

## TEX LEZAR MEMORIAL LECTURE\*

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It is surely no secret to anyone in this room that Tex Lezar had an abiding love for his country, its political structure, politics, and the law. Indeed, he dedicated a good part of his life to these passions. And the principle of government that held the most fascination for Tex was the separation of governmental powers.

The separation of powers was a very big deal to Tex. I first met Tex when he came to Washington to work with Ken Starr on the staff of President Reagan's first Attorney General, William French Smith. Tex was cranking out speeches for Attorney General Smith about the separation of powers before he had even unpacked his socks.

The best example I can give you to illustrate the fact that the separation of powers was almost a religion with Tex is the story I told at his memorial service regarding the decision by Tex and Merrie to ask me to be godfather to Maverick. I asked Tex why he had chosen me. I was certain that he knew people who had spent more Sundays in church. Wouldn't he and Merrie prefer someone who would be more qualified to deal with Maverick's spiritual upbringing? "No," Tex replied. If anything happened to him, he explained, he wanted Maverick to have someone to teach her about the separation of powers.

Of course, if that was his criteria, how many choices did he have? There are a lot more people who study the Old and New Testaments than Madison and Montesquieu. I must have seemed just the right person for the job. My position at the Justice Department when we served there together was all about the separation of powers. And the number of people other than Supreme Court Justices you could talk with about that subject in those days could all ride in the same elevator. Separation of

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powers was such inside baseball that when I left the Department in 1984 my friends had a great laugh about what a grand and glorious law practice I could create specializing in the separation of powers. Fortunately, it turned out more lucrative than they thought. At least I didn't have a lot of competition.

It is altogether fitting, therefore, that the first Tex Lezar Memorial Lecture be about the separation of powers. And, since this *is* the first such lecture, let me begin with some basics before turning to one recent manifestation of what I perceive to be a threat to the proper alignment of power in our central government.

Some of you might well be asking precisely what is the separation of powers, and why it is so important. Those are good questions, questions that Tex would have wanted you to ask and his first lecturer to address. Like Senator Kerry's Senate voting record, however, it is not that easy to explain.

Each of us knows, of course, that our Constitution divides governmental authority into three categories: legislative, executive and judicial. And that it lodges those powers in the three principal branches of our government: Congress, the President, and the Judiciary. Each component may thus act as a check on the other two, and the powers of government can never, in theory at least, be united in the same hands. This arrangement was quite carefully developed because the Founders of our government believed that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced *the very definition of tyranny*."<sup>1</sup> Therefore, these three discrete aspects of governmental power were separated and put into three branches under the leadership of different officials. As a consequence, the only way that government can tell you what to do is if both houses of Congress pass a law, the President decides to enforce it against you, and the courts decide that the law can fairly be applied to your conduct. This vindicates a principal, but not the only, goal of the separation of powers: the prevention of tyranny and the preservation of liberty.

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1. THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., 1999) [hereinafter THE FEDERALIST NO. 47].

Given how fundamental this concept is to our system of government, it may come as a surprise to some of you that the phrase “separation of powers” appears nowhere in the Constitution. “This invaluable precept in the science of politics,” as Madison put it in Federalist 47, is essentially simply presupposed by the actual structure of the Constitution, but never mentioned in so many words.<sup>2</sup>

In fact, our Constitution allows each branch to exercise some of the power that would naturally fall to other branches. The President’s veto power, for example, is a legislative function. And the Senate’s power to withhold its consent to Executive Branch appointments partakes of the President’s authority to discharge his constitutional duty to “take Care that the Laws be faithfully executed.”<sup>3</sup> Moreover, the impeachment power gives Congress the ability to remove Executive Branch officials. And the Supreme Court has upheld the creation of Article I courts, not established with life tenure according to the requirements for the Judiciary in Article III.

There was enough of this intermingling of authority in the proposed new Constitution that during the ratification debates, one of the principal objections, was the Constitution’s “supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct.”<sup>4</sup> As Madison explained in Federalist 47, opponents of the Constitution argued that

[t]he several departments of power are distributed and blended in such a manner [in the proposed Constitution] as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.<sup>5</sup>

That sounds a little like language that Tex might have used.

We know, of course, that Madison and his colleagues were successful in persuading the States that, while the new Constitution did not enact complete separation of powers, and each branch was not hermetically sealed from the other, it

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2. *Id.*

3. U.S. CONST. art. II, § 3.

4. THE FEDERALIST NO. 47, *supra* note 1, at 269.

5. *Id.*

contained more than adequate separation—as well as internal checks on the powers of each branch. The Constitution was in due course approved, and is widely regarded as the product of inspired genius. It has been characterized as the “Miracle at Philadelphia,” and is, in many respects, unique in the history of nations. It created the longest continuous government existing today; one unsurpassed in creating an effective and forceful central government, yet preserving the liberties of its citizens.

Justice Scalia explained during his confirmation hearings that it is the concept of separated powers, not the Bill of Rights or anything else in the Constitution, that has guaranteed both the strength of our government and the vitality of our liberties for 200 years. Other constitutions then in existence, he explained, such as those of the Soviet Union, Iraq, and others of the most despotic governments in the world, contained expansive and noble sounding lists of enumerated guaranteed individual rights. It is easy to create such lists and very difficult to sustain their continued viability. The parchment on which those promises may be printed does not preserve a single liberty or guarantee a single freedom. It is the *structure* of our government and its dynamic balance that prevents the legislature from enacting tyrannical laws, the executive from ignoring the restrictions set forth in legislation or the Constitution, and the judiciary from exceeding the limits imposed on it.

There are reasons beyond the prevention of tyranny for the separation of powers that are nearly as important. I will focus on just one: the Framers understood that each branch would be structured to perform its assigned functions effectively, but would be exceedingly ill-suited to perform the functions assigned to the other branches. For example, the Framers believed in a pluralistic representative legislature, but in a *unitary* executive because a plural executive would be less accountable, more difficult for the people to control or remove, and less energetic and effective. “A feeble Executive,” Alexander Hamilton explained, “implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill-executed, whatever it may be in theory, must be, in practice, a bad government.”<sup>6</sup> “Energy in the Executive,” on the other hand, he explained, “is a leading

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6. THE FEDERALIST NO. 70, at 391 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

character in the definition of good government.”<sup>7</sup> Among other things, “[i]t is essential to the protection of the community against foreign attacks . . . .”<sup>8</sup> Can you imagine the Senate, known as the world’s greatest deliberative body, conducting a war? I don’t think so, and neither could the Framers of our Constitution.

It was obvious to the Framers that neither the many-member legislature nor the multiple jurists who would compose the judiciary could perform the functions of the President, and except insofar as enacting and interpreting laws, the Constitution was structured so as to prevent them from inhibiting the President’s ability efficiently, effectively, and energetically to do so.

The Framers also knew that preserving what has been called the Constitution’s “delicate balance” is a never-ending task. They predicted that each branch of government would be endowed with a sense of its own superiority, and would constantly be seeking to expand its own powers at the expense of the other branches. Congress and the Courts would try to control execution of the law, the President would try to control decisions of judges, and so forth. The authors of our Constitution were nothing if not astute students of human nature. Each branch would therefore have a responsibility to resist encroachments by the other branches and to defend its constitutional sphere.<sup>9</sup> Indeed, the President’s oath of office, explicitly prescribed by the Constitution, requires him to “preserve, protect and defend the Constitution.”<sup>10</sup>

Which brings us to an aspect of the separation of powers that I want to discuss in somewhat greater detail today: Judicial involvement in the President’s exclusive constitutional responsibility to be “Commander in Chief of the [armed forces] of the United States.”<sup>11</sup>

The Framers believed that the “judiciary, from the nature of its functions, will always be the least dangerous to the political

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7. *Id.*

8. *Id.*

9. *See* THE FEDERALIST NO. 73 (Alexander Hamilton) (discussing constitutional provisions designed to protect the Executive from the Legislature).

10. U.S. CONST. art. II, § 1, cl. 8.

11. U.S. CONST. art. II, § 2, cl. 1. *See* *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936); *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).

rights of the Constitution; because it will be least in a capacity to annoy or injure them.”<sup>12</sup> As Alexander Hamilton explained, the judiciary would be “the weakest of the three departments”<sup>13</sup> because it “has no influence over either the sword or the purse,”<sup>14</sup> and “can never attack with success either of the other two” branches.<sup>15</sup> That would continue to be true, Hamilton continued, quoting the “celebrated Montesquieu,” “the oracle who is always consulted and cited on this subject,”<sup>16</sup> *provided* that “the judiciary remains truly distinct from both the legislative and the Executive. For . . . there is ‘no liberty, if the power of judging be not separated from the legislative and executive powers.’”<sup>17</sup> Thus, although the Framers did not spend much time discussing the subject because they presumed that the judiciary posed the least threat to the separation of powers, they certainly recognized that if the judiciary did begin to exercise legislative or executive powers, the threat to the scheme of separated powers would be real, and substantial. Certainly the Framers gave little or no thought to the possibility that the judiciary would involve itself in the President’s execution of authority exclusively vested in him such as the Commander in Chief or pardon powers, two explicit grants of presidential power set forth in the same sentence of the Constitution.<sup>18</sup>

Much has been said and written in recent decades regarding the increasing growth of judicial influence at the expense of the executive and legislative branches. Indeed, with the able assistance of his chief of staff, Ken Starr, and the craftsmanship of speech writer and adviser Tex Lezar, Attorney General William French Smith frequently spoke out about this trend and cautioned about its implications.

Political commentators tend to discuss this subject in terms of “activist judges.” I resist that phrase because it is too vague, tends to connote both too much and too little, and is used to describe different things by different people. It is too easy to characterize

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12. THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

13. *Id.* at 433–34.

14. *Id.* at 433.

15. *Id.* at 434.

16. THE FEDERALIST NO. 47, *supra* note 1, at 269.

17. THE FEDERALIST NO. 78, *supra* note 12, at 434. (quoting BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (1748)).

18. U.S. CONST. art. II, § 2, cl. 1. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1485–86, at 340–42 (1833).

any decision we do not like as the work of an “activist” judiciary, but that doesn’t really address the question whether the outcome was justified. Sometimes judges must aggressively reject unconstitutional conduct by the other branches. It is only when judges are insufficiently sensitive to the role, responsibilities, special expertise, and prerogatives of the other branches and overlook the manifest limitations on the capabilities and resources of the judiciary that separation-of-powers problems arise.

Concerns regarding the expanding reach of judicial power over the last half century have certainly proven to be well-founded. While the judiciary has been our nation’s greatest protector of civil liberties, its powers and influence have also grown increasingly to supervise the actions of the executive and legislative departments in ways the Framers do not seem to have contemplated. Through the exercise of power of judicial review, the authority to pronounce that laws passed by Congress or actions by the Executive are unconstitutional, the courts have demonstrated that the judiciary can, indeed, contrary to Hamilton’s supposition, control both the purse and the sword. And, in doing so, it can have significant, long term and potentially deleterious consequences on the separation of powers.

As Justice Scalia has repeatedly warned in dissenting opinions, once the Court has pronounced “what the law is,” the political process and the political branches are effectively displaced. Ill-advised laws may be changed by subsequent Congresses; executive branch policies may be altered through the process of elections. But changes in the Constitution tend to be both permanent and insulated from these democratic, political mechanisms. The Framers intentionally made amending the Constitution very difficult, cumbersome, and time-consuming. But that means that judicial decisions interpreting the Constitution tend to be immutable.

I offer these thoughts without intending in any way to impugn the integrity or motivations of members of the judicial branch. I have the greatest respect for our judges and Justices. Some of my best friends are judges. I believe that an independent and strong judiciary is not only vital to our government, but essential to our strength, vitality, and freedom as a nation. And our Supreme Court, before whom I have concentrated much of my practice

for a number of years, is a remarkable institution with nine extraordinarily well-qualified Justices of the highest caliber, both personally and professionally. Nothing I say today is intended to imply any diminution of my respect for that institution or its members.

But the Judiciary is not immune from the same institutional impulses and dynamic pressures to expand its authority that Madison ascribed to the legislative and executive departments. And, Hamilton to the contrary notwithstanding, the judiciary is no longer the weakest branch. Far from it. Madison cautioned that the legislative department, inspired by “an intrepid confidence in its own strength,” might be “everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”<sup>19</sup> But who believes today that Congress is exercising such authority or threatening to absorb all governmental power. The Supreme Court has repeatedly in the past few decades made it clear that it will not permit Congress to do so. And both Congress and the courts have proven themselves perfectly capable of reining in a wayward or abusive President.

At the same time, there are very few areas of policy-making or execution of the laws into which the judiciary has not reached, from the drawing of school district lines and the administration of prisons, to the regulation of marriage, contraception and sexual mores, and the determination of when and whether religious convictions may be expressed on public property or in public ceremonies. I am not saying that these decisions are necessarily wrong. Whether they are or not, no one can any longer claim that the judiciary is the weakest branch. It is not. In many, many areas, it is the last word, and thus *the most powerful branch*. And since its constitutional decisions can almost never be overturned by the elected representatives or by actual elections, the power that it exercises in connection with constitutional matters is both awesome and, for practical purposes, unchecked.

The latest example of judicial control over authority once thought to be a virtually exclusive province of the executive is the power of the Commander in Chief, especially in connection with the day-to-day control over the activities of our armed forces on foreign soil.

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19. THE FEDERALIST NO. 48, at 277 (James Madison) (Clinton Rossiter ed., 1999).

We only have time for one example. But it is contemporary, very important, and playing itself out at this very time. In *Rasul v. Bush*, the Supreme Court considered the authority of federal courts to exercise their habeas corpus jurisdiction.<sup>20</sup> The applicable statute gives courts the power “within their respective jurisdictions” to hear challenges by persons in federal custody.<sup>21</sup> *Rasul* involved petitions filed in the District of Columbia on behalf of detainees being held by U.S. military forces in Guantanamo, Cuba challenging the lawfulness of their detention. The *Rasul* Court rejected its own 1950 precedent in *Johnson v. Eisentrager*, which had held that federal courts had no habeas corpus jurisdiction over German soldiers in U.S. custody in an American-controlled prison in post-war Germany.<sup>22</sup> The *Eisentrager* Court had squarely determined that *nothing* in the text of the Constitution or any statute, gives jurisdiction to United States courts respecting aliens held abroad even if they contend that their detention violates U.S. laws, the Constitution, or treaties to which the United States is a party. In short, such individuals, never having made any connection with the territory of the United States, had no U.S. constitutional rights for U.S. courts to vindicate and U.S. courts had no statutory or constitutional authority to consider their status. To put it even more simply, the *Eisentrager* Court declared that the “privilege of litigation” does not extend to aliens not present within the United States.<sup>23</sup>

In a June 28, 2004 opinion authored by Justice John Paul Stevens, and joined by Justices O’Connor, Souter, Ginsburg, and Breyer, with a concurrence by Justice Kennedy, the *Rasul* Court swept away the fifty-four-year-old *Eisentrager* precedent. The Court held that since habeas acts not on “the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,” jurisdiction exists if the detainee simply asserts that he is in “federal custody in violation of United States laws.”<sup>24</sup> As long as some *custodian* may be reached by service of process, the courts of the United States have habeas corpus jurisdiction.

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20. 124 S. Ct. 2686 (2004).

21. 28 U.S.C. § 2241(a) (1948).

22. 339 U.S. 763 (1950).

23. *Id.* at 777–78.

24. 124 S. Ct. at 2689.

The Court thus held that persons captured by U.S. military forces during hostilities against the Taliban in Afghanistan and detained at a base in Guantanamo, Cuba, an area explicitly declared in the lease agreement between Cuba and the United States not to be subject to U.S. sovereignty, could challenge their detention and the conditions of their detention in United States courts under the federal habeas corpus statute.

The long-standing presumption against the extraterritorial application of U.S. laws had no applicability, the *Rasul* Court went on to hold, because jurisdiction exists over the *custodian* of the detainee, and such jurisdiction is present with respect to *any territory under U.S. control*. Thus, while the United States may argue in future cases that the *Rasul* holding should be limited to the unique character of U.S. control over Guantanamo, the language and logic of the opinion presents a formidable obstacle to any interpretation of the decision that would exclude U.S. courts from reviewing the claims of *any* person at *any* time held *anywhere* by U.S. officials. This would include persons captured in Afghanistan, or Iraq, or any place where hostile combatants may be detained.

Justice Scalia, joined by the Chief Justice and Justice Thomas, dissented. He labeled the decision “novel,”<sup>25</sup> “irresponsible,”<sup>26</sup> “unprecedented,”<sup>27</sup> “breathtaking,”<sup>28</sup> “clumsy,”<sup>29</sup> “counter-textual,”<sup>30</sup> “a wrenching departure from precedent,”<sup>31</sup> and a “monstrous scheme in [a] time of war, a frustration of our military commanders’ reliance on clearly stated prior law, [and] judicial adventurism of the worst sort.”<sup>32</sup> As he explained, “[t]oday the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to have been within their jurisdiction.”<sup>33</sup>

Justice Scalia was particularly harsh on the majority for not even mentioning some of the potential consequences of its

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25. *Id.* at 2701.

26. *Id.*

27. *Id.*

28. *Id.* at 2706.

29. 124 S. Ct. at 2711.

30. *Id.*

31. *Id.* at 2710.

32. *Id.* at 2711.

33. *Id.* at 2706.

decision, as enumerated in the 1950 *Eisentrager* opinion, such as the problem of transporting hostile detained combatants and their witnesses across the seas to U.S. courts, making U.S. courts available to enemy prisoners during actual wartime (which is what *Rasul* clearly does), allowing captured combatants to call field commanders to account in civil courts for military actions, diverting the military's attention from the "military offensive abroad to the legal defense at home," and generally giving "aid and comfort to the enemy."<sup>34</sup> As the venerable Justice Robert Jackson explained in *Eisentrager*, "[I]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission" to force him into civil courts to defend his every action against those enemies.<sup>35</sup>

Justice Steven's opinion for the Court's 6–3 majority not only did not address, it did not even acknowledge these potential catastrophic consequences of the outcome that the Court had so firmly rejected fifty-four years earlier in *Eisentrager*. It simply stated that "whether and what proceedings may become necessary *are matters that we need not address now.*"<sup>36</sup> Justice Scalia responded that the decision would apply to "the four corners of the earth" and would have applied to "millions of aliens held prisoner abroad" in the Twentieth Century including over two million at the conclusion of World War II.<sup>37</sup> He observed that alien detainees, taken into custody during wartime, would have greater rights of access to U.S. courts than domestic detainees, who would have to bring challenges to their confinement in the district of their confinement, whereas the Guantanamo Bay and presumably other detainees held on foreign soil could seek relief in any of the ninety-four federal judicial districts.

Bear in mind that very few combatants taken into custody in wartime are ever charged, or intended to be charged, with a crime. They are simply held as dangerous combatants to avoid their rejoining their comrades in conducting war, or, in this case, terrorism, against the United States, and for whatever intelligence value they may present. Most detained combatants

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34. 339 U.S. at 779.

35. *Id.* at 778–79.

36. 124 S. Ct. at 2699.

37. *Id.* at 2706.

are not considered criminals and are only detained as long as hostilities continue.

In this context, the *Rasul* Court left many questions unanswered: If habeas corpus actions may be filed in federal district courts by alien detainees being held on foreign soil, may the petitions, indeed be filed in any district court? Are detainees entitled to lawyers under the Sixth Amendment even if they are not charged with crimes? Must the government provide a lawyer if the detainee cannot afford one? At what point does the right to file a habeas petition attach? Immediately upon capture? If not then, when? Are detainees entitled to a hearing? What kind? Must it be open to the press and public? Are they entitled to hear the evidence against them? What is the standard which would permit their continued detention? Simply that they are a threat to U.S. forces, or something else? Who is to decide? Must that decision be made in every instance by an Article III judge? What deference is accorded to military officials? Are detainees entitled to present evidence? To call witnesses? To discovery? To subpoena witnesses held elsewhere? Are they entitled to the protections of the Fifth Amendment to remain silent? What international treaties provide substantive rights to detainees? Are these rights available even if these treaties are not self-executing? Does the Fourth Amendment protection against unreasonable searches and seizures apply? The exclusionary rule? *Miranda*?

The list goes on. Can you even imagine the nightmare that this will cause to commanders in the field? And must they worry about being sued if they deny rights to detainees to which the courts subsequently find them entitled? The Court's *Rasul* opinion expressly made reference to actions by detainees under the Alien Tort Statute<sup>38</sup> and Justice Scalia's dissent notes that the Court's reasoning would allow detainees to sue their captors for damages under the Court's *Bivens* doctrine.<sup>39</sup> Should we provide field commanders with lawyers on the battlefield?

Congress may be able to change the outcome of the *Rasul* case by limiting the reach of the federal habeas statute to citizens,

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38. 124 S. Ct. at 2699 (citing 28 U.S.C. § 1350).

39. 124 S. Ct. at 2706 (Scalia, J., dissenting) (citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that a federal law enforcement agent may be held personally liable if he violates an individual's Fourth Amendment rights)).

lawful aliens, or other persons held on U.S. territory, which had been, under *Eisenrager*, the law of the United States for the past fifty-four years. But I was advised just last week by several prominent Senators that in today's political climate, that is probably impossible. And even if the habeas statute could be amended, will the Court simply hold that the "suspension" of the "right" to habeas corpus under these circumstances violates the Constitution?

What has *Rasul* meant in actual practice? It is too soon to tell. After all, the decision was rendered just two and one-half months ago. We do know, however, that there are numerous cases now pending before numerous different federal judges challenging the detention of persons held in Guantanamo. In each case, military officials and lawyers are having to prepare responses. Groups of military and Defense Department civilian lawyers are conducting inquiries into the status of all Guantanamo detainees. Interrogation facilities are being converted to hearing rooms. Lawyers are communicating with detainees. Intelligence gathering has been severely inhibited, and the U.S. military has materially transformed its efforts in Guantanamo from learning about threats from Al Qaeda to responding to legal proceedings.

Immediately after *Rasul*, one lawyer even filed a habeas challenge to Saddam Hussein's detention in Iraq before he was handed over to Iraqi authorities.

Imagine how this scenario would have played out during and after World War II, when millions of enemy combatants from Japan, Germany, Italy, and other countries were being captured and detained during the war. Can you imagine lawyers in prison camps, soldiers and officers being pulled off the field of combat to respond to legal proceedings, and federal courts deciding whether military actions against enemy soldiers were properly conducted according to international standards for the conduct of war?

Am I exaggerating? I wish that I were. But the six Justices in the majority in *Eisenrager* and the three-Justice-minority in *Rasul* did not think so. And much of what they described is now coming to fruition in Guantanamo as we speak.

And what does this tell us about the separation of powers? During the oral arguments at the enemy combatant cases last April, some of the Justices suggested that if the courts did not

exercise jurisdiction over the detention of enemy combatants, the executive would be unchecked and might even be free to commit murder without repercussions. Of course, war does involve killing. If alien detainees have constitutional rights, what about the combatants who were not so fortunate to have been captured?

The questions the Justices asked and the *Rasul* decision seem to presuppose three things about the separation of powers: First, that the ample check over the executive by Congress through its oversight and appropriations powers, the limits on the executive pursuant to international treaties to which the United States is a party, and the restraints imposed by international opinion and condemnation count for nothing. Second, that the laws of the United States and the jurisdiction of United States courts extend, as Justice Scalia warned, to any place and to every corner of the globe. And, third, that there is no check on a coordinate branch of government if it is not exercised by the judiciary, that the other branches cannot be trusted to comply with the Constitution and laws of the United States without judicial overseers, and that the separation of powers among three equal branches of government is limited by the principle, as George Orwell would have put it, that one branch is more equal than the others.

It cannot be overemphasized that *Rasul* comes in an area where, according to the famed constitutional scholar Joseph Story,

The command and application of the public force . . . to resist foreign invasion . . . are so obviously of an executive nature, and require the exercise of qualities so peculiarly adopted to this department, that a well-organized government can scarcely exist, when they are taken from it. . . . Unity of plan, promptitude, activity, and decision are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power.<sup>40</sup>

Obviously, six Justices of the Supreme Court do not agree.

Perhaps the *Rasul* Court is right. Perhaps the right constitutional answer is that whatever the President does as commander in chief is subject to judicial review.

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40. 3 STORY, *supra* note 18, § 1485, at 340–41.

But I don't think so. The judiciary is not equipped to evaluate combat decisions, to decide how to deploy troops to counter or deter enemy combatants, to make fast-paced decisions on which the outcome of a battle may determine, or to micromanage the infinite number of daily decisions that the Commander in Chief and his subordinates must make. And the Executive cannot possibly conduct those decisions with energy and dispatch if his every wartime decision is subject to real-time judicial review.

It seems to me that if we are going to have a government of separated powers, there may be some spheres in which, however, unwisely they may act, the decisions of the separate branches are final, subject, of course, to the ultimate will of the people acting through constitutional processes.

I suspect that Tex would agree.