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The Supreme Court, Guantanamo Bay and Justice Fix-it

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Today we'll be talking about the Supreme Court's three decisions last June involving Presidential power, habeas corpus and individual rights; and what they teach us about the Supreme Court and Government in the 21st century.

When I went to law school last century, they were still teaching us about privity of contract and *trespass vi et armis*. Today, privity isn't even in my spell-check program. Back then, we all had our own favorite Supreme Court cases, but we pretty much agreed that the low point, or nadir of Supreme Court jurisprudence was either *Scott v. Sandford* (the Dred Scott decision, in 1857) or *Korematsu v. United States* (the Japanese exclusion case, in 1944). Some of us had other personal favorites, like *Buck v. Bell*, when Justice Holmes upheld the Virginia Eugenical Sterilization Act, saying that "three generations of imbeciles are enough;" or maybe *Plessy v. Ferguson*, the "separate but equal" case; or *Ex Parte Quirin*, the 1942 German saboteur case, where the Court upheld the right of a military tribunal to execute saboteurs, with an opinion to follow after they were dead.

Future generations may add to that list a case from the year 2000, when five justices who ordinarily wouldn't recognize an equal protection violation if they fell over it, used it as the ground to overturn a state Supreme Court's order regarding its own state's voting procedures.

These examples of underachievement remind us that Justices of the Supreme Court are as much prone to error as members of the other branches of government. They also show that when the Court reviews controversial decisions of other branches of government, sometimes it works backwards from a desired result to the law and logic

supporting them. Especially in *Quirin*, where after the petitioners were dead, the Justices couldn't agree why. Maybe that is what Holmes meant when he told us that "The life of the law is not logic, but experience."

So, when the Supreme Court had an opportunity last term to decide three cases involving the President's power in wartime, there was a lot of speculation about the historical importance of the decisions. One prediction, which was made by Prof. Eric Freedman of Hofstra Law School, was that, however the cases came down, they would be in the next edition of the Con Law casebook, on the page after *Korematsu*. When we see how those decisions turned out, we can consider whether Prof. Freedman was right.

Let's begin with the facts in these three cases. First, we have *Rumsfeld v. [Pa-dill-a]*. I say "Pa-dill-a", not "Padeeya," because that is how the defendant pronounces his name, and he oughta know. I say "Rumsfeld" because I have no choice.

Padilla is the so-called "dirty bomber," the U.S. citizen who was arrested in Chicago when he arrived on a flight from Pakistan. After he was arrested, he was placed in federal civilian custody in New York. A month later, President Bush invoked his powers as Commander-in-Chief and under Joint Congressional resolutions passed in the wake of September 11, and he designated Padilla an "enemy combatant" − which is a term that is not used in the resolutions. Padilla was then taken into military custody and imprisoned in the Navy brig in Charleston, South Carolina when he stayed for over two years, until the Court's decision last June. He was evidently held in solitary confinement; without being charged with any crime; and without access to an attorney for the first twenty-one months. Shortly after he was taken from New York to South Carolina, but

probably before his appointed attorney knew it, his attorney filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. Eventually, the Court of Appeals held that the President didn't have authority to detain American citizens who were captured on American soil, by designating them "enemy combatants," and ordering that Padilla be released. Both the District Court and the Court of Appeals rejected the Government's argument that they didn't have jurisdiction over Secretary Rumsfeld because he wasn't present in the Southern District of New York.

So, case # 1 – it looked like Padilla posed head-on the question of whether the President can detain an American citizen; captured on American soil; outside the criminal justice system; indefinitely; without charges; and without access to counsel.

Case # 2 is *Hamdi v. Rumsfeld*; again, a United States citizen, but this time he's captured overseas – in Afghanistan. Hamdi was brought to the U.S. Naval prison in Guantanamo Bay, along with hundreds of other people who were captured in Afghanistan and some captured further away, like Gambia and Bosnia. When Hamdi was interrogated, they found out that he was a U.S. citizen, so he was transferred to the Naval brig in Norfolk, Virginia, and later to the brig in Charleston, South Carolina. The President issued a determination that Hamdi, like Padilla, was an enemy combatant. Like Padilla, he was imprisoned without charges; without a hearing; and without counsel. Like Padilla, Hamdi (actually, Hamdi's father), filed a habeas petition, only his was denied. The Fourth Circuit held that, because Hamdi was captured "in a zone of active combat" outside the United States, he had no right to any further inquiry into his status, and the President could detain him in the exercise of his war powers. So, Case #2 –

Hamdi – again appearing to pose squarely the question of whether the President can detain an American citizen outside the criminal justice system; indefinitely; without charges; and without access to counsel.

Finally, Case # 3: *Rasul v. Bush* and *Al Odah v. United States.* Here, unlike Padilla and Hamdi, Rasul, al Odah, and the other petitioners in this case are not United States citizens. They are Australians and Kuwaitis, all of whom were captured overseas during hostilities with the Taliban. They and about 600 other non-U.S. citizens were brought to the U.S. Naval Base in Guantanamo Bay. They, too, were held for over two years without being charged with wrongdoing; without hearings or access to any tribunal; without counsel; and under conditions that we have gradually learned to be exceptionally harsh, and in the view of some, in violation of civilized standards of international law.

Relatives of Rasul and al Odah challenged their confinement in the U.S. District Court for the District of Columbia. The Court dismissed the petitions for lack of jurisdiction, relying on a 1950 Supreme Court decision called *Johnson v. Eisentrager,* and the Court of Appeals affirmed. Both courts construed *Johnson v. Eisentrager* to hold that non-citizens held in military custody outside the sovereign limits of the United States – which they found Guantanamo Bay to be – that those non-citizens had no access to the courts of the United States.

At this point, we need a very short overview of some provisions of the Geneva Conventions. In 1955, the United States ratified the Third Geneva Convention, which covers the treatment of prisoners of war; and the Fourth Geneva Convention, which covers the protection of civilians in time of war. For our purposes, all we have to know is

that these conventions provide that every person in enemy hands must have some status under international law. Nobody in enemy hands is outside the law. Every person who commits a belligerent act, and falls into the hands of the enemy, is entitled to the protection of the conventions "until such time as their status has been determined by a competent tribunal." These tribunals are familiar features of modern warfare. The United States is using them today in Iraq.

The Geneva conventions have been ratified by 191 nations. The United States has ratified them; it has spoken with pride of our compliance with them; it insists that other nations live up to them; and it condemns nations that don't.

Not only that, but the United States military has implemented the Geneva Conventions by writing them into their own regulations and insisting – on pain of criminal prosecution – that its personnel comply with them. Army Regulation 190-8, entitled "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees" says:

> (b) A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

This regulation has been adopted by all branches of the United States armed forces. It reflects the consistent practice of United States armed forces, at least since the ratification of the Geneva Conventions, of determining belligerent status through the use of tribunals.

In the United States Army's Area of Operations that includes Afghanistan and Iraq, these provisions are further implemented by a Regulation thatprovides:

> All US military and civilian personnel of the Department of Defense who take or have custody of a detainee will:….(2) Apply the protections of the Geneva Convention, Relative to the Treatment of Prisoners of War to each Enemy Prisoner of War and to each detainee whose status has not yet been determined by a Tribunal covered under this regulation.

Personnel who fail to treat a detainee in accordance with the Geneva Conventions are subject to criminal prosecution.

There is no provision in any United States domestic law; or in international law; that permits a country's commander in chief, or its chief executive, to issue a blanket pronouncement that all personnel falling into the power of the United States in a particular theater of war are excluded from the protection of the Geneva Conventions. The Conventions explicitly provide that *every* detainee whose status has not been determined by an impartial tribunal is entitled to its protection.

OK, you now have the procedural background of these cases at the time cert. was granted. And, if you've been paying attention, you also have a greater knowledge of the applicable international law than you could gain by reading any of the opinions of the Supreme Court in these three cases, because they scarcely talk about them. But that is getting a little ahead of ourselves.

The Government's position before the Court was that the President has the power as Chief Executive and Commander-in-Chief to designate individuals as enemy combatants; he has the power to take them out of the criminal justice system; he has the power to exclude them from protections of international law by branding them outlaws; and he has the power to bar them from access to any court. In oral argument, the Solicitor General even argued that there was no law, domestic or international, that could prevent the United States from torturing prisoners -- though, of course, that was something that the United States would never do. Details about conditions at Abu Ghraib came out after the oral argument, but before the decisions.

In addition to these substantive arguments, the Government again made its procedural argument that Padilla had brought his case in the wrong district – an argument that both the District Court and the Court of Appeals had rejected. And in the Guantanamo case (*Rasul*), the Government argued that the courts had no jurisdiction because the United States had no sovereignty over Guantanamo Bay (even though a treaty gives it complete control in perpetuity). Guantanamo Bay might as well have been Afghanistan, or, for that matter, the moon. That is why a lot of observers characterized Guantanamo Bay as a "black hole" – something that you here in the land of Carl Sagan know is an area where the force of darkness is so strong that everything collapses – light, gravity and federal court jurisdiction.

When these cases went to the Supreme Court, the petitioners had in their corner a large variety of friend-of-the-court briefs, and it's interesting to have a look at them to get a sense of how these issues are viewed by different segments of the political spectrum.

The only *amicus* brief supporting the Government was submitted by the Washington Legal Foundation and two Congressmen.

For the prisoners, there was a brief from former federal officials, who said, in essence, we're smart guys, we know Government, and we think the petitioners have the better of the argument.

There was also a brief from former U.S. prisoners of war, who said that, if the Government treats POWs this way, other countries are going to treat American POWs just as badly.

There was a brief from international human rights groups speaking of the need to uphold the Geneva Conventions and the international rule of law.

There was a brief from British lawyers who can make "Magna Charta" sound so much more impressive than when we say it.

There was a brief, I must add in the interest of full disclosure, from the National Institute of Military Justice, the principal author of which stands before you, arguing that the rule of law can function, and has functioned, through many international conflicts, without impairing the Executive's war powers.

And, perhaps best of all, there was a brief submitted on behalf of an individual, who argued from a long historical perspective that the courts had botched their review of the Alien and Sedition laws; and botched the Red Scare after World War I; and botched the internment of Japanese during World War II; and botched the McCarthy-era cases during the Cold War; all of which many now regard as judicial failures. And this

individual asked the Supreme Court to try, please, please, please, to get this one right the first time. That individual was an 84-year-old man named Fred Korematsu.

His lawyer, by the way, was that same Prof. Freedman of Hofstra Law School. He may have been engaged in a teeny bit of special pleading when he said these cases would appear in the Con Law casebook on the page after *Korematsu*.

All right, let me not keep in suspense any longer, those of you who have been in your own black hole for the last four months. How did these cases turn out?

First, let me tell you, that so far as I can tell, none of the ten opinions in the three cases makes any reference to any of the *amicus* briefs. So much for trying to be a friend.

More surprising, is the fact that, except for a few passing references in Hamdi, no Justice relies to any degree on anything in the Geneva Conventions. That omission is so glaring, that when I first spoke to Professor Wippman about this lecture, I said I wasn't even sure it qualified as a discussion of international law. I also said that, given the treatment some of the Justices brought to the issues, I ought to give this lecture at the Astronomy Department and entitle it, "Black Holes and White Dwarfs."

But here we are at the Law School, so let us start with the decision in Padilla.

Remember that Padilla is the dirty bomber case. It looked like it squarely posed the question of whether the President can detain an American citizen captured on American soil; outside the criminal justice system; indefinitely; without charges; and without access to counsel. We have a criminal justice system that is equipped to deal with crimes like treason and aiding the enemy. We have, even within the last decade, convicted people of the nasty crime of seditious conspiracy. Padilla seemed like a pretty

clear-cut case. That's what the Second Circuit found. But 5 Justices of the Supreme Court avoided the merits by deciding the case on the narrow ground that it was brought in the wrong court. Remember that the Government had taken Padilla out of New York, probably before his lawyer even knew it. The District Court and the Court of Appeals didn't think that was a bar to jurisdiction. But 5 Justices, in an opinion by Chief Justice Rehnquist, disagreed; and they reversed; and they dismissed the habeas petition. This narrow decision teaches us nothing about Executive power or individual liberties, or international law. It's definitely not a case to go in the Con Law casebook.

OK, so what about the second case, *Hamdi*? *Hamdi* looks to be the same as *Padilla*, except Hamdi was captured overseas. And Hamdi's lawyers brought their petition in the right place, in Virginia, where Hamdi was imprisoned, so the easy out of a dismissal on jurisdictional grounds wasn't an option.

And, indeed, the Court treated us to 4 opinions, every one of them reaching the merits. The problem is figuring out how they can be combined to make a majority of 5.

The most interesting opinion is by Justice Scalia, joined in by, of all people, Justice Stevens. The two of them are generally at the far ends of the ideological continuum; so you'd think that something the two of them could agree on would get the votes of a majority of the Court. But you would be wrong.

But of all the ten opinions written in these three cases, this one stands the best chance of fulfilling Prof. Freedman's prediction that it will be on the page opposite *Korematsu*. Because Justice Scalia absolutely outdoes himself. He is at his most judge-like and least political. He looks at the writ of habeas corpus – the Great Writ –

Blackstone calls it "a second magna charta" – the only common-law writ mentioned explicitly in the Constitution – (Scalia loves this stuff) – and he asks the question, "What does it do?"

And he answers it: "It means that citizens are free from imprisonment for indefinite terms at the will of the Executive." If it doesn't mean that, it doesn't mean anything. It was for this that Charles I was executed and James II was deposed and the colonies rebelled. *"The very core of liberty,"* Justice Scalia writes – *"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."* It doesn't require the slightest stretch of jurisprudence to apply this principle to Yaser Hamdi. Caesar had his Brutus, George III his Jefferson, and George W. Bush may profit from their example.

Of course, an original intent guy like Justice Scalia can't bring himself to rely on any case in the past two centuries to reach this conclusion. Blackstone, yes. The Federalist Papers, yes. The Petition of Right of 1628 and the Habeas Corpus Act of 1679, but of course. I take it back – he does cite the Civil War case of *Ex parte Milligan* – and it's even the American Civil War, not the English Civil War. But even Homer nodded, and we can forgive Justice Scalia his single lapse into the 19th century.

This opinion is as rousing a defense of habeas corpus as a check against arbitrary executive action as could ever be written. And it garnered one other vote.

Two other Justices, Souter and Ginsburg, agreed that the Executive could not detain Hamdi, but they base their conclusion not on habeas corpus, but on a narrow reading of a 1948 statute called the Non-Detention Act, which bars imprisonment of a

citizen "except pursuant to an Act of Congress." So, we have 4 Justices agreeing, on 2 different theories, that the Executive cannot detain Hamdi. But as Justice Brennan once said, the most important skill required of a Supreme Court Justice is counting to 5; and these guys don't have it.

Justice O'Connor was a little more persuasive with her colleagues. She got four votes for her opinion. And here we need to venture into the area of what makes Justice O'Connor tick. Justice O'Connor generally wants to make nice, but she doesn't want to make trouble. She thinks people ought to play fair, but not if it requires too much of a change in the system. Because she has more ideological justices to the right and the left of her, she often casts the deciding vote based on her own perceptions of fairness. So, to overstate a bit, she thinks minority groups and women are nice; and they ought to be treated fairly; and she makes up a kind of middle ground in affirmative action cases to do that. She thinks criminals are <u>not</u> nice, and she doesn't usually give them more fairness. And she is very, very reluctant to take sweeping doctrinal positions that will upset the status quo too much. A good example is in the recent Washington State sentencing guidelines case, where the majority held that allowing judges to increase sentences, by making factual findings that aren't proved to a jury beyond a reasonable doubt, impaired a defendant's right to trial by jury. Justice O'Connor was just overcome by the thought that applying the Sixth Amendment to sentencing would create havoc in the criminal justice system. And these are not nice people anyway – they're convicted criminals. So she dissented.

I would suggest to you that this kind of jurisdictional timidity doesn't face up to the fact that deciding cases can have consequences.

What decision caused more change than Brown v. Board? How about Miranda v. Arizona? Or Baker v. Carr? I don't have much confidence that Justice O'Connor would have joined the majority in any of those cases.

So, where does this philosophy lead her in this case, Hamdi?

Well, first of all, she won't deprive the President of the power to detain bad, hostile, dangerous people. They're not nice. But what if they're really not bad? What if they're nice? How do you know if they're nice? We've got to give them some chance to challenge the factual basis for their confinement and to prove they're nice. So she says we have to balance the President's right to confine prisoners, with the individuals' right to be free of arbitrary detention. And "balance" is a magic word at the Supreme Court. It's a passport, a master key to – making it up! What kind of process is due? What burden of proof? What rules of evidence? What notice of the evidence against you? What right to counsel? We have a system to answer these questions. It's called the Constitution. But, because we're making it up, we can do whatever we think is nice.

So Justice O'Connor tells us what burden of proof would be nice. What rules of evidence would be nice. What notice and process would be nice.

Justice Scalia just tears this fuzzy thinking apart. "Where do you get this stuff from?" he says. It's "constitutional improvisation," he says. "The only constitutional alternatives (he says) are to charge the crime or suspend the writ [of habeas corpus]." Justice O'Connor is "writing a new Constitution," he says. She is distorting the Great Writ. She is making

illegal detention legal by inventing a process to "Make Everything Come Out Right." Or, as I would say, to "Make Everything Come Out Nice." Scalia calls this a "Mr. Fix-it Mentality", and it drives him crazy. If Hamdi is being imprisoned in violation of the Constitution, he says, then the habeas petition has to be granted. Charge the crime, or suspend the writ – or let him out.

Well, this is all very amusing, to see Justice Scalia, the champion of individual liberties, stomping all over Justice O'Connor. But let me offer two observations.

First, there actually is a model for Justice O'Connor's "New Constitution," though you won't get her to admit it. Maybe consciously, or maybe unconsciously, she's giving Hamdi what he would get under, guess what – Article V of the Geneva Convention, which – you may remember – entitles captured personnel to have their status determined before a "competent tribunal." You're not likely to catch Justice O'Connor directing the President to comply with the Geneva Convention – but that's pretty much what she's doing.

And as for the great champion of individual rights, Justice Scalia -- well, it doesn't cost him much to engage in this fancy rhetoric. This is not the *Rasul* case. This decision doesn't determine the fate of 600 prisoners at Guantanamo Bay. Scalia makes very clear that he's only talking about citizens; and he's only talking about prisoners held within the reach of federal court jurisdiction, which he says doesn't include Guantanamo Bay. All he's talking about is a single individual in circumstances not likely to happen very often: an American citizen; captured abroad; accused of taking up arms against the United States or its allies; and imprisoned in the United States. So far, we have only 2 of them: Hamdi, and John Walker Lindh (and Lindh, you may remember, was processed entirely by the American civilian criminal justice system).

All right, meanwhile we have to get back to who wins this case. We have 4 votes saying the President can't detain Hamdi (Scalia, Stevens, Souter and Ginsburg); we have 4 votes saying the President can detain Hamdi, but has to give him an opportunity to challenge his status as an enemy combatant (O'Connor, Rehnquist, Kennedy and Breyer). Who's missing? Justice Thomas. What he says is: times are tough, the President can do whatever he wants. So now we've got 5 votes that it's OK to detain him, but only 4 of them say he's entitled to a hearing, and 4 others say let him out.

What plurality do we get out of this? What's the decision? Who wins the case? Could it be that the Court decides it's OK to detain him but he has no right to a hearing, when 4 Justices say he should get a hearing and 4 others say he should be released? That can't be right. So Souter and Ginsburg join O'Connor's 4 to make a majority of 6. Scalia's opinion becomes a dissent and so does Thomas's. Hamdi doesn't get released, but he gets a chance to challenge his status as an enemy combatant. And as it later turns out, it all becomes moot when the Government avoids a hearing by shipping him off to Saudi Arabia.

Which brings us to Rasul and the 600 prisoners at Guantanamo.

Here it becomes important to know that the only question the Supreme Court agreed to decide in *Rasul* is whether federal courts have jurisdiction to hear the prisoners' claims. Not what kind of process they should get, or what a hearing should consist of. Just, can foreign nationals captured overseas and imprisoned at Guantanamo Bay get in the door of a federal court?

5 Justices, in an opinion by Justice Stevens, see this as a relatively simple question. The habeas statute protects both citizens and non-citizens in federal custody. The United States exercises complete jurisdiction over Guantanamo Bay. The case of *Johnson v. Eisentrager*, that 50-year-old case the Government argued precluded jurisdiction, is distinguished. The federal courts have jurisdiction to consider the merits of petitioners' claims, and the case is remanded for them to do so. Short opinion. Boom, done. Based purely on the habeas statute, no Constitutional issue discussed. It's not going in the Con Law casebook, except maybe in a chapter on habeas.

Justice O'Connor joined the majority, presumably on the same general theory that people should get a hearing to prove they are nice.

To round out the voting, Justice Kennedy concurred. He said *Johnson v. Eisentrager* was still good law, but distinguishable.

Justice Scalia, with Rehnquist and Thomas, dissented, saying that *Eisentrager* applied, and precluded federal jurisdiction.

* * *

So, what are we left with after all this heavy breathing?

Does *Rasul* apply to places besides Guantanamo Bay, or to circumstances where prisoners aren't detained indefinitely? Can the Government no longer maintain prisoner-of-war camps, at least not in the United States? Justice Scalia says *Rasul* "extends the habeas statute to the four corners of the Earth." Give us a break. You can't count to 5 the Justices who would let prisoners at Abu Ghraib sue in federal court.

What process is due in the habeas proceedings required by *Rasul*? Dunno. Are there 5 votes for a full panoply of due process rights? I don't think so. Justice O'Connor is sure to be the swing vote, and she wouldn't give those rights to Hamdi, an American citizen. Why is she going to give more to aliens in Guantanamo Bay?

The Government may have been counting on that, when Deputy Secretary of Defense Wolfowitz, who you may have seen licking his comb in Fahrenheit 9/11, set up a series of status tribunals at Guantanamo to allow prisoners to challenge their classification as enemy combatants. The Government may be hoping that they can convince the District Court hearing the habeas petitions that those tribunals satisfy the Government's burden. I wouldn't have a lot of confidence that Justice O'Connor would disagree.

One thing we do know is that the *Hamdi* case won't be going forward, even under the Fix-It procedures invented by Justice O'Connor, because the Government made a deal that released him in return for his renouncing his U.S. citizenship and returning to Saudi Arabia.

But if Padilla's case goes forward, it's hard to see how there can be a different result than in *Hamdi*. If anything, Padilla has a stronger case, because he was arrested in the United States. Padilla's habeas proceeding is working its way very slowly in the South Carolina District Court, where it is opposed by United States Attorney J. Strom Thurmond, Jr. The latest scheduling order set a hearing for January 5, 2005.

A lot of people were saying these cases were a big defeat for the President, because it's a very rare thing to curb the Executive's power. I'm not so sure. Yes, giving

prisoners of war access to federal courts is a curb on Executive power, at least in theory. But upholding the Constitutional rights of American citizens like Hamdi is not new. And upholding the President's right to designate an American citizen an enemy combatant; and limit his rights to the "Constitutional improvisation" of Justice Fix-it; is an expansion of Presidential power.

But one thing we know for sure is which Justice was in the majority in all three cases, and that was Justice O'Connor. And that's nice.