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The Guantanamo Bay Cases

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I. INTRODUCTION

On 28 June 2004, the United States Supreme Court handed down its first decisions regarding the status of individuals held in U.S. military custody as "enemy combatants". In separate cases, the Court dealt with citizens held within United States territory and aliens held at Guantanamo Bay. In each case, the Court limited itself to deciding a strictly confined issue, its analysis raising far more questions than it answered. Subsequently, District Court judges have adopted divergent reasoning in seeking to resolve the outstanding issues in the petitioners' claims. It is evident that although the Supreme Court treated the cases as primarily involving questions of domestic law, some judges in lower courts have used international law extensively in their analysis of the rights of detainees.

II. THE CASES

A. Rasul v. Bush[1]

1. Introduction

In *Rasul*, the Supreme Court considered the claims of 14 petitioners, including Australians David Hicks and Mamdouh Habib, detained as "enemy combatants" at the U.S. naval base at Guantanamo Bay, Cuba. All of the detainees asserted that they had never committed terrorist acts or been combatants against the United States.

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[1] 124 S. Ct. 2686 (2004) ("*Rasul*").

Guantanamo Bay is the subject of a treaty, nominally a "lease", concluded between Cuba and the United States in 1903. Under the lease, the United States has "complete jurisdiction and control" within the area, while recognising the "ultimate sovereignty" of the Republic of Cuba.[2] In 1934, the parties concluded a second treaty that provides that unless the parties agree to modify the 1903 lease, it will remain in effect as long as the U.S. does not abandon the naval base.[3]

The Supreme Court's judgment in *Rasul* was handed down contemporaneously with judgments in two other cases concerning individuals held as enemy combatants. *Hamdi v. Rumsfeld*[4] concerned a U.S. citizen captured in Afghanistan and held in South Carolina. Its significance for the petitioners in *Rasul* is considered below. A related case, *Rumsfeld v. Padilla*,[5] dealt with technical rules regarding the jurisdiction in which a *habeas corpus* petition must be filed, and is not considered in this case note.

2. *The Majority*

In *Rasul*, the Supreme Court strictly confined itself to the question of whether United States courts have jurisdiction to consider the Guantanamo detainees' claims under three federal statutes: the *habeas corpus* statute,[6] the alien tort statute[7] and the federal question statute.[8] Most of the Court's analysis concerned the *habeas corpus* statute. The majority, consisting of Stevens J. joined by O'Connor, Souter, Ginsberg and Breyer JJ., held that the court's jurisdiction under these statutes extended to the aliens detained at Guantanamo Bay.

The *habeus corpus* statute begins by stating that: "Writs of *habeas corpus* may be granted by the Supreme Court, any justice thereof, the district

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[2] *Lease of Lands for Coaling and Naval Stations*, opened for signature 23 February 1903, U.S.-Cuba, T.S. 418, art. 3 (entered into force 23 February 1903).
[3] *Treaty Defining Relations with Cuba*, opened for signature 29 May 1934, U.S.-Cuba, T.S. 866, art. 3 (entered into force 9 June 1934).
[4] 124 S. Ct. 2633 (2004) ("*Hamdi*").
[5] 124 S. Ct. 1353 (2004).
[6] 28 U.S.C. § 2241 (2005).
[7] 28 U.S.C. § 1350 (2005).
[8] 28 U.S.C. § 1331 (2005).

courts and any circuit judge within their respective jurisdictions."[9] The essence of the majority's judgment is a finding that as Guantanamo Bay is under the "plenary and exclusive jurisdiction"[10] of the United States, federal jurisdiction under the statute extends there. Implicit in their analysis is the idea that judicial jurisdiction "follows" executive jurisdiction, so that the courts' jurisdiction will extend to acts done in areas that are not the sovereign territory of the United States, if the executive has the right to, and in fact does exercise exclusive and plenary jurisdiction there.

In finding that federal courts have jurisdiction over the *habeas corpus* claims of aliens held outside of the United State's sovereign territory, the majority distinguished the Court's 1950 decision in *Johnson v. Eisentrager*.[11] In that case, the Court held that a federal court lacked jurisdiction over the *habeas corpus* petitions of twenty-one Germans citizens held in by the U.S. military in occupied Germany. The petitioners had been captured in China and convicted by an American military commission in Nanking before being transferred to Lansberg prison in Germany. The majority in *Rasul* held that the petitioners in the case before it were in a different position:

> They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction or control.[12]

Unfortunately, the majority did not elaborate on the individual significance of these factors.

The Court further distinguished *Eisentrager* by arguing that the Court in that case had concerned itself only with whether the petitioners had a constitutional right to *habeus corpus* review. According to the majority,

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[9] 28 U.S.C. § 2241(a) (2005).
[10] *Rasul*, 124 S. Ct. 2686 at 2693 (2004).
[11] 339 U.S. 763 (1950) ("*Eisentrager*").
[12] *Rasul*, 124 S. Ct. 2686 at 2693 (2004).

this can be explained by an erroneous view of the *habeas corpus* statute that prevailed at the time of the *Eisenstrager* decision. In *Aherns v. Clark*,[13] decided in 1948, the Supreme Court held that the District Court for the District of Columbia did not have jurisdiction to entertain the *habeas corpus* claims of 120 Germans detained at Ellis Island in New York. In doing so they interpreted the phrase "within their respective jurisdictions" in the *habeas corpus* statute to require the petitioner's presence within the jurisdiction. The *Rasul* majority held that the "inflexible jurisdictional rule" in *Aherns* was overruled in the 1973 decision *Braden v. 30th Judicial Circuit Court of Kentucky*.[14] Braden was a prisoner incarcerated in Alabama, who filed a writ of *habeas corpus* in Kentucky, to challenge an indictment filed against him in that State. Because the proper respondent was the Kentucky court, not Braden's present custodian, the State of Alabama, the Supreme Court held that the Kentucky Court had jurisdiction over the writ. In doing so, the Supreme Court reasoned, "the writ of *habeas corpus* does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody".[15]

Finally, the majority argued that the historical reach of the writ of *habeas corpus* in British and American common law supported its finding that the scope of jurisdiction under the *habeas corpus* statute extends to places where the executive exercises jurisdiction outside its sovereign territory.[16]

The majority dealt briefly with the federal question statute and the alien tort statute, stating that American courts have traditionally been open to non-resident aliens, and that the alien tort statute specifically confers the privilege of suit upon them. The majority held that the petitioner's detention in military custody was "immaterial to the question of the District Court's jurisdiction over their nonhabeas (sic) statutory claims."[17] The majority did not explicitly consider whether the application of either statute could be limited to acts occurring within the sovereign territory of the United States. However, the Court's judgment in *Sosa v. Alvarez*

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[13] 335 U.S. 188 (1948) ("*Aherns*").
[14] 410 U.S. 484 (1973).
[15] Ibid., at 494-5.
[16] *Rasul*, 124 S. Ct. 2686 at 2696-7 (2004).
[17] Ibid., at 2699.

Machain,[18] decided one day after *Rasul*, confirms that the alien tort statute does apply outside U.S. territory, but only to the limited category of international law *cum* common law claims recognised when the statute was enacted in 1789:[19] "violation of safe conducts, infringement of the rights of ambassadors, and piracy".[20]

3. *Justice Kennedy*

Justice Kennedy wrote a short judgment concurring in the result but offering a different analysis of *Eisentrager*. He stated that the majority's "approach is not a plausible reading of *Braden* or *Johnson v. Eisentrager*",[21] instead commending Scalia J.'s analysis of these cases, although coming to the opposite result. Kennedy J. held that *Eisentrager* established an analytical framework under which an "ascending scale of rights" depends on an individual's degree of connection with the United States. At one end of the scale are citizens and those physically present within the United States who have "implied protection". At the other end, "there is a realm of political authority over military affairs where the judicial power may not enter".[22] Kennedy J. stated that two critical differences between the facts *Rasul* and *Eisentrager* permitted a finding of jurisdiction: "First, Guantanamo Bay is in every practical respect a United States territory", and second, "the detainees at Guantanamo Bay are being held indefinitely, without benefit of any legal proceedings to determine their status".[23]

4. *The Dissent*

Justice Scalia, who was joined by Rehnquist C.J. and Thomas J., wrote a thorough dissent, directly addressing each of the majority's arguments and labelling the decision a "wrenching departure from precedent".[24] While the dissent exposes many inadequacies in the majority's analysis, Scalia

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[18] 124 S. Ct. 2739 (2004).
[19] Ibid., at 2754.
[20] Ibid., at 2756.
[21] Ibid., at 2699.
[22] Ibid., at 2700.
[23] Ibid.
[24] Ibid., at 2710.

J.'s concerns in relation to the scope of the majority's decision, and its consequences, appear to be greatly exaggerated.

Scalia J. argued that the language of the *habeas corpus* statute presupposes that the detainee will be within the territorial jurisdiction of a particular federal district court.[25] As previous Supreme Court cases have entertained the *habeas corpus* claims of American citizens imprisoned outside the United States,[26] and the U.S. government conceded in oral argument that U.S. citizens imprisoned at Guantanamo would have a constitutional right to have their petitions heard,[27] Scalia J. was prepared to accept an "atextual extension"[28] of the statute covering Americans held outside U.S. territory, but not aliens.

Next Scalia J. discussed *Aherns*, *Eisentrager* and *Braden*. He argued that the Supreme Court in *Eisentrager* had ruled out extra-territorial jurisdiction over *habeas corpus* petitions under both the Constitution and the *habeas corpus* statute.[29] Scalia J. stated that it is "implausible in the extreme" that this position was altered by *Braden*, where the court was careful to distinguish *Aherns* and did not mention *Eisentrager*.[30] He argued that under the majority's interpretation of *Braden,* federal courts would have jurisdiction over *habeas corpus* petitions by aliens held anywhere in the world, so long as their custodians could be reached by a valid service of process, a result Scalia J. described "breathtaking".[31] This analysis appears to be misconceived, because it ignores the majority's focus on the United States' "plenary and exclusive jurisdiction" at Guantanamo.

Pursuant to his own interpretation of the effect of the majority's analysis of *Braden*, Scalia J. called the majority's analysis of the status of Guantanamo Bay "a puzzlement".[32] He stated that the consequence of the majority's analysis is that all U.S. domestic law must apply at

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[25] Ibid., at 2701.
[26] *Burns v. Wilson*, 346 U.S. 137 (1953); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); and *Hirota v. MacArthur*, 338 U.S. 197 (1948).
[27] *Rasul*, 124 S. Ct. 2686 at 2696 (2004).
[28] Ibid., at 2706.
[29] Ibid., at 2703.
[30] Ibid., at 2701.
[31] Ibid., at 2706.
[32] Ibid., at 2707.

Guantanamo Bay, but continued: "Fortunately, however, the Court's irrelevant discussion also happens to be wrong."[33] For Scalia J. since: "'jurisdiction and control' obtained by lease is no different in effect from 'jurisdiction and control' acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws."[34] It is interesting to note that this reveals an assumption that the use of force by the U.S. in Afghanistan and Iraq was lawful.

Finally, Scalia J. examined the historical *habeas corpus* cases cited by the majority, arguing that, in each, the relevant area was in fact the sovereign territory of the Crown, and in any case that the petitioners were British subjects.[35]

5. *The Result*

The petitioners' cases were remanded to the Federal District Court for the District of Columbia for hearing on the merits.

B. Hamdi v. Rumsfeld

To understand the action taken by the U.S. government after the Supreme Court's decisions of the 28 June 2004, and the subsequent decisions in the District Court, it is necessary to consider briefly the Court's findings in *Hamdi*.

Hamdi involved the *habeas corpus* petition of an American citizen who was held as an "enemy combatant" at a navy brig in South Carolina. Because the government did not define "enemy combatant", the Court limited its consideration to the legality of the detention of citizens who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there".[36] The combined result of the four divergent judgments delivered by the Court was a finding that the detention of such individuals was authorised by the Congressional resolution "Authorisation for Use of

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[33] Ibid., at 2707-8.
[34] Ibid., at 2708.
[35] Ibid., at 2708-2710.
[36] *Hamdi*, 124 S. Ct. 2633 at 2639 (2004).

Military Force" (A.U.M.F.),[37] but that detainees have the right to challenge the factual basis of the executive's finding that they are an "enemy combatant".[38]

The plurality held that the due process clause[39] informs the content of the writ of *habeas corpus*, requiring that the prisoner be given notice of the factual basis of their classification as an enemy combatant, a fair opportunity to rebut the factual assertions before a neutral decision maker,[40] and a right to counsel.[41] However, the plurality found that the requirements of due process would accommodate the admission of hearsay evidence and a rebuttable presumption in favour of the Government's evidence.[42] The plurality stated that "there remains the possibility that the standards we have articulated could be met by an appropriately authorised and properly constituted military tribunal".[43]

Scalia, Stevens, Souter and Ginsberg JJ. dissented by holding that Hamdi's detention was not authorised.[44] Souter and Ginsberg JJ. joined the order to remand made by the four members of the plurality in order to give effect to the conclusions of the eight members of the Court who rejected the Government's position that the petitioner's detention was not subject to review. They also supported the plurality's finding that the prisoner has a right to counsel, notice of the factual basis for their classification, and an opportunity to rebut the asserted factual basis. However, Souter and Ginsberg JJ. expressly disagreed with the plurality's finding that an evidentiary presumption casting the burden of rebuttal on the prisoner and trial by military tribunal could satisfy the requisite due process.[45] This left these elements of the plurality's findings with no binding precedential effect.

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[37] Ibid., at 2679 (O'Connor J. joined by Rehnquist C.J., Kennedy and Breyer JJ.).
[38] Ibid., at 2660.
[39] *United States Constitution,* Amend. V.
[40] *Hamdi*, 124 S. Ct. 2633 at 2648 (2004).
[41] Ibid., at 2652.
[42] Ibid., at 2648.
[43] Ibid., at 2648.
[44] Ibid., at 2652-74.
[45] Ibid., at 2651.

C. The Combatant Status Review Tribunals and the Military Commissions

Nine days after the Supreme Court's decisions in *Rasul* and *Hamdi*, the United States administration issued an executive order establishing the Combatant Status Review Tribunals (C.S.R.T.).[46] The C.S.R.T. are charged with establishing whether individual detainees are "enemy combatants". In the order, the Bush Administration defined that term for the first time:

> The term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[47]

The C.S.R.T. are composed of U.S. military officers. Each detainee is assisted in understanding the proceedings and presenting their case by a "Personal Representative"; a military officer who is not a lawyer. The personal representative can review any material in the possession of the Department of Defence that is relevant to the determination of the detainee's status as an "enemy combatant", but only non-classified information can be shared with the detainee. Detainees can attend the tribunal's proceedings unless their presence would compromise national security. The detainee may testify and present any relevant and reasonably available evidence rebuttal. The tribunal is not bound by formal rules of evidence and may consider hearsay evidence. It must make its determination based on the preponderance of the evidence but there is a rebuttable presumption in favour of the Government's evidence. Once the C.S.R.T. has come to its decision, the record is reviewed for legal sufficiency by the Staff Judge Advocate for the Convening Authority, who makes a recommendation to the Convening Authority either to approve the tribunal's decision or remit the case for further proceedings. The

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[46] Deputy Secretary of Defence, *Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal* (2004) <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.> at 7 July 2004.

[47] Deputy Secretary of Defense, above n. 46.

convening authority is designated by the Secretary of Defence to administer the C.S.R.T.

The U.S. Executive asserts a right to detain those determined to be "enemy combatants" until the President determines that the detainee is no longer a threat to U.S. national security or declares that the "war on terrorism" is concluded.[48] The Bush Administration concedes that this may take many generations and it cannot say for certain how it will determine when the "war" has ended.[49]

The C.S.R.T. are different from the military commissions established to try some Guantanamo detainees for alleged offences against the laws of war. In those proceedings, there is a presumption of innocence and the detainee has a right to counsel. A broad range of evidence is withheld from the detainee including: evidence, which is classified or otherwise protected; evidence that might implicate the physical safety of participants; and evidence that might compromise the integrity of intelligence and law enforcement sources and methods or other national security interests.[50] The detainee may be excluded from parts of the proceedings, although all evidence is disclosed to their counsel who is present for the entire proceedings. Parts of the proceedings that do not involve classified or otherwise sensitive information are open to the media.[51]

D. The Subsequent Cases

All *habeas corpus* petitions filed by prisoners at Guantanamo Bay are heard in the District Court for the District of Columbia.[52] In the first three such cases to follow *Rasul*, *Khalid v. Bush*[53] and *Re Guantanamo Detainee Cases*[54] and *Hamdan v. Rumsfeld*,[55] judges of that court came to very

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[48] *Re Guantanamo Detainees Cases*, D.C. No. 02-CV-0299 (Unreported, 2005), at 10.
[49] Ibid., at 40.
[50] *Hamdan v. Rumsfeld,* 344 F. Supp. 2d. 152 at 167 (D.C., 2005) (*"Hamdan"*).
[51] *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism* 32 C.F.R. § 9.1 (2001); and *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57 at 833 (2001).
[52] *Gherebi v. Bush,* 388 F. Supp. 2d. 91 at 94 (D.C., 2004).
[53] *Khalid v. Bush,* D.C. No. 04-CV-1142 (Unreported, Leon J., 2005) (*"Khalid"*).
[54] *Re Guantanamo Detainees Cases*, D.C. No. 02-CV-0299 (Unreported, 2005).

different decisions about the merits of the detainee's claims, including three different findings about the applicability of the Third Geneva Convention.[56]

1. *Khalid v. Bush*

In *Khalid*, the *habeas corpus* petitions of seven aliens captured in Bosnia and Pakistan and held at Guantanamo Bay were heard by Leon J. He took a narrow view of the finding in *Rasul*, quoting the majority's statement that it was considering only: "the narrow ... question whether the United States courts lack *jurisdiction* to consider challenges to the legality of the detention of foreign nationals captured abroad ... and incarcerated at Guantanamo".[57]

According to Leon J., the Supreme Court had not decided the question of "whether these same individuals possess any substantive rights on the merits of their claims".[58] In granting the government's motion to dismiss he held that even accepting the facts as pleaded in the *habeas corpus* petitions, and extending every reasonable inference in the petitioners' favour, "no viable legal theory exists by which the court could issue a writ of *habeas corpus* under these circumstances".[59]

Leon J. found that the prisoners' detention was authorised under the A.U.M.F. and the President's constitutional war powers,[60] a finding not altered by the fact that the detainees were not captured on or near the battlefield.[61] He further held that as non-resident aliens detained outside the United States, the petitioners had no rights under the United States Constitution.[62] Further, there was no United States statute that made the

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[55] *Hamdan,* 344 F. Supp. 2d. 152 (D.C., 2005).
[56] *Convention (III) Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 U.N.T.S. 135 (entered into force 21 October 1950).
[57] *Khalid*, D.C. No. 04-CV-1142 (Unreported, Leon J., 2005).
[58] Ibid.
[59] Ibid., at 2.
[60] Ibid., at 9-14.
[61] Ibid., at 13.
[62] Ibid., at 14-19.

detainees' custody unlawful,[63] because the statutes invoked "do not create a private right of action, and therefore, are not cognisable in *habeas*".[64]

Leon J. disposed of the detainees' arguments under the *Third Geneva Convention* by holding that it does not apply, as the detainees were not captured in the zone of hostilities in Afghanistan.[65] He also dismissed their arguments under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[66] and the *International Covenant on Civil and Political Rights*[67] because those treaties are not "self-executing" and thus do not create any individually enforceable rights in U.S. law. While recognising that torture is in violation of customary international law and U.S. law, Leon J. held that the petitioners' claims that their torture and arbitrary and prolonged detention are contrary to international law were not justiciable. This is because it would be "impermissible ... under our constitutional system of separation of powers for the judiciary to engage in a substantive evaluation of the conditions of their detention".[68]

2. *Re Guantanamo Detainees Cases*[69]

In *Re Guantanamo Detainees Cases*, Green J. considered the U.S. Government's motion to dismiss in 11 different cases, including that of the petitioners in *Rasul*.

As a matter of case management, Green J. was assigned to rule on the substantive and procedural issues common to the eleven different cases, which were transferred to her by other judges of the court for that purpose. The only exception was *Khalid*, where Leon J. exercised his discretion to decide the case himself.[70] Green J.'s judgment deals with legal issues

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[63] Ibid., at 21.
[64] Ibid., at 24.
[65] Ibid., at 26.
[66] Opened for signature 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987).
[67] Opened for signature 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).
[68] *Khalid*, D.C. No. 04-CV-1142 (Unreported, Leon J., 2005).
[69] Deputy Secretary of Defense, above n. 46.
[70] *Re Guantanamo Detainees Cases*, D.C. No. 02-CV-0299 (Unreported, 2005), at 10.

surrounding the C.S.R.T., not the military commissions. It serves as an advisory opinion for petitions brought subsequently. The judges hearing those petitions may adopt its reasoning at their discretion.[71] The opinion includes classified material that is redacted in the publicly available version and this makes it impossible to understand some of the examples that Green J. has drawn from the record to support her argument.

Green J. rejected the government's interpretation of *Rasul* that Leon J. accepted in *Khalid*. She characterised this interpretation as suggesting that:

> *Rasul* clarified that a detainee has every right to file papers in the Clerk's Office alleging violations of the Constitution, statutes, treaties and other laws, and although the Court has jurisdiction to accept the filing and to consider those papers, the Court must not permit the case to proceed beyond a declaration that no underlying substantive issues exist.[72]

Instead, Green J. quoted from a footnote in the *Rasul* judgment stating that the "petitioners' allegations...unquestionably describe custody in violation of the Constitution or laws or treaties of the United States".[73] After a thorough review of the history of case law regarding the application of the Constitution outside United States territory, Green J. held that: "in light of the Supreme Court's decision in *Rasul* it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply".[74]

After deciding that the detainee's had a constitutional right to due process under the Fifth Amendment, Green J. turned to *Hamdi* to determine the content of that right, stating that "although the detainees before this court are aliens ... that fact does not lessen the significance of their interests in freedom from incarceration and from being held virtually *incommunicado* from the outside world".[75]

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[71] Ibid., at 15.
[72] Ibid., at 18.
[73] Ibid., at 35.
[74] Ibid., at 38.
[75] Ibid., at 39.

Green J. held that the C.S.R.T. do not meet the requirements of due process in three respects. First, detainees are not given access to classified information before the tribunal. The District Court's own protective order allows classified information in the proceedings to be disclosed to the detainee's counsel, but not the detainee themselves.[76] Green J. distinguished this from the C.S.R.T. procedure, where classified information is disclosed to the detainee's Personal Representative. The important differences were that the Personal Representative is neither a lawyer nor the detainee's advocate and their discussions are not confidential as the Personal Representative is obliged to divulge inculpatory information to the C.S.R.T.[77]

Second, describing allegations made by Mamdouh Habib, Green J. held that the C.S.R.T.'s acceptance of evidence obtained by torture or other coercion could be a breach of the detainee's rights. She stated that "at a minimum, due process requires a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture".[78]

Third, Green J. held that the "vague and overly broad" definition of "enemy combatant" used by the C.R.S.T. could lead to a breach of due process rights in some cases. As discussed above, the decision in *Hamdi* was based on a definition of "enemy combatant" meaning an individual who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan *and* who engaged in an armed conflict against the United States there".[79] The definition used by the C.S.R.T. uses the word "includes" instead of "and" (see above). Green J. held that:

> Use of the word "includes" indicates that the government interprets the A.U.M.F. to permit the indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies ... [This] violates long standing principles of due process by permitting the detention of individuals based solely on their membership in anti-American

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[76] *Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba,* 344 F. Supp. 2d. 174, 180 at ¶30 (2005).
[77] *Re Guantanamo Detainees Cases*, D.C. No. 02-CV-0299 (Unreported, 2005), at 54.
[78] Ibid., at 56.
[79] Ibid., at 59-60.

> organisations rather than on actual activities supporting the use of violence or harm against the United States.[80]

Green J. held that detainees that were members of the Taliban had rights under the *Third Geneva Convention*. In this finding she applied the reasoning of Roberson J in *Hamdan* (discussed below) in all respects except one. She disagreed with his finding that the convention applies to al Qaeda members, stating that it did not apply because al Qaeda is not a party to the convention.[81]

3. *Hamdan v. Rumsfeld*

Hamdan was a national of Yemen captured in Afghanistan and held in Guantanamo Bay. On 13 November 2001, the President issued a Military Order finding that "there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States".[82] On 3 July 2003 the President issued an order that Hamdan be tried by military commission and on 9 July 2004 he was formally charged with "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism".[83]

Hamdan was appointed military counsel and after his petition to the Appointing Authority (designated by the Secretary of Defence to administer military commissions) to be tried under the Uniform Code of Military Justice (U.C.M.J.) was denied, he filed a petition for *habeas corpus*, which was heard by Robertson J. in the District Court for the District of Columbia. In the interim, on 3 October 2004, Hamdan appeared before a C.S.R.T., which determined that he was an "enemy combatant" as it concluded that he was either a member of, or associated with, al Qaeda.[84] Robertson J.'s opinion addresses only Hamdan's prospective trial before a military commission; he did not contest the finding of the C.S.R.T.

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[80] *Re Guantanamo Detainees Cases*, D.C. No. 02-CV-0299 (Unreported, 2005), at 60-61.
[81] Ibid., at 70.
[82] Ibid., at 155.
[83] Department of Defense, *Military Commission List of Charges for Salim Ahmed Hamdan*, (2004) <http://wwwdefenselink.mil/news/Jul2004/d20040714hcc.pdf> at 14 July 2004.
[84] *Hamdan,* 344 F. Supp. 2d. 152 at 161 (D.C., 2005).

Robertson J. held that Hamdan could not be tried by military commission because of the operation of two U.S. statutes. According to his analysis, under 10 U.S.C. § 821 military commissions may only be used to try offenders if such a trial is consistent with the laws of war. Hamdan could not be tried by military commission because the *Third Geneva Convention* requires that unless an individual is determined by a competent tribunal not to be a prisoner of war (P.O.W.), he must be tried by court martial under the U.C.M.J.[85] Robertson J. also found that under 10 U.S.C. § 836 Hamdan could not be tried by military commission because its procedures are 'contrary to or inconsistent with' those applicable to courts martial.[86]

Robertson J. held that the *Third Geneva Convention* applies to the conflict in Afghanistan because both the United States and Afghanistan are parties to the convention, which in Article 2 is stated to apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them". Robertson J. rejected the contention that the convention would not apply to members of al Qaeda. He stated that:

> the government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not by what particular faction a fighter is associated with.[87]

Quoting the International Court of Justice's decision in *Nicaragua*,[88] Robertson J. held that the *Geneva Conventions*' common Article 3 is a "minimum yardstick" that applies in both international and non-international conflicts.[89] Article 3(1)(d) applies to "persons taking no part in hostilities" including members of the armed forces who are held in detention, and prohibits: "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are

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[85] Ibid., at 158-166.
[86] Ibid., at 166-172.
[87] Ibid., at 161.
[88] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits)* [1986] I.C.J. Rep. 14 at 114.
[89] *Hamdan,* 344 F. Supp. 2d. 152 at 163 (D.C., 2005).

recognised as indispensable by civilised peoples". Article 102 of the *Third Geneva Convention* further provides that: "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure by the same courts as in the case of members of the armed forces of the Detaining Power". Robertson J. held that this requires detainees to be tried, as U.S. soldiers would be, by court martial under the U.C.M.J.[90]

Robertson J. emphatically rejected the U.S. Government's argument that Hamdan could not invoke the *Third Geneva Convention* because the treaty was not "self-executing". First, he stated that "the Convention is implicated in this case by the operation of the statute that limits trials by military tribunal to offenders ... triable under the law of war".[91] He also found that:

> Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty.[92]

In a footnote, Robertson J. made several remarks of interest regarding the attitude of the U.S. Government to the *Geneva Conventions*. Noting that the U.S. had refused Yemeni diplomats permission to visit Hamdan at Guantanamo Bay, he said: "It ill behoves the government to argue that enforcement of the Geneva Conventions is only to be had through diplomatic challenges".[93] He also stated that:

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[90] Ibid., at 165.
[91] Ibid., at 164.
[92] Ibid., at 165.
[93] Ibid.

> The government has asserted a position starkly different from the positions and behaviour of the United States in previous conflicts, one that can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad.[94]

Robertson J. further noted that "other governments have already begun to cite the United States' Guantanamo policy to justify their own repressive policies".[95]

Robertson J. rejected the government's argument that the Court could conclude that Hamdan was not a P.O.W. because the C.R.S.T. had determined that he was a member of al Qaeda, and al Qaeda members cannot meet the requirements for P.O.W. status under Article 4 of the Convention, because they do not carry their arms openly and operate under the laws and customs of war.[96] In doing so, he relied on Article 5 of the *Third Geneva Convention*, which requires that if there is any doubt whether an individual satisfies Article 4, they must be treated as a P.O.W. until their status has been determined by a competent tribunal. Robertson J. also rejected the proposition that in finding that Hamdan was a member of or associated with al Qaeda, the C.R.S.T. had *de facto* determined that he was not a P.O.W., because the President had already determined that al Qaeda members cannot be P.O.W.s under the *Geneva Conventions*. He noted that the President is not "a tribunal" as required by Article 5.[97]

Robertson J found that the military commissions' procedures were in breach of the Article 102 of the *Third Geneva Convention* and the U.S. statute requiring that they not be "contrary or inconsistent with" the procedures of a court martial, because the accused can be excluded from the proceeding and denied access to a broad range of classified and otherwise sensitive evidence. He stated that "the right to trial 'in one's

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[94] Ibid., at 163.

[95] Ibid., at 163, citing Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* (2003), at 77-80.

[96] *Convention (III) relative to the Treatment of Prisoners of War,* opened for signature 12 August 1949, 75 U.N.T.S. 135, arts 4(2)(c) and (d) (entered into force 21 October 1950).

[97] *Hamdan,* 344 F. Supp. 2d. 152, 163 (D.C., 2005).

presence' is established as a matter of international humanitarian and human rights law".[98]

Robertson J. was not willing to rule on what procedures would be required by common Article 3, which would apply if Hamdan was determined by a competent tribunal not to be a P.O.W., because its requirement for "'a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples' has no fixed, term of art meaning".[99] Robertson J. was also unwilling to apply Article 103 of the *Third Geneva Convention*, because although the article "does bar pre-trial detention exceeding 90 days, it provides no mechanism or guidance for dealing with violations".[100] Further, a ruling in Hamdan's favour under Article 103 would be of no effect because he did not contest the C.S.R.T.'s determination that he was an "enemy combatant", and so under *Hamdi* he could be held until the cessation of hostilities in Afghanistan.[101]

III. CONCLUSION

In *Rasul* and *Hamdi*, the Supreme Court took a familiar route by strictly limiting the scope of the questions it decided. The four divergent opinions in *Hamdi* and the brevity of analysis in both cases left many issues regarding the Guantanamo detainees unresolved. This allowed scope for judges in subsequent lower court decisions to come to starkly different results about the outstanding issues in the petitioner's claims. The result is an expanding web of litigation.

Complicating matters further is the dynamic relationship between courts' rulings and the actions of Bush Administration with regard to the Guantanamo detainees. While adjusting its practices in response to the Supreme Court's decisions, the government naturally seeks to interpret

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[98] Ibid., at 168 citing the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 U.N.T.S. 171, art. 14(d)(3) (entered into force 23 March 1976); and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 U.N.T.S. 3, art. 75.4(e), (entered into force 7 December 1978).

[99] *Hamdan,* 344 F. Supp. 2d. 152 at 165 (D.C., 2005).

[100] Ibid., at 173.

[101] Ibid., at 172-3.

each decision in its most favourable light. By establishing the C.S.R.T. in response to *Rasul* and *Hamdi*, the U.S. Government posed a new question for the lower courts: whether its actions were in accordance with the law elucidated in those cases. Since these cases were decided the government has voluntarily released many of the petitioners involved, including Mamdouh Habib and, at the time of writing, it is reportedly considering changing the rules of the military commissions.[102] Even so, the U.S. Government and the lawyers representing the detainees have demonstrated that they will always appeal a case decided against them, and given the principles and interests at stake it seems probable that the Supreme Court will eventually contend with further issues regarding the rights of the Guantanamo detainees.

[102] Tim Golden, "U.S. Is Examining a Plan to Bolster the Rights of Detainees", *New York Times* (New York) 27 March 2005.