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THE US SUPREME COURT’S ‘ENEMY COMBATANT’ DECISIONS:
A ‘MAJOR VICTORY FOR THE RULE OF LAW’?

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ABSTRACT

In its recent judgments in Rumsfeld v. Padilla, Hamdi v. Rumsfeld and Rasul v. Bush, the Supreme Court of the United States rejected the executive’s claim that it has the authority to incarcerate people suspected of terrorist connections without any judicial review. This article argues that, nevertheless, the suggestion that these decisions constitute a major setback for the US administration which will forever change the legal parameters of the ‘war on terror’ is misleading. For the court has upheld, in principle, the government’s power to designate terrorist suspects as ‘enemy combatants’ and to hold them without charging them with a criminal offence or according them prisoner-of-war status under the Geneva Conventions. And it is exactly this creation of a special category of detainees, not envisaged by international law, which underlies the most important controversies surrounding the government’s treatment of suspected terrorists. Furthermore, the procedural rules suggested by the Supreme Court for the judicial review of ‘enemy combatant’ detentions are so deferential to the executive that they could render the review all but meaningless. Finally, several controversial elements of the government’s post-September 11 detention policies are not addressed by the decisions at all. The Supreme Court, it is argued, has missed the chance to impose on the executive a clear framework, based on standards of international law, governing the detention of alleged terrorists.

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1. INTRODUCTION

On 28 June 2004 the Supreme Court of the United States delivered its long-awaited judgments in three cases revolving around the executive’s claimed power to detain alleged terrorists without judicial review: *Rumsfeld v. Padilla*,¹ *Hamdi v. Rumsfeld*² and *Rasul v. Bush*.³ While *Rasul v. Bush* concerns the foreign nationals held at the US military base in Guantánamo Bay, Cuba, the two other cases involve American citizens suspected of terrorist involvement who are in military detention on US mainland. Commentators had anticipated that the court would use these decisions as an opportunity to formulate fundamental, generally applicable rules for the ‘war on terror’; the *New York Times* predicted that the cases would generate ‘a debate of historic dimension’ about individual rights and the boundaries of presidential power.⁴ Once the rulings had been handed down, they were described as ‘the court’s most important statement in decades on the balance between personal liberties and national security’.⁵ Human rights organisations hailed them as ‘historic’⁶ and as ‘a major victory for the rule of law’.⁷ The general consensus seemed to be that they represent a significant setback for the Bush administration’s approach to the ‘campaign against terrorism’.

The suggestion that the court has inflicted a decisive defeat on the government which will forever change the legal parameters of the ‘war on terror’ is, however, misleading. The three decisions are actually rather modest in their conceptual reach and leave a number of important questions unanswered. In the case where the government is claiming the most far-reaching powers, *Rumsfeld v. Padilla*, the Supreme Court declined to address the crucial substantive issues raised by the administration’s detention policies on technical grounds. While in the *Hamdi* decision the court did conclude that even the detention of persons accused of terrorist connections must be subject to some kind of independent review, it proposed (very vague) rules for such review procedures which are clearly tilted in favour of the government. Finally, the judgment which sparked the most enthusiastic reaction by civil libertarians, *Rasul v. Bush*, is limited in its scope and impact: it is only concerned with the jurisdiction of the

¹ *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 159 L.Ed.2d 513.
² *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 159 L.Ed.2d 578.
American courts over the Guantánamo prisoners and not with the substance of their cases, namely the legality of their detention. Controversial central elements of the government’s post-September 11 detention policies thus remain unexamined by the highest American court. Nonetheless, the Supreme Court’s decisions do establish some general guidelines for the review of terrorist detentions and have had significant practical repercussions for the proceedings at issue. Yet as these guidelines are worded rather broadly, a dispute as to their correct interpretation has already arisen and it seems almost inevitable that the court will at some stage have to revisit some of the issues raised by the three cases.

Underlying the government’s line of reasoning in all three cases is its designation of the detainees as so-called ‘enemy combatants’. This article therefore starts with a short discussion of this category, which is not one recognised in international law, and the legal consequences the government has attached to this categorisation. This is followed by a summary of the justices’ findings in the three ‘enemy combatant’ decisions. Next, the article explains what the Supreme Court did not say, identifying several key issues which the court did either not touch upon at all or refer to only summarily. Finally, the practical consequences of the judgments for those currently detained as ‘enemy combatants’ are evaluated.

2. ‘ENEMY COMBATANT’ STATUS

The US government has designated the American citizens José Padilla and Yaser Hamdi as well as the foreign prisoners at Guantánamo Bay as ‘enemy combatants’.\(^8\) Yet, as the Supreme Court observed in the *Hamdi* case, it ‘has never provided any court with the full criteria that it uses in classifying individuals as such.’\(^9\) What seems to be common to these ‘enemy combatant’ classifications is the government’s endeavour to thereby prevent having to make a choice between either granting the detainees prisoner-of-war (POW) status under the Third Geneva Convention or charging them with a criminal offence. In practice, persons described as ‘enemy combatants’ have been detained without charge, interrogated and denied both access to legal counsel as well as the right to challenge the lawfulness of their detention.

In international humanitarian law the term ‘combatant’ denotes the right to participate directly in hostilities.\(^10\) Lawful combatants may not be prosecuted for taking part in a conflict,

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\(^10\) See Article 43(2) of the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I).
unless they have committed a violation of international humanitarian law. Upon capture they must be granted POW status and treated in accordance with the Convention (III) relative to the Treatment of Prisoners of War (Third Geneva Convention). The category of ‘enemy combatant’, by contrast, is not one recognised in international law. What has been used in legal literature and military manuals, though not in treaties of international humanitarian law, are the terms ‘unlawful’ or ‘unprivileged combatant’. These are generally used to describe persons taking part in hostilities without being entitled to do so; they can be prosecuted simply for their participation in an armed conflict and are not entitled to POW status upon capture.

The denial of POW treatment – normally implied by the use of the label ‘unlawful combatant’ – is apparently the primary purpose of the ‘enemy combatants’ qualification in the case of the Guantánamo prisoners. Any detainees recognised as POWs could not be compelled to give any further information than their name, rank, date of birth and identification number and would have to be released and repatriated without delay after the cessation of hostilities. On 7 February 2002, the US President determined that neither the Taliban nor the al-Qaeda detainees are entitled to POW status. As far as clearly identified al-Qaeda members are concerned, the conclusion that they do not qualify as POWs seems justified. For fighters not forming part of the armed forces of a state are only entitled to POW treatment if they fulfil the conditions, listed in Article 4(A)(2) of the Third Geneva Convention, of (i) being commanded by a person responsible for his subordinates; (ii) having a distinctive sign recognisable at distance; (iii) carrying arms openly; and (iv) conducting their operations in accordance with the laws and customs of war. At least the last, and possibly the second, of these criteria seem not to apply to al-Qaeda members. For Taliban soldiers, however, the situation is different. In their case, the US government has claimed that they did not effectively distinguish themselves from civilians nor conduct their operations in accordance with the laws and customs of war and did therefore not fulfil the conditions of Article 4(A)(2).

Yet at least the Afghan Taliban fighters arguably represented the armed

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12 Ibid.
13 See Articles 17 and 118 of the Third Geneva Convention respectively.
15 See Ari Fleischer, ‘Special White House Announcement Re: Application of Geneva Conventions in Afghanistan’, 7 February 2002, available in Lexis, Legis Library, Fednew File: ‘The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.’
forces of Afghanistan, and the text of Article 4(A) makes clear that as such they, unlike militia and volunteer corps not forming part of the armed forces, did not need to fulfil the four requirements mentioned before to qualify for POW status.\textsuperscript{16}

The most contentious element of the President’s decision to deny POW treatment to the Guantánamo prisoners is, however, its blanket nature, encompassing all captives irrespective of the particular circumstances of their cases. This stands in stark contrast to the cautionary rule of Article 5(2) of the Third Geneva Convention which provides that:

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Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.
\end{quote}

As the International Committee of the Red Cross (ICRC) has pointed out, the determination as to the legal status of each internee needs to be made on an individual basis.\textsuperscript{17} The US government’s refusal to do so constitutes the backdrop to the Rasul case.

In the cases of the US citizens Padilla and Hamdi, the designation as ‘enemy combatants’ seems to have been mainly designed to circumvent the procedural safeguards applicable in normal criminal procedures. Both of them have been held for more than two years without being charged with a criminal offence; they have been denied access to a lawyer as well as judicial review of their detention. The criteria used by the US authorities to determine whether terrorist suspects are held as ‘enemy combatants’ or charged with a criminal offence are unclear. Other American citizens allegedly involved in terrorism, for example John Walker Lindh and James Ujaama, and even the French ‘twentieth hijacker’ Zacarias Moussaoui and the British ‘shoe bomber’ Richard Reid were charged with terrorism-related offences rather than designated as ‘enemy combatants’.\textsuperscript{18} The most plausible

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\textsuperscript{16} Para. (1) of Article 4(A) plainly states that ‘[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces’ qualify for POW status. Only para. (2) relating to ‘[m]embers of other militias and members of other volunteer corps’ lists the additional four elements. See also G. Aldrich, ‘The Taliban, al Qaeda, and the Determination of Illegal Combatants’, (2002) 96 \textit{AJIL} 891. Supporting an interpretation contrary to the text of the Convention: R. Wedgwood, ‘Al Qaeda, Terrorism and Military Commissions’, (2002) 96 \textit{AJIL} 328, 335. For a comprehensive and balanced discussion of these issues, see R. Cryer, ‘The Fine Art of Friendship: Jus in Bello in Afghanistan’, (2002) 7 \textit{JCSL} 37, 68.

\textsuperscript{17} See ICRC Operational Update, ‘Guantanamo Bay: the work continues’, 18 July 2003.

\textsuperscript{18} Lindh, who had been captured fighting alongside the Taliban, was sentenced to 20 years in prison as part of a plea agreement; Ujaama, who allegedly had links with al-Qaeda, also entered a plea agreement and was sentenced to a two-year prison sentence; Moussaoui has been charged with a number of terrorist offences for his
explanation for this inconsistent policy would seem to be that the evidence against those described as ‘enemy combatants’ is not strong enough for a criminal prosecution. This makes it all the more important that such detention without charge on national security grounds is at least subject to judicial review. The right to be free from arbitrary detention, entailing a right to challenge the lawfulness of detention in court, is guaranteed by a number of international human rights standards, including Articles 9(1) and 9(4) of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States. Indeed, it is widely acknowledged as forming part of customary international law. The availability of this right and details concerning its exercise form the central contentious issues in both the Padilla and the Hamdi cases.

3. WHAT THE SUPREME COURT SAID

3.1 Rumsfeld v. Padilla
José Padilla, an American citizen who converted to Islam, was arrested on 8 May 2002 at O’Hare International Airport in Chicago under a warrant declaring him to be a material witness in the September 11 investigation. He was transported to New York where he was held in federal criminal custody. Before a New York district court could rule on motions contesting the arrest, President Bush, on 9 June 2002, issued an order to the Secretary of Defense designating Padilla an ‘enemy combatant’ and directing the Secretary to detain him in military custody. According to the government, Padilla was closely associated with the al-Qaeda network and was planning to detonate a radioactive ‘dirty bomb’ in the United States. Padilla was transferred to a military base in South Carolina, where he has been held incommunicado ever since.

On 11 June 2002, Padilla’s lawyer filed a habeas corpus petition in the District Court for the Southern District of New York, naming President Bush, Secretary of Defense Rumsfeld and Melanie A. Marr, the commander of the naval brig in which Padilla is detained, as respondents. The district court held that the Secretary of Defense (but not Bush or Marr) is

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19 The Universal Declaration of Human Rights, which is recognised as an authoritative statement of customary international law, contains the obligation to provide detainees with an opportunity to challenge their detention in court: see Articles 9-10. The principle is also included in all major human rights treaties and supported by wide international practice as evidenced by, e.g., Principle 32 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly by Resolution 43/173, UN Doc. A/43/49(1988). See also Restatement (Third) of Foreign Relations Law of the United States, 1987, § 702.
a proper respondent and that it has jurisdiction over him. On the merits, however, the court accepted the government’s contention that the President has the power to detain US citizens captured on American soil during a time of war as ‘enemy combatants’. According to the district court, this authority arises from two sources: First, from the Authorization for Use of Military Force Joint Resolution (AUMF), enacted by Congress on 18 September 2001, which authorises the President ‘to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.’ And second, from the President’s constitutional authority as Commander-in-Chief to take any military measures he deems necessary in the conduct of an armed conflict. The Court of Appeals for the Second Circuit reversed this decision. While it agreed with the district court that Secretary Rumsfeld is a proper respondent, it concluded that neither the AUMF nor the President’s Commander-in-Chief power explicitly authorises the military detention of Padilla. Accordingly, the court granted the writ of habeas corpus and directed the Secretary of Defense to release Padilla from military custody within 30 days. The government appealed to the Supreme Court.

A 5-4 majority of the Supreme Court overturned the Second Circuit’s decision on jurisdictional grounds. The majority opinion, delivered by Chief Justice Rehnquist, held that Padilla’s lawyer filed the habeas corpus petition in the wrong court and declined to rule on the merits. The proper respondent to a habeas petition was the person who has immediate custody of the party detained and not some remote supervisory officials – in Padilla’s case, the commander of the naval brig, Melanie A. Marr, rather than the Secretary of Defense. Accordingly, the majority found that the petition should have been filed in the district of actual custody, i.e. South Carolina rather than New York. The purpose of this long-standing jurisdictional rule was to prevent ‘forum shopping’ by habeas petitioners.

Justice Stevens, joined by three further judges, filed a dissenting opinion, arguing that ‘this exceptional case’ should be afforded special treatment. The Secretary of Defense was a proper custodian, as he had been entrusted with control over Padilla and was the only person

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21 Ibid., 588-599.
22 Padilla v. Rumsfeld, 352 F.3d 695.
23 Ibid., 724.
25 Ibid., 2724-25.
26 Ibid., 2730.
who had had a say in determining Padilla’s location. Furthermore, Stevens continued, New York is the more appropriate forum than South Carolina, since the government had sought the material witness warrant for Padilla’s detention in New York and had transferred him to South Carolina only once the New York judge and counsel had already become familiar with the issues surrounding the case.

3.2 Hamdi v. Rumsfeld

Yaser Esam Hamdi is a US citizen who was born in Louisiana and raised in Saudi Arabia. In 2001, he was captured in Afghanistan by members of the Northern Alliance and turned over to the US army who sent him to Guantánamo Bay. In April 2002, upon discovering Hamdi’s citizenship, the US authorities transferred him first to a naval brig in Virginia and then to the same military prison in South Carolina where Padilla is detained. There, he has been held ever since, until recently without access to a lawyer.

Hamdi’s father brought a habeas corpus petition on his behalf, asserting that his son had gone to Afghanistan to do humanitarian work and that he was trapped there once the military campaign began. The government filed a response and a motion to dismiss the petition, attaching a declaration from Michael Mobbs (‘Mobbs Declaration’), a Department of Defense (DoD) official, which ‘remains the sole evidentiary support that the Government has provided to the courts for Hamdi’s detention.’ The declaration states that Hamdi has affiliated with a Taliban military unit and that he was captured with a rifle when his unit surrendered to the Northern Alliance forces; in light of his association with the Taliban he had been classified as an ‘enemy combatant’.

A Virginia district court found that the two-page Mobbs Declaration falls ‘far short’ of supporting Hamdi’s detention and criticised it as ‘little more than the government’s “say-so’’. It ordered the government to produce much more detailed materials to enable a ‘meaningful judicial review’ of Hamdi’s classification. The Fourth Circuit Court of Appeals, however, overturned the district court order and dismissed the habeas petition. It held that Congress has authorised the detention of ‘enemy combatants’, including those of US citizenship, through the AUMF. As it was undisputed that Hamdi was captured in a combat zone in a foreign theatre of conflict, the Fourth Circuit concluded that he is not entitled to a

27 Ibid., 2733.
28 Ibid., 2735.
29 Hamdi v. Rumsfeld, 124 S.Ct. 2637.
31 Ibid., 533.
32 Hamdi v. Rumsfeld, 316 F.3d. 450.
judicial review of the factual determinations underlying his seizure, in the present case of the assertions set out in the Mobbs Declaration.\textsuperscript{33}

The Supreme Court reversed the Fourth Circuit and remanded the case to the district court for further proceedings. The plurality opinion,\textsuperscript{34} written by Justice Sandra Day O’Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, answers the questions raised by the case in two separate steps. First, O’Connor examined whether the executive has the authority to detain American citizens as ‘enemy combatants’. This question is answered in the affirmative: The AUMF, authorising the President to use ‘all necessary and appropriate force’ against those associated with the terrorist attacks of September 11, implied the power to detain individuals who fought against the US forces as part of the Taliban.\textsuperscript{35}

Relying on \textit{ex parte Quirin},\textsuperscript{36} O’Connor held that this power extends to US citizens engaged in an armed conflict against the United States, as citizens and non-citizens pose the same threat of returning to the front. While the AUMF did not authorise indefinite detention for the purpose of interrogation, it was a clearly established principle of the law of war that enemy forces could be detained until the end of active hostilities. In the case of the present conflict, active combat operations against Taliban fighters were ongoing in Afghanistan.\textsuperscript{37}

In a second step, O’Connor addressed the question of what process is constitutionally due to a citizen disputing his or her ‘enemy combatant’ status. Answering this question, she argued, requires balancing the interest of individuals to be protected from unjustified deprivation of liberty against the government’s interest to detain those who have fought with the enemy without being imposed undue burdens through complicated procedures. Neither the process proposed by the government (and the Fourth Circuit) nor the one envisioned by the district court would strike the proper balance between these competing concerns. While the risk of erroneous deprivation of a detainee’s liberty was unacceptably high under the government’s proposal, the procedural safeguards suggested by the district court were unwarranted in light of the burdens they would impose on the military.\textsuperscript{38} The proper balance, O’Connor held, requires that

\textsuperscript{33} Ibid., 476.

\textsuperscript{34} A ‘plurality opinion’ is an opinion lacking enough judges’ votes to constitute a majority, but receiving more votes than any other opinion. See B. Garner (ed.), \textit{Black’s Law Dictionary} (7th ed., 1999) 1119. In the present case, Justices Souter and Ginsburg dissented with part of the plurality’s reasoning but concurred in the judgment.

\textsuperscript{35} \textit{Hamdi v. Rumsfeld}, 124 S.Ct. 2640.

\textsuperscript{36} In \textit{Quirin}, the court held that ‘[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of ... the law of war.’ See 317 U.S. 1, 37-38 (1942).

\textsuperscript{37} \textit{Hamdi v. Rumsfeld}, 124 S.Ct. 2640-42.

\textsuperscript{38} Ibid., 2648.
a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker. […] At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.\textsuperscript{39}

Such concessions to the executive could, for example, include the admission of hearsay evidence and a presumption in favour of the government’s evidence. Furthermore, the requirement of an independent review could also be met by an ‘appropriately authorized and properly constituted military tribunal’.\textsuperscript{40} Whatever the precise procedural standards, O’Connor concluded, Hamdi has never been given an opportunity to rebut before a neutral decision-maker the factual assertions underlying his classification as an ‘enemy combatant’.\textsuperscript{41}

A minority of four judges rejected the government’s position already with regard to the first, more fundamental, issue concerning the government’s authority to detain US citizens as ‘enemy combatants’. Justices Souter and Ginsburg held that the AUMF does not constitute such an authorisation. However, as there was insufficient support for a ruling holding the detention illegal, they concurred in the judgment, which at least allows Hamdi to challenge his detention in the district court.\textsuperscript{42} Justices Scalia and Stevens made a similar argument but dissented. They opined that there are only two alternatives for detaining American citizens accused of fighting against the United States: either they have to be prosecuted for treason or some other crime, or Congress has to suspend the writ of habeas corpus. As neither element was fulfilled in the present case, the detention of Hamdi was not justified.\textsuperscript{43} Only Justice Thomas supported the government on both contentious points. In his dissenting opinion, he argued that the detention of ‘enemy combatants’ falls within the executive’s war powers and that the judicial branch lacks the expertise and capacity to review the government’s determinations in this field.\textsuperscript{44}

\subsection*{3.3 Rasul v. Bush}

\textsuperscript{39} Ibid.
\textsuperscript{40} Ibid., 2651.
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid., 2652-60.
\textsuperscript{43} Ibid., 2660-74.
\textsuperscript{44} Ibid., 2674-85.
In *Rasul v. Bush*, the Supreme Court had to decide whether US courts have jurisdiction to consider challenges to the detention of the foreign nationals held at the Guantánamo Bay naval base in Cuba. Sixteen of the approximately 600 Guantánamo prisoners (twelve Kuwaiti, two Australian and two British citizens) filed *habeas corpus* petitions in the District Court for the District of Columbia. (The two British petitioners, Shafiq Rasul and Asif Iqbal, have since been released.) The district court dismissed the petitions for lack of jurisdiction,\(^{45}\) and the Court of Appeals for the District of Columbia Circuit confirmed.\(^{46}\) The prisoners appealed to the Supreme Court.

The majority of the Supreme Court ruled that those detained in Guantánamo are entitled to have access to US courts under the federal habeas corpus statute. The statute provides that district courts may grant writs of habeas corpus ‘within their respective jurisdictions’.\(^{47}\) The majority opinion, written by Justice Stevens, held that the courts act ‘within their respective jurisdictions’ as long as they have jurisdiction over the officials responsible for the detention; the prisoner’s presence within the territorial jurisdiction of the district court was not required.\(^{48}\) American courts, Stevens continued, have the authority to review the legality of the executive’s detention of foreign nationals in a territory over which the United States exercises plenary and exclusive jurisdiction, though not ultimate sovereignty. With regard to the status of Guantánamo he noted that ‘by the express terms of its agreements with Cuba, the United States exercises “complete jurisdiction and control” over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.’\(^{49}\) Therefore, Guantánamo was functionally American territory to which the jurisdiction of US courts should extend. In addition, as it was undisputed that US courts would have jurisdiction over American citizens held at the base and considering that the habeas statute draws no distinction between US and foreign detainees, foreign citizens held in Guantánamo were equally entitled to apply to American courts.\(^{50}\)

The government had invoked the Supreme Court’s 1950 decision in *Johnson v. Eisentrager*.\(^{51}\) In that case, the Supreme Court ruled that German citizens captured by US forces in China, then tried and convicted of war crimes by an American military commission in Nanking, and finally imprisoned in occupied Germany had no right to bring habeas corpus applications in US courts. But the *Rasul* majority noted that the Guantánamo prisoners differ

\(^{46}\) *Al Odah v. U.S.*, 321 F.3d 1134.  
\(^{50}\) *Ibid.*
from the *Eisentrager* detainees in important respects: They are not nationals of countries which are at war with the United States; they deny that they have engaged in acts of aggression against the United States; they have never been charged or afforded access to any tribunals; and they are held in territory under US control.\(^{52}\) Furthermore, Stevens argued, the assumptions about the entitlement to habeas review underlying *Eisentrager* were rejected in later Supreme Court decisions.\(^{53}\)

In a sharp and emotional dissent, which was joined by Justices Rehnquist and Thomas, Justice Scalia called the majority’s ruling ‘judicial adventurism of the worst sort’.\(^{54}\) The majority’s reading, Scalia argued, contradicts the habeas statute and overrules the *Eisentrager* precedent, even though the military had undoubtedly relied on *Eisentrager* and ‘had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequences of bringing the cumbersome machinery of our domestic courts into military affairs’.\(^{55}\) If it was really true – as the majority argued – that ‘jurisdiction and control’ rather than sovereignty was the test, also parts of Afghanistan and Iraq should be subject to the oversight of American courts and military prisoners held there could bring habeas corpus petitions.\(^{56}\) The consequence of this ‘irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field’\(^{57}\) was ‘breathtaking’.\(^{58}\)

### 4. WHAT THE SUPREME COURT LEFT OPEN

The impact of the three ‘enemy combatant’ decisions may in fact be much more limited than what Justice Scalia’s dissent in the *Rasul* case suggests. Rather than developing a comprehensive legal framework governing the conduct of the ‘war on terrorism’, the Supreme Court stuck to the narrow issues presented by the specific cases at hand. Similarly, though occasionally referring to international humanitarian law sources, the court generally avoided engaging with the international law dimensions of the cases. As a consequence, numerous crucial questions raised by the US administration’s detention practices as well as by the justifications advanced in their support remain unanswered, and the court’s attitude towards

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\(^{52}\) *Rasul v. Bush*, 124 S.Ct. 2693-94.
\(^{53}\) Ibid., 2695.
\(^{54}\) Ibid., 2711.
\(^{55}\) Ibid., 2710-11.
\(^{56}\) Ibid., 2708.
\(^{57}\) Ibid., 2701.
\(^{58}\) Ibid., 2706.
international law has not been clarified. On the contrary, some of the court’s comments seem to raise more problems than they solve.

4.1 Does International Law Matter?

In its recent jurisprudence, especially in some of its decisions issued during the 2002 and 2003 terms, the Supreme Court had increasingly referred to international law sources. As a consequence, the editors of the American Journal of International Law, in a preview on the 2004 term, wondered ‘whether the new (or newly rediscovered) interest of the Court in international sources presages a long-term trend toward a more cosmopolitan constitutional jurisprudence.’ The court’s acceptance for decision in 2004 of quite a few cases raising international questions, including the ‘enemy combatant’ cases, they argued, may signal that it ‘is preparing for a new era of engagement with legal developments external to the United States, or, alternatively, that it seeks to limit (or in any event to delimit) the relevance of such developments for the U.S. legal system.’

To those advocating an enhanced engagement with international developments, the three Supreme Court decisions, especially the one in the Guantánamo case, must come as a bitter disappointment. In all three cases the lawyers of the alleged ‘enemy combatants’ had vigorously pressed international law arguments, and the numerous amicus curiae briefs submitted in their support were full of references to international and regional human rights treaties, the Geneva Conventions, pronouncements of the UN Human Rights Committee as well as judgments by such diverse bodies as the International Court of Justice, the European Court of Human Rights, the Inter-American Commission on Human Rights, the International Criminal Tribunal for the former Yugoslavia, the English Court of Appeal and the Supreme Court of Israel. If there ever was an occasion for the Supreme Court to extend its emerging pattern of relying on international legal developments, this would have been it. Particularly in

59 For example, the majority opinion delivered by Justice Kennedy in Lawrence v. Texas, 000 U.S. 02-102 (2003) refers extensively to the case-law of the European Court of Human Rights on the right to respect for private life. In Atkins v. Virginia, 000 U.S. 00-8452 (2002), the Supreme Court took into account the overwhelming international consensus against imposing the death penalty on mentally retarded persons.


61 Ibid.

62 See e.g. amicus curiae briefs submitted in the Rasul case by the International Commission of Jurists and American Association for the International Commission of Jurists, 175 Members of Both Houses of the UK Parliament, a Bipartisan Coalition of 16 National and International Non-Governmental Organizations, the Commonwealth Lawyers Association, Former US Diplomats, and the Human Rights Institute of the International Bar Association; in the Hamdi case by International Law Professors, the American Bar Association, Global Rights, and Experts on the Law of War; in the Padilla case by the American Civil Liberties Union, International Law Professors, Comparative Law Scholars, Law Professors Henkin, Koh et al, and Practitioners and Specialists
the Rasul case international law would have offered strong arguments in support of the court’s finding that the jurisdiction of the US courts extends to the Guantánamo Bay naval base: international human rights law makes clear that the duty to respect the right to be free from arbitrary detention and to challenge the lawfulness of detention in court applies whenever a state exercises authority and control over a person, regardless of where the detention occurs. None the less, there is not a single reference to international legal sources to be found in the whole of the Rasul decision.

At the same time, it should be stressed that Rasul does not explicitly dismiss the relevance of international and foreign law for the American legal system either. Apparently, the Supreme Court’s majority, by accepting the detainees’ claims on the basis of a line of reasoning anchored in US law, did simply not find it necessary to enter into a discussion of international law. Furthermore, both the Hamdi plurality opinion and the minority opinion drafted by Justice Souter do refer quite extensively to the United States’ obligations under international humanitarian law. In sum, while there is nothing in the ‘enemy combatant’ decisions which would suggest that the Supreme Court is moving ‘toward a more cosmopolitan constitutional jurisprudence’, the court has not decisively closed the door on the possibility of such a development either. This rather ambiguous attitude towards international law probably reflects the split of the justices’ views on this delicate question.

4.2 When Can War Powers Be Used Against American Citizens?

By remanding Rumsfeld v. Padilla on technical grounds, the court has avoided dealing with the merits of the case in which the government is asserting the most far-reaching powers. If the administration is right, it could capture US citizens on American soil – far from any battlefield and unconnected to any traditional armed conflict – and detain them indefinitely as ‘enemy combatants’ without charge. Even more fundamentally, the logical consequence of the government’s line of argument that the President’s war powers extend to all terrorist

63 Article 2 of the ICCPR provides that each state party must ‘respect and ensure to all individuals within its territory and subject to its jurisdiction’ the rights of the Covenant. The UN Human Rights Committee has interpreted this provision as meaning that the ICCPR applies to acts committed by state agents abroad: López Burgos v. Uruguay, Communication No. 52/1979, 29 July 1981, UN Doc. CCPR/C/13/D/52/1979 (see in particular para. 12.3 where the Committee held that it would be ‘unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.’); and Casariego v. Uruguay, Communication No. 56/1979, 29 July 1981, UN Doc. CCPR/C/13/D/56/1979. The Inter-American Commission on Human Rights has reached the same conclusion with regard to the American Declaration of the Rights and Duties of Man, by which the United States is also bound: see Coard et al v. United States, Case 10.951, Report No. 109/99, 29 September 1999 (concerning detention of petitioners during US military occupation of Grenada).

64 Damrosch and Oxman, loc. cit.
suspects, wherever they are, is that anyone suspected of terrorism could be shot dead at first
sight – whether on an Afghan battlefield or in a Detroit supermarket. Thus, Padilla’s case
concerns the claim which lies at the heart of the US administration’s counter-terrorism
policies: that there is a global ‘war on terrorism’, from Afghanistan to New York and from
Iraq to Chicago, justifying extraordinary executive competencies free from judicial
interference.

The Supreme Court’s findings in Hamdi suggest that also in Padilla’s case the
government will hardly be able to continue to refuse an independent review of his detention.
Yet the fundamental question of whether the President is, in principle, authorised to use war
powers on American soil against US citizens suspected of terrorist involvement remains
unanswered. As Justice O’Connor stressed in her plurality opinion in Hamdi, the court in that
case only confirmed the executive’s authority to militarily detain US citizens falling into the
narrow category of individuals who, allegedly, were part of or supporting enemy forces in
Afghanistan and engaged in an armed conflict against the United States there.\textsuperscript{65} Whether this
authority extends to terrorist suspects who are confronted elsewhere than on the Afghan
battlefields, whether something like a ‘war on terrorism’ exists – these questions will remain
unresolved for some time. Padilla’s lawyer has to re-file in the correct district court and it will
probably be a year or two before the Supreme Court revisits his case and addresses these key
issues – provided the government does not charge and prosecute him in the criminal courts in
the meantime.

The Hamdi opinions do, however, offer some hints of the Supreme Court judges’
views on these broader questions. It is safe to assume that the four justices who rejected the
government’s position on its authority to detain US citizens as ‘enemy combatants’ would
rule in favour of Padilla. And even O’Connor seemed to suggest that she would probably stick
to a traditional conception of armed conflict according to international humanitarian law and
not endorse the detention of suspected terrorists for the duration of a broadly defined ‘war on
terror’. The court’s understanding of the executive’s detention powers in Hamdi, she stressed,
is based on long-standing law-of-war principles and ‘[i]f the practical circumstances of a
given conflict are entirely unlike those of the conflicts that informed the development of the
law of war, that understanding may unravel.’\textsuperscript{66} Similarly, again referring to humanitarian law
principles, she made clear that the purpose of military detention should be to prevent captured
individuals from returning to the battlefield and not to interrogate them.\textsuperscript{67}

\textsuperscript{65} Hamdi v. Rumsfeld, 124 S.Ct. 2639.
\textsuperscript{66} Ibid., 2641.
\textsuperscript{67} Ibid., 2640-41.
4.3 What Should Future Habeas Proceedings Look Like?

While the Supreme Court held that both Hamdi as well as the Guantánamo prisoners have the right to bring habeas corpus proceedings in American courts, it did not go into any details with regard to the procedural and substantive standards which should govern such proceedings. In the Rasul case, the court simply stated that ‘[w]hether and what further proceedings may become necessary after respondents make their response to the merits of petitioners’ claims are matters that we need not address now.’\footnote{Rasul v. Bush, 124 S.Ct. 2699.} The Hamdi decision at least offers a few hints of how the procedure by which ‘enemy combatant’ detention can be challenged could look like.

4.3.1 Who Can Sue When Where?

One of the open questions concerning the habeas proceedings to come is whether this right will be available to foreign citizens detained elsewhere than at Guantánamo Bay. Justice Scalia warned in his Rasul dissent that the majority, through its ‘jurisdiction and control’ test, would open the American courts to all prisoners held by US forces, wherever they are detained.\footnote{Ibid., 2708.} As explained above, such a reading of the Rasul decision would in fact be consistent with international law: it is a well-established principle that a state cannot escape its obligations under international human rights and humanitarian law by detaining persons outside its borders.\footnote{See note 63 above with respect to international human rights obligations. For international humanitarian law, see e.g. C. Pilloud et al. (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), para. 2910, stating that the protections of the Conventions apply to persons who ‘are in enemy hands or have fallen into the hands or power of the enemy.’} Yet whether a majority of the Supreme Court would really be willing to extend the right to bring habeas proceedings to detainees held in places other than Guantánamo Bay – such as military bases in Iraq or Afghanistan – seems far from certain: the majority opinion sets great store by the special status of the Guantánamo Bay naval base, deriving from the lease agreement between Cuba and the United States which provides that the United States exercises ‘complete jurisdiction and control’ over the base and may continue to do so permanently.\footnote{Ibid., 2708.}

Further, it is as yet unclear how soon after seizure the right of combatants to challenge their detention becomes effective. The only reference to this issue in the Supreme Court’s decisions is the statement in the Hamdi opinion that ‘initial capture on the battlefield need not receive the process we have discussed here; that process is due only when the determination is...
made to continue to hold those who have been seized.’

Yet it will often be difficult to actually situate the point in time of this determination. In Hamdi’s case, was it the moment when he was removed from the immediate zone of combat? Or when the Northern Alliance handed him over to the US forces? Or when the US military transferred him to Guantánamo Bay? Or when he was transferred to Virginia? Depending on how this question is answered, the relevant moment triggering Hamdi’s right to bring habeas proceedings could have been at any point in time between one day and half a year, or even more, after his capture. The problem is further complicated by the fact that the timing of the decision to continue to detain someone is within the complete discretion of the military. In how far is the custodian allowed to delay the determination? Sooner or later the courts will have to clarify these questions. When doing so, they should be guided by relevant standards of international human rights law: Article 9(4) of the ICCPR, for example, entitles any person detained to challenge the lawfulness of his or her detention in a court ‘without delay’.

Finally, the Supreme Court’s decisions raise the question as to the appropriate forum for bringing habeas corpus petitions when the detentions are ordered by the President or another federal official. The majority in Rasul concluded that US courts have jurisdiction to consider the challenges to the detention of the Guantánamo Bay prisoners. According to Justice Scalia’s dissent this ruling implies that, as the prisoners are not confined in one of the federal districts, they could petition in any one of the 94 judicial districts – and, as a result, to forum shop. Conversely, the finding in Padilla that detainees must sue their immediate custodian in the district of actual custody means that, in the case of prisoners held on US territory, the government can choose the forum in which it litigates by imprisoning (or transferring) detainees there. That the venue of litigation can be of decisive importance when national security issues are involved is demonstrated by the divergent court of appeal decisions on the President’s authority to detain ‘enemy combatants’ in the Padilla and Hamdi cases. The Supreme Court could have prevented the real danger of forum shopping – both by detainees and the government – by concluding that in ‘enemy combatant’ detentions ordered by the President or another federal official, the President or that official is a proper respondent

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72 Hamdi v. Rumsfeld, 124 S.Ct. 2649 (original emphasis).
73 The UN Human Rights Committee has found that already a delay of three days is in breach of Article 9(4) of the ICCPR: see Hammel v. Madagascar, Communication No. 155/1983, 3 April 1987, UN Doc. CCPR/C/29/D/155/1983. See also Principle 32(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, note 19 above, which provides that ‘a detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.’
in a habeas corpus proceeding and the District Court for the District of Columbia the proper forum.\textsuperscript{75}

\subsection*{4.3.2 What Kind of Due Process Standards Do Apply?}

As far as the due process requirements in the habeas proceedings to come are concerned, the \textit{Rasul} decision offers no guidance whatsoever. Justice O’Connor’s plurality opinion in \textit{Hamdi}, by contrast, sketches out a process which she called ‘a basic system of independent review’\textsuperscript{76} and which Justice Scalia criticised as ‘an unheard-of system’ based on ‘constitutional improvisation’.\textsuperscript{77} Indeed, the problem underlying the plurality’s approach is that, having concluded that the executive is, in principle, authorised to detain citizens as ‘enemy combatants’, it tried to make up for the executive’s failure to apply due process protections by itself establishing the needed procedures. All the plurality seemed to rely on when drawing up this system is the endeavour to find a fair balance between the due process rights of detainees and the government’s interest to protect national security. The result of this balancing act is the broad outlines of a process which would be highly deferential to the executive:

Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.\textsuperscript{78}

As, apart from unspecified ‘screening’ processes and military interrogations, Hamdi had received no process at all, the Supreme Court had no difficulty in reaching the conclusion that its proposed basic review standard was not satisfied in his case. Yet it is not evident how compliance with this standard would be assessed in less clear-cut cases or, indeed, in the ordered review proceedings in Hamdi’s case. What, for example, is ‘credible’ and ‘more


\textsuperscript{76} \textit{Hamdi v. Rumsfeld}, 124 S.Ct. 2650.

\textsuperscript{77} \textit{Ibid.}, 2672.
persuasive evidence’ respectively? Does it count as a ‘fair opportunity for rebuttal’ when the detainee has to search for evidence or witnesses in the Afghan desert? Is any hearsay evidence acceptable, irrespective of its source?

The *Hamdi* plurality’s rough sketch of a possible review system is further obscured by its similarly vague proposition that the neutral decision-maker before which ‘enemy combatants’ must be allowed to challenge their detention need not necessarily be an ordinary court. As Justice O’Connor stated rather ambiguously, ‘[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.’ Yet, instead of spelling out the requirements such tribunals would have to meet as well as the details of the corresponding process, O’Connor only adds a short reference to the process established under a 1997 US Army Regulation to determine the status of detainees who claim to be POWs under the Geneva Conventions. Significantly, this Regulation provides, in accordance with Article 5 of the Third Geneva Convention, that detainees must be treated as POWs until their status is ascertained by a competent tribunal. This is not what has happened in the ‘enemy combatant’ cases, and O’Connor’s suggestion for a presumption of ‘enemy combatant’ status seems to be at odds with both the Army Regulation she is referring to and international humanitarian law. In addition, the Army Regulation does not provide for such extraordinary evidentiary rules as the admissibility of hearsay evidence. Not surprisingly, the DoD was swift to take up the *Hamdi* plurality’s advantageous, though vague, propositions and has created military Combatant Status Review Tribunals which operate on the basis of a presumption in favour of the government’s evidence.

5. PRACTICAL CONSEQUENCES

The most important consequence of the Supreme Court’s decisions in *Hamdi* and *Rasul* is that all those being held by the United States as ‘enemy combatants’ – whether American citizens or not – must now be given the opportunity to challenge their detention in US courts. As explained in the previous section, the decisions leave, however, some room for interpretation

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78 Ibid., 2649.
79 Ibid., 2651.
81 Ibid., § 1-6a.
82 Yasmin Naqvi has identified a pattern of granting a presumption of POW status in both international humanitarian law and state practice, including US army practice: Y. Naqvi, ‘Doubtful prisoner-of-war status’, (2002) 84 International Review of the Red Cross 571.
with regard to the specifics of the relevant proceedings, and the battleground between the
government and those representing the detainees is now shifting from the basic question as to
the existence of a right to judicial review of ‘enemy combatant’ detention to the more specific
issue as to the exact standards which should govern these procedures. The government’s
purported first steps to implement the court’s decisions, reviewed below, and the reactions
they provoked with the detainees’ lawyers and human rights advocates suggest that the new
controversy will be just as vigorously fought out and protracted as the dispute which led to the
decisions at hand and might well equally end up in the Supreme Court.

5.1 Padilla
For José Padilla, the Supreme Court’s decision in his case means that, for the moment, he
remains in military custody without charge or judicial review of his detention. Four days after
the Supreme Court had issued its judgment, his lawyer re-filed the habeas corpus petition, this
time in the District Court for the District of South Carolina, naming the commander of the
naval brig in Charleston where Padilla is held as respondent. At the time of writing, the
court was expected to hear arguments in the case in January 2005. After the Hamdi ruling,
Padilla will probably not find it too difficult to convince the courts that he must be afforded
judicial review of his detention. Yet whether he will also be able to persuade them of the
substance of his claim, namely that the executive has no authority to detain him or,
alternatively, that there is no factual basis for his designation as an ‘enemy combatant’, is a
different question altogether. Certainly his chances have not been improved by the change of
venue ordered by the Supreme Court. While in the first round the Court of Appeals for the
Second Circuit in New York had ruled in his favour, the now competent Fourth Circuit
adopted a distinctly deferential approach to the government’s arguments in the Hamdi case.
And, as explained above, the courts’ interpretation of the evidential standards sketched out in
the Hamdi decision could be of decisive importance in the habeas proceedings of alleged
‘enemy combatants’ to come.

5.2 Hamdi
How the process to challenge ‘enemy combatant’ classification advanced by the Supreme
Court in the Hamdi decision would work in practice will never be tested in his own case. For,

83 See section 5.3.1 below.
after nearly three years of solitary confinement, Yaser Hamdi was released on 11 October 2004 and deported to Saudi Arabia, where his family lives.\textsuperscript{86} In return, Hamdi agreed to renounce his US citizenship, not to sue the United States over his imprisonment and to abide by certain travel restrictions.\textsuperscript{87} The government stated that Hamdi was freed because ‘considerations of United States national security did not require his continued detention’, without giving any reasons for the suddenly changed assessment as to his dangerousness.\textsuperscript{88} The thought suggests itself that his release was as a reaction to the Supreme Court’s decision, especially as the negotiations leading to the agreement had been taken up immediately after the pronouncement of the judgment.\textsuperscript{89} Apparently, the government believed that the evidence against Hamdi would not be sufficient to meet even the lenient standard required by the \textit{Hamdi} plurality and preferred to free him rather than to explain in court why he was designated as ‘enemy combatant’.

5.3 The Guantánamo Detainees (Rasul)

After almost three years of detention, it is still not clear how much longer the Guantánamo prisoners can and will be held. As a direct consequence of the Supreme Court’s \textit{Rasul} decision, two new sets of bodies apart from the government will now be involved in answering this question: the ordinary US courts and the newly established Combatant Status Review Tribunals. These tribunals should not be confused with the entirely separate military commissions which had been created shortly after September 11 to try some of the foreign citizens detained in Guantánamo Bay for violations of the laws of war. Almost simultaneously with the beginning of the relevant proceedings before the Combatant Status Review Tribunals and the ordinary courts, the military commissions started with their first trials of Guantánamo detainees.

5.3.1 The Combatant Status Review Tribunals

The DoD reacted swiftly to the Supreme Court’s decisions and, only ten days later, issued an order establishing Combatant Status Review Tribunals.\textsuperscript{90} The order applies to the foreign


\textsuperscript{88} Markon, \textit{loc. cit.}


citizens held at Guantánamo Bay, giving them the opportunity to contest their designation as ‘enemy combatants’ before these new review tribunals. The tribunals are each composed of three military officers, one of whom must be a judge advocate. The detainees are not permitted the assistance of lawyers in the proceedings before the tribunals but are instead assigned military officers as ‘personal representatives’ to assist in connection with the review process. The detainees can be excluded from parts of the proceedings if their presence would compromise national security, and are allowed to call witnesses only ‘if reasonably available’. The tribunals are not bound by the rules of evidence which would apply in ordinary courts and are free to consider any information they deem ‘relevant and helpful’, including hearsay evidence. They determine by majority vote whether a detainee is properly detained as an ‘enemy combatant’. The standard used for this determination is ‘preponderance of evidence’, but there is a rebuttable presumption in favour of the government’s evidence. Referring explicitly to the passage in O’Connor’s Hamdi opinion which suggests that a military tribunal might satisfy the due process requirements articulated by the Supreme Court, the DoD claimed that the newly created tribunals would comply with the court’s rulings.

Yet human rights groups decried the establishment of the Combatant Status Review Tribunals, which started functioning on 30 July 2004, as an attempt by the DoD to subvert the Supreme Court’s decisions. While the DoD expressly acknowledged that the tribunal proceedings do not preclude detainees from seeking review in US courts, the human rights groups feared that the outcomes of these proceedings (which would normally be in favour of the government) would be used as evidence in the ordinary court proceedings, thus deterring careful scrutiny and restricting the scope of court review. The government’s returns to the first habeas corpus petitions on behalf of Guantánamo detainees suggest that that is indeed its


The procedures before these tribunals should not be confused with the Administrative Review Procedures, designed to determine annually whether each Guantánamo detainee remains a threat to the United States. The legal basis for these latter procedures had already been created prior to the Supreme Court’s Rasul decision: see Deputy Secretary of Defense, ‘Order on Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba’, 11 May 2004.

92 Ibid., para. (e).
93 Ibid., para. (c).
94 Ibid., para. (g) (4).
95 Ibid., para. (g) (8).
96 Ibid., para. (g) (9).
97 Ibid., para. (g) (12).
100 DoD, ‘Fact Sheet on Combatant Status Review Tribunals’, loc. cit.
strategy. However, several elements of the tribunal proceedings let it appear as questionable whether courts which would rely on the records emerging from these proceedings would comply with the requirements established by the Supreme Court for the judicial review of ‘enemy combatant’ detentions.

Firstly, and most importantly, the plurality in *Hamdi* held that ‘he unquestionably has the right to access to counsel’ in his further review proceedings. This is in line with the findings of international human rights bodies that an effective exercise of the right to challenge the lawfulness of detention is dependent on access to legal representation. The ‘personal representatives’ assigned in the proceedings before the Combatant Status Review Tribunals are clearly no substitute for the assistance of a lawyer. While it is true that the tribunals established to determine POW status which O’Connor favourably referred to in her plurality opinion do not require the participation of lawyers, those tribunals are set up near the frontlines of the battle and need to be organised quickly, normally determining the status of detainees shortly after capture. There are no apparent legitimate reasons for equally denying detainees who have been held for nearly three years the assistance of a lawyer. Bearing these considerations in mind, it seems unlikely that with its reference to the tribunals under the 1997 Army Regulation the court intended to somehow qualify its clear statement that an ‘enemy combatant’ should have access to a lawyer.

Furthermore, it is doubtful whether the Combatant Status Review Tribunals can be regarded as ‘neutral decision-makers’ as required by the Supreme Court and as independent courts according to international human rights law. Senior military officials up to the Secretary of Defense and the President have maintained for almost three years that those held in Guantánamo are ‘enemy combatants’. This position is even reflected in the order establishing the tribunals itself, which explicitly describes the Guantánamo detainees as ‘enemy combatants’ and stresses that they have been determined as such ‘through multiple levels of review by officers of the Department of Defense’. To find that a detainee is not an ‘enemy combatant’, military officers sitting on the tribunals would have to decide against the firm position of their superiors. In addition, the tribunals can only confirm the original ‘enemy

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101 See note 99 above.
105 See e.g. Order signed by President Bush on 7 February 2002, loc. cit.
combatant’ classification or conclude that it was wrong; they may not declare a detainee a ‘lawful combatant’ or POW, and their findings cannot create a detainee’s right to be released.\textsuperscript{107} As of 18 October 2004, 183 reviews had been carried out, resulting in the release of only one of the detainees;\textsuperscript{108} a large number of prisoners have refused to attend the hearings.\textsuperscript{109}

5.3.2 The Civilian Courts

There are thus good reasons to argue that the military review process should not be allowed to somehow restrict or even replace the judicial review of the Guantánamo detentions by the ordinary US courts. This civilian review process is now also under way. At least 50 Guantánamo prisoners have filed habeas corpus petitions in the District Court for the District of Columbia; at the time of writing, the first decisions were still outstanding.\textsuperscript{110} Without entering into speculations about the outcome of these proceedings, it is important to note that, depending on the courts’ interpretation of the vague ‘basic system of independent review’ put forward by the \textit{Hamdi} plurality, the government could find itself in a very advantageous position. Cases are often won and lost on the burden of proof, and according to \textit{Hamdi} the government would only need to put forth ‘credible evidence’ that a detainee is an ‘enemy combatant’. Thereupon, the burden would shift to the detainee who would have to prove that he was never affiliated with the Taliban or al-Qaeda – a task which might be extremely difficult, especially as it might involve finding witnesses or evidence in Afghanistan. Thus, much will depend on how the courts construe the vague standards formulated by the \textit{Hamdi} plurality in practice, in particular how exactly they define and apply the threshold test as to the production of ‘credible evidence’ by the government.

5.3.3 The Military Commissions

A military order issued by the US President on 13 November 2001 and subsequent DoD orders created the legal basis for trying foreign terrorist suspects before so-called military commissions for violations of the laws of war.\textsuperscript{111} The first of these trials began in August

\textsuperscript{106} Order Establishing Combatant Status Review Tribunal, \textit{loc. cit.}, para. (a).
\textsuperscript{107} Ibid., paras. (g)(12), (i) and (j).
\textsuperscript{111} See Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism, issued by the President on 13 November 2001; Department of Defense Military Commission Order No. 1 of 21 March 2002; Department of Defense Military Commission Instruction No. 2: Crimes and Elements for Trial by Military Commission of 30 April 2003.
2004 with the preliminary hearings of four alleged al-Qaeda members held at Guantánamo.\textsuperscript{112} Neither in \textit{Rasul} nor in \textit{Hamdi} or \textit{Padilla} did the Supreme Court have to consider the legality of the military commission trials. The \textit{Hamdi} plurality did, however, approvingly quote the important precedent of \textit{Ex Parte Quirin}, dating back to the Second World War.\textsuperscript{113} In \textit{Quirin}, the Supreme Court upheld the jurisdiction of a military commission established by President Roosevelt to try eight Nazi agents who had covertly entered the United States to commit acts of sabotage and terrorism. The commissions created by the Bush administration are modelled in large part on the military order issued by Roosevelt, and the reference in \textit{Hamdi} might suggest that the court would, in principle, be willing to confirm the legality of trials by military commissions. At the same time, this reference can certainly not be construed as an approval of the way the process before the commissions has been designed in practice. The rules and procedures of the military commissions have been heavily criticised by legal scholars, human rights organisations and wide parts of the media for their failure to accord with international fair trial standards as set out, in particular, in Article 14 of the ICCPR.\textsuperscript{114} In addition, the impartiality of the military officers selected to hear the cases has been called into question.\textsuperscript{115} There is no indication in the decisions at hand as to whether the Supreme Court would uphold trials carried out by the commissions under these conditions.

6. CONCLUSION

The Supreme Court’s fundamental finding that, even when the executive is claiming that it is engaged in a war, the judiciary still has a role to play, is a significant and welcome statement. Judicial review is not only an integral component of the prohibition against arbitrary detention but also an important safeguard against torture or other inhuman treatment. Abu Ghraib and the fate of the so-called Iraqi ‘ghost prisoners’ stand as a stark reminder of what terrible

\begin{itemize}
\item[\textsuperscript{113}] \textit{Hamdi v. Rumsfeld}, 124 S.Ct. 2642-43.
\item[\textsuperscript{115}] See e.g. Amnesty International, \textit{ibid.}, on structural problems. In the first trials, three of the six military officers – but not the presiding officer whose impartiality had also been challenged – were dismissed after
\end{itemize}
consequences the removal of detention from independent oversight might entail.\textsuperscript{116} In its ‘enemy combatant’ decisions the court made clear that, at least on US territory and in places where the United States exercises ‘complete jurisdiction and control’, it will not tolerate such legal black holes. International law would have required the court to go even further and state the same with regard to any persons under the authority and control of US state agents.

At the same time, there is a danger that the procedural rules suggested by the Supreme Court could make the judicial review of ‘enemy combatant’ detentions as deferential to the government as to render it all but meaningless. In addition, the court’s upholding, in principle, of the executive’s authority to detain ‘enemy combatants’ captured abroad means that, at least for the moment, the government is not forced to make a choice between charging the detainees with a criminal offence and according them POW status under the Geneva Conventions. Rather, it can continue to hold them without charge or trial while denying them the benefits and protections due to POWs. It is exactly this creation of a special category of detainees, not envisaged by international law, which is at the bottom of the most important controversies surrounding the government’s treatment of suspected terrorists.

While the Supreme Court could, of course, not be expected to establish rules for every imaginable aspect of the ‘war on terrorism’, it has missed the chance to impose on the executive a clear framework, based on standards of international law, which would govern the detention of alleged terrorists. Some of the justices’ comments even raise new questions which will occupy courts and tribunals on all levels. Hence, although the Supreme Court’s decisions represent a step towards increased judicial involvement, the legal battle over the rights of ‘enemy combatants’ is far from over.