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# The Great Writ of Incoherence: An Analysis of Supreme Court's Rulings On "Enemy Combatants"

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# THE GREAT WRIT OF INCOHERENCE: AN ANALYSIS OF THE SUPREME COURT'S RULINGS ON "ENEMY COMBATANTS"

GREGORY DOLIN\*

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## I. INTRODUCTION

On June 28, 2004, the United States Supreme Court released its much awaited decisions in the cases posing a challenge to the Executive's self-professed authority to detain and indefinitely hold individuals designated as "enemy combatants."<sup>1</sup> The cases arose from the "war on terrorism" that was launched after the attack on the United States on September 11, 2001.<sup>2</sup> When each decision is looked at individually,

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1. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). Also, on June 29, 2004, the Supreme Court summarily vacated the U.S. Court of Appeals for the Ninth Circuit's decision in another terrorism case. *Bush v. Gharebi*, 124 S. Ct. 2932 (2004) (mem.). Together, in this Article, these cases are referred to as the "Enemy Combatant Cases."

2. As of the day the decisions came down (and of the day of writing of this Article), the "war on terrorism" was ongoing with no end in sight.

the result seems to make sense and, given the outcome (affording detainees rights of judicial review), feels good. Yet when these decisions are looked at collectively, it is hard to believe that they were issued by the same complement of Justices, much less on the same day. Moreover, when the decisions rendered on June 28, 2004, are read in concert with previous decisions dealing with the habeas corpus rights of non-citizen detainees, the legal landscape becomes quite muddled.

This Article seeks to show inconsistencies in the three Enemy Combatant Cases, as well as the potentially catastrophic interaction of these cases with *Zadvydas v. Davis*, a case decided in 2001. Part II of this Article describes the historical and political background of these cases and summarizes the Supreme Court's opinion in each case. Part III points out the tension between these decisions and suggests that it is impossible for all three to be implemented as written. Part IV addresses the far-reaching implications of *Rasul v. Bush* on the present and future military operations and argues that that decision has the potential to wreak havoc on the military's ability to effectively detain and interrogate terrorists and prisoners of war (POWs). Part V addresses the interaction of *Rasul* and *Zadvydas* and suggests that if the decisions are meant to be read in concert, they may require a highly implausible result of releasing individuals whom the military considers to be dangerous into the very country that these individuals wish to destroy. Part VI proposes a restricted construction on these decisions so as to limit the potential damage that these decisions can cause. The Article concludes its analysis in Part VII.

## II. THE CASES AND THEIR BACKGROUND

On the bright morning of September 11, 2001, the world shook. The United States was attacked by terrorists associated with al-Qaeda, a vast, worldwide terrorist network. Two planes crashed into the World Trade Center buildings in New York, bringing both buildings down, while a third plane crashed into the Pentagon. Yet another plane, headed for the U.S. Capitol or the White House, was brought down by courageous passengers. In all, over 3,000 people perished in the attack. On September 14, 2001, Congress unanimously passed a resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks."<sup>3</sup> On October 7, the

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3. Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224 (2001).

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U.S. forces began a bombing campaign against Afghanistan,<sup>4</sup> a country then ruled by the radical Islamist Taliban regime—a regime harboring the mastermind of September 11, 2001, attacks, Osama bin Laden.<sup>5</sup> It is in this context that the Enemy Combatant Cases arose. This Part will describe *Hamdi*, *Padilla*, and *Rasul*, the Enemy Combatant Cases.

### A. *Hamdi v. Rumsfeld*

After the United States started military operations in Afghanistan, as would be expected, it captured a number of individuals who allegedly were (and are) Taliban and al-Qaeda supporters.<sup>6</sup> Among them was Yaser Esam Hamdi, a Saudi national.<sup>7</sup> Like many other foreign-born individuals captured in Afghanistan and suspected of being members of the Taliban or al-Qaeda, Mr. Hamdi was detained and initially transported to Camp X-Ray in Guantanamo Bay Naval Base, Cuba.<sup>8</sup> Officials soon discovered, however, that in addition to being a Saudi national, Mr. Hamdi also laid a claim to U.S. citizenship, by virtue of having been born in Louisiana.<sup>9</sup> Once U.S. officials discovered that Mr. Hamdi was a U.S. citizen, he was transferred from Guantanamo Bay Naval Base and into the United States proper.<sup>10</sup> The Department of Defense chose the military brig in Norfolk Naval Station in Norfolk, Virginia,<sup>11</sup> as his new place of confinement. The U.S. government further determined that Mr. Hamdi was an “enemy combatant” and consequently should remain detained in accordance with the laws and customs of war.<sup>12</sup>

While being detained, Hamdi was not permitted to meet with his

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4. David Rohde, *Thunderous Blasts and Bright Flashes Mark Kabul Strikes*, N.Y. TIMES, Oct. 8, 2001, at A1.

5. *Id.* at B5.

6. See Katharine Q. Seelye, *A Nation Challenged: The Detention Camp; U.S. to Hold Taliban Detainees in 'the Least Worst Place'*, N.Y. TIMES, Dec. 28, 2001, at B6 (“As of today, the United States was holding 45 fighters from Al Qaeda and the Taliban.”).

7. See *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 534 (E.D. Va. 2002).

8. *Id.* at 529. For further details about Camp X-Ray, see *infra* Part II.C.

9. *Hamdi v. Rumsfeld*, 316 F.3d 450, 460 (4th Cir. 2003). Mr. Hamdi has since renounced his U.S. citizenship as part of the deal with the Government. See *infra* note 41.

10. *Id.*

11. *Id.* Hamdi was thereafter transferred to the military brig in Charleston Naval Brig in Charleston, South Carolina. See *Hamdi*, 124 S. Ct. at 2636.

12. *Hamdi*, 294 F.3d at 601.

attorneys or anyone else, including family members,<sup>13</sup> nor was he indicted or arraigned on any charges in either civilian or military proceedings.<sup>14</sup> In essence he was being held as a POW but without the rights that the Geneva Convention accords to POWs.<sup>15</sup> Furthermore, the Government announced that the detention would last indefinitely, or at least until the Government itself makes a determination that access to counsel and the courts is warranted.<sup>16</sup>

On May 10, 2002, a federal public defender, Frank Dunham, filed a habeas corpus petition challenging the Government's detention of Hamdi as an enemy combatant and naming as petitioners both Hamdi and himself as Hamdi's next friend.<sup>17</sup> The petition requested an order from the court requiring the Government to allow the public defender to meet privately with Mr. Hamdi, to cease all interrogation of Mr. Hamdi, and to release Mr. Hamdi from "unlawful custody."<sup>18</sup> The District Court for the Eastern District of Virginia granted the petition insofar as it requested that Mr. Hamdi be allowed to privately meet with counsel.<sup>19</sup> The U.S. Court of Appeals for the Fourth Circuit reversed but did not address the propriety of treating Mr. Hamdi as an "unlawful combatant."<sup>20</sup> Instead, the court held that the public defender did not have standing to file a habeas corpus petition on Mr. Hamdi's behalf.<sup>21</sup>

While Mr. Durham's petition on behalf of Mr. Hamdi was pending in the Fourth Circuit, Mr. Hamdi's father, Esam Fouad Hamdi, filed a nearly identical habeas corpus petition on behalf of his son, claiming to be his next friend.<sup>22</sup> Once again, the district court granted the petition

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13. See *Hamdi v. Rumsfeld*, 337 F.3d 335, 368 (4th Cir. 2003) (Motz, J., dissenting from denial of rehearing en banc) ("Nor has the Executive allowed Hamdi to appear in court, consult with counsel, or communicate in any way with the outside world.").

14. *Id.*

15. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 118 [1955] 6 U.S.T. 3316, 3406, T.I.A.S. No. 3364 [hereinafter Geneva Convention] ("Prisoners of war shall be released and repatriated without delay *after the cessation of active hostilities.*") (emphasis added). As the duration of hostilities is indefinite (in the sense that no one knows *a priori* how long a particular war will last), so too can detention under the Convention be indefinite. See also *Hamdi*, 124 S. Ct. at 2641-42 (addressing the issue of indefinite detention in light of the Geneva Convention); cf. *Hamdi v. Rumsfeld*, 316 F.3d 450, 468-69 (4th Cir. 2002) (rejecting Hamdi's Geneva Convention claims).

16. *Hamdi*, 124 S. Ct. at 2636.

17. *Hamdi*, 294 F.3d at 601.

18. *Id.*

19. *Id.* at 602 (detailing the district court's order).

20. See *id.* at 607.

21. See *id.* at 600.

22. See *Hamdi v. Rumsfeld*, 296 F.3d 278, 280 (4th Cir. 2002).

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insofar as it requested that Mr. Hamdi be allowed to meet privately with an attorney.<sup>23</sup> Once again, the Fourth Circuit reversed, holding that the district court failed to properly consider the detainee's status as an "enemy combatant," or to give proper deference to the decision of the President and Congress regarding the conduct of war and foreign policy.<sup>24</sup> Accordingly, the Fourth Circuit remanded the case to the district court for reconsideration.<sup>25</sup>

Upon remand, having addressed the issues identified by the Fourth Circuit, the district court ordered the Government to produce support for its contention that Hamdi was an "enemy combatant."<sup>26</sup> The Government produced a declaration (the Mobbs Declaration) by Michael Mobbs—"an unelected, otherwise unknown, government 'advisor'"<sup>27</sup>—attesting to the circumstances of Mr. Hamdi's capture.<sup>28</sup> The district court found the Mobbs Declaration to be insufficient and ordered the Government to produce additional documentation including information on the identity of the individuals who actually made the ultimate decision to designate Mr. Hamdi as an "enemy combatant" and the criteria used for such designation.<sup>29</sup> Yet again, the Fourth Circuit reversed, holding that the Government's affidavit was sufficient and that, in any event, the district court did not have jurisdiction to question the Executive's designation of Hamdi as an enemy combatant.<sup>30</sup> Additionally, the Fourth Circuit held that the Geneva Convention affords Mr. Hamdi no rights to have his "enemy combatant" status reviewed by a court of law.<sup>31</sup>

The Supreme Court granted certiorari to address, *inter alia*, whether

the Constitution permit[s] Executive officials to detain an American citizen indefinitely in military custody in the United States, hold him essentially incommunicado and deny him access to counsel, with no opportunity to question the factual basis for his detention before any impartial tribunal, on the sole ground that he was seized abroad in a theater of the War on

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23. *See id.* at 281 (detailing the district court's order).

24. *Id.* at 281-82.

25. *Id.* at 284.

26. *See Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002).

27. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 368 (4th Cir. 2003) (Motz, J., dissenting from denial of rehearing en banc).

28. *See id.*; *infra* note 42.

29. *Hamdi*, 243 F. Supp. 2d at 528-29.

30. *See Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

31. *Id.* at 468-69.

Terrorism and declared by the Executive to be an “enemy combatant”?<sup>32</sup>

On June 28, 2004, a splintered Court announced its judgment,<sup>33</sup> with opinions transcending the usual “liberal-conservative” divide.

Although no opinion garnered the necessary five votes to become an opinion of the Court, five Justices agreed that the indefinite<sup>34</sup> detention of American citizens, in the narrow circumstances of this case, was permissible.<sup>35</sup> At the same time, however, six Justices concluded that, contrary to the Fourth Circuit’s view, Mr. Hamdi is indeed entitled to challenge his designation as an “enemy combatant” and to have an attorney for the purpose of such proceedings.<sup>36</sup> The Court, however, did specify that given the extraordinarily sensitive nature of the military information, and the deference that the courts owe to the Executive in his determination on the conduct of war, the onus in challenging the “enemy combatant” designation should be placed on the detainee.<sup>37</sup> Furthermore, the Court allowed the Government to rely on evidence that in most other proceedings would be deemed undependable (*e.g.*, hearsay).<sup>38</sup>

The plurality opinion did concede that the challenge to the “unlawful combatant” status need not proceed in the civilian courtrooms, but may instead be adjudicated in the military tribunals.<sup>39</sup> If such is the

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32. Petition for Writ of Certiorari at 1, *Hamdi v. Rumsfeld*, 2003 WL 23170355 (Oct. 31, 2003); *Hamdi v. Rumsfeld*, 124 S. Ct. 981 (2004) (mem.) (order granting certiorari).

33. The case produced five opinions. The plurality opinion was authored by Justice O’Connor and joined by the Chief Justice and Justices Kennedy and Breyer. Justice Souter, joined by Justice Ginsburg, concurred in the judgment. Justice Scalia, joined by Justice Stevens, dissented. Justice Thomas also dissented, though on different grounds than Justice Scalia.

34. The plurality opinion did make a cautionary footnote that “indefinite” means only until cessation of hostilities, which in turn may last for the course of Mr. Hamdi’s lifetime. (After all, “hostilities” between Israelis and Palestinians have been “ongoing” for almost 60 years. Although one hopes that the U.S. military operations in Afghanistan would conclude well short of the sixty-year mark, the possibility that the operations will carry on for years, if not decades, certainly cannot be ruled out.) Because the Court took note of the fact that the hostilities in Afghanistan are still ongoing, it saw no need to delve deeper into the propriety of holding a citizen indefinitely when no active military operations are conducted, but the country nevertheless is in a heightened state of alert due to terrorist threats.

35. See *Hamdi*, 124 S. Ct. at 2641-42 (plurality opinion); *id.* at 2680 (Thomas, J., dissenting).

36. See *id.* at 2651-52 (plurality opinion); *id.* at 2660 (Souter, J., concurring in judgment).

37. 124 S. Ct. at 2649.

38. *Id.*

39. *Id.* at 2651-52. Technically, this part of the opinion did not command the majority of the Court. See *id.* at 2660 (Souter, J., concurring in judgment) (specifically disavowing agreement with

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case, the plurality would probably concede that Mr. Hamdi's choice of lawyers could be limited.<sup>40</sup> In short, the Court was quite deferential to the powers of the Executive, but not to the point where it ceded to the Executive the sole, unreviewable, and unaccountable power to indefinitely detain U.S. citizens.<sup>41</sup>

### B. *Rumsfeld v. Padilla*

The second case decided by the Supreme Court concerned another U.S. citizen classified as an "enemy combatant." Although Jose Padilla came to be held in the same military jail and under the same status as Yaser Hamdi, the circumstances of his arrival there were quite different.

Jose Padilla was born in New York and raised in Chicago.<sup>42</sup> He started having problems with the law at a very early age and was arrested for murder when he was fourteen.<sup>43</sup> He was tried as a juvenile, convicted, and incarcerated until his eighteenth birthday.<sup>44</sup> He later moved to Florida, where he was once again arrested and convicted on a handgun charge.<sup>45</sup> Sometime between 1993 and 1994, Mr. Padilla converted to Islam and started referring to himself as Ibrahim Padilla.<sup>46</sup> In 1998, he moved to Egypt.<sup>47</sup> Mr. Padilla subsequently traveled to Saudi Arabia, Pakistan, and Afghanistan.<sup>48</sup> It is alleged that during these travels Mr. Padilla met and became involved with senior leaders of al-Qaeda<sup>49</sup> and

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the majority on this point). However, given Justice Thomas' view that Hamdi is not entitled to *any* additional process, it is likely that he would agree that a truncated process would not be constitutionally offensive.

40. For example, the Government may impose a requirement that the attorneys be able to obtain security clearance and/or be on active military duty.

41. After the Court handed down its decision, Mr. Hamdi and the Federal Government entered an agreement whereupon Mr. Hamdi renounced his U.S. citizenship and was sent to Saudi Arabia. Mr. Hamdi agreed to certain limitations on his activities as part of the deal. See Joel Brinkley & Eric Lichtblau, *Held 3 Years by U.S., Saudi Goes Home*, INT'L HERALD TRIB., Oct. 13, 2004, at 2.

42. See Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy ¶ 4 [hereinafter *Mobbs Declaration*], available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush82702mobbs.pdf> (last visited Nov. 2, 2004).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* ¶¶ 5-6.



that he became a part of the plan to detonate a “dirty bomb”<sup>50</sup> in the United States.<sup>51</sup> On May 8, 2002, Mr. Padilla traveled from Pakistan to Chicago O’Hare Airport at which point he was, pursuant to a court order, detained by the U.S. Marshal Service as a material witness to a federal grand jury investigation.<sup>52</sup> The grand jury was empanelled in the Southern District of New York, and accordingly, Mr. Padilla was held in New York City’s Metropolitan Correctional Center.<sup>53</sup>

While Mr. Padilla was being held on a material witness warrant, the district court appointed an attorney to represent him.<sup>54</sup> Donna Newman, the court-appointed attorney, was allowed to confer with Mr. Padilla<sup>55</sup> and subsequently moved to vacate the material witness warrant. However, on June 9, 2002, while the motion to vacate was pending, President Bush classified Mr. Padilla as an “enemy combatant” and ordered the Secretary of Defense to detain Mr. Padilla.<sup>56</sup> Secretary Rumsfeld then ordered Mr. Padilla held at the Charleston Naval Brig in Charleston, South Carolina.<sup>57</sup> After Mr. Padilla was moved to South Carolina, Ms. Newman filed a habeas petition on June 11, 2002, as Mr. Padilla’s “next friend” in the Southern District of New York.<sup>58</sup> Secretary Rumsfeld was named as the respondent in the petition.<sup>59</sup>

The U.S. District Court for the Southern District of New York, like the district court in Hamdi’s case, held that Mr. Padilla’s lawyer can style herself as “next friend” and, accordingly, had standing to pursue

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50. “Dirty bomb” is a regular explosive device that is enhanced with radioactive material. Although not a true nuclear weapon (because instead of causing a nuclear reaction, a “dirty bomb” merely causes the fallout of “prepackaged” nuclear material), the damage from a “dirty bomb” exceeds that of the regular explosive device due to the release of nuclear material. For a quick summary on “dirty bombs,” see U.S. NUCLEAR REG. COMM’N, *Fact Sheet on Dirty Bombs*, available at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/dirty-bombs.html> (last visited Nov. 29, 2004).

51. *Mobbs Declaration*, *supra* note 42 ¶¶ 7-8.

52. *Id.* ¶ 11.

53. *See Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002).

54. *Id.*

55. *Id.* Additionally, after the habeas petition was filed, Ms. Newman conferred with Mr. Padilla’s relatives and with government representatives on Padilla’s behalf. *Id.* at 572.

56. *Id.* at 571; *see also President’s Order to the Secretary of Defense to Detain Jose Padilla* (June 9, 2002), available at <http://news.findlaw.com/hdocs/docs/padilla/padillabush60902det.pdf> (last visited July 31, 2004).

57. *See* 233 F. Supp. 2d at 571.

58. *Id.*

59. *Padilla*, 124 S. Ct. at 2716. The petition also named President Bush and Melanie Marr, Commander of the Charleston Naval Brig, as respondents. *Id.*

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the habeas petition.<sup>60</sup> Additionally, the district court rejected the Government's argument that Secretary Rumsfeld was not a proper respondent and that the warden of the Charleston Naval Brig should have been named instead.<sup>61</sup> The district court then ordered the Government to allow Mr. Padilla access to an attorney<sup>62</sup> and the opportunity to rebut the Government's contention that he is an "enemy combatant."<sup>63</sup> The Government appealed, and the U.S. Court of Appeals for the Second Circuit, one judge dissenting, affirmed the district court. The Court of Appeals also ordered Secretary Rumsfeld to release Mr. Padilla from military custody and transfer him to civilian authorities.<sup>64</sup> The Supreme Court granted certiorari to resolve, inter alia, whether the District Court for the Southern District of New York had personal jurisdiction over the proper respondent to the habeas petition.<sup>65</sup>

On June 28, together with the *Hamdi* decision, the Supreme Court rendered its judgment in *Rumsfeld v. Padilla*. In a 5-4 decision,<sup>66</sup> the Court reversed the Second Circuit, holding that the warden of Charleston Naval Brig was the proper respondent, rather than Secretary Rumsfeld.<sup>67</sup> Thus, the Court continued, the petition should have been brought in the U.S. District Court for the District of South Carolina and not in the U.S. District Court for the Southern District of New York.<sup>68</sup> In reaching this decision, the Court recognized that allowing a prisoner to sue the high-level official in any jurisdiction where that official would be amenable to long-arm jurisdiction, instead of suing the immediate captor locally, would encourage "rampant forum shopping" and result

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60. *Newman*, 233 F. Supp. 2d at 578.

61. *Id.* The district court actually dismissed Commander Marr as the respondent because the court did not view her as a necessary party to the dispute. *Id.* at 583.

62. *Id.* at 610.

63. *Id.* at 599-600.

64. *Padilla v. Rumsfeld*, 352 F.3d 695, 698-99 (2d Cir. 2003). It is at this point that the Second Circuit disagreed with the District Court. While the District Court was of the view that the President was authorized and could detain U.S. citizens as "enemy combatants," provided that these individuals can contest the designation, the Court of Appeals held otherwise. Compare *Newman*, 233 F. Supp. 2d at 588, with *Padilla*, 352 F.3d at 724. For the purpose of the Supreme Court's opinion, however, that distinction did not matter.

65. *Rumsfeld v. Padilla*, 124 S. Ct. 1353 (2004) (mem.) (order granting certiorari).

66. Chief Justice Rehnquist delivered the decision in which Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justices Souter, Breyer, and Ginsburg joined Justice Stevens' dissenting opinion. Additionally, Justice Kennedy filed a concurring opinion in which Justice O'Connor joined. *Padilla*, 124 S. Ct. at 2711.

67. *Id.* at 2721-22.

68. *Id.* at 2727.

in “district courts with overlapping jurisdiction, and the very inconvenience, expense, and embarrassment Congress sought to avoid when it added the jurisdictional limitation [to the habeas corpus statute] 137 years ago.”<sup>69</sup>

In footnote nine, the majority did recognize that in the past it allowed suits against high level officials when the immediate jailer was outside of the jurisdiction of any U.S. district court. However, the Court carefully noted that in the past this exception applied to U.S. citizens only.<sup>70</sup> As detailed below, that last limitation apparently no longer holds.

### C. *Rasul v. Bush*

*Rasul v. Bush* was the third of the Enemy Combatant Cases. The facts of the case closely track those of *Hamdi*, with the exception that none of the individuals involved are U.S. citizens. The individuals named in *Rasul* (and others similarly situated) are all foreign nationals, captured in Afghanistan during U.S. military operations there. After being captured, these individuals were transferred to the Guantanamo Naval Base, Cuba, and have been held there to the present day.<sup>71</sup>

On February 19, 2002, the relatives of Shafiq Rasul, a detainee in the Guantanamo Bay Base, filed a habeas petition in the U.S. District Court for the District of Columbia.<sup>72</sup> In their petition, President George W. Bush was named as a respondent.<sup>73</sup> The district court held that because the petitioners were located outside of the United States, the court could not grant them the relief requested.<sup>74</sup> The court based its holding on the fact that Guantanamo Bay Base is technically Cuban territory, held by the U.S. under the terms of a (nearly) perpetual lease.<sup>75</sup> The U.S. Court of Appeals for the District of Columbia Circuit unanimously affirmed.<sup>76</sup> The Supreme Court granted certiorari to address the question of “[w]hether United States courts lack jurisdic-

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69. *Id.* at 2725.

70. *Id.* at 2718 n.9.

71. *Rasul*, 124 S. Ct. at 2690-91.

72. *Rasul v. Bush*, 215 F. Supp. 2d 55, 57 (D.D.C. 2002), *aff'd sub nom.* *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.* *Rasul v. Bush*, 124 S. Ct. 2686 (2004). Rasul's petition was consolidated with several others, but the backgrounds of these cases are quite similar, so there is little need to identify each plaintiff and his specific circumstances.

73. *See Al Odah v. United States*, 321 F.3d 1134, 1136 (D.C. Cir. 2003).

74. *Rasul*, 215 F. Supp. 2d at 72-73.

75. *Id.*

76. *Al Odah*, 321 F.3d at 1143.

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tion to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.”<sup>77</sup>

The Supreme Court delivered its judgment in *Rasul* together with the two other Enemy Combatant Cases. The decision was unexpected. The court ruled, 6-3,<sup>78</sup> that foreign citizens being detained by the U.S. Government have the right to have U.S. courts hear their challenges to the legality and the propriety of that detention.<sup>79</sup> The decision is notable for several points. First, it is the first time that the Court explicitly stated that foreign citizens located outside of the United States can sue the U.S. Government.<sup>80</sup> Second, the Court focused on the fact that, although Guantanamo Bay Base is technically Cuban territory, the United States has exercised, exercises, and likely will continue to exercise full jurisdiction and control over the territory for the foreseeable future. Therefore, according to the Court, the Guantanamo Base should be treated as if it actually were sovereign U.S. territory.<sup>81</sup> The focus on Guantanamo’s unique status makes it difficult to judge how far down the battlefield the Court is willing to interpose itself.<sup>82</sup> Next, unlike the decision in *Hamdi* that explicitly allowed for adjudicatory proceedings to occur before a military tribunal (or com-

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77. Petition for Writ of Certiorari at 1, *Rasul v. Bush*, 2003 WL 22428935 (Sept. 2, 2003); *Hamdi v. Rumsfeld*, 124 S. Ct. 534 (2003) (mem.) (order granting certiorari).

78. Justice Stevens delivered the majority opinion in which Justices O’Connor, Souter, Breyer, and Ginsburg joined. Justice Kennedy concurred in judgment. The Chief Justice and Justice Thomas joined Justice Scalia’s dissenting opinion. *Rasul*, 124 S. Ct. at 2686.

79. *Rasul*, 124 S. Ct. at 2698; *see also id.* at 2706 (Scalia, J., dissenting) (stating that the majority “for the first time” allowed aliens outside the United States to sue for habeas relief).

80. The Court’s previous opinions did raise such a possibility, but the extent of those opinions was not clear until *Rasul*. *See Braden v. 30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484 (1973). Then again, as discussed in this Article, the extent of *Rasul* is far from clear as well, and we most likely will have to wait for another pronouncement from the Court in order to have a clearer idea of the rights and obligations of the U.S. Government vis-à-vis foreign nationals.

81. *See Rasul*, 124 S. Ct. at 2696-97.

82. The Court was careful to specify that it held only that the “District Court [has] jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention *at the Guantanamo Bay Naval Base.*” *Id.* at 2698 (emphasis added). The Court could have just as easily ended the above sentence with the word “detention,” without specifying the location of that detention. The fact that it chose to add “at the Guantanamo Bay Naval Base” may mean that the decision applies only to Guantanamo, and does not extend beyond it. Nonetheless, in light of the Court’s view that in order for the Great Writ to be granted only the respondent must be within the court’s geographical jurisdiction, it cannot be ruled out that the *Rasul* decision extends beyond Guantanamo’s gates. *See infra* Part IV.

mission), the *Rasul* decision makes no such concession.<sup>83</sup> Finally, *Rasul* is notable for the fact that in the entire 45-page decision, *Rumsfeld v. Padilla*, a case ostensibly decided by the same Court, with the same nine Justices, is mentioned only once, and only in Justice Scalia's dissent.<sup>84</sup> It is these last two points that make the Court's jurisprudence in this area incoherent.

### III. THE TENSION BETWEEN THE THREE DECISIONS

As alluded to above, the three decisions handed down by the Supreme Court on June 28, 2004, neither are a model of clarity nor do they fully harmonize with one another. Indeed, each of the opinions completely ignores the existence of the other two.<sup>85</sup> Given the fact that an unambiguous resolution of all three cases would greatly illuminate the legal problems surrounding the ongoing "war on terror," the Supreme Court's performance is, to say the least, inadequate. This Part discusses how, by failing to provide the Executive and the lower courts with proper guidance, the Supreme Court assured itself of further litigation and continued uncertainty regarding detainees' rights and the powers of the Government.

#### A. *The Interaction of Hamdi and Rasul*

The majorities for *Hamdi* and for *Rasul* were quite different,<sup>86</sup> so perhaps it is no surprise that the decisions read differently. Yet Justice O'Connor and Justice Kennedy, who both agreed with the conclusion that U.S. citizen "enemy combatants" may not necessarily be entitled to adjudicate their claims in federal courts, so long as they have *some avenue* of challenging their status,<sup>87</sup> expressed no such certainty in cases of non-U.S. citizen "enemy combatants." Furthermore, the remaining members of the *Rasul* majority either explicitly rejected or, at the very least, cast grave doubt on their acceptance of a "truncated" habeas

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83. Granted, the Court did not say that such a procedure would be *inappropriate*. However, it is noteworthy that the Court explicitly authorized proceedings in the military system with respect to a U.S. citizen, but declined to do so (though reserving that question) in the case of foreign nationals.

84. 124 S. Ct. at 2711 (Scalia, J., dissenting).

85. Not one opinion even cites to the other two, except in concurrences or dissents.

86. Compare *Hamdi*, 124 S. Ct. at 2633, with *Rasul*, 124 S. Ct. at 2686.

87. See *Hamdi*, 124 S. Ct. 2633 (plurality opinion); *Rasul*, 124 S. Ct. at 2686 (majority opinion); *id.* at 2699 (Kennedy, J., concurring).

process for “enemy combatants.”<sup>88</sup> Reading the two decisions together, one is struck by the failure of *Rasul*’s majority or concurrence even to mention the possibility of litigating a detainee’s status in a non-Article III court. In other words, it may well be that the import of *Hamdi* and *Rasul* is that the Government may *not* adjudicate Guantanamo Bay Base detainees’ status in military tribunals but may do so for U.S. citizens detained on U.S. soil.<sup>89</sup> If this conclusion sounds improbable, that is because it is. It may well be that if and when the issue of sufficiency of process for Guantanamo Bay Base detainees reaches the Supreme Court, a different majority may conclude that military commission status review is sufficient.<sup>90</sup> However, it is, to say the least, sloppy decision-making and opinion-writing not only to leave the question of the type of process due to the non-citizen detainees *open* but also to completely fail to even *mention* the issue. The sloppiness is all the more obvious in light of the fact that this very issue was discussed in some detail with respect to American U.S. citizen detainees.<sup>91</sup>

Additionally, although *Hamdi* makes relatively clear the consequences of finding a U.S. citizen not to be an enemy combatant,<sup>92</sup> *Rasul* leaves that question open with respect to non-citizens. There is no question that the U.S. Government may prosecute Mr. Hamdi (or Mr. Padilla) in criminal courts.<sup>93</sup> Indeed, the Government already has exercised such an option with respect to another so-called American Taliban.<sup>94</sup> It is altogether unclear whether criminal procedures can be applied with the same force and effectiveness to non-citizen detainees.

88. See *Hamdi*, 124 S. Ct. at 2652-53 (Souter, J., concurring in judgment); *id.* at 2660 (Scalia, J., dissenting). As noted, *supra* note 33, in *Hamdi*, Justice Ginsburg joined Justice Souter’s opinion, while Justice Stevens joined Justice Scalia’s opinion.

89. Indeed, the Government quickly moved to provide detainees with a military “Review Commission,” but some legal scholars already expressed reservations as to the sufficiency of such a mechanism. See Christopher Marquis, *Pentagon Will Permit Captives at Cuba Base to Appeal Status*, N.Y. TIMES, July 7, 2004, at A4 (describing the proposed process and stating that legal experts have expressed doubts about the constitutional adequacy of new procedures).

90. See *supra* note 39 and accompanying text.

91. See *Hamdi*, 124 S. Ct. at 2651-52.

92. Although the opinion itself does not mention what such consequences would be, if Mr. Hamdi and Mr. Padilla indeed did what they are accused of doing, there is little question that they could be prosecuted in a regular criminal trial. See, e.g., 18 U.S.C. § 2332 (2000) (specifying the type of prohibited terrorism-related conduct and penalties therefor); § 2339A (prohibiting provision of any aid to terrorists).

93. See *supra* note 92.

94. See Indictment of John Phillip Walker Lindh, United States v. Lindh, Crim. No. 02-37a (E.D. Va. Feb. 5, 2002), available at <http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.pdf> (last visited Oct. 21, 2004); see also Plea Agreement of John Phillip Walker Lindh, United States v.

Although U.S. laws do allow for prosecution of foreign nationals for crimes committed against U.S. citizens, even if such crimes are committed on foreign soil,<sup>95</sup> it is altogether unclear that resisting invading U.S. forces is a crime.<sup>96</sup> Nonetheless, it is beyond dispute that it is quite undesirable (at least from the U.S. perspective) to have anyone offer armed resistance to U.S. forces and that it is even less desirable to have anyone perpetrating acts of terrorism in a region where the United States may have vital interests (whether or not these acts are targeted at U.S. citizens). It then follows that it is desirable to isolate and detain individuals who have *or may* impede the progress of U.S. forces abroad. This is not the same as advocating for preventive detention but merely a recognition of the fact that someone may have been a member of the Taliban (perhaps even a high-ranking member) and yet not have been a combatant. If one is not a combatant, it is doubtful that he could be an “*enemy combatant*,” nonetheless, it may not be prudent to release former Taliban members when the situation in Afghanistan is far from stable. The U.S. Government may then be faced with an untenable situation. If the detainee is able to show that he was not a combatant, presumably the courts would be bound to order the military to release that individual. In the case of a U.S. citizen, the Government may then continue to detain this individual in connection with any criminal prosecution that it may bring.<sup>97</sup> However, in the case of a non-citizen, it is altogether unclear what actions the Government can take to prevent the return of this individual to the zone of ongoing conflict. The practical result of the Court’s decisions, therefore, is to give the Government more options with respect to U.S. citizens and fewer options with respect to non-citizens. The result is counter-intuitive and in all likelihood wrong or, at the very least, unintended. In either case, the result suggests that the Court lacked sufficient intellectual rigor to resolve the two cases in a manner in which at the very least the U.S. Government is not more constrained with respect to non-citizens than it is with respect to U.S. citizens.

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Lindh, Crim. No. 02-37a (E.D. Va. Feb. 5, 2002), *available at* <http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf> (last visited Oct. 21, 2004).

95. *See, e.g.*, 18 U.S.C. § 2332 (2000).

96. Although § 2332(c) of Title 18 provides for penalties for *anyone* acting with intent to cause serious injury to a U.S. national (and it can be safely assumed that anyone firing on U.S. soldiers intends to cause such injury), international law prohibits the prosecution of those engaged in legitimate armed conflict between nations. *See generally* Geneva Convention, *supra* note 15, art. 4 (recognizing that captured members of the opponent’s armed forces are POWs and not common criminals).

97. *See supra* notes 92-95 and accompanying text.

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### B. *The Interaction of Padilla and Rasul*

The inconsistencies between *Hamdi* and *Rasul* are not the only ones that are present in the trio of decisions. There are also glaring inconsistencies and omissions between *Padilla* and *Rasul*. This Part is dedicated to illuminating the flaws in these decisions.

The *Padilla* Court recognized that, although the courts may be a necessary counterbalance and check on the Executive's ability to indefinitely detain individuals, the jurisdiction of the courts is limited. The Supreme Court was understandably wary of prisoners challenging their detention in a variety of jurisdictions, hoping to have their case heard by a more sympathetic set of judges.<sup>98</sup> The Court also understood that the Executive would be unduly hampered if it had to defend against habeas proceedings in a variety of jurisdictions.<sup>99</sup> Taking all these facts into account, the Court, consistent with its prior rulings, limited prisoners' ability to litigate to the jurisdiction where their immediate captor is located. No such restriction was placed on non-U.S. citizen individuals held outside the U.S. sovereign territory.

In *Padilla* the Court recognized that U.S. laws allow federal courts to hear habeas petitions only within their territorial jurisdiction.<sup>100</sup> At the same time the Court recognized that since the Great Writ is directed to the jailer, the jailer (as opposed to the prisoner) must be within the

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98. See *Padilla*, 124 S. Ct. at 2725. I do not mean to imply that some judges are less cognizant of the limits of their judicial power or are automatically more predisposed to rule against the Government and for the detainee. However, it should be beyond dispute that some judges take a broader view of rights guaranteed to prisoners under the laws and the Constitution of the United States than do others. Compare 20 Questions for Circuit Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit ("Justice William Brennan . . . had a broad and generous, rather than a cramped and niggardly, view of the law and its functions."), available at [http://legalaffairs.org/howappealing/20q/2004\\_02\\_01\\_20q-appellateblog\\_archive.html](http://legalaffairs.org/howappealing/20q/2004_02_01_20q-appellateblog_archive.html) (last visited Jan. 21, 2005), with 20 Questions for Circuit Judge Diarmuid F. O'Scannlain of the U.S. Court of Appeals for the Ninth Circuit ("Apart from Judge Hand's superb craftsmanship, I admire his skepticism with respect to his proper role as an unelected judge in a democratic society, which led to his modest approach to judging, and to his advocacy of judicial restraint."), available at [http://legalaffairs.org/howappealing/20q/2003\\_03\\_01\\_20q-appellateblog\\_archive.html](http://legalaffairs.org/howappealing/20q/2003_03_01_20q-appellateblog_archive.html) (last visited Jan. 21, 2005) (Both judges were responding to a question that asked them to identify "one federal or state court judge, living or dead, whom you admire the most and explain why."). It would therefore stand to reason that prisoners would prefer to litigate in front of the first rather than the second set of judges.

99. See *id.*

100. *Padilla*, 124 S. Ct. at 2722 ("[F]or . . . habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement.").



territorial jurisdiction of a given district court.<sup>101</sup> Of course, in the case of Guantanamo Bay Naval Base, *neither* the jailer nor the prisoner is located within the jurisdiction of *any* district court. Other U.S. territories have specific district courts to adjudicate cases arising in that territory.<sup>102</sup> Thus, Congress clearly knew how to create a court that would have jurisdiction for cases arising outside of the fifty states. Congress also knew how to hold territory without creating federal district court jurisdiction.<sup>103</sup> That Congress has failed to create a district court with jurisdiction over Guantanamo Bay Naval Base is beyond dispute. It is therefore clear that no district court has jurisdiction over either the prisoner or the immediate jailer. Yet the Supreme Court easily dispensed with this problem and allowed Guantanamo Bay detainees access to U.S. courts. The Court achieved this result by allowing the detainees to sue the President as the “jailer-in-chief.”<sup>104</sup>

Although the decision to allow Guantanamo Bay Naval Base detainees to challenge their detention in court “solved” the problem of having no *specific* court to hear detainees’ claims, it created a different problem by essentially allowing *any* court to hear those claims.<sup>105</sup> That of course places *Rasul* in direct conflict with *Padilla*. Once again, the

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101. *Id.* at 2723 (“[H]abeas jurisdiction requires only ‘that the court issuing the writ have jurisdiction over the custodian.’”) (quoting *Braden*, 410 U.S. at 495).

102. For example, there is a District Court for the District of U.S. Virgin Islands, with the Third Circuit having appellate jurisdiction. *See* 48 U.S.C. § 1611 (2000). There is also a District Court for the District of Guam and a District Court for Northern Mariana Islands, with the Ninth Circuit having appellate jurisdiction. *See* 48 U.S.C. §§ 1424, 1821 (2000). Additionally, there is a District Court for Puerto Rico with the First Circuit having appellate jurisdiction. *See* 28 U.S.C. § 119 (2000); *see also* 28 U.S.C. § 41(2000) (defining composition of federal Circuit Courts of Appeals).

103. Indeed, as far back as 1810, the Supreme Court has recognized that Congress can hold territory and assign such powers to the judiciary within that territory as it deems advisable. *See* *Sere v. Pitot* 10 U.S. (6 Cranch) 332, 336-37 (1810) (emphasis added):

The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. . . . Accordingly, we find Congress possessing and exercising the *absolute and undisputed power* of governing and legislating for the territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with *such powers as it has been their will to assign* to those departments respectively.

104. *See Rasul*, 124 S. Ct. at 2698 (stating that the District Court for the District of Columbia has jurisdiction over the custodian, with the implication being that the custodian is the named respondent, *i.e.*, the President).

105. *See id.* at 2711 (Scalia, J., dissenting) (“[U]nder today’s strange holding Guantanamo Bay detainees can petition in any of the 94 federal judicial districts.”).

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Court created a situation where non-citizens held outside the United States are in a more advantageous position than U.S. citizens held within the United States. As Justice Scalia noted in his dissent, “[t]he fact that extraterritorially located detainees lack the district of detention that the statute requires has been converted from a factor that precludes their ability to bring a petition at all into a factor that frees them to petition wherever they wish—and, as a result, to forum shop.”<sup>106</sup>

The Court apparently recognized the incoherence of such an approach and signaled that perhaps the U.S. District Court for the District of Columbia is the only appropriate forum to hear Guantanamo Bay Naval Base detainees’ claims. While *Rasul* was being decided, another case was pending before the Court.<sup>107</sup> In that case, a Guantanamo Bay Naval Base detainee’s brother filed a habeas corpus petition on behalf of his detainee-brother in the U.S. District Court for the Central District of California.<sup>108</sup> Contrary to the D.C. Circuit’s holding, the U.S. Court of Appeals for the Ninth Circuit held that it had jurisdiction to hear the habeas petition.<sup>109</sup> On June 30, 2004, the Supreme Court vacated the Ninth Circuit’s judgment in an unsigned order and remanded the case to that court to reconsider in light of *Padilla*.<sup>110</sup> This action indicates that the Supreme Court is at the very least uncomfortable with the notion of Guantanamo Bay detainees litigating in any of the 94 judicial districts and, consequently, forum shopping. Nonetheless, adjudicating by cryptic orders is not a paragon of judicial lucidity and gives little guidance to lower courts as to why the U.S. District Court for the District of Columbia (which is without jurisdiction as to Guantanamo Bay) is a better (or more appropriate) forum than the U.S. District Court for the Central District of California (which is also without jurisdiction as to Guantanamo Bay). After all, the President (in his official capacity) is amenable to the service of process (and thus jurisdiction) in any judicial district, and given the resources of the federal government it is unclear why it would be inconvenient to litigate these cases in a federal district court other than the U.S. District Court for the District of Columbia. In actuality, it may well be that the U.S. District Court for the Southern District of Florida is a more appropriate forum than the U.S. District Court for the District of

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106. *Id.*

107. *See* *Bush v. Gherebi*, 124 S. Ct. 2932 (2004).

108. *Gherebi v. Bush*, 262 F. Supp. 2d 1064 (C.D. Cal. 2003).

109. *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. 2003).

110. *Gherebi*, 124 S. Ct. at 2932.

Columbia; after all, the former is geographically proximate to Guantanamo Bay, while the latter is quite far removed. Hence, it is altogether unclear why the D.C. District should have exclusive jurisdiction over Guantanamo Bay.

The uncertainty created by the interaction of *Padilla* and *Rasul* is evident in the Ninth Circuit's decision in *Gherebi* on remand.<sup>111</sup> There, the Ninth Circuit held to the view that it possessed jurisdiction to hear cases from Guantanamo Bay<sup>112</sup> but held that transfer to the D.C. District Court was appropriate.<sup>113</sup> The Court of Appeals did not concede that the transfer was mandatory and, indeed, cited as the basis for the transfer both 28 U.S.C. § 1404 (discretionary transfer for convenience of the parties) and § 1406 (mandatory transfer if venue is improper and a party makes a timely objection).<sup>114</sup> Thus, it seems that, although federal courts will transfer cases from Guantanamo Bay to the D.C. District out of prudential considerations, it is not altogether clear that the courts would view themselves under an obligation to do so. Therefore, as a matter of *rights*, the Guantanamo Bay detainees are in a better situation than U.S. citizens detained in Charleston.

#### IV. THE IMPACT OF THE ENEMY COMBATANT CASES ON MILITARY OPERATIONS

Beyond the internal inconsistencies, the Enemy Combatant Cases have a potentially far-reaching impact on the future operations of the U.S. military and intelligence-gathering services.<sup>115</sup> To be sure, the Court did use language that could be viewed as carefully circumscribed, yet, if one takes the logic of the decisions to its ultimate conclusion, the results could well be grotesque.<sup>116</sup>

It is true that the writ of habeas corpus is an extraordinary remedy and is generally available only when there are no other means of

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111. See *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004).

112. *Id.* at 738 ("In sum, we hold that neither *Johnson v. Eisentrager* nor any other legal precedent precludes our assertion of jurisdiction over *Gherebi's* habeas petition.") (emphasis added).

113. *Id.* at 739.

114. *Id.*

115. See *Rasul*, 124 S. Ct. at 2706 (Scalia, J., dissenting) ("The consequence of this holding, as applied to aliens outside the country, is breathtaking. It permits an alien captured in a foreign theater of active combat to bring a § 2241 petition against the Secretary of Defense.")

116. See *id.* at 2706.

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securing the Government's compliance.<sup>117</sup> The "Great Writ," as it has been called, is the last resort of the imprisoned.<sup>118</sup> That, in and of itself, however, should not be sufficient to craft new rules of jurisdiction and expand courts' powers to areas traditionally reserved to Congress and the Executive. If habeas is so used, no principled reasons exist as to why, in the same situation, other extraordinary remedies available to the judicial branch should not be employed with equal force.

In the course of its military operations in Afghanistan, the U.S. forces captured a number of Taliban and al-Qaeda members, many of whom were not Afghani citizens.<sup>119</sup> After detaining and interrogating them, these individuals were often turned over to their home governments.<sup>120</sup> Additionally, U.S. forces have employed interrogation methods that certainly would not pass muster in U.S. jails. For example, in interrogating Abu Zubaydah, a high-ranking al-Qaeda operative, U.S. forces withheld painkillers, despite the fact that Mr. Zubayda was suffering from several gunshot wounds.<sup>121</sup> Other methods specifically designed to humiliate the prisoners have also been employed.<sup>122</sup> All of these have occurred while the suspects were in U.S. custody and under U.S. control. If one takes the Supreme Court at its word—that it is not the territorial sovereignty but the actual physical custody that gives the federal courts jurisdiction—it then follows that all of these practices are subject to judicial review. Accordingly, the prisoners held by the U.S. military and intelligence services (regardless of where they are held) can petition the U.S. courts for writs of habeas corpus or other extraordinary relief.<sup>123</sup> For example, following the Supreme Court's logic, there is no particular reason as to why individuals being held by U.S. forces in foreign countries could not petition for a writ of

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117. See *Wade v. Mayo*, 334 U.S. 672, 694-95 (1948) ("[F]ederal courts should not utilize habeas corpus . . . except in extraordinary situations where otherwise the accused would be remediless.") (internal citations and quotations omitted).

118. Cf. *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) ("Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate.").

119. For example, prisoners in *Rasul* were not Afghani citizens. *Rasul*, 124 S. Ct. at 2690.

120. Don Van Natta, Jr. et al., *Threats and Responses: Interrogations; Questioning Terror Suspects In a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1.

121. *Id.*

122. *Id.*

123. See 28 U.S.C. § 1651 (allowing federal judges to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law").

prohibition or a writ of mandamus.<sup>124</sup> Through these writs the detainees could attempt to prevent the United States from transferring them to third countries or to require the United States to provide them with medications or other items that the prisoners deem necessary. It is conceivable that Saddam Hussein, who is being physically held by U.S. forces (though legally in Iraqi custody)<sup>125</sup> could petition the District Court for the District of Columbia seeking a prohibition from being physically turned over to the new Iraqi authorities.<sup>126</sup> Surely, this cannot be the result envisioned by the Supreme Court.

It may be argued that the courts would reject most, if not all, of such claims and would give due deference to military operations. That answer does not suffice. Even if the courts eventually reject the detainees' claims, it would still be an unbelievable imposition on field commanders to respond to the prisoners' claims. It would be an even larger imposition on U.S. foreign policy to have to explain to a federal judge the return of prisoners to their home countries.

In addition to the potential parade of horrors that has been ushered in by the Supreme Court, there are unanswered practical questions even in the limited situation of Guantanamo Bay Naval Base. It seems beyond dispute, and the Supreme Court has recognized, that the interrogation of detainees can and does serve an invaluable military and intelligence-gathering function.<sup>127</sup> It should be equally obvious that effective interrogation cannot be completed in a matter of hours or often even days.<sup>128</sup> All too often, weeks and months are necessary to pry even a minute amount of information from an unwilling de-

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124. See *Rasul*, 124 S. Ct. at 2706 (Scalia, J., dissenting) ("The consequence of this holding, as applied to aliens outside the country, is breathtaking. It permits an alien captured in a foreign theater of active combat to bring a § 2241 petition against the Secretary of Defense."). If § 2241 can be utilized by non-U.S. citizen prisoners held abroad, there is no reason why § 1651 cannot. After all, writs of mandamus and prohibition are also directed at the government official and not at the prisoner. Therefore, the jurisdictional question is no different in these cases than in *Rasul*.

125. See Ian Fisher & John F. Burns, *Court Hands Legal Custody of Saddam Hussein to Iraq*, N.Y. TIMES, June 10, 2004, at A10.

126. This is more than mere fanciful speculation. For example, the Supreme Court was presented with a petition to review Saddam Hussein's detention. The Court declined it because Mr. Hussein did not personally sign an affidavit of indigency. See *In re Saddam Hussein*, 125 S. Ct. 239 (2004) (mem.) (order denying petition to proceed *in forma pauperis* without affidavit of indigency executed by petitioner).

127. See *Hamdi*, 124 S. Ct. at 2651 ("An *interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker.*") (emphasis added).

128. See, e.g., Van Natta, *supra* note 120 (discussing interrogations that have lasted days).

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tainee.<sup>129</sup> *A fortiori*, it is necessary to keep such detainee from contacting the outside world, lest such contacts reinforce his strength and resolve to resist American interrogators.<sup>130</sup> It then follows that the prolonged incommunicado detention of these individuals is of paramount importance to U.S. security.

The question therefore arises: at what point should the detainees be able to petition the courts for a writ of habeas corpus? Generally, when an individual is detained in the United States, he has a right to be brought before a magistrate within forty-eight hours of detention.<sup>131</sup> Bringing a person captured in the field of military operations and suspected of being a member of a terrorist organization before a magistrate within forty-eight hours is not just impractical, it is impossible. Thus, a new timeframe must be designed. However, given the highly individualistic approaches to interrogation, a one-size-fits-all rule is likely to prove counterproductive. In the criminal context, the one-size-fits-all approach works because, at the end of the day, all defendants are entitled to the same basic rights at trial.

In the case of terrorism detainees, however, there may never be a trial, as it is not at all clear that they violated any U.S. laws. The purpose behind holding these individuals is twofold. First, they are held to prevent them from rejoining their comrades in arms in their fight against U.S. forces. Second, and more pertinent, they are held in order to elicit information on the whereabouts and plans of other al-Qaeda officials. As already explained, eliciting this information could take months.<sup>132</sup> Allowing people to meet with attorneys before that time may, and likely will, impede the investigation.<sup>133</sup> Furthermore, prior to obtaining any information, it may be difficult for the Government to show to the satisfaction of the court that the individual in question is indeed an enemy combatant and does indeed consort with terrorists. Thus, by hearing habeas petitions too early, the courts may impede the Government's ability to gather information and to effectively conduct military and anti-terrorist operations. On the other hand, it is altogether unclear what point in time the courts will view as not too early. In any event, detainees will be tempted to seek habeas review early and

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129. *Id.* ("The officials say the most effective interrogation methods involve a mix of psychological disorientation, physical deprivation and ingratiating acts, all of which can take *weeks or months.*") (emphasis added).

130. *Id.*

131. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

132. *See supra* note 129 and the accompanying text.

133. *See supra* note 130 and the accompanying text.

often, thus interrupting the Government's information gathering. The courts, of course, will have no guidance to decide when the person has been detained long enough to vitiate any intelligence value that he may have had at some point in time. This lack of ability to correctly judge the necessary detention length will result in either inconsistent and haphazard adjudication or, equally problematic, a too rigid standard that may not be applicable (though it will be applied) to all situations.

In its decisions, the Supreme Court has essentially announced that the principles underlying the U.S. criminal justice system also apply to military detainees, although potentially in a scaled-back form.<sup>134</sup> However, the Court has failed to appreciate that the principles designed to assure a fair trial have little, if any, application to a situation where interrogation and prevention of future terrorist activity are the overriding issues. The Court has also extended judicial power to the areas where it is least suited. Interposing the judiciary, however minimally, between the U.S. military and individuals captured by U.S. forces is likely to put a strain not only on military and intelligence operations but potentially on U.S. foreign relations as well.<sup>135</sup>

#### V. THE CONSEQUENCES OF GRANTING THE WRIT OF HABEAS CORPUS

By now it should be clear that the Enemy Combatant Cases suffer from internal inconsistencies and potentially lead to results not at all envisioned by the Court. There is also an additional and absurd twist to the Court's jurisprudence in this area. It comes from the interaction of the Enemy Combatant Cases and *Zadvydas v. Davis*,<sup>136</sup> a 2001 ruling from the Supreme Court.

In *Zadvydas*, an immigrant born in Germany but of Lithuanian descent was being held by the Immigration and Naturalization Service (INS) pending deportation.<sup>137</sup> However, Germany refused to accept Mr. Zadvydas, claiming that he was not a German citizen despite having

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134. See *Rasul*, 124 S. Ct. at 2698 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.").

135. *Id.* at 2711 (Scalia, J., dissenting) ("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.").

136. 533 U.S. 678 (2001).

137. *Id.* at 684. Mr. Zadvydas was ordered deported in 1994, after Lithuania regained its independence from the former Soviet Union. *Id.*

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been born there.<sup>138</sup> Lithuania also refused to accept Mr. Zadvydas, claiming that he never became a Lithuanian citizen.<sup>139</sup> The INS tried to deport Mr. Zadvydas to his wife's home country (the Dominican Republic) but that, too, proved unsuccessful.<sup>140</sup> In short, Mr. Zadvydas quickly became a man without a country. During the entire removal process, which lasted for several years, the INS kept Mr. Zadvydas in custody.<sup>141</sup> Eventually, Mr. Zadvydas filed a petition for a writ of habeas corpus claiming that the Government would never be able to remove him from the United States (because no country was willing to accept him) and, therefore, detention during the removal proceedings would in effect amount to perpetual detention.<sup>142</sup> The Supreme Court agreed. In a 5-4 opinion,<sup>143</sup> the Court held that the Government may detain an alien for the purposes of removal only for a "reasonable" period of time and that, generally, six months is the outer limit of reasonableness.<sup>144</sup> Accordingly, the Court ordered that an alien who can show that there is no likelihood of being removed in the "foreseeable future" must be released from confinement.<sup>145</sup>

The impact of *Zadvydas* on the situation of the Guantanamo Bay detainees could be enormous. Let us assume a situation where a detainee successfully challenges his "enemy combatant" status before the court. Upon such a successful challenge, the court would issue a writ of habeas corpus. The Government consequently would no longer be entitled to hold the individual as an enemy combatant. Of course, the Government could continue to detain that individual pending his removal from the United States (or the U.S. base in Cuba) and,

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138. *Id.* Mr. Zadvydas was born to Lithuanian parents who were held in a displaced persons camp in Germany. His parents were not residents of Germany; Mr. Zadvydas, therefore, could not lay a claim to German nationality. *Id.*

139. *Id.* Lithuanian law allows for descendants of people who held Lithuanian citizenship prior to June 15, 1940, (the date of Lithuania's occupation and annexation by the USSR) to claim Lithuanian citizenship in their own right. REPUBLIC OF LITHUANIA, LAW ON CITIZENSHIP § 1(1) (1991), available at <http://www.litlex.lt/Litlex/Eng/Frames/Laws/Documents/55.HTM> (last visited Nov. 2, 2004). Lithuania rejected Mr. Zadvydas' application for citizenship, stating that the documentation of his parents' citizenship (through which he would derive his own) was inadequate.

140. *Zadvydas*, 533 U.S. at 684.

141. *Id.* at 684-85.

142. *Id.*

143. Justices Stevens, O'Connor, Souter, and Ginsburg joined Justice Breyer's majority opinion. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas dissented. *Zadvydas*, 533 U.S. 678.

144. *Id.* at 701.

145. *Id.*



presumably, back to the country of capture or origin.<sup>146</sup>

No doubt many countries whose citizens are currently held as enemy combatants would allow these individuals to return home.<sup>147</sup> However, the situation may not be that simple for everyone. A good number of individuals captured in Afghanistan are not Afghani citizens. Indeed, the lead plaintiff in *Rasul* was a British citizen.<sup>148</sup> It is unlikely that Afghanistan would be willing to accept these individuals. Unfortunately, there are no guarantees that the individual's country of citizenship would be willing to accept him back either. For example, the country of citizenship could conceivably claim that the individual expatriated himself by joining the Taliban. In fact, Saudi Arabia did expatriate Osama bin Laden,<sup>149</sup> thus precluding him from returning there. Furthermore, there may be situations similar to that of Mr. Zadvydas', where the individual in question does not hold citizenship of any country. It is therefore not unfathomable that an individual adjudged by the court not to be an "enemy combatant" would have no country to which he could return.

If a situation such as the one described above arises, under *Rasul* and *Zadvydas* the Government would be obligated to release individuals captured on the field of battle into American society.<sup>150</sup> Such a result is nothing short of absurd and grotesque. Yet it is the result one must reach if one is to follow *Rasul* and *Zadvydas* to their logical conclusion. The utter absurdity of such a result leads me to believe that the Supreme Court could not have possibly intended it. This is the most logical explanation. However, if this explanation is correct, the Court should have at least foreseen this possibility. By failing to address the

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146. See 8 U.S.C. § 1231(a)(6).

147. See, e.g., Elaine Sciolino, *4 Detainees Are Returned to France After 2 Years at Guantanamo*, N.Y. TIMES, July 27, 2004, at A5; see also *Rasul*, 124 S. Ct. at 2690 (detailing nationalities of various petitioners, not one of whom was an Afghani national).

148. *Rasul*, 124 S. Ct. at 2690 n.1.

149. Jeff Gerth & Judith Miller, *Terror Money: A Special Report; Funds for Terrorists Traced to Persian Gulf Businessmen*, N.Y. TIMES, Aug. 14, 1996, at A1 (stating that Saudi Arabia revoked bin Laden's citizenship in 1994).

150. To be sure, the Supreme Court in *Zadvydas* did leave itself an out by specifying that it was not addressing a situation where terrorism was a concern. 533 U.S. at 696. That concession, however, is quite meaningless, for under the scenario described above, we are assuming that the courts have already determined that as far as they are concerned the individual seeking release is *not* an enemy combatant and *a fortiori* is *not* a terrorist. This of course does not mean that the person in question would not be considered dangerous by the military. Rather, it only means that the district court in habeas proceedings wasn't *convinced* that the person has taken up arms against the United States, and/or is dangerous.

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consequences of granting the writ of habeas corpus to prisoners of undefined status (citizenship-wise), the Court has failed to give the Government proper guidance for dealing with detainees. The Court, of course, is not generally responsible for providing the Government with legal guidance beyond adjudicating specific disputes; however, when it radically changes the legal landscape, it should at the very least recognize and explain the consequences and pitfalls of its own decisions.

### VI. THE WAY OUT OF THE MORASS

Now that the Court has ruled and settled the issue of access to courts for those captured on the field of battle, the question is not necessarily whether the decision was right, but rather, what's next? Let there be no mistake, for the reasons stated above, I believe that the Court erred, at the very least, in the *Rasul* decision and was insufficiently clear in *Hamdi*. Nonetheless, the decision has been made, and now the Government and the legal system must cope with the result. This Part proposes a three-pronged approach to dealing with the Supreme Court's decisions. First, the lower-level courts, other than in the District of Columbia, should utilize their discretion and refuse to entertain habeas petitions from Guantanamo Bay detainees.<sup>151</sup> Second, the courts should allow military commissions to adjudicate detainees' claims<sup>152</sup> and limit judicial review to the adequacy of the proceedings before the military commissions. Third, in case a habeas petition is granted, the courts should allow the Government to reclassify detainees as prisoners of war, thus allowing the Government the option of continuing to detain these individuals until the end of hostilities.<sup>153</sup> In cases where U.S. citizens are granted the writ, the Government should be able to criminally prosecute these individuals.<sup>154</sup> These limitations on the Court's decisions would curb any damage that the Court's decisions may have on U.S. military and intelligence-gathering operations.

Letting only a single district court entertain habeas petitions from Guantanamo Bay would address the problems that the Supreme Court raised in *Padilla*. Detainees would be prevented from forum shopping, and the Government would not have to defend various cases in a variety of jurisdictions. Such an approach would also prevent non-citizen detainees from enjoying greater rights than U.S. citizens. Thus, this

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151. See *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004).

152. See *Hamdi*, 124 S. Ct. at 2651-52.

153. See Geneva Convention, *supra* note 15, art. 118.

154. See *supra* notes 92-95 and accompanying text.

approach would resolve the inconsistencies between *Rasul* and *Pardilla*.<sup>155</sup>

Next, allowing military commissions to adjudicate the status of Guantanamo Bay Base detainees would appropriately balance the due process concerns expressed by the Court and the necessities of U.S. military and intelligence services.<sup>156</sup> By limiting detainees' forum to military commissions, the Government would be able to ensure that courts do not get involved prematurely, ruining any chance for successful interrogation.<sup>157</sup> This approach would also foreclose the possibility of detainees petitioning U.S. courts for writs of prohibition on transferring them to other countries or writs of mandamus, requiring the U.S. military to limit its interrogation techniques. Furthermore, this approach would resolve the tension between *Hamdi* and *Rasul*<sup>158</sup> by explicitly recognizing that the impartial factfinder could be a military officer. Again, such a resolution would place U.S. and foreign citizens on equal footing, rather than (inexplicably) giving non-citizens more rights. Judicial review could still be available to verify that military commissions are not kangaroo courts willing to rubber-stamp the Government's decision on the flimsiest of pretexts. Perhaps review could be conducted under a deferential "substantial evidence" standard. Such a review would assure the court that there is indeed evidence justifying the classification of a prisoner as an enemy combatant, while at the same time giving sufficient deference to the military's assessment of the situation as it existed on the field of battle where presumably capture occurred. The Administration has already moved forward with plans to set up such military review commissions.<sup>159</sup> Courts should hold that this process comports with the holding in *Rasul*.

Finally, in the event that habeas is granted, the courts should at all costs avoid the absurd situation described in Part V, *supra*. If habeas is granted, the courts should allow the Government, at the Government's election, to either release and deport these individuals or to continue holding them as POWs rather than as enemy combatants. This approach has several advantages. First, if the Government chooses to hold the detainees as POWs, it can continue doing so until the cessation of

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155. See *supra* Part III.B.

156. See *Hamdi*, 124 S. Ct. at 2651-52.

157. See *supra* notes 127-29 and accompanying text.

158. See *supra* Part III.A.

159. See *supra* note 89.

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hostilities.<sup>160</sup> The determination of when hostilities actually end would be squarely within the province of the Executive and Congress.<sup>161</sup> Courts will not have to guess as to when release is appropriate. This will prevent these individuals from (re)joining forces adverse to the United States. On the other hand, the detainees would be able to enjoy more rights, such as the ability to receive visits from the Red Cross, to receive mail and care packages, and to have the conditions of their confinement monitored for any potential violations by independent observers.<sup>162</sup> In short, the detainees would come within the ambit of the Geneva Convention's protections. In case a *Zadvydas*-like situation arises after hostilities are declared over, the Government would be able to keep the stateless individuals in a displaced persons camp, where they too would receive the protections of the relevant international treaties.<sup>163</sup> In such camps the Government could simultaneously seek to deport these individuals and re-educate them, so that if deportation is not possible, they could at some conceivable point be released. Such a process would allow the authorities to hold individuals past the six months limit established in *Zadvydas*, while at the same time ensuring that the detained individual enjoys communication with the outside world and other basic privileges.

These mechanisms are likely to limit the interfering impact that the Court's decisions in the Enemy Combatant Cases may have on U.S. military and intelligence-gathering operations. They are not ideal, and possibly not exhaustive, but they are good initial steps towards reestablishing a balance between the needs of the military and the concern of the courts.

## VII. CONCLUSION

On June 28, 2004, the Supreme Court issued three seminal yet contradictory decisions. The interplay of these decisions, as well as their interaction with prior decisions of the Court, could impede the U.S. fight against terrorism. However imprudent these decisions may have been, the fact remains that today they are the law of the land.

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160. See Geneva Convention, *supra* note 15, art. 118.

161. See *Baker v. Carr*, 369 U.S. 186, 214 (1962) (“[E]ven in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to the political departments’ determination of dates of hostilities’ beginning and ending.”).

162. See generally Geneva Convention, *supra* note 15.

163. See, e.g., United Nations Convention Relating to the Status of Refugees, art. 2, 19 U.S.T. 6223, T.I.A.S. No. 6577 (1968).

Short of overruling them (an unlikely prospect in the near term), legal strategies meant to both implement the Court's judgments and protect U.S. military and security needs must be devised. Among these strategies are limiting the forums for applications for the writ of habeas corpus, allowing the facts to be adjudicated by a military commission, with a deferential judicial review, and permitting the Government to continue holding individuals who successfully petitioned for habeas corpus, if the Government is willing to upgrade the status of the detainees to that of a POW. Putting these limitations on the Supreme Court's decisions may yet restore some coherence to the jurisprudence in this area.