

## Book Note

### THE CHALLENGE: *HAMDAN v. RUMSFELD* AND THE FIGHT OVER PRESIDENTIAL POWER, by Jonathan Mahler<sup>1</sup>

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IN THE AFTERMATH OF 9/11, President Bush issued an executive order authorizing the creation of military tribunals for the detention, treatment, and trial of certain suspected terrorists. The reasons were largely strategic—perhaps most alarmingly, the order enabled the administration to withhold certain rights otherwise considered fundamental in American civilian courts, including a defendant’s right to see the evidence against him or her. Under the assumption that Guantánamo Bay would be beyond the territorial jurisdiction of the federal courts, the US naval base became “the interrogation battle lab for the war on terror”<sup>2</sup>—and on 11 January 2002, the first planeload of prisoners landed in Guantánamo, with hundreds more following shortly thereafter, including a Yemeni man named Salim Ahmed Hamdan.

In *The Challenge*, Jonathan Mahler chronicles the journey of the lawyers who defended Hamdan and whose eventual Supreme Court victory not only placed critical limitations on the power of the President, but also afforded detainees the basic protections provided under the US Constitution and international law. The book centres on Lieutenant Commander Charles Swift, a JAG Corps defense attorney, and Neal Katyal, a Georgetown University law professor. Mahler braids stories of their personal and professional struggles and achievements with a readable behind-the-scenes account of the case as it unfolded before the courts.

Orphaned at age eleven, Hamdan grew up on the streets working odd jobs until he was recruited for jihad. Although not especially religious, he embraced the promise of paid and meaningful work and quickly became the driver and

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1. (New York: Farrar, Straus and Giroux, 2008) 334 pages.

2. *Ibid.* at 32.

bodyguard for Osama bin Laden. On 16 December 2003, Hamdan was chosen by the US administration to be one of the first detainees to be tried for unspecified offenses by a special military commission. Lead prosecutors believed that Hamdan's story had narrative appeal because of his direct connection to bin Laden—and if Hamdan did not plead guilty, his trial would at least illustrate al-Qaeda's long-standing jihad against America.

While Swift represented Hamdan in the military tribunal, Katyal focused on preparing the lawsuit for the federal courts with the help of Seattle-based law firm Perkins Coie. At trial, Judge Robertson found that the President's unilateral finding that Hamdan was affiliated with al Qaeda was not enough to try him by military tribunal and that under the Geneva Conventions, only a "competent tribunal" could make such a determination—"the president," wrote Robertson, "is not a tribunal."<sup>3</sup> This decision was, however, reversed by the D.C. Circuit Court of Appeals (3-0) in a dismissively short opinion. Consequently, Katyal, Swift, and Perkins Coie lawyers began drafting a Supreme Court petition—all the while mindful of the senate bill (now *Detainee Treatment Act*), which would have deprived the court jurisdiction to hear *Hamdan* and suspended the writ of habeas corpus for detainees.

Mahler's book culminates in the climactic Supreme Court hearing, which resulted in a 5-3 reversal from the Court of Appeals.<sup>4</sup> The Court determined that the *Detainee Treatment Act* had not meant to strip the justices of their authority to hear the case and that the President's power to convene military commissions is carefully circumscribed by the laws of war, including international treaties and statutes.

In September 2006, the President unveiled a modified version of his military commissions, and Hamdan was subsequently re-charged with material support for terrorism and conspiracy. Following the book's publication, Hamdan was sentenced to over five years and, having been credited for his time at Guantánamo, was transferred to Yemen in November 2008 to serve out his remaining month.

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3. *Ibid.* at 165.

4. Chief Justice John G. Roberts was on the Court of Appeals which decided *Hamdan* and recused himself from the case.