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How the Status of Non-American "Enemy Combatants" Is Influenced by Precedent Stemming from WWII

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The legal conflict as to whether people termed "enemy combatants" by President Bush have any status under the law of the United States allowing them redress from detention will be found moot or not in the face of precedents stemming from World War II cases.

In the American legal system there are certain fundamental rights in the Constitution that are held as absolutes. The violation of such rights is considered nearly unconscionable. One of these is the right to trial, granted to all citizens of the United States under the Fifth Amendment (with the framework found in the Sixth Amendment). In a number of rulings the Supreme Court has extended these rights to resident aliens.[1] In the aftermath of September 11, Congress passed legislation which when enacted by President Bush stimulated countrywide debate as to whether the fundamental right previously noted has been violated. The resolution passed by Congress, called "Authorization for Use of Military Force" (AUF), gives the President the statutory power to "use all necessary and appropriate force against those nations, organizations or persons he determines" in anyway aided the attacks.[2] In the course of applying of that force, President Bush has led military operations in which United States governmental officials detained individuals that had been captured in Afghanistan and Iraq. Those individuals, who are not citizens of the United States, have in some cases been held for over four years without charge or trial. The legal conflict as to whether these people, termed "enemy combatants" by President Bush,[3] have any status under the law allowing them redress from detention is moot in the face of precedents stemming from World War II cases. This is seen by

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the use of these cases in recent rulings in the federal courts.[4] These precedents will influence the Supreme Court's decision in *Hamdan v. Rumsfeld*, which will be heard in 2006.[5] This case will determine with conclusiveness whether an enemy alien can be legally held and tried before a military commission.

At first glance the detentions of "enemy combatants" by President Bush connected to the implementation of AUF appear to conflict with the right and tradition of the right to trial. President Bush is not the first president to create a seemingly inherent conflict between the law and presidential action. Presidents have previously dealt with threats to national security through preventive detention measures, including trials of resident enemy aliens captured outside of sovereign United States territory. It has been the place of the judicial branch of the government—the Supreme Court in particular—to determine to what extent these enemy aliens have a right to appear before a Federal Court whether through writ of *habeas corpus* or through appeal of their sentences and confinement. In the present climate of the "War on Terror" following the September 11 attacks in 2001, this question has become ever more pertinent in both application in the context of national security and the need to have a solid legal foundation with which to lawfully pursue policy implementation.

The legal status assigned by President Bush to these "enemy combatants," who are foreign nationals, denies them the status of prisoners of war. This status would entitle them to rights under the Geneva Convention[6] or as regular criminal defendants with access to civilian courts. This determination has been the source of continuous litigation in Federal Courts since

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[1] See *Johnson v. Eistenger*, 339 U.S. 763, (the Supreme Court states that since "1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment," referring to *Yick Wo v. Hopkins*, 118 U.S. 356).

[2] Pub. L. No. 107–40, 115 Stat. 224 (2001).

[3] Mitch Frank, *Uncharted legal Territory*, CNN (June 27, 2002) (available at http://archives.cnn.com/2002/ALLPOLITICS/06/17/time.civilrights/index.html).

[4] *Hamdi et al. v. Rumsfeld*, 124 S.Ct. 2633 (2004); *Hamdan v. Rumsfeld*, No. 04-5393, (D.C. Cir. 2005); *Rasul et al. v. Bush*, 124 S.Ct. 2633 (2004).

[5] *Hamdi et al. v. Rumsfeld*, 124 S.Ct. 2633 (2004).

[6] Geneva Convention III relative to the Treatment of Prisoners of War (1949).

the first detentions were made. As defined under the Geneva Convention, an "unlawful combatant"[7] is someone who engages in hostile acts but is not covered under the Geneva Convention III Articles 4 or 5. The Geneva Convention urges but does not require all signatories who act as a "detaining power" to treat "unlawful combatants" as qualified POWs.[8] Prisoners are granted under the Geneva Convention the right to not be treated harshly and to receive a fair trial.[9] President Bush has so far refused to give this status to non-Americans who have been captured in operations carried out under AUF. The resulting controversy is centered on the idea that President Bush has the authority to detain "enemy combatants" without a clear outline of the legal limitations of his power in the matter. A recent Federal appellate ruling in the case of *Hamdan v. Rumsfeld*[10] has started to establish a legal foundation to give boundaries for the authority of a President. The District of Columbia appellate court has determined that non-Americans can be held and tried by the government as "enemy combatants," pending a "searching review" of the facts underlying the detention.[11]

What the Wartime Cases Can Teach Us

An understanding of how the cases from the WWII era as precedent increases understanding of how the Supreme Court may rule. Given the state of war against Germany and Japan, the Supreme Court sanctioned most of the steps taken by the President and Congress to achieve victory. The Supreme Court did require that government keep within the bounds of the Constitution, as in the precedent setting case of *Hartzel v. United States.*[12] In this case, the Supreme Court overturned a conviction of a "fascist sympathizer

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[7] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316

[8] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, art. 3

[9] *Id.*

[10] *Hamdan v. Rumsfeld*, No. 04-5393, (D.C. Cir. 2005).

[11] *Hartzel v. United States*, 322 U.S. 680 (1944)

[12] *U.S. Supreme Court to Rule on 'war on terror' Tribunals*, AFP (Nov. 8, 2005), Available at http://news.yahoo.com/s/afp/20051108/ts_alt_afp/usattacksguantanamojustice;_ylt=ApGLiW5ULILSObHHcpqJP.pMEP0E;_ylu=X3oDMTBjMHVqMTQ4BHNlYwN5bnN1YmNhdA.

who had mailed . . . literature urging the occupation of the United States by foreign troops."[13] The Supreme Court has ruled in cases that protection of individual freedoms is to be extended even while there is no declared state of war.[14]

The burden upon the president to base his actions on Constitutional or statutory power was clarified in 1952 in the language the Supreme Court used in *Youngstown Sheet & Tube Co. v. Sawyer.*[15] Since there was no power in the Constitution or statutes that President Truman used to shape his actions, the Supreme Court ruled the President's actions void. The critical point is if the President can find legislation authorizing his actions, his powers are virtually unassailable.[16] If there is no legislation, he must rely on his vested powers, which "[are] likely to depend on the imperatives of the events and contemporary imponderables."[17] The Supreme Court articulated that President Truman's action "represents an exercise of authority without law," and returned the mills to their owners.[18] This clarification of the limits of presidential power by the Supreme Court provides insight to understand where President Bush's actions lie.

The Supreme Court's explanation on where presidential power lies allows for President Bush to contest that his actions are legal under the authority given to him by Congress, under the AUF. Regarding the issue of detaining non-Americans as "enemy combatants," the "President [has] relied on four sources of authority."[19] These cases stand out as precedents from World War II that have bearing on the current situation of the detained "enemy combatants." Though it has been over fifty years since the last of these cases was ruled

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[13] Kermit L. Hall, Kermit Hall, James W. Ely, Joel B. Grossman, *The Oxford Companion to the Supreme Court of the United States*, 1104 (2d ed., Oxford University Press).

[14] *Bas v. Tingy*, 4 U.S. 37 (1800).

[15] *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] President Bush cited his authority as stemming from "Commander in Chief of the Armed Forces, U.S. CONST., art. II, §2; Congress's joint resolution authorizing the use of force; 10 U.S.C. §821; and 10 U.S.C. §836. The last three are, of course, actions of Congress." *Hamdan v. Rumsfeld*, No. 04-5393, (D.C. Cir. 2005).

upon, they have remained the standard for two different aspects of the law: the legality of holding "unlawful combatants" who fall outside the prevue of the Geneva Convention or other U.S. law, and their trial by military commission. The precedent setting cases are *Ex Parte Quirin* (1942), *In re Yamashita* (1946), *Johnson v. Eisentrager* (1950).

Ex Parte Quirin. In June of 1942 eight German Nazi agents came ashore to commit acts of sabotage and espionage against the United States. They had been trained and selected after war had been declared to return to the United States to commit sabotage. Four of them came ashore from a submarine in Florida with orders to proceed north to New York. All were eventually arrested, and it was learned that all the men had previously lived in America and had returned to Germany. The government determined that by returning to Germany they lost their citizenship and had become enemy nonresident aliens.[20]

In July of 1942, a military commission tried the eight Nazi agents on charges of sabotage and espionage under the order of President Franklin Roosevelt.[21] After they were sentenced by the military tribunal, a petition was filed stating that the "petitioners asked leave to file petitions for *habeas corpus* in [the] Court."[22] These were granted due to the seriousness of the questions raised, specifically if they even had a right to file. After hearing arguments on July 31, the Supreme Court denied the petitions of *habeas corpus.* The grounds on which the Supreme Court denied *habeas corpus* were that the commission had indeed been founded on the constitutional authority of Congress's Articles of War. Power to enforce these laws always belongs to the presidents, due to the "executive power" clauses in the Constitution.[23] When tested against the actions of President Bush, this same principle of the "executive power" clauses in the Constitution shows that he is following the same vein of legal thought and precedent as was given to the actions of the President during World War II.

The denial of *habeas corpus* by the Supreme Court gave the president the ability to create the military commission that held the Nazi agents. Under

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[20] *Ex Parte Quirin*, 317 U.S. 1 (1942).

[21] *Id.*

[22] *Id.*

[23] *Id.*

the normal laws of war the Supreme Court stated that "lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[24] The Supreme Court also explained that "the spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals."[25] By these standards the Supreme Court gave weight to the government's position that it can, in times of war or conflict authorized by Congress, hold enemy "combatants" for trial and punishment by military tribunals.

In re Yamashita. Tomoyuki Yamashita, commanding general of the Japanese Fourteenth Area Army, had the responsibility of defending the Philippines. He was captured in September 1945 by American forces and was tried before a military commission with Army officers, all lawyers, acting as defense counsel. After being convicted of war crimes on the fourth anniversary of Pearl Harbor, December 7, 1945, Yamashita was sentenced to death by hanging. Petitions for *habeas corpus* were filed, alleging that the detention of the petitioner was unlawful because no commission could be lawfully created after the cessation of war between America and Japan. Furthermore, the petitions claimed that the commission had violated both the Geneva Convention and the due process clause of the Fifth Amendment by proceeding with a trial which the commission had no authority to authorize. The Supreme Court of the Philippine Islands denied the petition of review on the grounds that it was limited to an inquiry as to the jurisdiction of the commission, finding that the commission did have jurisdiction over Yamashita. An appeal was filed with the Supreme Court of the United States because at this time the Philippines was a territory, meaning

[24] *Id.*
[25] *Id.*

that all appeals from the courts of that territory were under the provision of the U.S. Supreme Court in Washington DC.[26] Using the detainment location as the basis for determining the right of enemy foreign nationals to review by federal courts in the case of *In re Yamashita* mirrors the debate over "enemy combatants" in *Hamdan v. Rumsfeld.*

The U.S. Supreme Court ruled against Yamashita, stating simply that under the precedent set down in *Ex Parte Quirin*, Yamashita could not rely on the territorial location of a military commission to have the right to a petition of *habeas corpus.*[27] The Supreme Court further stated,

> Despite this, the doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to advance every argument in their support and to show some reason in the petition why they should not be subject to the usual disabilities of nonresident enemy aliens. This is the same preliminary hearing as to sufficiency of application that was extended in *Quirin, supra, Yamashita, supra,* and *Hirota v. MacArthur,* 338 U.S. 197. After hearing all contentions they have seen fit to advance and considering every contention we can base on their application and the holdings below, we arrive at the same conclusion the Court reached in each of those cases, viz.: that no right to the writ of *habeas corpus* appears.[28]

The conclusion by the Supreme Court would clearly lend credence to the policy of President Bush to exclude those deemed "enemy combatants" from Federal courts and refer them for purview to military commissions.

Johnson v. Eisentrager. After the hostilities had ended with German forces by order of the German High Command on May 8, 1945, a group of German nationals in China continued to collect and furnish information to the armed forces of Japan for further action against the United States. This was in violation of the laws of war, and subsequently the German nationals were arrested and convicted by a military commission constituted by the properly proscribed U.S. military authorities in China. After military review the prisoners were repatriated to Germany to serve their prison terms. In Germany the prisoners

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[26] *In Re Yamashita,* 327 U.S. 1 (1946).

[27] *Id.*

[28] *In Re Yamashita,* 327 U.S. 1 (1946).

petitioned, claiming that their trial, conviction, and imprisonment violated Articles I and III of the Fifth Amendment. They also held that provisions of the Geneva Convention had been violated. They petitioned the District Court of the District of Columbia for a writ of *habeas corpus* directed at the Secretary of Defense and others who had directive power over their custodian.[29]

The Supreme Court overturned the Appellate Court's decision on the grounds that the Constitution provides no rights to enemy nonresidents during wartime. Said Justice Jackson of the Supreme Court, "Our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments."[30] The ruling of the Supreme Court states that it would be absurd to grant the petition because that would logically grant application of the Bill of Rights to hostile combatants. Further Jackson states that "resident enemy alien[s] [are] constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists. Courts will entertain his plea for freedom from executive custody only to ascertain the existence of a state of war and whether he is an alien enemy. Once these jurisdictional facts have been determined, courts will not inquire into any other issue as to his internment."[31] This ruling by the Supreme Court clearly stated that nonresident enemy aliens, captured and imprisoned abroad, have no right to a writ of *habeas corpus* in a court of the United States. The trials by a properly ordered military commission, like those sought by President Bush, are therefore the only legal means for "enemy combatants" to dispute their captivity. These actions as argued by President Bush are founded on the precedents of the Supreme Court going back to the previously cited *Ex Parte Quirin* and *In re Yamashita.*

Weight of These Cases in Federal Courts Today

The Federal Courts have looked to these cases from World War II to determine the status of "enemy combatants" who had been captured under

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[29] *Johnson v. Eisentrager*, 339 U.S. 763 (1952).

[30] *Id.*

[31] *Id.*

President Bush's Military Order of November 13, 2001.[32] It is under this Order that people deemed as "enemy combatants" have no right of review by the courts. This Order explicitly states that no individual shall be "privileged to seek any remedy . . . in any court of the United States." Alberto Gonzales, while White House Counsel in 2001, stated that "the order preserves judicial review in civilian courts," following the example of the protection the Supreme Court created in *Ex Parte Quirin* for the review of petitions.[33] The Supreme Court in 2004 and the District of Columbia Court of Appeals in July 2005 ruled on the holding and trying of an "enemy combatant." These rulings were constructed mainly from the precedent established from the three previously cited cases.

The first test case before the Supreme Court was *Rasul et al. v. Bush*,[34] which was brought by a group of two Australians and twelve Kuwaitis who were being held at Guantanamo Bay, Cuba, after being captured abroad. The petitioners asserted that they had the right to challenge their detentions as unconstitutional because Guantanamo Bay is controlled by the U.S. The government sought to quash the petitions, arguing that in the decision *Johnson v. Eisentrager* aliens detained outside United States sovereign territory may not invoke *habeas* relief. The Supreme Court disagreed with the position of the government, stating that due to the "express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Base, and may continue to do so permanently if it chooses."[35] They based their ruling on federal law that "authorizes district courts, 'within their respective jurisdictions,' to entertain *habeas* applications by persons claiming to be held 'in custody in violation of the . . . laws . . . of the United States,'" §§2241(a), (c)(3). Such jurisdiction, the Supreme Court ruled, extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."[36] Thus, the Supreme Court granted the right to "enemy combatants" to have

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[32] 66 Fed. Reg. 57,833.

[33] Alberto R. Gonzales, 2001, *Martial Justice, Full and Fair.* New York Times, Nov. 30, Haynes II, William J.

[34] *Rasul et al. v. Bush*, 124 S.Ct. 2633 (2004).

[35] *Id.*

[36] *Id.*

their petitions for *habeas corpus* to be at least heard by Federal Courts, if not upheld.

Since the ruling in *Rasul*, the legal battle has shifted as stated before to a case now before the Supreme Court, *Hamdan v. Rumsfeld*, as to whether enemy aliens have the right to an "application for *habeas corpus*."[37] The burden of the government before a Federal Court is not to prove the guilt or innocence of the accused, but whether it is in "the lawful power of the commission to try the petitioner for the offense charged."[38]

Hamdan v. Rumsfeld

The District of Columbia appellate court heard arguments from the Federal government and Hamdan's defense team about what the outcome of this case shouldbe. The government stated that the District Court should not have exercised "jurisdiction over Hamdan's *habeas corpus* petition," trying to reduce the precedential effect of *Ex Parte Quirin*. The District of Columbia appellate court decided that Hamdan's claim is "firmly supported by the Supreme Court's disposition of *Quirin*." Hamdan's assertion is that "the President violated the separation of powers inherent in the Constitution when he established military commissions. The argument that Article I, §8, of the Constitution gives Congress the power 'to constitute Tribunals inferior to the Supreme Court,' that Congress has not established military commissions, and that the President has no inherent authority to do so under Article II" was rejected, ruling that the President did indeed have the power to establish tribunals and that "there is little to Hamdan's argument. The President's Military Order of November 13, 2001, stated that any person subject to the order, including members of al Qaeda, 'shall, when tried, be tried by a military commission for any and all offenses triable by [a] military commission that such individual is alleged to have committed . . .,' 66 Fed. Reg. at 57,834. The President relied on four sources of authority: his authority as Commander in Chief of the Armed Forces, U.S. CONST., art. II, §2; Congress's joint resolution authorizing the use of force; 10 U.S.C. §821; and 10 U.S.C. §836. The last three are, of course, actions of Congress." The appellate court reversed the District Court's decision and

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[37] *In Re Yamashita*, 327 U.S. 1 (1946).

[38] *Id.*

rejected Hamdan's claim that he was entitled to the rights under the Geneva Convention.

The District of Columbia appellate court stated that the District Court had failed to take into consideration "the Supreme Court's treatment of the Third Geneva Convention of 1929 in *Johnson v. Eisentrager*."[39] Quoting from *Johnson v. Eisentrager* the appellate court stated, "The Supreme Court, speaking through Justice Jackson, wrote in an alternative holding that the Convention was not judicially enforceable: the Convention specifies rights of prisoners of war, but 'responsibility for observance and enforcement of these rights is upon political and military authorities,'" *Id.* at 789 n. 14.[40] The appellate court therefore ruled that the "Convention does not apply to al Qaeda and its members,"[41] only to people in situations of "international conflict" and "civil war." Lastly the Supreme Court's opinion in *Madsen v. Kinsella* that "the place of military commissions in our history,"[42] referring to them as "our common-law war courts,"[43] the appellate court order that the standing commission assigned to try Hamdan could proceed. It concluded that the military commission was the proper place for Hamdan to assert his claim to prisoner-of-war status and "receive the judgment of a 'competent tribunal.'"[44]

Conclusion

If the Supreme Court upholds the ruling of the District of Columbia appellate court, all challenges to constitutionality of the detention status and trying of "enemy combatants" by military commissions would effectively be ended. All litigation until now has been focused on the extent of the President's power to hold "enemy combatants" without trial. The Federal Courts have agreed with the precedent from World War II that the President does in fact have this power during wartime or states of equivalent conflict. By logical extension from this, the Supreme Court has ruled that the President can take whatever measures are necessary to fulfill the require-

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[39] *Johnson v. Eisentrager*, 339 U.S. 763 (1952).

[40] *Id.*

[41] *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. 2005).

[42] *Madsen v. Kinsella*, 343 U.S. 341 (1952).

[43] *Id.*

[44] *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. 2005).

ments of the statutes passed by Congress. The President clearly has the power to detain "enemy combatants" under the authority granted from Congress under the AUF to combat those who perpetrated the terrorist attacks of September 11th and their supporters. The ability of "enemy combatants" to file petitions of *habeas corpus* in Federal Courts has been deemed by President Bush to be a hindrance in pursuit of his objective under the AUF. Even with this policy of President Bush, there is allowance under the rulings of the Supreme Court that "enemy combatants" have the possibility of judicial review. That power for review by the courts to claims for *habeas corpus* is clearly set forth in the precedent cases that came out of World War II. For all intents and purposes those claims would fall on deaf ears because of *Hamdan v. Rumsfeld*, allowing the government to rightfully try "enemy combatants" by military commissions.