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## The Supreme Court's 2004 "War on Terror" Cases

By:

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On June 28, 2004, the Supreme Court handed down three important decisions in cases arising out of the war on terror. All three cases were brought by, or on behalf of, individuals captured and detained by the United States based on their alleged association with al Qaeda or the Taliban. Most of these men are being held at the United States Naval Station in Guantanamo Bay, Cuba, although two American citizens are in the U.S. Naval Brig at Charleston, South Carolina.

Much of the media coverage of these decisions incorrectly suggests that they represent a defeat for the Bush Administration's policies. In fact, the decisions have affirmed a number of the critical legal and constitutional principles on which the Administration's treatment of the detainees has been based, and will require only modest revisions to the policies and procedures it already has adopted. Significantly, the cases affirm the basic validity of the wartime paradigm, chosen by the Administration after the September 11 attacks to handle captured enemy combatants, and effectively reject arguments - made by many Administration critics - that the criminal law is the appropriate model for handling these matters. Although each case will be discussed in turn, it should be underscored that they must be read together in order to fully understand the Court's views on these important issues.

### Rumsfeld v. Padilla, No. 03-1027 (June 28, 2004)

There is little doubt that the most contentious of the three cases was *Rumsfeld v. Padilla*, the "dirty bomber" case. José Padilla is an American citizen who allegedly trained with al Qaeda and entered the United States on May 8, 2002 with the purpose and intent of detonating a radiological, or "dirty," bomb. He was taken into custody at O'Hare International Airport in Chicago, and then transferred - on the basis of a material witness warrant - to New York City, where he was assigned counsel. A few days later, however, the President re-designated Padilla as an "enemy combatant," and ordered his transfer to military custody. Padilla is now held in the Naval Brig at Charleston, South Carolina.

Padilla's lawyer brought a *habeas* petition on his behalf in the United States District Court for the Southern District of New York - although the government contested his right to counsel in the context of that civil process. The District Court ruled that Padilla was entitled to counsel, but also made clear that the President was within his authority to designate Padilla as an enemy combatant, and that any judicial review of this decision would have to accord significant deference to the Executive. On appeal, the Second Circuit reversed this decision, concluding that Padilla - as an American citizen - could not be held as an enemy combatant. Rather, the court's two judge majority ruled that the government would have to process Padilla through the ordinary criminal justice system, on the basis of an indictment and resulting in a full criminal trial, or release him from custody.

In reaching this result, the Second Circuit majority relied particularly on 18 U.S.C. § 4001(a), the so-called "Non-Detention Act," reasoning that this law forbade the prolonged detention of an American citizen absent a specific congressional enactment to the contrary. The court did not consider that Congress' September 18, 2001 Joint Resolution, authorizing the use of "all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons," was sufficient to meet this standard. Overall, this represented a major defeat for the government's position.

The Supreme Court, in a 5-4 vote, reversed. They did not, however, reach the merits of whether the President could designate Padilla as an enemy combatant or the Non-Detention Act's applicability. Rather, the Court ruled that Padilla's *habeas* petition had been filed in the wrong federal district, because his "immediate custodian," to whom the writ would have to issue, is located in the District of South Carolina, not in the Southern District of New York.

Writing for the majority, Chief Justice Rehnquist explained that, based on the weight of Supreme Court precedent, a *habeas* petition

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can only be filed in a district court with jurisdiction over the prisoner's immediate custodian, *i.e.*, the "warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." It rejected the Second Circuit's position that, because Secretary of Defense Rumsfeld has "legal control" of Padilla (and could be reached on the basis of New York State's "long-arm" statute), he was the proper respondent. Therefore, if José Padilla wishes to seek his release through a writ of *habeas corpus*, he must refile his petition in the United States District Court for the District of South Carolina. In dissent, Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer), argued that the Court should have reached the merits of Padilla's petition because of the questions of "profound importance" it presented.

## Hamdi v. Rumsfeld, No. 03-6696

Although the Supreme Court was badly fractured in *Hamdi v. Rumsfeld* - with a plurality opinion authored by Justice O'Connor (joined by Chief Justice Rehnquist, Justice Breyer and Justice Kennedy), an opinion concurring in the judgment but also dissenting in part, authored by Justice Souter (joined by Justice Ginsburg), and dissents by Justice Scalia (joined by Justice Stevens) and Justice Thomas - the decision represents a significant victory for the Bush Administration. A clear majority, including Chief Justice Rehnquist, and Justices O'Connor, Breyer, Kennedy and Thomas, explicitly recognized the President's legal authority to designate individuals (including American citizens) as enemy combatants, and to hold such individuals in custody without criminal charge or trial for the entire duration of an armed conflict.

Yasser Hamdi was born in the State of Louisiana and, as a result, is a United States citizen. However, he is also a citizen of Saudi Arabia, where he was raised. In 2001, he was turned over to American forces in Afghanistan by the Northern Alliance. Since April 2002, he has been held as an enemy combatant, currently in the Charleston Navy Brig. Hamdi's family sought his release through a writ of *habeas corpus*, a petition that was ultimately rejected by the United States Court of Appeals for the Fourth Circuit. That court reasoned that Hamdi had been detained as an enemy combatant in a "zone of combat," that the President had the authority to hold him in this status, and that the government had produced sufficient evidence to support his detention.

On review, the Supreme Court reversed and remanded, but only because Hamdi had not been given any opportunity to rebut the government's factual allegations. Four justices concluded that the President does have the constitutional power to designate individuals as enemy combatants in the context of an armed conflict, even if they may be American citizens, and that such individuals can be held, without charge or criminal trial, pending the end of hostilities.

They relied, in large part, on the Supreme Court's 1942 ruling in *Ex Parte Quirin*, 317 U.S. 1 (1942), where a unanimous Court had upheld the President's right to detain enemy combatants, including citizens, during wartime. (The Court's reliance on *Quirin* has effectively revitalized this case and implicitly rejected arguments, advanced by the Administration's critics, which challenged the continuing viability of that important decision.) The plurality further rejected arguments that the Non-Detention Act, 18 U.S.C. § 4001 (a), prohibited the detention of American citizens, finding the necessary authorization in Congress' September 18, 2001 Joint Resolution authorizing the use of military force against those responsible for the September 11 attacks and their allies. On both of these points, although in dissent, Justice Thomas agreed with the plurality. Thus, there are actually five votes supporting these critical conclusions. It should be noted here that the Non-detention Act-related arguments were prominently featured in the Second Circuit's *Padilla* decision; hence, the plurality and Justice Thomas' rejection of these arguments in the context of *Hamdi* is all the more notable.

At the same time, the plurality also concluded that "a citizen-detainee" must be provided with an opportunity to challenge his or her designation as an enemy combatant, at least to the extent of receiving "notice of the factual basis for his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker." Slip Op. at 26.

Significantly, the Court did not rule that this process must be afforded in the Article III civilian courts through a *habeas corpus* proceeding. Rather, the plurality suggested that the "standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," similar to the "Article V" tribunals already established by Army regulation in cases where the Geneva Conventions apply. *Id.* at 31. Only if the government fails to provide such a process must the courts "ensure that the minimum requirements of due process are achieved." *Id.* at 31-32. This conclusion, while, of course, a logical outgrowth of the application of the military justice paradigm, represents a significant augmentation of the President's power.

In addition, the standard to be applied in either case is highly deferential to the government. Once it "puts forth credible evidence that the *habeas* petitioner meets the enemy combatant criteria," the burden can be shifted to the detainee to prove that he is not an enemy combatant. *Id.* at 27. This, according to the plurality, "would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant." *Id.* In addition, the plurality concluded that the detainees would be entitled to assistance of counsel in the context of this process, a position that appears to command at least six votes (including Justices O'Connor, Kennedy, Breyer, Souter, Ginsburg and Chief Justice Rehnquist) - although no particular rationale was offered.

Justice Souter and Justice Ginsburg concurred in the plurality's judgment, so as to ensure that Hamdi received an opportunity for some hearing, although they would have ruled that the Non-detention Act prevented his continued detention in the absence of a criminal charge. Justice Thomas dissented, arguing forcefully that the designation of individuals as enemy combatants was a matter for the

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and that the judicial role in reviewing such designations was highly limited. He noted that these cases come to the courts  
ing presumption in the government's favor, in view of the President's "authority to detain enemy combatants, an authority  
des making virtually conclusive factual findings." Slip Op. at 11 (Thomas, J., dissenting). Justice Thomas further concluded  
ed on a number of earlier precedents that the plurality failed to address. "[i]n this context, due process requires nothing more  
ood-faith executive determination." *Id.* at 12. Based on this statement, it appears that Justice Thomas would - when the case is  
ed - likely vote to uphold an Executive Branch process permitting the detainees to challenge their designations in a military  
al, as suggested by the plurality.

Justice Scalia, joined by Justice Stevens, also dissented. They argued that American citizens cannot be held as enemy combatants, but  
be processed as criminal defendants - absent a congressional suspension of the right to *habeas corpus*. The dissenters accepted as  
obably accurate" the statement that "captured enemy combatants . . . have traditionally been detained until the cessation of  
ilities," but then asserted that "[t]he tradition with respect to American citizens . . . has been quite different. Citizens aiding the  
emy have been treated as traitors subject to criminal process." Slip Op. at 6 (Scalia, J., dissenting).

Overall, the plurality's decision in *Hamdi*, particularly in view of Justice Thomas' conclusions regarding the President's constitutional  
authority as Commander-in-Chief and Chief Executive, affirms that the Executive Branch has broad authority in dealing with enemy  
combatants during war. Individuals can be designated as enemy combatants, even if they are American citizens, and held until  
hostilities conclude. Such detainees are not entitled to the elaborate due process rights associated with a criminal trial. Although enemy  
combatants must be afforded an opportunity to contest the factual conclusions on which their designation was based, and are entitled to  
assistance of counsel in this process, that proceeding could be before a military tribunal established for this purpose.

Detainees would be entitled to challenge their detention in a civilian court only if the Executive fails to provide the requisite process in  
the military setting.

**Rasul, et al. v. Bush, No. 03-334**

This case involved claims brought on behalf of individuals detained, as al Qaeda or Taliban operatives, at the United States Naval  
Station, Guantanamo Bay, Cuba. These detainees are not American citizens, and are held beyond the territory of the United States -  
Cuba having retained the "ultimate sovereignty" over Guantanamo Bay when it leased the area to the United States in 1903. As a  
result, based on the Supreme Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the government had argued that the  
detainees were not entitled to challenge their captivity in the federal courts.

*Eisentrager* involved efforts by several German nationals, captured in China at the close of World War II and then imprisoned under  
American authority in occupied Germany, to have their detention reviewed by the United States courts. The Supreme Court rejected  
their petitions, reasoning that they were held beyond the jurisdiction of the federal courts, since they were not held on U.S. territory.

In reviewing the Guantanamo detainees' cases, the United States Court of Appeals for the District of Columbia Circuit agreed with the  
government that *Eisentrager* controlled, and that these individuals could not challenge their detention in the U.S. courts because they  
were held beyond the sovereign territory of the United States. In *Rasul v. Bush*, the Supreme Court reversed.

Writing for the majority, including Justices O'Connor, Souter, Ginsburg, and Breyer, with Justice Kennedy concurring in the result,  
Justice Stevens distinguished *Eisentrager*. He reasoned that the Court in that case had assumed that statutory *habeas corpus* review  
was unavailable and, going on to consider whether there was an inherent constitutional right to *habeas* review, found none that would  
apply beyond U.S. territory - at least none where aliens were involved. However, Justice Stevens construed subsequent Supreme Court  
decisions to clarify that individuals, including non-citizens, held overseas can obtain review under the *habeas corpus* statute, 28 U.S.C.  
§ 2241 - effectively undercutting the predicate on which the *Eisentrager* decision was based. As a result, the majority concluded that  
the men now held at Guantanamo Bay may challenge the legality of their detention through *habeas corpus* petitions in the United States  
courts. (In this regard, one of the interesting aspects of the majority's decision is that, since the availability of *habeas* review for  
Guantanamo detainees is based solely on a statutory, rather than constitutional basis, nothing in this decision would prevent Congress  
from amending the *habeas corpus* statute to eliminate it.)

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, filed a strong dissent. First, Justice Scalia noted that the  
*Eisentrager* Court had, in fact, considered and correctly rejected a statutory claim to *habeas* review by aliens detained beyond U.S.  
territory. Second, he rejected the majority's claims that the Court's later case law had effectively extended the statutory *habeas* right  
to individuals held overseas.

In fact, the dissenters concluded, the majority had effectively overruled *Eisentrager*, without explanation, and thereby opened the  
gates of litigation: "In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the *habeas*  
statute to the four corners of the earth." Slip Op. at 11 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting).

because the Court's decision purports to extend the *habeas corpus* statute to the Guantanamo detainees to take advantage of an exception to the general rule  
Court in *Rumsfeld v. Padilla*, that a *habeas corpus* petition must be filed in a federal district with jurisdiction over

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claimant's immediate custodian, the Guantanamo detainees may "forum shop" in any of the Nation's 94 judicial districts. "For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort." *Id.* at 20.

Whether the dire predictions of the dissent actually materialize will depend on whether the Executive Branch adopts an adequate military procedure, as outlined by the plurality in *Hamdi*, that offers detainees a meaningful opportunity to challenge the factual basis of their designation as enemy combatants. Although the *Hamdi* decision addressed the rights of citizens, it is unlikely that the Court would require more elaborate procedures for similarly situated aliens. Significantly, the majority in *Rasul* specifically declined to address the question of "what further proceedings" would be necessary, but limited its decision to an affirmation that the federal courts do have jurisdiction to determine the legality of detentions at Guantanamo Bay.

### Conclusion:

Overall, the three "war on terror" decisions, issued by the Supreme Court on June 28, reaffirmed the President's core authority to capture and detain enemy combatants in time of war, and to hold such individuals, without charge or criminal trial, for the duration of hostilities. Detainees, however, must be given the opportunity to challenge the factual basis of their designation as enemy combatants, although this likely can be achieved in the context of a military, rather than a civilian, proceeding. Once the government has submitted some "credible" evidence that the individual was part of, or supporting, forces hostile to the United States or its allies, the burden of proof shifts to the detainee, who must then show that he was not associated with those forces. The detainee is entitled to legal counsel for the purposes of this proceeding.

Although these rules were established in the *Hamdi* case, which dealt with a U.S. citizen detainee, the relevant rationale will extend this system to non-citizens, who seek to challenge their detention at Guantanamo Bay. Thus, although the Court recognized the right of detainees held beyond the territory of the United States to challenge their captivity, that challenge will only take place in a federal court if the Executive Branch fails to provide a military proceeding that meets the criteria set forth in the *Hamdi* plurality opinion.

In fact, the review procedures already established for the Guantanamo detainees go a long way towards meeting these criteria. As a result, rather than requiring a fundamental alteration in the way the government is dealing with these issues, as a practical matter, the Court's decisions will require the refinement and augmentation of existing procedures. The government will now, presumably, revise those procedures as necessary to ensure compliance with the Court's decisions, and begin to process the detainees.

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