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The Supreme Court and Detainees in the War on Terrorism: Summary and Analysis

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Summary

The Supreme Court's decisions in *Rasul*, *Hamdi*, and *Padilla* affirm the President's power to detain enemy combatants as part of the necessary force authorized by Congress after the terrorist attacks of September 11, 2001, but approved a more limited scope of that authority than the President had asserted, and clarified that detainees have due process rights under the Constitution. For more, see CRS Report RL31367, *Treatment of 'Battlefield Detainees' in the War on Terrorism*, and CRS Report RL31724, *Detention of American Citizens as Enemy Combatants*.

At the close of its 2003-2004 term, the Supreme Court took up the war against terrorism, issuing three decisions related to the detention of "enemy combatants." In *Rasul v. Bush*, the Court held that aliens detained at the U.S. Naval Station at Guantanamo Bay, Cuba, have access to federal courts to challenge their detention. In *Hamdi v. Rumsfeld*, a plurality held that a U.S. citizen allegedly captured during combat in Afghanistan and incarcerated at a Navy brig in South Carolina is entitled to notice and an opportunity to be heard by a neutral decision-maker regarding the government's reasons for detaining him. The Court in *Rumsfeld v. Padilla* overturned a lower court's grant of habeas corpus to another U.S. citizen in military custody in South Carolina on jurisdictional grounds. The decisions affirm the President's powers to detain "enemy combatants" as part of the necessary force authorized by Congress after the terrorist attacks of September 11, 2001. However the Court appears to have limited the scope of individuals who may be treated as enemy combatants pursuant to that authority, and clarified that such detainees have some due process rights under the U.S. Constitution.

The three decisions will likely have little immediate impact on the detainees; none was ordered set free. The definition of the term "enemy combatant" and the scope of legal process due to persons designated as such remain for lower courts to resolve. However, the detainees will have a right to an attorney and an opportunity to challenge their detention in federal court. The Defense Department has announced plans to create "Combatant Status Review Tribunals" to implement the decision in Guantanamo [<http://www.dod.mil/transcripts/2004/tr20040707-0981.html>].

The Bush Administration had argued that the President has the inherent power as Commander-in-Chief to seize and detain persons as enemy combatants for the purpose of keeping them off the battlefield and in order to interrogate them for intelligence purposes, and that aliens held abroad have no access to federal courts even to challenge their status. The Administration conceded that U.S. citizens have the right to petition for habeas corpus, but argued that the role of the courts was merely to ascertain whether the government had provided “some evidence” to support the designation, and not to provide the detainee an opportunity to rebut the evidence.

Rasul v. Bush, 72 U.S.L.W. 4596 (2004). This case involved two Australians and twelve Kuwaitis (a petition on behalf of two U.K. citizens was mooted by their release) who were captured during hostilities in Afghanistan and are being held in military custody at the Guantanamo Bay Naval Base, Cuba. The Administration argued, and the court below agreed, that under the 1950 Supreme Court case *Johnson v. Eisentrager* (339 U.S. 763), “‘the privilege of litigation’ does not extend to aliens in military custody who have no presence in ‘any territory over which the United States is sovereign.’” The government argued that the United States occupies the base at Guantanamo Bay under a treaty and lease that recognize Cuba’s “ultimate sovereignty” over the territory, and that therefore Cuba rather than the United States exercises sovereignty there, even though the treaty gives “complete jurisdiction and control” over the leased area for so long as it remains in U.S. hands. Noting that the Writ of Habeas Corpus (“Writ”) has evolved as the primary means to challenge executive detentions, especially those without trial, the Court held that jurisdiction over habeas petitions does not turn on sovereignty over the territory where detainees are held. Even if the habeas statute were presumed not to extend extraterritorially, as the government urged, the Court found that the “complete jurisdiction and control” the United States exercises under its lease with Cuba would suffice to bring the detainees within the territorial and historical scope of the Writ. Without expressly overruling *Eisentrager*, the Court distinguished the cases at issue to find *Eisentrager* inapplicable. *Eisentrager* listed six factors that precluded those petitioners from seeking habeas relief: each petitioner “(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.” The present Court noted that the Guantanamo petitioners, in contrast “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.”

The majority stressed that the *Eisentrager* opinion was concerned with the *constitutional* right to habeas corpus rather than the statutory right. The *Rasul* Court found authority for federal court jurisdiction in 28 U.S.C. § 2241, which grants courts the authority to hear applications for habeas corpus “within their respective jurisdictions,” by any person who claims to be held “in custody in violation of the Constitution or laws or treaties of the United States.” When *Eisentrager* was decided in 1950, the *Rasul* majority found, the “respective jurisdictions” of federal district courts was understood to extend no farther than the geographical boundaries of the districts (*Ahrens v. Clark*, 335 U.S. 188 (1948)). According to the Court, that understanding was altered by a line of cases

recognized in *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973) as overruling the statutory interpretation that had established the “inflexible jurisdictional rule” upon which *Eisentrager* was implicitly based. The Court also declined to read the statute to vary its geographical scope according to the citizenship of the detainee. Justice Kennedy, in a concurring opinion, would have found jurisdiction over the Guantanamo detainees based on the facts that Guantanamo is effectively a U.S. territory and is “far removed from any hostilities,” and that the detainees are “being held indefinitely without the benefit of any legal proceeding to determine their status.”

Justice Scalia, with Chief Justice Rehnquist and Justice Thomas, dissented, arguing that the habeas statute on its face requires a federal district court with territorial jurisdiction over the detainee. The dissenters would read *Braden* as distinguishing *Ahrens* rather than overruling it, and take issue with the majority’s discussion of the special status of Guantanamo Bay as inconsistent with its analysis that a court may entertain habeas petitions as long as jurisdiction is proper over the official with custody of a detainee, even if that detainee is located outside of the court’s jurisdiction. Under this view, whether the United States exercises “jurisdiction and control” over the territory where detainees are held is irrelevant, and the door to the courts of *any* U.S. federal district would also be open to detainees held *anywhere* outside the United States. The dissenters objected to the Court’s “irresponsible overturning of settled law” on which military commanders had relied in selecting Guantanamo as the site for the detention facilities. The Court’s opinion leaves many questions unanswered. It is unclear which of the *Eisentrager* (or *Rasul*) factors would control under a different set of facts. For example, if a detainee at Guantanamo is convicted by military commission, would a petition for habeas corpus on his behalf then be foreclosed? The opinion does not address whether persons detained by the U.S. military abroad in locations where the United States does not exercise full jurisdiction and control would have access to U.S. courts. The Court did not decide the merits of the petitions, although in a footnote the majority opined that “Petitioners’ allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’” The opinion leaves to lower courts such issues as whether the detentions are authorized by Congress, who may be detained and what evidence might be adduced to determine whether a person is an enemy combatant, or whether the Geneva Conventions afford the detainees any protections. However, the *Hamdi* decision may provide some guidance for those courts.

Hamdi v. Rumsfeld, 72 U.S.L.W. 4607 (2004). Yaser Esam Hamdi was seized by members of the Northern Alliance in Afghanistan and turned over to the United States military. The government transferred him along with other detainees captured in Afghanistan to the United States Naval Base in Guantanamo Bay. Later, upon learning that Hamdi is a U.S. citizen, authorities transferred him to a naval brig in Norfolk, Virginia, and then to a brig in Charleston, South Carolina. Hamdi’s father filed a petition for habeas corpus on his behalf. The government argued that the President has the constitutional and statutory authority to detain Hamdi as an “enemy combatant” without recognizing the constitutional rights available to criminal defendants. Hamdi’s attorney argued that his detention was unlawful as a violation of 18 U.S.C. § 4001(a), which prohibits the detention of U.S. citizens absent an act of Congress, and that the

Constitution entitles him to due process rights to challenge his detention. The Fourth Circuit dismissed the petition on appeal, finding that the Congress had authorized the detention, that a declaration prepared by a Defense Department official was sufficient to justify Hamdi's continued detention, and that Hamdi did not have a right to meet with counsel or present evidence to rebut the government's assertions. A majority of Supreme Court Justices agreed to vacate the dismissal and remand the petition so that Hamdi could have an opportunity to present evidence on his behalf. However, the Justices could not reach a consensus for the rationale.

Justice O'Connor, joined by the Chief Justice as well as Justices Kennedy and Breyer wrote the opinion for the Court. This plurality opinion found that Congress' Authorization for Use of Military Force ("the AUMF"), 115 Stat. 224 (2001), "clearly and unmistakably" authorizes the detention of captured persons who were "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," as a necessary incident to the military use of force. Having found the AUMF satisfies the requirement under 18 U.S.C. § 4001(a) for an "act of Congress" authorizing detention, the plurality did not address whether the President has the inherent authority to detain "enemy combatants" without Congress' authorization. The opinion also assumed, without deciding, that 18 U.S.C. § 4001(a) applies to detention under military as well as civilian authority.

The question of congressional authorization did not end the inquiry, however, as the plurality found that even wartime detentions authorized by Congress raise due process questions. The plurality took it as given that, absent a suspension of the Writ of Habeas Corpus, any individual detained within the United States has the right to challenge his or her detention. Noting that the habeas statute, 28 U.S.C. §§ 2241 *et seq.*, "makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process," they rejected the government's contention that due process under these circumstances is met if the government shows "some evidence" to support detention, or that a more searching review would unconstitutionally impede the President's war powers. Instead, the plurality invoked the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), which holds that "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest. . ." The plurality noted that "substantial interests lie on both sides of the scale," but that the circumstance of war does not tip the scale irretrievably in favor of the government. The plurality also agreed "that indefinite detention for the purpose of interrogation is not authorized," and presumably could not serve as a governmental interest under *Mathews*.

The plurality determined that a citizen detained as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the government's factual assertions before a neutral decision-maker, including the right to counsel. They explained, however, that the exigencies of the circumstances may allow for a tailoring of enemy combatant proceedings "to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," possibly allowing hearsay evidence and "a presumption in favor of the Government's evidence," as long as a fair opportunity to rebut such evidence is provided. They concluded that

. . . once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort 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.

The four Justices suggested that a military tribunal of some sort might fulfill due process requirements, but also explicitly rejected the contention that courts should have no role in the process.

Justice Souter, joined by Justice Ginsberg, agreed that Hamdi is entitled to due process, including the right to counsel (but without the qualifications suggested by Justice O'Connor), and joined the plurality to provide sufficient votes to vacate the decision below. However, finding no explicit authority in the AUMF (or other statutes) to detain persons as enemy combatants, they would have determined that 18 U.S.C. § 4001(a) precludes the detention of American citizens as enemy combatants altogether. They rejected the theory that the detention was authorized as a necessary incident to the use of military force because "the Government's stated legal position in its campaign against the Taliban . . . is apparently at odds with its claim here to be acting in accordance with customary law of war and hence to be within the terms of the Force Resolution in its detention of Hamdi." In other words, the government's failure to accord the Taliban detainees rights under the Geneva Convention or in accordance with Army regulations vitiated its contention that Hamdi's detention was authorized pursuant to the AUMF.

Justice Scalia, joined by Justice Stevens, dissented, arguing that "our constitutional tradition has been to prosecute [U.S. citizens accused of waging war against the government] in federal court for treason or some other crime" unless Congress has suspended the Writ of Habeas Corpus pursuant to the Constitution's Suspension Clause, Art. I, § 9, cl. 2. They viewed as "unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing." Under their view, even if the AUMF did authorize detention in sufficiently clear language to overcome the prohibition in 18 U.S.C. § 4001(a) (which, in their view, clearly it did not), Hamdi's detention would be unconstitutional without a proper suspension of the Writ. Finally, the two justices argued that the role of the Court is limited to ordering the release of a citizen unlawfully detained, not creating its own set of rules to justify it:

The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free. The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.

Justice Thomas also dissented, essentially agreeing with the government's position that the detention of enemy combatants is an unreviewable aspect of the war powers constitutionally allocated to the political branches. He agreed that the AUMF provides sufficient authority to detain enemy combatants, but suggested the President might have inherent authority even without such authority. While he would have found that the courts may properly review whether Hamdi's executive detention is lawful, he would have given utmost deference to the Executive branch. He would not have applied the *Mathews v. Eldridge* balancing approach, opining at the same time that the test was misapplied. In his view, the national security interests asserted by the government, including the need to gather intelligence through interrogation, would outweigh any individual liberties that might be affected. Finally, he questioned whether other acts of war, such as bombings and missile strikes, would also be subject to due process inquiry.

Rumsfeld v. Padilla, 72 U.S.L.W. 4584 (2004). Jose Padilla, like Yaser Hamdi, is currently detained in a military brig in South Carolina as an enemy combatant. The circumstances surrounding his arrest differed substantially, however. Rather than being captured during hostilities in Afghanistan, Padilla was arrested at O'Hare airport in Chicago and held initially in New York under a material witness warrant. After the President determined that Padilla was an enemy combatant and ordered him transferred to military custody, his court-appointed attorney filed a petition for habeas corpus in federal district court in New York. The district court found that the President was authorized to detain Padilla as an enemy combatant pursuant to the AUMF, but asserted that Padilla had a due process right to communicate with his lawyer and present evidence to refute his designation as an enemy combatant. On interlocutory cross-appeals, the Second Circuit granted the habeas petition, finding that the AUMF did not authorize detention under the circumstances alleged. None of the judges in the Second Circuit agreed with the government that the habeas statute mandates that Padilla's petition could only properly be brought against the commander of the military brig and only in the local federal district court. It was on this ground that a majority of the Supreme Court, led by Chief Justice Rehnquist, reversed. The Court did not reach the issue of whether the President has the authority to detain Padilla militarily. Padilla's attorney has filed a new petition in the Fourth Circuit. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented, arguing that the jurisdictional rule applied by the majority has many exceptions, and that the Court has a duty to address the "questions of profound importance to the Nation" Padilla's case raises. He wrote:

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For 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.

The four dissenting judges appear to agree with the opinion of the Second Circuit. The opinions in *Hamdi* suggest that a sufficient number of Justices would reject the government's position that the President has the authority to detain U.S. citizens who were taken into custody within the United States, at least unless Congress has specifically authorized such detentions.