

# LAW IN A NEW SORT OF WAR

‘Enemy combatants’ line up to plead for legal rights before the nation’s highest court

BY CHITRA RAGAVAN

In the post-9/11 world, traditional American notions of both security and freedom have been violently shaken, and what has emerged is part legal confusion, part moral uncertainty. Is the “war on terror” a war like other wars, subject to the same rules? Or is it somehow different? And what about the prisoners in this new sort of war? What sort of rights, if any, should they have?

Over the next two weeks, the U.S. Supreme Court will begin the process of answering those questions, and in doing so will step into a white-hot debate that has raged for two years among the Bush administration, the lawyers for those detained, civil libertarians, and political leaders worldwide. The complexity of the four cases before the court reflects an era in which the government is fighting to balance the legal rights of its citizenry against the security measures needed to protect that citizenry from unprecedented threats. Taken together, the cases could also add up to the most important referendum since World War II on the scope of presidential authority in times of armed conflict—especially if the court decides to make a broad ruling rather than deal with the narrower technical issues each case presents.

At issue: the rights of some 650 alleged Taliban and al Qaeda fighters held incommunicado at the U.S. Navy base at Guantanamo Bay, Cuba, and the rights of two American citizens held in a U.S. Navy brig in South Carolina—all of whom have been detained without access to attorneys for two years. In a series of three oral arguments, the Bush administration will contend that in times of war, the president can unilaterally detain foreign nationals and U.S. citizens whom he designates as “unlawful enemy combatants.” The government says the aliens do not

have any recourse to U.S. courts to challenge their detentions. It also contends that if U.S. citizens are provided access to civilian counsel, it should be at the military’s discretion, and the courts cannot look into the facts underlying these detentions. “The government is defending traditionally accepted powers of the president as commander in chief during times of war,” says Bradford Berenson, former associate counsel to President Bush. “If we try to bring in the courts to change that, we’ll ultimately destroy our ability to win wars.”

Meanwhile, America’s allies and enemies are wondering what protections *their* citizens have against the world’s most powerful military. Advocates for the U.S. citizens have similar questions. “You cannot create an island outside the law where people have no rights,” says Anthony Romero, executive director of the American Civil Liberties Union. “Granting the government authority to take people off the streets in foreign countries and detaining them without charges is a shortsighted policy, because it puts our own soldiers at risk.”

## THE GUANTANAMO BAY CASES

When the first handcuffed prisoners from the war in Afghanistan arrived at Guantanamo Bay on military transport planes in January of 2002, Michael Ratner, president of the liberal Center for Constitutional Rights, was ready. He’d waited since Bush issued a military order two months earlier creating military tribunals to try alleged al Qaeda fighters as enemy combatants. “This was so outside what we understood to be legal,” says Ratner, “that we decided to file a challenge on behalf of the first person picked to go before the tribunal.” That person turned out to be David Hicks, an Australian citizen captured in Afghanistan in December 2001.



The court is set to hear four high-profile rights cases.

But for two years, the tribunals and the detainees remained in limbo. Meanwhile Ratner and another attorney, Thomas Wilner, developed two federal court cases—now consolidated—appealing these detentions in concert with the families of two Australians, three Britons, and 12 Kuwaitis. “This is my first time in over 35 years of being a lawyer that I have not been allowed to meet my clients,” says Wilner, who is representing the Kuwaitis. “It’s extraordinary, really.”

The issue before the Supreme Court is whether U.S. courts have jurisdiction to consider legal challenges to the detention of foreign nationals captured abroad and held at Guantánamo Bay. Specifically, the court will examine a March 2003 ruling by the U.S. Court of Appeals for the D.C. Circuit, which stated that foreign nationals held outside the United States don’t have the “privilege of litigation” before American courts. Despite a 1903 lease giving the United States “complete jurisdiction and control” over Guantánamo Bay, the court ruled that it’s not a formal U.S. “sovereign” territory. Noncitizens have the right to challenge detention only if they are within U.S. borders. The detainees’ families appealed. U.S. Solicitor General Theodore Olson says giving the courts jurisdiction over these detainees would amount to “micromanaging” the president’s handling of enemy combatants and thus “directly interfere” with the military campaign against al Qaeda. Renowned Georgetown University law scholar David Cole admits that “historically the courts defer to the executive in times of war,” but he wonders whether “this assertion of authority is so sweeping that the court may well blanch at it.”

## HAMDI V. RUMSFELD

In November 2001, U.S.-backed Northern Alliance forces ferreting out Taliban fighters from catacombs in Afghanistan discovered two men who turned out to be U.S. citizens. One was a native of Baton Rouge, La., Yaser Esam Hamdi,

who was taken to Guantánamo and later transferred to a U.S. Navy brig in Charleston, S.C., where he remains, designated an “enemy combatant.”

At issue before the Supreme Court is a January 2003 Fourth Circuit federal Court of Appeals ruling that a U.S. citizen, when “captured in a zone of active combat operations in a foreign country,” loses his standing to challenge the facts



## THE GUANTANAMO CASES

### The cases

- *Rasul v. Bush*
- *Al Odah v. United States*

### Arguments

April 20



Rasul



Al Odah

### The question

Do U.S. courts have the power to review the detention of noncitizens held as “enemy combatants” at Guantánamo Bay?

### The government argument

Solicitor General Theodore Olson will argue that noncitizens held outside the country by the military are not entitled to access to U.S. courts, based on a 1950 Supreme Court precedent, *Johnson v. Eisen-trager*. In that case, the justices ruled that Nazi soldiers tried by U.S. military tribunals in China could not appeal their convictions in U.S. civil courts.

### The detainees

Lawyers say the suspects have not had the trial rights that were afforded the *Eisen-trager* defendants and have not been convicted of anything. They are seeking the right to challenge their detention in U.S. courts.

underlying his detention. The government has argued that a two-page declaration by Pentagon official Michael Mobbs, describing the allegations against Hamdi, should be sufficient to justify his detention. The appeals court agreed, declaring that the Mobbs declaration was indeed sufficient because it is “indisputable” that Hamdi was “captured in a zone of active combat opera-

tions in a foreign theater of conflict." But Hamdi's lawyer, Virginia public defender Frank Dunham, will try to convince the Supreme Court that the American justice system should demand more. "They lob an affidavit from miles away and want to have the affidavit unchallengeable, unquestionable," says Dunham. The government, says Dunham, should be required to prove its case against Hamdi.

## RUMSFELD V. PADILLA

On May 8, 2003, FBI agents arrested a Brooklyn-born U.S. citizen named Jose Padilla at Chicago's O'Hare International Airport, alleging that he had knowledge of an al Qaeda plan to explode a "dirty bomb" in the United States. Padilla was flown to New York City as a "material witness," but a month later, the government designated Padilla an "enemy combatant" and transferred him to the same Charleston brig where Hamdi is being held. Padilla's attorney, Donna Newman, did not see her client again until this past February, some eight months later. "The government only allowed us to see him on their terms," says Newman.

As in the Hamdi case, the government has justified Padilla's detention based on a six-page "Mobbs declaration," which lists the charges against Padilla and cannot, the government claims, be challenged. Deborah Pearlstein, an attorney with Human Rights First, sees it differently. "The president is saying, 'You, Americans, should trust me, George Bush, to identify who is a combatant and who's not a combatant, without a check on that authority,'" says Pearlstein. "But the United States is built on the premise that Americans don't trust the government. We were living under King George and it didn't work."

To the administration's shock, the U.S. Court of Appeals for the Second Circuit agreed with Padilla and ruled in De-



**LANDMARK?** Frank Dunham, a Virginia public defender, will argue the Hamdi case.

cember that the president "lacks inherent constitutional authority . . . to detain American citizens on American soil outside a zone of combat." The court also ruled that the detention violates a statute expressly forbidding the executive branch to detain a U.S. citizen without congressional edict. The court ordered that Padilla be charged or released within 30 days. The government then appealed to the Supreme Court. Solicitor General Olson argued that the Second Circuit's elimination of "a core wartime judgment" of the commander in chief is "unprecedented" and warranted the court's review.

It could be argued that just by expressing interest, the Supreme Court has already changed the dynamics of this explosive debate. It was only after the court began agreeing to grant

certiorari in these cases that the government did an about-face, allowing Hamdi and Padilla to meet with their attorneys and announcing that 140 detainees would be released, including the three British petitioners. The government is also negotiating with other countries like Kuwait to release other detainees. And the Pentagon has now established procedures and timetables to move forward with several detainee trials before the military tribunals. Berenson, the president's former associate counsel, says those moves are "proof of good faith and not an attempt to manipulate the court's consideration of the case." ●

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## THE U.S. CITIZEN CASES

### The cases

- *Hamdi v. Rumsfeld*
- *Rumsfeld v. Padilla*

### Arguments

April 28



Hamdi



Padilla

### The question

Does the president have the authority to detain without due process an American citizen seized as an "enemy combatant" in the United States or an American citizen captured abroad by the U.S. military during wartime?

### The government argument

Lawyers for the Justice Department will argue that under Article II of the U.S. Constitution, the president, as commander in chief, has the power to detain indefinitely anyone he designates an "enemy combatant" in the "war on terror."

### The detainees

Their lawyers will say that under the Non-Detention Act of Congress and under the U.S. Constitution's Bill of Rights, U.S. citizens are entitled to due process when detained by the government—including the right to a lawyer to challenge the detention.