
# The Jurisprudence of Justice John Paul Stevens: Leading Opinions on Wartime Detentions

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# Summary

Justice John Paul Stevens played a pivotal role in determining the scope of executive-branch power in a post-9/11 world. After 9/11, Congress quickly authorized the Executive to respond to the terrorist attacks using military force. Difficult legal questions emerged from the consequences of the ensuing military actions, particularly as suspected members of Al Qaeda and the Taliban were captured in Afghanistan and elsewhere and transferred to the U.S. Naval Station at Guantanamo Bay, Cuba. Key questions included: What legal authorities restrict the Executive's ability to detain and try such persons as it sees fit? To what extent do detainees outside of the United States have the right to challenge their detentions in federal courts? When may Congress remove federal courts' jurisdiction over habeas cases?

Justice Stevens authored majority opinions in two leading cases, *Rasul v. Bush* and *Hamdan v. Rumsfeld*, in which the Court allowed detainees' habeas petitions to proceed and invalidated the early incarnation of military commissions, thereby rejecting the broader views of executive power articulated shortly after the 9/11 attacks. In the cases, his view prevailed over strongly articulated dissenting opinions authored by Justice Scalia and other justices.

For a more in-depth examination of the Supreme Court's post-9/11 decisions regarding habeas corpus, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by (name redacted) and (name redacted).

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# Introduction

Following the 9/11 terrorist attacks, Congress authorized the President's use of "all necessary and appropriate force" against those "nations, organizations, or persons" who "planned, authorized, committed, or aided the terrorist attacks."[1] As a result of subsequent military action, particularly in Afghanistan, the United States captured numerous persons whom it suspected of ties to Al Qaeda or the Taliban—groups alleged to have perpetrated the 9/11 attacks or to have aided the perpetrators. The United States transferred many such persons to the U.S. Naval Station at Guantanamo Bay, Cuba.

The Guantanamo detentions prompted difficult legal questions regarding wartime detention and the separation of powers, some of which had previously been explored only in the context of traditional wars. What legal frameworks limit the Executive's authority to detain and try persons captured in a military conflict as it sees fit? Do statutory and constitutional rights to challenge one's detention extend to non-citizens detained outside of the United States? In what circumstances may Congress limit the federal courts' jurisdiction over petitions for habeas corpus?

Justice Stevens has been a key player in the Supreme Court's resolution of such questions.[2] He authored majority opinions in two significant cases, *Rasul v. Bush*[3] and *Hamdan v. Rumsfeld*.[4] In those cases, the Court decided questions regarding Guantanamo detainees' access to habeas review on statutory grounds, without addressing whether the U.S. Constitution might guarantee such a right. Nevertheless, they arguably provided the legal underpinning for the 2008 decision *Boumediene v. Bush*,[5] in which the Court reached the constitutional question. Likewise, although the *Hamdan* decision struck down early military commission procedures on statutory grounds, it arguably framed the Court's approach to reviewing the balance of the three branches' powers during wartime and set the stage for future reviews of military commission procedures.

Justice Stevens might also be characterized as the leading voice among the justices encouraging the Court to rule on difficult separation-of-powers questions implicated by wartime detentions. In 2004, for example, he wrote a dissenting opinion, joined by three other justices, in *Rumsfeld v. Padilla*.[6] The case involved a man, determined by the President to be an enemy combatant, arrested in Chicago and detained in a military brig. The Court resolved his subsequent habeas challenge on statutory grounds, and did not resolve questions regarding the President's authority to conduct military detentions. In dissent, Justice Stevens argued that the Court had a duty to address the "questions of profound importance to the Nation" raised in the case.[7] He used relatively strong language to describe the importance of the questions at stake, concluding with

[1] Authorization for Use of Military Force, P.L. 107-40 (2001). The authority also extended to those "nations, organizations, or persons" who harbored the perpetrators of the attacks.

[2] For a more in-depth examination of the Supreme Court's post-9/11 decisions regarding habeas corpus, see CRS Report RL33180, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, by (name redacted) and (name redacted).

[3] 542 U.S. 466 (2004).

[4] 548 U.S. 557 (2006).

[5] 553 U.S. 723 (2008).

[6] 542 U.S. 426 (2004).

[7] *Id.* at 455 (Stevens, J., dissenting).

the argument that "if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."[8]

# Historical Interpretation in Habeas Corpus Questions

Over time, the writ of habeas corpus has evolved as the primary means to challenge executive detentions. The U.S. Constitution does not mention the writ, except to limit the circumstances in which it may be suspended.[9] A federal statute, 28 U.S.C. § 2241, provides the federal courts with jurisdiction to grant writs of habeas corpus to specified petitioners, including those whose custody is shown to violate the U.S. Constitution, federal statute, or international law.[10] However, the writ has a history "antecedent to statute … throwing its root deep into the genius of our common law."[11] Thus, the historical use and interpretation of the writ are crucial factors for interpreting its scope.

It is common for Supreme Court justices to emphasize history in their interpretation of the habeas writ; however, their views of history differ. A case decided shortly before the 9/11 attacks, *INS v. St. Cyr*,[12] offers a pre-9/11 glimpse of Justice Stevens's historical interpretation of the writ. In that case, a lawful permanent resident of the United States was subject to deportation by the executive branch because of an earlier conviction, but a legal issue arose on whether he was eligible for discretionary relief from removal. He filed a habeas petition in federal court to challenge his continued detention pending deportation. Although the case was resolved on statutory grounds, Justice Stevens emphasized the traditional role the habeas writ plays in limiting executive-branch detention authority. Writing for the majority in the 5-4 case, he asserted that "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention…."[13] Contrasting petitions brought to challenge detentions initiated by the executive with petitions asserted in other contexts, including petitions filed by prisoners convicted by criminal courts,[14] he asserted that "it is in [the executive detention] context that [the writ's] protections have been the strongest."[15]

This view of the habeas writ's historical role appeared to inform Justice Stevens's approach in post-9/11 cases. For example, in *Hamdan*, he emphasized the "compelling historical precedent" supporting civilian courts' intervention in military commission proceedings.[16]

[8] *Id.* at 465.

[9] *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.").

[10] 28 U.S.C. § 2241(c)(3).

[11] Williams v. Kaiser, 323 U.S. 471, 484 n. 2 (1945).

[12] 533 U.S. 289 (2001).

[13] *Id.* at 380, n. 13.

[14] For example, a petitioner may challenge his or her custody while serving a sentence imposed after trial and appeal in the federal courts, or bring a collateral attack to challenge custody while a case or appeal is pending.

[15] *Id.*

[16] *Hamdan*, 548 U.S. at 588-89.

# Contrast with Justice Scalia

Some commentators have characterized the post-9/11 wartime detention cases as evidencing a jurisprudential clash between Justice Stevens and Justice Scalia.[17] Nevertheless, though subsequently drawing differing conclusions from its application, the two justices have proceeded from a common analytical premise, as evidenced in *Hamdi v. Rumsfeld*,[18] one of the early landmark cases decided after the 9/11 attacks. In that case, a plurality of the Supreme Court justices upheld, with limitations,[19] the domestic detention of a U.S. citizen who was captured in Afghanistan and alleged to have been fighting for the Taliban. In a dissenting opinion, Justices Stevens and Scalia agreed on a position that none of the other justices shared. Specifically, they viewed the domestic, preventative (i.e., non-criminal) detention of a U.S. citizen as exceeding the Executive's power. The dissenting opinion articulated the most restrictive view of executive power among the various opinions. It asserted that, historically, "the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge."[20]

However, as the factual scenarios moved beyond U.S. boundaries and involved non-citizens—including in *Rasul* (decided the very same day as *Hamdi*)—the two justices' interpretations diverged. Although both justices emphasized historical context and prior precedents, they reached opposite conclusions. Specifically, whereas Justice Stevens continued to interpret executive authority relatively narrowly as applied to non-citizens in Guantanamo, Justice Scalia perceived a historical distinction between the treatment of detainees on U.S. soil, on one hand, and the treatment of aliens outside U.S. territory, on the other hand. That difference is evident throughout the post-9/11 wartime detention cases. In several dissenting opinions, Justice Scalia argued in favor of bright-line rules, in which jurisdiction would end at the boundaries of U.S. sovereign territory. In contrast, Justice Stevens adopted a more case-specific approach, in which history and precedents were viewed as supporting the application of rights and jurisdiction to Guantanamo detainees.

One result of this split was that if Justice Scalia's approach had prevailed in the post-9/11 cases, the Court would have resolved many of the wartime detention cases by declining to exercise jurisdiction. Instead, Justice Stevens's approach led to the Court's resolution of various questions on the merits.

[17] *See, e.g.*, Daniel A. Farber, *Justice Stevens, Habeas Jurisdiction, and the War on Terror*, 43 U.C. Davis L. Rev. 945 (2009).

[18] 542 U.S. 507 (2004).

[19] A plurality of justices upheld the detention but held that the petitioner was entitled to a hearing. Justice O'Connor, writing for the plurality, stated that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Id.* at 536.

[20] *Id.* at 554 (Scalia, J., dissenting).

# *Rasul v. Bush*

After 9/11, numerous Guantanamo detainees submitted habeas petitions in federal courts to challenge their detentions. The petition in *Rasul* was filed on behalf of two Australian and 12 Kuwaiti citizens whom the United States had captured in Afghanistan.[21] The question before the Court was whether the federal habeas statute granted jurisdiction to consider petitions brought by non-citizens located in Guantanamo. The government argued that the statute did not apply extraterritorially. The statutory text made no reference to petitioners' geographic location or citizenship.[22]

Supreme Court precedents did not necessarily decide the issue. In several cases predating the habeas statute, the Court upheld federal courts' jurisdiction over writs of habeas corpus challenging wartime detentions.[23] However, those cases typically involved persons detained in the United States.[24] In contrast, in *Johnson v. Eisentrager*,[25] a post-World War II case decided a few years after Congress enacted the current habeas statute, petitioners were serving sentences in Germany after a trial by a U.S. military commission in China. Noting six factors,[26] the Court held that the courts lacked jurisdiction over the *Eisentrager* petitions.

Writing for the five-justice majority[27] in *Rasul*, Justice Stevens relied on case-specific facts to distinguish *Eisentrager* and hold that the "[a]pplication of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus."[28] To reach that conclusion, he characterized the *Eisentrager* holding as limited to its facts. He then distinguished the Guantanamo detainees from the petitioners in *Eisentrager*, concluding that the two groups "differ … in important respects."[29] In particular, he emphasized that unlike the *Eisentrager* petitioners, the Guantanamo detainees were not alien enemy combatants in a traditional conflict between state armies.[30] He also noted that unlike its detention facility in post-

[21] 542 U.S. 466 (2004).

[22] *See* 28 U.S.C. § 2241 *et seq.*

[23] *See, e.g.*, Ex parte Milligan, 71 U.S. 2 (1866); Ex parte Quirin, 317 U.S. 1 (1942). *But see* In re Yamashita, 327 U.S. 1 (1946) (denying a habeas petition brought by a Japanese Army General).

[24] *But see* In re Yamashita, 327 U.S. 1 (1946) (holding that the courts had jurisdiction to review a habeas petition brought by a Japanese Army General detained in the Philippines).

[25] 339 U.S. 763 (1950).

[26] *Id.* at 777 ("To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.").

[27] A sixth justice, Justice Kennedy, concurred in the Court's decision.

[28] *Rasul*, 542 U.S. at 481.

[29] *Rasul*, 542 U.S. at 476.

[30] *Id.* (Noting that the Guantanamo detainees are "differently situated" because they "are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.")

war Germany, the United States exercises "complete jurisdiction and control" over the Guantanamo Naval Station, pursuant to an agreement with Cuba.[31]

Justice Stevens relied on a second line of argument to support the Court's holding. He recalled *Ahrens v. Clark*,[32] a case decided a few years prior to *Eisentrager*, in which the Court interpreted the federal habeas statute as not providing jurisdiction for petitions brought by persons located outside of a court's territorial jurisdiction. (Justice Stevens was well situated to recollect that case: when the Court considered *Ahrens*, he was serving as a law clerk for Justice Rutledge, who wrote a dissenting opinion.) He then interpreted a 1973 decision as having limited *Ahrens*.[33] Particularly given the sparse precedent on the issue of the extraterritorial reach of habeas corpus rights, Justice Stevens's unique historical understanding might have been persuasive to some of the other justices.

Justice Scalia wrote a dissenting opinion in *Rasul* that rejected Justice Stevens's fact-specific distinctions in favor of a bright-line rule. He characterized *Eisentrager* as "settled law."[34] Under that precedent, he argued, courts lack jurisdiction over habeas claims brought by non-citizens outside U.S. sovereign territory.

# *Hamdan v. Rumsfeld*

The petitioner in *Hamdan* was a Yemeni national alleged to have worked as Osama Bin Laden's bodyguard and driver. Like the petitioners in *Rasul*, he was captured in Afghanistan and detained at Guantanamo. Two years into his detention at Guantanamo, he was determined by the President to be subject to a military order establishing military commissions and charged with one count of conspiracy "to commit … offenses triable by military commission."[35] He challenged the planned military commission proceeding, arguing that (1) the Executive lacked the authority under existing statutes and the laws of war to use a military commission as the forum for a trial for the crime of conspiracy; and (2) the military commission procedures violated both the Uniform Code of Military Justice (i.e., Chapter 47 of Title 10 of the U.S. Code) and the Geneva Convention, under which he was entitled to be treated as a prisoner of war.[36]

In response, the government urged the Court to dismiss the case based on a provision of the Detainee Treatment Act that had removed federal courts' jurisdiction over habeas challenges brought by aliens held in U.S. custody as enemy combatants. The petitioner argued that the provision did not apply to cases that, like his, were pending when the measure passed, and that, in any event, it was unconstitutional.

*Hamdan* prompted a complicated set of opinions by the justices. Justice Stevens wrote the main majority opinion, but the opinion was divided into multiple parts, with other justices joining some but not all of them. For example, only three other justices joined a portion of Justice Stevens's

[31] *See id.*; Lease of Lands for Coaling and Naval Station, Feb. 23, 1903, U.S.-Cuba, Art. 111, T.S. No. 418.

[32] 335 U.S. 188 (1948).

[33] *See* Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 495 (1973); *Rasul*, 542 U.S. at 478.

[34] *Id.* at 489 (Scalia, J., dissenting).

[35] *See id.* at 566 (citing App. to Pet. for Cert. 65a.).

[36] Article 5 of the Third Geneva Convention governs prisoners of war. It dictates that individuals captured during battle be treated as prisoners of war unless they are determined to be unlawful enemy combatants.

opinion that held that the offense of "conspiracy … to commit offenses triable by military commissions" was one that could not be tried by military commission.

Other parts of Justice Stevens's opinion were joined by a majority of justices and thus expressed a holding of the Court that has precedential weight. Writing for a majority of the justices, Justice Stevens rejected the argument that the Detainee Treatment Act removed federal courts' jurisdiction over Hamdan's habeas challenge.[37] That holding was grounded on an analysis of the Court's precedents regarding retroactivity of statutes, under which a presumption generally favors a prospective effect only.

Also writing for a majority, he concluded that the military commissions' procedures, as then designed, violated precepts of the Uniform Code of Military Justice (UCMJ), international laws of war incorporated into the UCMJ, and UCMJ provisions regulating military commissions. An Executive Order signed in November 2001 governed the detention and trial of non-citizens whom the President determines might have an Al Qaeda connection or might have engaged in terrorist activities directed at the United States.[38] It then provided that such individuals would be tried by military commission "for any and all offenses triable by military commissions."[39] The Court held that any power to create them must flow from the Constitution and must be among those "powers granted jointly to the President and Congress in time of war."[40] In other words, it viewed the statutes as, at most, "acknowledg[ing] a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws,' including the law of war," rather than as providing an independent basis of authority for the convening of special military trials.[41] It also held that even alleged Al Qaeda members, such as Hamdan, fell within the protections of the Geneva Conventions.[42]

Justices Scalia, Thomas, and Alito wrote dissenting opinions. One point of disagreement concerned statutory interpretation. For example, Justice Scalia asserted that under the plain text of the Detainee Treatment Act, federal courts lack jurisdiction over Hamdan's habeas petition. He likewise disagreed with the majority's reading of the precedents regarding retroactivity.

Other areas of contention seemed to strike closer to the heart of separation-of-powers concerns. For instance, Justice Scalia argued that the Court should refrain from exercising jurisdiction in the case even if Congress had not prohibited its exercise, in part because of the "military exigencies" supporting the detentions and the military commission process.[43] Similarly, Justice Alito's dissenting opinion argued that the Court is bound to defer to the President's plausible interpretation of the treaty language.

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[37] *Hamdan*, 548 U.S. at 583-584.

[38] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

[39] *Id.*

[40] *Hamdan*, 548 U.S. at 591 (citing Congress's powers to "declare War ... and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11, to "raise and support Armies," *Id.*, cl. 12, to "define and punish ... Offences against the Law of Nations," *Id.*, cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," *Id.*, cl. 14.).

[41] *Hamdan*, 548 U.S. at 594-595.

[42] *Id.* at 630.

[43] *See id.* at 673-73 (Scalia, J., dissenting).

# Role in Subsequent Cases

Because the questions regarding habeas jurisdiction were decided on statutory grounds in *Rasul* and *Hamdan*, those cases did not resolve a looming constitutional question: did the U.S. Constitution's Suspension Clause prevent Congress from stripping the federal courts of jurisdiction over Guantanamo detainees' habeas challenges? The Suspension Clause of the U.S. Constitution 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."[44]

After the *Hamdan* decision, Congress again enacted a statutory provision in 2006 that purported to explicitly remove federal courts' jurisdiction to review habeas challenges, including pending cases, brought by aliens held in U.S. custody as enemy combatants.[45] The constitutional question was thus prompted. A case raising the question, *Boumediene v. Bush*,[46] was soon brought.

Although Justice Stevens did not write the majority opinion in *Boumediene*, he arguably had two important roles in the case. First, when the Court earlier declined to review the case, he and Justice Kennedy issued a statement noting the "obvious importance of the issues raised" by the case, signaling a possible willingness to vote to review the case after some procedural circumstances had changed.[47] Second, as the senior Associate Justice on the Court, Justice Stevens has the role of assigning the writing of opinions in cases in which the Chief Justice is not in the majority. In *Boumediene*, Justice Stevens assigned the majority opinion to Justice Kennedy, an assignment that might have been important in retaining a five-justice majority in the case.

# Justice Stevens's Legacy

Although the *Rasul* and *Hamdan* decisions were largely resolved on statutory grounds, it can be said that Justice Stevens has been instrumental in developing post-9/11 jurisprudence regarding the limits of executive power during—and following—armed conflicts. Prior to 9/11, the Supreme Court had rarely considered questions regarding potential limits on the President's Commander in Chief power.[48] The wartime detention cases provide key insights into the Court's views on the reach of executive authority, as well as on other separation-of-powers concerns, including Congress's role.

The 9/11 attacks were arguably indicative of broad and long-lasting shifts in the manner in which wars are waged. *Rasul*, *Hamdan*, and other key post-9/11 cases will likely serve as the leading line of precedents in future non-traditional conflicts. Justice Scalia and some other justices have perceived a broad vision of executive power to be well grounded in historical and legal

[44] U.S. Const. art. I, § 9, cl. 2.

[45] Military Commissions Act of 2006, P.L. 109-366, § 7.

[46] 553 U.S. 723 (2008).

[47] Boumediene v. Bush, 549 U.S. 1328 (2007).

[48] Perhaps the leading Supreme Court opinion on that issue is Justice Robert Jackson's concurring opinion in a Korean War era case, Youngstown Steel & Tube Co., 343 U.S. 579 (1952). *See also Hamdan*, 548 U.S. at 638 ("The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in Youngstown."). Justice Jackson's framework was invoked in both majority and dissenting opinions after 9/11, with justices reaching differing conclusions.

precedents, as least where non-citizens are concerned. In contrast, Justice Stevens and other justices have viewed historical precedents as placing limits, in some circumstances, on the Executive's authority to indefinitely detain wartime captives or to set procedures for their trial. It has been asserted that Justice Stevens's jurisprudential views on such issues may have been focused, to some degree, by both his experience as a World War II veteran and his time as a law clerk for Justice Rutledge, who is said to have regretted legal interpretations he adopted to uphold the internment of Japanese Americans.[49]

Regardless, Justice Stevens's case-specific approach to such issues is likely to have both a short-term and a long-standing effect. For example, in the near future, the Court will likely review newly enacted military commission procedures, which are currently being utilized in trials of detainees. Looking into the future, the decisions are likely to impact future decisions in which the Court is called upon to decide the extent to which aliens held outside of U.S. territory are entitled to rights under the U.S. Constitution.

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[49] *See, e.g.*, Deborah Pearlstein, *The Path from Chevron to Hamdan: Justice Stevens and National Security Cases*, Apr. 21, 2010, http://www.scotusblog.com/2010/04/the-path-from-chevron-to-hamdan/#more-19018.