Two Out of Three Ain't Bad

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July 19, 2004 at 12:00 AM

GIVEN his constitutional role as commander in chief, with principal responsibility for the nation's security, the president might be expected to overreach occasionally in times of war, to place the energetic defense of the country ahead of the meticulous safeguarding of civil liberties. Equally, given its constitutional role as guardian of the fundamental laws of the land, the Supreme Court might be expected to patrol zealously the boundaries established by the Constitution for the protection of individual liberty, and occasionally even to go to an extreme to ensure that the executive respects them. And as a consequence of the wartime contest between the executive and the Court, as each seeks to advance the interests and uphold the honor of its constitutional office, one could reasonably hope that both national security and civil liberties would be given their due to the extent possible.

On the basis of the Court's decisions in the enemy combatant detention cases, handed down June 28,

it is a pleasure to report that the system is working more or less as designed. In waging the war on terror, the executive branch has certainly pushed the legal limits of its prerogatives. And the Supreme Court has responded, pushing back, at times quite aggressively, in the opposite direction.

This is certainly not to suggest that the legal positions of the administration have been ideal, or that in *Hamdi* v. *Rumsfeld*, *Rumsfeld* v. *Padilla*, and *Rasul* v. *Bush* the Court achieved an optimal balance between national security and civil liberties. To the contrary. The Bush administration, for example, suffered self-inflicted wounds when it refused to grant the detainees at Guantanamo Bay the adequate minimal process, well grounded in the laws of war, for determining whether the government had correctly classified them as enemy combatants. And in *Rasul* v. *Bush* a provoked Court struck back. It ruled that noncitizen or alien enemy combatants who have not set foot in the United States and are detained outside of the territorial jurisdiction of any U.S. federal court nevertheless have a right to challenge their detentions in any federal district court they please. Unfortunately, to reach this result the Court distorted its own cases, arrogating to itself a scope of review of military detentions it had not previously been thought to possess.

So, the Supreme Court now having spoken, there remains work to be done in hammering out the proper balance between waging the present war effectively and maintaining the rule of law scrupulously. This is particularly challenging as the nation confronts a shadowy adversary, himself ruthlessly indifferent to the distinction between lawful combatants and civilian noncombatants, who has at his disposal or is bent on obtaining weapons of great destructiveness. Still, the United States is at war, and the constitutional order holds.

Indeed, notwithstanding its overreaching, the Court's decisions vindicated the core constitutional principle that there is no unreviewable executive power to detain individuals. To be sure, in none of the cases did the government deny the right to due process. What was at issue in all three was the degree of process due an individual designated by the military, or the president directly, as an enemy combatant. In essence, the government contended that it was enough to assert facts that, if true, would warrant such a designation. And the Court ruled, in sum, that individuals held as enemy combatants--whether citizens or aliens, whether held in the United States or abroad--had the right to challenge before an impartial tribunal the factual allegations on the basis of which they had been captured and incarcerated.

In *Hamdi* v. *Rumsfeld*, the court struck the balance nicely. Seized on the battlefield in Afghanistan in 2001, Yaser Esam Hamdi, a U.S. citizen, has been detained in the United States since April 2002 without formal charges or proceedings. This was necessary, argued the Bush administration, not only to prevent him from returning to fight with the enemy (the internationally recognized justification for the detention of enemy combatants) but also in order to subject him to extended interrogation that could yield precious information concerning al Qaeda's whereabouts, intentions, and capabilities. Hamdi's court-appointed counsel countered that indefinite military detention without charge or trial in a war that could last the detainee's lifetime violated his Fifth and Fourteenth Amendment due process rights, in particular the right of all persons detained in the United States to the writ of habeas corpus, the legal means by which a detainee asks a court to review the basis for his imprisonment.

Writing for a plurality and announcing the judgment of the Court, Justice O'Connor recognized the force of both parties' arguments. Just as there is no bar to holding a U.S. citizen as an enemy combatant, she reasoned, so too being held as an enemy combatant should not prohibit a U.S. citizen from invoking his constitutional rights.

While she rejected the notion that a citizen held in the United States as an enemy combatant was entitled to the full panoply of protections under the Constitution for citizens charged with *criminal* conduct, Justice O'Connor did rule that the government must give citizens alleged to be enemy combatants and held in the United States "a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker."

The case of Jose Padilla, who came to the United States in May 2002 allegedly to lay the groundwork for a dirty bomb attack, presented an even stronger challenge to indefinite military detention without charge or trial. Padilla not only is a U.S. citizen but also was seized on U.S. soil. The Court, however, in a 5-4 opinion authored by Justice Rehnquist, declined to rule on the merits on the grounds that Padilla had failed to bring his challenge to the federal district court that had jurisdiction to hear it and, in bringing the suit against Secretary of Defense Rumsfeld, had failed to identify the correct respondent, namely, the commanding officer at the South Carolina Navy brig in which he was imprisoned.

How strange, therefore, that the Court ruled in favor of the detainees in *Rasul* v. *Bush*. In contrast to Padilla, they were alien enemy combatants not citizens, held outside the United States not inside the country, and they filed suit against the president rather than the commander at Guantanamo Bay. In fact, the Court seemed bent on sending a message to the administration regardless of the settled law that it needed to trample to do so.

Contrary to University of Chicago law professor Cass Sunstein, who argued in the *New York Times* that the Court in *Rasul* decided the issues before it in the "narrowest possible fashion," the Court reached its result by silently and tendentiously overruling the controlling precedent. In *Johnson* v. *Eisentrager* (1950), the Court held that it is a precondition for the filing of a writ of habeas corpus by an alien detainee that he be held within the territorial jurisdiction of a U.S. court. In keeping with *Eisentrager*, the Supreme Court might have narrowly ruled that the Guantanamo Bay detainees have a right to challenge their detentions in U.S. courts because U.S. control over Guantanamo Bay, by longstanding agreement with Cuba, amounts to in all but name the exercise of sovereignty. In fact, in a 6-3 decision written by Justice Stevens, the Court appears to have ruled, extravagantly, that U.S. federal district courts may hear legal challenges from alien enemy combatants at Guantanamo Bay because U.S. courts have jurisdiction wherever the U.S. military holds foreign enemy combatants inasmuch as U.S. courts have jurisdiction over the secretary of defense and his boss, the president.

The constitutional contest between the executive and the judiciary over how to balance the competing claims of security and liberty is by design perennial. At the same time, and also by design, there is only so much the executive and the judiciary, given their limited powers, can accomplish. It would be welcome, therefore, in the next round for the third branch, Congress, to step in and clarify not only the jurisdiction of federal courts in the case of alien enemy combatants held abroad, but

also the details of the procedural protections due citizens wherever they are held as enemy combatants. Both the circumstances and the constitutional system call for this.

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