

**HAMDAN V. RUMSFELD:
DOMESTIC ENFORCEMENT OF INTERNATIONAL LAW**

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International law has long been subjected to the charge that it isn't really law—at least not in the sense that we usually imagine law. There is no international police force standing ready to enforce the laws of the international community against states that violate them. There is no court system that can adjudicate violations and assess penalties. And, with a few exceptions, there is no mechanism for penalizing states found to have fallen short of the law's rules. This has led some to conclude that most of international law is little more than cheap talk—words not backed up deeds and, hence, without any real force.

And yet this view of international law misses much of what makes international law relevant and powerful: International law is not only enforced by states against one another, but it is also enforced by states *against themselves*. That is to say, it is enforced by domestic courts and political institutions that pressure their own government to live up to the promises it has made; it is enforced by individuals and interest groups that pressure the political branches of government to live up to international legal commitments they have made, whether they can be enforced in the courts or not; and it is enforced by individuals or groups that use a state's own court system to enforce international law through litigation. It is this missing part of the picture—the enforcement of international law at home—that this essay brings to light.²

¹ I thank Neal Katyal, Lieutenant Commander Charles Swift, Marty Lederman, Sanford Levinson and the editors of this volume for offering their insights into the case and the broader war on terror and for their comments and suggestions on earlier drafts of this chapter. I also thank Katherine Wiltenberg Todrys, Nicole Hallett, and Sumon Dantiki for their excellent research assistance.

² This chapter builds upon earlier academic work that lays out the theoretical claims in more detail, including Oona A. Hathaway, "Why Do Countries Commit to Human Rights Treaties?," *J. CONFLICT RESOLUTION* (forthcoming 2007); Oona A. Hathaway & Ariel Lavinbuk, "Rationalism and Revisionism in International Law," 119 *HARV. L. REV.* 1404 (2006); Oona A. Hathaway, "Between Power and

International law that fails to provide for international sanctions is not doomed to failure. It simply falls back upon a second, and potentially far more powerful, line of defense against violations within states themselves: the dance of politics and the domestic rule of law. International law both depends upon and empowers existing checks and balances within a state. For example, it gives courts a basis for reigning in damaging behavior by the political branches, or gives political actors an external source of authority and legitimacy to point to in their efforts to challenge and contain abuses of power by government officials.

Still, relying upon enforcement at home is not without drawbacks. Not all states will engage in domestic enforcement, nor will states that do engage in domestic enforcement do so all the time. In states where domestic political and legal institutions hold the government to its word, government actors have difficulty ignoring international law for long periods of time without being called to account. But in weak or autocratic states, governments can make international legal commitments and then ignore them without fear of repercussions. Similarly, in states with judiciaries that are corrupted by politics, violence, or money, judges are unable to make independent decisions, and the threat of litigation is likely to be largely ineffective. And even in states with independent judiciaries, the effectiveness of legal commitment varies depending on whether such commitments are binding as a matter of domestic law or not.³

This brings us to the case that is the subject of this essay: *Hamdan v. Rumsfeld*. Widely recognized as one of the most important international law cases in the United States in at least the last decade, *Hamdan* powerfully illustrates both the promise and limits of domestic enforcement of international law. The circumstances that gave rise to the case demonstrate the hurdles that domestic enforcement of international law faces in even the most

Principle: An Integrated Theory of International Law,” 72 U. CHI. L. REV. 469 (2005); Oona A. Hathaway, “The Cost of Commitment,” 55 STAN. L. REV. 1821 (2003); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1989 (2002).

³ I have found, for example, that democratic states are much more likely to improve their human rights practices after ratifying a human rights treaty and are non-democratic states. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1989 (2002). I also find that democratic states are less likely to ratify both human rights and environmental treaties when their practices are out of compliance than are non-democratic states. See Oona A. Hathaway, “The Cost of Commitment,” 55 STAN. L. REV. 1821 (2003) and Oona A. Hathaway, “Why Do Countries Commit to Human Rights Treaties?,” J. CONFLICT RESOLUTION (forthcoming 2007).

robust democracies. As we shall see, the *Hamdan* case and those that preceded it arose from systematic efforts by the Bush Administration to create an exclusive zone of authority over those captured in the “war on terror.” By shielding its actions from oversight, the Administration aimed to exercise unfettered discretion over what rights would be afforded to those it held and who would judge these detainee’s guilt and innocence. The case thus stands as a stark reminder that the domestic enforcement of international law relies not only on the existence of robust rule of law institutions, but also on the ability of those institutions to reach the cases in which international legal rules are at stake.

And yet *Hamdan* also offers a more hopeful message: Domestic enforcement of international law can succeed even where there is stringent resistance by even the most powerful of political actors. In the face of claims by the Administration that it alone should judge the legality of its actions in the war on terror, the Court responded with a resounding “no.” As Justice Breyer put it, “The Court’s conclusion ultimately rests upon a single ground: Congress has not issued the Executive a “blank check.””⁴ Thus, even as it showcases the limits of international law, the case stands, too, for the hopeful message that domestic enforcement of international law can bring even the most powerful nation to account. Where there is no international enforcement of international law, where the nation at odds with the law is the most powerful in the world, and where the executive resists the constraints of international law—even then the law can hold sway. The story of *Hamdan* is the story of both the fragility and the power of domestic enforcement of international law, and in this story lies broader lessons for the promise and limits of international law as a whole.

This essay begins with the circumstances behind the *Hamdan* case. Part I examines how the terrorist attacks on the World Trade Center on September 11, 2001 prompted reactions that threatened to undermine the power of international law in the United States and the world. As Part II shows, these challenges did not go unanswered. They prompted responses in the media, in American and world politics, and in the courts. These responses culminated, Part III explains, in the decision that is the central focus of this story—*Hamdan v. Rumsfeld*. But as we shall see in Part IV, the Supreme Court’s decision in this case is not the end of the story. The battle over the fate of domestic enforcement of international law in the war on terror promises to continue.

⁴ *Hamdan v. Rumsfeld*, 549 U.S. ___, 126 S. Ct. 2749, 2798 (2006).

PART I: THE WAR AGAINST TERROR AND CAMP X-RAY

Just over a week after the devastating attacks on the World Trade Center, President George W. Bush stood before a Joint Session of Congress. “On September the 11th,” he declared, “night fell on a different world, a world where freedom itself is under attack.” He announced the commencement of a “war on terror”—a campaign “unlike any we have ever seen”—that would “not end until every terrorist group of global reach has been found, stopped and defeated.”⁵

The first target of the new war was the Taliban government of Afghanistan—a government that had openly harbored terrorist Osama bin Laden and his al Qaeda terrorist network, which was suspected of plotting the September 11 attacks. By the end of October, American and British troops had entered Afghanistan in what American forces dubbed “Operation Enduring Freedom,” and coalition forces had captured hundreds of suspected Taliban soldiers and al Qaeda members.⁶ American forces would eventually go on to capture and hold more than 83,000 prisoners in the war on terror by the end of 2005.⁷

It soon became apparent that the U.S. government had decided not to afford those it had captured the full range of protections defined by the international laws of war. The Bush Administration instead openly questioned the relevance of the four international agreements known collectively as the “Geneva Conventions”—agreements that together form the core of international humanitarian law.⁸ These Conventions, the U.S.

⁵ President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001).

⁶ Though the initial attacks were carried out exclusively by U.S. and British forces, a significant number of other countries soon offered support, including the United Kingdom, Canada, France, Italy, Spain, Portugal, Germany, Australia, Pakistan, and New Zealand.

⁷ Katherine Shrader, *U.S. Has Detained 83,000 in War on Terror*, ASSOCIATED PRESS, Nov. 16, 2005.

⁸ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 7 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention

Administration argued, did not apply to the detainees in the war on terror. They were created to protect nonparticipating civilians and soldiers engaged in classic state-to-state military conflict, not the “unlawful combatants” who had been captured in Afghanistan.⁹ As then-White House counsel, Alberto Gonzales, put it in early 2002, “the war on terrorism is a new kind of war, a new paradigm [that] renders obsolete Geneva’s strict limitation on questioning of enemy prisoners and renders some of its provisions quaint.”¹⁰

Only a month into the war in Afghanistan, President Bush issued a military order entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism.”¹¹ The order authorized the creation of military commissions to try any non-citizen captured in the armed conflict that President determines “there is reason to believe . . . is or was a member of the organization known as al Qaida” or has “engaged in, aided or abetted, or conspired to commit acts of international terrorism.”¹² The Order vested the Secretary of Defense with the power to appoint military commissions to try those subject to the Order.¹³ The decision not to

IV]. The Third Geneva Convention held particular relevance, for it provides that prisoners of war in situations of armed conflict must be given immunity for taking up arms and for actions committed in the course of warfare, even though such acts would usually be considered crimes. It further requires that a “competent tribunal” determine the status of those that are accused of committing a “belligerent act and having fallen into the hands of the enemy.” Geneva Convention III, art. V.

⁹ Secretary Rumsfeld stated that “technically unlawful combatants do not have any rights under the Geneva Conventions.” Donald Rumsfeld & Gen. Richard B. Myers, Department of Defense News Briefing (Jan. 11, 2002), http://www.defenselink.mil/transcripts/2002/t01112002_t0111sd.html. The term itself is not mentioned in the Geneva Conventions. The basis for the claim is that Article 4 of the Third Geneva Convention defines a Prisoner of War as: “Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (c) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.” Geneva Convention III. The administration held that combatants that did not meet these requirements were “unlawful combatants” not entitled to the protections of the Geneva Conventions.

¹⁰ Robert O. Boorstin, *Tossing Aside the Geneva Conventions, Bush Decisions Place U.S. Troops in Greater Danger*, Center for American Progress, May 18, 2004, at <http://www.americanprogress.org/site/pp.asp?c=biJRJ8OVF&b=79532>.

¹¹ 66 Fed. Reg. 57833 (2001) [hereinafter the November 13 Order].

¹² *Id.*

¹³ This power was later delegated to John D. Altenberg, Jr., a retired Army major general and longtime military lawyer. The tribunals set up on Guantanamo were

offer the detainees the protections of international humanitarian law was thus insulated from challenge—or so it was thought—by the creation of an adjudicative body that was subject to little external influence or oversight.¹⁴ Thus began what would become a sustained effort not only to test and even exceed the limits of international humanitarian law, but also to insulate the resulting actions from the scrutiny of domestic courts. This insulation of government action from domestic enforcement of the law would, in turn, eventually give rise to an unchecked tide of violations.

Freed from the conventions of domestic law or direct oversight by domestic courts, the commissions promised to offer few procedural protections to the accused: “Given the danger to the safety of the United States and the nature of international terrorism,” the President’s Order stated, “it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”¹⁵ The Administration soon made good on this promise in the rules it outlined to guide the commissions.¹⁶ Most notably, the rules provided that evidence need only have “probative value to a reasonable person,” a standard that is generally regarded to permit the admission of hearsay and other types of usually inadmissible evidence, such as testimony obtained through coercion or even torture. Furthermore, the accused detainees would be afforded no right to know the evidence against them if doing so might compromise national security—a dramatic departure from the procedures of not only civilian courts, but courts-martial as well.¹⁷

made up of a panel of between three and seven military officers selected by an Altenberg.

¹⁴ Among other things, the “Appointing Authority,” which may be the President, Secretary or Defense, or a designee, has ultimate control over the military commission proceeding, including appointing commissioners, appointing review panels, and selecting the Chief Prosecutor and Chief Defense Counsel (civilian lawyers are allowed, but they must be approved by the government and may be excluded from trial proceedings for national security purposes). Moreover, the procedures make it possible for the Appointing Authority to influence individual cases by permitting interlocutory appeals to review panels that may be appointed for specific cases and by permitting the Appointing Authority to set aside a review panel recommendation of a new trial or lesser sentence.

¹⁵ November 13 Order, 66 Fed. Reg. 57833 (2001).

¹⁶ The regulations were laid out in the Department of Defense Military Commission Order No. 1, available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>, which was issued pursuant to the President’s November 13 Order, mentioned above.

¹⁷ Many other procedural protections ordinarily afforded criminal defendants were not required to be observed by the Commissions, including, for example, judicial

Meanwhile, the U.S. government began to transport detainees from Afghanistan to Camp X-Ray, a U.S. military base located on Guantánamo Bay, in January 2002.¹⁸ Within a few weeks, hundreds of detainees had been relocated to Guantánamo Bay. From the administration's point of view, the base had two significant advantages that made it, as then-Secretary of Defense Donald Rumsfeld later put it "the least worst place we could have selected":¹⁹ It is physically isolated and hence offers excellent security. And it is not located on U.S. territory. Instead, it sits on land that is on long-term lease from the Cuban government. As a consequence, the prisoners would not have the same legal protections they would have were they held in the United States—including, it was hoped, the ability to challenge their detention in U.S. federal court. As a retired Airforce attorney put it, "The government wants to keep them out of any place in the U.S. where they can claim protections."²⁰ The physical isolation also made it possible to hold the prisoners incommunicado, with little or no access to the press, non-military lawyers, or family members. The Guantanamo base would serve as a prison, interrogation center, and judicial facility rolled into one—run and overseen almost exclusively by the Department of Defense and the White House.

International law was an unsurprising casualty of this exclusive arrangement. In February 2002, over the opposition of Secretary of State Colin Powell, the Administration declared in a memo with the subjectline "Humane Treatment of al Qaeda and Taliban Detainees" that "none of the provisions of Geneva" apply to the conflict with al Qaeda members.²¹ Moreover, although the memo stated that the provisions of Geneva would be applied to the conflict with the Taliban in Afghanistan, the captured Taliban detainees were nonetheless declared "unlawful combatants" who therefore did not qualify as prisoners of war under the Geneva Conventions.²² In a series of memoranda throughout 2002, Administration officials offered and defended a legal rationale permitting the use of torture

review by an independent civilian court (as is available for courts martial), a public hearing, and the right of the defendants to confront the evidence against them. Moreover, the Order permits indefinite detention without charge, even for those who are acquitted.

¹⁸ Steve Vogel, *Afghan Prisoners Going to Gray Area*, WASH. POST (Jan. 9, 2002), A1.

¹⁹ *Id.*

²⁰ *Id.* (quoting former Airforce attorney Michael F. Noone).

²¹ Memorandum from President George W. Bush to the Vice President, et al. (Feb. 7, 2002).

²² *Id.*

against detainees.²³ These memos argued that as long as detainees were held outside the United States—and therefore outside the reach of domestic enforcement—the government could ignore domestic laws and outdated international legal rules and instead write its own rules to fit the challenges of the new war on terror.

PART II: CHALLENGE IN COURT: THE DOMESTIC ENFORCEMENT OF INTERNATIONAL LAW BEGINS

Almost as soon as the U.S. government began holding detainees in Afghanistan, there emerged first a trickle and then a flow of allegations of detainee torture and abuse. As the war expanded into Iraq and detainees were moved to Guantánamo Bay, the allegations followed. Claimed abuses included inhumane interrogation procedures, sexual humiliation, extended solitary confinement,²⁴ and psychological abuse.²⁵ The International Committee of the Red Cross later submitted confidential reports to the U.S. government detailing evidence that the U.S. military's treatment of detainees at Guantanamo involved psychological and physical coercion that was "tantamount to torture," in clear violation of international law.²⁶

Human rights groups both at home and abroad worked to bring these abuses to light and to encourage the American public to press their government to afford detainees basic protections. With the country at war, however, memories of September 11 still fresh, and Republicans in charge of both houses of Congress, these efforts met with little success. The international press, rights organizations, and political leaders from around the world decried American actions at

²³ A series of memos in which the Administration devised arguments permitting torture can be found at <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html>.

²⁴ *C.f.* Tania Branigan & Vikram Dodd, *Fight Against Terror*, GUARDIAN, August 4, 2004, at 5; John Hendren, *The Conflict in Iraq: Army Limits Methods Used on Detainees*, L.A. TIMES, May 15, 2004, at A1; James Meek, *Welcome to Guantánamo: A Special Investigation into the Prison that Shames American Justice*, THE GUARDIAN, Dec. 3, 2003, at 1; Paul Waugh, *My Torture Hell in Camp Delta Cage*, EVENING STANDARD, Aug. 3, 2004, at A4-5 (detailing detainee abuse at Camp Delta in Guantánamo Bay).

²⁵ *Guantánamo: Shameful Regime of Detention Without Trial*, THE INDEPENDENT, Jan. 10, 2005.

²⁶ Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES (Nov. 30, 2004), available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm.

Guantanamo and pressed for the release of those detained.²⁷ This pressure had only minimal effect. Yet more formal enforcement of the Geneva Conventions' requirements was impossible because the United States is a veto-wielding member of the United Nations Security Council and hence possesses the power to stop any enforcement action by the UN in its tracks.

Groups and individuals thus began to challenge the Administration in the courts. Within months of the U.S. invasion of Afghanistan, the Administration's policy on detainees was under attack in U.S. domestic court in tens and eventually hundreds of cases.²⁸ By the spring of 2004, several of the cases had made their way up to the United States Supreme Court.²⁹ Through these cases, the courts began to assert a role in enforcing the requirements of international law against a recalcitrant executive—they began the *domestic enforcement* of international law in the war on terror.

Two of the cases that wound their way to the Supreme Court, *Rasul v. Bush* and *Al Odah v. United States*, presented what the Supreme Court called the “narrow but important question” of whether the United States could hear challenges to the legality of the detention of foreign nationals captured abroad and held at the Naval base on Guantanamo Bay—which was, after all, not U.S. on soil.³⁰

²⁷ See, for example, Alison Healy, *Large crowd expected at anti-war rally in Dublin*, IRISH TIMES (March 29, 2003); José María Irujo, *Unica: Pleas for Spaniard in Guantanamo to be released rejected by US government*, EL PAIS (March 31, 2003); Francois Sergeant, *Kenneth Roth, président de Human Rights Watch, dénonce les abus de Bush : “Les Etats-Unis réécrivent les lois de la guerre,”* LIBERATION (March 22, 2002); Andrew Gumbel, *Campaigners begin legal battle to shut down Camp X-Ray*, INDEPENDENT (July 10, 2002).

²⁸ The first, filed in late 2001 by a group of lawyers, religious leaders, and professors on behalf of the Afghan detainees at Guantánamo, alleged a deprivation of the detainees' due process. The suit, *Coalition of Clergy v. Bush*, was dismissed by the Central District of California and the Ninth Circuit for lack of “next friend” standing. 189 F. Supp. 2d 1036, 1038 (C.D. Cal. 2002), *aff'd in part, vacated in part*, 310 F.3d 1153 (9th Cir. 2002). Marty Lederman's various on-line posts provide a remarkably thorough account of the many legal developments in the detainee cases that followed. See, e.g., Marty Lederman, *Hamdan Summary -- And HUGE News*, Scotus Blog, June 29, 2006, available at http://www.scotusblog.com/movabletype/archives/2006/06/hamdan_summary.html; Marty Lederman, *Top Ten Myths About Hamdan, Geneva, and Interrogations*, Georgetown Law Faculty Blog, July 5, 2006, available at http://gulcfac.typepad.com/georgetown_university_law/2006/07/top_ten_myths_a_1.html; and Marty Lederman, *What's to Become of Common Article 3?*, Aug. 2, 2006, available at <http://balkin.blogspot.com/2006/08/whats-to-become-of-common-article-3.html>.

²⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

³⁰ *Rasul v. Bush*, 542 U.S. 466 (2004), slip op at 1.

The plaintiffs in the cases were numerous foreign nationals who had been captured in Afghanistan after the U.S. invasion and were being held at Guantanamo Bay.³¹ Through their relatives and attorneys, they challenged the legality of their detention, arguing that they had not been combatants against the United States.³² They asserted that they had not been formally charged with any illegal acts, had not been permitted to meet with their legal counsel, and had not received access to a court or tribunal, and they sought access to counsel, freedom from interrogation, and release from custody.

The cases made their way up to the Supreme Court, which consolidated the two cases and granted certiorari to consider whether the federal courts have jurisdiction over foreign nationals detained outside the United States.³³ At stake in these cases, in other words, was whether the Administration efforts to insulate its actions from oversight would succeed. Would domestic courts be able to enforce the law against a recalcitrant Administration or would the Administration's actions against foreign nationals abroad (and on Guantanamo) be immune from domestic enforcement?

A third case involving detainee rights also made its way up through the courts, landing on the Supreme Court's docket during the same term as *Rasul* and *Al Odah*.³⁴ The case was filed on behalf of

³¹ Shafiq Rasul and the other British citizen on the petition were released from custody on March 10, 2004, more than three months before the case was decided, 542 U.S. at 470-71; *Guantánamo: Shameful Regime of Detention without Trial*, *supra* note 22. Since his release from Guantánamo, Shafiq Rasul and his fellow captives have spoken out about the conditions they say they endured on Guantanamo. Shafiq Rasul, Asif Iqbal & Ruhel Ahmed, *Detention in Afghanistan and Guantánamo Bay*, available at <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=4bUT8M23lk&Content=424>; Robert Verkaik, *Guantánamo Releases: Prisoners Freed a Year Ago Struggle to Rebuild Their Lives*, THE INDEPENDENT, Jan. 12, 2005; Sam Wollaston, *G2: Television & Radio: Last Night's TV: Michael Winterbottom Skillfully Highlights the Injustices of Guantánamo Bay—But Is He Telling the Whole Story?*, GUARDIAN, March 10, 2006, at 28.

³² *Al Odah v. United States*, 321 F.3d 1134, 1138 (D.C. Cir. 2003).

³³ *Rasul v. Bush*, 540 U.S. 1003 (2003).

³⁴ The Supreme Court also heard another case, *Padilla v. Rumsfeld*, which involved an American citizen that was captured in Chicago and suspected of involvement in a plot to set off a "dirty bomb" in the United States. President Bush declared Padilla an enemy combatant on June 9, 2002 and ordered him detained. He was subsequently transferred from civilian detention to the Charleston Naval Brig in South Carolina. His attorney filed suit as his "next friend" against Donald Rumsfeld, challenging his detention and designation as an enemy combatant. The district court and Second Circuit Court of Appeals both decided in his favor and ordered him transferred to civilian authorities. The Supreme Court granted certiorari. In a decision issued on the same day as *Hamdi* and *Rasul*, the Supreme

Yasser Esam Hamdi, who had been captured by a coalition of military groups opposed to the Taliban government known as the “Northern Alliance” in November 2001. Alleged to have fought on behalf of the Taliban, Hamdi was turned over to the U.S. military, which detained and interrogated him in Afghanistan before transferring him to Guantanamo Bay in January 2002. In April, upon learning that he was an American citizen, the government again transferred him, this time to a military brig in Norfolk Naval Station in Norfolk, Virginia and eventually to a brig in Charleston, South Carolina.³⁵ Labeled an “enemy combatant” who therefore did not deserve the protections of either the criminal laws or the laws of war, Hamdi was held without being charged, and was not permitted to meet with his family or attorneys.

In May 2002, Hamdi’s attorneys filed a writ of habeas corpus in district court challenging Hamdi’s detention and his label as an “enemy combatant.” Twice the district court declared the evidence against him insufficient to justify his detention as an “enemy combatant” and twice the Fourth Circuit Court of Appeals reversed the decision in his favor, finally ruling that the district court did not have jurisdiction to question the executive’s designation of Hamdi as an enemy combatant and that Hamdi was afforded no protection by the Geneva Conventions.³⁶ The Supreme Court accepted the case to determine whether the executive could unilaterally declare Hamdi an “enemy combatant” and hold him indefinitely without the traditional procedural protections granted criminal defendants. Again, the threshold issue in the case was whether the domestic courts had the power to engage in oversight of the Administration’s actions in the war on terror. Could the Administration unilaterally label an American citizen an enemy combatant and thereby insulate his detention from domestic court oversight?

Even as the cases came before the Supreme Court, the war in Iraq began to take a turn for the worse. The *Rasul* and *Odah* cases were argued before the Court on April 20, 2004, and *Hamdi* was argued just over a week later, on April 28. During oral argument, a Justice asked Deputy Solicitor General Paul Clement what constrained the Administration’s treatment of detainees if not the

Court declined to reach the merits of the case, deciding instead that the case had been filed in the wrong federal court and hence ordered the case dismissed. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

³⁵ Though he was raised in Saudi Arabia, he was born in Louisiana during a brief stay there by his parents. Jan Crawford Greenburg, *Court Takes Terror Case: Justices Face Clash over “Combatants,”* CHI. TRIB., Jan. 10, 2004, at C1.

³⁶ *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003)

federal courts. Clement answered that “where there is a war . . . you have to trust the executive to make the kind of quintessential military judgments that are involved in things like that.”³⁷

That night, CBS news showed photos on “60 minutes II” of horrific abuse at the Abu Ghraib prison in Iraq—some of the starkest images showed naked prisoners stacked in a human pyramid and a prisoner with a hood on his head and wires attached to his fingers.³⁸ Even before the photos were released, polls showed support for the war had begun to erode at a rapid pace. A CBS news-New York Times poll released that day showed that fewer than half of those polled said taking military action in Iraq was the right thing to do, compared with 58 percent a month earlier.³⁹ The evidence of widespread abuse of detainees was a stark counterargument to Clement’s exhortation that the Court should “trust the executive.”⁴⁰

On a single day at the end of its term in June 2004, the Supreme Court issued its decisions in all three cases and with them a stinging rebuke to the Executive Branch. The Court reaffirmed the principle that the courts have the power to say when the president has gone too far, even when doing so involves placing limits on the president’s ability to act in the war on terror.

In the *Rasul* and *Odah* cases, the Court held that the federal courts had jurisdiction over the habeas corpus petitions filed by

³⁷ In full, the exchange (which occurred during oral arguments in *Padilla*) reads:

Question: What’s constraining? That’s the point. Is it just up to the good will of the executive? Is there any judicial check?

Mr. Clement: This is a situation where there is jurisdiction in the habeas courts. So if necessary, they remain open. But I think it’s very important -- I mean, the court in *Ludecke* against *Watkins* made clear that the fact that executive discretion in a war situation can be abused is not a good and sufficient reason for judicial micromanagement and overseeing of that authority. You have to recognize that in situations where there is a war -- where the Government is on a war footing, that you have to trust the executive to make the kind of quintessential military judgments that are involved in things like that.

Transcript of Oral Argument, *Rumsfeld v. Padilla*, Argued April 28, 2004, p. 23.

³⁸ *Photos Show U.S. Troops Apparently Abusing Iraqis*, L.A. TIMES (April 29, 2004), 8.

³⁹ *Poll Find Doubts About Iraq Rising*, ASSOCIATED PRESS (April 29, 2004).

⁴⁰ Several of the soldiers involved in the abuses at Abu Ghraib prison were eventually punished for engaging in violations of the Uniform Code of Military Justice (UCMJ). They were not, however, prosecuted for war crimes violations. This omission left open the possibility that CIA officials might engage in similar abuse with relative impunity, for they (unlike soldiers in the armed forces) are not covered by the UCMJ.

detainees held at Guantanamo Bay.⁴¹ In so holding, the Court rejected the administration's claim that it could unilaterally declare persons captured in the war on terror "enemy combatants" and hold them on Guantanamo indefinitely without any outside scrutiny. Though the cases were remanded back to the lower courts for substantive review, leaving the petitioning detainees' fates in some doubt, the decision was nonetheless hailed by human rights groups as a major victory. The decision represented the first time that the Supreme Court had permitted foreign citizens not located in the United States to sue the U.S. government. Moreover, the Court refused to allow Guantanamo Bay to be treated as a law-free zone, emphasizing that the United States exercised indefinite jurisdiction and control over the territory.

Though no single opinion received a majority vote in *Hamdi*, the message of the Court was clear: Hamdi could not remain imprisoned at the unchecked discretion of the executive branch.⁴² Five of the Justices agreed that Congress had given the President the power to detain U.S. citizens as "enemy combatants" when it passed the Authorization for the Use of Military Force on September 2001. And yet the plurality (joined in this part by two additional Justices, thus forming a majority) held that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." The Court thus held that once detained, Hamdi had to be granted certain due process protections, including the right to challenge his status and detention, the right to access to counsel, and the right to have an impartial decision maker hear the proceedings on remand.⁴³ Despite the divided decision, commentators concluded that the Supreme Court had acted to sharply limit the powers claimed by the Bush administration since the Sept. 11 terrorist attacks.⁴⁴ And, indeed, several months later, Hamdi was released to Saudi Arabia after agreeing to relinquish his U.S. citizenship.⁴⁵

⁴¹ *Rasul*, 542 U.S. 466 (2004), slip op at 15-16.

⁴² All of the Justices, except Justice Thomas, agreed on this point.

⁴³ Notably, only four of the six justices who agreed that due process protections were warranted also agreed that Congress had in fact granted the President the power to detain Hamdi.

⁴⁴ See, e.g., Naftali Bendavid, *Justices Rule that Detainees Get Day in Court: Guantánamo Bay Inmates Granted Similar Rights*, CHI. TRIB., June 29, 2004, at C1.

⁴⁵ *CNN Daybreak: Voting Problems* (broadcast 5:00 AM EST, Oct. 14, 2004); *NewsHour with Jim Lehrer: Hamdi to Be Released* (broadcast Sept. 23, 2004).

Together, these decisions stood as a bold declaration by the Supreme Court that it would oversee the Administration's actions in the war on terror and that the protections of domestic and international law could and would be enforced by U.S. domestic courts. The decisions led to a flood of similar actions. Soon more than three hundred habeas petitions were filed in federal court on behalf of detainees on Guantanamo.⁴⁶

Meanwhile, the consequences of the law-free zones continued to pour forth. Further evidence of abuses at Abu Ghraib emerged as the soldiers that participated in the abuse were tried.⁴⁷ It soon became clear, moreover, that Abu Ghraib was "only the tip of the iceberg."⁴⁸ As Reed Brody, special counsel for Human Rights Watch put it, "abuse of detainees has happened all over—from Afghanistan to Guantanamo Bay to a lot of third-country dungeons where the United States has sent prisoners."⁴⁹ The International Committee of the Red Cross submitted a confidential report to the U.S. government concluding that in military sections of Abu Ghraib, "methods of physical and psychological coercion used by the interrogators appeared to be part of the standard operating procedures by military intelligence personnel to obtain confessions and extract information"—tactics that it found amounted to serious violations of international humanitarian law as provided in the Geneva Conventions.⁵⁰ Months later, it submitted a similar report on abuses at Guantanamo.

Amid the ongoing evidence of widespread abuses at American detention facilities in Iraq and allegations of abuse at Guantanamo, Congress, which to this point had remained largely

⁴⁶ After the decisions were rendered, Center for Constitutional Rights deputy legal director Barbara Olshansky—who filed the case in 2002 at the behest of Rasul's family—received 51 voicemail messages within one day from attorneys offering to help with Guantánamo Bay litigation. She soon had roughly 500 (mostly volunteer) attorneys working on similar cases, representing more than 300 of Guantánamo's detainees in the federal courts. Hegland, *supra* note 50; Herbert, *supra* note 47, at A21.

⁴⁷ One of the more notorious cases involved private Lynndie England, who, after pictures of her watching and participating in prisoner abuse came to light, was charged with ten violations of the Uniform Code of Military Justice in February 2004 and pled guilty to seven of these on April 30, 2005. Kate Zernike, *Plea Deal Is Set For G.I. Pictured In Abuses in Iraq*, N.Y. TIMES, April 30, 2005.

⁴⁸ HUMAN RIGHTS WATCH, US: ABU GHRAIB ONLY THE "TIP OF THE ICEBERG" (Apr. 27, 2005).

⁴⁹ *Id.*

⁵⁰ Alexander G. Higgins, *Red Cross Report Describes Abuse in Iraq*, ASSOCIATED PRESS (May 10, 2004). The full report is available at http://www.truthout.org/mm_01/4.rcr.iraq.pdf.

silent on the issue of detainee treatment, began to intervene. Republican Senator John McCain—himself a former prisoner of war who was held in a Vietnam prison camp for five years—presented an amendment to the United States Senate Department of Defense Authorization bill. The “McCain Amendment” promised to prohibit inhumane treatment of prisoners held by the United States, regardless of where they are located, and confined interrogation techniques to those specified in the Army Field Manual.⁵¹ Introduced to the Senate on October 3, 2005, it quickly won widespread support, passing two days later with 90 votes in favor and only 9 against.

The Administration responded to the bill by pressuring its sponsors to exempt the CIA from the ban on the use of cruel, inhuman, and degrading treatment. In a private forty-five minute meeting on October 20, Vice President Cheney and C.I.A. Director, Porter J. Goss pressured Senator McCain to support the exemption, arguing that the president needed “flexibility” in waging the global war on terrorism.⁵² On November 2, news broke that made clear why the administration had been so intent on securing the exemption.⁵³ Reporter Dana Priest reported in the Washington Post that the CIA had been operating a network of secret prisons since shortly after September 11 in eight countries, including Thailand, Afghanistan, and several fledgling democracies in Eastern Europe, as well as at a small center at the Guantanamo Bay prison. More than one hundred suspected terrorists had been funneled through the detention facilities, referred to in internal classified memos as “black sites.” CIA interrogators in the sites were authorized by the Agency to use “Enhanced Interrogation Techniques,” some of which—including “waterboarding” prisoners to create the sensation of

⁵¹ The provision requiring that no person in the custody or control of the Department of Defense be subject to “any treatment or technique of interrogation not authorized and listed in the United States Army Field Manual on Intelligence Interrogation” for a time seemed likely to become a hollow victory. For more than a year, the Department of Defense debated various options—including adding a classified annex to the Field Manual detailing permitted interrogation techniques and putting forth two sets of interrogation guidelines, one for those designated as prisoners of war and one for those designated as enemy combatants—that would have effectively evaded many of the intended limits. Under the weight of public and congressional scrutiny, however, the plan was abandoned and the Field Manual that was approved included neither.

⁵² Eric Schmitt, *Exception Sought in Detainee Abuse Ban*, N.Y. TIMES, Oct. 25, 2005).

⁵³ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, A1.

drowning—are widely regarded as inconsistent with international law.⁵⁴

Soon after this news broke—on November 7—the Supreme Court announced that it had agreed to hear the certiorari petition of Salim Ahmed Hamdan, a suspected former member of al Qaeda held at Guantanamo Bay. Three days later, the Senate agreed in a largely party-line vote of 49 to 42 to a plan sponsored by Republican Senator Lindsey Graham to amend the McCain proposal by limiting suspected foreign terrorists' access to U.S. courts.⁵⁵ In a move widely regarded as an effort to overturn the Supreme Court's earlier decision in *Rasul* by “stripping” significant jurisdiction over habeas corpus petitions from the federal courts, the Graham amendment restricted review of military tribunal decisions to the U.S. Court of Appeals for the District of Columbia while at the same time significantly limiting the scope of review that court could provide. Moreover, the amendment also permitted the use of statements “obtained as a result of coercion” if their probative value was deemed sufficient while at the same time protecting United States government personnel from civil action or criminal prosecution for acts committed against detainees if they “did not know that the practices were unlawful.”⁵⁶ Not long thereafter, a version of the bill passed the House by an overwhelming vote of 308 to 122—in what was regarded by the press at the time as an “unusual bipartisan rebuke to the Bush Administration.”⁵⁷ The human rights community, however, regarded it as a Trojan horse—one that would appear on the surface to rebuke the President while effectively sanctioning torture and removing future administration actions from court oversight. The measure was signed into law by President Bush as the “Detainee Treatment Act” just before the close of 2005.

The sparing did not end there. In a controversial signing statement that accompanied the Act, the President declared that the Executive Branch would construe the Act “in a manner consistent

⁵⁴ *Id.*

⁵⁵ Dan Eggen, *Senate Approves Plan to Limit Detainee Access to Courts*, WASH. POST, Nov. 11, 2005, A7.

⁵⁶ Detainee Treatment Act of 2005 § 1004(a). The Act goes on to explain that, “Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful.” *Id.* This was generally understood to refer back to the memos from the Office of Legal Counsel and Department of Defense declaring most extraordinary interrogation techniques legal.

⁵⁷ Eric Schmitt, *House Defies Bush and Backs McCain on Detainee Torture*, N.Y. TIMES, Dec. 15, 2005.

with the constitutional authority of the President to supervise the unitary Executive Branch and as Commander in Chief.”⁵⁸ Three key Republican senators, including John McCain, fired back with a joint statement rejecting Bush’s claim that he could unilaterally waive the restrictions on cruel, inhuman, and degrading treatment against detainees. “The Congress declined when asked by administration officials to include a presidential waiver of the restrictions including in our legislation,” they declared. “Our committee intends through strict oversight to monitor the administration’s implementation of the new law.”⁵⁹ As of a year later, however, no public hearings or Senate debate had been held on the subject of detainee treatment despite continuing reports of abuse.

Thus what began as an effort to assert limits on the president’s treatment of detainees in the war on terror looked poised to end as a Congressional stamp of approval on the President’s plan to “hold people indefinitely without a hearing and beyond the reach of U.S. law and checks and balances.”⁶⁰ The first test of this Act—and whether the Administration’s efforts to avoid domestic enforcement of international law by keeping the federal courts from overseeing its conduct in the war on terror—would soon come in the very case it was intended to force out of the courts: *Hamdan v. Rumsfeld*.

PART III: HAMDAN V. RUMSFELD

In many ways, it was mere happenstance that led Salim Ahmed Hamdan to the center of one of the most important international law cases of the last decade. For the first quarter-

⁵⁸ George W. Bush, President’s Statement on Signing of H.R. 2863 (Dec. 30, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>. The statement continued:

Further, . . . [the Act] shall apply to past, present, and future actions, including applications for writs of habeas corpus . . . [and] does not confer any constitutional right upon an alien detained abroad as an enemy combatant, the executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus

Id.

⁵⁹ Charlie Savage, *3 GOP Senators Blast Bush Bid to Bypass Torture Ban*, BOSTON GLOBE, Jan. 5, 2006. *See, e.g., Recent Developments*, 19 HARV. HUM. RTS. J. 257, 263 (2006)

⁶⁰ Eggen, *supra* note ?, at A7 (quoting a statement by the Center for Constitutional Rights).

century of his life, Hamdan led a largely uneventful existence. Born in a rural tribal village in South Yemen, he earned the rough-equivalent of a fourth-grade education before his parents both died of illness and he left school. He went to live with relatives in a small port city and was soon living on his own, working a variety of odd jobs.⁶¹ There was no sign that Hamdan was particularly religious. Indeed, he seemed to have no plans beyond marrying and finding a decent job. He was twenty-six years old and working as a taxi driver in the Yemeni city of Sana in 1996 when a Saudi jihadist named Nasser al-Bahri recruited him to join a group of men leaving for jihad in Tajikistan, offering to pay for his travel as well as a salary.⁶²

Hamdan joined al-Bahri and thirty-five other Yemenis on a grueling six-month trip to Tajikistan to fight alongside the Islamist insurgency against the Russia-backed government. When they were turned back at the border, one of the group's members suggested that they go see a man named Osama Bin Laden. Recently expelled from the Sudan, Bin Laden had relocated to Afghanistan, where he had begun working with the support of the Taliban-led government of the country to rebuild Al Qaeda. He was seeking recruits to join his efforts to drive the United States from the region. After listening to Bin Laden's teachings for three days, Al-Bahri and many of his companions agreed to join Al Qaeda. Al-Bahri soon helped arrange for Hamdan to work as a driver on a farm owned by Bin Laden for a salary of \$200 per month. About seven months later, Hamdan began working as one of Bin Laden's personal drivers.⁶³

Over the course of five years, Hamdan is alleged to have performed many different jobs for Bin Laden—most often serving as his personal bodyguard and driver.⁶⁴ It is unknown how much responsibility Hamdan was given or how much he was involved in

⁶¹ Mahler, Jonathan, *The Bush Administration vs. Salim Hamdan*, N.Y. TIMES MAG., Jan. 8, 2006, at 44.

⁶² Mahler, *supra* note 61. Al Bahri had been engaged in jihad for many years, first in Bosnia and later in Somalia. He later became Hamdan's brother-in-law when the two traveled to Yemen, at Bin Laden's urging and with his financial help, to marry two women who were sisters. He was captured and held in Yemen after the bombing of the U.S.S. Cole. Later released, he is currently living free in Yemen. *Id.*

⁶³ Mahler, *supra* note 61. Carol Rosenberg, *Detainee Stunned By Court Victory*, SEATTLE TIMES, June 30, 2006. Hamdan v. Rumsfeld Petition for Certiorari, App. H (Affidavit of Salim Hamdan).

⁶⁴ Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES, June 30, 2006, at A1.

the planning of Al Qaida's terrorist activities.⁶⁵ Although he undoubtedly had access to information regarding the group's activities and plans, his lawyers contend that he served primarily as a simple employee.⁶⁶

In 1999, Hamdan married a Yemeni woman and brought her to Afghanistan. When the U.S. invaded Afghanistan in October 2001, she fled with their child across the Pakistani border, eventually making her way back to Yemen. Hamdan was attempting to join her when he was captured by warlords near the Pakistani border and turned over to the U.S. military for a \$5,000 reward.⁶⁷ After spending six months in prison in Bagram and Kandahar, he was transported along with nearly five hundred other detainees to Guantánamo Bay, where he has been held as an enemy combatant ever since.

On July 3, 2003, the President determined that Hamdan and five of his fellow detainees at Guantanamo were eligible for trial by military commission as established by the November 13 Order.⁶⁸ Hamdan was appointed military counsel in December 2003—forty-four year-old Lieutenant Commander Charles Swift of U.S. Navy.⁶⁹ Swift later recounted arriving at his assignment on the first day as Defense Counsel for the military commissions to find that “[n]o one involved in the Commission process appeared eager to begin the process.”⁷⁰ The Chief Prosecutor made clear that Hamdan's access to legal counsel was contingent on his guilty plea⁷¹ (a charge that the Prosecutor denies, but that has been confirmed by several other military lawyers). “I had the unenviable task of going down to this guy from Yemen in the uniform of people who had been treating him badly and saying, ‘If you don't make a deal you may never see me

⁶⁵ Hamdan denies involvement in al-Qaida's terrorist activities. *See, e.g., Lawyer says prisoner 'humble, not jubilant,'* CHI. TRIBUNE, June 30, 2006, at C22 (“Hamdan contends he worked as a driver for bin Laden in Afghanistan only to make a living for his family”).

⁶⁶ Mahler, *supra* note 4.

⁶⁷ *Id.*

⁶⁸ Press Release, Department of Defense, President Determines Enemy Combatants Are Subject to His Military Order (July 3, 2003), <http://www.defenselink.mil/releases/2003/nr20030703.html>. (“[T]here is reason to believe that [Hamdan] was a member of al Qaida or was otherwise involved in terrorism directed against the United States.”)

⁶⁹ Greg Stohr, *Navy Lawyer Charles Swift Battles Bush in Guantanamo Bay Case*, BLOOMBERG, March 28, 2006, at <http://www.bloomberg.com/apps/news?pid=10000103&sid=a4x6M3Dyr6jM&refer=us>.

⁷⁰ *Detainees: Hearing Before the Senate Judiciary Committee*, 109th Cong. (2005) (statement of Charles Swift, Office of Chief Justice Counsel).

⁷¹ *Id.*

again,” Swift recalls.⁷² After he met Hamdan on January 30, 2004, it was clear to him that Hamdan wanted to fight the charges against him.

At this point, Swift had been working for months with Neal Katyal, a professor at Georgetown University Law Center who had recently clerked for Supreme Court Justice Stephen Breyer and was widely regarded as one of the leading constitutional law experts in the country. A known hawk on national security issues and terrorism who served for a time as national security advisor to the Deputy Attorney General,⁷³ Katyal surprised some when he volunteered to work with defense lawyers to challenge the military commissions. But he was appalled by what he saw as a “blatantly unconstitutional” plan for trying the suspected terrorists.⁷⁴ Hamdan’s case, he and Swift decided, was the test case they had been waiting for.

Katyal drafted an agreement allowing Swift to serve as Hamdan’s “next friend” in a lawsuit against his employer. It was a bold move for Swift, who had made his career in the military.⁷⁵ Swift later explained that he decided to mount a challenge to the administration’s policies because he was “fearful of the dangerous precedent that could be set by denying international standards of justice to those swept up in the war on terrorism.”⁷⁶ With the help of lawyers they enlisted from the Seattle-based law firm Perkins Coie and law students from Yale and Georgetown, Swift and Katyal then filed a demand for charges and a speedy trial pursuant to Article 10 of the Uniform Code of Military Justice (UCMJ). After the legal advisor to the Appointing Authority ruled that the Uniform Code of Military Justice did not apply to Hamdan, they filed a habeas petition

⁷² *Lawyer Says Prisoner ‘Humble’ Not ‘Jubilant,’* CHI. TRIBUNE, June 30, 2006, at C22.

⁷³ Neal Katyal, Biography, at http://www.law.georgetown.edu/curriculum/tab_faculty.cfm?Status=Faculty&Detail=272; Amon, Elizabeth, *Defending Detainees*, AMERICAN LAWYER, Sept. 1, 2004.

⁷⁴ Dan Froomkin, *A Challenge to Presidential Power*, YALE ALUMNI MAGAZINE (Sept./Oct. 2006)

⁷⁵ Indeed, Swift was later forced to retire under the military’s up-or-out system when he was passed over for a promotion—a decision he learned of just two weeks after winning the *Hamdan* case in the Supreme Court and which many viewed as retaliation for his decision to challenge the government’s detainee policies. *The Cost of Doing Your Duty*, THE NEW YORK TIMES (October 11, 2006)

⁷⁶ Carol Williams. *Lonely Victory for U.S. Navy Lawyer*, L.A. TIMES, June 30, 2006, at A23.

on Hamdan's behalf in the Western District of Washington in April 2004.⁷⁷ The case, *Hamdan v. Rumsfeld*, was born.⁷⁸

Though the President determined that Hamdan was eligible for trial by military commission in July 2003, it was not until just over a year later—and only after Hamdan's lawyers had filed the habeas petition in the United States District Court—that he was formally charged.⁷⁹ Hamdan was accused of conspiracy to commit the offenses of “attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.”⁸⁰ Concurrently, in response to the Court's decision in *Hamdi v. Rumsfeld*,⁸¹ a Combatant Status Review Tribunal reviewed Hamdan's detention and on July 7, 2004, declared that Hamdan had been correctly classified as an enemy combatant and was subject to detention. At the same time, “proceedings before the military commission commenced.”⁸²

Asked later why Hamdan's case was the one that made it to the center of debate, Katyal said it was a matter both of substance, timing, and the strength of the case. Most important, they were looking for a case involving a link to al Qaeda or some other stateless actor rather than a more conventional conflict (such as the war with Afghanistan)—a condition met by Hamdan, who was held because of his alleged connection to al Qaeda. Hamdan was also among the first detainees declared triable by the military commission. At the same time, the case against him seemed extraordinarily thin. He and Swift chose this case from among the others, “because this was a guy they couldn't allege had done anything personally wrong. He drove a bad guy, but that didn't make him much of a criminal.”⁸³ It was far from clear, however, that the

⁷⁷ 542 U.S. 466 (2004). Pursuant to the Ninth Circuit's ruling in *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004), the case was moved to the D.C. District Court and docketed on September 2, 2004. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 156 (D.D.C. 2004).

⁷⁸ “Hamdan's counsel, Charles Swift, initially filed the petition in this case in his own name as Hamdan's next friend. The government challenged Swift's standing to do so. At a conference on September 14, 2004, the petition was amended, by consent and *nunc pro tunc*, to be in Hamdan's name only.” 344 F. Supp. 2d at 156, n. 3.

⁷⁹ *Hamdan v. Rumsfeld*, 549 U.S. ___, [slip op at 4] (2006).

⁸⁰ Department of Defense, Military Commission List of Charges for Salim Ahmed Hamdan, <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>

⁸¹ 542 U.S. 507 (2004).

⁸² 548 U.S. at ____.

⁸³ Author interview with Neal Katyal, October 30, 2006.

courts would agree—or that Hamdan could even reach a court that would hear his claims.

A. District Court

Hamdan's lawyers filed his petition for habeas corpus in U.S. District Court, where they made six central claims: First, Hamdan was denied his right to a speedy trial under the Uniform Code of Military Justice (UCMJ) when being held for years without charge. Second, the nature and length of his detention violated the Third Geneva Convention and common article 3 of the Geneva Conventions. Third, the establishment of the Military Commission by the Executive violated the separation of powers. Fourth, the Military Commission had exceeded its authority to try violations of the law of war because the crime of conspiracy is not a war crime. Fifth, the establishment of the Military Commission violated the Equal Protection Clause of the Fifth Amendment and 42 U.S.C. § 1981. Sixth and finally, the President's November 12 Order did not, on its face, apply to Hamdan.

On November 8, 2004, Judge James Robertson granted Hamdan's petition in part.⁸⁴ He ruled that the President had the power to create military commissions only under the laws of war as authorized by Congress⁸⁵ and that, furthermore, the government had not properly determined whether Hamdan was a prisoner of war under the Third Geneva Convention, which guarantees that prisoners of war are "sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power."⁸⁶ Judge Robertson found that "[t]he Military Commission is not such a court. Its procedures are not such procedures."⁸⁷ Under Article 5 of the Third Geneva Convention, until such a determination was made, Hamdan was therefore entitled to all of the protections of POW status, including trial by court-martial.⁸⁸

⁸⁴ *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152 (2004).

⁸⁵ Uniform Code of Military Justice, 10 U.S.C. § 821 (2000) states "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provosts courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

⁸⁶ Geneva Convention III, art. 102.

⁸⁷ 344 F. Supp at 160.

⁸⁸ Geneva Convention III, art. 5.

Moreover, Robertson found that even if Hamdan were not a prisoner of war, the military commission still had to comply with the UCMJ, which states:

procedures...in courts-martial, military commissions and other courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be *contrary to or inconsistent with* this chapter.⁸⁹

Hamdan's exclusion from his own trial, Robertson found, is "directly contrary to the UCMJ's right to be present"⁹⁰ and furthermore conflicts with the American conception of fundamental fairness. The military commissions thus did not comply with the procedures set forth by Congress and therefore, the President's authority was "at its lowest ebb."⁹¹

Furthermore, the court ruled not only that the Geneva Conventions applied to the conflict with al-Qaida, against the government's arguments to the contrary,⁹² but also that most of the provisions were self-executing—that is, created binding law—and were therefore judicially enforceable. Specifically, Robertson found that the prohibition against "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees as indispensable by civilized peoples"⁹³ provided a modicum of protection for Hamdan even if it were determined that he was not eligible for prisoner-of-war status.

It was a striking victory that called into question the entire apparatus the Administration had built to hold and try suspected terrorists on Guantanamo outside the reach of U.S. courts and international law. The Bush Administration, calling the Robertson

⁸⁹ Uniform Code of Military Justice, 10 U.S.C. § 836 (a) (2000) (emphasis added).

⁹⁰ 344 F. Supp 2d at 172.

⁹¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

⁹² The government argued that Common Article 3 should be applied only to domestic conflicts or conflicts "not of an international character." It argued that the conflict with al-Qaida was clearly international in scope and therefore Common Article 3 did not apply. The court found that the government had misinterpreted Common Article 3's protections, that it was meant to provide a "minimum yardstick" of protection for conflicts not otherwise covered by the Conventions, and that Common Article 3 applied to the conflict with al-Qaida.

⁹³ Geneva Convention III, art. 3(i)(b).

ruling an “unprecedented intrusion” into presidential powers, responded by seeking full review in the D.C. Circuit Court within ten days.⁹⁴

B. Circuit Court

On July 15, 2005, the Court of Appeals for the District of Columbia reversed the decision of the district court.⁹⁵ Judges Randolph, joined by then-Judge Roberts (who would soon be promoted to the U.S. Supreme Court), wrote the opinion of the court; Judge Williams agreed in judgment and filed a concurring opinion. The court agreed with the district court that it could—and should—exercise jurisdiction over Hamdan’s habeas corpus petition, dismissing Administration arguments that civilian courts should not interrupt the processes of military commissions. Yet the circuit court judges disagreed with the lower court on the merits of Hamdan’s claims. It found that Congress had authorized the military commissions as constituted by President Bush in the Authorization for the Use of Military Force (AUMF)⁹⁶ and in the Uniform Code of Military Justice.⁹⁷ The court further held that the military commissions were not “contrary to or inconsistent with” the UCMJ, arguing

the UCMJ takes care to distinguish between ‘courts-martial’ and ‘military commissions’. . . . The terms are not used interchangeably, and the majority of the UCMJ’s procedural requirements refer only to courts-martial. The district court’s approach would obliterate this distinction. A far more sensible reading is that in establishing military commissions, the President may not adopt procedures that are ‘contrary to or inconsistent with’ the UCMJ’s provisions governing military commissions.⁹⁸

⁹⁴ Tony Mauro, *Inadmissible: Fast Track*, LEGAL TIMES, Nov. 29, 2004.

⁹⁵ Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

⁹⁶ Authorization for Use of Military Force, Pub. L. No. 107-40 (2001).

⁹⁷ Pursuant to 10 U.S.C. § 821, and 10 U.S.C. § 836(a).

⁹⁸ 415 F.3d at 41-42.

Moreover, the court interpreted an earlier case⁹⁹ to render the Geneva Conventions non-self-executing and hence judicially unenforceable and declared that Conventions did not apply because the conflict with al-Qaida was not a conflict “not of an international character.” The Court ruled, however, that even if the Conventions did apply, Hamdan could get no relief, because comity required that the judicial branch to “defer to ongoing military proceedings.”¹⁰⁰ All the other claims were dismissed without discussion.

C. Supreme Court

On August 8, 2005, Hamdan’s lawyers filed a writ of certiorari in the U.S. Supreme Court. The Supreme Court granted certiorari on November 7, 2005 to determine, first, whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the “war on terror” was duly authorized under the AUMF, the UCMJ, or the inherent powers of the President; and second, whether Hamdan and others held at Guantanamo could challenge the legality of their detention by the Executive branch through a writ of habeas corpus in the federal courts.¹⁰¹

⁹⁹ *Johnson v. Eisentrager* concerned German nationals convicted by military commission in China. 339 U.S. 763 (1950). The court in *Eisentrager* ruled that the 1929 Geneva Conventions were non-self-executing. The court in *Hamdan* argued by analogy that the 1949 Geneva Conventions were likewise judicially unenforceable.

¹⁰⁰ 415 F.3d at 42.

¹⁰¹ 540 U.S. 1099 (2005). On December 30, 2005, President Bush signed into public law the Detainee Treatment Act, which states in its relevant part that “the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant” and “shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1.” Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739. Although the DTA was ambiguous in its application to existing cases, the Department of Justice immediately voiced its intent to seek dismissal of more than 180 habeas petitions of Guantánamo detainees, including Hamdan’s petition, pursuant to the DTA. *Government seeks to end detainee cases*, SCOTUSBLOG.COM, January 4, 2006, http://www.scotusblog.com/movabletype/archives/2006/01/government_open.htm. On January 12, 2006, the government moved to dismiss the case for lack of jurisdiction arguing that the DTA “immediately removes the jurisdiction of the district court and ultimately the jurisdiction of this Court over this action.” Motion to Dismiss, 2006 WL 77694 at *2 (Jan. 12, 2006). The Supreme Court postponed the motion pending argument on the merits. 540 U.S. 1099 (2006).

The threshold question in the case was whether the Court could even hear the case. Seeking to take advantage of the jurisdiction-stripping provisions added to the Act only days after the Court accepted the *Hamdan* case, the government argued first in a motion to dismiss the writ of certiorari and then in its merits brief that the case ought to be dismissed. The government founded its argument on the Detainee Treatment Act (formerly the McCain Amendment), which had been signed into law two short weeks after the Supreme Court's decision to grant certiorari in *Hamdan*. The Act, the government argued, had the effect of repealing federal jurisdiction over detainee habeas actions—including those, like *Hamdan*, that were presently pending before the courts.¹⁰²

By a vote of five justices to three, the Court ruled in *Hamdan*'s favor.¹⁰³ The decision, announced on June 29, 2006, included a dizzying array of concurrences and dissenting opinions that stretched across 185 pages. Justice Stevens, writing for the majority of the Court, began by rejecting the government's claim that the Detainee Treatment Act required the Court to dismiss the case, concluding that the Act's jurisdiction stripping provisions did not apply to cases that were, like *Hamdan*'s, pending on the date of enactment.¹⁰⁴ The Court likewise rejected the government's argument that principles of comity should lead it to abstain from the case. Emphasizing the public importance of the questions raised and the duty that rests on the courts "to preserve unimpaired the constitutional safeguards of civil liberty," it concluded that "the public interest requires that we consider and decide those questions without any avoidable delay."¹⁰⁵ The Court thus once again decisively rejected the Administration's—and Congress's—efforts to exclude it from overseeing the Executive Branch's conduct toward

¹⁰² It was likely not coincidental that the President's signing statement specifically stated that he understood the Act's jurisdiction stripping provisions to apply to pending cases, as well as those not yet filed.

¹⁰³ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006). Justice Stevens delivered the judgment and opinion of the court, in which Justices Ginsburg, Souter, Breyer joined, and Kennedy joined in part. Justices Kennedy and Breyer both filed separate concurring opinions. Justices Scalia, Thomas and Alito all filed and joined each other's dissenting opinions. Chief Justice Roberts took no part in the consideration or decision of the case because of his role in deciding the case at the circuit court level. For details on Roberts' involvement in the case, see Jim VandeHei, *Judge Heard Terrorism Case As He Interviewed for Seat*, WASH. POST, Aug. 17, 2005, at A4.

¹⁰⁴ 126 S. Ct. at 2762-69.

¹⁰⁵ *Id.* at 2771-72. Quoting *Ex Parte Quirin*, 317 U.S. 1, 19 (1942).

detainees held in the war on terror.¹⁰⁶ The Court would oversee the Administration's conduct and subject its actions to scrutiny in light of domestic and international legal limits.

On the merits of the case, the Court concluded that Congress had explicitly authorized the use of military commissions created by the Executive in Article 21 of the UCMJ, *provided that* they comply with the laws of war.¹⁰⁷ In this case, however, the commission was operating in violation of that limited mandate. First, a plurality of the Court held that the commission exceeded its powers in Hamdan's case by trying him for a crime that falls outside the laws of war. "Conspiracy," the only charge levied against him, is not a violation of the laws of war, the plurality held, because it is neither proscribed by statute nor by domestic or international sources of the common law of war.¹⁰⁸

Second, the Court held that the procedures that the Government had decreed for the commissions were woefully inadequate. They are inconsistent "not only with the American common law of war, but also with the rest of the UCMJ, insofar as applicable, and with the 'rules and precepts of the law of nations.'"¹⁰⁹ The UCMJ imposes a variety of procedural protections, including a requirement that the rules applied to military commissions must be the same as those applied to courts-martial "insofar as practical."¹¹⁰ And yet the procedures outlined for the Commissions deviate from the procedures for courts martial in ways that are not adequately justified. For example, the Commissions would "permit the admission of any evidence that, in the opinion of

¹⁰⁶ This is true at least with regard to those that filed their cases before the Act became law, thus rejecting efforts to deprive the courts of jurisdiction over active cases.

¹⁰⁷ Id. at 2774. The Court also held that nothing in either the AUMF or the DTA expanded this authorization. Id. at 2774-75.

¹⁰⁸ Id. at 2775-86. Justices Stevens, Souter, Ginsburg, and Breyer formed the plurality on this point. Justice Kennedy joined these four justices to form a majority on the rest of the case but he did not join Parts V and VI-D-iv, concluding that there was no need to decide whether Common Article 3 of the Conventions requires that the accused have the right to be present at all stages of a criminal trial or to address the validity of the conspiracy charge against Hamdan.

¹⁰⁹ 126 S.Ct. at 2786. Two restrictions are placed on the President's power to promulgate rules of procedure – no rule can be "contrary to or inconsistent with" the UCMJ and the rules must be "uniform insofar as practicable." In other words, courts-martial and military commissions are subject to the same procedures unless impracticable. The Court held that the government had shown no reason why such uniformity was impracticable in this case.

¹¹⁰ Article 36 of the UCMJ requires that the procedures for military commissions and courts martial be "uniform insofar as practicable."

the presiding officer, ‘would have probative value to a reasonable person.’”¹¹¹ Under this test, the Court explained, testimonial hearsay and evidence obtained through coercion would be fully admissible. A vote of two-thirds of the Commission members is sufficient to for a guilty verdict, and appeals are taken to a three-member review panel composed of military officers and designated by the Secretary of Defense (hence the review is in the sole purview of the executive branch). And a conviction can be based on evidence that the defendant has not seen or heard, and a defendant can be excluded from his own trial for reasons other than his own behavior.¹¹²

Finally, the Court directly addressed international law, specifically the applicability of the Geneva Conventions. It found that the Conventions applied to the case whether or not they are independently judicially enforceable because Congress had chosen to incorporate the international laws of war into the Uniform Code.¹¹³ The Court also rejected the government’s argument that the Conventions do not apply to the conflict with al Qaeda, concluding instead that “[t]he term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations”¹¹⁴ and was intended to provide “some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory “Power” who are involved in a conflict ‘in the territory of’ a signatory.”¹¹⁵

On the merits, the Court held that the military commissions failed to provide the protections required by the Conventions. The Conventions, the Court explained, require that Hamdan be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”¹¹⁶—a requirement that was not satisfied by the military tribunals. At a minimum, a military commission “can be “regularly constituted” by

¹¹¹ 126 S. Ct. at 2786.

¹¹² Justice Kennedy declined to decide whether “information used to convict a person of a crime must be disclosed to him” or whether “the accused has the right to be present at all stages of a criminal trial.” Hence the decision is a plurality on this last point. *Id.* at 2809.

¹¹³ Some of the language in Justice Stevens’ opinion can be read to suggest that the Conventions are independently enforceable. Justice Kennedy specifically reserved on this issue: “There 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.” 126 S. Ct. at 2809.

¹¹⁴ 126 S. Ct. at 2795.

¹¹⁵ 126 S. Ct. at 2796.

¹¹⁶ 126 S. Ct. at 2796 (citing Geneva Convention III, art. 3(i)(d).)

the standards of our military justice system only if some practical need explains deviations from court-martial practice”—a need that had not been demonstrated.¹¹⁷ The Court thus concluded: “Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.”¹¹⁸

And so the Court once again beat back efforts by the Administration to shield its actions from outside scrutiny. Once again the Court refused executive branch claims of unilateral authority to act in the war on terror without significant oversight of its actions by the courts. And once again the Court found that when it pulled back the curtain, the actions that were revealed fell far short of the standards established by both domestic and international law. In revealing these weaknesses in the system, however, the Court also revealed its core strength. For all the abuses and violations of the law, as terrible as they were and are, the case itself—and the decision of the Court in favor of a suspected enemy of the state and against the country’s own representatives—signaled the country’s deep and abiding commitment to the very principles that had been broken.

PART IV: THE AFTERMATH

Universally viewed as a sharp rebuke to the Bush Administration,¹¹⁹ the Court’s decision was met with jubilation in the human rights community. *Time* called the opinion “185 pages [that] can be summarized in two words: Start over.”¹²⁰ The *New York Times* reported that “the decision was such a sweeping and categorical defeat for the administration that it left human rights lawyers who has pressed this and other cases on behalf of Guantanamo detainees almost speechless with surprise and delight.”¹²¹ The *Chicago Tribune*, likewise, called it an elimination of “a central pillar of the president’s anti-terrorism strategy” and

¹¹⁷ *Id.* at 2797 (quoting Kennedy, J., concurring in part).

¹¹⁸ 126 S. Ct. at 2798.

¹¹⁹ See, e.g., David Sanger, *Court’s Ruling Is Likely To Force Negotiations Over Presidential Power*, N.Y. TIMES, June 30, 2006, at A21.

¹²⁰ Nathan Thornburgh, *Gitmo. How to Fix It*, TIME Magazine, July 10, 2006, at 22.

¹²¹ Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES, June 30, 2006, at A1.

“signaled a limit to judicial deference to the executive branch on a key question of war powers.”¹²² The *Washington Post* proclaimed that the decision was “clearly a setback for the White House.”¹²³ In a subsequent analysis piece, the Post gave even more gravitas to the decision, finding that it struck down not only a specific presidential policy but also the “governing philosophy of a leader who at repeated turns has operated on the principle that it is better to act than to ask permission.”¹²⁴ Walter Dellinger declared, “Hamdan is simply the most important decision on presidential power and the rule of law ever.”¹²⁵ Even presidential power enthusiast John Yoo recognized the importance of the court’s assertion of power, saying the decision “could affect every aspect of the war on terror. It could affect detention conditions, interrogation methods, the use of force . . . the court is saying ‘we are going to be a player now.’”¹²⁶

The Bush administration was quick to respond. At a press conference in Chicago, President Bush stated unequivocally, “I am willing to abide by the ruling of the Supreme Court” and expressed his intent to work with Congress in drafting new legislation to address the Court’s concerns. At the same time, Bush also tried to limit the decision to military commissions asserting that “[t]hey were silent on...whether or not we should have used Guantánamo. In other words, they accepted the use of Guantánamo, the decision I made.”¹²⁷ And during a joint press conference with the Japanese Prime Minister, Bush implied that he would continue to make decisions that some would find controversial, explaining that “I’m not going to jeopardize the safety of the American people. People have got to understand that.”¹²⁸

A briefing with unnamed “Senior Administration Officials” reiterated the President’s interpretation, asserting that “[n]othing in

¹²² Andrew Zajak, *Tribunals Ruled Illegal; Court: Guantanamo Trials Violate U.S.*, *Global Laws*, CHI. TRIBUNE, June 30, 2006 at C1.

¹²³ Charles Lane, *High Court Rejects Detainee Tribunals; 5 to 3 Ruling Curbs President's Claim Of Wartime Power*, WASH. POST, June 30, 2006, at A1.

¹²⁴ Peter Baker & Michael Abramowitz, *A Governing Philosophy Rebuffed*, WASH. POST, June 30, 2006, at A1. See also Sidney Blumenthal, *The Imperial Presidency Crushed*, SALON.COM at http://salon.com/opinion/blumenthal/2006/07/06/hamdan/index_np.html (arguing that the decision “has thrown Bush’s war paradigm into profound crisis”).

¹²⁵ Walter Dellinger, *The Most Important Decision on Presidential Power. Ever*, SLATE MAG., June 29, 2006, at <http://www.slate.com/id/2144476/entry/2144825>.

¹²⁶ Daniel Liptak, *The Court Enters the War, Loudly*, N.Y. TIMES, July 2, 2006.

¹²⁷ President George Bush, Press Conference at the Museum of Science and Industry, Chicago, Illinois (June 30, 2006).

¹²⁸ Josh Gerstein, *Court Sidelines Bush’s War Crimes Strategy*, N.Y. SUN, June 30, 2006, at A1.

the holding affects the authority of the president in wartime to detain enemy combatants through the duration of hostilities... nothing in the holding affects the status of Guantanamo Bay or the continued detention of enemy combatants there one way or the other.”¹²⁹ At the same time officials confirmed the administration’s willingness to follow the decision and expressed its intent to work with Congress.¹³⁰ Pentagon spokesman Bryan Whitman also reaffirmed that the administration had no plans to shut down Guantánamo as a result of the decision, stating that “[i]t serves as a place where we’re able to learn about terrorist networks, their operations, their activities. It enables us to thwart future attacks.”¹³¹

Others in the administration were less accommodating, with Attorney General Alberto Gonzales complaining, “[w]hat this decision has done is, it’s hampered our ability to move forward with a tool which we had hoped would be available to the president of the United States in dealing with terrorists.”¹³² Capitol Hill Republicans were even more direct in their condemnation of the decision. House Majority Leader, John Boehner, accused Democrats who supported the *Hamdan* decision as advocating for “special privileges to violent terrorists” and further commented that “al Qaida...is surely pleased at the show of support from Capitol Hill Democrats.”¹³³

Despite these words of defiance, the Administration and its allies on Capitol Hill seemed for a time to be ready to make some important changes in its handling of detainees. On September 6, 2006, the Department of Defense issued a revised Army Field Manual along with an accompanying Department of Defense Directive 2310.¹³⁴ Together, they prohibited the use of unlawful and abusive techniques, and committed to compliance with Common Article 3 of the Geneva Conventions.

Yet this hopeful move was quickly overshadowed by sweeping new legislation that was passed in the waning days of the

¹²⁹ *Transcript of Teleconference With Senior Officials Regarding Supreme Court's Ruling in the Hamdan Case*, U.S. NEWS WIRE, June 30, 2006.

¹³⁰ *Id.*

¹³¹ Jane Sutton, *US ruling won't close Guantanamo camp-Pentagon*, Reuters, June 30, 2006.

¹³² Blumenthal, *supra* note X.

¹³³ Press Release, Representative John Boehner, Capitol Hill Democrats Advocate Special Privileges For Terrorists (June 30, 2006).

¹³⁴ Headquarters, Department of the Army, FM 2-22.3 (FM 34-52) Human Intelligence Collector Operations (September 2006), available at <http://www.army.mil/references/FM2-22.3.pdf> [known as “Army Field Manual”]; U.S. Department of Defense Directive 2301.01E (September 5, 2006), available at <http://news.findlaw.com/hdocs/docs/dod/detainee90506directive.html>.

109th Congress. Only days before members of Congress left Washington to campaign for reelection in their home states, Congress passed the Military Commission Act of 2006.¹³⁵

The Act's stated purpose is to "facilitate bringing to justice terrorists and other unlawful enemy combatants through full and fair trials by military commissions, and for other purposes."¹³⁶ In many ways, however, the Act was a repudiation of the *Hamdan* decision. Where the Court found the rules of international law placed limits on the commissions, the Act rendered the Conventions judicially unenforceable—even going so far as to forbid courts from relying on foreign or international law decision in any cases involving military commissions. Where the Court had insisted on independently considering whether the Administration's actions were consistent with international law, the Act gave the President the exclusive authority to interpret the Geneva Conventions beyond grave breaches. Where the Court resisted efforts to strip the federal courts of jurisdiction over the habeas petitions of detainees, the Act stripped the statutory right of habeas corpus from non-citizen enemy combatants, while giving the president the sole authority to determine enemy combatant status. Where the Court had insisted on more significant procedural protections for detainees, the Act eliminated them—including the right to a speedy trial and most hearsay. It also permitted the use of statement obtained through the use of cruel, inhuman or degrading treatment if obtained prior to the enactment of the Detainee Treatment Act of 2005. Where the Court had held the commissions' authority limited to trying violations of the laws of war, the Act expanded that authority to include a variety of crimes—including conspiracy. And where the Court had held the Detainee Treatment Act did not apply to cases pending at the time of its enactment, the Act amended it to clearly apply retroactively to all pending and future cases.¹³⁷

Almost immediately after the Act was signed into law by President Bush, the government moved to dismiss the pending habeas corpus petitions of the roughly 430 detainees remaining at Guantanamo. In early November 2006, the *New York Times* reported, "The Bush administration's successful effort to have Congress eliminate the right of Guantanamo prisoners to challenge

¹³⁵ Military Commission Act of 2006 Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

¹³⁶ Pub. L. No. 109-366.

¹³⁷ Pub. L. No. 109-366.

their detentions before federal judges is now moving toward what may be an epic battle in the courts.”¹³⁸

CONCLUSION

The story of the post-September 11 era is by now a familiar one. In the name of the “flexibility” allegedly essential to protecting national security, the U.S. Administration has repeatedly sought to exclude its treatment of detainees in the war on terror from review by domestic federal courts. It succeeded for a time in creating islands of exclusive authority—in Afghanistan, in Iraq, on Guantanamo, and at CIA “black sites.” With no international or domestic enforcement mechanism behind it, and facing the executive leadership of the most powerful nation in the world, international humanitarian law appeared consigned to irrelevance. Meanwhile, the troops and contractors on the ground—offered little formal oversight, given insufficient guidance, and placed under pressure to produce results,—clearly and consistently resorted to violations of international law. Reports of abuse, including cruel, inhuman, and degrading treatment and even actions “tantamount to torture,” became common.

Yet international law proved less powerless than the conventional view of it would lead one to believe. For into the breach created by the Administration’s insistence on its own exclusive authority came the domestic courts—sporadically and with uncertain long term effect, but with a clear determination to assert the authority of the rule of law. This is ultimately what makes *Hamdan v. Rumsfeld* so important. It stands for the principle that the courts—and not the president—have the ultimate authority to say what the law is and that the most basic principles of domestic and

¹³⁸ Neil A. Lewis, *Appeals Court Weighs Prisoners’ Right to Fight Detention*, N.Y. TIMES, Nov. 7, 2006. As this chapter went to press, the Military Commission dismissed the charges against Hamdan and one other Guantanamo detainee in separate back-to-back decisions. The judges held that the government had not followed the procedures necessary to properly designate the two detainees as unlawful enemy combatants and hence the Commission did not have jurisdiction to try them. See William Glaberson, *Military Judges Dismiss Charges for 2 Detainees*, N.Y. TIMES, June 5, 2007, at A1. This holding is consistent with claims long made by advocates of international law. Whether these decisions will spur Congress to revisit the Military Commissions Act or simply prove to be a temporary roadblock to the government’s prosecutions remains to be seen. Equally uncertain is the effect this turn of events will have on the detainees. Though on its face it is a victory for the detainees, it could lead to their lengthy or even indefinite detention without any legal process.

international law must be observed even if doing so gives some comfort to our enemies.

This is the very principle that, at least until recent years, made the United States a shining beacon of authority in international law. It is also the very principle that explains why international law can have sweeping effects even in a world in which such law is almost entirely voluntary (nations decide whether to be bound by it) and where human rights law is almost never enforced at the international level. Even when the international community would or could not enforce its laws against the United States, American domestic institutions enforced international law within American borders. This domestic enforcement of international law—the enforcement of the law by domestic institutions, even when, indeed especially when, the government opposes such enforcement—represents the most remarkable and least appreciated aspect of the growing reach of international law. It is also why in the Supreme Court’s decision in the *Hamdan* case, the United States reclaimed a small measure of its moral authority in international law.