

## Lighting the legal black hole ? – The US-Supreme Court, *Hamdi* and the “enemy combatant”

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### Focus

#### U.S. Constitution Fifth amendment

“[...] [no person shall] be deprived of life, liberty, or property without due process of law; [...]”

The ping-pong game (see Bofax No. 237 E) has entered a new round.

On 28 June 2004 the US Supreme Court delivered its decision in the case *Hamdi v. Rumsfeld*, which had already gone back and forth between the US District Court for the Eastern District of Virginia and the US Court of Appeals for the 4th Circuit (see Bofax no. 237 E).

An end to the litigation, however, is not yet in sight, taking into account that the Supreme Court annulled the judgment of the US Court of Appeals by a majority of 6 to 3, and remitted the case for retrial.

*Hamdi* himself was captured in Afghanistan and was first held in *Guantánamo Bay*. After it was established that he had American citizenship, he was transferred to the US Navy facility at Norfolk, Virginia, where he has since been detained on the grounds that he is an “enemy combatant”. As *Hamdi* was denied access to legal counsel, his father pleaded for him as his “next friend”.

In this decision, the Supreme Court restricted itself to answering the question whether an American citizen who had been seized in Afghanistan can be lawfully detained for an indefinite period as an “enemy combatant” without any recourse to legal proceedings.

The court’s final judgment deems that the detention of US citizens for an unlimited period is permissible, but grants the detainee the right to have his status as a so-called enemy combatant reviewed by a neutral authority. The US government is however entitled, with a view to clarifying the status issue, to have recourse to the evidence of hearsay, which would otherwise be inadmissible according to the fundamental principles of *common law*. Furthermore, *prima facie* evidence would be valid in support of the US government’s case, though this could be overturned by evidence submitted by the detainee himself. In addition *Hamdi* was granted, without any further reasons given, the right of recourse to legal counsel.

In the context of this decision, two questions need to be raised: (1) Has an unambiguous definition of the term “enemy combatant” been provided? And (2) What are the implications of this judgment for other individuals who are being detained on the grounds that they are enemy combatants?

In the case *Hamdi v. Rumsfeld* the Supreme Court has been working with the following definition formulated by the American government, according to which an enemy combatant is “[...] an individual, who, it [the government] alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there [...]”.

The consequence of a consistent application of this definition of the term would be, on the one hand, that “enemy combatants” could also be taken to include belligerents who form part of the regular military forces of Afghanistan, and as such are protected by the Geneva Conventions. On the other, the restricted regional reference would exclude individuals like *Padilla*, although the latter is likewise being detained under the designation of “enemy combatant” by the US government.

Therefore, the question raised is whether the above-mentioned definition of the term can really be considered as conclusive. Although this would appear desirable – especially with a view to establishing legal certainty on this issue – the answer must be in the negative.

This is because the US government, on being asked for a definition of the expression “enemy combatant”, made it plain that the description cited earlier was not designed to cover all cases of enemy combatants, but had just been formulated with reference to the *Hamdi* case. So even after the present decision the government will still have authority to hold individuals as “enemy combatants” who do not come under the above-mentioned definition.

Thus it is still impossible to find an unambiguous classification that would show what types of person are deemed “enemy combatants”.

Nonetheless, the decision could have implications for all those individuals who are detained under this heading. This is because the majority of the judges responsible for the decision derived *Hamdi*’s right to have his classification as an enemy combatant re-examined from the Fifth Amendment to the US Constitution, which is formulated in such terms as to protect the rights not just of American citizens but of any individual whatsoever. Admittedly, the concession of this right is the result of the balancing of the national interest in maintaining custody against *Hamdi*’s interest in being released. In the context of this balancing of interests, the judges expressly refer to the privilege of American citizenship, which in their view must be taken into account in favour of *Hamdi*. Thus it remains doubtful, to say the least, whether the considerations of the court can apply without restriction to foreign detainees, inasmuch as the majority of the judges responsible for the decision emphasise, in the reasons given for their judgment, that their decision has reference only to the case of a person held as an “enemy combatant” who is also an American citizen.

In the case of foreign nationals who are being held on the grounds that they are enemy combatants, a further question that needs to be addressed is whether they are entitled to any rights on the basis of the Geneva Conventions. In this regard it is interesting that judges Souter and Ginsburg, whose dissenting opinion lays in the reasons given for the judgment, differ from the one expressed by the majority of the judges in that they refer to the Geneva Conventions (in particular to Art. 5 GA III), and make specific reference to *Hamdi*. This contradicts the prevailing opinion in international law that a national who takes up arms against his own State does not enjoy the protection of the Geneva Conventions (see Bofax No. 227 E). The decision in the case *Hamdi v. Rumsfeld* does not entail any final and conclusive definition of the term “enemy combatant”; on the other hand it nonetheless – in deriving the right to a review of detention from the Fifth Amendment to the US Constitution – pointed a way forward, albeit an uncertain one, for all individuals held as enemy combatants. To that extent it does cast, at least, a glimmer of light on the black hole where these persons currently languish.

### Responsibility

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