

the terrorist attacks of September 11, 2001. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), the Court ruled that American citizens, as well as noncitizens who were detained at the military detention facility at Guantanamo Bay Naval Base, could challenge their enemy combatant classification through habeas corpus in federal district courts. After these decisions, though, in the Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA), Congress tried to revoke US district court habeas jurisdiction for those held at Guantanamo Bay. Finally, in *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court held that these attempts to strip district courts of habeas powers were unconstitutional.

In the twenty-first century, habeas corpus still serves as the primary tool for state and federal prisoners to challenge the constitutionality of their detention. State prisoners primarily use habeas corpus to challenge the constitutionality of their detention as a petition to federal courts, though Congress has now limited the amount of habeas challenges that both state and federal prisoners can make. Detainees held in Guantanamo Bay now have the opportunity to challenge the government's charge that they are "enemy combatants." These habeas petitions, though, have rarely been successful, and both the Bush and Obama administrations have released the vast majority of those detainees held in Guantanamo Bay. Even with significant limitations, habeas is still functioning as the basic legal tool to guarantee that individuals held by their government have the opportunity to challenge the constitutionality of their detention.

SEE ALSO *Article I, United States Constitution; Blackstone, William; Boumediene v. Bush; Ex parte McCordle; Ex parte Milligan; Federalist, The; Magna Carta.*

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Justin J. Wert
University of Oklahoma

HABITS OF THE HEART

SEE *Tocqueville, Alexis de.*

HAMDI V. RUMSFELD

Hamdi v. Rumsfeld, 542 U.S. 507 (2004), was the first major terrorism case decided by the US Supreme Court after the attacks of September 11, 2001, and remains today one of the most important war powers decisions handed down by the Court in the ensuing decade. Although the suit involved a narrow question about the US government's power to detain without trial as an "enemy combatant" a US citizen captured in Afghanistan, it resulted in a landmark ruling that continues to play a central role in defining the legal contours of US counterterrorism policy.

BACKGROUND

Yaser Esam Hamdi was captured in Afghanistan by the Northern Alliance, an Afghan military front formed in opposition to Taliban rule, sometime in the fall of 2001. Like hundreds of other Northern Alliance detainees, Hamdi was turned over to US military authorities shortly after the commencement of US combat operations in late October. He was then transferred to the US detention facility at Guantanamo Bay Naval Base in January 2002. Not long thereafter, the US government discovered that Hamdi was a natural-born US citizen; although he had spent most of his childhood in Saudi Arabia, he was born in Louisiana in 1980. Thus Hamdi was subsequently transferred to a military brig in Norfolk, Virginia—the first US citizen detained without charges as an "enemy combatant" as part of the then-nascent conflict with al-Qaeda and the Taliban.

In June 2002, Hamdi's father filed a petition for a writ of habeas corpus on Hamdi's behalf in the US District Court for the Eastern District of Virginia. Hamdi claimed that his detention without charges was unlawful because it was (1) not authorized by Congress; (2) therefore in violation of the Non-Detention Act, 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress"; (3) in violation of his right to a hearing under Article 5 of the Third

Geneva Convention; and (4) unconstitutional in violation of the Fifth Amendment's due process clause.

After a series of preliminary rulings and interlocutory appeals, the US Court of Appeals for the Fourth Circuit affirmed Hamdi's detention—and ordered his case dismissed—in January 2003. Specifically, the Court of Appeals held that (1) the Authorization for the Use of Military Force (AUMF) passed by the US Congress in September 2001 provided statutory authority for Hamdi's detention (thereby satisfying the Non-Detention Act); (2) Hamdi could not personally invoke the relevant provisions of the Geneva Conventions; and (3) an affidavit offered by the government purporting to substantiate the factual basis for Hamdi's detention was sufficient to satisfy the due process clause.

Hamdi unsuccessfully sought to have that decision reheard by the en banc Court of Appeals, after which he petitioned the US Supreme Court for a writ of certiorari. On January 9, 2004, to the surprise of many observers, the Supreme Court granted certiorari. It heard arguments on April 28—alongside the case of Jose Padilla, the other US citizen held as an "enemy combatant." Two months later, on June 28, a sharply divided Supreme Court delivered a judgment siding with the Fourth Circuit on detention authority, but vigorously disagreeing as to due process.

THE GOVERNMENT'S DETENTION AUTHORITY

Five of the nine justices held that, assuming the government could meet its evidentiary burden, Hamdi's detention was not unlawful. Writing for a four-justice plurality (including herself, Chief Justice William Rehnquist, and Justices Anthony Kennedy and Stephen Breyer), Justice Sandra Day O'Connor concluded that Hamdi's detention was authorized by the AUMF—which authorized the president "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Although the AUMF did not specifically refer to detention, Justice O'Connor concluded that it should follow that it applied to "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." As she explained, "detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured," is "an exercise of the 'necessary and appropriate force'" that Congress authorized under the AUMF. And because the AUMF authorized Hamdi's detention, it necessarily satisfied the Non-Detention Act. At the same time, Justice O'Connor

stressed, "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war," such an understanding of the government's detention authority "may unravel." But because of the continuing hostilities then under way in Afghanistan, "that is not the situation we face as of this date."

The fifth vote for the result came from Justice Clarence Thomas, who agreed that the AUMF authorized Hamdi's detention but argued in a solo opinion that the president would have inherent constitutional authority to detain enemy combatants even without the AUMF.

The four dissenters offered two different rationales for their disagreement. Writing for himself and Justice Ruth Bader Ginsburg, Justice David Souter argued that the Non-Detention Act was a clear statement rule—and so necessarily required *affirmative* indicia of legislative intent to authorize the detention of US citizens (which the AUMF was demonstrably lacking). Justice Antonin Scalia, joined by Justice John Paul Stevens, agreed with Justice Souter that the AUMF did not authorize Hamdi's detention but would have gone further, holding that no statute *could* authorize the military detention of a US citizen without charges. In their view, only by validly suspending habeas corpus could Congress provide such authority—and there was no argument that the AUMF was such a statute.

THE GOVERNMENT'S EVIDENTIARY BURDEN

Although a 5–4 majority ruled for the government with respect to its authority to detain Hamdi, a no less significant ruling was the rejection—by a 6–1 vote—of the modest evidentiary burden adopted by the Court of Appeals and endorsed by the government. Thus, whereas the Fourth Circuit had held that a government affidavit was a sufficient evidentiary basis on which to uphold Hamdi's detention, Justice O'Connor held (in a part of her opinion joined by Justices Souter and Ginsburg) that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Although the Court in *Hamdi* did not specify the exact evidentiary burden that should apply on remand, it was emphatic that the "some evidence" standard relied on by the lower courts was constitutionally inadequate—notwithstanding Justice Thomas's argument, in dissent, that "some evidence" was enough.

CONTINUING IMPLICATIONS

Even though Hamdi and Padilla remain the only two US citizens held as enemy combatants since September 11 (and Hamdi the only one captured in Afghanistan), the

Supreme Court's two holdings in *Hamdi* have both proven to be foundational with regard to the legal contours of US counterterrorism policy over the ensuing decade. This is the case even though Hamdi was released to Saudi Arabia in 2004 (in exchange for relinquishing his citizenship), and Padilla was transferred to civilian criminal custody (and subsequently convicted of criminal terrorism charges) in 2006. Thus, for example, Justice O'Connor's interpretation of the AUMF has formed the basis for a rich body of jurisprudence in the lower courts arising out of the detention of noncitizens at Guantanamo Bay, with those courts assuming that Justice O'Connor's understanding of the government's detention authority applies a fortiori to noncitizens captured by the United States overseas. To similar effect, Justice O'Connor's rejection of the "some evidence" standard led the government to provide Combatant Status Review Tribunals (CSRTs) to all of the Guantanamo detainees—and has also shaped the procedural standards lower courts have utilized in the Guantanamo cases as well. More important for Hamdi's case, the higher procedural burden may help to explain why, rather than litigate his continuing detention on remand, the government entered into a conditional release agreement—including a proviso that Hamdi voluntarily renounce his citizenship.

But inasmuch as *Hamdi* has provided the foundation for the legal architecture, it is a foundation that the Supreme Court did not revisit in the decade that followed—even as (1) hostilities in Afghanistan appeared to be winding down; and (2) the threats the United States faced overseas were increasingly coming from individuals and groups with less and less of a connection to the September 11 attacks. As Justice Breyer explained in *Hussain v. Obama*, 134 S. Ct. 1621 (2014), in an opinion concurring in the denial of certiorari in another detention case, the Court never subsequently clarified whether the AUMF authorizes detention of individuals who were *members* of al-Qaeda or the Taliban but were *not* "engaged in an armed conflict against the United States" in Afghanistan prior to their capture. As he continued, "[n]or have we considered whether, assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention."

With the United States ending its combat role in Afghanistan at the end of 2014, and with increasing debate in Congress over whether the AUMF should be refined or repealed—as President Barack Obama proposed in a May 2013 speech—*Hamdi* continues to loom large not just because it is the Supreme Court's only precedent on the scope of the AUMF, but because of the increased concerns that, as Justice O'Connor suggested, its reasoning "may unravel."

SEE ALSO *Citizenship; Federal Powers: War; O'Connor, Sandra Day; Scalia, Antonin; Separation of Powers; Thomas, Clarence; War on Terrorism.*

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Stephen I. Vladeck

American University Washington College of Law

HAMILTON, ALEXANDER

Alexander Hamilton was born on January 11, 1755, to Rachael Faucett Lavien on the island of Nevis in the West Indies. His father was James Hamilton, an itinerant Scottish merchant. At the time Rachael was separated from her husband, John Lavien. In 1765 James and Rachael moved to St. Croix, but a few months later James abandoned his common law wife and family. Rachael opened a general store, and Alexander worked there until becoming a clerk in the mercantile firm of Beekman and Cruger. When Alexander was fourteen, he wrote to a friend that he "would willingly risk my life . . . to exalt my Station" (Syrett 2011, 1:4).

Hamilton's brilliance was well recognized. New York City merchant Nicholas Cruger (1743–1800) and others financed Hamilton's move to the mainland for a formal education. He attended a grammar school in Elizabethtown, New Jersey, and in 1773 entered King's College in New York City. But Hamilton never graduated, because the American Revolution began, and he joined the military forces of New York in 1775.

Hamilton became a captain of the New York provincial company of artillery, which fought in New Jersey at the battles at New Brunswick, Trenton, and Princeton. On March 1, 1777, he joined General George Washington's staff as an aide-de-camp. In February 1781, after a trivial dispute between them, Hamilton resigned his position as Washington's aide-de-camp. At the end of July 1781, despite Hamilton's rift with Washington, the general did give him what he had always wanted: the command of a light infantry battalion. Hamilton was