

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

The research paper will discuss the legal rights of alien detainees from Afghanistan and Iraq, captured and/or controlled by the U.S. Government, in unconventional warfare situations and held outside the U.S.

A critical review of the US Government reaction to the detained suspects and their right to a writ of habeas corpus will be argued in the context of the executive endorsement of different statutes and acts of the President of the United States and the judiciary review of these acts, and subsequent Supreme Court case law on the issue.

I. The Habeas Corpus Writ.

Understanding the issues in habeas corpus cases throughout the war on terror entails some knowledge of the historical value of the Great Writ, the rules governing its availability, and the legal and political issues surrounding its implementation.

The English writ of habeas corpus ad subjiciendum has long played a central role in protecting individual liberty. American jurisprudence relates to the writ with the federal court relitigation of constitutional issues raised by prisoners convicted in state courts. The historic use of habeas corpus was used to protect those detained by the executive power without previous judicial decision.

[\[1\]](#)

The procedures of the writ's applicability have not changed much over the centuries; a detainee or his/her representative petitions a court to issue a writ directing the prisoner's custodian to "provide the body" and to show lawful authority for the detention. In case the court finds the detention unlawful, it can order the prisoner's release.

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

Habeas corpus enjoyed a great standing among the founding fathers, as being the only remedy in the Constitution which protects against unlawful detention. Article I, Section 9, Clause 2 provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

Scholars [2] have examined three issues that evolve in habeas actions for the federal courts: the question of jurisdiction, substantive rights, and procedural rights.

Since 1789, the judiciary act provided the federal courts with statutory jurisdiction to review the lawfulness of federal executive detentions. [3] 28 U.S.C. § 2241 limits the courts to act “within their respective jurisdictions.” [4]

The Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA) also have restricted the jurisdiction over alien detainees determined by the executive to be enemy combatants (or awaiting such a determination). Habeas jurisdiction not only authorizes the courts to hear cases, but also grant a remedy of release unless the custodian can show that detention is lawful.

The Court in *Hamdan v. Rumsfeld* [5], for example, does not identified any constitutional or statutory rights that the government had violated, instead held that to subject Hamdan to a war crimes trial before a military tribunal that Congress had prohibited was not lawfully authorized.

While habeas jurisdiction can be limited by Congress, the principles and structure of the Constitution require that some courts must be available to determine whether the Constitution and laws create substantive rights to judicial relief. The Court in *Hamdi* [6], for example, invalidated the Executive’s detention scheme as failing to satisfy due process standards. “[A] state of war is not a blank check for the President when it comes to the rights of Nation’s citizens” [7], the Court says.

Challenging the legality of a detention, the habeas petitioners can raise questions that focus on separation-of-powers matters and the executive authority to detain. The detainee can claim protected constitutional rights: for example, even with congressional authorization, the executive

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

power could not detain a citizen only for expressing opposition to a war.

[8]

Another question is the so called subconstitutional rights, that have their existence in statutes or treaties, which specified the circumstances when a person should be free from detention.

The question whether a detainee is categorized as a person whose detention without criminal trial, or criminal punishment by a military commission, is lawful, involves procedures that are distinctive from the substantive issues described above. One of these procedures is the initial administrative determination of an "alien enemy", during wartime. The question is whether the Government has followed constitutionally adequate procedures in finding that a particular detainee is in fact an alien enemy. In *Hamdi*, the Court, while finding substantive authorization for detaining "enemy combatants" seized on battlefields in Afghanistan, also defined the procedures required to make legally valid an executive determination that the detainee in question truly is an enemy combatant.

Habeas court's review of the Executive's determination of legal and factual questions underlying its decision to detain is empowered by the Courts' view that continuing detention is lawful only if a court independently determines some issues or engages in sufficiently searching review.

habeas corpus

[9]

Historically, courts have managed to adapt the general norms of positive, statutory law to the traditional notion of fairness and the constitutional principle of due process, while conforming to the imperatives of national security and public interest.

II. The Geneva Conventions and *Hamdan v. Rumsfeld*.

In *Hamdan v. Rumsfeld*, the Supreme Court held that the military commissions convened by the administration of President Bush to try a non-citizen terror suspect could not proceed as constituted because they lacked congressional authorization and violated the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

Hamdan was a Yemeni national accused of al Qaeda membership, captured in Afghanistan in November 2001. He was imprisoned in Guantanamo Bay, and detained there for more than two years before being charged with conspiracy to commit “offenses triable by military commission.”

[\[10\]](#)

Later, Hamdan filed a petition for a writ of habeas corpus to challenge the military commission’s decision.

The District Court for the District of Columbia granted the petition for habeas relief, staying the military commission’s proceedings. [\[11\]](#)

The Hamdan Court held that the Executive’s authority to establish military commissions was bound by the international humanitarian law, which includes the Geneva’s laws of war and that Hamdan was entitled to the protection of the Third Convention (on Prisoners of war) until it was determined, according to the convention, that he was not a lawful combatant and could not enjoy its protection. [\[12\]](#) In addition, Hamdan could not be tried by the military commissions in question because the court found that the procedures violated the rights of the accused protected by the UCMJ and the Common Article 3 of the Geneva Conventions.

The Court of Appeals for the District reversed, holding that the Geneva Conventions do not grant any judicially enforceable rights. The court argued that the military commissions did not violate the separation of powers doctrine, the UCMJ, or the Geneva Conventions. Even if it did, any challenges to these procedures should have been delayed until the appeal post-conviction.

The Supreme Court reversed and remanded, with the majority opinion written by Justice Stevens, joined by justices Breyer, Souter, Ginsburg and Kennedy, and held that the established military commissions surpassed executive authority. [\[13\]](#) The Court did not debate on the question of judicial enforceability of rights protected in the Conventions, nevertheless the Court declared that the Geneva law is part of the International humanitarian law (laws of war), and consequently constrained the construction of military commissions.

[\[14\]](#)

The majority found it unnecessary to reach the issue because Article 21 of the UCMJ grants authority to military commissions conditionally based on compliance with the laws of war.

[\[15\]](#)

On the other hand, determining the judicial enforceability of individual human rights protected by international treaties is essential to the future implementation of these treaties. The circuit court and the dissent relied primarily on the precedent of *Johnson v. Eisentrager*

[\[16\]](#)

to support their argument that the Geneva Conventions are not judicially enforceable.

The Court interpreted the Common Article 3 as applicable and referred to its provision that enemy combatants must be subject to “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.” [\[17\]](#) The Court held that the military commissions convened by the Administration were not “regularly constituted” since they were not “regular military courts” and appeared to have the status of “special tribunals”. [\[18\]](#)

Hamdan, however, was not seeking to enforce a private right of action, but rather invoking his rights defensively. [\[19\]](#)

Treaties are part of the “supreme law of the land” [\[20\]](#) , thus Hamdan’s claim that he was detained and tried in violation of the Third Geneva Convention

[\[21\]](#)

is a valid habeas petition. This right is prohibited by the Military Commission Act (MCA) of 2006, for non-citizen determined to be unlawful enemy combatants, therefore the argument returns to the question if the provisions of the Convention can be enforced through judicial remedies.

As a final point, the Court affirmed that even though the provisions in the Common Article 3 are vague and flexible for those captured during an armed conflict, these “requirements [were] nonetheless,” unsatisfied by the military commissions in question. According to the opinion of Justice Stevens, Hamdan was not accused of any crime against the laws of war. [\[22\]](#)

The next question is whether the Geneva Convention that governs the status of prisoners of war (POW) applies to combatants captured in the conflict with a terrorist agent like al Qaeda, which is not a contracting party to the Conventions. Hamdan would not have deserved a protection as a POW because his acts did not meet the criterion for a lawful combatant, set up in the Convention. But Article 5 of the Convention requires a presumption that detainees are POWs until or unless their status is determined by a “competent tribunal” and they are stripped of their privilege as lawful combatants.

Even if the Third Geneva Convention’s protection does not apply the enemy captured in the

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

conflict with al Qaeda, discussions continue as to whether Common Article 3 applies. All four Geneva Conventions establish, through their Common Article 3, some minimum protective provisions in the case of armed conflict not of an international character occurring in the territory of one of the High contracting parties. The dissent in Hamdan interpreted “conflict not of an international character” to be limited to conflicts not between two or more states. The 1949 Conventions protection, extended with the Additional Protocols of 1977, intended to provide basic humanitarian rights to combatants participating in civil wars.

The majority opinion embraced the literal definition of “international” as “between nations”, as opposed to “on the territory of more than one nation”, and argued that the Common Article 3 provides a minimum standard for all conflicts, of international and non-international character, in order to affirm the principles incorporated in the international humanitarian law and opinions of international courts.

Responding to the decision in Hamdan, Congress passed the MCA and deprived non-citizen “unlawful enemy combatants” of habeas corpus review and the ability to assert rights under the Geneva Conventions. The MCA also explicitly defined the military commissions to be in compliance with Common Article 3 of the Geneva Conventions. While the MCA does not allow exclusion of the accused from proceedings, it makes special provisions for the protection of classified information, so that the prisoner can still be convicted based on evidence he cannot examine. [\[23\]](#)

III. The Detainee Treatment Act (DTA) of 2005 and the Military Commission Act (MCA) of 2006.

With the enactment of the DTA a compromise was reached, resulting in the addition of three more clauses related to the treatment of the detainees: legal defenses available to U.S. personnel accused of abuse, procedure for status review for detainees outside the United States, and detainee treatment training for Iraqi forces. [\[24\]](#) Congress responded to Rasul v. Bush [\[25\]](#) and to the following [\[26\]](#) decision in Hamdan by depriving the federal courts of the habeas jurisdiction that Rasul had sustained. The DTA amended 28 U.S.C. § 2241 to abolish habeas corpus jurisdiction, and any other form of judicial review, for aliens held in military custody at Guantánamo Bay.

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

A year later, another act – the MCA eliminated habeas corpus jurisdiction (and, again, other forms of review) for any alien, wherever seized or held, who has “been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.” [\[27\]](#)

Nevertheless, the DTA, as amended by the MCA, still provides some judicial remedies to the prisoners, as long as they wish to challenge the fact rather than the conditions of their detention. Instead of habeas corpus jurisdiction, the Act delegates on the United States Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to review at least some military decisions underlying the detention of aliens. [\[28\]](#)

The number of cases has arisen as to the rights of such detainees concerning not their detention itself, but the conditions of their detention. These claims talk of mistreatment of detainees, including allegation of use of extreme temperatures, short shackling, and beatings. [\[29\]](#)

These courts will have held that the detainees would suffer irreparable injury by not having the opportunity to contest the detention on its merits since jurisdiction over the case would be lost. Nonetheless, the courts have rejected claims that would impair the Executive in dealing with foreign policy issues or national security interests. In such circumstance the courts have not come forward with any legal authority that could be read to prohibit the transfer of these prisoners to a foreign country, any jurisdiction, or any reason to doubt evidence of the government intention to relinquish control of the detainees upon transfer to the foreign state and courts obtained all assurances under the law from the foreign state that the prisoner would be treated humanly upon transfer. [\[30\]](#)

In this respect we can find case law that alien detainees held by the Executive outside the United States possess enforceable constitutional rights as to the conditions of their detention, based mainly on the Rasul case. Numbers of courts, in the context of a motion for a preliminary injunction, have held that the evidence did or could support a finding that an alien detainee incarcerated outside the United States had a right to notice before being transferred to another location. [\[31\]](#)

The decisions of Combatant Status Review Tribunals (CSRTs) [\[32\]](#) became an object of judicial review in the aftermath of Rasul, in order to determine whether detainees held at Guantánamo Bay really are enemy combatants.

A similar provision of the DTA authorizes judicial review by the D.C. Circuit of a final executive branch decision upholding a conviction and sentence by a military tribunal of an alien prosecuted for a war crime.

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

[\[33\]](#)

Yet, neither the DTA nor the MCA empowers the D.C. Circuit to entertain claims from aliens detained as enemy combatants to the conditions of their confinement, including alleged mistreatment or abuse (except as to the admissibility of evidence before a military tribunal or CSRT in cases that resulted from coercive interrogation).

[\[34\]](#)

In considering the constitutionality of the DTA and MCA, Richard Fallon and David Meltzer argue that neither the Suspension Clause nor the Due Process Clause inhibits Congress from withdrawing federal habeas jurisdiction as long as it provides a constitutionally adequate alternative form of judicial review. Nor do statutes limiting jurisdiction to a particular federal court, such as the D.C. Circuit, pose constitutional difficulty, according to both.

Under the DTA and the MCA, the key governing access to habeas corpus has been turned off for aliens detained at Guantánamo Bay in the same way as for aliens detained in the United States.

Theory and practice seem to illuminate the fact that the DTA and the MCA are unconstitutional to the extent that they foreclose jurisdiction over petitions from aliens in the United States that bring the issue over the constitutionality of the detention. The petitioners cannot raise these claims within a reasonable time, in compliance with the statutory review mechanism now established in the D.C. Circuit, or to allege that the conditions of their confinement are unconstitutional.

IV. *Boumediene et al. v. Bush, President of the United States, et al.* [\[35\]](#)

The United States Supreme Court in *Boumediene* held that aliens designated as enemy combatants and detained at the United States Naval Stations in Guantánamo Bay, Cuba, have the constitutional privilege of habeas corpus. The Court decided that the procedures for review of the detainees' status in the Detainee Treatment Act of 2005 (DTA), enacted by Congress,

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

were not an adequate and effective substitute for habeas, which may not be withdrawn except in conformance with the Suspension Clause. [\[36\]](#)

Justice Kennedy wrote for the majority and considered that § 7 of the Military Commissions Act of 2006 (MCA), 28 U.S.C. § 2241(e), which deprived courts of jurisdiction to consider habeas applications filed by persons determined to be enemy combatants or awaiting such determination, operated as an unconstitutional suspension of the writ. [\[37\]](#) He was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice Kennedy concluded that, if MCA § 7 were valid, it denied the federal courts jurisdiction to hear habeas corpus actions pending at the time of its enactment. The Court gave opinion on the government's argument that non-citizens defined as enemy combatants and detained in territory outside the Nation's borders had no constitutional rights and no privilege of habeas corpus by going through the history of the writ of habeas corpus. The opinion of the Court was that the Framers of the United States Constitution considered the writ to be an essential instrument in the separation-of-powers. Arguing that at common law the writ applies only to territories over which the Sovereign has power, the Government alluded that the Suspension Clause provided no rights to the Guantánamo detainees because the United States did not claim sovereignty over their place of detention. The Court agreed that Cuba retained de jure sovereignty over Guantánamo Bay, but that nevertheless the United States maintained de facto control over that territory. Analyzing *Johnson v. Eisentrager*

[\[38\]](#)

, Justice Kennedy rejected the Court's statement that the prisoners were not within any territory over which the United States was sovereign, adopting a formalistic, sovereignty-based test for determining the reach of the Suspension Clause. The Government's formal sovereignty-based test, according to the majority in *Boumediene* had raised troubling separation-of-powers concerns. "Our basic charter cannot be contracted away like this," Justice Kennedy said. Therefore, the Suspension Clause had full effect at Guantánamo Bay. In determining the reach of the Suspension Clause the Court observed the following questions: 1) citizenship and status of the detainee and the adequacy of the process through which that status determination was made; 2) the nature of the location (on or off the battlefield) or where apprehension and detention took place; 3) the obstacles inherent in resolving the prisoner's entitlement to the writ. In determining these questions the Court argued on the fact that the status of the Guantánamo detainees was in dispute, and they were being denied the status enemy combatants. Regarding the jurisdiction question the Court said that although the detainees were officially outside the sovereign territory of the United States, their detention in Guantánamo Bay was not abroad. The legal issue arose with the question would the military mission at Guantánamo be compromised if habeas courts had jurisdiction to hear the detainees' claims? The MCA has stripped jurisdiction to issue the writs to the detainees and gave the option to Congress to avoid the Suspension Clause, but the question that the Court asked was did the MCA provided adequate substitute procedures for habeas corpus.

The Supreme Court did not remand the case to the Court of Appeals, and led by the gravity of

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

these cases, their exceptional character and its role as a guarantor of constitutionalism, addressed the issue. Justice Kennedy concluded that the detainees' access to the review procedures provided by the DTA did not provide an adequate substitute and that § 7 of the MCA was an unconstitutional suspension of the writ. The Court said that the DTA did not provide an opportunity for a detainee to present relevant exculpatory evidence that was not made part of the record in earlier proceedings and did not allow the Court of Appeals to review or correct factual determinations. The DTA deprived the detainee by restraining the scope of collateral review to a record that might not have been correct or complete, foreclosing further consideration of evidence during the Combat Status Review Tribunal (CSRT) decision. Justice Kennedy said that the detainees were not restrained to seek review of their CSRT determinations in the Court of Appeals before proceeding with their habeas actions and that certain adjustments should be made to ease the burden that habeas corpus proceedings would place on the military.

In a state of war, emergency or national crisis, Presidents claim extraordinary authority, and sometimes while exercising that power the Executive has the duty to find a balance between the restriction of constitutional rights and other legal norms and the common good and the national security of a country. As disputes come to court, interests come to play from one side that a ruling for the challengers would imperil national security and from the other that courts must hold the nation to the ideals that make its security worth preserving. This difficult task that the Court encounters may be overcome by using a just, fair and balanced approach. Thus, the judicial branch has the burden to preserve the values, reputation and historic reality of America's commitment to the rule of law, at home and abroad.

As Timothy Ash reminds us in his book *Free World* "If we are free, we can work with other free people toward a free world. Nothing can stop us, except the walls of ignorance, selfishness, and prejudice that divide free men and women from each other, and the free from unfree..."

- *Viara Marshall* *

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

Paper and online resources:

Cases

Boumediene v. Bush, 128 S. CT. 2229 (U.S. 2008)

Hamdan v. Rumsfeld, 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)

Rasul v. Bush, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004)

Articles

Goldman, Robert K, **Tittlemore**, Brian D., *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian an Human Rights Law*, ASIL, Task Force on Terrorism, December 2002.

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

Fitzpatrick, Regina, *Hamdan v. Rumsfeld: Implications for the Geneva Conventions*, Harvard Human Rights Journal, Vol. 20 2007.

Suleman, Arsalan, *Detainee Treatment Act of 2005 and Military Commissions Act of 2006*, Recent Developments, Harvard Human Rights Journal, Vol. 19/20, 2006/2007.

Vazquez, Carlos Manuel, *The Military Commission Act, the Geneva Conventions, and the Courts: A Critical Guide*, The American Journal of International Law, 98, 2007.

Zitter, Jay M, J.D., *Rights of Aliens Detainees Held Outside the United States as to Their Treatment and Conditions of Detainment*, American Law Reports ALR Federal 2d, Westlaw.

[1] Fallon Jr., [Richard](#), Meltzer, Daniel J., Habeas Corpus Jurisdiction, Substantive Rights, and the War on terror, 120 Harv. L. Rev. 2029, Harvard Law Review, June, 2007.

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

[2] Ibid.

[3] See Judiciary Act of 1789, ch. 20, §14, 1 Stat. 73, 81-82.

[4] [28 U.S.C.A. §2241\(a\)](#) (West 2006).

[5] [126 S. Ct. 2749 \(West 2006\)](#) .

[6] 542 U.S. 507, 536 (2004).

[7] Ibid

[8] See *Supra* note 1

[9] Ibid.

[10] See *Supra* note 5

[11] Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 173-174 (D.D.C. 2004).

[12] Ibid at 162.

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

[13] See *Supra* note 5

[14] *Ibid* at 2786

[15] 10 U.S.C. § 821 (2006).

[16] [339 U.S. 763 \(1950\)](#) .

[17] *Ibid.* 2796

[18] Fitzpatrick, Regina, *Hamdan v. Rumsfeld: Implications for the Geneva Conventions*, Harvard Human Rights Journal, Vol. 20 2007.

[19] *Ibid.*

[20] U.S. Const. Art. 6, cl. 2.

[21] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[22] See *Supra* note 5, 2777-79.

[23] See *Supra* note 18.

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

[24] Suleman, Arsalan, *Detainee Treatment Act of 2005 and Military Commissions Act of 2006*, Recent Developments, Harvard Human Rights Journal, Vol. 19/20, 2006/2007.

[25] 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004)

[26] See *Supra* note 5

[27] 28 U.S.C. §2241(e)(1).

[28] See *Supra* note 1

[29] Zitter, Jay M, J.D., Rights of Aliens Detainees Held Outside the United States as to Their Treatment and Conditions of Detainment, American Law Reports ALR Federal 2d, Westlaw.

[30] *Ibid.*

[31] *Ibid.*

[32] DTA §1005(e)(2)(A), 119 Stat. at 2742

[33] DTA §1005(e)(3), 119 Stat. at 2743, amended by MCA sec. 3, §§950g(a)(1), 950j(b), 120 Stat. at 2622-24.

[34] See *Supra* note 1

Rights of Alien Detainees held outside the U.S.

Written by Viara Zaprianova-Marshall
Thursday, 01 September 2011 17:32 -

[35] 128 S. Ct. 2229 (U.S. 2008).

[36] U.S. Const. Art. 1, § 9, cl. 2.

[37] Binimow, Jason B., Constitutional Validity of Terrorism Prosecutions and enemy Combatant Detention and Proceedings – Supreme Court Cases, American Law Reports ALR Federal 2d, (West 2008).

[38] 339 U.S. 763, 70 S. Ct. 936, 94 L. Ed. 1255 (1950)

* LL.M. Student, International and Comparative Law, Santa Clara School of Law, 2008/09, Federal Courts Research Paper