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The United States Supreme Court Rulings on Detention of “Enemy Combatants” – Partial Vindication of the Rule of Law

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In three rulings on prolonged military detention of so-called “unlawful enemy combatants” in the “war” against terrorism, the United States Supreme Court in June 2004 shielded the rule of law from some of the more extreme excesses of the Bush Administration. However, the Court also yielded some ground and left open a number of troublesome questions.

To appreciate the Court’s rulings, one need only contemplate the deep wound to the rule of law, had the Court sustained the Administration’s most sweeping – and chilling – assertion of executive power. Based on his authority as commander in chief of the military, the President claimed the right, without prior judicial authorization and without express constitutional or statutory authority, on the basis of secret intelligence information unseen by anyone outside the executive branch, to designate individuals he suspects of involvement in international terrorism as “enemy combatants,” and then to imprison them indefinitely, for as long as the “war” on terrorism may last, without criminal charges, access to lawyers or courts, due process of law or even status hearings under the Geneva Conventions.

This presidential claim was not limited to persons captured on or near the battlefield in Afghanistan, but extended to the entire world. For example, among “enemy combatants” imprisoned at the United States Naval Base in Guantanamo Bay, Cuba, are individuals arrested far from any battlefield in West Africa and Bosnia-Herzegovina. Similarly, U.S. citizen Jose Padilla, imprisoned as an enemy combatant at a Navy brig in South Carolina, was originally arrested, unarmed and in civilian clothes, at a civilian airport in Chicago.

This assertion by the chief executive of the global superpower of a right to imprison persons he deems enemy combatants indefinitely, without due process of law, would have seriously undermined, at least in the context of counter-terrorism measures, the fundamental international norm against prolonged arbitrary detention, embodied in such international human rights instruments as the International Covenant on Civil and Political Rights (art. 9) and in such humanitarian law

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treaties as the Third Geneva Convention of 1949 (art. 5). (The U.S. is a party to both treaties, without relevant reservation.)

Fortunately, relying mainly on U.S. domestic constitutional and statutory law, the Supreme Court rejected the Administration's claim by a vote of 6 to 3 in the case of foreign citizens imprisoned offshore at Guantanamo, and by 8 to 1 in the case of a U.S. citizen (Yasir Hamdi) imprisoned in the United States.

In the Guantanamo case,¹ the Administration argued that United States courts have no jurisdiction to hear petitions for relief by foreign citizens imprisoned outside the sovereign territory of the United States. Even though the 1903 lease by which the United States occupies Guantanamo expressly grants the United States "complete jurisdiction and control" over the base, the lease reserved "ultimate sovereignty" over the base to Cuba.

The Administration's denial of jurisdiction was limited and selective. It conceded that U.S. courts have jurisdiction over claims for relief by U.S. citizens at Guantanamo, as well as jurisdiction to prosecute crimes committed at Guantanamo by foreign nationals. Only claims for relief by foreign citizens at Guantanamo were said to fall outside the jurisdiction of U.S. courts.

Rejecting the Administration's formalistic argument, the Supreme Court majority emphasized the practical nature of the traditional Anglo-American writ of habeas corpus, by which judges review the lawfulness of executive detentions. U.S. control of Guantanamo suffices to warrant the exercise of jurisdiction by American courts over the custodians in Washington who order the detention of prisoners at Guantanamo.

Basing its ruling on the U.S. statute which recognizes habeas corpus, the majority noted that nothing in the statute purports to discriminate between U.S. and foreign citizens. Its ruling, however, was narrow. The "holding" – the portion of the opinion that has binding precedential weight – was only that U.S. courts have jurisdiction. The Court expressly declined to reach the questions that might arise once prisoner petitions are brought before U.S. courts.

Seizing on this point, the Administration now argues in subsequent litigation that even though U.S. courts have jurisdiction, foreign nationals imprisoned at Guantanamo have no legally enforceable rights in U.S. courts – not even to assistance of counsel for purposes of filing their petitions. This argument is untenable for at least three reasons. First, albeit in *dicta* (non-binding reasoning), the majority in a footnote indicated that if the two Australian and twelve Kuwaiti prisoners in

¹ *Rasul v. Bush*, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004).

the case before it were, as they alleged, neither combatants nor terrorists, then their indefinite detention without due process of law “unquestionably” violates the “Constitution or laws or treaties” of the United States.²

Second, it is difficult to imagine how foreign nationals imprisoned at Guantanamo could file legal papers in U.S. courts without assistance of counsel. Implicit in the right of effective access to court must be a right of access to counsel. And third, the Administration’s position reflects a continued resistance to the rule of law. To argue that persons imprisoned by the U.S. military have no judicially enforceable rights is tantamount to relegating their basic right to liberty to the good faith of executive and military officers, rather than to the protection of the law.

In two other cases decided the same day, the Court addressed the rights of U.S. citizens imprisoned in the United States as enemy combatants. One involved a citizen (Yasir Hamdi) allegedly captured on the battlefield in Afghanistan.³ By a 5 to 4 majority, the Court ruled that because he was allegedly captured in a traditional armed conflict (the United States attack on Afghanistan), Hamdi could be detained as an enemy combatant. The Court did not reach the question of whether the “war” on terrorism would otherwise justify detention of persons as “enemy combatants.”

On the other hand, the Court ruled by a 6 to 3 majority that the U.S. Constitution guarantees Hamdi the right to due process of law, which must include, at minimum, notice of the factual basis of the accusations against him and a “meaningful opportunity” to be heard and to present evidence in rebuttal before a “neutral decision maker.”

At least four members of the Court intimated that military tribunals might qualify as such neutral arbiters. The Administration has since responded to the ruling (even though it involved a U.S. citizen) by establishing military review panels to evaluate the status of foreign nationals imprisoned at Guantanamo. However, these panels are hardly neutral; the military order establishing them states expressly that the prisoners have already been determined, through multiple levels of review within the U.S. Department of Defense, to be enemy combatants.

In the other U.S. citizen case (Jose Padilla), the Court ruled by 5 to 4 that his petition had been filed in the wrong court; it should have been filed in South Carolina rather than New York.⁴ (Padilla’s lawyers have since re-filed in the proper

² 124 S.Ct. 2686, at 2698, note 15.

³ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 159 L.Ed. 2d 578 (2004).

⁴ *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 159 L.Ed. 2d 513 (2004).

court.) However, in a footnote, the four dissenters expressed the view that the U.S. Non-Detention Act,⁵ a statute which bars detention of U.S. citizens absent express authorization by Congress, prohibits “the protracted, incommunicado detention of American citizens arrested in the United States.” Since one of these dissenters (Justice Stephen Breyer) was also among the five Justices who agreed that Yasir Hamdi could be detained, the import of the two rulings, read together, is that whether U.S. citizens may be imprisoned as enemy combatants depends on where they are apprehended. Those who, like Hamdi, are allegedly captured on a foreign battlefield may be imprisoned as enemy combatants, provided they are given due process of law. In contrast, those who, like Padilla, are arrested in the United States may not be imprisoned as enemy combatants. However, because this latter ruling relies in part on a view of one Justice expressed in dissent, it lacks binding precedential force. A definitive answer may have to await the possible return of the case of Jose Padilla to the Supreme Court.

The central theme of the Supreme Court’s enemy combatant rulings, then, is a recognition by the majority that liberty is too precious to be left in the unreviewable hands of the executive. That is an important vindication of the rule of law and repudiation of the Administration’s claims of unchecked power to imprison suspected “enemy combatants.”

Yet, even after the rulings, it remains unclear what substantive rights, if any, of foreign citizens imprisoned as enemy combatants at Guantanamo will be judicially enforceable in the United States. It also remains to be seen how extensive a process and how searching a review the courts will provide, even in the case of U.S. citizens. At least four Justices suggested, for example, that once the government offers credible evidence that a prisoner is an enemy combatant, the burden shifts to the prisoner to prove that he is not.

In short, the rulings are a vital step forward, but much work remains to be done to ensure judicial recognition and effective protection of the rights to liberty and to due process of law of persons imprisoned as “enemy combatants” by the U.S. President.

⁵ 18 U.S.C. section 4001(a)(2004).