Black Hole in Guantánamo Bay

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Abstract

The US government has created a black hole in Guantánamo Bay by refusing to allow the detainees captured in the Afghanistan war to test the legality of their confinement. Next spring, the Supreme Court will decide whether these detainees can bring a writ of habeas corpus *to force a hearing on their state. The cornerstone of the government's legal case is a 1950 decision (in* Eisentrager*) holding that German 'enemy aliens' had no access to the American courts. An analysis of this decision reveals that it has no bearing on the legal status of the captured aliens today. The government has shifted the focus of the argument to whether the Constitution applies abroad. The big questions are whether the Court will consider the Geneva Conventions relevant to the dispute and whether the lawyers for the detainees can convince the court that the executive branch is unconstitutionally seeking to suspend the writ of* habeas corpus.

1. Enter the Supreme Court

The legal crisis in Guantánamo Bay has become a source of embarrassment to lawyers and civil libertarians around the world. International lawyers are chagrined that the Bush Administration flouts the Geneva Conventions by failing to recognize the detainees as prisoners of war. American constitutional lawyers are disturbed by the Administration's claim that the military is entitled to act without constitutional restraint. Many ordinary citizens sense something wrong in the wholesale subjection of a group of men to primitive conditions of confinement without any public adjudication of who, among them, actually represents an ongoing military threat to the United States.

The Supreme Court has agreed to hear a challenge by a small group of Kuwaiti, Australian and British detainees that the legality of their confinement should be tested

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under a writ of *habeas corpus*.[1] The government resists granting them access to our courts on the ground that they are equivalent to 'enemy aliens' and therefore have no right to litigate in our courts and, further, that allowing battlefield enemies to litigate their legal status would seriously impede the American military effort.[2] These arguments, based on status and pragmatic concerns, prevailed in the Court of Appeals for the District of Columbia.[3] That the Supreme Court has unanimously agreed to hear the case gives some people hope that they might be prepared to reverse and grant the minimal right to the detainees to be heard on a writ of *habeas corpus*.

The executive branch has often tried and often succeeded in imposing its will to punish via special tribunals, which they call military tribunals or commissions (although these are, in fact, ad hoc courts, outside the military court structure), and the Executive typically decrees in advance that those convicted in ad hoc tribunals should not have the right to challenge their convictions under a writ of *habeas corpus*.[4] On this latter point, with one exception, the government has always lost in the Supreme Court. The writ of *habeas corpus* is too fundamental as a 'stable bulwark of our liberties'[5] for the Executive to be able to suspend it whenever it sees fit. Only Congress is entitled to suspend the writ, and only when 'in cases of rebellion or invasion the public safety may require it'.[6] The one relevant exception is the 1950 *Eisentrager* case, about which I will have much more to say.

2. Four Categories of Detainees

The current situation in Guantánamo Bay is best described as a black hole,[7] namely a place where individuals are sent on military or executive order without any form of trial or hearing — not even a determination, as required by the Geneva Conventions

1 *Al Odah v. United States*, 2003 *US LEXIS* 8204; 72 *United States Law Week* 3327 (10 November 2003). On 18 December 2003, the Ninth Circuit reached the contrary result in *Gherebi v. Bush*, 2003 U.S. App. LEXIS 25625.

2 For a summary of the government's position, see the brief by the Solicitor General of the United States, Theodore B. Olson, as Respondents on the Petitions for a Writ of Certiorari, *Rasul v. Bush*, online at http://news.findlaw.com/cnn/docs/scotus/rasulodahoct03sgopbrf.html (visited 20 January 2004).

3 *Al Odah v. United States*, 321 *Federal Reporter, Third Series* (*F. 3d*) 1134 (DC Cir. 11 March 2003).

4 On Roosevelt's executive order, see Proclamation No. 2561, 3 *Code of Federal Regulation* (*CFR*) 309 (1938–1943), reprinted in 10 *United States Code* (*USC*) 906 (1994), quoted in G.P. Fletcher, 'On Justice and War: Contradictions in the Proposed Military Tribunals', 25 *Harvard Journal of Law and Public and Policy* (2002) 635, at 641. The Executive Order issued by President Bush, 13 November 2001, 'Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism', 66 *Fed. Reg.* 57, 833 (16 November 2001), s. 7(b) tries to vest exclusive jurisdiction over suspected international terrorists in military tribunals and declares that any individual so prosecuted will not have any remedy in 'in any court of the United States, or any state thereof'.

5 W. Blackstone, *Commentaries on the Laws of England 1765–69*, vol. 1, (1979), 133.

6 United States Constitution, Art. I, s. 9, Clause 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.'

7 For this metaphor, I am indebted to a fine recent article by J. Steyn, 'A Monstrous Failure of Justice: Guantánamo', *International Herald Tribune*, 28 November 2003, at 6. See the response by R. Wedgwood, 'Let the Rules Apply While the War Goes On', *International Herald Tribune*, 2 December 2003, at 8.

— by a 'competent tribunal' on whether they should be classified as prisoners of war.[8] The nature of the black hole is that there is no way out, except through the good grace of the military.[9] Those who fall in have no legal recourse, either under international law or under the writ of *habeas corpus*. At first blush, this seems outrageous but there are in fact better arguments for the government's position than one might assume.

Before addressing those arguments, we should situate ourselves properly in the debate. The government is now waging war against civil liberties on many fronts and deploying different legal concepts for different purposes. Not all of these are relevant to the crisis in Guantánamo.

The concept of 'enemy aliens' should not be confused with two closely related terms: 'unlawful combatants' and 'enemy combatants'. Although influential in other contexts, these concepts are irrelevant in the dispute about *habeas corpus* in Guantánamo. The concept of the 'unlawful combatant' was invented to explain the legal fate of the eight German saboteurs tried in *Quirin.* Although they landed in the United States in uniform, they proceeded into the United States in civilian clothing, for the purpose of espionage and sabotage. They were all arrested before they could get close to their criminal objectives. Roosevelt established a military tribunal that tried them and, with the Supreme Court's imprimatur, convicted them and subjected six of the eight to rapid execution.[10]

The concept of the 'unlawful combatant' explained why the saboteurs were entitled neither to a jury trial under the Constitution nor to POW status under the Hague Convention. Because the term 'unlawful' also suggests, incorrectly, that their entrance into the United States was itself a punishable war crime, the more suitable term is 'unprivileged belligerent'.[11] The Department of Defence now uses the latter term to refer to hostile military personnel who fail to qualify as regular uniformed soldiers by wearing uniforms and carrying their arms openly.[12] The only implication of calling the Guantánamo detainees either 'unlawful combatants' or 'unprivileged belligerent' would be to justify their trial before a military tribunal, which, as compared to their present location in the black hole, would be an outcome much to be desired.[13]

As applied to the Guantánamo detainees, the notion of 'enemy combatant' conveys

8 Third Geneva Convention, 6 *United States Treaties* 3316, Art. 5.

9 A good example of 'good graces' is the decision by the Department of Defense, at the moment of this writing, to allow Yaser Hamdi to see a lawyer; see N. Lewis, 'Sudden Shift on Detainee', *The New York Times*, 4 December 2003, at A1.

10 *Ex parte Quirin*, 317 *United States Supreme Court Reports* (*US*) 1 (1942). The Court issued a *per curiam* opinion, upholding the military tribunal while the trial was in session. Several months after the execution of six of the defendants, Justice Harlan Fisk Stone filed his opinion, explaining the result.

11 For a critique of this term and of the concept as used in *Quirin*, see R. Baxter, 'So-called Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs', 28 *British Yearbook of International Law* (1951) 323.

12 Department of Defense Military Commission Instruction, 28 February 2003, s. 5A (defining 'combatant immunity' or 'belligerent immunity'), available online at http://www.dod.mil/news/Feb2003/d20030228dmci.pdf (visited 20 January 2004).

13 It is not clear that the detainees are guilty of an offense under the precise regulations cited *supra* note 12. Losing belligerent immunity is not *per se* a war crime. Nor is fighting a war against the US.

other associations unfavourable to the government's position. This term was first employed in order to justify the detention without trial of two American citizens, Jose Padilla[14] and Yasir Hamdi,[15] arrested and held as suspected agents of al Qaeda. While their legal situation is nearly as bad as that of the Guantánamo detainees, they can at least bring a writ of *habeas corpus*. According to the views of both courts, the Great Writ was a privilege of citizenship.[16] Although tested on *habeas corpus*, however, their legal situation did not improve much; they have lifted themselves out of the black hole, but not very far. Padilla got the right to confer with a lawyer, although the government has apparently failed to execute the court order. Hamdi was denied access, as a matter of right, to a lawyer.[17] They are both still in prison within the United States. Neither is likely to be charged with a crime. Neither will be treated as a prisoner of war. They are deprived of their rights, but at least they are visible as legal personalities, with a right to challenge the legitimacy of their detention under a writ of *habeas corpus*.

This is all that the detainees in Guantánamo are seeking at this stage of the conflict. They are at the bottom of a four-rung hierarchy that is still in the process of being worked out in the courts. The top position is occupied by American citizens, who enjoy the full panoply of rights secured by the Constitution, that is if the executive branch does not suspect them of terrorism or of collaborating with al Qaeda. If they are so suspected, they might join Padilla and Hamdi in the third level. The second rung is made up of suspected foreign terrorists who, by President Bush's Executive order, are subject to detention and then trial in a military tribunal.[18] While there were many foreigners (and some Americans)[19] in this category during and immediately after World War II,[20] military tribunals today are hypothetical modes of trial. The Bush Administration is constantly threatening to bring suspects before these tribunals, but they have not yet done so. These suspects are not quite in the black hole because, in all past cases except *Eisentrager*, the Supreme Court has entertained writs of *habeas corpus* as a mode of judicial supervision.

The third rung on the ladder is represented by Padilla and Hamdi — American

14 *Jose Padilla v. George W. Bush* et al, 233 *Federal Supplement* 2d 564, at 569 (SDNY, 4 December 2002). This decision was reversed by the Second Circuit on 18 December 2003. See *Padilla v. Rumsfeld*, 2003 U.S. App. LEXIS 25616.

15 *Hamdi v. Rumsfeld*, 337 *F. 3d* 335, at 468 (4th Cir., 9 July 2003); *Yasir Hamdi v. Donald Rumsfeld*, 316 *F. 2d* 450 (4th Cir., 8 January 2003).

16 In *Padilla*, *supra* note 14, Judge Mukasey assumed this to be true. The Fourth Circuit was initially eloquent about Hamdi's rights as a citizen: 'Hamdi's petition falls squarely within the Great Writ's purview, since he is an American citizen challenging his summary detention for reasons of state necessity.' 316 *F. 3d* 465.

17 See *supra* note 9.

18 On the Executive Order, see *supra* note 4.

19 At least one, perhaps two, of the defendants in *Quirin* were American citizens, *supra* note 10, at 9.

20 Virtually all of the cases that came to the Supreme Court in that period were *habeas corpus* appeals from convictions in military tribunals. This included *Quirin*, *Yamashita* and *Eisentrager*, cited *supra* note 10, and below in notes 46 and 21, respectively. See also *Ex Parte Milligan*, 71 *US* 18 (1966), also based on *habeas corpus*, and the leading case for the view that if the government can proceed in the regular civil courts, it cannot prosecute and sentence a defendant in a military tribunal.

citizens who are held *de facto* in preventive detention, protected only by the writ of *habeas corpus*. The fourth, and bottom, position is held by the detainees in Guantánamo Bay who, if the government had its way, would be subject to the whims of executive power.

3. *Eisentrager*

However disturbing the government's position is with respect to the Guantánamo Bay detainees, the government's radical views about the limited reach of *habeas corpus* represent a natural extension of the law and the philosophy of war. The sole exception, referred to several times, provides the entire legal foundation for the Bush Administration. In the *Eisentrager* case,[21] the Supreme Court held that Germans convicted of war crimes by a military tribunal in China and imprisoned in Germany could not bring a writ of *habeas corpus* to challenge the legitimacy of their confinement.[22] While they were civilian employees of the German government in China, the petitioners allegedly aided the Japanese war effort after the German surrender on 8 May 1945. The majority of the Supreme Court concluded that, as 'enemy aliens' abroad, they had no access to the American courts.

When the *Eisentrager* opinion is read today, it is easy to overlook the reliance in the opinion on a nineteenth-century conception of warfare, in which the entire nation was thought to be at war.[23] As Francis Lieber put it in his famous *Instructions to the Union Troops in the Field*, General Order No. 100, 24 April 1863, Article 20: 'Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in ... states or nations, whose constituents bear, enjoy, suffer, advance, and retrograde together, in peace and war.'[24] The nation should prosper and suffer together as an organic whole. This means that the agents of the enemy lose their legal personalities as individuals.

Of course, Lieber was mindful of the special status of non-combatants in bearing the burdens of violent warfare, but not with the degree of strictness later to be adopted in the Geneva Conventions. For example, Lieber thought it was permissible to starve 'hostile belligerents' in order to bring about a speedier resolution of the war. If the defending commander of a besieged city drives out the non-combatants, 'it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender'.[25]

21 *Eisentrager v. Johnson*, 339 *US* 763 (1950).

22 For some of the rich historical details surrounding the military trials, see C. Lane, 'Supreme Court Revisits Enemy Combatants; Bush Administration Cites 1950 Ruling to Justify Holding Foreign Nationals at Guantanamo Bay, Cuba', *Washington Post*, 23 November 2003, at A3.

23 I refer to this conception as 'nineteenth-century' because there are good sources during this period documenting it. In fact, this is the view of warfare that presumably prevailed in all earlier periods as well.

24 The Lieber Code can be found online at: http://www.yale.edu/lawweb/avalon/lieber.htm (visited 20 January 2004).

25 General Order No. 100, Arts 16 and 17.

This is now considered a war crime.[26] Lieber's position made sense against the background of organic nationalism in nineteenth-century thinking.

Early nineteenth-century American case law is replete with seemingly draconian rulings against the legal rights of enemy aliens. During the War of 1812 with Great Britain, the United States banned all commerce with the enemy, whether it would have been good for the US war effort or not. The Supreme Court heard the case of an American who tried to ship property home that he had earlier purchased from a British national. The Americans seized the ship, the *Rapid*, and her cargo, on the ground that the American citizen had no right to engage in commerce with a British national, even if the American was shipping home goods previously purchased. In the course of upholding the seizure,[27] Justice Johnson articulated the nineteenth-century conception of warfare with startling clarity:

> In the state of war, nation is known to nation only by their armed exterior, each threatening the other with conquest or annihilation. The individuals who compose the belligerent states exist, as to each other, in a state of utter occlusion. If they meet it is only in combat.[28]

These pointed words document the wartime submersion of the individual into the collective. The enemy is a nation; all of its nationals are part of the enemy. In this sense, the citizens belonging to the warring sides have no distinct and individual legal personalities. No civilian can stand outside the nation, as it were, watching the war from afar. No one can pretend that he or she just happened to be caught living as an accidental German or Frenchman when the two countries go to war. The nation at war suffers and prospers as an organic entity.

Under this conception of the enemy, the natural result is to conclude that non-resident enemy aliens should have no access to our courts during wartime. Two New York cases uphold this principle, in private-law disputes growing out of the war of 1812, both of them about aliens resident abroad who tried to collect debts from Americans. The courts held that they would have to wait until the war was over.[29] In a third case, a British subject resident in the United States during the war tried to collect debts from a New Yorker, which had been incurred before the war broke out. In this case, the status of residency prevailed and the British national was entitled to bring the suit.[30]

On the basis of these precedents, the Supreme Court concluded in *Eisentrager*, more than a century later:

> [T]he nonresident enemy alien, especially one who has remained in the service of the

26 Article 8(2)(a)(xxv) ICCSt. (intentionally starving a besieged city).

27 *The Rapid*, 12 *US* (8 Cranch) 155 (1814).

28 *Ibid.*, at 160–161 (Johnson, J.)

29 *Bell v. Chapman*, 10 *Johnson's Chancery Reports* (*Johns*) 183 (NY 1813) (British subject could not enforce contract against American); *Jackson v. Decker*, 11 *Johns* 418 (NY 1814) (same); see also *Griswold v. Waddington*, 16 *Johns* 438 (NY 1818) (War dissolved partnership between British and American nationals).

30 *Clarke v. Morey*, 10 *Johns* 69 (NY 1812).

> enemy,[31] does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy.

Thus, the nineteenth-century conception of warfare triumphed after World War II in generating a categorical rule about the class of persons who should be excluded from civil suits in American courts, either as plaintiff or defendant. The extension proposed by the *Eisentrager* court is that the same principle should govern standing to bring a writ of *habeas corpus* to test the legality of their confinement under a judgment by a military tribunal.

The reference at the end of the last quote to being 'helpful to the enemy' suggests an additional pragmatic argument in *Eisentrager* for excluding enemy aliens from American courts. The *Eisentrager* court expresses this point elsewhere as the fear that every captive in the field would seek to frustrate the war effort by litigating their status.[32]

Eisentrager leaves us, therefore, with two arguments for the government's position — one based on the nature of war as a conflict between nations, and the second a pragmatic observation about the inefficiency of applying the rule of law in the battlefield. Let us refer to these respectively as the 'status' and 'pragmatic' arguments.

4. The Relevance of *Eisentrager* for the Guantánamo Bay Detainees

The argument for the Bush Administration's policies in Guantánamo Bay seems to depend on invoking *Eisentrager* as a precedent. But the differences are overwhelming. First, the *Eisentrager* defendants had a trial, albeit before a military tribunal. The tribunal made an individualised judgment of guilt, imposed differential punishments and acquitted six of the defendants.[33] The detainees in Cuba have had no hearing — no chance to show that they had nothing to do with the Taliban and its military operations.

Secondly, the status argument falls entirely flat with regard to the specific litigants in the case pending before the Supreme Court. None of them is an enemy alien, none a national of a country with which the United States has been at war or engaged in an armed conflict. Not surprisingly, both the Court of Appeals, upholding the denial of *habeas corpus*, and the Solicitor General, representing the government before the Supreme Court, have sought to transmute the concept of 'enemy alien' into 'aliens who are detained outside the sovereign territory of the United States'.[34]

31 This characteristic of 'being in service to the enemy' is described elsewhere in the opinion as the category of 'nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.' *Supra* note 21, at 769.

32 *Ibid.*, at 779 ('such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.')

33 See *supra* note 22.

34 *Al Odah*, *supra* note 3, at 1137.

Here is the legal alchemy:

> Nonetheless the Guantánamo detainees have much in common with the German prisoners in *Eisentrager*. They too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States.[35]

Thus, almost without realizing it, the government totally abandons the nineteenth-century conception of warfare on which the *Eisentrager* opinion depends. This is not surprising. After the Geneva Conventions, ratified in the United States a few years after *Eisentrager*, the nineteenth-century conception of warfare lost its currency. The new emphasis on civilians as protected persons makes it difficult to think of the entire nation going to war together as an organic unit. If the combatants go to war and the civilians do not, it hardly makes sense to penalize enemy civilians as enemy aliens constituting part of the enemy.

In lieu of the original rationale in *Eisentrager*, the government has adopted an entirely new logic. The argument goes like this:

Major Premise: Due process and other constitutional rights do not apply on behalf of aliens outside the sovereign territory of the United States.
Minor Premise: According to the lease between Cuba and the United States, the Guantánamo Bay military base remains under Cuban sovereignty.
Ergo, the Constitution does not apply in Guantánamo Bay.

In order to reach a conclusion about the writ of *habeas corpus*, however, the government needs another syllogism:

Major Premise: The writ of *habeas corpus* should apply only where the Constitution, in general, applies.
Minor Premise: The Constitution does not apply in Guantánamo Bay.
Ergo, the detainees in Guantánamo have no right to bring a writ of *habeas corpus* to test the legality of their confinement.

This argument has nothing to do with *Eisentrager*, even though the government claims that there is no difference between 'enemy aliens' and 'aliens outside the sovereign jurisdiction of the United States'.

The government's case turns on the formal concept of sovereignty. If the United States does not have sovereignty over a particular piece of land, then those whom it imprisons there supposedly have no right to complain about their confinement. This is a glaring non sequitur. Let us suppose that according to the formal terms of the lease agreement with Cuba, the latter retains sovereignty. Why should it follow logically that the United States had no obligation to afford a hearing to the persons it subjects to illegal confinement on its military base? Why should sovereignty be a necessary condition for individual rights and judicial review of executive power?

As Justice Black put in his dissent in *Eisentrager*, the proper question is not

35 *Ibid.*, at 1140. The argument is repeated in the Brief by Solicitor General Theodore B. Olson for Respondent, *supra* note 2.

sovereignty but control and alternative sources of relief.[36] If the *Eisentrager* inmates could have expected relief from the German courts, they would have no need for access to an American court. In Guantánamo Bay, no one seriously thinks that Cuban courts might have the power to intervene and release the detainees. And, if not, what is the point of saying that Cuba retains sovereignty?

In the long history of debates about when constitutional protections applied to territories or bases abroad, the relevant question has always been whether the United States should defer to local cultural practices. The question was put as to whether the Constitution required local courts systems in, say, Puerto Rico or the Philippines to conform to American institutions, most notably the jury trial.[37] The Supreme Court imposed this requirement only when incorporation of the territory indicated a process of full integration into the American legal system.[38] Thus, the United States has always expressed a healthy pluralistic respect for local traditions.

The value of pluralism hardly enters the picture, however, when the United States exercises parallel or exclusive power in its own institutions. In a thoughtful and influential opinion in the prosecution of Detlef Tiede, Judge Herbert Stern held the jury requirement applicable to a criminal trial of an East German national in an American occupation court in Berlin.[39] The American institution was a parallel institution, legitimate in its own sphere, and there was therefore no reason to defer to German attitudes toward the jury system. Whether the United States was sovereign over the territory was irrelevant.

The same situation has arisen in Guantánamo Bay, except that, in the military base, the United States is not a parallel, but in fact the only, political authority. The suggestion that the government should defer to local practices (as in Puerto Rico or the Philippines) would hardly be compatible with the official American disdain for the Cuban Communist system of justice. Therefore, the teachings of the *Tiede* case should apply in Guantánamo. However the American military exercises its authority, it must recognize that it is bound by basic constitutional restraints, including the right of detainees to a judicial hearing to determine the legality of their status.[40]

The status argument from *Eisentrager* (non-resident enemy aliens have no access to our courts) could hardly carry the weight of a full-scale denial of *habeas corpus* rights to the Guantánamo detainees. The government needs the pragmatic argument as well. Here, they have a point. If the question were litigation on the front during the heat of battle, we might understand why the government would be concerned about the efficiency of the war effort. No one would insist on due process in the face of a military

36 *Supra* note 21, at 791.

37 *Balzac v. Puerto Rico*, 258 *US* 298 (1922) (no jury trial in Puerto Rico); *Dorr v. United States*, 195 *US* 138 (1904) (no jury trial in the Philippines).

38 *Rassmussen v. United States*, 197 *US* 516 (1905) (jury trial required in territory of Alaska).

39 *States v. Tiede*, 86 *Federal Rules Decisions* 227 (1979).

40 The most important Supreme Court precedent, restricting the application of the Constitution, is easily distinguishable. In *United States v. Verdugo-Urquidez*, 494 *US* 259 (1990), the Court held that the Fourth Amendment did cover the actions of an American drug agent in Mexico. The Court was influenced by the impossibility of securing a warrant in Mexico when there were no American magistrates available.

attack. Only with a rich imagination, however, could one apply this argument to the situation today, far from the battlefield, two years after the cessation of hostilities.

5. How the Court Could Close the Black Hole

The Supreme Court could resolve the case by avoiding the issue of *habeas corpus* and rule on the basis of the Third Geneva Convention. The argument would be that the detainees appear to be prisoners of war, with at least some doubt about their status under international law. Under these circumstances of doubt, they are entitled to a determination of their status by a 'competent tribunal'.[41] The danger is that the Court would dismiss this argument on the ground that the Geneva Convention is not self-executing and, therefore, vests no rights in the individual detainees against the United States government. In the *Hamdi* case, the Court of Appeals for the Fourth Circuit invoked this rationale for holding American treaty obligations irrelevant to the case.[42]

Of course, with regard to criminal charges, the Geneva Conventions are not self-executing in the United States. Congress must enact legislation, defining the circumstances under which a grave breach of the Conventions is punishable in American courts.[43] But the Supreme Court has often resolved issues in the law of war by relying on provisions in the treaties ratified by the United States and constituting, therefore, the 'supreme law of the land'.[44] For example, in *Quirin*,[45] the Court invented the term 'unlawful combatant' in order to explain why the eight German saboteurs who surreptitiously entered the United States in civilian clothing were not entitled to be treated as prisoners of war. Thus, they defined the basic contours of the subsequent debate by recognizing as controlling law the definition of 'combatancy' in the Annex to the Hague Convention of 1907.

Even more significantly, in the *Yamashita* case,[46] the justices resolved the central issues of the case by relying directly on American treaty obligations. The Japanese general, Tomoyuki Yamashita, was allegedly negligent in failing adequately to supervise his troops as they committed atrocities against the Philippine population in the closing days of the war. The problem was why this should constitute a war crime. The Supreme Court reasoned that implicit in the definition of combatancy — the same one as invoked in the *Quirin* opinion — is an obligation to supervise troops in the field. This followed, supposedly, from the words 'commanded by a person responsible for his

41 See *supra* note 8.

42 *Hamdi v. Rumsfeld*, 337 *F. 3d* 335, at 468 (4th Cir., 9 July 2003).

43 See 18 *USC* 2441 (called 'war crimes' as of 2002).

44 United States Constitution, Art. IV, Clause 2 (defining supreme law of the land as including 'treaties made under the authority of the United States').

45 *Supra* note 10.

46 *In re Yamashita*, 327 *US* 1 (1946).

subordinates' as used in the Annex to the Hague Convention. At the same time, the justices engaged in a long debate about whether Article 60 of the 1929 Geneva Convention guaranteed the accused a court-martial trial instead of a military commission. The majority held that it did not. Whether these interpretations of international law are sound is less important than the Court's implicit acceptance of the guiding force of international treaty obligations in the law of war. There was no talk then about whether the treaties were 'self-executing', nor should there be now.

If the Supreme Court does not resolve the case under the Third Geneva Convention, it will have to enter the thicket of American constitutional law as applied to foreign territories and offshore military bases. The conceptual problems in this area are daunting. It is unlikely that the justices will assay the general issue of when the Constitution applies abroad. But they might hold, nonetheless, that the writ of *habeas corpus* is a fundamental right, available to all those affected by American governmental power. Still, there would be a problem of whether the exigencies of warfare justified a suspension of the writ.

If the relevant legal description guiding the Court is that the writ of *habeas corpus* has been suspended, that description would not necessarily resolve the case in favour of the detainees. The government might have a textual argument on its side. The Constitution requires legislative authorization to suspend the writ in cases of 'rebellion or invasion'.[47] These two grounds represent internal disturbances. The external consequences of war are not mentioned. Arguably, it follows that, in cases of warfare, the president may suspend the writ 'where the public safety may require it'.[48]

In the final analysis, the fate of the Guantánamo detainees will depend on the resolution of two conflicting forces. One is the majesty of the writ of *habeas corpus* — the pride of the Anglo–American legal tradition. The other is the logic of warfare and the imperative of conducting military operations efficiently, without unnecessary obstacles. Resolving this conflict will take the justices back to the principle incorporated in the Geneva Conventions. The requirement of a competent tribunal to resolve questions of doubt about prisoner-of-war status communicates an important message about reconciling proper procedures with efficient warfare. Because of the way in which the international community understands warfare, it is still necessary to pause and resolve questions of doubt with proper regard for the rights and interests of detainees. If this is the general understanding of the international community, it should also be the way in which we approach the scope of *habeas corpus* in American law. The pragmatic argument fails as a rationale for suspending the judicial supervision of executive power.

As of this writing, it appears that the government might release the specific detainees who have pursued their case to the Supreme Court. They might hope to

47 See *supra* note 6.
48 *Ibid.*

render the case moot by depriving the petitioners of standing to complain. This would be good for those released, but harmful to the hundreds still in detention. The Supreme Court could nonetheless affirm standing by invoking the principle that the illegal situation is 'capable of repetition' and the denial of standing would undermine the role of judicial supervision.[49] The hope remains that the Supreme Court will assert its judicial authority and redeem the American commitment to principles of liberty and individualized justice.

49 The crystallized phrase is 'capable of repetition yet evading review'. See *Roe v. Wade*, 410 *US* 113, at 125 (1973) (the petitioner was no longer pregnant but still had standing to challenge restrictive abortion laws).