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Justices Affirm Legal Rights of 'Enemy Combatants'

By LINDA GREENHOUSE

ASHINGTON, June 28 — Declaring that "a state of war is not a blank check for the president," the Supreme Court ruled on Monday that those deemed enemy combatants by the Bush administration, both in the United States and at Guantánamo Bay, Cuba, must be given the ability to challenge their detention before a judge or other "neutral decision-maker."

Although divided in its rationale, the court was decisive in rejecting the administration's core legal argument that the executive branch has the last word in imposing open-ended detention on citizens and noncitizens alike. The justices' language was occasionally passionate, reflecting their awareness of the historic nature of this confrontation between executive and judicial authority.

Eight justices, all but Justice Clarence Thomas, said the two-year-long detention of an American citizen, Yaser Esam Hamdi, had either been invalid from the beginning or had become so, for constitutional or statutory reasons. The controlling opinion, by Justice Sandra Day O'Connor, said that Mr. Hamdi's detention was permissible if designation as an enemy combatant proved to be correct, but that his inability so far to appear before a judge, challenge the government's evidence, and tell his side of the story had deprived him of his constitutional right to due process.

The opinion said that a citizen held as an enemy combatant was entitled to "notice of the factual basis for his classification" and a "fair opportunity to rebut the government's factual assertions before a neutral decision-maker." Writing for herself, Chief Justice William H. Rehnquist, and Justices Anthony M. Kennedy and Stephen G. Breyer, Justice O'Connor said, "These essential constitutional promises may not be eroded."

She added that "we necessarily reject the government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances." She said that the administration's position that the courts could not examine individual detainees' cases "serves only to condense power into a single branch of government."

Mr. Hamdi, ostensibly picked up on the battlefield in Afghanistan, has sought to contest his designation as an enemy combatant. The federal appeals court that heard his case ruled last year that a nine-paragraph statement filed by a Pentagon official, Michael Mobbs, was a sufficient basis for Mr. Hamdi's continued detention and that no further inquiry into his case was required.

In a second case Monday, concerning the hundreds of noncitizens confined at the United States naval base at Guantánamo Bay, the court ruled 6 to 3 that federal judges have jurisdiction to consider petitions for writs of habeas corpus from detainees who argue that they are being unlawfully held.

The administration's position on the Guantánamo detainees was that under a World War II-era Supreme Court precedent, no federal court had jurisdiction to hear their cases because the base is outside the sovereign territory of the United States. But for a variety of reasons, the precedents the

administration relied on did not govern the analysis, Justice John Paul Stevens said for the majority. A main factor was the nature of Guantánamo bay, "territory over which the United States exercises exclusive jurisdiction and control" under a 101-year-old lease, Justice Stevens said.

The majority's analysis suggested, in fact, that federal courts might have jurisdiction to hear claims of illegal detention from those held in other foreign locations as well. While Justice Stevens was not explicit on this point, his suggestion was enough to provoke Justice Antonin Scalia to complain in dissent that "the court boldly extends the scope of the habeas statute to the four corners of the earth." Chief Justice Rehnquist and Justice Thomas joined the dissent.

The Supreme Court also dealt with a third case Monday, that of Jose Padilla, an American citizen picked up at O'Hare International Airport in Chicago on suspicion of planning to detonate a radioactive device. This case ended with what was essentially a nonruling. Mr. Padilla's habeas corpus petition was brought in the wrong court, the Supreme Court said by a 5 to 4 majority. His lawyers said they would act promptly to refile the case, which is now considerably strengthened by the court's analysis in the Hamdi case.

The decisions in the Hamdi and Padilla cases came two months to the day after those cases were argued. Just hours after the arguments concluded on April 28, CBS television broadcast the first images of the mistreatment of Iraqi prisoners at the Abu Ghraib prison.

While the Supreme Court cases all involved detentions resulting from the war against the Taliban in Afghanistan and had no connection to Iraq, there was much speculation in the intervening weeks about what impact the revelations from Abu Ghraib might have on the court.

Not surprisingly, no justice made a direct reference to those events. But it was difficult to read some of the passages in a vacuum. For example, Justice Stevens, dissenting from the court's refusal to reach the merits of the Padilla case, noted that Mr. Padilla had been held without charges or access to a lawyer for two years, and then said:

"Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."

Justice Breyer and Justices David H. Souter and Ruth Bader Ginsburg joined that dissent.

In her opinion in the Hamdi case, Justice O'Connor said that "indefinite detention for the purpose of interrogation is not authorized." She also said: "History and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others."

All three decisions left important questions unanswered. In the Guantánamo case, *Rasul v. Bush*, No. 03-334, while it is clear that the detainees there can now bring habeas corpus petitions in federal court, the justices said little about the range of claims they could present or about how judges are to weigh those claims against the government's arguments about the need for continued detention.

Barbara Olshansky, deputy legal director of the Center for Constitutional Rights, a New York legal organization representing the Guantánamo detainees, said in an interview that lawyers would move quickly to test the scope of the court's ruling. The case the Supreme Court decided was brought in the name of 16 British, Australian, and Kuwaiti detainees, two of whom have been released by the government and sent home to England. Ms. Olshansky said the case may now be expanded into a class-action suit on behalf of many others.

Justice O'Connor's opinion in the Hamdi case, *Hamdi v. Rumsfeld*, No. 03-6696, offered a more detailed blueprint for what might happen next.

As a matter of constitutional due process, Justice O'Connor said, the lower courts must now balance Mr. Hamdi's interest in liberty against the "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."

"Striking the proper constitutional balance here is of great importance to the nation during this period of ongoing combat," she said, adding: "But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship."

On Mr. Hamdi's side, she said, was "the most elemental of liberty interests — the interest in being free from physical detention by one's own government."

Justice O'Connor said the Federal District Court in Richmond that first handled Mr. Hamdi's petition for habeas corpus had been too demanding on the government, requesting many records, while the United States Court of Appeals for the Fourth Circuit had been too quick to set aside the district court's order and dismiss Mr. Hamdi's petition.

Suggesting that the proper path lay somewhere in between, Justice O'Connor said that "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the executive at a time of ongoing military conflict." She said that the normal rules that curbed the use of hearsay evidence might be bent and that there could be a "presumption in favor of the government's evidence" as long as a detainee had "a fair opportunity for rebuttal."

The administration had argued that if any kind of hearing was found necessary, the government's submission should be accepted according to a low standard of proof known as the "some evidence" standard, which is used in administrative proceedings to provide that as long as there is "some evidence" in the record, the government wins. This standard was "inadequate" and "ill suited" to evaluate the basis for detaining a citizen, Justice O'Connor said. She added: "Plainly, the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause."

It was not clear from the opinion whether the court would insist in all circumstances that a detainee's case be evaluated by a federal judge. "There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," Justice O'Connor said.

Four other justices who found fault with the administration's position took very different lines of attack. Justices Souter and Ginsburg said that in their view, Mr. Hamdi's detention lacked a legal

basis as a matter of statutory authority. There was consequently no need to delve into constitutional issues, the two said in an opinion by Justice Souter.

This opinion relied on a 1971 federal law, the Non-Detention Act, which provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." There has been no act of Congress to justify the detention of Mr. Hamdi, they said.

Justice O'Connor had found statutory justification in the Authorization for Use of Military Force, which Congress passed in the days following the terrorist attacks of Sept. 11, 2001, to authorize "all necessary and appropriate force" to pursue and prevent international terrorism. While only three other justices joined her opinion, Justice Thomas expressed a similar view of the statutory authorization in what was otherwise a dissenting opinion, thus giving a majority of five votes on the statutory question.

But Justices Souter and Ginsburg said the use-of-force law said nothing about detaining citizens. "If the government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released," Justice Souter said, adding: "On the record in front of us, the government has not made out a case on any theory."

At another point, Justice Souter referred to the court's 1952 decision that overturned President Harry Truman's seizure of the steel mills. "It is instructive to recall Justice Jackson's observation that the president is not commander in chief of the country, only of the military," he said.

The remaining two justices, Justice Scalia and Justice Stevens, hardly the most likely of allies, applied a very different analysis. Mr. Hamdi was entitled to a habeas corpus petition ordering his release, they said, unless either the government prosecuted him for treason or Congress exercised its constitutional authority to suspend habeas corpus.

Justice Scalia's opinion, which Justice Stevens signed, said that the O'Connor opinion had not gone far enough to protect Mr. Hamdi's civil liberties. Deriding that opinion as too tempered, he said it embodied a "Mr. Fix-it Mentality" with a "mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions."

Justice Scalia added: "If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this court."

That left Justice Thomas alone. "I do not think that the federal government's war powers can be balanced away by this court," he said in his dissenting opinion. "This detention falls squarely within the federal government's war powers, and we lack the expertise and capacity to second-guess that decision."

The court's reliance on the use-of-force authorization did not appear to be an open-ended one. Noting that the United States still has thousands of troops in Afghanistan, Justice O'Connor said, "The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who engaged in an armed conflict against the United States."

The clear implication was that an ongoing, generations-long global war on terrorism would not in itself be sufficient to justify detention if active hostilities had ended.

For Mr. Padilla's case, *Rumsfeld v. Padilla*, No. 03-1027, the path now lies in the Federal District Court in South Carolina. Writing for the majority, Chief Justice Rehnquist said the case could not proceed because Mr. Padilla's lawyer, Donna Newman, had filed his habeas corpus petition in district court in New York, where she had been appointed to the case, two days after the government transferred him to a military prison in Charleston.

When the proper court does consider his case, however, the Hamdi decision may well put Mr. Padilla in a stronger position to challenge his classification as an enemy combatant, given that he was taken into custody in Chicago rather than in Afghanistan.

The scene in the courtroom Monday morning was one of considerable drama as the three decisions were announced.

After Justice O'Connor explained her decision in the Hamdi case, both Justices Souter and Scalia described their separate positions. Justice Stevens also read from his dissent in the Padilla case after Chief Justice Rehnquist had explained why the majority was not reaching the merits.

The announcements went on for more than half an hour, certainly the best live theater in town although the courtroom was, surprisingly, nearly half empty. At the end of the session, Chief Justice Rehnquist announced that the court would conclude its term and announce all remaining decisions on Tuesday.