
FEDERALISM AND SEPARATION OF POWERS

HOLDING ENEMY COMBATANTS IN THE WAKE OF *Hamdan*

By Ronald D. Rotunda*

In *Hamdan v. Rumsfeld*, the Supreme Court reversed (5 to 3) a decision that John Roberts had joined when he was on the D.C. Circuit.¹ *Hamdan* held, first, that it had jurisdiction. In other words, the Detainee Treatment Act of 2005, which limited federal jurisdiction, did not apply to pending cases.² Second, the Court held that the Uniform Code of Military Justice did not authorize the President to set up “military commissions” (or “war crimes tribunals” in popular parlance) to try alleged war criminals.

In addition, a plurality of the justices offered their views of the Geneva Convention.³ However, the majority opinion focused on what it saw were the limitations of the governing statute. Justices Breyer, Ginsburg, Souter, and Kennedy invited Congress to change the result by changing the statute.⁴ Congress then enacted a new law limiting habeas jurisdiction and authorizing trial by military commission subject to various safeguards. Congress enacted this new law, the Military Commissions Act of 2006 (“MCA”), within months of the decision in *Hamdan*.⁵ Hence, *Hamdan* is primarily case based on statutory interpretation. It merely holds that the President needs congressional authorization for the military commission, not that he cannot have military commissions at all.

Litigants promptly argued that this new statute was unconstitutional—although four members of the majority in *Hamdan* had invited such a statute and the three members of the dissent saw no problem with the existing law.⁶

The D.C. Circuit, in *Boumediene v. Bush*,⁷ rejected all the challenges to the new law that the plaintiffs raised.⁸ It held (2 to 1) that the MCA limits federal courts of jurisdiction to hear habeas and non-habeas claims by aliens detained as enemy combatants. To accept appellants’ arguments “would be to defy the will of Congress,” because “one of the primary purposes of the MCA was to overrule *Hamdan*.”⁹ The court held that the MCA is constitutional. “The precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States.”¹⁰ There is no violation of the habeas corpus suspension clause because historically, there was no habeas for an alien held “outside the territory of the sovereign.”¹¹

In response, defense counsel for David Hicks, charged with war crimes, responded that the President, the Secretary of Defense, and Congress “intentionally created a rigged system that guarantees convictions in order to cover up wrongdoing” and that “everyone involved is potentially guilty of war crimes greater than the charge against” Mr. Hicks.¹²

Charging the President, the Secretary of Defense, and Congress with war crimes is a most serious charge. To understand that charge, to understand *Hamdan* and its

aftermath as represented by *Boumediene*, and to understand future challenges to the MCA—*Boumediene* only dealt with jurisdiction—it is necessary to take a brief romp through history, focusing on the major cases.

I. THE HISTORICAL PRELUDE TO THE DETAINEE CASES OF 2004

A trio of cases that date back to the Civil War and World War II set the stage for the Detainee Cases of 2004 and the Detainee Case of 2006.

The first is *Ex parte Milligan*.¹³ This case grew out of the Civil War but the Court decided it after the war had ended. The commander of the Indiana military district ordered the arrest of Milligan, a civilian. The military tried him in a court martial, which convicted him and sentenced him to death. He applied for a writ of habeas corpus, arguing that, as a civilian and citizen of Indiana, a non-rebelling state, he was not under the jurisdiction of a court martial.

The *Milligan* Court summarized the crucial facts:

Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the *legal* power and authority to try and punish this man?¹⁴

Under those facts, the Court said no. Congress could not authorize such military commission to operate since “the late rebellion” because the federal courts were open and operating. Milligan had never been behind enemy lines fighting for the Confederacy, nor was he a Confederate soldier.

The Court decided the next major decision during World War II. That case, *Ex parte Quirin*, often called the Nazi Saboteurs case.¹⁵ At least one of the petitioners was an American citizen working as a spy for the Germans. Unlike Mr. Milligan, the American citizen had been behind enemy lines. He returned to the United States as a spy for the Nazis. Shortly after the government captured the alleged saboteurs in this country, President Franklin D. Roosevelt created a military tribunal on July 2, 1942, to try them for violating the laws of war. The Government gave them appointed counsel and the military *tried them in secret*.

While that *Quirin* military trial was proceeding, the defendants applied for habeas relief. Supreme Court heard oral argument on July 29, 1942, issued a very short per curiam opinion, on July 31, 1942 (which denied petitioners leave to file petitions for writs of habeas corpus), and then took a summer recess. The military tribunal then found the suspects guilty; a week after the July 31st opinion, the Government executed six of them, including, Hans Haupt, who was a U.S. citizen. The

* Ronald D. Rotunda is University Professor and Professor of Law at George Mason University. He thanks his colleague, Ilya Somin, for his helpful advice.

Court returned from its recess and filed its extended opinion on October 29, 1942.

Quirin imposed swift justice, some think too swift. Detractors argue that J. Edgar Hoover wanted the trials in secret so that he could take credit and the public would not know how lucky the FBI had been in apprehending the saboteurs. True enough. But there was also a less prosaic reason for the secrecy. If the trial were public, the Nazi Government also would have learned that its spies had almost succeeded in their sabotage, and it would, therefore, be more likely to try again. In 1942, it was not clear who would win the war. Every extra division of American troops used to guard our borders was a division that would not be fighting in the European or Pacific theaters.

Quirin held that rules protecting *civilians* from courts martial while civil courts can function and are open do not insulate enemy *combatants* from military jurisdiction. Milligan was a civilian (a noncombatant), unlike Mr. Haupt, who was a combatant, i.e., a soldier for the Nazis. Hence, Haupt was not within the purview of *Milligan's* holding.

Moreover, Haupt was more than a mere combatant or soldier for Germany. He was also a spy, and hence subject to prosecution. The Government cannot prosecute enemy soldiers merely because they are soldiers, but it can prosecute spies. *Quirin* drew a distinction between “lawful” and “unlawful” combatants (or “privileged” and “unprivileged” combatants). The Court ruled that their status as “unlawful” removed them (including the American citizen) from the purview of *Milligan's* holding:

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.¹⁶

Quirin explained that Mr. Milligan was not “a part of or associated with the armed forces of the enemy” but “was a non-belligerent, not subject to the law of war....”¹⁷ In contrast to Mr. Milligan, the detainees in *Quirin* had been in Germany and entered the United States as spies for the Third Reich.

The third decision, *Johnson v. Eisentrager*, also arose out of World War II.¹⁸ A U.S. military commission in China tried certain German soldiers and found that they had engaged in military activity against United States in China *after the surrender of Germany* (but not after the surrender of Japan). Hence, they violated the laws of war because they fought after their country had surrendered. After their conviction, the U.S. military detained these German nationals in a U.S. prison in occupied Germany. They sued in the U.S. courts, claiming that their military trial, conviction, and imprisonment violated the Constitution, U.S. laws, and the Geneva Convention governing treatment of prisoners of war. Their jailers, stationed in Germany, were not parties to the proceeding, but the Court assumed that “the respondents named in the petition have lawful authority to effect that release.”¹⁹ The Court, in other words,

had no jurisdiction over the jailers but did have jurisdiction over their superiors, such as the Louis A. Johnson, the Secretary of Defense.

Justice Jackson, speaking for the *Eisentrager* Court, phrased the issue as follows: “The ultimate question in this case is one of jurisdiction of civil courts of the United States vis-à-vis military authorities in dealing with enemy aliens overseas.”²⁰ He found no jurisdiction.²¹ Neither the Constitution nor the habeas statute gave jurisdiction to any federal court because the jailers were outside the court’s jurisdiction:

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. *Nothing in the text of the Constitution extends such a right*, nor does anything in our statutes.²²

Now, with the stage set, we move on to the Detainee Cases of 2004.

II. THE THREE DETAINEE CASES OF 2004

A. *The Padilla Case*

Rumsfeld v. Padilla, involved Jose Padilla, an American citizen arrested when he entered the United States on a flight that from Pakistan to Chicago.²³ The civilian authorities later turned him over to U.S. military custody. The Government, at that point, did not charge Padilla with a crime although it had information that he was planning acts of terror, such as blowing up buildings. Under these facts, Mr. Padilla was, like Mr. Haupt, a spy who entered the United States after having served the enemy in Afghanistan. However, unlike Mr. Haupt, the Government captured Mr. Padilla at the border.

In *Padilla*, Chief Justice Rehnquist held (5 to 4) that the immediate jailer, the commander of the naval brig in Charleston, South Carolina where the military detained Padilla, was the only proper respondent in a habeas petition, so the Southern District of New York did not have jurisdiction over the commander. The Court dismissed the petition with leave to re-file it in South Carolina.²⁴

Padilla remained in U.S. custody. He filed a habeas petition in the district where he was confined, and the Government presented evidence, under seal, that he was an enemy combatant. The trial judge ruled that the Government must either charge Padilla with a crime or release him. The Fourth Circuit unanimously reversed.²⁵

The Fourth Circuit held that the Authorization for Use of Military Force permitted the President to detain Padilla without charge, as an enemy combatant, until the end of hostilities in Afghanistan. The facts were not in dispute because Padilla’s lawyers *stipulated* that Al Qaeda operatives recruited Jose Padilla—

to train for jihad in Afghanistan in February 2000, while Padilla was on a religious pilgrimage to Saudi Arabia. Subsequently, Padilla met with al Qaeda operatives in Afghanistan, received explosives training in an al Qaeda-affiliated camp, and served as an armed guard at what he understood to be a Taliban outpost. When United States military operations began in Afghanistan, Padilla and other al Qaeda operatives moved from safehouse to

safehouse to evade bombing or capture. Padilla was, on the facts with which we are presented, “armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States.” . . . After receiving further training, as well as cash, travel documents, and communication devices, Padilla flew to the United States in order to carry out his accepted assignment.²⁶

Given those *stipulated* facts, Mr. Padilla is similar to the saboteurs in *Quirin*. In *Hamdi*, discussed below, Justice O’Connor emphasized that *Quirin* (not earlier cases that the dissent cited) is “the law today.”²⁷ As the Fourth Circuit unanimously concluded, the President may —

detain militarily a citizen of this country who is closely associated with al Qaeda, an entity with which the United States is at war; who took up arms on behalf of that enemy and against our country in a foreign combat zone of that war; and who thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets.²⁸

The Fourth Circuit’s reasoning is straightforward. It relied on *Quirin*: Mr. Padilla has no more rights than Mr. Haupt in *Quirin*. The Fourth Circuit accepted *Quirin* as controlling because the O’Connor plurality in *Hamdi* reaffirmed *Quirin*’s continuing validity. The specific issue in *Quirin* was the President’s authority to subject a United States citizen who was also an enemy combatant to military trial. As the Fourth Circuit noted, “the plurality in *Hamdi* went to lengths to observe that *Haupt* [the American citizen], *who had been captured domestically*, could instead have been permissibly *detained* for the duration of hostilities.”²⁹ If you add the four justices who joined the O’Connor plurality with Justice Thomas’ vote (he would defer even more than the plurality to the power of the executive to detainee enemy combatants), one has a majority. The Fourth Circuit followed that majority.

However, the *Quirin* Court upheld a military *trial* of Haupt, while the issue in *Padilla* is the power of the military to hold (detain) Mr. Padilla without trial. But “the plurality in *Hamdi* rejected as immaterial the distinction between detention and trial (apparently regarding the former as a lesser imposition than the latter), noting that “nothing in *Quirin* suggests that [*Haupt*’s United States] citizenship would have precluded his *mere detention* for the duration of the relevant hostilities.”³⁰

One might respond, “but Padilla is only an *alleged* combatant.” Not true. Recall that his own lawyers *stipulated* that al Qaeda trained him and he was fighting the American armed forces in Afghanistan. Then, al Qaeda told him to come to the United States and cause mayhem.

Hence, the Fourth Circuit concluded that the President has—

the power to detain identified and committed enemies such as Padilla, who associated with al Qaeda and the Taliban regime, who took up arms against this Nation in its war against these enemies, *and* who entered the United States for the avowed purpose of further prosecuting that war by attacking American citizens and targets on our own soil—a power without which, Congress understood, the President could well be unable to protect American citizens from the very kind of savage attack that occurred four years ago almost to the day.³¹

Quirin approved of FDR’s decision to try the unprivileged enemy combatants. In *Padilla*, the court approved of the President’s decision to detain the unprivileged enemy combatant. Detention only lasts until the end of the war. We do not know when that the war will end, but we do know that it is not over yet. As Justice O’Connor recognized, the war in Afghanistan will last as long as American troops are still fighting there and dying there.³²

The fact that we do not know when this war will end is hardly unusual. Whenever a war starts, no one knows when it will end. On December 8, 1941, no one knew when World War II would end or who would win. No one knew, when the “Seven Days War” started, when it would end. Historians did not name that war the “Seven Days War” on day one or day two. Similarly, when the “Seven Years War” or when the “Thirty Years War” started, no one knew when they would end.

After the *Padilla* decision, the Government successfully snatched defeat from the jaws of victory. The Government argued that the case was moot, opposed certiorari, turned Padilla over to civilian custody, charged him with various crimes and began prosecution in an Article III court—a prosecution that continues to this day. The Supreme Court denied certiorari, allowed the transfer from the military authorities, but did not decide the mootness issue.³³

One wonders why the Government thought it could moot the issues. They are not moot, for Padilla can sue for damages for the period of his allegedly unlawful detention. Now that the Government has indicted him, we should hardly be surprised if he seeks to exclude any evidence procured against him because of his allegedly unlawful detention. That issue also serves to prevent mootness. Moreover, the Government still claims that it has the right to detain enemy combatants such as Padilla; its transfer of Padilla to the custody of an Article III court does not change the Government’s claim, so the Government is free to return to its old ways. For all these reasons, it is unlikely that any court would find the issues moot.³⁴

One might think that the Government should have supported certiorari, so that it would know what the rules are. Moreover, it could hardly find a better vehicle to set the stage for a favorable ruling. Recall that Padilla *stipulated* that he was an enemy spy sent to the United States to cause terror.³⁵

B. *The Rasul Case*

*Rasul v. Bush*³⁶ involved non-Afghan nationals (2 Australians, 12 Kuwaitis) captured abroad in connection with the Afghanistan hostilities. The military held them at the Guantánamo Bay, Cuba, an American Naval Base. Their brief emphasized that “[t]hey are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States[.]”³⁷

Justice Stevens, for the majority in *Rasul*, found that the federal court has jurisdiction to hear the habeas claims but did not decide what further proceedings may be necessary. The Court did not even decide that the litigants would win, only that the lower courts had jurisdiction to hear their petitions.

In *Hamdi*, decided the same day and discussed below, the O’Connor plurality articulated procedures that it required for U.S. citizens who claimed that they were not enemy combatants.

One would think that the *Rasul* aliens would be entitled to no greater protections than those afforded to U.S. citizens, so the military decided to offer the *Hamdi* procedures to *all detainees* held in Guantánamo (whether or not they were citizens of allied countries, like Australia, or countries not allies at the time of capture, like Afghanistan or Iraq). The military created what it called Combat Status Review Tribunals (called “CSRTs”) to offer what *Hamdi* only required for U.S. citizens: a “meaningful opportunity to contest the factual basis for [their] detention.”³⁸ The purpose of these tribunals is to decide if the alleged detainee really is an enemy combatant, a problem caused because the detainees do not wear uniforms.

The detainees in *Rasul* were similar to the detainees in *Johnson v. Eisentrager*. To find jurisdiction, the *Rasul* Court first had to distinguish *Eisentrager*. The Court did not overturn that case. Instead, it said that statutory changes following *Eisentrager* now gave the courts habeas jurisdiction. The court need not have jurisdiction over the detainee as long as it has jurisdiction over a custodian of the detainee.³⁹

If one compares the results in *Rasul* to *Padilla*, we have an odd result: aliens held in Guantánamo have more rights than U.S. citizens held in the United States. Aliens held at Guantánamo can file a habeas petition anywhere in the United States while U.S. citizens (and aliens held in this country) must file suit in the federal district where the jailer resides. One wonders why Congress would write a statute that way. We can continue to wonder because the Court offers no explanation why it was interpreting the habeas statute in *Rasul* and *Padilla* to reach that result.

Rasul really foreshadowed the result in D.C. Circuit’s opinion in *Boumediene v. Bush*.⁴⁰ Because *Rasul* was simply interpreting the habeas statute differently given the change in the statutory framework, Congress should be able to change the result by changing the statute. That is what it did after *Hamdan v. Bush*, discussed below.

One does not “suspend” habeas corpus by reverting to a statutory definition that the *Eisentrager* had previously upheld as constitutional. Recall that *Eisentrager* concluded that the statute denied habeas to the habeas petitioners and that this interpretation of the statute was constitutional. This result would change if the Court were to decide that the Guantánamo Bay Naval Base is part of the sovereign territory of the United States—a result that would surprise both the United States and Cuba.

C. The *Hamdi* Case

Hamdi involved a natural-born American citizen captured in Afghanistan allegedly fighting against American troops and their coalition partners.⁴¹ Mr. Hamdi allegedly fought for al Qaeda and for the Taliban, a group that controlled Afghanistan and harbored al Qaeda. Mr. Hamdi was captured with an AK-47 in his hand, but his father claimed that his son went to Afghanistan to do “relief work,” and arrived in Afghanistan less than two months before September 11, 2001.⁴²

Mr. Hamdi, the detainee, told a different story. He said that he wanted to join the Saudi Army to obtain military training so he could learn to kill Israelis. When the Saudi Army rejected him, he sought military training in Afghanistan so that

al Qaeda and the Taliban could teach him how to kill; then, he would go to Israel so that he could kill Israelis.⁴³ In that sense, one might argue that rather than embracing the Taliban cause, he simply wanted to use Americans as target practice. That would still make him a terrorist and a danger.

The O’Connor plurality concluded that the military could not detain a U.S citizen unless it first held a minimal hearing to determine that the citizen was really a combatant. One cannot tell that he is a combatant by looking at his uniform because these combatants do not wear uniforms. However, the fact that he was carrying an AK-47 and with a Taliban military unit when captured did not help his position.⁴⁴

In this war, unlike in previous ones, it is more difficult to tell genuine enemy combatants from noncombatants because the combatants generally do not wear uniforms. The United States and its coalition partners (Afghan forces not under direct US supervision) may capture people by mistake. The fact that the United States has paid a bounty for some detainees only serves to exacerbate the problem.

After this decision, the military created what it called “Combat Status Review Tribunals,” or CSRTs, to determine if a detainee was really an enemy combatant or simply captured by mistake. These CSRTs are not war crimes tribunals (called, in military parlance, “military commissions”). The job of CSRTs is neither to punish nor to try. Instead, it is much more modest: to determine if the detainee was really an enemy combatant instead of an “errant tourist, embedded journalist, or local aid worker.”⁴⁵ Because of this modest burden, Justice O’Connor emphasized that the military can shift the burden of proof to the detainee, who has to prove that the military was in error.

The military drafted the CSRT rules based on O’Connor’s opinion in *Hamdi*. Her opinion said that the hearing officers must not include anyone involved in the capture; that hearsay is admissible; that rebuttable presumption favors the Government; that each detainee may testify but has a right not to testify, and that the detainee may call witnesses. Commentators have criticized CSRTs because, for example, there is a rebuttable presumption that favors the Government. But one must recall that Justice O’Connor’s opinion created this presumption.⁴⁶

CSRT rules, like grand jury rules (and like Army Regulation 190–8, on which O’Connor relied), do not authorize lawyers to be present to represent the detainee. *Hamdi* only requires CSRTs for U.S. citizens, but the military offers them to all detainees held in Guantánamo Bay.

Guerrilla wars are not new. The war on terrorism is really a guerilla war where the battlefield is not limited to a particular geographic area. The enemy combatants in this guerilla war do not normally wear uniforms. They also do not abide by the laws of law. In other words, they do not carry their guns openly; they target protected places, like mosques (which they use to keep guns and supplies); they pretend to surrender when they are not really surrendering, and so forth. Because they do not wear uniforms, it is inevitable that we or our allies might capture people whom we think are guerillas but are not.⁴⁷ The Supreme Court required the military to create CSRTs in order to sort out these mistakes, to make sure that we do not detain the “errant tourist, embedded journalist, or local aid worker.”⁴⁸

Pursuant to this new procedure, the military has released some detainees. Critics say that the CSRTs release too few detainees, but one can argue that they release too many: the military has recaptured or killed in battle about 5% to 10% of the detainees it has released.⁴⁹

The Court decided the war crimes issue in *Hamdan v. Rumsfeld*, discussed next.

III. HAMDI AND THE WAR CRIMES TRIBUNALS

A. Introduction

One of the President's responses to the 9/11 attack was to create war crimes tribunals or "military commissions" to prosecute selected enemy combatants for alleged war crimes. By 2006, the Government had charged 13 combatants. One of these defendants was Salim Ahmed Hamdan, a Yemeni national, who filed a habeas petition in federal court. He admitted being bin Laden's chauffeur between 1996 and 2001 but denied committing war crimes.

In November 2001, during fighting in Afghanistan with the Taliban, militia forces captured Hamdan and turned him over to the U. S. military, which transferred him to the Guantánamo Bay Naval Base where the military held him as an enemy combatant and eventually charged him, among other things, with "conspiracy to commit war crimes." He conceded that a court martial constituted in accordance with the Uniform Code of Military Justice ("UCMJ") would have authority to try him, but argued, among other things, that the tribunal that was trying him was not so constituted. The trial judge agreed and used habeas to enjoin the military commission; the D.C. Circuit reversed unanimously.

In *Hamdan v. Rumsfeld*, the Supreme Court (5 to 3) reversed the D.C. Circuit.⁵⁰ Chief Justice Roberts did not participate because he had been on the panel that had ruled against Mr. Hamdan.⁵¹ This case, in spite of all the publicity surrounding it, did not involve constitutional issues, only a statutory one. The Court held that the military commission convened to try Hamdan lacked the power to proceed because its structure and procedures violated the Uniform Code of Military Justice (UCMJ). Justice Stevens, in a portion of the opinion that was a plurality, also argued that the Government's procedures violated the Geneva Conventions, but he could not muster five votes for that proposition.⁵²

Justice Stevens spoke for the Court on some issues and for the plurality on others. Five other justices wrote various concurrences and dissents in the 185-page opinion. The Court said that the military could prosecute Hamdan under the UCMJ if the tribunal had procedures akin to a court martial, or if Congress authorized the President to use different procedures for the defendants.

B. The Detainee Treatment Act and the AUMF

The Court held that the jurisdictional limitations of the Detainee Treatment Act of 2005 (DTA) did not apply to pending cases.⁵³ Congress enacted the DTA after Hamdan had applied for certiorari. It provides that "no court, justice, or judge shall have jurisdiction to hear" the habeas application of Guantánamo Bay detainees.

Then the Court agreed with Hamdan that no Act of Congress authorized the President to create these military commissions. The Court assumed that the Congressional Authorization of the Use of Military Force ("AUMF") "activated the President's war powers" (citing *Hamdi v. Rumsfeld*) and that "those powers include the authority to convene military commissions in appropriate circumstances." Moreover, "we do not question the Government's position that the war commenced with the events of September 11, 2001," but, "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ."

C. Absence of a Formal Declaration of War

The Court was, frankly, unconcerned that Congress had not "declared war" in a formal sense, because the Court recognized that we are at war. Congress had passed the AUMF and that is enough. "[W]e assume that the AUMF activated the President's war powers,"⁵⁴ and "we do not question the Government's position that the war commenced with the events of September 11, 2001."⁵⁵ Later, Stevens emphasizes yet again: "nothing in our analysis turns on the admitted absence of either a formal declaration of war or a declaration of martial law."⁵⁶

That theme repeats itself in all the detainee cases.⁵⁷ Commentators often emphasize that this war is "different" because there is no declaration of war. However, Congress does not need to declare war in order for the President to make war. Indeed, most of the wars that America has fought never involved a declaration of war. For example, Congress did not declare war when we entered the Korean War, or the first Gulf War. The Civil War, our bloodiest, was never declared.

Oddly enough, one can find a formal "declaration of war" that began the present "war on terror," but the United States did not issue that declaration. The time was August 1996, and al Qaeda's leader, Osama bin Laden, actually "declared war" on the United State. In 1998, he expanded his declaration to include killing "Americans and their allies, civilians and military ... in any country in which it is possible to do it."⁵⁸

While Congress never formally "declared war" on al Qaeda, in 1998, after al Qaeda agents bombed U.S. embassies in Kenya and Tanzania, the United States responded by firing missiles at suspected al Qaeda targets in Afghanistan and Sudan. The U.S. Ambassador to the United Nations promptly reported this action to the Security Council: "In accordance with Article 51 of the United Nations Charter, I wish, on behalf of my Government, to report that the United States has exercised its right of self-defense in responding to a series of armed attacks against U.S. Embassies and U.S. nationals."⁵⁹

D. Afghanistan Not an International Conflict

The armed conflict in Afghanistan involves many nations besides the United States. Armies of Australia, Great Britain, Germany, Canada, NATO, and other countries are all fighting to this day in Afghanistan against al Qaeda and its Taliban supporters. And those supporters come from other countries as well—from Saudi Arabia, Australia, Afghanistan, and 38 other countries.⁶⁰

Nonetheless, Justice Stevens' opinion said that the present conflict with al Qaeda and the Taliban, while not limited to one nation, is not a conflict between nations. The Geneva Convention's Common Article III applies to an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." Stevens said that this Article applies because this multi-nation conflict in Afghanistan is not a conflict "of an international character."

Stevens then argued because this conflict is not "of an international character," the President could not use military commissions (instead of courts martial, the "regularly constituted tribunals") unless he made a special determination that they are necessary. But the President has not made an "official determination that it is impracticable to apply the rules for courts-martial."⁶¹ If he had made such an "official determination," the situation would change: "We assume that *complete deference* is owed that determination."⁶²

Because the President had not made his determination to the satisfaction of Stevens, the justices then had to decide if a military commission was a "regularly constituted court" within the meaning of the Geneva Conventions. They concluded that a military commission is not a "regularly constituted court" but a court martial would be.

E. Changing the Tribunal's Rules

One reason the *Hamdan* majority concluded that the commission is not regularly constituted is because "its rules and procedures are subject to change midtrial, at the whim of the Executive."⁶³ The Court was right.

After the Government had started the war crimes proceedings and *after* it had won in the Court of Appeals on July 15, 2005, it announced in October 2005 that it was changing all the rules. The military's appointing authority dramatically changed the Commission rules—the rules that the D.C. Circuit had approved—and then applied those changes to pending proceedings.

Not surprisingly, the lawyers for the detainees complained. Why would the Government create this problem? The Government said it was imposing the change in order to make the process more "efficient."⁶⁴ The Supreme Court found, on June 29, 2006, that the change in the rules was one reason why the tribunals were not "regularly constituted." The Government imposed a self-inflicted wound that helped it to lose its case.

F. Pro Se Representation

The Commission's original rules, like its changed rules of October 2005, did not allow the accused to represent himself. The Commission, by fiat, assumed that no defendant was competent enough to defend himself, although the Commission thought that a defendant was competent enough to plead guilty.

However, the standard rule in this country is that a criminal defendant has a constitutional right to represent himself in a state or federal trial if he voluntarily and intelligently elects to do so.⁶⁵ The Commission rules, until Congress imposed a change by statute, forbade *pro se* representation.⁶⁶

Consider the case of al Bahlul, a detainee charged with war crimes who refuses civilian or military counsel. During

the August 2004 war crimes proceedings, al Bahlul asked to represent himself. Judge Brownback immediately said no. He conducted no hearing to determine if al Bahlul was competent enough to defend himself.

Later, al Bahlul then asked to make a statement and he asked not to be interrupted. He started speaking and said:

As God is my witness, and the United States did not put any pressure on me, I am an al-Qaeda member, and the relationship between me and Sept. 11...⁶⁷

"Stop!" yelled Judge Brownback, who interrupted him. Brownback told the tribunal members—incorrectly—that he cut off al Bahlul because the defendant's statement, which was not under oath, was inadmissible as evidence. The prosecution objected to the judge's announcement. Defense lawyers chimed in. Eventually, after the lawyers spoke, Judge Brownback turned back to al Bahlul, who had lost his train of thought and sat down! We never heard what al Bahlul had to say. His complete statement might well have been interesting.

Later, during the proceedings in January of 2006, al Bahlul again asked to appear *pro se*. He made clear that he rejected not only his military counsel but also his civilian counsel:

I heard the judge say that I have appointed volunteer lawyers. I would like to tell the judge and the people present here that I never appointed any civilian lawyers, not directly, and not in writing. And I am surprised to hear that from you. This is not because—I'm not surprised that some people [the civilian lawyers] volunteered their services. Many people would like to volunteer in this case just to get some fame. *They ask for fame. They want fame for themselves* and I do not appoint anyone by writing or even by inference.⁶⁸

Finally, Congress changed the Commission rules by statute in order to allow the basic right of a defendant to represent and speak for himself.

G. The Medoc Indians

During oral argument in the *Hamdan* case, Justice Breyer asked the Government, "And if the president can do this, well, then he can set up commissions to go to Toledo and, in Toledo, pick up an alien and not have any trial at all, except before that special commission."⁶⁹ The Government could have responded that Hamdan was not a U.S. citizen or alien picked up in Toledo but an alien captured in Afghanistan. The Government alleged that bin Laden's admitted chauffeur was aiding him in his terrorist activities.

The military cannot simply prosecute aliens it finds in Toledo. But if the hypothetical alien had been walking in Toledo and the Government could prove that he was an enemy spy who had been inside enemy lines fighting against the United States, he would be like the aliens whom the Government captured in the *Quirin* case. And, recall, Justice O'Connor told us that *Quirin* is the law today.⁷⁰

The Government's power to detain enemy aliens was quite limited. First, as the Fourth Circuit explained, the individual must take up "arms on behalf" of an enemy warring against the United States. Second, that person must have fought "against our country in a foreign combat zone of that war," and finally,

he must have “traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets.”⁷¹ That is a much more limited power than the power to “go to Toledo and, in Toledo, pick up an alien.”

Perhaps it was hard for the Government to rely on the Fourth Circuit because it had fought mightily to make that decision moot, appearing to manipulate the jurisdiction of the federal court.⁷² Instead, the Government responded: “This is much more of a call for military commissions in a real war than, certainly, the use of military commissions against the Medoc Indians or any number of other instances in which the President has availed himself of this authority in the past.”⁷³ Justice Breyer did not appear interested in the Medoc Indians.

H. Excluding the Defendant from Part of his Own Trial

One of the major issues that upset the Court was that the commission rules authorized the tribunal to exclude the accused and his civilian counsel (but not his military counsel) from any part of the proceeding in order to protect classified information. The Court considered this provision to be a violation of one of the “most fundamental protections,” the “right to be present.”⁷⁴

The provision also bothered the D.C. Circuit when it considered this case. In the course of oral argument, Judge Randolph asked the Government about this issue. Then he added, “Doesn’t the Geneva Convention also contemplate secret proceedings? Article 105 says that the court may hold in camera proceedings when state secrets are at stake.” It appeared that the judge was throwing a helpful comment to the Government. If so, the Government rejected it: “I wasn’t aware that Article 105 said that... [w]e haven’t asserted Article 105 and I’m not certain what the precise scope is...”⁷⁵

Perhaps the Government was seeking a broad rule based on some sort of inherent executive power. If so, by asking for so much, it received very little. The Supreme Court found one of the basic flaws in the military commission procedure is that it allowed the court to exclude the detainee from part of the proceedings.

The issue of whether the accused must be present at all stages of his criminal trial—even if the Government claims that military secrets require that the defendant (but not his lawyer) be excluded for part of the trial—figured prominently in this case, even though there had not yet been a trial. That raises the obvious question: Did the military prosecutors plan to introduce any classified evidence that might call the Hamdan’s exclusion? In fact, the military prosecutors had no intention of using and could not envision using any classified evidence that would require Hamdan to be excluded from any part of his trial. The prosecution simply was not relying on any classified information and could not imagine moving to exclude him.⁷⁶ But it appears this very relevant information was not brought to the attention of the trial court, the D.C. Circuit, and the U.S. Supreme Court.

The Supreme Court was concerned that Hamdan had already been, excluded from his own trial.⁷⁷ What the Supreme Court apparently did not know was that the trial

transcript showed that this exclusion (for a portion of the voir dire) occurred because *Hamdan’s own lawyer* asked to exclude Hamdan. The military prosecutors simply did not object.⁷⁸

One would think the Court would have been interested to know that defense counsel excluded their own client from part of his voir dire and then successfully moved to enjoin the proceedings because they had excluded their own client from part of his voir dire. Why was the Court unaware? I do not know.

CONCLUSION

Stevens, speaking for the Court in *Hamdan*, emphasized that he assumed “the truth of the message implicit in that charge—viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm.”⁷⁹ So, Hamdan remained detained as an enemy combatant.

His lawyers (and lawyers for other detainees) continued litigation in the federal courts. The prime case was *Boumediene v. Bush*,⁸⁰ which rejected all the habeas challenges to the new law that the plaintiffs raised.⁸¹ The D.C. Circuit held that Congress could change the habeas statute so that it did not cover aliens who are outside (and who have never been within) the sovereign territory of the United States.

However, that law raises other questions that are not yet ripe. Indeed, they may never be ripe. One section of the new law may be read to allow evidence procured by torture subject to various conditions:

10 U.S.C. § 948r: Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements

(a) In General.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

(b) *Exclusion Of Statements Obtained By Torture.*—A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

(c) *Statements Obtained Before Enactment Of Detainee Treatment Act of 2005.*— A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) *in which the degree of coercion is disputed may be admitted only if* the military judge finds that—

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence.

(d) Statements Obtained After Enactment Of Detainee Treatment Act of 2005.— A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

- (1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;
- (2) the interests of justice would best be served by admission of the statement into evidence; and
- (3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.⁸²

If a trial judge allows in evidence procured by torture, it is hard to imagine that the federal court would allow that, no matter how credible the evidence is. For example, if a witness who was tortured says, “I hid the gun under the Oak tree,” that statement may well be true, even if procured by torture. All one has to do is dig under the oak tree and find the gun with the witness’ fingerprints on it. The statement is true, but that does not mean a court would allow that statement into evidence. The trial judge should first determine if there was torture, coercion, or “cruel, inhuman, or degrading treatment.”

While the legal battles will now proceed before the military tribunals, they will eventually return to the federal courts. But when they do, the Article III courts will decide the remaining issues. Some issues, like the applicability of 10 U.S.C. § 948r, may never come up. But if they do, the federal courts will not be reluctant to decide them, given the judicial history thus far.

Endnotes

1 548 U.S. ___, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006).

2 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA). The DTA added subsection (e) to the habeas statute which stated that, “[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge” may exercise jurisdiction over—

“(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

“(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who

“(A) is currently in military custody; or

“(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit... to have been properly detained as an enemy combatant.”

DTA § 1005(e)(1). Section § 1005(e)(2) & (e)(3) provide for exclusive judicial review of Combatant Status Review Tribunal determinations and military commission decisions in the D.C. Circuit.

3 Kennedy did not participate in parts V and VI-D-iv. He made explicit in his concurring opinion in *Hamdan v. Rumsfeld* that he did not join the Geneva Convention issues: “In light of the conclusion that the military

commission here is unauthorized under the UCMJ, I see no need to consider several further issues addressed in the plurality opinion by Justice Stevens and the dissent by Justice Thomas.” 126 S.Ct. 2749, 2808-09 (2006).

4 “The Court’s conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’ Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. *Nothing prevents the President from returning to Congress to seek the authority he believes necessary.*” *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2799 (Breyer, J., concurring, joined by Kennedy, Souter, & Ginsburg, JJ.) (emphasis added; internal citation omitted).

Kennedy went on to repeat this invitation to Congress: “here should be reluctance, furthermore, to reach unnecessarily the question whether, as the plurality seems to conclude, Article 75 of Protocol I to the Geneva Conventions is binding law notwithstanding the earlier decision by our Government not to accede to the Protocol.... In light of the conclusion that the military commissions at issue are unauthorized *Congress may choose to provide further guidance in this area. Congress, not the Court, is the branch in the better position to undertake the ‘sensitive task of establishing a principle not inconsistent with the national interest or international justice.’*” *Id.* at 2749, 2809 (Kennedy, J., concurring in part) (emphasis added).

5 PL 109-366, October 17, 2006, S. 3930. It passed the Senate, 65-34 (Sept. 28, 2006), and the House, 250-170-12 (Sept. 29, 2006).

6 *See supra* note 4.

7 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 2007 WL 957363 (April 2, 2007.)

8 Foreign nationals detained at Guantanamo Naval Base filed petitions for writs of habeas corpus and alleged violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations. and the Alien Tort Act. 476 F.3d at 984.

9 476 F.3d at 987.

10 476 F.3d at 991.

11 476 F.3d at 989, 990, 1001.

12 *Quoted in* Raymond Bonner, *Terror Case Prosecutor Assails Defense Lawyer*, N.Y. TIMES, March 5, 2007, at A10, 2007 WLNR 4161723.

13 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866).

14 71 U.S. 2, 118.

15 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 (1942).

16 *Ex parte Quirin*, 317 U.S. 1, 30-31, 63 S.Ct. 2, 12 (1942) (footnotes omitted). The Court cited, e.g., Winthrop, *Military Law*, 2d Ed., at pp. 1196-1197, 1219-1221; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, sections IV and V. This distinction goes back a long ways. *See also*, e.g., Hague Convention No. IV of October 18, 1907, 36 Stat. 2295. Article I of the Annex defines the persons to whom belligerent rights and duties attach.

17 317 U.S. at 45.

18 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950).

19 339 U.S. 763, 767, 70 S.Ct. 936, 938.

20 339 U.S. 763, 766, 70 S.Ct. 936, 937.

21 Justices Black, Douglas, and Burton dissented.

22 *Johnson v. Eisentrager*, 339 U.S. 763, 768 (emphasis added).

23 542 U.S. 426, 124 S.Ct. 2711, 159 L.Ed.2d 513 (2004).

24 Kennedy, joined by O’Connor, also filed a concurring opinion. Stevens, joined by Souter, Ginsburg, & Breyer, dissented, arguing that the Court should create an exception to the habeas requirement.

25 *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

26 423 F.3d 386, 389–390 (footnote omitted).

27 *Hamdi v. Rumsfeld*, 542 U.S. 507, 523, 124 S.Ct. 2633, 2642 (2004) (O'Connor, J., for the plurality).

28 *Padilla*, 423 F.3d at 386, 389.

29 *Id.* at 394.

30 *Id.* at 395.

31 *Id.* at 397 (emphases by court).

32 “Detention is limited to the duration of the hostilities as to which the detention is authorized. Because the United States remains engaged in the conflict with al Qaeda in Afghanistan, Padilla’s detention has not exceeded in duration that authorized by the AUMF.” *Id.* at 392 n. 3.

33 ___ U.S. ___, 126 S.Ct. 1649, 164 L.Ed.2d 409 (2006) (Souter & Breyer, JJ., objecting to denial of certiorari; Ginsburg, J., also dissented from certiorari and filed an opinion; Kennedy, J., joined by Robert, C.J. & Stevens, J., writing a brief opinion concurring in the denial of certiorari).

34 1 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 2.13(c) (4th ed. 2007); Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and their Aftermath*, 57 SYRACUSE L. REV. 1, 42 (2006).

35 See *supra* note 25.

36 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004).

37 *Rasul*, 542 U.S. at 471.

38 *Hamdi*, 542 U.S. at 509.

39 *Rasul*, 542 U.S. at 478-79 (quoting *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494-95 (1973)). “*Braden* overruled the statutory predicate to *Eisentrager*’s holding.” 410 U.S. at 479.

40 476 F.3d 981 (D.C. Cir. 2007).

41 *Hamdi*, 542 U.S. at 507, 510-13.

42 *Id.* at 507, 511 (O’Connor, J., plurality).

43 Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and their Aftermath*, 57 SYRACUSE L. REV. 1, 15 & n.86 (2006).

44 *Hamdi*, 542 U.S. at 513.

45 *Id.* at 534.

46 “*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.” *Id.* at 507, 534 (emphasis added).

47 Ronald D. Rotunda, *Frische Datteln für die Häftlinge*, SUEDEDEUTSCHE ZEITUNG (Germany), January 2, 2006, at p. 2 (published in German).

48 *Hamdi*, 542 U.S. at 534.

49 *Supra* note 43, at 46-47.

50 548 U.S. ___, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006).

51 See *discussion in*, Ronald D. Rotunda, *The Propriety of a Judge’s Failure to Recuse When Being Considered for Another Position*, 19 GEO. J. LEGAL ETHICS 1187 (2006).

52 See *Hamdan*, 126 S.Ct. at 2749, 2808-09 (J. Kennedy): “In light of the conclusion that the military commission here is unauthorized under the UCMJ, I see no need to consider several further issues addressed in the plurality opinion by Justice Stevens and the dissent by Justice Thomas.”

53 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA).

DTA § 1005(e)(1). Section § 1005(e)(2) & (e)(3) provide for exclusive judicial review of Combatant Status Review Tribunal determinations and military commission decisions in the D.C. Circuit.

54 *Hamdan*, 126 S.Ct. at 2775.

55 *Id.* n.31.

56 *Id.* at 2778 n.31.

57 See, e.g., *Hamdi*, 542 U.S. at 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion).

58 *Quoted in* RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW* 321 (8th ed. 2007)

59 Letter from Bill Richardson, U.S. Ambassador to the United Nations, to Danilo Turk, President, U.N. Security Council, Aug. 20, 1998 (emphasis added).

60 See, e.g., Robert Howard, *Canada Needs NATO Partners*, HAMILTON SPECTATOR, Oct. 28, 2006, at A16.

61 *Hamdan*, 126 S.Ct. at 2791.

62 *Id.* (emphasis added).

63 *Id.* n. 65. Commission Order No. 1, § 11 provides that the Secretary of Defense may change the governing rules “from time to time.”

64 The changes “to the military commission procedures made in August [2005] will create a more efficient process for trying detainees,” according to the U.S. Government’s press release in October 2005. <http://usinfo.state.gov/dhr/Archive/2005/Oct/27-738948.html>.

65 *Faretta v. California*, 422 U.S. 806 (1975).

66 The statute now provides, “The accused shall be permitted to represent himself, as provided for by paragraph (3).” 120 Stat 2600, 2608, 10 U.S.C.A. § 949a -- § 949a (b)(1)(D).

Paragraph 3 goes on to say:

“(3)(A) The accused in a military commission under this chapter who exercises the right to self-representation under paragraph (1)(D) shall conform his deportment and the conduct of the defense to the rules of evidence, procedure, and decorum applicable to trials by military commission.

“(B) Failure of the accused to conform to the rules described in subparagraph (A) may result in a partial or total revocation by the military judge of the right of self-representation under paragraph (1)(D). In such case, the detailed defense counsel of the accused or an appropriately authorized civilian counsel shall perform the functions necessary for the defense.”

67 USA TODAY, 8/26/2004; BBC News, 26 August, 2004 ; 8/27/04 FT. WORTH STAR-TELEGRAM A12, 2004 WLNR 1920964; 8/27/04 INT’L HERALD TRIBUNE 3, 2004 WLNR 5224120.

68 http://www.defenselink.mil/news/May2006/d20060512RoT_alBahlul_v1.pdf, at pp. 50-51 (11Jan. 2006)

69 Westlaw, 3/29/06 Fed. News Service (MIDDLE EAST) 07:55:00.

70 *Hamdi*, 542 U.S. at 507, 523, 124 S.Ct. 2633, 2642 (O’Connor, J., for the plurality).

71 *Padilla*, 423 F.3d at 386, 389.

72 ___ U.S. ___, 126 S.Ct. 1649, 164 L.Ed.2d 409 (2006) (Souter & Breyer, JJ., objecting to denial of certiorari; Ginsburg, J., also dissented from certiorari and filed an opinion; Kennedy, J., joined by Robert, C.J. & Stevens, J., writing a brief opinion concurring in the denial of certiorari).

73 Westlaw, 2006 WL 846264 (U.S.) at p. *67; *supra* note 63.

74 *Hamdan*, 126 S.Ct. at 2788, citing Commission Order No. 1

75 Transcript, Salim Ahmed Hamdan v. Donald H. Rumsfeld, No. 04-5393, April 7, 2005, at 16, lines 10-15, 20-21.

76 Rotunda, *supra* note 34, at 59.

77 *Hamdan*, 126 S.Ct. at 2788.

78 United States v. Hamdan, U.S. Military Comm., at 81-82, Nov. 8.2004, *available at* <http://www.defenselink.mil/news/Nov2005/d20051110Hamdanvol6.pdf>.

79 *Hamdan*, 126 S.Ct. at 2798.

80 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 2007 WL 957363 (April 2, 2007).

81 Foreign nationals detained at Guantanamo Naval Base filed petitions for writs of habeas corpus and alleged violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations. and the Alien Tort Act. 476 F.3d at 984.

82 120 Stat 2600, 2607 (emphasis added).

