

## Hamdi: The Ping-Pong Game Continues

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### Focus

The concurring opinion cites GC III, Article 5, requiring treatment of detainees as POWs until such time as status is determined by a competent tribunal.

It calls into question Bush's statement that there is no doubt as to detainees' status and cites Army Reg. incorporating GC provision re presumption of POW status.

The third case decided by the US Supreme Court on 28.06.04 continues the game of ping-pong that has characterized this case. It will now again return to the US District Court, the court of first instance in the US federal court system.

The division of the justices deciding this case is complex. The judgment of the court and an opinion was prepared by Justice O'Connor with whom three justices, including the Chief Justice, joined. Two justices, Souter and Ginsburg, filed a separate opinion termed concurring in part, dissenting in part, concurring in the judgment. Two other justices, Scalia and Stevens, dissent and Justice Thomas files a separate dissent. What does this mean? At first it seems that the decision was a 6-3 decision. However, I would categorize it as an 8-1 decision.

The dissent of Scalia and Stevens is, indeed, much stronger in favor of Hamdi than the judgment. "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." As in the case of *Rasul*, the Court analyzes many old cases, the most important being *Milligan* of 1866, a case from the US Civil War, *Quirin* (1942), and also cases from the War of 1812, against the British. *Milligan* basically holds that when the civil courts are open, a US citizen may not be tried by the military: "[...] the law of war [is inapplicable] to citizens when the courts are open [...]" This statement requires further examination and explanation. The writ of *habeas corpus* has not been suspended as this would require a specific act of Congress and can be authorized only on the occurrence of two events, neither of which is applicable here. "[...] [A]bsent provision of special treatment in a congressional suspension of the writ, [there is] no exception to the right of trial by jury for citizens who could be called 'belligerents' or 'prisoners of war'". This dissent concludes "[...] Hamdi is entitled to [...] release unless criminal proceedings are promptly brought [...]"

The concurring/dissenting opinion of Justices Souter and Ginsburg also would result in the release of Hamdi because the Authorization for Use of Military Force Resolution of the Congress of 18 September 2001 (Force Resolution) does not authorize the detention of a person in Hamdi's position. The statute in question was passed by the Congress to replace two earlier statutes that were thought to have been abused, including for the detention of Japanese Americans during World War II, without evidence of any criminal act. These justices conclude that, based on the history of this statute, it cannot be interpreted to require anything but a very specific and clear congressional authorization to justify detention of a citizen. The congress did not do this via the Force Resolution.

Very interestingly in this opinion the justices say, "[B]y holding him incommunicado, however the government has not been treating him as a prisoner of war, and in fact the Government claims that no Taliban detainee is entitled to prisoner of war status. This treatment appears to be a violation of the Geneva Convention provision that even in cases of doubt, captives are entitled to be treated as prisoners of war 'until such time as their status has been determined by a competent tribunal.'" This is the most specific discussion of the Geneva Conventions in the 50-page opinion. It goes on further to state that the administration's reliance on its categorical pronouncement that it has no doubt as to the status of the detainees is "[...] at odds with the military regulation [...]" regarding POWs, Army Regulation 190-8, which provides for a military tribunal to resolve doubt as to status. "The regulation also incorporates the Geneva Convention's presumption that in cases of doubt, 'persons shall enjoy the protection of the [...] Convention until such time as their status has been determined by a competent tribunal.' Thus, there is reason to question whether the US is acting in accordance with the laws of war it claims as authority." This, indeed, is a very welcome statement, clear and accurate.

The plurality opinion is somewhat less in favor of Hamdi than the above two opinions. In giving the judgment of the court, it states, "We hold that although Congress authorized the detention of combatants [...] due process demands that a citizen held in the US as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."

In other words, the simple allegation of the government is not sufficient to detain a citizen without giving him the right to question the basis of his detention. The basis for the opinion is that there must be a balancing between the interest of the government and that of the detainee and that, in this case, the balance must be more in favor of Hamdi to challenge the grounds for his detention. The court remands Hamdi to the District Court to review the evidence so as to give Hamdi a chance to question it.

Justice Thomas alone avows that in a time of war, the judiciary must give almost unquestioning deference to the executive branch (the military) and not question its determination of the grounds for holding Hamdi.

The game of ping-pong is far from over but now it is Hamdi's turn to serve.

### Responsibility

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