting the rules have fundamental integrity and be uniformly viewed as appropriate and fair.

Barry, *supra* note 65, at 243.

particular mechanism [for deciding whether a United States citizen is an enemy combatant is] required by law.”⁶⁹ While it is true that there is no particular antecedent process that the Administration has to use, the rule of law posits that *some* regular process *is* required to give assurance to a justifiably nervous legal community and polity that the controversial substantive result—a status determination that affects the liberty of a United States citizen—is correct. Further, that process must itself be established with procedural regularity pursuant to the rule of lawmaking. In this respect, Judge Chertoff, now at some objective remove from the front lines where he formerly toiled as head of the Criminal Division after 9/11, has the better view: “We need to debate a long-term and sustainable architecture for the process of determining when, why, and for how long someone may be detained as an enemy combatant, and what judicial review should be available.”⁷⁰

His call for debate suggests a third element of the rule of lawmaking: opportunity for public input. Such opportunity is required for several reasons. First, it may improve the quality of the resulting law. Consider, for example, the result if military lawyers had an early opportunity to make suggestions regarding the November 13 Order or Military Commission Order No. 1, or if the National Association of Criminal Defense Lawyers or the American Bar Association had an early opportunity for input into the Military Commission Instructions regarding defense counsel. Indeed, we do not have to speculate about the latter; the Department of Defense ultimately relaxed strictures on defense counsel in response to public criticism. This experience suggests that public input can be influential not just because it may convince that executive of a way to improve the final rule, but also because it may force the executive to change the rule to make it more acceptable to the public, reflecting what Neal Devins calls the “potency of social norms . . . to constrain administration overreaching.”⁷¹ Thus, a second reason to provide the opportunity for public input is that it increases the likelihood of public acceptance of the resulting law. It is easier for one to tolerate even an imperfect law if she is satisfied that her views were at least heard and seriously considered in its making, whether or not they were accepted.

Of course, such opportunity for public input presupposes notice of the proposed rulemaking, and the operation of social norms also presupposes publication of the result. In a word, *transparency* is

69. Gonzales, *supra* note 47, at 12.

70. Chertoff, *supra* note 27, at 3.

71. Neal Devins, *Congress, Civil Liberties, and the War on Terrorism*, 11 Wm. & Mary Bill Rts. J. 1139, 1149 (2003).

another basic principle of the rule of lawmaking. Transparency requires that the rules also be written and published. "From its birth," Judge Wood reminds us, "the United States has been a country based on written law."⁷² This is true even of common law rules; "you can look it up," is an Americanism central to the rule of law and lawmaking. Yet, while a non-citizen could look up the November 13 Order in the *Federal Register*, United States citizens Hamdi and Padilla, ironically, could not look up the law governing their detention before the *Hamdi* decision. Even after that decision, the law the President purports to invoke to detain United States citizens is still largely "undefined," as Judge Wesley put it. Transparency reinforces the myth of the rule of law: that ours is a government of law, not men. Little wonder that many Americans see what Judge Gonzales calls "the specter of arbitrary action" by a few men in the military detention of United States citizens, instead of decisions by law.

Finally, the rule of lawmaking insists at some stage of the process on the availability of judicial review. Judicial review is traditionally regarded as a necessary check even when the President directs "that a congressional policy be executed in a manner prescribed by Congress."⁷³ *A fortiori*, it is needed when the President "directs [by military order] that a presidential policy be executed in a manner prescribed by the President."⁷⁴ Fortunately, notwithstanding the Military Order's effort to deny any judicial review, the courts have to date unanimously insisted on a role—no matter how deferential—in deciding the legality of military detention of United States citizens.⁷⁵ That role, however, should have been built clearly into the November 13 Order from the start. Relying on the courts to ignore the Order's attempt to cut off judicial review is not an honest substitute.

B. *But This Is War . . . (Exactly!)*

The other rebuttal to the demands of the rule of lawmaking is that they are traditionally used in the mundane regulation of everyday activities and business, where we can afford them, *but this is war*,

72. Wood, *supra* note 67, at 457.

73. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588, 72 S. Ct. 863, 867 (1952). This, of course, is the premise of the APA presumption of judicial review. See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507 (1967); see generally Richard J. Pierce, Jr., *Administrative Law Treatise* § 17.6 (2002).

74. *Youngstown*, 343 U.S. at 588, 72 S. Ct. at 867.

75. Indeed, Judge Chertoff surmises that the availability of judicial review and the procedural regularity of executive action are inversely related principles of the rule of national security lawmaking, the courts being more willing to give review the less procedural regularity they detect in the executive's assertion of a national security authority. See Michael Chertoff, *Judicial Review of the President's Decisions as Commander in Chief*, 55 Rutgers L. Rev. 1289, 1302 (2003).

mandating an exception. Supporters of this position posit that the September 11 attacks placed us in a continuing national security emergency in which life and liberty are at stake, and in which rule-of-lawmaking procedures are impracticable and too costly. They suggest that war and national emergency call uniquely on executive initiative, which cannot be shackled by essentially peacetime lawmaking requirements. There is more than an echo of this rebuttal in Judge Gonzales' explanation for the Administration's two-year silence about the process for deciding whether United States citizens are enemy combatants subject to military detention: the secrecy was "largely for reasons of national security."⁷⁶ "Reasons of national security" sounds chillingly like the "reasons of state," invoked by more than one monarch in history to justify authoritarian action. Whether reasons of national security require a departure from the law of rulemaking, however, depends on what those reasons are.

If the reason is time-urgency—that the war or emergency will not brook the tedious delay of notice and public input, the usually glacial pace of public lawmaking—the reason is sometimes sound. When the November 13 Order was issued, for example, we had just commenced military operations in Afghanistan that would require military detention of combatants on the battlefield and possibly off it, as well. Rapid issuance of the November 13 Order without opportunity for public input could be defended on the ground that it was necessary to have a detention policy in place before the first combatants were captured. The Department of Defense's invocation of "the need to move decisively and expeditiously in the ongoing war against terrorism" thus might have been justified for the November 13 Order itself.

But the rule of lawmaking codified in the APA is no stranger to time-urgency. It permits administrative agencies to issue rules first, and take public comments later, and to place them into effect at the same time they are published, for good cause.⁷⁷ The oxymoron "interim final rules" is familiar to administrative lawyers.

In any case, any time-urgency in November 2001 had long since passed by the time the Department of Defense promulgated Military Commission Procedures and Instructions. It certainly passed sometime during the two-year detention of Hamdi and Padilla, well before Judge Gonzales disclosed the procedure for deciding United States citizen status for purposes of detention. Moreover, time-urgency does not dispense with other elements of the rule of

76. Gonzales, *supra* note 47, at 11.

77. See 5 U.S.C. §§ 553(b)(B), 553(d)(3) (2000). See Pierce, *supra* note 73, § 7.10 (explaining that "temporary rules" represent a "practical compromise between the need for temporal urgency and the desirability of public participation in the rulemaking process").

lawmaking, including the need to identify specific legislative authority, transparency, or a role for the courts.

Another “reason of national security” is secrecy. Judge Gonzales explained that the Administration’s long silence in disclosing the procedure for enemy combatant designation was largely because the deliberations involved in such a designation “invariably include extraordinarily sensitive intelligence information that we are loathe to reveal for fear that it may jeopardize the future capture of enemy combatants and future prevention of terrorist attacks.”⁷⁸

This claim of secrecy confuses the rules of law with their application. It may well be the case that disclosure of how military detention rules were applied to particular persons like Padilla or Hamdi could compromise sources and methods of intelligence or ongoing investigations to prevent terrorist attack. But it is exceedingly difficult to see how disclosure of the rules themselves, let alone of the general process by which they are applied, could do the same. That the CIA compiles data, that the Office of Legal Counsel issues a formal opinion, or that the White House Counsel makes his own recommendation to and briefing of the President regarding the designation of United States citizens as enemy combatants is of no conceivable interest to our enemies, but of vital interest to Americans concerned about arbitrary action and erroneous designations. There was simply nothing in what Judge Gonzales disclosed for the first time in a breakfast meeting with a bar association committee in February 2004 that he could not have disclosed a year or more earlier, or even disclosed before the designation process was used. One cannot help suspecting that the real secret was that, as an administration lawyer privately admitted to *Newsweek*, “we were making this up as we went along.”⁷⁹ The process could not be disclosed earlier because it did not yet exist, at least in its present rococo form.

I would put the point more strongly yet. There is a nearly irrebuttable presumption under the rule of lawmaking that the legal authority and procedures for national security decisions by the executive—as opposed to details of their application to particular cases—should *not* be kept secret from the public. The executive therefore has a heavy burden of proving a need for keeping legal authority or lawmaking processes secret and a commensurate duty to resist the hydraulic pressure to extend even appropriate secrecy to

78. Gonzales, *supra* note 47, at 11. Cf. Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. Pa. J. Const. L. 648, 709 (2002) (stating that it was appropriate for Administration not to follow the APA because of how the detainees were detained).

79. Michael Isikoff & Daniel Klaidman, *The Road to the Brig*, *Newsweek*, April 26, 2004, at 26.

inappropriate subjects. That burden has not been met by the Administration with respect to the law of military detention or trial by military commission and how it was made. Judge Gonzales' extension of arguably appropriate secrecy concerning the application of the law to the facts of Hamdi or Padilla to the rules of law and the lawmaking procedures themselves also shows that the Administration has not successfully resisted the pressure.

Ultimately, the proposition that national security and the war on terrorism are too important, too big, for the conventional rule of lawmaking has it exactly backwards. "The rule of law becomes more vital," Judge Wood remarks, "not less so, when democracy is attacked."⁸⁰ When democracy is under attack, and the nation is at war, public trust in the executive is essential to victory. That trust "is in large measure a function of maximizing public participation and transparency and minimizing departures from normal governmental practice."⁸¹ Precisely because the President makes life and liberty affecting decisions when he orders military detention or trial by military commission of American citizens, the rule of lawmaking applies with special force, and more, not fewer, lawmaking procedures are required as a check on arbitrary power and as assurance to the public.

When military orders, incommunicado detention, military trials, and secrecy seem to replace a government of laws with a government of men, it is natural to worry that bad men (or women) will seize and abuse their power. I do not have that worry yet. It seems to me that men of good faith are asserting power to protect us from terrorism, not to aggrandize themselves or the President. The real danger to the rule of law today is more insidious than a coup by bad men. It is the erosion of the rule of law by sloppy, excessively secretive, and irregular lawmaking, because good men don't see it.

80. Wood, *supra* note 67, at 470.

81. Fidell, *supra* note 6, at 379-80.