

## DECIDING THE RULES FOR DETAINEES: WARS ARE NOT CRIMINAL PROSECUTIONS

by  
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The Supreme Court is poised to hear three cases that will define the status of combatants captured during the War on Terror and may determine whether the detainees can be held for the duration of hostilities. In deciding these cases, the Court also will consider to what extent the civilian judiciary can interfere with the President's authority as Commander in Chief. The Supreme Court must reject all efforts to limit the constitutional war powers of the President and Congress.

The detainees, acting through "next friend" petitioners, are asking the Court to review and override presidential decisions even as American troops are fighting in Afghanistan, Iraq and other nations. They want to interpose the judgment of the nation's courts between the executive branch and the military, through a reinterpretation of the Constitution and an imposition of supposed international norms that are at odds with current United States policies. Various foreign opponents of American war actions have banded together to file an *amicus* brief on behalf of the Guantanamo detainees, urging judicial intervention.

Two of the cases, *Hamdi v. Rumsfeld* and *Rumsfeld v. Padilla*, involve detainees who are United States citizens. Yaser Hamdi was captured in Afghanistan. Jose Padilla, the so-called "dirty bomber," was captured in Chicago after returning from an extended stay in Afghanistan and Pakistan, where he allegedly participated in planning the explosion of a nuclear device in downtown Washington, D.C. The United States military identified both as active members of al Qaeda. The third case, *Rasul v. United States*, along with a companion matter *Al Odah v. United States*, was brought on behalf of 650 non-citizen detainees captured abroad by the military and currently housed at Guantanamo Bay. In deciding jurisdiction over these cases, the lower courts have split. The U.S. Court of Appeals for the Second Circuit ruled that it had jurisdiction over Padilla's detention; the U.S. Court of Appeals for the Fourth Circuit ruled against Hamdi's suit. In *Rasul*, the D.C. Circuit found that United States civilian courts lacked jurisdiction over combatants held outside the United States. Late last year, the Ninth Circuit found to the contrary in *Gherebi v. Bush*, a case not presently before the Supreme Court, holding that the court did have jurisdiction over Guantanamo detainees and thereby creating another split in the Circuits.

Civilian courts that claim jurisdiction over the status of the detainees treat them as criminal suspects rather than as military combatants. In doing so, these lower courts have twisted two World War II-era Supreme Court cases — *Johnson v. Eisentrager* (which holds that the United States civilian courts do not have jurisdiction over combatants captured and held abroad) and *Ex Parte Quirin* (which denied habeas corpus relief to a United States citizen in the German military captured in the U.S.) — to fit the result. The *Gherebi* court displayed special enthusiasm for using international law to justify judicial interference with executive and military wartime decisions.

Under Articles I and II of the Constitution, the political branches of government are charged with making war. Capture and detention of enemy combatants are a military matter, and the judiciary has

traditionally deferred to the executive branch in such decisions. Al Qaeda and other Islamic militant terrorist groups are transnational organizations that operate independent of geographical restrictions and have no central location. The terrorist leadership is multinational and spread throughout many countries; the organizations themselves subject to lesser and stronger degrees of affiliation depending on specific circumstances. The groups likely maintain so-called sleeper cells that can be activated on an as needed basis. Al Qaeda and its allies do not have traditional military forces, but they do have access to modern weaponry and maintain extravagant ambitions to rule the world.

Prior to September 11, 2001, the United States approach to al Qaeda was essentially a law enforcement action that restricted use of the military. The Islamic militants who attacked the World Trade Center in 1994 were arrested, tried and imprisoned. A group who plotted to hijack United States civilian airplanes in Asia was similarly caught and jailed. After the bombing of two American embassies in east Africa in 1998, President William J. Clinton ordered cruise missile attacks on suspected al Qaeda sites in Afghanistan and Sudan. However, there was no continuing military assault upon the al Qaeda leadership; instead they were indicted.

The strategy for dealing with al Qaeda and its allies changed abruptly after the September 11 attacks. Prior to September 11, 2001, the United States was unwilling to occupy Afghanistan and destroy the al Qaeda forces there. After the second World Trade Center attack there was no hesitation in doing so. What had been a continuing law enforcement action similar to those brought against organized crime groups became a full scale war. The reason for the change was as simple as it was necessary. A law enforcement approach did not work against an enemy like al Qaeda, which had taken over a large part of Afghanistan and used it as a location for training thousands of recruits who were then sent out to conduct terrorist operations throughout the world. Al Qaeda had grown too powerful to be stopped by indictments in federal court in New York.

Confronting al Qaeda more aggressively after the first World Trade Center attack and the East African embassy bombings might have prevented it from pressing forward with its later, more deadly assaults. For the political branches of the United States government, after September 11 the question to defend the country against a continuing menace became more urgent. The political decision was made to go to war against al Qaeda, pursuant to a resolution of Congress that authorized the President to use all necessary force.

That resolution changed the United States campaign against al Qaeda and other Islamic militants from a law enforcement action to war. Once begun, war seldom allows for the types of decision making procedures that courts utilize, which is among the reasons why the Constitution gives war making powers to the executive and not the judiciary. To be effective, military decisions must be implemented without outside review, debate and interference. The aim of war is not to prove the culpability of the enemy but to destroy it. This utilitarian approach carries over to the treatment of prisoners. In wartime, the chief purpose for detaining enemy combatants is not punishment — although some detained combatants may be tried for war crimes by military tribunals — but rather to prevent them from continuing to fight and also to make use of them as sources of intelligence.

In resolving the current cases before it, the Supreme Court should adopt clear rules that will forestall judicial intrusions on executive wartime authority. One necessary holding is that the military can detain captured foreign battlefield combatants for the duration of hostilities, and that such detentions may be made either within or outside the United States without civilian court interference. There is no constitutional basis or public policy rationale for restricting such detentions to Guantanamo Bay, Diego Garcia, Afghanistan or any other foreign location. The second rule should state citizens who are active combatants and belong to military organizations with which the United States is at war are subject to military detention. Such a holding would be consistent with *Ex Parte Quirin*, which some lower courts are eager to abandon.

Such rules would disappoint those eager to judicialize the War on Terror and make military decisions subject to civilian court review. After the war is over, the civilian courts can deal with what remains of al Qaeda and its ilk. But until restraining orders and arrest warrants replace military action as the government's response to the continuing threat of Islamic militancy, the judiciary has a constitutional duty not to interfere with the President's war powers and conduct of hostilities.