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INTERNATIONAL DECISIONS

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Availability of U.S. courts to review decision to hold U.S. citizens as enemy combatants—executive power in war on terror

HAMDI V. RUMSFELD. 124 S.Ct. 2633.
United States Supreme Court, June 28, 2004.

In a fractured decision, the U.S. Supreme Court upheld the detention as enemy combatants of persons who were "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged [there] in an armed conflict against the United States,"[1] but ruled that U.S. citizens held in the United States were entitled by the U.S. Constitution to a "meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[2]

The case of Yaser Esam Hamdi arose out of U.S. military activity in Afghanistan following the September 11, 2001, attacks on the Pentagon and the World Trade Center. Hamdi, a U.S. citizen by birth, was allegedly seized in Afghanistan by members of the Northern Alliance, a group opposed to the Taliban government of that country and allied with U.S. coalition forces. He was handed over to the U.S. military and, in January 2002, was transferred to the U.S. naval base at Guantánamo Bay, Cuba. Once authorities realized that Hamdi was a U.S. citizen, they moved him to a naval brig in Norfolk, Virginia, where he was held in solitary confinement and without access to an attorney. The government deemed Hamdi to be an "enemy combatant"—an action that was not adjudicated by any tribunal but was instead based solely on executive branch review.

In June 2002, Hamdi's father filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Virginia.[3] The petition alleged that Hamdi's detention violated the Due Process Clauses of the Fifth Amendment to the U.S. Constitution. Hamdi's attorneys pressed several additional arguments in their briefs. First, they argued that Hamdi's detention violated the Non-detention Act, which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[4] They argued that this statute precluded the detention of U.S. citizens by the United States even when the international law of war might otherwise allow such detention.[5] In addition, they contended that the international law of war, including the Geneva Conventions, did not authorize Hamdi's continued detention since the international armed conflict in Afghanistan had terminated with the installation of Hamid Karzai as that country's president.[6] Finally, they argued in the alternative that Article 5 of Geneva Convention [No. III] Relative to the Treatment of Prisoners of War (Third Geneva

[1] Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2645 (2004) [hereinafter *Hamdi IV*].

[2] *Id.* at 2635.

[3] Two previous "next friend" petitions filed by nonrelatives had been dismissed for lack of standing. *See* Hamdi v. Rumsfeld, 294 F.3d 598, 600 (4th Cir. 2002) [hereinafter *Hamdi I*].

[4] 18 U.S.C. §4001(a) (2000).

[5] *See, e.g.*, Brief of the Petitioners/Appellees at 47 (Oct. 18, 2002) [hereinafter *Hamdi III* brief], Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (No. 02-7338) [hereinafter *Hamdi III*].

[6] *Hamdi III* brief, *supra* note 5, at 53 (citing presidential proclamations recognizing regime change in Afghanistan).

Convention)[7] required that Hamdi be treated as a prisoner of war until a competent tribunal determined otherwise.[8]

Following district court preliminary rulings on the issue of access to counsel[9] and the sufficiency of the government's evidence,[10] the U.S. Court of Appeals for the Fourth Circuit upheld Hamdi's detention. Citing the U.S. Supreme Court's decision in *Ex parte Quirin*[11]—which allowed the trial by military commission of Nazi soldiers sent to the United States on a mission of sabotage during World War II—the plurality concluded that "if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one."[12] Citing the need to defer to the president in wartime, the court stated that because it was "undisputed" that Hamdi was "captured in a zone of active combat operations in a foreign country," he was entitled to neither an evidentiary hearing nor access to counsel.[13] In addition, the court rejected Hamdi's Geneva Convention claims on the ground that the Convention was not self-executing; rather than explicitly providing a private right of action, the Convention focused instead on diplomatic remedies for its enforcement.[14]

The U.S. Supreme Court vacated the Fourth Circuit's decision in a plurality opinion by Justice O'Connor.[15] Citing and quoting *Ex parte Quirin,* and citing treatises and academic articles on the law of war, the plurality stated that the "capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'"[16] In light of this well-established practice, the plurality concluded, Congress had "clearly and unmistakably"[17] authorized the detention of "enemy combatants" when, in the wake of September 11, 2001, it passed the Authorization for Use of Military Force (AUMF) that preceded the U.S. campaign in Afghanistan.[18] The plurality left for future judicial elaboration the full scope of the category "enemy combatant,"[19] ruling only that persons who were "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who "engaged in an armed conflict [there] against the United States" could be detained.[20]

With respect to Hamdi's objection to the "indefinite" nature of his detention, the plurality agreed that it "is a clearly established principle of the law of war that detention may last no longer than active hostilities," citing the Third Geneva Convention and other treaties.[21] The opinion emphasized, moreover, that "indefinite detention for the purpose of interrogation is not authorized."[22] The plurality nevertheless found that detention to prevent combatants from

[7] Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 [hereinafter Third Geneva Convention].

[8] *Hamdi III* brief, *supra* note 5, at 38.

[9] The district court's order that Hamdi be granted immediate unrestricted access to counsel was reversed on interlocutory appeal, and the case was remanded for further proceedings. Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) [hereinafter *Hamdi II*].

[10] *Hamdi III*, *supra* note 5, at 461.

[11] 317 U.S. 1 (1942).

[12] *Hamdi III*, *supra* note 5, at 461 (quoting *Hamdi II*, *supra* note 9, at 283).

[13] *Id.* at 473. The Fourth Circuit denied rehearing en banc, with several written dissents. 337 F.3d 335 (4th Cir. 2003).

[14] *Hamdi III*, *supra* note 5, at 468.

[15] *Hamdi IV*, *supra* note 1, at 2635. Chief Justice Rehnquist and Justices Kennedy and Breyer joined this opinion.

[16] *Id.* at 2640.

[17] *Id.* at 2641.

[18] Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The AUMF 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" or "harbored such organizations or persons." *Id.*

[19] *Hamdi IV*, *supra* note 1, at 2642 n.1.

[20] *Id. at* 2639.

[21] *Id.* at 2641. The Court also cited the 1899 Hague Convention [No. II] with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247, and the 1907 Hague Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

[22] *Hamdi IV*, *supra* note 1, at 2641.

rejoining the battle was authorized so long as "United States troops are still involved in active combat in Afghanistan."[23]

The plurality also rejected the government's claim that an "enemy combatant" has no right to a hearing to contest his status. Applying the due process balancing test from *Mathews v. Eldridge*,[24] the plurality weighed Hamdi's "elemental" interest in physical liberty against the government's "weighty and sensitive" interests in waging war effectively.[25] Considering the risk that Hamdi might be erroneously deprived of his liberty, as well as the costs and benefits of additional procedural safeguards, the plurality concluded 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."[26] It also declared that Hamdi "unquestionably has the right to access to counsel in connection with the proceedings on remand."[27] The plurality opined that the proceedings should be "tailored to alleviate . . . [the] burden [on] the Executive at a time of ongoing military conflict" and that they could involve the admission of hearsay evidence as well as a rebuttable "presumption in favor of the Government's evidence."[28] The plurality further noted "the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."[29] Because the plurality found the Constitution entitled Hamdi to the hearing that he sought, it did not address "whether any treaty guarantees him similar access to a tribunal for a determination of his status."[30]

Justice Souter, joined by Justice Ginsburg, concurred in part, dissented in part, and concurred in the judgment.[31] Souter would have found Congress's authorization for use of force following the September 11 attacks insufficiently specific regarding the detention of U.S. citizens to satisfy the Non-detention Act.[32] The government had argued that the AUMF necessarily encompassed the detention of "enemy combatants" since such detentions are customary under the laws of war, but Souter noted that, insofar as the government was not treating Hamdi in compliance with the Third Geneva Convention, it was not actually acting in accordance with the laws of war.[33] Souter and Ginsburg would have held that the government had no authority to hold Hamdi as an "enemy combatant," but in order to create a majority for the Court's holding on due process, they concurred in the plurality's conclusion that Hamdi was entitled to both access to counsel and a meaningful hearing.[34] They specifically disclaimed, however, the plurality's suggestions that such hearing might include an evidentiary presumption in favor of the government or that military tribunals might obviate the need for a court hearing.[35]

Justice Scalia, joined by Justice Stevens, dissented.[36] In Scalia's view, the "very core of liberty" secured by the Due Process Clause and the writ of habeas corpus is "freedom from indefinite imprisonment at the will of the Executive."[37] He noted that "[w]here the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal

[23] *Id.* at 2642.
[24] 424 U.S. 319 (1976).
[25] *Hamdi IV*, *supra* note 1, at 2646–47.
[26] *Id.* at 2648.
[27] *Id.* at 2652. While the case was pending in the Supreme Court, the government began allowing Hamdi access to his attorneys on a voluntary basis.
[28] *Id.* at 2649.
[29] *Id.* at 2651.
[30] *Id.* at 2649 n.2.
[31] *Id.* at 2652 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).
[32] *Id.* at 2654.
[33] *Id.* at 2658–59.
[34] *Id.* at 2660.
[35] *Id.*
[36] *Id.* at 2660 (Scalia, J., dissenting).
[37] *Id.* at 2661.

court for treason or some other crime."[38] Because Congress had not suspended habeas corpus,[39] Scalia concluded that Hamdi was entitled to be charged with a crime or released.[40] Scalia also noted that even if the detention were consistent with the international law of war, it would not necessarily follow that "it also complies with the restrictions that the Constitution places on the American Government's treatment of its own citizens."[41]

Justice Thomas also dissented.[42] Although he concurred with the plurality's conclusion that Congress had authorized Hamdi's detention (providing the crucial fifth vote necessary for a majority on that issue), he would have held that Hamdi was not entitled to a hearing; in Thomas's view, separation of powers demanded deference to the president's wartime decision to detain Hamdi as an "enemy combatant."[43]

* * * *

The Supreme Court's decision in *Hamdi*—along with its decision to exercise jurisdiction over the Guantánamo detainees in *Rasul v. Bush*[44]—is a sharp and much needed rebuke to the U.S. government's position that its treatment of detainees in the so-called "war on terrorism" is immune from judicial oversight. But the *Hamdi* decision leaves open at least as many questions as it answers, including: the scope of the definition of "enemy combatant"; how long the government can hold a detainee before it affords him access to counsel and a hearing; what precisely such hearings should look like; the degree to which military hearings are sufficient; whether noncitizen detainees are entitled to the same type of hearing as citizen detainees; and how long "enemy combatant" detainees in the "war on terrorism" may be held. These questions will have to be answered in the course of future litigation.[45]

The *Hamdi* decision is also notable for the ways in which it does, and does not, rely on international law. On its face, *Hamdi* is a decision about the powers given to the U.S. president by the U.S. Congress in enacting the AUMF, and about the rights that the U.S. Constitution guarantees to U.S. citizens. At the same time, however, it is a decision rendered in the shadow of international law, and many of the ambiguities in the decision stem at least in part from the Court's reluctance to grapple directly with the contours of international humanitarian law and from its failure to articulate clearly the relationship between that body of law and U.S. law, whether constitutional or statutory. The Court did not engage in a rigorous examination of the treaties and customary international law applicable to the armed conflict in Afghanistan during which Hamdi was allegedly captured. Instead, it borrowed concepts from international humanitarian law—such as the detention of prisoners until the end of hostilities—and incorporated those concepts into its own interpretation of the U.S. Constitution and statutes passed by the U.S. Congress. The unfortunate result of the *Hamdi* decision's ambiguous mingling of domestic and international law is continuing uncertainty about the scope of the U.S. government's power to detain individuals in the context of the "war on terrorism."

The Supreme Court's ambivalent reliance on international humanitarian law is evident in its treatment of the term "enemy combatant." The term "enemy combatant" does not appear in any statute enacted by the U.S. Congress and is defined nowhere in U.S. law. The *Hamdi* plurality's

[38] *Id.* at 2660–61.

[39] *See* U.S. CONST. Art. I, §9, cl. 2 ("The 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.")

[40] *Hamdi IV*, *supra* note 1, at 2660–61 (Scalia, J., dissenting).

[41] *Id.* at 2672 n.5.

[42] *Id.* at 2674 (Thomas, J., dissenting).

[43] *Id.* at 2674–75.

[44] 124 S.Ct. 2686 (2004); *see* David L. Sloss, Case Report: Rasul v. Bush, 98 AJIL 788 (2004).

[45] This clarification will not, however, come in the case of Hamdi himself; at the time of this writing, the government had agreed to release Hamdi, a remarkable turnaround from its previous insistence that national security demanded that Hamdi be held incommunicado and denied access to counsel and court. *See* Jerry Markon, *U.S. to Free Hamdi, Send Him Home*, WASH. POST, Sept. 23, 2004, at A1.

recognition of the category thus appears to have been based at least in part on international humanitarian law. In support of its conclusion that the U.S. Congress had implicitly authorized, and that the U.S. Constitution permitted, the detention of "enemy combatants," the plurality relied principally upon the "'universal agreement and practice'" of detaining captured soldiers referred to by the Supreme Court in *Ex parte Quirin*.[46] That earlier case explains, in turn, that this "universal agreement and practice" is part of the "law of war" and that the "law of war" is a "branch of international law."[47] Most of the other sources cited by the *Hamdi* plurality in this part of the opinion likewise derive their conclusions from the international law of war.[48] And the *Hamdi* plurality relied even more explicitly upon international humanitarian law when it stated that it "is a clearly established principle of the law of war that detention may last no longer than active hostilities," citing the Third Geneva Convention as well as the 1899 and 1907 Hague Conventions.[49]

But having extracted from international humanitarian law the concept that "enemy combatants" may be detained until the end of hostilities—and having found that concept sufficiently powerful to trump the normal presumption under the U.S. Constitution that individuals cannot be deprived of liberty without criminal trial—the plurality stopped short of attempting to confine the detention of "enemy combatants" to those circumstances sanctioned by international humanitarian law. The plurality acknowledged that "[t]here is some debate as to the proper scope" of the term "enemy combatants" and that "the Government has never provided any court with the full criteria that it uses in classifying individuals as such."[50] But the plurality brushed aside the question of what, precisely, an "enemy combatant" is or where the definition of that term might come from, suggesting simply that detention of Taliban fighters captured in Afghanistan was allowable and that the "permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."[51] There was no hint in the plurality opinion, however, as to whether the lower courts should find those bounds in the U.S. Constitution, international humanitarian law, or some other source. Thus, the status of prisoners detained by the United States as "enemy combatants" in the broader "war on terrorism," rather than in Afghanistan, was left ambiguous.[52] Similarly, instead of considering when international humanitarian law requires the release of prisoners of war detained in an international armed conflict, the Court instead applied a time frame of its own creation—whether U.S. troops "are still involved in active combat in Afghanistan."[53]

Had the Supreme Court grappled with the specifics of international humanitarian law, it would have been forced to acknowledge that "enemy combatant" is not a term frequently employed in international humanitarian law—and is certainly not one mentioned in any treaty in this body of law. Instead, the more salient legal categories in this field include the division in legal rules applicable to international versus non-international armed conflicts, and the distinction between privileged belligerents protected in international armed conflict by the Third Geneva Convention and civilians who, though they may have taken part in hostilities, remain protected by the Fourth Geneva Convention.[54] With closer scrutiny of these relevant legal categories, the

[46] *Hamdi IV*, *supra* note 1, at 2640 (plurality op.) (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

[47] *Quirin*, 317 U.S. at 29–30.

[48] For example, this passage of the plurality opinion includes quotations from an article in the *International Review of the Red Cross* and from the decision of Nuremberg Military Tribunal as reprinted in the *American Journal of International Law*, 41 AJIL 172, 229 (1947)). *Hamdi IV*, *supra* note 1, at 2640; *see also In re Territo*, 156 F.2d 142, 145–47 (9th Cir. 1946) (relying on the 1929 Geneva Conventions) (cited at *id.*).

[49] *Hamdi IV*, *supra* note 1, at 2641. For the Hague Conventions, see *supra* note 21.

[50] *Hamdi IV*, *supra* note 1, at 2639.

[51] *Id.* at 2642 n.1.

[52] Comments in some of the other opinions rendered at the same time as *Hamdi* suggest that the majority of the Court may view such detentions skeptically. *See, e.g., Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2735 n.8 (2004) (Stevens, J., dissenting).

[53] *Hamdi IV*, *supra* note 1, at 2642.

[54] Geneva Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287. Though I recognize that the issue remains in dispute, I agree with the position of the

Court might have engaged directly with arguments that the law of war does not provide legal authority for Hamdi's ongoing detention. He was allegedly captured while fighting in the armed forces of the Taliban government in an armed conflict between two "High Contracting Parties" to the Geneva Conventions—the United States and Afghanistan—and therefore was subject at the time of his capture to the legal regime governing international armed conflicts.[55] Under the Third Geneva Convention, captured members of the Taliban army were entitled to be treated as prisoners of war until a competent tribunal determined otherwise.[56] As Justice Souter's dissent pointed out, the failure to treat Hamdi as a prisoner of war violated the explicit terms of that treaty. Moreover, any authority for detention provided by the Third Geneva Convention may possibly have ceased when the U.S.-friendly government of Hamid Karzai took control of Afghanistan, arguably ending the international armed conflict there. Fighting within the territory of Afghanistan after the change of governments could potentially be classified by international humanitarian law as a non-international armed conflict.[57]

International humanitarian law provides certain baseline standards for humane treatment of prisoners in non-international armed conflicts,[58] but it does not provide any independent authority for detention of individuals in such conflicts, leaving it up to domestic governments to enact laws providing such authority. Even if the U.S. Congress, in enacting the AUMF, intended to authorize implicitly the detention of individuals to the extent customary under the laws of war, that authority would have ended with the termination of the international armed conflict; some separate statutory authority for continuing detentions past that point would have been required. Similarly, international humanitarian law provides no independent authority for detention of persons captured outside of traditional armed conflict, as has been the case with many persons detained by the U.S. as part of its broader campaign against terrorism. Although the U.S. Congress might conceivably authorize such detentions (provided that they were carried out in a manner that was consistent with domestic constitutional law and the baseline standards of international humanitarian and human rights law), such detentions could not properly be based on implied incorporation of the customary laws of war, but instead would need to be based on positive, explicit, domestic lawmaking.

Instead of confronting international humanitarian law, with all its limitations, the Supreme Court appears in *Hamdi* to have embarked on a questionable path toward creating its own, new constitutional common law of war, ungrounded either in international humanitarian law or in any specific legislation enacted by the U.S. Congress. It may be that international humanitarian law should be modified to respond to the changing factual circumstances of contemporary armed conflict, but the U.S. Supreme Court seems a body particularly ill suited by institutional competence to be the principal author of this new regime. To be sure, involvement by the courts is preferable to the unbridled discretion sought by the executive branch of the U.S. government.

International Committee of the Red Cross (ICRC) that such persons remain covered by the Fourth Geneva Convention. *See* ICRC, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 9 (2003), *at* <http://www.icrc.org>.

[55] *See* Third Geneva Convention, *supra* note 7, Art. 2 ("[T]he present Convention shall 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 . . . .").

[56] *See id.*, Arts. 4 ("Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."), 5 ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."). Although there remains some dispute about whether individuals sharing the nationality of their captors are protected persons under the Third Geneva Convention, I take the position that they are.

[57] *See, e.g.*, ICRC, *International Humanitarian Law and Terrorism: Questions and Answers* (2004) (describing conflict in Afghanistan after June 2002 as a non-international armed conflict), *at* <http://www.icrc.org>. My intent here is not to stake out a definitive position on this issue, but simply to note that it is a relevant question, and one that the Court might have addressed.

[58] *See, e.g.*, Third Geneva Convention, *supra* note 7, Art. 3 (setting forth standards applicable to an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties").

But the ambiguous judicial ratification of new legal standards for use in the "war on terrorism" is inferior to addressing any needed changes to existing legal regimes through the treaty-making process or, in appropriate circumstances, through domestic legislation (subject, of course, to subsequent review by the courts for constitutionality and protection of human rights).

On a more encouraging note, the *Hamdi* plurality was appropriately cautious about extending legal categories created with traditional armed conflicts in mind to the broader "war on terrorism." The plurality acknowledged that "the national security underpinnings of the 'war on terror' . . . are broad and malleable,"[59] and warned that its holding in *Hamdi* was grounded in an "understanding [that] is based on longstanding law-of-war principles" and that "[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, that understanding may unravel."[60] One may hope that if we are unfortunate enough to see the scourge of terrorism continue, the U.S. Supreme Court's understanding of international humanitarian law will increase over time as it becomes more familiar with this complex, but indispensable, body of law.

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Availability of U.S. courts to detainees at Guantánamo Bay Naval Base—reach of habeus corpus—executive power in war on terror

RASUL V. BUSH. 124 S.Ct. 2686.
United States Supreme Court, June 28, 2004.

In *Rasul v. Bush*,[1] the U.S. Supreme Court entertained claims by aliens imprisoned at the Guantánamo Bay Naval Base in Cuba. The Court held that the federal habeas corpus statute "confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention" at Guantánamo Bay.[2] The Court also held that petitioners' status as aliens held in military custody at Guantánamo Bay did not preclude the district court from exercising jurisdiction over their non-habeas claims challenging their conditions of confinement.[3]

Rasul involved two separate cases that were consolidated in the district court. In *Al Odah v. United States*, twelve Kuwaiti nationals sought "a declaratory judgment and an injunction ordering that they be informed of any charges against them and requiring that they be permitted to consult with counsel and meet with their families."[4] The *Al Odah* plaintiffs did not seek habeas corpus relief. Indeed, they expressly "disclaim[ed] any desire to be released from confinement."[5] In contrast, the petitioners in *Rasul*—two British and two Australian citizens[6]—filed their action

[59] *Hamdi IV*, *supra* note 1, at 2641.
[60] *Id.*
[1] 124 S.Ct. 2686 (2004) [hereinafter *Rasul* (Supreme Court)].
[2] *Id.* at 2698.
[3] *Id.* at 2698–99.
[4] Al Odah v. United States, 321 F.3d 1134, 1136 (D.C. Cir. 2003) [hereinafter *Al Odah* (circuit court)].
[5] Rasul v. Bush, 215 F.Supp.2d 55, 62 (D.D.C. 2002) [hereinafter *Rasul* (district court)].
[6] The original petitioners in *Rasul* were Shafiq Rasul and Asif Iqbal, both citizens of the United Kingdom, and David Hicks, an Australian citizen. *See Rasul* (district court), *supra* note 5, at 57. Later, Mamdouh Habib, an Australian citizen, filed a separate habeas petition. *See* Petition for a Writ of Certiorari at 2 n.2, *Rasul* (Supreme Court), *supra* note 1. Before the Supreme Court issued its opinion, Rasul and Iqbal, the two UK citizens, were released from U.S. custody. *Rasul* (Supreme Court), at 2690 n.1. The day after the Supreme Court issued its opinion, the government approved charges against Hicks (and two others) for trial by military commission. *See* Dep't of Defense News Release, Military Commission Charges Referred (June 29, 2004). Thus, of the four petitioners, Habib is the only one who is still being held without charge. Department of Defense news releases for 2004 are available at <http://www.defenselink.mil/releases/2004>.