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# Dissecting the Guantanamo Trilogy

Diarmuid F. O'Scannlain

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## SPEECHES

### DISSECTING THE GUANTANAMO TRILOGY

DIARMUID F. O'SCANNLAIN\*

Ladies and gentlemen, I am very honored to join you here today in Melbourne, Australia. You and your fellow countrymen have been most hospitable to my wife Maura and me and we are privileged to be your guests in your spectacularly beautiful country in this delightful corner of the world.

As you know from the introduction, I am a United States Circuit Judge, having been nominated in 1986 to the Ninth Circuit Court of Appeals by President Ronald Reagan, and confirmed by the United States Senate. My court, just one level below the Supreme Court, is our largest regional circuit, encompassing the nine Western states, including California, Oregon, Hawaii, and the Western Pacific Territories, and comprising roughly twenty percent of the population of the country. And while I will strive today to represent my circuit well, I must make explicit that I speak only for myself as an individual American judge and not for the court of which I am a member.

#### I.

I would like to speak with you today about three recent United States Supreme Court cases dealing with military justice and the extent of our Commander in Chief's powers in times of war. Today, one of the most important and inescapable challenges we all face is the very real threat of terrorism. Our respective countries have risen up in the face of such ignoble tactics, declaring a War on Terror to protect our interests both at home and abroad. And, of course, this War is indeed a different kind of conflict; and it must be, for the threat it responds to is like none we've before encountered. But because the pernicious

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\* United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. This speech was delivered on August 30, 2004, to Monash University Post Law Graduates at the Australian Institute of Judicial Administration in Melbourne, Australia. I would like to acknowledge, with thanks, the assistance of Robert D. Rees, my law clerk, in preparing these remarks.

threat of terrorism is so very difficult to identify—much less to defeat—the precious value of information and intelligence in this struggle is difficult to deny.

Nevertheless, a fierce debate rages regarding the tactics used to glean it. For, information is not costless. There is a price for it, whether paid in terms of money, privacy, or even pressures on our cherished civil liberties. Striking a balance between the value and the cost of such information is inherently a political decision, and I mean that in the broadest possible sense: in democracies such as ours, the polity itself is the ultimate arbiter of this conflict.

The way the people govern themselves in our systems, of course, is through elected representatives. Of particular note in this context is the President, the highest executive official, who is generally responsible for matters of national defense in the United States. In exercising such duties, the President's political decisions about how to respond to terrorism—indeed, all of his political decisions—are bound by law, both statutory and constitutional.

Tasked with determining the precise extent of those pre-existing boundaries is the judiciary; most notably our Supreme Court. This Court must finally answer whether the President exceeds his authority, either under a statute as enacted by the Congress, or perhaps under the Constitution itself. Still, it is hard to deny the wide-ranging political and social ramifications these legal determinations can have.

## II.

The U.S. Supreme Court's recent enemy combatant detention cases serve as excellent illustrations of these concepts.

### A.

After agents of the al Qaeda terror network launched attacks against the World Trade Center and the Pentagon on September 11, 2001, the United States Congress authorized 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 . . . or harbored such organizations or persons."<sup>1</sup> Pursuant to this statute, President George W. Bush sent the United States Armed Forces into

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1. Authorization for Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C.A. § 1541 (West 2003)).

Afghanistan to confront al Qaeda operatives and the Taliban regime that had supported them.

During the ensuing hostilities, American forces captured a number of prisoners. Several hundred of them, including two British citizens, two Australian citizens, and several Kuwaitis, were subsequently transferred to the United States Naval Base at Guantanamo Bay on the Southeast Cuban coast. One of the men captured in Afghanistan, however, was an American citizen named Yasser Hamdi. Rather than being sent to Guantanamo, he was transferred to a naval brig in South Carolina. And a final person, Jose Padilla, also an American citizen, was not captured abroad at all. Rather, he was suspected of conspiring to transport and to detonate a “dirty bomb” in America. Padilla was initially detained in a jail in New York, but was eventually transferred to military custody in the same area where Hamdi was held.

One thing, however, united all these people: the President designated each of them an “enemy combatant,” as a result of which they would not be subject to certain Geneva Convention protections available to those who can be classified as prisoners of war. Inevitably, many disagreed with this decision, arguing not only that the various detentions were poor political decisions, but that they were illegal ones as well. As one might expect, the legal challenges to the various detentions were subtle and multifaceted, and often entirely unrelated to questions regarding the political wisdom of President Bush’s decisions. With such arguments in hand, “next friends” or legal proxies, of some of the prisoners brought their dispute to the courts. The particular arguments and their resolutions by the Supreme Court differed in each of these three cases, of course, so I’ll briefly discuss each of them in turn.

### B.

The first case, *Rumsfeld v. Padilla*,<sup>2</sup> involved the American citizen who was captured at Chicago’s O’Hare Airport upon arrival of an airplane flight on suspicion of conspiring to obtain and to detonate a so-called “dirty bomb.”<sup>3</sup> But as is often the case in the law, there was a threshold issue: before deciding what process, if any, Padilla may be due, and whether the President’s actions were supported by the Constitution and laws, the trial court first

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2. 124 S. Ct. 2711 (2004).

3. *Id.* at 2715.

had to determine whether it possessed the jurisdictional power to consider the case.<sup>4</sup>

The precise vessel for such jurisdiction is known as the writ of habeas corpus, a term well known to you, of course. Established in English common law several centuries before either of our two countries were even founded, the "Great Writ" has historically served as the means by which a United States court examines the legality of an executive detention. In practice, the petitioner names his or her immediate custodian as the respondent.<sup>5</sup> This is because the court, by granting the petition, formally orders that custodian to set the prisoner free.<sup>6</sup> For jurisdictional purposes, then, a prisoner seeking habeas relief must file his or her petition with the trial court that is in the same district as the custodian.<sup>7</sup>

The question in Padilla's case was who properly qualified as his immediate custodian and, based on where that person was located, which trial court had jurisdiction to hear the case.<sup>8</sup> Padilla's habeas petition was filed in New York because his counsel thought that he was still being held there. But that turned out not to be the case. Rather, two days before Padilla's attorney filed the petition, the government transferred him to military custody in a naval brig several hundred miles away—in an entirely different judicial district than the one in which the habeas petition had been filed.<sup>9</sup> Nevertheless, the New York trial court and, eventually, the federal appellate court, concluded that even though Padilla's custodian was not actually located in their district, he had sufficient contacts there to justify jurisdiction.<sup>10</sup>

The U.S. Supreme Court granted review and disagreed.<sup>11</sup> Such a theory, the Court noted, would undermine the rule that strictly limits the jurisdiction in which a habeas petition must be filed. For, there are often at least *some* contacts between a prisoner's custodian and any given judicial forum. Accordingly, the Supreme Court dismissed the case.<sup>12</sup> Padilla should be able to file a petition for a writ of habeas corpus in another court—just not in the U.S. District Court for the Southern District of New

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4. *Id.* at 2715–16.

5. *Id.* at 2718.

6. *Id.* at 2717.

7. *Id.* at 2724.

8. *Id.* at 2717.

9. *Id.* at 2715–16.

10. *Id.* at 2716–17.

11. *Id.* at 2717, 2727.

12. *Id.* at 2727.

York.<sup>13</sup> In Padilla's case, then, the Court never even got past the threshold issue it first had to confront.

### C.

The next case, *Rasul v. Bush*,<sup>14</sup> involved the non-U.S. citizen Guantanamo Bay detainees. Just as in *Padilla*, this case presented a similar threshold question of whether the trial court possessed habeas corpus jurisdiction over the case.<sup>15</sup> The very specific legal issue was whether a United States court, this one sitting in Washington, D.C., had jurisdiction to consider the claims of foreign nationals at a military base in Cuba.<sup>16</sup>

The district court, relying on *Johnson v. Eisentrager*,<sup>17</sup> a U.S. Supreme Court case involving German prisoners of war during World War II, dismissed the action, holding that its habeas jurisdiction did not extend to foreign prisoners held on foreign soil, even if their custodian was within the boundaries of the court's judicial district.<sup>18</sup> A federal appeals court—a sister court to my own—agreed.<sup>19</sup>

The Supreme Court granted review, and began its analysis by examining the Guantanamo Bay lease agreement between the United States and Cuba. While the lease explicitly does not establish “ultimate sovereignty” over the lands it specifies, it does provide that the United States exercises “complete jurisdiction and control” over them.<sup>20</sup> Given such dominion over the specified land, the Court determined that the military base was sufficiently within the “territorial jurisdiction” of the United States.<sup>21</sup> And because the trial court and the prisoners' custodians were each located in the District of Columbia, the Supreme Court held that the habeas corpus statute conferred jurisdiction over the case.

Unlike Mr. Padilla, Mr. Rasul and his fellow petitioners were able to clear the initial jurisdictional hurdle in their case. The Supreme Court, however, was not: because the lower courts dismissed the case, those courts never had a chance to consider the myriad of other claims presented in the habeas corpus petitions.

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13. *Id.*

14. 124 S. Ct. 2686 (2004).

15. *Id.* at 2690.

16. *Id.*

17. 339 U.S. 763 (1950).

18. *Rasul*, 124 S. Ct. at 2691.

19. *Id.*

20. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418.

21. *Rasul*, 124 S. Ct. at 2696.

As a result, the Supreme Court simply sent those remaining issues back to be determined in the first instance by the trial court.<sup>22</sup>

#### D.

The final case, *Hamdi v. Rumsfeld*,<sup>23</sup> is the only one in which the Supreme Court actually got beyond a threshold issue—although not by much. First, there were no jurisdictional problems with Hamdi's habeas corpus petition: both he and his immediate custodian were clearly located in the United States and within the judicial district where the petition was filed. Accordingly, the Supreme Court was able to address some of the meatier issues involved.<sup>24</sup>

Yet *Hamdi* is nevertheless a complicated case, particularly because no one Justice's view was able to command a majority of the Court. So while there are roughly fifty pages worth of legal opinions, none of them can be characterized as the clear law of the land. The closest we have is a plurality opinion, joined by four of the nine Justices.<sup>25</sup>

Still, a majority of the Justices were able to find common ground on some points. For example, at least five of them agreed that the President had the statutory authority to have Hamdi detained by the military in the first place.<sup>26</sup> Further, and perhaps most importantly, nearly all of the Justices agreed that Hamdi deserved *some* kind of process through which he could challenge his designation as an enemy combatant before a neutral arbiter.<sup>27</sup>

But because of the fractured nature of the Court's opinions, it is not at all clear exactly what kind, or what amount of process would satisfy such a requirement. Some, such as Justices Scalia and Stevens, suggested that nothing short of a full criminal trial in a court of law would do based on Hamdi's status as a U.S. citizen.<sup>28</sup> Others, including the plurality, indicated that the full due process protections of a trial in the United States courts may not be necessary.<sup>29</sup> The Supreme Court ultimately remanded

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22. *Id.* at 2699.

23. 124 S. Ct. 2633 (2004).

24. *Id.* at 2636.

25. *Id.* at 2634–35.

26. *Id.* at 2639–40, 2653, 2679.

27. *Id.* at 2650, 2670–71, 2685.

28. *Id.* at 2670–71.

29. *Id.* at 2650–51, 2685.

the case back to the lower courts, saving further consideration for another day.<sup>30</sup>

### III.

The Supreme Court announced these rather limited dispositions in all three cases, *Padilla*, *Rasul*, and *Hamdi*, on June 28th, 2004.<sup>31</sup> It immediately sparked a media frenzy, prompting screaming headlines around the world. Almost all of them emphasized the perceived political repercussions of the Court's decisions, such as, "Court Deals Blow to Bush on Combatants";<sup>32</sup> and, in one of the more inflammatory examples, "Court Defies White House with Ruling on Prisoners."<sup>33</sup> Indeed, as might be expected, some reports were overtly partisan: compare "Supreme Court Issues 'Troubling' Decisions on War on Terrorism"<sup>34</sup> with "Due Process Victory."<sup>35</sup>

But despite all the hoopla, I feel confident in presuming that the great public appetite for the case was not premised upon an interest either in the proper physical location in which to file a writ of habeas corpus or in the interpretation of a century-old real estate lease. Rather, I believe it is fair to conclude that the fervor arose because of the perceived political impact the cases necessarily had. Although the Supreme Court generally decided upon narrow and rather technical legal issues, and reserved several specific issues for another day, the *effect* of the decisions was to provide some support for those who refuted one of the President's political responses to the War on Terror.

And perhaps the Supreme Court did "refute" the President—but only in the most oblique sense of the word. The President's legal position was that the courts lacked jurisdiction over

30. *Id.* at 2652.

31. *Padilla*, 124 S. Ct. at 2711; *Rasul*, 124 S. Ct. at 2686; *Hamdi*, 124 S. Ct. at 2633.

32. *Court Deals Blow to Bush on Combatants*, ABC NEWS, June 28, 2004, at [http://www.abcnews.go.com/wire/Politics/ap20040629\\_111.html?CMP=OTCRSSFeeds0312](http://www.abcnews.go.com/wire/Politics/ap20040629_111.html?CMP=OTCRSSFeeds0312).

33. *Court Defies White House with Ruling on Prisoners*, THE INDEPENDENT (London), June 29, 2004, available at <http://news.independent.co.uk/world/americas/story.jsp?story=536303> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

34. Am. Ctr. for Law and Justice, *Supreme Court Issues "Troubling" Decisions on War on Terrorism* (June 28, 2004), at <http://www.aclj.org/News/Read.aspx?ID=177> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

35. *Due Process Victory*, THE MONITOR (McAllen, Tex.), July 1, 2004, available at <http://www.themonitor.com/SiteProcessor.cfm?Template=/GlobalTemplates/Details.cfm&StoryID=2529&Section=Opinion> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

any of these prisoners, and the Supreme Court did disagree on that point, foreclosing the prospect that the U.S. courts simply had nothing whatsoever to do with the cases. Additionally, the Court did assert, over the objections of the administration, that Hamdi, at least, deserved some amount of process before a neutral arbiter to challenge his detention.<sup>36</sup>

But to identify a “winner” or a “loser” is far too simplistic in my view. For the Supreme Court—indeed all courts—make pronouncements of law, *not* politics. Indeed, despite the cases’ disagreements with the President’s position on certain grounds, the Court simultaneously reaffirmed several of his other legal propositions. For example, the Court accepted that the United States is pursuing a legally authorized armed conflict with al Qaeda and the Taliban. It also recognized that both United States and non-United States citizens can be “enemy combatants,” and that the President can capture and hold them indefinitely, without trial, during the pendency of a given conflict. What is perhaps most clear from the decisions is that the courts will have some continuing, though perhaps limited role in reviewing such cases.

But beyond that, a great deal remains to be settled, both as a legal and as a political matter. Indeed, such additional considerations are already beginning. In the aftermath of these three detention decisions, the President began establishing military tribunals to consider some of the claims of the Guantanamo detainees. The Secretary of the Navy has already announced fourteen decisions among the thirty-one Detainees Combatant Status Review Boards convened since June 28, 2004. All fourteen upheld the enemy combatant designation after hearings before panels of military officers. Annual review tribunals are also planned. Additionally, several trial courts—now exercising their newly affirmed habeas corpus jurisdiction—are beginning to consider the substantive question of just how much process the detainees must receive and whether it may differ between those captured abroad and those seized within the United States, and between those who are American citizens and those who are not. Of course, these are distinct from the military commission of five officers that will try David Hicks and three others on specific charges.

There is a fair chance that these and other legal questions will wind their way through our entire legal system once again, facing further review in the Supreme Court. And as we have seen, even the most obscure legal determinations the Court may

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36. *Hamdi*, 124 S. Ct. at 2650, 2670–71, 2685.

be faced with—such as the niceties of a hundred-year-old lease—can implicate some of the most delicate political choices a free society must make in dangerous times. For this reason, I expect that the full attention of our country—if not the world—will focus with profound intensity on our courts as we continue working through these difficult and important issues regarding military justice.

I thank you for your kind and generous attention and welcome any questions you may have.

