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Kenneth Anderson

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By Kenneth Anderson

Two branches of government have been hard at work in the war on terror these past years, even if they have not infrequently worked at cross-purposes. Executive agencies devise a warrantless surveillance program — and a federal judge declares it unconstitutional. Administration officials and federal bureaucrats devise rules for trying accused terrorists in military tribunals — and the *Hamdan* decision sends the tribunal drafters back to the drawing board.

But where are the people's elected representatives in all of this? The Supreme Court has said that Congress has an indispensable role to play in establishing democratically legitimate policy in counterterrorism. Democratic theory tells us, moreover, that whatever actions the executive was able to undertake on its own authority in the immediate emergency of 9/11, and indeed whatever inherent powers it might permanently possess, in fact democracy is better off when the political branches work in concert to

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create a long term policy. So where is the legislation, passed by Congress and signed into law by the president, on the multiple topics that make up a full and complete counterterrorism policy for the country?

It is true that, at this writing, Congress is finally coming to grapple with legislation proposed to regulate trials of enemy combatants and interrogation procedures. It is legislation of grave national importance. It is likewise true that Congress involved itself in counterterrorism policy last year in the Detainee Treatment Act of 2005 (the McCain amendmet). But notwithstanding the importance of those issues, they are in fact narrow ones. They are merely compelled by the *Hamdan* decision, and far from the range or depth of issues necessary to establish what the country urgently needs prior to the end of the Bush second term, and what the Bush administration ought to have been working toward from the day its second term began — a long term, systematic, comprehensive, institutionalized counterterrorism policy for the United States.

This frozen state of affairs makes unfortunately good sense from Congress's self-absorbed point of view.

Unfortunately, despite the end-of-term, politically charged pre-election legislative bustely, there is no indication that Congress has any appetite to undertake systematic, comprehensive legislation with respect to counterterrorism policy. Nor is there any indication that the Bush administration has any desire to seek it. No one should mistake the energetic debate of this moment — debate in which, in any case, Democrats are not really taking part — for more than what it is. The legislative proposals of both the administration and its interlocutors hew narrowly to the *Hamdan* minimum — another skirmish, in other words, not over concrete policy in the war on terror, but instead in the never-ending, abstract, and finally metaphysical battle over the constitutional extent of presidential discretion. But what the administration especially fails to appreciate is that no matter who wins the 2008 presidential election or the 2006 midterms, there is not likely to *be* any coherent national counterterrorism policy past the end of the second Bush administration unless Congress takes steps to legislate it, institutionalize it, and make it long-term and indeed permanent.

The fissured *Hamdan* decision, while leaving open many momentous questions, at least makes one thing reasonably clear: Responsibility for democratically establishing the war on terror — its overall contours, its long-term legitimacy, its institutional form, its trade-offs of values of national security and civil liberties — today falls to the legislative branch. The most desirable policy result of *Hamdan* would be the acknowledgment that the judiciary has only a limited role to play in foreign policy and national security, and that it will discipline itself to stay out of such disputes. At the same time, the judiciary will stay out of these arenas because it knows that the separation of powers will remain in the two political branches of govern-

ment operating actively as checks and balances upon each other.

That interpretation of *Hamdan* is in accordance with the best interpretation of a long line of Supreme Court cases dealing with the role of the judiciary in time of war and in matters of urgent national security: Rather than dealing with the substantive result, the Court appears often to have been concerned instead with ensuring that meaningful democratic checks and balances are maintained even if the courts stay out, through the active participation of Congress in legislation. And in any case, that is the democratically legitimate thing to do for long-term policy, even vital matters of national security, in the American republic.

Varieties of aggression

The strategic political situation is simple and unattractive. The administration remains caught in the grip of a lawyerly clique that places an abstract ideology of executive discretion above the war on terror and is willing to lose intragovernmental battles about how to conduct the latter over and over again for the sake of the former. The administration therefore brings only minimal legislation to Congress, preferring to bet on arguments of executive power that are rebuffed in the courts. The Supreme Court gives some indication that it is willing to lessen its role in what amounts to foreign policy and war, provided the two political branches come together to give the democratic imprimatur of legislation to counterterrorism policy and to the inevitable trade-offs between national security and civil liberties. Congress, however, has little desire to exert itself legislatively in these matters because, despite the noise it makes in the public sphere, it currently has the best of all worlds — the ability to snipe, second-guess, complain, whine, and Monday-morning-quarterback against the administration, without any obligation to legislate what it thinks the solution should actually be. The executive allows it to do so, up to now, because it believes — quite fantastically — that it is protecting and even enhancing executive power for the long run. And this is a House and Senate whose majorities, for the moment, are of the president's own party. Whining without accountability — Congress wallows, one might be forgiven for thinking, precisely in its element. And why would it want to do anything different? It is a good bet that *Hamdan's* requirements can be satisfied with relatively modest legislative changes — and a bad bet that Congress will be eager to undertake more, before or after the midterm elections.

Strategically, this frozen state of affairs unfortunately makes good sense, from Congress's self-absorbed and self-interested point of view. It is, however, a terrible mistake from the standpoint of policy and the common good of the American people. This is not merely because so many of President Bush's opponents believe the very idea of a "war" on terror to be an appalling, if not absurd, policy. Opponents of the Bush administration seek a counterter-

rorism policy that emphasizes containment of the terrorist threat — in the short to medium term, a defensive posture emphasizing such elements as control over vital entry points such as seaports, counterterrorism pursued as criminal justice domestically, police and intelligence cooperation with allied governments abroad and, in the longer term, reaching out culturally and socially to the Muslim world, seeking a permanent solution to the Israeli-Palestinian conflict, and hoping that a posture of restraint, rather than bellicose reaction, will result in a diminution of global anti-Americanism among inflamed Muslim populations that feed the ranks of Islamofascist terrorists. It seeks to decouple the Bush administration's linkage of terrorists and rogue states with weapons of mass destruction, and it argues that war cannot contain terrorism, nor can war democratize the Middle East, in Iraq or anywhere else. The terminology of a "war on terrorism" is, on this view, tendentious, because it illegitimately gives standing to war as counterterrorism policy, whereas that is precisely what should be at issue. The phrase "war on terror" presumes the conclusion of what should be a policy debate.

Who would not like to see a diminution of anti-Americanism in the Muslim world?

The Bush administration and its supporters do not deny the value of any of these elements of a counterterrorism strategy. Cooperation with allies in intelligence and policework is undeniably important, likewise control over ports and other points of entry and — many would add, although the Bush administration's bona fides on this point are themselves at issue — the U.S. land borders generally. Who would not like to see a diminution of anti-Americanism in the Muslim world, whether in the Middle East, Muslim Europe, or elsewhere? Who would not like to see a permanent solution to the Israeli-Palestinian conflict? The extra elements under debate, the additions of the Bush administration to this list, are two — war, the willingness to use military force, for a variety of purposes and, second, the aggressive use of intelligence-gathering methods, including aggressive interrogation falling short of torture. The president has made the case in his speeches for the indispensability of these aggressive methods in preventing terrorist attacks. One may regard the trade-off he implicitly proposes between the human rights of terrorist suspects and security as morally wrong. But his description of the concrete stakes is surely right, and those who might regard his language as merely hyperbolic take American and other lives in their hands. And looking to the new U.S. counterterrorism strategy unrolled at the beginning of September by the administration along with other parts of its campaign to refocus on the war on terror, the Bush administration sees war as a means to deny terrorists safe haven, to establish to the world that harboring terrorists risks war, to ensure that terrorists do not have access to weapons of mass destruction, and to topple evil regimes with the aim of

introducing democracy in the hopes of breaking the cycle of corrupt, authoritarian regimes that motivate terrorism. More generally, the inclusion of war as an instrument of counterterrorism policy is a way of remaining on offense, rather than defense, carrying the battle to the terrorists themselves, rather than waiting for them to come to us.

What is the point of such rhetorical bellicosity, ask the administration's critics. The neoconservative moment of infatuation with armed force as a leading instrument of foreign policy is over, the victim of military overstretch in Afghanistan and Iraq. No one in the administration, the Pentagon, the Joint Chiefs, seriously contemplates new war except in utter extremis — the administration will do or say almost anything to avoid the use of armed force in Iran or North Korea, as references to Iran in the President's recent UN General Assembly speech made clear. It is foolish to tempt having one's military bluff called, say the critics, so any future counterterrorism policy would be better off not mentioning war and focusing on the elements that are in fact possible and, on this view, more successful anyway.

Americans know that even if they would rather not be interested in terrorism, terror is interested in them.

The point is fairly taken but, for their part, the Bush administration's supporters correctly question whether these critics and opponents are in fact as serious or in good faith about the alternative containment strategy as they claim. After all, many of them have *also* opposed so many of the measures that might be deemed essential to any meaningful "nonwar" strategy — the Patriot Act, NSA surveillance, financial monitoring and seizure of terrorist assets, effective border and immigration control, profiling, etc. If your strategy is to conduct a defensive war located within your own borders, warn the Bush administration's supporters, then you had at least better be prepared to conduct it there, even if it discomfits civil liberties.

Of course, sensible people on either side of this debate recognize that the world cannot be understood in simple binaries of war and not-war. Sensible people do not think solely about counterterrorism as offense or defense, criminal justice or war, containment or regime change. It is a question of emphasis and the mix of tools available. Nonetheless, the two are fundamentally distinguished by two characteristics: whether war and the large-scale use of military force shall be a tool of counterterrorism policy or not, and whether intelligence gathering shall include aggressive techniques even though still falling short of torture. It might develop in the future that the disputants disagree on some other fundamental issue, such as the role and permissibility of armed violence falling short of war — targeted assassinations or abductions by intelligence agents, for example. But nearly all the other instruments of policy are agreed upon by the serious parties as useful and important. The points of disagreement are war and the permissible

extent of intelligence gathering. Those issues define the two sides, no matter what the other complexities. The result is that each alternative form of counterterrorism sets forth a complex bet, filled with guesses and unknowns about what is most likely to protect American security over the long term. As such, neither one can be written off as obviously foolish. And yet decisions have to be made between them.

As for the American people themselves, well, particularly in the wake of the summer London airline plot, despite impatience with the war in Iraq and an understandable desire that life could go back to the halcyon days of September 10, they comprehend that even if they would rather not be interested in terrorism, terror is interested in them. Hence the continued importance of the national security issue in the run-up to the November midterm elections. It is simply wrong to believe that the issue is on the public agenda because the Bush administration or the Republican Party trumped it up and put it there. It is there because the American people remain profoundly concerned. They — we — have questions about the nature of the national security "bets" represented by the parties, and in particular by where the Iraq war fits into any national security bet, but interest and concern themselves are unabated.

All of which makes it more dismaying that Congress should respond so minimally to the democratic challenge of defining counterterrorism policy, comprehensively and for the long term, all the more dismaying that the Bush administration should have avoided taking up comprehensive policy with the national legislature. Like most readers of this essay, I have a view on the fundamental approach to counterterrorism policy; I reckon it a war and reckon the Bush administration's approach better than the Democratic Party alternative. Speaking, however, not as a supporter of the Bush administration's war on terror but instead as a democrat, someone committed to democratic process, it seems to me less important at this moment in the political cycle to argue for a particular policy in counterterrorism policy — a war on terror or something else — than to argue that now is the moment for comprehensive legislation to institutionalize policy for the long term.

Irrespective of where one comes down in the debate over counterterrorism policy, Congress today should act maximally through the only legitimate mechanism for the long haul in a democracy, legislation. No matter who is in control of the House or Senate come January 2007, it is critical that the legislature step up to its democratic responsibility. The administration responded swiftly to an unprecedented national emergency. But the United States cannot operate permanently as a national security state. The Cold War demonstrated that a democracy *can* develop mechanisms to accommodate — so long as the democratic apparatus remains flexible and willing to recognize the need for genuine tradeoffs — national security, democratic process, and civil liberties. The Bush administration has operated national security questions and the war on terror, in Jonathan Rauch's words, "out of its hip pocket," on a discretionary basis. But that cannot be the long-term

operation of a democracy. I am willing to do political battle in favor of a genuine "war" on terror; but more important at this moment is the democratic impulse — that the republic, and its legislature, move beyond the executive discretion suitable to an emergency and act in the way a democracy constitutionally possessed of a legislature should act.

The executive power cul-de-sac

The internal debate within the Bush administration over the prerogatives of executive power requires little adumbration. In wide areas of counterterrorism and national security, the executive since 9/11 has asserted inherent presidential power as the constitutional basis for its actions. The subject matters include detention at Guantanamo and elsewhere (the so-called CIA "black sites" and ghost detainees), interrogation methods, procedures for military tribunals for unprivileged belligerents (illegal combatants not protected as POWs under the Third Geneva Convention), and warrantless surveillance and data mining by the National Security Agency (NSA), among others. All, of course, have emerged as prominent national controversies. The administration seems to have divided internally around a group centered in the vice president's office that carries forward an agenda to restore, as they see it, a strong executive power wrongly lost in Watergate and the 1970s, on the one hand, and other officials who simply view whatever particular program they work on as, on its own terms, within the executive's constitutional powers, without necessarily taking a position on any larger, abstract constitutional question, on the other. That is, from the outside at least, the unified view of the Bush administration appears to be that indeed it has the constitutional power to do what it does. But in one case it arises from an abstract agenda about executive power and in the other from a casuistical assessment of each particular program.

At this point, with the clock ticking against the administration, the abstract executive power position, executive power as an independent ideological agenda, has been severely weakened. It has lost repeatedly in the courts, and those failures have served to weaken the persuasiveness of the administration's less extreme legal arguments. The other faction, meanwhile, although generally seeming to believe, push come to shove, that the executive has the necessary inherent power, has no special ideological objection to seeking authorization from Congress and, indeed, prefers it insofar as it places counterterrorism programs on a surer political footing. As one senior administration official observed anonymously to the *Washington Post* regarding interrogation techniques, the administration intended to seek input from congressional intelligence oversight committees in order that the program "be more durable" and not subject to the "pendulum swings of Congress and the president."

Yet it would be a mistake to characterize the crusade for greater executive power as merely an ideological obsession of an interior claque of administration lawyers, revolving around the relentless and, by nearly every account, genuinely obsessive David Addington. In the academic quiet of my study, I sit with John Yoo's recent book, *The Powers of War and Peace* (University of Chicago Press, 2005), defending executive power; the arguments are considerably more compelling than the critics are wont to grant. At some points, despite my final conclusion that the national emergency state cannot last forever or even for a long time and that democracy requires the action of the legislature, I find his arguments for inherent presidential power very persuasive even if not finally conclusive. The force of argument with respect to the conduct of war is overwhelmingly so — the issue is not the executive's power in that case, but instead how widely "war" can be defined so as to invoke that power. The "state of emergency" issue was new to the postwar United States following 9/11. It was not so in many other countries — even such developed, sophisticated democracies as Britain, Germany, or Italy, which responded to the experience of serious terrorism in the 1970s with draconian state powers, some continuing to this day, compared to which the Patriot Act is a minor inconvenience. My own experience of the national security states of Latin America in the 1970s and 80s — Chile with its permanently renewed, over decades, "state of emergency" under Pinochet, for example, or Guatemala in the 1980s — convinces me, at least, that emergency presidential power conjoined with highly ideological, abstract notions of "war," such as the war of anti-communism, must eventually erode democratic institutions. The United States is not exempt from that risk — American exceptionalism is real, but not that real — and ultimately the accommodations that national safety requires of civil liberties must be placed on a democratically assented-to footing as a bulwark against what our forebears would have called "despotism."

Both sides in this running escalation of threat and response needed, long ago, to take a deep breath and a step back.

Yet the drive for greater executive power is not only a function of certain right-wing lawyers in the administration and out. Significantly (and significantly overlooked), it is also driven by an equally obsessive, excessive legalism among liberals and the left, who often choose to call the president's actions "illegal" rather than settling for calling them "wrong." A stroll across the academic parts of the liberal-left blogosphere reveals just how widespread this tendency is even among otherwise sober-minded professors; fantastical plans for impeachment hearings, seemingly (to the outsider, anyway) far-fetched theories of criminal liability of administration insiders, dreams of payback that center on allegations of illegality. Many of the administration's critics having lost the distinction between bad policy and

illegal action, the natural result on the other side, within the administration itself, is excessive concern with protestations and formalities of lawfulness. The administration's many, many lawyers circle the wagons, zealously protecting its legal positions far beyond the point of relevance to practical policymaking — indeed, to the *detriment* of sound policymaking. They believe that as advocates for their clients, the president and his administration, they have no choice, particularly given how high outside critics seek to raise the stakes — criminal penalties, civil trials, and the prospect of criminal indictment, civil suits, and personal bankruptcy defending oneself. The collapse of the Fitzgerald investigation into Plamegate but the unconscionable persistence of the Libby indictment is an object lesson to the administration's lawyers that the threat is real. Both sides in this running escalation of threat and response needed, long ago, to take a deep breath and a step back — and no one did.

The administration's lawyers should never, for example, have been issuing legal opinions ruminating on just how serious bodily damage would have to be in order the violate the torture convention, merely in order to assert the hypothetical outermost edges of presidential authority, as though in a law school classroom and not the halls of actual power, policy, and responsibility. We need instead *actual* policies on *actual* techniques of interrogation and what crosses the line into *actual* torture — not lawyers debating torture hypotheticals as a way of pressing a quite separate argument about executive power. While this debate over abstract hypotheticals goes on, meanwhile, CIA field officers, pressed in the period following 9/11 to come up with actionable intelligence, move interrogation techniques forward, while nervously wondering if they will be criminally indicted and, as recently reported in the press, therefore consult their own lawyers, sometimes refuse to participate in interrogations or even meetings discussing interrogations, and sign up for legal liability insurance. This lack of certainty as to legal standards is entirely unacceptable, and the maneuverings of administration lawyers to protect the outer boundaries of executive power while leaving essential national security policy dangling extraordinarily bad judgment. Yet, on the other hand, the administration's legion critics should never have been — and should not continue to be — baiting them to do so by relentlessly dangling the threat of individual criminal liability over the heads of officials at the first breathless opportunity and as an alternative to winning the 2004 election and the opportunity to establish policy themselves.

The Bush administration thus turns out, peculiarly, to be the most *overlawyered* ever seen. The drastic raising of the legal stakes for both institutions and individual officials in the formation of policy has been near-lethal to the ability to reasonably and practicably formulate policy — as a future Democratic administration will one day discover, to its dismay. And, as a corollary, indubitably the *least* helpful exercises in seeking a comprehensive counterterrorism policy are those that view any relaxation of the administration's existing legal positions as the "gotcha" moment — necessarily a tacit

admission, to be used in court if at all possible, of past illegality and possible criminality.

Dying by discretion

In considering its next moves, therefore, the Bush administration should mark well that what lives by executive discretion also dies by executive discretion. If national counterterrorism policy is as important as the White House believes — certainly it has gone to great efforts to convince people not only of that but moreover that it should, in crucial ways, be a *war* on terror — then it affirmatively merits the blessing of the legislature. It ought not to exist merely at the discretionary whim of some future president.

The Bush administration ought to see that insofar as it believes in the long term necessity of not merely a national counterterrorism policy, but one with particular political and strategic features, it thereby has an incentive to institutionalize those priorities and strategies in law. That requires, however, being willing to take to Congress not merely the bare minimum necessary to satisfy *Hamdan*, but something comprehensive and long term. And it also requires being willing to engage in the political process of legislation, understanding that whereas presidential discretion can perhaps give you precisely what you want today, but runs the risk of turning on a dime in the future, legislation is inevitably (even when your party controls the House and Senate) a matter of messy compromise. But at this stage, five years following 9/11, a comprehensive, long- term, reasonably stable national counterterrorism policy, enacted legislatively, is well worth giving up the purity of presidential discretion. And even leaving strategic arguments aside, the principled democratic response is to recognize that the long-term design and formation of something as fraught with issues of both national security and civil liberties as counterterrorism can only be done through legislation enacted by Congress and faithfully executed by the president — this and any future president.

Put that way, the argument for comprehensive, long term legislation ought to appeal to a White House acting rationally — an administration that perceives, even if only strategically, that its executive discretion arguments have gone as far as they can go and in fact are in retreat and carrying the ship down with it. Better, therefore, to pull back and instead defend its vision of the war on terror. There is some indication that the White House is starting to understand this. "It's really important at this stage . . . to be thinking about how to institutionalize courses of action that will enable future presidents to gain the information necessary to prevent attack," President Bush said in a September session with reporters.

In that case, however, what's in it for Congress? Or, more precisely, what's

in it for Democrats? Why should they cooperate with Republicans in crafting long-term legislation for the war on terror? One should like to say, of course, that both sides have an interest because the American people have an interest — because the terrorists have an interest in us. The polarized political reality is such, however — the perceived differences in what counterterrorism policy should mean — that arguing from the common good goes nowhere. But what remains in legislating for the Democrats is the chance to have a voice in the shaping of such legislation — perhaps as the majority in January, perhaps as a minority with considerable bargaining power and, as has been revealed over and over throughout the Republican majority years, considerable powers of political maneuver. Or it might be that a Republican majority and the White House will present the Democrats with legislation and force them to respond or be painted in 2008 as obstructionist and uninterested in comprehensive national security. I do not wish to pretend, Pollyannaish, that there is a great incentive for Democrats, or legislators generally, to depart from the stance of sniping at the administration without bearing any real responsibility for policy. On the other hand, why the White House would persist in such a masochistic stance for the remainder of its time in office and why it would not want to share that burden with Congress eludes me.

If we can agree, even if only for discussion's sake, to get beyond strategic politicking and take up the substance, we can then ask, on what general principles should we be legislating? Comprehensive legislation, yes, but are there any general concepts to guide us? Here are some; no doubt there are others.

Counterterrorism as state of exception

Counterterrorism can be construed to mean almost anything — this is one reason it can so threaten civil liberties. Anything might conceivably be policed in the name of security. Consider the Patriot Act. On the one hand, it is a good example of a counterterrorism law containing many quite sensible national security features. And even at that, it nonetheless falls far short (this fact surprises many Americans) of the vastly more draconian security and surveillance regimes of most Western European states, including Britain, France, and Germany. From a strictly instrumental security point of view — leaving aside American constitutional values — one would swap our rather laguid domestic system for any of theirs. These features in Europe derive in part from the searing political experience of terrorism in the past, in part from more statist political traditions, and in part from differences in legal systems that have traditionally (leaving aside the effect of such new institutions as the European Court of Human Rights and EU bodies) given the prosecutor greater discretion and investigative rights, in the case of civil law countries, and the ability of

Parliament to act without judicial review in establishing criminal law standards, as in the case of Britain (which recently jettisoned 800 years of common-law privilege against double jeopardy by a mere act of Parliamemt). Americans presumably would balk at such intrusions on civil liberties and so cavalier a view of civil rights (in the American case, constitutionally specified rights).

On the other hand, the Patriot Act is also larded with provisions that either have little to do with terrorism of the jihadist or transnational kind that requires an extraordinary response or else — much more threatening to civil liberties — are allowed to be applied in criminal matters having nothing to do with terrorism. So, for example, Patriot Act provisions have been applied in child pornography cases having no relationship with political terrorism. The Justice Department correctly points out that nothing in the Patriot Act limits the kinds of cases to which its provisions may be applied. Although intended and justified to the public as counterterrorism legislation, in fact it is a law of general application. Its critics are quite wrong, silly even, to dismiss it as a police-state assault upon basic civil liberties and human rights — the critics seem rarely to say the same of Britain, France, or Germany. They are not wrong, however, to condemn it insofar as provisions in it which, if limited strictly in their application to transnational terrorism make perfectly good sense, are instead allowed general application.

The Patriot Act is larded with provisions that have little to do with terrorism of the jihadist or transnational kind.

As a general principle on which comprehensive legislation should be based, counterterrorism laws which then morph into general criminal law are a very bad idea. Either they will indeed erode ordinary civil liberties, or else they are laws make sense limited in application to the extraordinary threat of terrorism but nonetheless will not get passed because of the fear of more general application. The point is to draft legislation to cover contingencies that are indeed considered extraordinary with respect to ordinary criminals and ordinary crimes. For that reason, in some cases — as in tribunals for alleged terrorists — they justify procedures involving special rules that deliberately depart from the usual rules of criminal law. Perhaps any such departures are all a mistake and, as many have argued, all of this should be undertaken in the regular law courts under regular laws of the land or not at all. And perhaps Congress would agree — although I doubt it. I take as point of departure for the remainder of this discussion that certain aspects of counterterrorism policy may, as a practical necessity, differ from the usual systems of criminal justice and enforcement. If, even only for argument's sake, that is accepted, however, then at least the circumstances under which those exceptional rules may be invoked should be confined strictly to the emergency which justified them in the first place — viz., terrorism strict-

ly, and nothing else. Not even child pornography or whatever admittedly heinous crime might otherwise tempt departure from normal processes. Rules for a state of exception must remain rules solely for the stated exception.

The justification for a strict separation of ordinary law and counterterrorism regimes has a conceptual basis. Transnational terrorists are, on the one hand, criminals who use or hope to use the basest criminal means — the slaughter of innocents to leverage political gains. So they *are* criminals. But that does not automatically mean that they thereby merit access to the ordinary criminal law system that we, as a domestic society, have elaborated to deal with those of our own who criminally deviate from the legal and social order. Our system of criminal justice is aimed fundamentally at those within our own political community, within our own domestic society, who transgress its norms. Ordinary criminals violate our society's legal norms; they do not challenge, much less attack with terrorist violence, its fundamental legitimacy and existence. The terrorists who attack us, on the contrary, are not merely criminals — they are simultaneously our "enemies." They are enemies of the social and legal order itself, not merely deviants within it.

Ordinary criminals violate our society's legal norms; they do not challenge, much less attack with terrorist violence, its fundamental legitimacy.

The consequences of seeking to deal with terrorists who are once "criminals and enemies" through a system of criminal justice designed with ordinary criminals in mind are severe. We risk dragging down the entire criminal justice system to the level necessary — and justified — to contain the terrorist threat, or else we risk not dealing with the terrorist threat at all. The manifest difficulties of the Moussaoui trial demonstrate just how unsuited the ordinary mechanisms of criminal justice are for dealing with alleged terrorists; likewise the hubris of prosecutors in always thinking they will be the ones who manage to make the case and claim the glory in the newspapers.

What is unacceptable is that we return to anything like the Clinton-era system in which the FBI accompanies military teams to read suspects their rights after they have been captured, and the Clinton administration declines to take custody of Osama bin Laden because it has — and is no doubt legally correct — insufficient evidence to indict him. We cannot go back to such a criminal justice model of counterterrorism on security grounds. But we *also* cannot go back to a pure criminal justice model because of what terrorist cases threaten to do to it. If terrorism becomes the tail wagging the dog of criminal justice, we risk the loss of civil liberties across the legal system — just as, Judge Richard Posner notes, the greatest single risk to civil liberties lies in no policy proposed or followed by the Bush administration, but

instead by the public backlash following a next and truly catastrophic terrorist attack.

Important civil liberties we cherish — and some civil liberties embedded in criminal law dating from the Warren Court that some conservatives dispute but I, at least, cherish — *will not* survive contact with a flood of serious terrorism cases. And just as the Patriot Act's presumably "anti-terror" provisions leak over to other crimes, such as child porn, trying our terrorism cases in ordinary courts will tend to diminish our civil liberties in ordinary cases as well. When it comes to those who are *not* criminals and enemies to our political community, when it comes to those who "merely" deviate from our social order, even in very serious and violent ways, we owe it to them and to ourselves — we owe it to "us" as a people — not to sacrifice the nobler aims of criminal justice, including rehabilitation, because we have no choice but harshness in dealing with terrorists. It is not, as some might imagine, merely a matter of necessity in dealing with terrorism — it is, rather, a general moral proposition that we do not owe those who declare themselves enemies of our constitutional political community, and then pursue their "war" with the most criminal means, the same moral or political obligations we owe to "our" ordinary criminals.

Because of this distinction, Congress ought to create a special terrorism court system, outside the ordinary criminal justice system, with special rules of procedure and evidence, for dealing with those accused of a strictly defined list of terrorist crimes; models can partly be found in Western Europe. The court would be civilian in nature, rather than the military tribunals currently contemplated; it would deal with persons accused of terrorism crimes who were either noncitizens or U.S. citizens, whether captured abroad or within the territorial U.S. Military tribunals would be limited to those, whether U.S. citizens or not, captured on the battlefield as traditionally defined — Iraq or Afghanistan, for example — rather than the "world as battlefield" concept of the war on terror. The court would have two hearing functions. The first would be to determine innocence, guilt, and punishment for unprivileged belligerency and any related crimes, such as murder, etc. The second would be to determine whether a detainee posed a threat to the United States — in proceedings on a regular, ongoing basis — and providing for administrative detention in such cases until the threat abated. (Citizenship would continue to differentiate rights in certain cases;and habeas corpus would be available with limitations.) As to the thorny procedural questions for a court departing ordinary U.S. criminal practice, guidance could be sought in Western European systems of terrorism courts and administrative detention, as well as the U.S. military tribunals now being legislated. As for evidentiary questions, a useful source would be the evidentiary codes of the Yugoslavia tribunal — loudly endorsed at its inception by human rights monitors — allowing for the use of hearsay evidence, anonymous witnesses, closed hearings, and generally anything that the judges thought would be of probative value; those terms would perhaps suffice and

have already gained the human rights community's approval over many years.

Massive waste

A second way in which comprehensive counterterrorism legislation might be conceived is as a matter of large scale institutional design. What new or reformed institutions are needed to combat terror in the long run? The United States has gone down that road several times since September 11, notably in the creation of the Department of Homeland Security (DHS). It has also had numerous commissions, studies, investigations, and large-scale reports recommending many reforms to existing institutions that deal with counterterrorism. Of course it is true that Congress must have important things to say and enact with respect to any shifts in large counterterrorism bureaucracies, whether in law enforcement, intelligence, the military or elsewhere, if for no other reason than as a prerogative of its spending power. On the other hand, the experience of intelligence and counterterrorism reform, well described by Judge Richard Posner in his several recent books on the subject, provide grounds for great caution in encouraging Congress to become directly the architect of institutional design for counterterrorism.

Indeed, the case against having created DHS in the first place — merely another layer of bureaucracy in the intelligence system with no greater increase in either the flow of new raw intelligence into the system or compelling new mechanisms of analysis yielding new, accurate, actionable new conclusions — is very considerable. Yet the temptation to create a superagency is very strong. It likely would have been better, in retrospect, not to have created a new body, but to have given the executive stronger authority to reform existing agencies, shift resources, bypass and sideline those that were ineffective, and do what presidents have long been unable to do — manage the intelligence bureaucracy. The same concerns can be raised, for example, with respect to a proposal pressed by Judge Posner, for the United States to create a wholly new domestic intelligence agency along the lines of Britain's MI5, hiving off such work from the FBI.

As a legislative body, Congress cannot manage or superintend; all this is well-known, of course, but somehow gets forgotten in the sense of crisis in intelligence. The compromises necessary for Congress to reach agreement mean that it cannot offer efficient or effective direction except at the general level of legislative mandates. Its extrusion into matters below the level of mandates and general design practically guarantees ineffectiveness, as well as massive waste as legislators see in counterterrorism an irresistible opportunity for pork spending. Posner cites, as one among many examples, Congress's legislative intervention in the particular computer systems to be used by

DHS; this is, of course, the legislative process at work, but in the worst way possible and one guaranteed to reduce the effectiveness of agencies such as DHS and their ability to keep America safe. Congress cannot act as an executive.

Legislating our values

CONGRESS INSTEAD HAS a far more important role that only it can play. Among all the possible topics of legislation, all the things that Congress might do, those that matter most are not matters of either institutional design or management but values. Our values; America's values — the clear enunciation of those values, what they are and our willingness to defend them.

The Islamofascist threat is potent for the long term in part because it is, as with all persistent terrorist movements, an ideology founded on values. Islamist jihadism is founded on values, ideas, beliefs, spirituality, sacrifice, martyrdom, transcendence, and eschatology that accepts a very long-term perspective; these make it dangerous because it is not amenable to the usual rationality of a democratic society, the civil society of a "polite and polished commercial people," as Adam Ferguson long ago described the rising bourgeois ideal in Western societies. Although it might simply burn itself out within the internal dynamics of the global Muslim communities — the past five years as a kind of extended 1968, the radical moment of an enormous Muslim baby boom cohort worldwide in a world where other societies are instead aging, but one that thankfully fades — well, that is a slender hope and not one upon which to rest political safety.

But precisely because it is driven by values, the opposition to it must likewise be driven by values. This is a vital lesson of the Cold War; Peter Beinart is profoundly correct to assert Islamofascism as the rise of a new totalitarianism in our time, and just as the role of Western liberal, democratic values publicly asserted is widely acknowledged in the defeat of Soviet communism, likewise the role of Western liberal, democratic values publicly asserted will be one day undisputable in the defeat of radical Islamist jihad.

In fact, the most bitter and divisive debates over national security policy and counterterrorism have been about our values — what they are and what they concretely mean in counterterrorism. Not at the level of lofty, but necessarily abstract, speeches about defending American values onto which everyone can easily sign on — but instead the concrete practices of the United States government in dealing with terrorists and suspected terrorists. Issues of detention and interrogation, allegations of torture and war crimes — while keeping America safe from attack. The bitter, ugly fights over Guantanamo, Abu Ghraib, CIA secret "black sites" in Europe, torture, rendition, putting a pure conception of the humane rule of law on one side and the specter of catastrophic terrorist attack on the other — well, liberty and

security are both liberal values, both social goods, and yet in important respects fundamentally incommensurable, apples and oranges. It is not surprise that the battles over them are as deep and bitter as they are.

Yet we are not weakened by debate, even ugly debate that in the way of the lively, crude, often rude society America has always been. We are, however, weakened by the failure to resolve that debate in the only legitimate mechanism of a democracy, by democratic votes by the people's representatives. What matters is not that some people believe with all their hearts that the Bush administration has betrayed the country's values and made it complicit with torture, or that other people believe equally strongly that there are foolish and immoral Americans who would give up a million lives rather than waterboard one known terrorist — what matters, rather, is that between the administration and Congress, those fundamental conflicts of values have not been brought plainly and openly before the people's representatives for votes. The republic is deeply divided; we have one and only one long-term, legitimate procedure for resolving those differences: to put the alternatives to a vote by the legislature. We have not used it — Congress has been happy, by and large, with an arrangement in which the administration does not bring these questions to them, and the administration has been happy, by and large, to keep policy in its own hands.

And so the values questions fester. And, in their own way, they undermine the ability of even the apparently purely managerial and technocratic servants of the war on terror successfully to do their work. For their work, try as one might, cannot be divorced from the values at stake. The concrete actions of CIA employees on a daily basis — who is detained, how they are treated in interrogations, whether they are released — make that only too clear. The failure to articulate clear legal standards as has been the case up to now means one of two very dangerous things — either that intelligence personnel believe that they have carte blanche in dealing with terrorist suspects or, more likely, that any action might be later regarded as criminal, resulting in an unwillingness to interrogate at all — what, after all, is the precise meaning of "degrading" treatment, violation of which might well be criminal? Can one know in advance what it would mean, for example, in the courtroom of Judge Anna Diggs Taylor? We all know these concerns; the president himself said so in his recent speech calling for immunity for CIA and other officials for past actions.

But the point is that this apparently technocratic gap in the ability to manage counterterrorism arises specifically from a failure to articulate our values *as law* in the war on terror. Although taking the Bush administration's point that constitutionally it lies with the executive to interpret treaty obligations, including those arising from the Geneva Conventions' Common Article Three, the very concept of the rule of law requires that acts incurring criminal or civil liability be spelled out in plain terms so as to announce in advance what is and is not legal. The very concept of the democratic rule of law requires that they be spelled out by a legislature. The vague terms of

Common Article Three will of necessity be interpreted and given concrete meaning by someone — if not by Congress, then by a judge in a case against a CIA officer. Those in Congress arguing that the executive already has sufficient authority to interpret those terms by getting — ludicrously — an opinion from a lawyer in the Justice Department, but then anticipate that liability might attach to a different interpretation given them by a judge in a criminal trial, weaken the rule of law. In any case, since presumably no one in the Justice Department wants to be the next John Yoo, the only likely advice from said lawyers would be to say no to everything. The rule of law is undermined, and the war on terror, too, as the ability to gather intelligence is lost. Those in the administration arguing — before the White House decided that legal certainty in this case was more important than executive power — that the executive had power to determine the meanings of terms in Common Article Three forget that it is a large step from the interpretation of treaty provisions to defining the terms of actual criminal liability; the latter is surely a responsibility of the legislature. Congress ought not to be let off the hook in stating plainly — without recourse to euphemisms, platitudes, generalities, or abstractions — precisely and specifically which interrogation techniques are legal and which illegal, whether under the rubric of Common Article Three or anything else. The White House should welcome this sharing of moral responsibility for these profound and controversial choices about our collective values.

And we incur damage from our failure to convey a clear message as to our values to the outside world. It is not, to be sure, that the outside world will agree, like, or express joy at a plain, legislated U.S. policy enunciating our values and striking our bargains between the incommensurate social goods of liberty and security — the outside world will always complain, if only to seek leverage over U.S. policy — but clear evidence that this is policy of the United States and not merely a frolic of the Bush administration can only strengthen our hand against our enemies in the world. We recall that terrorist exhortations among themselves have emphasized patience to simply outwait this administration. The message that American resolve will last beyond 2008 — in whatever form policy actually takes as legislation, including, come to that, policies that depart from what this administration desires — can only come from the legislature.

Institutionalizing counterterrorism

Finally, institutionalization of counterterrorism requires that it be genuinely comprehensive. The Bush administration is perhaps beginning to understand that its days are numbered and that it cannot leave things as they are. Yet its talk of "institutionalizing" the nation's counterterrorism policy so far is peculiarly vague and ambiguous — in particular, it does not distinguish between the need to institutionalize by

legislation, a system of laws which would both empower and bind future administrations, and institutionalizing by —against all legal odds — "institutionalizing" presidential discretionary power. Without legislation, there is no institutionalization, and one hopes that the administration understands that.

To date, the policy areas advanced for legislation have been constrained and far from comprehensive. No doubt moving any legislation in matters as divisive as American values on liberty and security is a daunting task, even for a president dealing with a Congress of his own party. But the only significant areas thus far addressed by proposed legislation are three, and narrow in scope at that — legislation aimed at making ensuring the lawfulness of NSA surveillance programs; legislation to enable military tribunals, satisfying the narrowest requirements of *Hamdan*; and legislation to clarify what the vague terminology of Common Article Three, also mandated by *Hamdan*, means in actual, concrete practice for US officials who might face criminal or civil liability under such language, as well as immunity for past actions under other standards. Add to that the nonlegislative issuance of the army manual on procedures for military tribunals — parts of which, dealing with the specifics of interrogation and the line of torture, ought in fact to be legislated in complete detail so that the world knows what is legal and illegal officials and so American voters can know what tradeoffs their representatives make between liberty and safety.

We need institutions for the long term, not quick fixes designed to satisfy the immediate pressures of a Supreme Court decision. And the administration might consider that a program of comprehensive legislation is far more likely to persuade the Court to stay out of national security matters because it believes that the political branches of government are not merely doing as little as possible. What are the topics on which legislation is most urgently needed to articulate America's values in a genuinely comprehensive counterterrorism program? The most critical are:

- *Surveillance*. This encompasses not just the NSA programs, but also the utterly vital financial assets surveillance and seizure programs.
- *Detention and rendition*. The question of who may be detained and for how long — how do you make a determination that this person is likely a terrorist and this person merely a shepherd?
- *Rendition*. Under what circumstances may a detainee be turned over to his home country or some other jurisdiction?
- I*nterrogation and the definition of torture*. What are the plain, noneuphemistic definitions and legal rules?
- *A domestic intelligence agency*. Should we create one, as Judge Posner urges? Or is a reformed and reconfigured FBI the best instrument for gathering such intelligence?

- *Reforming the classification system*. Although relatively neglected in discussions of comprehensive counterterrorism legislation, some of the most bitter and divisive arguments are over the revelation of classified information; we need a complete revamping of the classified information system, first to cut down by whole orders of magnitude the amount of material classified and, second, to create meaningful penalties for revealing what is left.

- *Military tribunals*. They should be limited to detainees from war zones as traditionally defined — Afghanistan and Iraq, today — not from a war zone defined as the "whole world as a battlefield."

- *A special counterterrorism court*. A new civilian counterterrorism court, with special rules of procedure and evidence, should be the primary place for dealing with terrorist suspects, both U.S. citizens and noncitizens, and those detained within the United States and without.

- *Legal protections for interrogators and indemnities for mistakes*. In addition to legal protections for government interrogators, including immunity for past actions under different standards, the law should provide generous cash indemnities for those detainees found to have been mistakenly held.

- *Use of force short of armed conflict*. The Cold War laws governing the use of force outside of formal armed conflict — targeted assassination of terrorists, for example, or the abduction of terrorists abroad — need to be updated and revised to take account of new realities of stateless, transnational actors.

- *The role and interpretation of international law in counterterrorism*. Much of the acrimony over the war on terrorism can be traced to the administration's initial unwillingness to admit a role of international law — and the Geneva Conventions in particular. It has later become accepted, even within the administration, that application of the Conventions would have led to application of the category of unprivileged belligerents not entitled to POW protections. The McCain amendment attempted to deal with the lacunae created by the refusal, under executive authority, to acknowledge international law with respect to torture and interrogation techniques. It produces more problems than it solves, however, by invoking a U.S. constitutional standard that ought not to be the basis for dealing with terrorists — criminals and enemies who stand outside our constitutional community. We would have been better then, and now, to reach instead to define in domestic law an authoritative domestic interpretation of Common Article Three and to apply Article 75, Protocol 1, as the standard for trials for unprivileged belligerents.

- *The congressional oversight system*. The oversight system stands in

clear need of revision. The revelations by Senator John Rockefeller, for example, that not only did he not understand, that he did not regard himself as capable of understanding, and finally that he did not think it worth informing anyone at the time of these salient conditions regarding his ability to give congressional oversight to the NSA programs, suggest that something needs reform in the matter of oversight.

Consensus is not democracy

THIS CALL FOR comprehensive reform is not a call for some sort of mythical legislative "consensus" in which everyone somehow mysteriously sets aside party affiliations, political agendas, and partisan preferences to "come together" around a comprehensive legislative program. This essay has talked much about democratic legitimacy and democratic process. It has argued strenuously that the benefits of democratic legitimacy in the long-term struggle against transnational Islamist terrorism today far outweigh the advantages of conducting counterterrorism essentially through executive power. But consensus, rather than democratic process, is the wrong standard and the wrong goal.

Consensus is fundamentally undemocratic. The point of democracy is that everyone raises their hands and votes. The minority accepts the policy of the majority — but democratic process does *not* require that the minority change its mind about the wrongness of policy or stop trying to change policy by some future vote. Democracy is not collectivism, not even as high-minded a collectivism as consensus. So too with counterterrorism policy. The people of the United States are deeply divided on many matters, values issues in relation to terrorism especially. We are not, as a people, going to achieve a consensus view on anything other than lofty abstractions too platitudinal to serve as policy.

Naturally we wanted to tell ourselves in the sorrow and sentimentality following 9/11 that we had achieved a consensus — everything had changed; our political alignments were now consensual rather than merely democratic. For the brief moment of immediate emergency, that was so. But it was not to continue — and it should not, because consensus is not democracy, and we are proudly and unapologetically a democracy. We squabble and bicker among ourselves in order to achieve not a consensus, but a democratically established law that all will follow even if they disagree with it and seek to change it. The task of institutionalizing counterterrorism policy — whether a war on terror or anything else — is to let the sharp-elbowed, rancorous political process of reaching compromises on some things and imposing the majority's will on others go forward to its conclusion.

In our democracy, informal consultation and coordination with the opposition certainly go on. But we do not form "national unity governments" in

the tradition of parliamentary governments facing existential emergencies, such as Britain in the Second World War. The United States faces its emergencies with the government elected by the people. It goes to war with the government it has. And its elections take place as scheduled, neither sooner nor later: Ours is not a system of a no-confidence votes and falling governments — even in the midst of total war, a principle settled at least as far back as the Lincoln election during the Civil War. A Republican president, a Republican House and Senate, will pursue the struggle against terrorism differently than a Democratic president, House, and Senate would; this is democracy, and if the voters want to change things, they can. Therefore, in the long struggle against terrorism, let legislative majorities, Republican or Democrat, decide as they decide.

The Bush administration, as it says goodnight, ought to consider that the war on terror, counterterrorism policy, about which it has been properly adamant, will over time amount to little if it is unwilling to go to Congress and ask that it be enacted as policy — not of the Bush administration, or of any administration, but of the United States.