



# The Guantánamo Detainee Case

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**O**n June 28, 2004, the Supreme Court decided a narrow, legalistic, tedious question, but in so doing completely upended President Bush's plan for imprisoning alleged enemy combatants and terrorists, checked the President's drive for unprecedented power, reaffirmed the importance of separation of powers, and put the court on a course to have a significant voice in future cases involving national security.

The case arose from petitions for writs of habeas corpus filed by David Hicks and Mamdouh Habib, two Australian citizens, and Fawzi Khalid Abdullah Fahad Al Odah and 11 other Kuwaiti citizens, who were captured in Afghanistan in early 2002, during hostilities between the United States and the Taliban. Some time later, they, along with about 640 other non-Americans—all captured abroad—were imprisoned at the Naval Base at Guantánamo Bay, 45 square miles of land and water along the southeast coast of Cuba, which the United States occupies pursuant to a 1903 Lease Agreement executed with the Republic of Cuba following the Spanish-American War. The habeas petitions claimed that the detainees faced indefinite imprisonment without an opportunity to prove their innocence, asserted that they were not combatants against the United States and had not engaged in any terrorist acts, requested to be informed of the charges against them and to be allowed to meet with their families and counsel, and asked to be given access to the courts or some other impartial tribunal so they could prove their innocence.

The narrow legal question presented in *Rasul v. Bush* was this: Does the federal habeas statute grant the federal courts jurisdiction to review the detention of aliens in Guantánamo? The government offered three arguments. The federal courts lacked jurisdiction because the President has power as the commander in chief to

detain indefinitely those captured in Afghanistan. Congress had specifically authorized the indefinite imprisonment of these individuals and it has withheld from the federal courts jurisdiction over habeas petitions filed by individuals imprisoned at Guantánamo. The detainees, who pressed the federal courts to exercise jurisdiction, responded in kind: As commander in chief, the President lacks the power to detain indefinitely the Guantánamo 640; Congress had not given the executive the power to detain these individuals indefinitely; and the statute defining habeas jurisdiction did authorize the federal court to review the habeas petitions filed by the detainees.

By a vote of six to three, the court ruled in favor of the detainees. In reaching that result, the court said nothing about what should happen next. It left until another time and another case which process should be followed to determine whether the government could continue to imprison the 640 detainees. As the court stated, “[W]hether and what further proceedings may become necessary after respondents make their response to the merits of petitioners’ claims are matters that we need not address now.”

On its face, the court's opinion in *Rasul* was no trumpet of liberty, no ringing endorsement of the importance of due process, no memorable restatement of the significant linkage between having a vital democracy and a strong separation of powers doctrine. There are no lofty phrases and no uplifting sentences. Instead the opinion is written in the narrowest and most cautious of terms, and went no further in offering guidance to the lower courts than was absolutely necessary to decide the legal question before it.

The dry opinion masks the significance and vibrancy of the decision. Until the court decided *Rasul*, the Bush administration assumed that it could imprison indefinitely, and without any judicial interference whatsoever,

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those captured in a combat zone and suspected of being enemy combatants or terrorists, so long as it detained these individuals outside the United States. The court in *Rasul* torpedoed that assumption. It did so by asserting that the courts have jurisdiction over the petitions filed by the Guantánamo detainees and by leaving the ultimate reach of federal court jurisdiction in habeas cases uncertain.

The court created this uncertainty by including within its opinion statements that support both a contracted and expanded definition of habeas jurisdiction. The con-

tracting federal courts will have jurisdiction no matter where on the planet those detained are imprisoned so long as Pentagon officials in Washington control the imprisonment. These were the statements that Justice Scalia pounced on when he charged in his dissent that the majority was extending the reach of habeas statute “to the four corners of the earth.” This “breathtaking” decision, Scalia contends, permits “an alien captured in a foreign theater of active combat to bring a habeas petition against the Secretary of Defense,” thus “forcing courts to oversee one aspect of the executive’s conduct of a war.”

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tracted conception of federal court jurisdiction in habeas cases is based on statements in the opinion that make two related points. First, the court emphasizes the special and exceptional control the United States exercises over the Naval Base at Guantánamo Bay: “By the express terms of its agreements with Cuba, the United States exercises ‘complete jurisdiction and control’ over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.” Second, the court asserted that the application of the habeas statute “to persons detained at the base is consistent with the historical reach” of the writ to “so-called exempt jurisdictions,” “all other dominions under the sovereign’s control,” and a territory that was “under the subjection of the Crown.” The court emphasized that later British cases “confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of ‘the exact extent and nature of the jurisdiction or dominion exercised by the Crown.’” Combined, these two points suggest the court was signaling that although the federal court had habeas jurisdiction outside of the United States, it was quite limited, and perhaps only to Guantánamo.

The expanded conception of habeas jurisdiction rests on other statements that make jurisdiction dependent upon the court having jurisdiction over the Secretary of Defense, the ultimate custodian of alleged enemy combatants and terrorists imprisoned under the authority of the United States military. The statements provide as follows: “No party questions the District Court’s jurisdiction over petitioners custodians.... Section 2241 by its terms, requires nothing more.” If those statements measure the scope of jurisdiction that federal courts will have, then

The uncertainty created by the opinion over the reach of habeas jurisdiction was no accident. If the court intended habeas jurisdiction to reach to the four corners of the globe, there was no reason for it to emphasize the special circumstances surrounding Guantánamo or to recount the historical reach of the writ in Britain. And if the court intended habeas jurisdiction to be limited to Guantánamo or other narrowly defined areas that have a special connection to the United States, the court would not have suggested that jurisdiction existed so long as a court had jurisdiction over the custodians.

Although one can only speculate as to the reasons underlying the uncertainty created by the court’s opinion, what seems likely is that the court was trying to shape a doctrine that respected two important concerns. First, it wanted to preserve its capacity to review the possibility of indefinite confinement of aliens who are suspected of being enemy combatants or terrorists and who are imprisoned someplace other than Guantánamo. Second, the court wanted to retain discretion in future cases so that it could respect the commander in chief’s need for unfettered authority over detainees imprisoned on the battlefield or nearby and for some period of time after capture. To be responsive to both concerns, the court needed to eschew rigid rules so that it could define the future scope of jurisdiction in light of its competing concerns.

The outcome in *Rasul* was certainly a boon for the detainees. They will now be informed of the charges against them and be given an opportunity to prove facts that establish their innocence. But the outcome was more significant than that. In *Rasul*, the President insisted on the power to imprison indefinitely and without trial those captured in a combat zone. This was an

extreme claim, and in rejecting it, the court upheld the nation's traditional commitment to due process and to separation of powers. The President has the power to imprison alleged enemy combatants and terrorists, but not indefinitely, and not without some mechanism of review, at least not in the absence of specific congressional authorization.

The court's decision in *Rasul* is equally significant in another and more general respect. When placed in a historical perspective, the decision constitutes a sharp break with the court's well-established pattern of deferring to the executive branch in national security cases. In 1919, the court sustained the convictions of peaceful political dissenters who had merely criticized US involvement in World War I. In 1944, the court sustained the power of the government to intern without a hearing and without providing evidence more than 100,000 Japanese Americans. In 1951, the court sustained the conviction of leaders of the American Communist Party under the Smith Act even though their speech and activities did not present a clear or present danger. In each case, the executive exaggerated the national security danger and the members of the Supreme Court, as well as others, tended to accept the government's allegations at face value. Each episode is now widely considered a betrayal of a national commitment to separation of powers that protect democratic values and individual liberty.

There has been only one exception to this pattern of deference. In 1971, the government sought a prior restraint against *The New York Times* to bar it from publishing excerpts from the Pentagon Papers, a classified,

which had begun to publish excerpts after *The Times* had been initially enjoined) to continue to publish reports from the secret study. Although the government had predicted serious and irreparable harm to the nation's security, there is no evidence that public disclosure of the Pentagon Papers injured the national security.

By following in the footsteps of the Pentagon Papers case, the court in *Rasul* took the less traveled road. Many reasons surely prompted the justices in *Rasul* to reject the President's position, but one bears mentioning. The mystique surrounding national security and classified information has dissipated substantially in recent years. As a result, the Congress, the press, and the public routinely demand information. The essence of this point was captured by Michael D. McCurry, a White House press secretary under Bill Clinton, who was recently quoted as observing the following: "Just 10 years ago, you could basically shut off any question on anything by saying, 'That's an intelligence matter and we never discuss it.' Now that just doesn't cut it anymore, and part of the reason is that people are so skeptical of intelligence as a consequence of intelligence failures pre-9/11 and pre-Iraq war."

One of the most serious current threats to our democratic values, our traditionally open society, and our liberties during the war on terrorism is the felt needs of the national security state. Left unchecked, the executive branch may well take misguided actions as it seeks to assure security. The courts offer a potentially powerful check and reassuring counterbalance to this potential abuse of power. But for years the court deferred to the

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7,000-page study of America's involvement in Vietnam spanning the period from the end of World War II to 1968. In support of its request, the government maintained that the threatened disclosures would reveal war plans, compromise intelligence operations, and undermine efforts to negotiate a settlement. The Nixon administration argued that the court should accept its allegations as true because it had primary responsibility for national security and the courts lacked the expertise to assess national security considerations. After 16 days of frenetic litigation, the Supreme Court denied the government the injunction it sought, which permitted *The New York Times* (as well as *The Washington Post*,

executive branch and inappropriately diminished its own power in national security cases, thus contributing to an unhealthy imbalance of power and the needless loss of liberty.

The decision in *Rasul* suggests that the high court, similar to the Congress, the press, and the public, may be much less accepting of government representations that courts stay out of certain areas because of national security do-not-enter signs. If this turns out to be true, then *Rasul* will come to be viewed as the moment when the high court began to correct a harmful and regrettable pattern. Such a development would be a good thing for our freedom and our democratic order. ■