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an unanticipated consequence of
Jack M. Balkin

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The Anti-Torture Memos (arranged by topic)

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Suspending Habeas Corpus at Guantánamo and

Wednesday, October 04, 2006

Suspending Habeas Corpus at Guantánamo and Beyond

Guest Blogger

Jonathan Hafetz

One of the most significant aspects of the Military Commissions Act of 2006 ("MCA") is its repeal of habeas corpus jurisdiction. Section 7 of the MCA eliminates habeas for an "alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." Does this provision violate the Constitution's Suspension Clause?

Challenges to the MCA's habeas repeal will be addressed in the Guantánamo detainee litigation, where two lead cases are pending before the D.C. Circuit, *Al Odah v. United States* and *Boumediene v. Bush*. In *Al Odah* (captioned in the district court as *In re Guantanamo Detainee Litigation*), Judge Joyce Hens Green invalidated the Combatant Status Review Tribunal ("CSRT"), established to determine whether Guantánamo detainees were enemy combatants. Judge Green found that the Guantánamo detainees were protected by the Fifth Amendment's Due Process Clause and that the CSRT violated due process by denying them access to counsel, preventing them from seeing the government's evidence, and permitting evidence gained by torture. In *Boumediene*, by contrast, Judge Leon concluded that Guantánamo detainees had no cognizable rights, notwithstanding the Supreme Court's ruling in *Rasul v. Bush*, 542 U.S. 466 (2004), that the detainees could challenge their confinement by habeas corpus.

As a threshold matter, precedent supports the conclusion that Guantánamo detainees have a constitutional right to habeas. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), Chief Justice Marshall suggested that even though judges must have a statutory basis to issue the writ, the Suspension Clause obligates Congress to establish habeas jurisdiction, as Congress did in the Judiciary Act of 1789. The Court revisited Marshall's statement in *INS v. St. Cyr*, 533 U.S. 289 (2001), suggesting that statutory habeas jurisdiction is constitutionally compelled by the Suspension Clause.

But even so, do aliens detained at Guantánamo fall within the Suspension Clause's protections? *Rasul* suggests they do and informs the constitutional analysis in several ways.

First, *Rasul* drew upon history, explaining that the common law writ remained available to individuals in territory under the control of the English crown. Viewed in that light, Guantánamo is an easy case given more than a century of exclusive U.S. jurisdiction and control. *Rasul*'s historical analysis is of constitutional salience because, as *St. Cyr* instructs, the Suspension Clause at least protects the common law writ as it existed in 1789. And, in 1789, the writ would have run to an enclave like Guantánamo.

Second, *Rasul* distinguished *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in two ways. For purposes of the habeas statute, the Court concluded that under *Braden v. 30th Judicial Circuit of Ky.*, 410 U.S. 484 (1973), a habeas petitioner does not need to be within the district court's territorial jurisdiction (as he did at the time *Eisentrager* was decided). Hence, the Guantánamo detainees could invoke a district court's jurisdiction under the plain terms of the habeas statute. The Court, however, also distinguished *Eisentrager* because, among other things, the petitioners there were *conceded* enemy aliens who had been tried and convicted by a military tribunal, not held indefinitely without trial. For this reason *Eisentrager*, as Steven Vladeck and others have pointed out, may be read as a decision on the merits. And, on the merits, *Eisentrager* is a very different case.

Finally, appellate review of a CSRT finding under last year's Detainee Treatment Act ("DTA") does not alleviate Suspension Clause concerns because it fails to provide a constitutionally adequate substitute for habeas under *Swain v. Pressley*,

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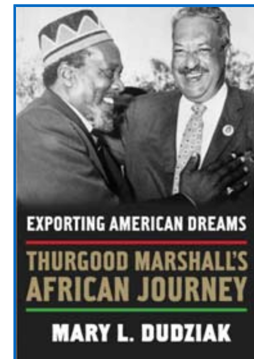
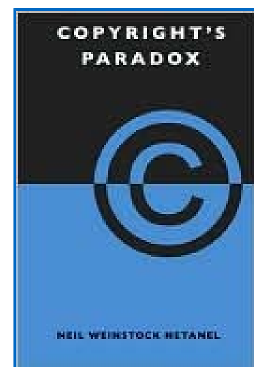
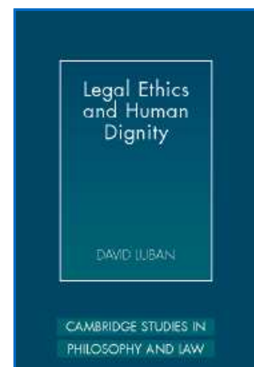


Mary Dudziak, Exporting American Dreams: Thurgood Marshall's African Journey (Oxford University Press 2008)



Neil Netanel, Copyright's Paradox (Oxford Univ. Press 2008)



David Luban, Legal Ethics and Human Dignity (Cambridge Univ. Press 2007)

430 U.S. 372 (1977). As *St. Cyr* makes clear, the DTA's scope of review must encompass legal and constitutional claims, including the lawfulness of the administration's designation of a prisoner as an "unlawful enemy combatant" and whether the CSRT violates due process. Yet, the statute, as written, arguably precludes that review, asking only whether "the use" of CSRT procedures is unlawful. But even if the DTA permitted that review, it would still fall short of the Suspension Clause's requirement by foreclosing any meaningful examination of the factual basis for a prisoner's detention.

As I previously argued for *amici* in the D.C. Circuit, habeas review traditionally guaranteed a searching inquiry into factual allegations in cases of executive detention without trial (as opposed to the narrower review in post-conviction cases, where the prisoner was afforded due process at trial). These common law protections were later codified in the federal habeas statute, 28 U.S.C. § 2241 *et seq.*, a point noted by both Justice O'Connor in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and Judge Muskasey in *Padilla ex rel. Newman v. Bush,* 233 F. Supp. 2d 534 (S.D.N.Y. 2002), who saw the statute as providing a skeletal outline of due process independent from the Fifth Amendment. Indeed, it was when the administration recognized that the D.C. Circuit might actually force it defend its detentions in district court on habeas (including by entertaining allegations that evidence was obtained under duress), that it engineered passage of the DTA. Call it legislation as cover-up. In short, DTA review by the D.C. Circuit of a CSRT finding would not provide what common law habeas provided, but instead sanction indefinite detention without an opportunity to submit evidence or rebut the government's allegations before a neutral decisionmaker. The CSRT's basic inadequacy, coupled with the DTA's narrow scope of review, does not satisfy the constitutional core of habeas.

A habeas case filed on the eve of the MCA's passage challenging detentions at Bagram Air Base in Afghanistan will also raise issues important Suspension Clause issues. To be sure, Bagram does not possess the same century-long exclusive U.S. jurisdiction and control that makes Guantánamo unique. On the other hand, there is no alternative review scheme for detentions at Bagram since the DTA's review mechanism applies only to detainees at Guantánamo. Thus, Bagram will force courts to confront the legal black hole they faced at Guantanamo before *Rasul*. It will also highlight the perverse incentives created by a jurisprudence that provides for review of detentions at Guantánamo but denies it at other off-shore prisons, allowing the administration to transfer prisoners to avoid the reach of the writ, exactly what habeas traditionally sought to prevent.

Posted 8:59 AM by Guest Blogger [link]

Comments:

Jonathan Hafetz:

You have obviously done a great deal of research into this issue. Are you aware of a US or British court granting habeas corpus review of a captured alien enemy combatant pursuant to the Constitution or a statute before this conflict?

Thanks in advance.
posted by Bart DePalma : 10:07 AM

Guest Blogger Jonathan Hafetz: *...do aliens detained at Guantánamo fall within the Suspension Clause's protections?*

Bart: *Are you aware of a US or British court granting habeas corpus review of a captured alien enemy combatant...*

First, Welcome, Jonathan! I'm sure the conversations will greatly benefit from your in-the-trenches experience.

The question you ask, and Bart's response, should perhaps match up, but in reality they refer to two peripherally related classes of person. But Bart's question is a bit of a non sequiter, because his group, "alien enemy combatants" would seem best described as folks captured on the battlefield and subject to Prisoner of War status. And some of the prisoners in Guantanamo and the CIA's secret prison system are just that, people who were caught raising arms against our military in pitched battle in Afghanistan (or so I'm willing to stipulate.) But for this class of person there is no need to invent a new

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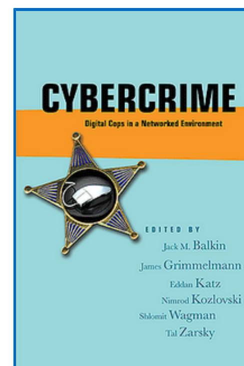
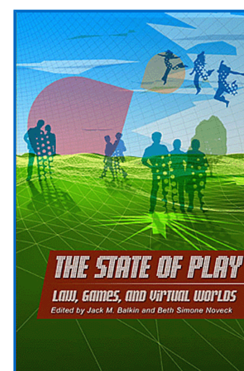


Jack M. Balkin, James Grimmelmann, Eddan Katz, Nimrod Kozlovski, Shlomit Wagman and Tal Zarsky, eds., Cybercrime: Digital Cops in a Networked Environment (N.Y.U. Press 2007)



Jack M. Balkin and Beth Simone Noveck, The State of Play: Law, Games, and Virtual Worlds (N.Y.U. Press 2006)

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category of prisoner nor new rules for their treatment.

Just because a thing is democratically voted in doesn't make it right, or even legal. Slavery was legal, Constitutionally so, for a long time, but it was never right. My question, is it right to invent new categories of prisoner, thereby allowing the administration leeway in its treatment of prisoners at Guantanamo who came there by means other than being picked up in pitched battle or as the result of legitimate criminal justice procedures?

The simple answer for most of the simple public today is a clear affirmative, because most of the simple public have accepted the fallacy that we are "facing a new kind of enemy in a new kind of war." You and I and any rational commentator know this is false; hijacking is not new, suicide missions are not new, killing civilians is not new. But based on the notion of a "new" kind of enemy and "new" kind of war we have elevated the rhetorical equivalent of the war on poverty into an ever spreading attack on all limits to executive power and the intelligence community. The root of all of it is the Authorization for Use of Military Force passed by Congress on September 18, 2001, legislatively embodying the "war" on "terror," and giving the President (this one and any successor during the life of the "war") a blank check---at least so far as the letter of the authorization reads. "...those nations, organizations, or persons **he determines** planned, authorized, committed or aided the terrorist attacks..."(emphasis added) Note there isn't even the restriction that he must *reasonably* determine; this is a blank check from the legislative branch to the executive branch, and only the undemocratic judiciary has had the will or ability to set limits on it to date.

You ask if aliens detained at Guantanamo fall within the Suspension Clause's protections, and I answer that it depends on what flavor prisoner they be. I would argue the answer is fairly clear, depending on whether they are a bona fide prisoner of our unprovoked invasion and occupation of Afghanistan or Iraq, or if they are a bona fide prisoner of a criminal investigation. But I am as yet unconvinced of the need for or possible legitimacy of creating new designations of prisoner. I am a hard case who also doesn't see the value of calling kidnapping and disappearing "rendition." I know, Jonathan, that in your work you are forced to operate within a framework that accepts this odious notion of a "war" on "terror" and the "need" for new shades of grey which allow the administration to disappear people, torture them and hold them indefinitely without recourse to representation or trial. I hope you find all the moral and strategic support you could hope for, here at Balkinization and in all of your work.

posted by Robert Link : 10:50 AM

Oh robert,

You wrote, "But Bart's question is a bit of a non sequiter, because his group, "alien enemy combatants" would seem best described as folks captured on the battlefield and subject to Prisoner of War status. And some of the prisoners in Guantanamo and the CIA's secret prison system are just that, people who were caught raising arms against our military in pitched battle in Afghanistan (or so I'm willing to stipulate.) But for this class of person there is no need to invent a new category of prisoner nor new rules for their treatment."

Go read the 3rd Geneva Convention and get back to us. The plain text quickly disposes of your thoughts on "what seems best." Of course, you could be making a normative argument, but I dont think you are.

Finally, anytime someone spouts about our "unprovoked invasion" of Afghanistan my wacko senser goes off the charts. Iraq is completely arguable. But, Afghanistan was unprovoked? Come on. (you can make an argument over whether it was worth it - weak argument, but possible to make. but yours is just laughable).

posted by humblelawstudent : 11:49 AM

Robert Link said...

The question you ask, and Bart's response, should perhaps match up, but in reality they refer to two peripherally related classes of person. But Bart's question is a bit of a non sequiter, because his group, "alien enemy combatants" would seem best described as folks captured on the battlefield and subject to Prisoner of War status.

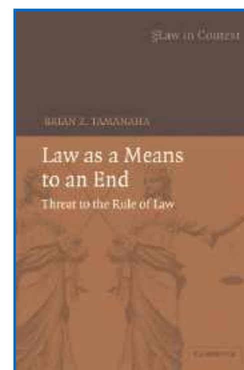
Just to clarify, I am using the term "alien enemy combatants" because the Supreme Court in St Cyr noted that habeas has only been extended in the past by by Britain and the US to citizens and alien noncombatants. "Alien enemy combatants" would be therefore the remaining group to which habeas corpus review has not been extended in the past.

I do not make a distinction between lawful and unlawful alien enemy combatants, both would be included in my term "alien enemy combatants."

Historically, the military, not the courts, have determined the status of a capture as a lawful or unlawful enemy combatant or as a civilian.

Prior to this conflict, I am unaware of any British or US court extending habeas review

Andrew Koppelman, Same Sex, Different States: When Same-Sex Marriages Cross State Lines (Yale University Press 2006)



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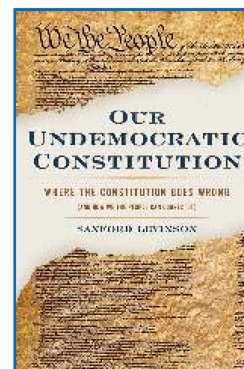

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to captured alien enemy combatants. However, I have not performed the research which Mr. Hafetz has on this issue, thus, my inquiry.

But for this class of person there is no need to invent a new category of prisoner nor new rules for their treatment.

Actually, the MCA grants greater rights than we have historically granted unlawful enemy combatants fighting in civilian clothing or in our uniforms. Apart from our grant of POW status to the Viet Cong, the US military has summarily executed unlawful combatants as they did captured SS in US uniforms during WWII. Due process historically was a battlefield determination if the capture in civilian clothing was a combatant.

posted by Bart DePalma : 11:51 AM

The Canadian commission which spent three years examining the Arar matter has a website here. Besides the packets of cases in the DC court, there may be added political pressure feasibly brought to bear from the international community as embodied in our good neighbor and trade partner to the north.

I am still reading the report; the summary is in a set of three documents which total about 5MB pdf, qpproximately 1,000 pages; the website also links to transcripts and other uninterpretive data. At first look it seems to be a case which will add impact to concerns in the US regarding to a matter related to habeas, treatment of prisoners according to conventional norms.

posted by John Lopresti : 1:47 PM

Bart: *Due process historically was a battlefield determination if the capture in civilian clothing was a combatant.*

We continue to talk past each other, across a divide on one side of which your only focus is on expedient means of "getting the bad guys" and the other side of which I am talking about the dangers presented by your expedient means. You seem quite incapable of discussing the handling of innocent persons who will inevitably be caught in this net. Honor requires that we care deeply. And I believe you are a man of honor, truly.

posted by Robert Link : 2:15 PM

"humble," You would do me, your point, and the rest of the readers of this thread a favor to include a link to the relevant portion of the Geneva Convention. Feel free to email me a relevant section if you can't find a link to share (liberty, repeal-aumf, com; you can figure how the pieces go together.) I would have replied by direct email but you are posting anonymously and your blogger profile offers nothing of value for deepening the conversation.

Enjoy your chuckles, but when you're through please also help me find the source for your contention that the sovereign nation of Afghanistan initiated hostilities with the United States. I have an open mind; educate me. My understanding is that, having openly aided and abetted bin Laden and failed to renounce his acts our leaders felt justified to declare war on Afghanistan. But as we learn in 1l, there are distinctions between accomplice, conspirator, perpetrator and accessory, with the most severe punishments largely held in reserve for actual perpetrators. Are there not similar distinctions to be made in the international field? I'm sure we agree that the nation of Afghanistan was not the perpetrator; perhaps yours is a co-conspirator argument? While it seems likely specific Afghani state officials could qualify as such, the state itself is probably best seen only as an accessory rather than an accomplish (at the risk of over extending the metaphor.)

posted by Robert Link : 2:39 PM

Bart:

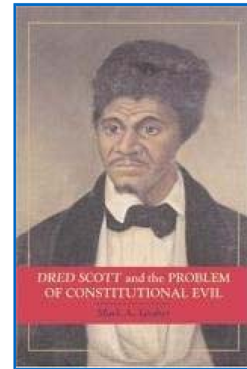
You keep talking about enemy combatants *captured in actual combat.* What about cases of local warlords looking for a bounty who hand someone over to us and say, "This guy is Al-Qaeda." Because there have been a lot of those. How do you classify them?

posted by Enlightened Layperson : 2:49 PM

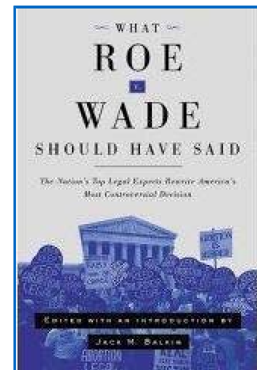
Robert Link said...

Bart: Due process historically was a battlefield determination if the capture in civilian clothing was a combatant.

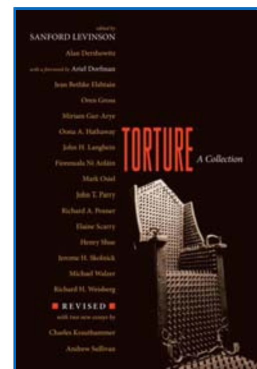
We continue to talk past each other, across a divide on one side of which your only focus is on expedient means of "getting the bad guys" and the other side of which I am



Mark Graber, Dred Scott and the Problem of Constitutional Evil (Cambridge University Press 2006)



Jack M. Balkin, ed., What Roe v. Wade Should Have Said (N.Y.U. Press 2005)



Sanford Levinson, ed., Torture: A Collection (Oxford University Press 2004)

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talking about the dangers presented by your expedient means. You seem quite incapable of discussing the handling of innocent persons who will inevitably be caught in this net. Honor requires that we care deeply. And I believe you are a man of honor, truly.

We apparently are talking past one another. I was limiting myself to the question of law of whether aline enemy combatants have a constitutional right to habeas corpus. You are raising a question of policy.

I would argue that a military commission run by a JAG judge experienced in both legal **and** military matters would be a far more competent judge of whether a capture is likely to be an enemy combatant than would a civilian court whose experience is limited to civilian criminal matters.

Al Qeada are not common criminals. This enemy is trained to lie convincingly and mislead interrogators under torture as are our special operations soldiers who undergo SERE training.

http://www.usdoj.gov/ag/
manualpart1_1.pdf#search=%22al%20qaeda%
20manchester%20training%20manual%22

Consequently, as Justice Scalia properly observed in his Hamdan, judicial intervention into military commissions "brings the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent."

http://www.law.cornell.edu/supct/html/
05-184.ZD.html

Moreover, the balance of interests on the battlefield between the enemy and surrounding civilians is fundamentally different than the balance between guilty and innocent civilians in the criminal justice system.

It is said that it is better to release ten guilty persons than convict one innocent under our criminal justice system. That makes sense when the vast majority of civilian criminal suspects are not dedicated to killing you.

However, in a war, the mission to kill or capture the enemy comes before the general welfare of the citizenry the enemy is fighting amongst. While you take all reasonable measures to protect the surrounding civilians, the mission comes first because the enemy is trying to kill or capture you. Civilian casualties are a necessary part of winning a war.

The balance is the same with military captures. The military needs to provide reasonable measures to determine whether a capture is a combatant or a civilian. However, this determination is not beyond a reasonable doubt. If there is good reason to believe the capture is a combatant, then you proceed on that assumption knowing that some civilians who cannot reasonably explain their presence on the battlefield will be detained as well. Detention is nothing compared to dying as "collateral damage" on the battlefield.

For example, there are several detainees in Gitmo who insist they they are innocent Gulf State arabs who just happened to be in Afghanistan in the company of al Qaeda and Taliban because they were seeking work or undergoing "religious training.

This song and dance might be enough to win a civilian habeas hearing and certainly has many prominent legal scholars outraged.

However, the story makes no sense to a military expert in Afghanistan. Arabs from rich Gulf Oil States with plenty of their own religious schools do not emigrate to the one of the poorest nations on Earth and hang out with the enemy to find a job or go to school.

Rather, these arabs match the profile of an al Qaeda terrorist to a "T." Civilian courts frown on profiles. However, counter terrorism experts must use profiling to separate terrorists acting as civilians from real civilians.

One aside, if I may. In a counter terror war against a world wide terrorist organization, the entire world is the battlefield. The fact that we may have captured al Qeada in the EU and around Africa far away from the battlefields in Iraq and Afghanistan is irrelevant. The enemy is the enemy.

posted by Bart DePalma : 3:31 PM

Enlightened Layperson said...

Bart: You keep talking about enemy combatants captured in actual combat. What about cases of local warlords looking for a bounty who hand someone over to us and say, "This guy is Al-Qaeda." Because there have been a lot of those. How do you classify them?

There is nearly no indigenous Arab communities in Afghanistan. The Arabs were known

to and hated by the Afghanis as al Qaeda, After we liberated Afghanistan, we did give bounties to round up al Qaeda and the Afghanis rounded up the Arabs and gave them to us. We have released hundreds of these captures after interrogating them in Afghanistan. Those who appeared to be enemy combatants were shipped to Gitmo. Nearly half of them were released after further interrogation.

The process is rough justice, but there is no better way of which I am aware to identify an enemy intent on disguising himself as civilians.

posted by Bart DePalma : 3:37 PM

This forum is frequented by a poster named "Bart." Visitors to this forum should understand the following about Bart:

Bart has no interest in understanding you. Bart will only read your words to see if he can somehow twist them to his purposes.

Bart will pretend that he is open to honest debate and has pure intentions. Bart lies. Bart has no regard for facts or logical argument.

Bart is a bully and coward. Bart will bludgeon other posters with harsh rhetoric and flawed arguments and proclaim victory on the basis of having shouted the loudest. When called on it, Bart will claim that he is the victim of injustice.

Bart never apologizes and sees such actions as a sign of weakness. Do not apologize to Bart.

Bart has no sense of humor. Irony and sarcasm are wasted on Bart.

Bart is only useful as the target of ridicule for his intellectual superiors. Happily, he is marvelously effective in this capacity. Bart should be mocked and ridiculed at every opportunity. There is no need to address the substance of his remarks. (There isn't any.)

In his youth, Bart dreamed of becoming a journalist, but his poor academic performance and weak moral character left him to an increasingly tragic career in prostitution. Happily for Bart, the current administration cannot tell the difference between journalism and prostitution. Bart now makes a living wage as a paid sock puppet of the Vast Right-Wing Conspiracy.

Remember, when Bart smiles, the terrorists win.

posted by pelvic_thrust : 3:58 PM

But Bart,

What about people "captured" on the streets of Los Angeles or Memphis or anywhere else? If they are non-citizens, they will be unable to get into court on a habeas writ to dispute the determination by the Executive Branch that they are enemy combatants because, well, the Executive Branch has determined that they are enemy combatants. The danger posed by a law that allows this to happen should be obvious. Even if you believe that we have (and always will have) a benevolent Executive Branch, you can't believe that we have an infallible Executive Branch.

Anyway, it's not really about whether we think the military has competent and honest personnel making these decisions. It's about making sure that our constitution and laws don't predicate the existence of our most fundamental rights on the assumption that people in positions of power in any one branch of government are always competent and honest and infallible.

This "War on Terror" extends far beyond what we recognize as warfare in the conventional sense, and that is at the very heart of the problem. I think we could have avoided all of this by keeping warfare and criminal justice matters separate and circumscribed more or less by their traditional bounds. But, that's another argument for another day.

posted by Psittakos : 4:11 PM

Robert,

Since you won't take the five seconds to look up the Geneva conventions, I'll post it here for your convenience. This is Article IV of the 3rd Geneva Convention. It lists the requirements for someone to fall under POW status. Al-Qaeda fighting in Afghanistan most definitely do not fall under its protection.

"Article 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

2. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention. "

posted by humblelawstudent : 4:12 PM

Text in the previous post copied from http://www.unhchr.ch/html/menu3/b/91.htm

As to your second point, when in your 1L class did you learn that domestic law on conspiracy and the like directly comports to international law? I sure must have missed that class. While, you may be able to derive useful (or not) analogies they are hardly dispositive. Our actions against Afghanistan don't have to be (and shouldn't be) justified from the perspective of domestic law. While broad principles inherent to both types of law may be applicable to each, the specifics are not.

posted by humblelawstudent : 4:20 PM

"Bart" DePalma dissembles:

However, in a war, the mission to kill or capture the enemy comes before the general welfare of the citizenry the enemy is fighting amongst. While you take all reasonable measures to protect the surrounding civilians, the mission comes first because the

enemy is trying to kill or capture you. Civilian casualties are a necessary part of winning a war.

Even if we were to allow for sake of argument the claim that battlefield exigencies dictate a different balance of interest, WTF does that have to do with what happens once you've captured them (or had them handed over by warlords), disarmed them, and transported them half way around the globe?

Cheers,

posted by Anonymous : 4:33 PM

"Bart" DePalma explains it all for us:

The enemy is the enemy.

Thus, *habeas corpus* (a/k/a "The Great Writ") is at best superflous, and has become, in our post-911 "Brave New World", a quaint and outmoded idea from a far gentler time (you know, like those halcyon days of peace of the American Revolution or the plains of Runnymede).....

If you need to know where "Bart" is coming from (outside of '30s Germany), this is it.

Cheers,

posted by Anonymous : 4:40 PM

"Bart" DePalma makes a spelling error:

Nearly half of them were released after further interrogation.

Here, let me fix that:

"Nearly half of them were released after coercive interrogation, hunger strikes, three 'homicide suicides' (which out military gratuitously termed just a different form of 'attacking' us), intense international pressure, complaints from the ICRC, **and four *years* captivity**."

Much better.

Cheers,

posted by Anonymous : 4:44 PM

Bart DePalma wrote:

One aside, if I may. In a counter terror war against a world wide terrorist organization, the entire world is the battlefield.

Thus your implied advocacy for a general suspension of habeas. Why not just come out and say it?

posted by Tonal Crow : 4:47 PM

humble,

Thanks for the link. I could do without the condescending tone, but don't suppose there's much to be done about it. If you read a little closer you will see I already confessed my analogy might be overburdened. Still, in your haste to chide me for making it you fail to actually refute it. Maybe I should ask directly: Do you consider the nation of Afghanistan to be the prime mover in the attacks of September 11, 2001, such that we can say "they started it!"?

I won't have time to read the material you cut-and-pasted from the Geneva document until later today or tomorrow; it warrants a clearer mind than I can give while at the day job. I'm not sure what the jab about "taking five seconds" does for your position; of course I could have googled for it. Nonetheless, I am more likely to understand your argument if *you* make it rather than if I look for it in some referenced document.

posted by Robert Link : 5:43 PM

Robert,

Its simple. I disputed two of your points. The first was that you positived that Al-Qaeda captured in Afghanistan should fall under the POWs protections of the geneva convention. The 4th article of the 3rd Geneva Convention specifically lays out four conditions that must be met if the terrorists we captured in Afghanistan would receive

POW protections. Those we captured arguably fail most if not all of the stipulations.

Your second point was that we attacked Afghanistan "unprovoked." I counterposed that we were anything but unprovoked. You then argued that certain categories of domestic law are (or should be) relevant to international law regarding determitions of the responsibility of regimes that harbor terrorists. I responded that it is a mistake to transpose the particular categories of domestic law onto the international law arena and that while certain broad principles surely do run through both - the specifics hardly do.

posted by humblelawstudent : 5:58 PM

Psittakos said...

But Bart, What about people "captured" on the streets of Los Angeles or Memphis or anywhere else?

I am not discussing the reach of judicial habeas corpus review. Rather, I am arguing that alien enemy combatants have no right to habeas corpus review by our civilian courts under statute or the constitution no matter where they are captured.

I will leave whether the Rasul decision on the reach of habeas corpus was correct to a different day.

The danger posed by a law that allows this to happen should be obvious. Even if you believe that we have (and always will have) a benevolent Executive Branch, you can't believe that we have an infallible Executive Branch.

To my knowledge, democracies have always left the disposition of alien enemy combatant captures to their executives because they have the competence in military matters. No government is always benevolent or infallible, but our executive does not have these qualities in any more or less abundance than does the judiciary. The executive is simply the best branch to deal with this issue.

posted by Bart DePalma : 6:11 PM

Tonal Crow said...

Bart DePalma wrote: One aside, if I may. In a counter terror war against a world wide terrorist organization, the entire world is the battlefield.

Thus your implied advocacy for a general suspension of habeas. Why not just come out and say it?

I am not the one coflating the rights of citizens and alien enemy combatants under the Constitution. Rather, I am drawing a bright line between the two. Therefore, what happens concerning the latter has no effect on the former.

posted by Bart DePalma : 6:15 PM

I would like to apologize to Professors Balkin, Lederman and Levinson, as well as anyone else who is here for a serious discussion, for having certain flamers follow me here from other blogs on which I post.

I am going to ignore these flamers and do my best not to encourage them.

posted by Bart DePalma : 6:18 PM

humble: *Those we captured arguably fail most if not all of the stipulations.*

I would think this statement, if accurate, tends to support rather than dispute my point, in that "arguably fails most" seems to imply "arguably passes some" and in all cases you are agreeing it's arguable. A quick look at the section you posted (thanks again for that) leaves my opinion unchanged: either a prisoner fits those criteria and should be treated accordingly, or they don't and should instead be treated by extant law. I see nothing to justify creation of a shadow designation.

On my other point, I offered an example in domestic criminal law and then asked, "*Are there not similar distinctions to be made in the international field?*" You eventually replied, "*certain broad principles surely do run through both - the specifics hardly do.*" So far so good, we agree completely. I ask again: Do you consider the nation of Afghanistan to be the prime mover in the attacks of September 11, 2001, such that we can say "they started it!"? An affirmative here would dispute (but not refute) my statement about our invasion and occupation of Afghanistan; we could at least agree to disagree or research further for factual support of our opinions.

posted by Robert Link : 6:27 PM

Bart: *I am not the one coflating the rights of citizens and alien enemy combatants under the Constitution. Rather, I am drawing a bright line between the two. Therefore, what happens concerning the latter has no effect on the former.*

Please pardon my replying to this rather than your lengthy direct reply to me; it's just that this really seems to me to be the meat of our conversation. I, and folks such as some of our hosts here at Balkinization, do indeed fear that measures aimed at the latter will have a great effect on the former. In particular the language of the MCA, in creating the designation "unlawful enemy combatant" with such broad language, could well come to be used against you and me and anyone else who disagrees with the then-powers-that-be. I understand if your focus is on other matters, such as the implacability of some of our enemies, but you must likewise understand that the conversation as started by the posts of our hosts are centered on how MCA and similar legislation can go astray and be used to rob the innocent, alien or citizen, of thier rights. And it isn't a matter of the percentage of innocents condemned to guilty ones set free; the issue is what that percentage could become if this legislation were to be wielded without good faith by an unscrupulous executive.

posted by Robert Link : 7:01 PM

Bart DePalma said:

I am not the one co[n]flating the rights of citizens and alien enemy combatants under the Constitution. Rather, I am drawing a bright line between the two. Therefore, what happens concerning the latter has no effect on the former.

When (a) the law enables the executive conclusively to deem a person to be an "enemy combatant" based upon any criteria the executive wishes to apply; (b) the law prohibits judicial review of this determination; and (c) the law does not explicitly provide a means to prove or disprove alienage, then that law does, for all practical purposes, 'conflate[] the rights of citizens and alien enemy combatants."

A citizen swept up into the MCA rubric very possibly will be unable to obtain judicial review of not only an executive determination that he's an "enemy combatant," but also of an executive determination that he's an "alien enemy combatant."

That's a serious problem that you seem unwilling to acknowledge.

Is it impolitic to say directly whether you favor a general suspension of habeas?

posted by Tonal Crow : 7:19 PM

Robert,

Ah!!! Sorry, getting frustrated here. Below is the specific relevant portion. You should notice, that ALL four, a,b,c,d and must be met. Therefore, failing even one of the requirements negates the whole. B and D are not met by any Al-Qaeda that I have ever heard of. Further, D categorically goes against them. A and C are arguable. However, having failed surely D and B, that in and of itself removes any possible POW protections for members of Al-Qaeda, even those captured in Afghanistan. Here is the text again...

"Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.
"

That should definitively clear up your confusion on the matter.

As to your other point, I'm not going to take the time to rehash the general arguments over invading Afghanistan. There are plenty of sources - articles and academic pieces that explain it however you would like it explained.

I really don't want to humor your attempt at analogies between international law and domestic law in this context, because I think the differences destroy any analogy's ability to provide any insight into the matter. There are superficially analogous situations, but the complexity makes using any such analogies dangerous. Each must be regarded on its own merits.

posted by humblelawstudent : 7:30 PM

Tonal Crow said...

Bart DePalma said: I am not the one co[n]flating the rights of citizens and alien enemy combatants under the Constitution. Rather, I am drawing a bright line between the two. Therefore, what happens concerning the latter has no effect on the former.

When (a) the law enables the executive conclusively to deem a person to be an "enemy combatant" based upon any criteria the executive wishes to apply...

This is incorrect. The MCA defines lawful enemy combatants and the plain meaning of the term "enemy combatant" means that noncombatant civilians are not part of that group.

(b) the law prohibits judicial review of this determination;

This is nothing new. The MCA merely reverses Rasul and Hamdan to return us to the status quo ante prevailing during the prior 200 some years..

(c) the law does not explicitly provide a means to prove or disprove alienage...

Oh come on, there is not a single case where the military has not properly determined the alienage of a capture.

A citizen swept up into the MCA rubric very possibly will be unable to obtain judicial review of not only an executive determination that he's an "enemy combatant," but also of an executive determination that he's an "alien enemy combatant." That's a serious problem that you seem unwilling to acknowledge.

I'm sorry, but that sounds more like a paranoid conspiracy theory. This postulate cannot be a serious problem unless it is actually happening.

Is it impolitic to say directly whether you favor a general suspension of habeas?

No, I most certainly do not. I simply object to extending the rights and privileges of US citizens under the Constitution to alien enemy combatants for the reasons which I have stated.

posted by Bart DePalma : 8:52 PM

Bart DePalma said:

This is incorrect. The MCA defines lawful enemy combatants and the plain meaning of the term "enemy combatant" means that noncombatant civilians are not part of that group.

I am sorry to have to say this, but you intentionally are mis-stating the law here. Your "plain meaning" flies in the face of the MCA's statutory definition. That definition, which we have discussed numerous times, includes within the term "unlawful enemy combatant" any person whom a tribunal established by the President or SoD determines to be so, under any criteria the President or SoD directs it to use. That could be anyone, and you know it, I know it, and everyone else here knows it.

[I said:] ***(c) the law does not explicitly provide a means to prove or disprove alienage...***

Oh come on, there is not a single case where the military has not properly determined the alienage of a capture.

In other words, you are telling us to have faith that the executive will not make mistakes or abuse his authority. That is appropriate for monarchies and dictatorships, but not for representative democracies. For good reason, we seek enforceable legal guarantees.

[I said:] ***A citizen swept up into the MCA rubric very possibly will be unable to obtain judicial review of not only an executive determination that he's an "enemy combatant," but also of an executive determination that he's an "alien enemy combatant." That's a serious problem that you seem unwilling to acknowledge.***

I'm sorry, but that sounds more like a paranoid conspiracy theory.

Thank you for implicitly admitting the possibility, and also for flinging such transparent political rhetoric. What's next? Accusations of donning a "tinfoil hat?"

This postulate cannot be a serious problem unless it is actually happening.

Many people said the same thing about terrorists flying planes into buildings and about Hitler invading Europe. Contrariwise, those who framed and ratified the Constitution and the Bill of Rights discussed many usurpations that were hypothetical at the time. Were

they fools for doing so?

Finally, I'd note that "it" could well be "actually happening" without us knowing the first thing about it. That's yet another reason to be extremely careful about granting broad, unreviewable authority to the executive.

[I said:] ***Is it impolitic to say directly whether you favor a general suspension of habeas?***

No, I most certainly do not. I simply object to extending the rights and privileges of US citizens under the Constitution to alien enemy combatants for the reasons which I have stated.

You're contradicting yourself, as shown above.

For what it's worth, I think it's appropriate to recognize different rights for (a) actual combatants captured on a recognized battlefield (where "battlefield" is not defined so broadly as to make the term meaningless) versus others; and (b) citizens versus non-citizens. The devil is in the details. You have no problem with unlimited executive discretion on the definition of "unlawful enemy combatant," even as you deny the clear language of the statute that grants that discretion. I have a big problem with that discretion.

By the way, statutes include definitions for a reason.

posted by Tonal Crow : 9:36 PM

Bart said: "Actually, the MCA grants greater rights than we have historically granted unlawful enemy combatants fighting in civilian clothing or in our uniforms. Apart from our grant of POW status to the Viet Cong, the US military has summarily executed unlawful combatants as they did captured SS in US uniforms during WWII."

I think we can infer from this that Bart believes that anyone fighting against the US is completely within their rights under international law and any conception of morality to summarily execute any US special forces member or CIA agent captured out of uniform.

Do I have you wrong, Bart? And if I do, exactly which principle of law says that the US can do whatever it wants but others are constrained?

posted by Dilan : 9:41 PM

Dilan,

If I understand you correctly, then yes, covert CIA operatives and special forces fighting behind enemy lines and out of uniform can be executed by the enemy. It's what we did do the German saboteurs during WW2 - and rightfully so. At least that is my understanding of how it has always been.

posted by humblelawstudent : 10:21 PM

"Bart" DePalma said:

To my knowledge, democracies have always left the disposition of alien enemy combatant captures to their executives because they have the competence in military matters.

"[C]ompetence in military matters"! Ha-ha-HAH-HAAAHHhhh-Haaaaa-Heeeee-heh... Say, anyone seen any "competence in military matters around these parts? *Anyone*?!?!?

You know, if you *need* an ironclad example as to why the Founders so wisely rejected a preznit with all kinds of powers like this (as well as deciding who's a criminal and who's not), you need look no farther than the Dubya maladministration for a poster child.

Cheers,

posted by Anonymous : 10:57 PM

"Bart" Depalma said:

I would like to apologize to Professors Balkin, Lederman and Levinson, as well as anyone else who is here for a serious discussion, for...

Here, let me finish that: "... bringing my own brand of solipsism and sophisty to yet another blog. Sorry that so much of your valuable bandwidth will be wasted by me getting trounced yet again. And I apologise in advance for any miscites of cases or even statutory law I might come up with, and for claiming that dicta have the force of law (or conflating the two as is my wont), but I'll never admit to such."

Just a FYI, folks. Remember: "The enemy is the enemy", according to "Bart". But you who still have free will and some remanent freedom to think get to decide yourself who the "enemy" is here.

Cheers,

posted by Anonymous : 11:03 PM

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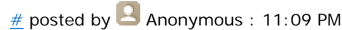
robert link [to "Bart"]:

[y]ou must likewise understand that the conversation as started by the posts of our hosts are centered on how MCA and similar legislation can go astray and be used to rob the innocent, alien or citizen, of thier rights. And it isn't a matter of the percentage of innocents condemned to guilty ones set free; the issue is what that percentage could become if this legislation were to be wielded without good faith by an unscrupulous executive.

"Bart" doesn't care about precentages. To "Bart", so what if a few eggs get cracked. People that care about the law do, though. When we start rounding up the innocent just to get to the guilty (because *we* can't tell the difference), we get to Walt Kelly's PogoLand: "We have met the enemy, and he is *us*" "Bart", of course, is oblivious to this; he isn't much one for catching on to irony or satire.

Cheers,

posted by Anonymous : 11:09 PM

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[Tonal Crow]: A citizen swept up into the MCA rubric very possibly will be unable to obtain judicial review of not only an executive determination that he's an "enemy combatant," but also of an executive determination that he's an "alien enemy combatant." That's a serious problem that you seem unwilling to acknowledge.

["Bart" DePalma]: I'm sorry, but that sounds more like a paranoid conspiracy theory. This postulate cannot be a serious problem unless it is actually happening.

Sure, sure. Tell that to Khaled el-Masri and Maher Arar (and I'm sure many others....) They'll be glad to hear of "Bart's" glib assurances here.

Cheers,

posted by Anonymous : 11:30 PM

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Arne,

In response to Bary, you wrote "[C]ompetence in military matters"!
Ha-ha-HAH-HAAAHHhhh-Haaaaa-Heeeee-heh... Say, anyone seen any "competence in military matters around these parts?
Anyone?!?!?

You know, if you need an ironclad example as to why the Founders so wisely rejected a preznit with all kinds of powers like this (as well as deciding who's a criminal and who's not), you need look no farther than the Dubya maladministration for a poster child."

Well, if I understand your disagreement with Bart correctly, he is right. Please pray tell what branch of government is tasked with determining who is an enemy combatant in your opinion? Your point about the competence of THIS executive is well-taken, but that speaks nothing to the seperation of powers argument that institutionally the executive makes such decisions within certain rules. The Courts and Congress do have their own respective roles in determining the proper contours of this power. That said, the power to make such determinations (within the proper contours) is with the executive.

As a matter of Supreme Court jurisprudence, the only quibbles the Court has had with the President (and Presidents past) is over his definition and process, but fundamentally the power lies with the executive and is recognized as such.

posted by humblelawstudent : 12:56 AM

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humblelawstudent wrote:

Well, if I understand your disagreement with Bart correctly, he is right. Please pray tell what branch of government is tasked with determining who is an enemy combatant in your opinion? Your point about the competence of THIS executive is well-taken, but that speaks nothing to the sep[a]ration of powers argument that institutionally the executive makes such decisions within certain rules. The Courts and Congress do have their own respective roles in determining the proper contours of this power. That said, the power to make such determinations (within the proper contours) is with the executive.

This raises the interesting question of the other branches' function in containing a particular out-of-control executive, as opposed to their function in containing executives in general. Stare decisis probably will deter courts (but not congress?) from doing anything too drastic in this sphere, but isn't it their duty to do something? And shouldn't a particular executive's behavior give courts pause when they consider, for example, invoking the political question doctrine?

posted by Tonal Crow : 1:54 AM

humblelawstudent:

Well, if I understand your disagreement with Bart correctly, he is right. Please pray tell what branch of government is tasked with determining who is an enemy combatant in your opinion?....

I don't mind the maladministration rounding up people (*on the battlefiled*, but I get a bit more queasy when they start rounding 'em up at JFK and O'Hare...), but I don't see any problem with *courts* doing the determination of who is and who isn't an "enemy combatant" when the detainees challenge that determination, nor of independent and well-constituted courts doing the CSRB determinations). If they're to be military courts, they ought to be the same as we afford our own servicemen (and I think the Geneva Conventions alludes to such in saying that such proceedings should have the same protections as are customary).

Why you think the executive should act as police, DA, judge, jury, defence attorney, Supreme Court, *and* executioner given our system of gummint is beyond me.

... Your point about the competence of THIS executive is well-taken, ...

But the Founders were of the opinion that even a competent executive couldn't be trusted with unchecked power; that might even be more dangerous.

... but that speaks nothing to the seperation of powers argument that institutionally the executive makes such decisions within certain rules....

The legislature should be making the rules. They ceded the guts of the 'ruke-making' to the executive with the MCA, particularly since no one gets to second-guess any decisions they make.

... The Courts and Congress do have their own respective roles in determining the proper contours of this power. That said, the power to make such determinations (within the proper contours) is with the executive.

Shouldn't be. Once off the battlefield (as I alluded to in the first post), the head nod to "exigencies" loses even its superficial appeal as a justification for unilateral executive power.

I think that *Hamdan* (as well as *ex parte Milligan*) are in accord with that.

Cheers,

posted by Anonymous : 2:01 AM

Tonal Crow:

Finally, I'd note that [secret illegal detentions of American citizens] could well be "actually happening" without us knowing the first thing about it. That's yet another reason to be extremely careful about granting broad, unreviewable authority to the executive.

Two points.

First, the MCA does not deny the privilege of judicial habeas corpus review to US citizens who have been detained as unlawful enemy combatants. So much for unreviewable authority. When such cases were reviewed, I am confident that the Court would interpret the MCA's definition of unlawful enemy combatant as I do using the definitions and plain meanings of the words in the statutory language.

Second, your hypothetical essentially takes the courts out of the picture no matter how they chose to define the MCA. If the evil executive has declared a group of American citizens to be unlawful enemy combatants and "disppeared" them so that no one knows who or where they are, exactly what do you think the courts or anyone else could do about it until the "disappeared" were found?

In short, if you want to debate the effect of a law, you have to give hypotheticals which assume situations under which the law could be enforced.

posted by Bart DePalma : 9:01 AM

Dilan said...

Bart said: "Actually, the MCA grants greater rights than we have historically granted unlawful enemy combatants fighting in civilian clothing or in our uniforms. Apart from our grant of POW status to the Viet Cong, the US military has summarily executed unlawful combatants as they did captured SS in US uniforms during WWII."

I think we can infer from this that Bart believes that anyone fighting against the US is completely within their rights under international law and any conception of morality to summarily execute any US special forces member or CIA agent captured out of uniform.

What is fair for the goose is fair for the gander.

Spies and commandos operating in civilian clothing or enemy uniforms have traditionally been executed unless the enemy thinks they have trade value.

Ours are no different.

During the Nuremberg trials, the SS were charged with executing our uniformed soldiers at Malmedy during the Battle of the Bulge. However, no one was charged with executing the dozens of Jedburg and OSS commandos the Germans captured behind their lines in civilian clothing or German uniforms.

posted by Bart DePalma : 9:10 AM

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Oh come on, there is not a single case where the military has not properly determined the alienage of a capture.

Under the new law, how would we know?

posted by Anderson : 10:12 AM

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Please pray tell what branch of government is tasked with determining who is an enemy combatant in your opinion?

Under Article I, Section 8, cl. 11, Congress has the power to "make rules concerning captures on land..." The President has to follow those rules, which in turn suggests some oversight by either Congress or the Courts, the latter much more plausibly.

The President himself does not make the determinations. Instead, he designates CSRT's for that purpose. These being quasi-judicial, that again suggests the plausibility of judicial review.

Finally, the current struggle is, as others have noted, not really a war except in metaphor. There seldom are any doubts about the status of uniformed soldiers captured as POWs. Terrorists are more properly seen as criminals than as soldiers. Their identification as "combatants" is rarely obvious and there is no period of detention which might come to an obvious end, such as a peace treaty or surrender. Again, this strongly suggests that the proper branch for supervising the system is the judiciary.

posted by Mark Field : 11:49 AM

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[dilan]: I think we can infer from this that Bart believes that anyone fighting against the US is completely within their rights under international law and any conception of morality to summarily execute any US special forces member or CIA agent captured out of uniform.

["Bart" DePalma] What is fair for the goose is fair for the gander.

Translated from Yooesque into English: "We must do anything our most loathsome enemies do too..."

I note that "Bart" is repeating here the canard that summary execution is the order of the day in military affairs. This has been debunked elsewhere (for instance, George Washington's orders in the American Revolution, and the erroneous claim circulated by the RW "echo chamber" about U.S. troops killing SS troops ["Bart" gets his 'facts' from Freepervile; beware!]).

Cheers,

posted by Anonymous : 11:57 AM

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"Bart" DePalma:

*During the Nuremberg trials, **the SS were charged** with executing our uniformed soldiers at Malmedy during the Battle of the Bulge. However, **no one was charged** with executing the dozens of Jedburg and OSS commandos the Germans captured*

behind their lines in civilian clothing or German uniforms.

"Bart" confuses lack of prosecution with legality.

He also conflates "summary execution" with "execution" *after trial*:

Spies and commandos operating in civilian clothing or enemy uniforms have traditionally been executed unless the enemy thinks they have trade value.

Standard practise for "Bart" to muddy the waters and conflate issues. Notice also the lack of documentation to back up his claims.

Cheers,

posted by Anonymous : 12:02 PM

Bart DePalma wrote:

Tonal Crow [wrote]:

Finally, I'd note that [secret illegal detentions of American citizens] could well be "actually happening" without us knowing the first thing about it. That's yet another reason to be extremely careful about granting broad, unreviewable authority to the executive.

Two points.

First, the MCA does not deny the privilege of judicial habeas corpus review to US citizens who have been detained as unlawful enemy combatants. So much for unreviewable authority.

I think this might be correct, in that a detainee claiming citizenship should be able to argue that the restrictions of MCA sec.7 don't prohibit habeas for the limited purpose of determining citizenship. If the court then determined her to be a citizen, she should be able to invoke a further habeas process to bring her detention into the civilian legal system (if she's a civilian) or into the courts martial (if she's military). That is, she should assuming that the executive is not so evil as to ignore the law.

When such cases were [are?] reviewed, I am confident that the Court would interpret the MCA's definition of unlawful enemy combatant as I do using the definitions and plain meanings of the words in the statutory language.

The statute's plain definition of "unlawful enemy combatant" refutes your reading. For those who need the context, the statutory arm that Bart's determined to ignore is s.948a(1)(ii):

[The term `unlawful enemy combatant' means--]...or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

I really hope you don't treat authority in this manner when arguing before the courts.

Second, your hypothetical essentially takes the courts out of the picture no matter how they chose to define the MCA. If the evil executive has declared a group of American citizens to be unlawful enemy combatants and "disppeared" them so that no one knows who or where they are, exactly what do you think the courts or anyone else could do about it until the "disappeared" were found?

That evil executives exist is not a reason to accomodate them in the law; much the opposite: it's a reason to strengthen the law, as by providing for personal criminal liability for violations. By the way, your argument here undermines your previous argument about the Presidency's weakness. Did you really mean to do that?

posted by Tonal Crow : 6:02 PM

Bart, humble, anyone else who may have addressed comments of mine: Apologies for not getting back to you. One of my primary dissatisfactions with this medium, blogging, is that it lends itself nicely to rants and echos but is poorly suited to actual conversation---especially conversations lasting longer than the blog owner's posting frequency. I was detained yesterday with personal matters, and feel odd saying even that much in this outlet. Email me if you feel slighted (of if you just want to say hello) and I will try to set things right. (The address is a dot-com, the domain is oblios-cap, and the username is beau; you can figure it out from there.)

Peace.

posted by Robert Link : 8:47 AM

According to This Gentleman the administration is acting in our best interest by putting the rights of the state before those of an individual. I don't know if I can agree with that. It seems to me that if one person's rights are stripped away what good are the rights of you or I?
posted by KramersLaw.com : 11:33 AM

Kramerslaw.com said:

According to This Gentleman the administration is acting in our best interest by putting the rights of the state before those of an individual.

From the linked article:

"Both are traditional legal systems that put the protection of individual rights first, ahead of accommodations for national security and military necessity...."

I'm not sure I can agree with "military necessity" (or "military expediency") trumping our system of law. First, it's not in the least obvious this is indeed "nessesary" for any particular purpose (nor that working 'within' the traditional system can't work effectively). Nor is some unilateral and unaccountable rubric of "national security" sufficient reason to take short-cuts; *there* be dragons....

The article continues:
"... This system is not appropriate for trying terrorists in the Pentagon's custody while the war is still going on."

There's a difference between what
s warranted on the battlefield, and what's warranted five *years* later and half a world removed from the battlefield. Particularly in the context of some amorphous and interminable "war on 'terror'" where the determination of *who* is the "enemy" is difficult in the best of circumstances and becomes quite problematic in the hands of an overly political and unchecked executive.

Cheers,
posted by Anonymous : 3:16 PM

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