

THE SUPREME COURT'S INITIAL RESPONSE TO THE WAR AGAINST TERRORISM

By: Steve Shapiro*

The Supreme Court firmly staked out its territory in the war against terrorism in a trilogy of cases decided on June 28, 2004.¹ Viewed collectively, the decisions represent a forceful rejection of the Administration's assertion that it can detain "enemy combatants" without any meaningful judicial review. Viewed historically, they represent a significant step forward from the Court's traditional response of near-total deference to the president's wartime judgments. And while the decisions did not give us everything we wanted, and still leave many questions unanswered, they established a legal framework that will now make it easier to insist on both fair process and public accountability in future cases. Moreover, by vigorously asserting its own institutional role, the Court sent a clear message that judges cannot and should not abdicate their responsibility to enforce the rule of law merely because the government relies on the vocabulary of war and invokes the menace of terrorism. That message, in the long run, may turn out to be even more important than any of the Court's specific holdings.

*Rasul v. Bush*²

Rasul v. Bush, the first case in the trilogy, involved the fate of approximately 600 prisoners held incommunicado by the American military at the U.S. Naval Base in Guantánamo Bay, Cuba. Many of the prisoners had been captured in Afghanistan, but an undisclosed number had also been apprehended as alleged terrorists in various countries around the world. Regardless of how or why they had been brought to

Guantánamo, none of the detainees had been charged or tried, and none had been given access to lawyers. In addition, none of the detainees had been granted prisoner-of-war status by the U.S. government, which took the position that the Geneva Conventions did not apply to anyone held at Guantánamo.

Sixteen detainees sued in federal court in Washington, D.C., seeking to challenge the legality of their detention as a violation of both the U.S. Constitution and various international treaties that the United States has signed and ratified, including the Geneva Conventions.³ In response, the government argued that the American courts had no jurisdiction to rule on activities that took place in Cuba. It relied primarily on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which ruled that twenty-one German soldiers who were tried and convicted of war crimes by a military commission following World War II could not challenge those convictions in a habeas corpus proceeding. The lower courts agreed, and broadly read *Eisentrager* for the proposition that the "privilege of litigation" does not extend to aliens in military custody outside the sovereign territory of the United States.⁴

The Supreme Court reversed in a 6-3 decision written by Justice Stevens. The majority opinion began by noting that habeas corpus has long been available as a check on executive detention "in wartime as well as in times of peace." 124 S.Ct. at 2692-93. It then distinguished *Eisentrager* on numerous grounds. First, as Justice Stevens explained, the factual situations are entirely different. Unlike the German soldiers in *Eisentrager*, the Guantánamo detainees in *Rasul* and *al-Odah* had not been given access to counsel, had not been brought before any tribunal (military or civilian), had not been convicted of war crimes, denied their involvement in any acts of aggression against the United States, and were not nationals of a country at war with the United States.

* Steve Shapiro is the National Legal Director of the ACLU.

Second, the legal rules governing habeas jurisdiction have changed dramatically since *Eisentrager*. At the time, the Court had construed the federal habeas statute to require the filing of any habeas petition in the district where the detainee was held.⁵ That made it impossible for a detainee held outside of any federal district to seek habeas relief pursuant to 28 U.S.C. § 2241. Since *Eisentrager*, the Court has revised its interpretation of § 2241 and no longer regards the detainee's presence in the district as an inflexible jurisdictional requirement.⁶ "Because Braden overruled *Eisentrager*'s holding, *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims." 124 S.Ct. at 2695.

In response to the claim that federal statutes normally do not apply extraterritorially, Justice Stevens stressed that the common law courts in England had long ago recognized that habeas corpus cannot fulfill its historic function as a judicial constraint on executive abuse unless it is available wherever the executive actually exercises jurisdiction and control. Citing the language of the 1903 lease agreement with Cuba, he then concluded that the United States has plainly exercised "complete jurisdiction and control" over the Guantánamo Bay Naval Base for more than a century, and can continue to do so for as long as it chooses.

Finally, in a brief but encouraging final few paragraphs of the majority opinion, Justice Stevens specifically acknowledged the Alien Tort Statute, 28 U.S.C. § 1350, as an additional basis for federal court jurisdiction. "The fact that petitioners in these cases are being held in military custody," he wrote, "is immaterial to the District Court's jurisdiction over their nonhabeas statutory claims." 124 S.Ct. at 2698.

The victory in *Rasul* totally altered the legal and political debate over the Guantánamo detainees. At the same time, it is important to understand the limits of the ruling. It did not resolve whether the Guantánamo detentions are unlawful; that issue will be resolved in further proceedings that are already underway.⁷ And it

did not resolve whether habeas petitions can be filed by other detainees who are being held in U.S. custody around the world. *Rasul*, nonetheless, began a legal dialogue that that the Administration desperately wanted to avoid. The fact that there are still unanswered questions does not diminish the importance of *Rasul*'s holding.

*Hamdi v. Rumsfeld*⁸

Yaser Hamdi is an American citizen who was seized in Afghanistan by members of the Northern Alliance in 2001 and then turned over to American military forces. Before the government realized he was an American citizen, he was sent to Guantánamo. After the government discovered his American citizenship, he was transferred first to a naval brig in Norfolk, Virginia, and then later to a naval brig in Charleston, South Carolina. He is one of two American citizens designated as an "enemy combatant" by President Bush.⁹

Several months after Hamdi was brought to the United States, Hamdi's father brought a habeas corpus action on his son's behalf.¹⁰ In contrast to the position it had taken with regard to the Guantánamo detainees, the government conceded that Hamdi had the right to seek relief from an American court as an American citizen. But, it argued, he was not entitled to relief because he did not have any right to charges, trial, or access to counsel as an "enemy combatant."

The Fourth Circuit agreed with the government that its decision to designate Hamdi as an "enemy combatant" was entitled to substantial judicial deference. Taking full advantage of that deference, the government rested its case on a two-page affidavit submitted by a Department of Defense official, who relied on second- and third-hand accounts to describe the circumstances of Hamdi's capture in Afghanistan. On that scant record, the appeals court ruled that Hamdi could be imprisoned in a military brig for the duration of hostilities. Hamdi was not given any opportunity to present

his side of the story or to question the government's evidence. He was also denied any right to counsel on the theory that there was nothing for counsel to say or do since only the government's evidence was relevant in deciding whether Hamdi was properly classified as an "enemy combatant."

The Supreme Court reversed. Only Justice Thomas accepted the government's proposition that Hamdi's detention was a legitimate exercise of the executive branch's war-making power and should not be subject to second-guessing by the judiciary; the remaining eight Justices all vigorously disagreed. Six members of the Court either joined or concurred in an opinion by Justice O'Connor holding that Hamdi's due process rights had been violated by the one-sided proceeding that the lower court had endorsed.

As an initial matter, Justice O'Connor avoided the question of whether the president has inherent authority as Commander-in-Chief under Article II to detain "enemy combatants" by affirming the Fourth Circuit's narrower holding that Congress had authorized the detention of "enemy combatants" when it authorized the use of military force in Afghanistan.¹¹ Describing the capture of "enemy combatants" as an incident of war, she held that American citizens can be held as "enemy combatants" if they fight with the enemy. She was much more hesitant, however, to embrace the government's argument that Hamdi and other "enemy combatants" could be detained indefinitely until the war against terrorism had ended. On the one hand, she acknowledged that "the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable," 124 S.Ct. at 2642, and could conceivably lead to Hamdi's imprisonment for life. On the other hand, she concluded that concern was premature since active military operations in Afghanistan were still ongoing. Even still, she added a potentially critical caveat by cautioning that

"indefinite detention for the purpose of interrogation is not authorized." *Id.*¹²

Furthermore, having ruled that the government was authorized to detain "enemy combatants" in Afghanistan, including American citizens, she rejected the government's assertion that the President's decision to designate a detainee as an "enemy combatant" could not be questioned as long as there is "any" evidence in the record to support it. Applying the due process balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), she held that Hamdi, at a minimum, was entitled to be told the factual basis for his designation as an "enemy combatant" and to be given a "fair opportunity" to rebut the government's case before a neutral decision-maker. In addition, he "unquestionably" has the right to access to counsel in connection with those proceedings. At the same time, Justice O'Connor held that the government could rely on hearsay evidence if it was the best evidence available, that the burden of persuasion could shift to the detainee once the government presented credible evidence supporting the "enemy combatant" designation and, she tentatively suggested, "[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." *Id.* at 2651.

In sum, Justice O'Connor attempted to steer a middle course, providing due process protection for what she regarded as Hamdi's "core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator," *id.* at 2650, while also giving credence to the government's asserted national security concerns. There is absolutely no doubt, however, that she regarded it as the Court's role to define those boundaries in a system of checks and balances. As she wrote in a memorable coda to the majority opinion: In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such

circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.¹³

While agreeing with Justice O'Connor that Hamdi's procedural due process rights had been violated, Justices Souter and Ginsburg were prepared to go further and hold that Hamdi's detention had not been authorized by Congress and thus violated the Non-Detention Act--regardless of how many procedural protections were added to the process of designating him an "enemy combatant"ö Finally, in the most sweeping opinion of all, Justices Antonin Scalia and John Paul Stevens concluded (in a rare judicial alliance) that even Congress could not authorize the detention of American citizens as "enemy combatants" without first suspending the writ of *habeas corpus*, which it clearly had not done. "Where the Government accuses a citizen of waging war against it," Justice Scalia wrote, "our constitutional tradition has been to prosecute him in federal court for treason or some other crime." *Id.* at 2661.

The government did not even attempt to defend Hamdi's continued detention following the Supreme Court decision. Rather than provide him with a "fair opportunity" to challenge the government's case, as the Supreme Court had ordered, the government immediately began to negotiate the terms of his release. Three months after the Supreme Court's decision, Hamdi was allowed to rejoin his family in Saudi Arabia on October 11, 2004. In exchange, Hamdi agreed to relinquish his U.S. citizenship. The government insists that Hamdi was released solely because he was no longer viewed as a valuable intelligence source.

But after holding Hamdi in custody for almost three years, much of it spent in solitary confinement, that explanation is difficult to accept at face value. The Supreme Court's decision undoubtedly played a far more important role in Hamdi's release than the government has been willing to acknowledge publicly.

*Rumsfeld v. Padilla*¹⁴

Rumsfeld v. Padilla was the last and most limited of the Court's holdings from June 2004, although the facts of the case continue to generate enormous controversy. Like Hamdi, Jose Padilla is an American citizen who was designated as an "enemy combatant" by presidential order. But, unlike Hamdi, Padilla was not captured on the battlefield in Afghanistan or elsewhere. He was arrested by the Federal Bureau of Investigation at Chicago's O'Hare Airport after returning to the United States from Pakistan on May 8, 2002. The government announced that it had foiled a plot to detonate a "dirty" nuclear bomb.¹⁵ Padilla, however, was never charged with that or any other terrorist crime. He was arrested instead on a material witness warrant and brought to New York, ostensibly to testify before a grand jury investigating the events of September 11.

Two weeks later, Padilla had still not been summoned before the grand jury, and the lawyer appointed to represent him in the material witness proceedings filed a motion to have him released.¹⁶ Before that motion could be heard, President Bush designated Padilla an "enemy combatant" in an order dated June 9, 2002. He was immediately transferred from the custody of the Justice Department to the custody of the Defense Department and flown to the naval brig in Charleston, South Carolina. The government did not notify Padilla's lawyer that he had been removed from New York and placed in military custody until after the transfer. She was also told that she would no longer be able to communicate with her client.

What had begun as a challenge to Padilla's detention as a material witness then morphed into a challenge to his incommunicado detention in military custody. In contrast to Hamdi, Padilla was successful in persuading an appeals court in New York that the government had acted without congressional authorization when it detained him as an "enemy combatant" in violation of the Non-Detention Act. From the beginning, however, it was widely recognized that the issues raised by Padilla's case extended well beyond the threshold question of statutory authorization. Allowing the government to designate any suspected terrorist as an "enemy combatant"—including American citizens arrested in the United States far away from any military battlefield—converts the safeguards of the criminal process from a right to a privilege that the government can grant or deny whenever it chooses.

These larger issues were never reached by the Supreme Court, which dismissed Padilla's case on procedural grounds. Writing for a 5 to 4 majority, Chief Justice Rehnquist held that Padilla's challenge to his military detention had been improperly filed in New York and needed to be re-filed in South Carolina, where Padilla is currently imprisoned. Those new proceedings have begun, and Padilla's case is again working its way through the judicial system. In the meantime, he remains in a military brig. It is inconceivable that Padilla will wind up with fewer rights than Hamdi was granted; the question is whether he will wind up with more.

Endnotes

¹ The ACLU submitted amicus curiae briefs in all three cases. Portions of this article will appear in a longer essay to be published in a forthcoming issue of the Fletcher Forum of World Affairs.

² 124 S. Ct. 2686 (2004).

³ Because the detainees themselves had no access to counsel, the lawsuits were brought on their behalf by family members. The original group of 16 included 12 Kuwaitis, two Australians, and two British citizens. Shortly before the case was argued in the Supreme Court in April 2004, the two British petitioners were repatriated to Britain, which ended their involvement in the litigation. The Kuwaiti petitioners were represented by Shearman & Sterling; the Australian and British petitioners were represented by the Center for Constitutional Rights and Joseph Margulies, a cooperating attorney for CCR, in the companion case of *Al-Odah v. United States*. The consolidated cases were argued in the Supreme Court by Hon. John Gibbons, former Chief Judge of the Third Circuit.

⁴ 321 F.3d 1134, 1144 (D.C.Cir. 2003).

⁵ *Ahrens v. Clark*, 335 U.S. 188 (1948).

⁶ *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973).

⁷ Dozens of habeas petitions have been filed in the wake of the Supreme Court's decision.

⁸ 124 S.Ct. 2633 (2004)

⁹ The other is Jose Padilla, whose case is discussed below. In addition, the government has acknowledged designating one non-citizen detained in the United States as an "enemy combatant." See *al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir.), cert. denied, 125 S.Ct 34 (2004).

¹⁰ Hamdi was represented by Frank Dunham, the Federal Defender in Richmond, Virginia.

¹¹ That holding necessarily defeated Hamdi's claim that the government had violated the Non-Detention Act of 1971, 18 U.S.C. § 4001, by holding him without congressional authorization.

¹² Justice O'Connor's discussion of "enemy combatants" relied heavily on *Ex Parte Quirin*, 317 U.S. 1 (1942), the so-called German saboteurs case. She distinguished *Ex Parte Milligan*, 71 U.S. 2 (1866), which had precluded the use of military tribunals when the civilian courts are "open and

functioning,” as not applicable to “enemy combatants.”

¹³ *Id.* at 2651. The reference to “the Nation’s citizens” is a potentially troubling one if it is meant to suggest that the due process safeguards outlined in *Hamdi* are limited to citizens. Because Hamdi is an American citizen, however, the reference can be seen as descriptive rather than normative. At worst, it is plainly dicta

¹⁴ 124 S.Ct. 2711

¹⁵ The government has apparently abandoned that theory. Its more recent public statements attempt to link Padilla to a plot to blow up apartment buildings

¹⁶ Padilla was represented by Donna Newman and Andrew Patel. His case was argued in the Supreme Court by Jenny Martinez, who is now teaching at Stanford Law School.