

**CUES FROM OFFSTAGE:
INTERNATIONAL LAW AND THE
SUPREME COURT’S DETENTION
TRILOGY**

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The U.S. Supreme Court’s trilogy of decisions on detention was remarkable not only for the check that it placed on the executive’s policy, but also for the delicacy with which it approached the international implications of that policy. A year earlier six members of the Court openly had relied on the values of a “wider civilization,” particularly as reflected in the jurisprudence of the European Court of Human Rights, to hold that the U.S. Constitution’s due process guarantee forbids criminal prosecution of same-sex intimacy. *Lawrence v. Texas*, 123 S. Ct. 2472, 2481-83 (2003). Due process likewise was central to resolution in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), and *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), and transnational aspects were myriad. The detainees in each case had traveled, or been transported, across national borders. All but one held citizenship in a country other than the United States, and the pleadings of each cited international treaties and custom. The cases provoked international outcry and, eventually, briefs cataloguing international legal norms at odds with the executive’s detention policy.¹ Despite these considerations the Court’s detention trilogy eschewed reliance on international law. Justices scarcely made even makeweight mention of external norms, instead drawing support from American law and Anglo-American history. International law and context nonetheless played a role, albeit an offstage one, in the three judgments.

The rise of executive detention in the wake of Al Qaeda’s September 11, 2001,

terrorist attacks is by now well documented.² The United States struck back against the Taliban, the regime that provided Al Qaeda safe haven in Afghanistan. Thousands of persons were captured, among them Taliban fighters and Al Qaeda operatives, as well as many who said they were noncombatant bystanders. The U.S. government soon made clear its intention to hold many of the captives for a prolonged period, and began to search for a location suitable for such detention. On January 11, 2002, exactly four months after the attacks in New York and Washington, a U.S. cargo plane delivered the first group of captives, hooded, shackled, and clad in lurid orange jumpsuits, to cages hastily constructed inside the military base at Guantánamo Bay, on the island of Cuba. Eventually the cages of Camp X-Ray gave way to the permanent structures of Camp Delta, as Guantánamo became the premier site at which the U.S. executive subjected captives to interrogation, without access to family or counsel and with little hope for release. At one point the detainee population approached 700. Detainees reportedly came from dozens of countries and ranged in age from as young as ten to as old as 105. International objections were swift and loud, but failed to alter the executive’s policy. And in focusing on detention at Guantánamo, critics often ignored less evident detention sites: many hundreds were said to have been held at the Bagram prison and elsewhere in Afghanistan, others still at so-called “undisclosed locations,” sites maintained in utter secrecy by the CIA.

U.S. officials freely admitted that they had chosen Guantánamo for reasons of extraterritoriality; that is, because they believed that no court of the United States, let alone any other enforcement mechanism, possessed the power to ensure that non-Americans at the offshore base received the benefits of the rule of law.³ The executive took a slightly different tack with regard to Yaser Esam Hamdi and José Padilla, two Americans suspected of terrorist activity: considering that the reach of the U.S.

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judiciary might extend to U.S. citizens even if they were held abroad, the executive designated these two individuals “enemy combatants” and sent them to a military brig in South Carolina. Though in a different location, Hamdi and Padilla, no less than persons at Guantánamo, endured *incommunicado* detention and unimpeded, seemingly unending, interrogation by government officials.

Detainees filed challenges in national and international fora, but at first their efforts were unsuccessful. The U.S. executive rebuffed demands of extranational bodies such as the Inter-American Commission for Human Rights and the U.N. Working Group on Arbitrary Detention. A rare public entreaty by the International Committee for the Red Cross had little effect. National courts outside the United States, as well as federal Courts of Appeals within, judged themselves without jurisdiction to enjoin the U.S. executive. Then, to the surprise of many, the Supreme Court announced that it would review the federal cases. The ensuing judgments likewise came as a surprise.

Ruling in *Rasul* for petitioners, two Australian and twelve Kuwaiti detainees, the same six Justices who had composed the majority in *Lawrence* rejected the position of the executive and held that U.S. courts indeed have jurisdiction to consider the lawfulness of protracted executive detention at Guantánamo.⁴ Justice John Paul Stevens’ opinion for five members situated such review within a common law tradition of habeas corpus that predated the founding of the American Republic; in fact, it traced the roots of the writ to the Magna Charta of 1215. *Rasul*, 124 S. Ct. at 2699. The statute Congress passed in service of this tradition, 28 U.S.C. § 2241, gives U.S. courts power to hear habeas petitions by persons claiming to be “in custody in violation of the Constitution or laws or treaties of the United States” and, the Court noted, says nothing to limit the reach of habeas corpus to U.S. borders. The Court further held that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), did not impose any such limit,

particularly at Guantánamo, where, on account of a lease executed in 1903, the United States enjoyed “complete jurisdiction and control.”

The Court declined to establish the procedures for reviewing detention at Guantánamo in *Rasul*, and it avoided making any substantive decisions in *Padilla* by ruling that the citizen-enemy combatant in that case had not followed proper procedures when he filed his petition for habeas corpus.⁵ But the Court’s decision in *Hamdi*, the other citizen-enemy combatant case, sketched the contours of a framework by which courts might review executive detention.

Hamdi involved a dual citizen, born in Louisiana but raised in Saudi Arabia, who had been seized in Afghanistan and since kept in the custody of the U.S. military. Unable in this case to raise the bar of extraterritoriality, the executive contended that, as Commander-in-Chief, the President enjoyed absolute prerogative to detain during time of war. The Court unanimously rejected this position. All Justices agreed that a modicum of judicial review of the lawfulness of detention was in order; consensus splintered, however, on the questions of the proper nature and extent of that review. At one extreme, the dissent of Justices Antonin Scalia and Stevens called upon ancient common law sources and the text of the U.S. Constitution in support of their argument that unless Congress suspended the writ of habeas corpus, the only way that the executive may detain a U.S. citizen is “to prosecute him in federal court for treason or some other crime.” *Hamdi*, 124 S. Ct. at 2660. At the other extreme Justice Clarence Thomas’ dissent argued that by dint of the AUMF – Congress’ Authorization for Use of Military Force, 115 Stat. 224 (Sept. 18, 2001) – the President enjoyed almost plenary power to decide whom to detain and under what conditions. *Hamdi*, 124 S. Ct. at 2679. In between was the opinion of Justice Sandra Day O’Connor, joined by Chief Justice William H. Rehnquist and Justices Anthony Kennedy and Stephen Breyer. This plurality agreed that the

congressional authorization to “use all necessary and appropriate force” gave the executive power to detain, but maintained that due process “unquestionably” guaranteed petitioner “the right to access to counsel” and “a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.” *Id.* at 2635, 2653 (quoting AUMF). The plurality suggested that on remand there should be a balancing of individual and governmental interests along the lines of the model for review of administrative decisions established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), but stated that, given the “ongoing military conflict,” the government’s interests deserved added ballast. *Hamdi*, 124 S. Ct. at 2645-50. Possibly, the plurality added, “an appropriately authorized and properly constituted military tribunal” might suffice for this review. *Id.* at 2651. These points drew criticism from the remaining Justices, David Souter and Ruth Bader Ginsburg. Concurring in part and dissenting in part, the two insisted that Congress had not authorized executive detention, and that in any event, due process likely would not condone giving excess weight to the government’s interests or allowing a military tribunal to act as sole arbiter of a challenge to detention. *Id.* at 2652-60.

The detention trilogy of June 2004 thus put an end to the period in which the executive had enjoyed unfettered discretion to detain and interrogate, inside and outside the United States, persons it considered enemies in what it calls its war on terror. The landmark consequences of its essential holding – that in a democracy founded on the separation of powers the judicial branch is obliged, even in wartime, to check the executive – soon became apparent. The executive returned Hamdi to Saudi Arabia on the condition that he renounce his U.S. citizenship, amid speculation that Padilla would be returned to the ordinary federal criminal courts to face prosecution.⁶ Trial before special military commissions of the few Guantánamo detainees charged with crimes were stopped by

order of a federal judge. Releases of other detainees stepped up, so that by mid-November the population at Guantánamo had dropped to 550. Those remaining could plead for release before what the military dubbed Combatant Status Review Tribunals, three-officer panels invented in the wake of the Court’s trilogy. Procedures fell below the floor indicated by the plurality in *Hamdi*, not the least because detainees were denied the assistance of counsel. Moreover, the status review process was slow; by late autumn the tribunals there had been 104 hearings, and only one had resulted in liberation. Nor did it seem likely that the hearings would have preemptive effect on the scores of habeas petitions that detainees had filed in federal district court soon after the Court’s decisions.⁷

It would be easy to describe the opinions as little more than interpretations of the statutory and constitutional law of the United States. To be sure, no opinion evinced a forthright embrace of external norms like that in *Lawrence*. Yet analysis points to the judgments’ attention to international law and context.

All Justices, for example, appeared to accept the executive’s assertion that the United States is at war. The plurality in *Hamdi* went furthest, justifying its view that “enemy combatants” could be held if Congress so authorized on the ground that such detention is “a fundamental incident of waging war.” *Hamdi*, 124 S. Ct. at 2641. It called this detention rule “universal,” and it cited the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316. Indeed, it seemed to borrow its idea that military panels might review detainee challenges from that convention’s requirement that a “competent tribunal” assess whether a detainee deserves prisoner of war status. *Id.*, art. 5. The plurality thus appeared to signal that it was honoring international, and not just internal, laws of war. On this it was wrong. The Geneva framework only applies to “armed conflict,” *id.*, common

art. 2, and despite U.S. governmental assertions to the contrary, not all of the “war” on terror qualifies. As for application of the combatant detention rule to citizens like Hamdi and Padilla, the relevant authority is, as the plurality acknowledged, *Ex parte Quirin*, 317 U.S. 1 (1942). That opinion was decided before adoption of the Geneva Conventions of 1949, the framework of which typically does not apply to citizens of the detaining country. Even if those conventions did apply, they were not followed: as Justices Souter and Ginsburg pointed out, the conditions of detention were inconsistent with the requirements of the Prisoner of War Convention.⁸ Correct interpretation of contemporary international humanitarian law would have compelled a stance far different from that of the plurality.

Some Justices’ misreading of international law may be a byproduct of the Court’s longstanding reluctance – set aside only recently in cases like *Lawrence* – to grapple with the demands that globalization places on the law. In the last decade, for instance, the Court often stopped the protections of the Constitution at water’s edge. Thus it declined to extend the Fourth Amendment to a noncitizen defendant subjected to a warrantless search in Mexico, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); permitted U.S. prosecution of a noncitizen kidnapped abroad, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); and withheld the Fifth Amendment privilege against self-incrimination from a witness who feared that his compelled testimony would be used against him in a foreign prosecution, *United States v. Balsys*, 524 U.S. 666 (1998). The decision in *Rasul* deviated from this path in holding that overseas detainees could seek relief in U.S. courts – not only for violations of U.S. law and treaties by means of habeas corpus petitions, but also for violations of international law by means of civil suits brought under the Alien Tort Claims Act of 1789, 28 U.S.C. § 1350.⁹ And although the facts of *Rasul* pertained only to Guantánamo, the decision took

pains to state that no precedent “categorically excludes aliens detained in military custody outside the United States from the ““the privilege of litigation”” in U.S. courts.” *Rasul*, 124 S. Ct. at 2698 (quoting *Eisentrager*, 339 U.S. at 777-78). The phrasing implied an assertion of jurisdiction consistent with the jurisprudence of the inter-American, European, and U.N. human rights systems;¹⁰ that is, the exercise of jurisdiction by a U.S. court in order to examine the plight of persons whom the United States detains well beyond the island of Cuba, perhaps even as far away as Afghanistan and Iraq.

The latter two countries remained foremost in Americans’ minds the whole time that the Court had *Rasul*, *Hamdi*, and *Padilla* under advisement. The horrific evidence of detainee abuse at the hands of U.S. soldiers at Abu Ghraib prison in Iraq was released just hours after the Court concluded oral arguments. As the Justices wrote their opinions, public disclosures of photos and videotapes, of official memoranda justifying harsh detention measures, and of reports documenting abuse, mounted. No opinion made explicit mention of the scandal, which touched Afghanistan and Guantánamo as well as Iraq, but its existence gave aspects of the decisions added significance. Four Justices in *Padilla* spoke of torture – an issue central to the Abu Ghraib scandal but not raised in the cases at bar – in the course of condemning indefinite, *incommunicado* detention. “At stake in this case,” they wrote, “is nothing less than the essence of a free society. ... Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber.” Having raised the specter of that loathed and secret tool of the old English monarchy, the four observed, ““There is a torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men.””¹¹

Thus the Court’s detention trilogy,

though it gave center stage to the laws of the United States, quietly accepted offstage cues from jurisprudence, and events, that had originated well outside the borders of the United States.

Endotes

¹ See, e.g., Brief of Amici Curiae Practitioners and Specialists in the International Law of War in Support of Respondents in *Rumsfeld v. Padilla*, Apr. 9, 2004, available at 2004 WL 791895; Brief of Amicus Curiae Global Rights in Support of Petitioners in *Hamdi v. Rumsfeld*, Feb. 23, 2004, available at 2004 WL 354184; Brief of Amici Curiae International Law Professors Listed Herein in Support of Petitioners, Feb. 23, 2004, 2004 WL 354186; Brief for the National Institute of Military Justice as Amicus Curiae in Support of Petitioners in *Rasul v. Bush*, Jan. 14, 2004, available at 2004 WL 96758. But see, e.g., Brief Amicus Curiae of Law Professors, Former Legal Advisers of the Department of State and Ambassadors, Retired Judge Advocates General and Retired Military Commanders, and Other International Law Specialists in Support of Respondents in *Rasul v. Bush*, Mar. 3, 2004, available at 2004 WL 419453 (arguing that international legal sources supported executive's policy at Guantánamo).

² For accounts of the events and legal developments that preceded Supreme Court review, see, e.g., Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004); Diane Marie Amann, *Human Rights, Antiterrorist Wrongs*, INT'L CIVIL LIBERTIES REPORT 3 (2002).

³ Government lawyers set forth the legal justifications for this position in a confidential memorandum that first was leaked in June 2004 and later was released by the Pentagon. *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Jan. 9, 2002, Memorandum of John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defense, <http://www.msnbc.msn.com/id/5024040/site/newsweek> (visited June 8, 2004).

⁴ *Rasul*, 124 S. Ct. at 2699 (Stevens, J., joined by O'Connor, Souter, Ginsburg, and Breyer, JJ.) (concluding that "federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing"); see also *id.* at 2699-2700 (Kennedy, J., concurring in judgment) (describing the indefinite nature of detention as "critical" to his decision to rule in favor of petitioners).

⁵ *Id.* at 2699; *Padilla*, 124 S. Ct. at 2727 (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.) (ordering dismissal of petition filed in New York, but permitting petitioner to refile in South Carolina).

⁶ See *Yaser Esam Hamdi v. Donald Rumsfeld, Settlement Agreement*, Sept. 17, 2004, available at <http://news.findlaw.com/hdocs/docs/hamdi/91704stla-grmnt2.html> (visited Sept. 29, 2004); Joel Brinkley, *From Afghanistan to Saudi Arabia, via Guantanamo*, N.Y. TIMES, Oct. 16, 2004, at A4; ; Emma Schwartz, *Terror Indictments May Be Linked to Padilla*, L.A. TIMES, Sept. 17, 2004, at A16. Padilla had been arrested at Chicago's O'Hare Airport and was designated an enemy combatant only after spending a month in federal custody pursuant a material witness warrant issued in New York. *Padilla*, 124 S. Ct. at 2715-16.

⁷ See *Hamdan v. Rumsfeld*, 2004 WL 2504508 (D.D.C. Nov. 8, 2004) (faulting commissions for failure to comply with Geneva Conventions); Dep't of Defense, *News Release: Transfer of Detainees Completed*, Sept. 18, 2004, <http://www.defenselink.mil/releases/2004/nr20040918-1363.html> (visited Sept. 27, 2004); Sec'y of Navy, *Memorandum for Distribution: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba*, July 29, 2004, <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> (visited Sept. 27, 2004); Neil A. Lewis, *Guantánamo Prisoners Getting Their Day, but Hardly in Court*, N.Y. TIMES, Nov. 8, 2004, at A1 (providing statistics on review tribunals); Carol D. Leonnig, *Charges for Detainees Ordered*, WASH. POST, Sept. 21, 2004, at A2 (stating that federal judge had instructed government immediately to "provide the charge or factual basis for detaining each of the

60 detainees who have sued the government” in the wake of the Court’s detention trilogy).

⁸ *Hamdi*, 124 S. Ct. at 2658. Among other things, the Third Geneva Convention requires the detaining power to treat an individual as a prisoner of war unless a tribunal convened under Article 5 finds otherwise. In that event, the person ordinarily would fall under the aegis of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 – a treaty that the Court’s trilogy never mentions. Both conventions require a degree of access to the outside world, with which *incommunicado* detention does not comport. On the relation of *Quirin* and the U.S. war on terror to contemporary international humanitarian law see, e.g., Knut Dörmann, *The legal situation of “unlawful/unprivileged combatants”*, 85 INT’L REV. RED CROSS 45 (2003); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror”*, 27 FLETCHER F. WORLD AFF. 55 (2003). On the inapplicability of the conventions to nationals of the detaining power, see Dörmann, *supra*, at 48-49 (discussing Fourth Geneva Convention, *supra*, art. 4(1) (describing as protected those persons who “find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”)); see also Third Geneva Convention, *supra*, art. 87 (implying its nonapplicability to detaining power’s nationals in that it specifies that “[w]hen fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance”); accord Amann, *Guantánamo*, *supra* note 2, at 276.

⁹ The day after issuing its decision in *Rasul*, the Court affirmed that non-Americans who have suffered violations of international law, at least with regard to norms considered universal, may invoke seek compensation in U.S. courts by means of this statute. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

¹⁰ See Amann, *Guantánamo*, *supra* note 2, at 311-19 (discussing relaxation of extraterritoriality limits in, e.g., *Bankovic v. Belgium*, App. No. 52207/99, Eur. Ct. H. R. (2001) (Dec. on Admis.), available at <http://www.echr.coe.int/Eng/Judgements.htm>; *Coard v. United States*, Case 10.951, Inter-Am. C. H. R.

1283, OEA/Ser.L/VII.106, doc.6 rev at 1283, (1999); *Saldias de Lopez v. Uruguay*, UN GAOR, Hum. Rts. Comm., Annex XIX, U.N. Doc. A/36/40 (1984)).

¹¹ *Padilla*, 124 S. Ct. at 2735 & n.10 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.) (quoting *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (opinion of Frankfurter, J.)).