The Courts and Terrorism

In late 2001 and 2002, the legislative and executive branches of government throughout the world responded to the terrorist attacks of September 11, 2001 with tough new anti-terrorism laws and policies. Now, three years after that terrible day, we are starting to see whether the judiciary will moderate those laws and policies.

This summer, the United States Supreme Court delivered three landmark decisions on the role of legality in the war against terror. The good news for legality is that significant majorities of the Court rejected the Bush administration's claims that the war against terror can be conducted in an essentially lawless fashion. The bad news is that the Court may have legitimated a significant dilution of due process.

In a 6:3 decision, the Court held that the 600 detainees at Guantanamo Bay can challenge the legality of their detentions by way of habeas corpus. The majority confirmed that as long ago as 1759, Lord Mansfield held that the great writ extended to territory "under the subjection of the Crown". Justice Scalia in his dissent raised the spectre of the Court extending the writ to the four corners of the earth, something that may indeed be necessary given American detention practices, including the atrocious behaviour in Iraqi prisons.

The majority in Rasul v. Bush, however, did not decide the merits of the case, including (a) the difficult issue of when hostilities in the war against terrorism will, if ever, cease and (b) the legality of indefinite detention for interrogation. The Court's decision in the Jose Padilla case, however, suggests that the Guantanamo detainees will have to proceed with care. A majority of the Court in Padilla v. Rumsfeld, June 28, 2004, held that courts in New York did not have jurisdiction over an "enemy combatant" held in a Navy Brig in South Carolina and that Secretary of Defence Donald Rumsfeld was not the proper defendant. This is an overly technical approach to take when basic rights are at stake.
Justice Stevens, unfortunately only joined by three others, got to the merits and declared that "... unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen is the hallmark of due process."

The Court’s decision in Hamdi v. Rumsfeld provides some clues about what sort of due process may be required by the courts in enemy combatant cases. In a problematic plurality judgment, Justice O'Connor suggested a sliding scale approach that will tolerate a reverse burden on the detainee, the use of hearsay evidence, and the use of military commissions as "neutral decision-makers". It is doubtful that even counsel could overcome these obstacles to due process.

A more attractive prospect was revealed in a surprising alliance of Justices Scalia and Stevens. They argued that the government either has to suspend habeas corpus or lay criminal charges against citizens alleged to be enemy combatants. In Canadian terms, this can be translated as respect for the principles of fundamental justice or a temporary override, or perhaps even limitation of such rights. These are stark alternatives but they may be preferable to the middle ground of diluted due process.

The Constitutional Court of Indonesia issued an important 5:4 decision this summer holding that the retroactive imposition of a new anti-terrorism law enacted in response to the Bali bombings violated a constitutional guarantee against retroactive punishments. It is not clear yet whether this decision will benefit those already convicted under the retroactive law, including three persons sentenced to death. New anti-terrorism laws can invite successful due process challenges and ignore the strength of the regular criminal law in punishing murder as murder.

The Supreme Court of Canada also delivered two important judgments this summer. In R. v. Bagri (2004), 240 D.L.R. (4th) 81 at paras 55-66, 184 C.C.C. (3d) 449, the Court indicated that investigative hearings included in the Anti-Terrorism Act, S.C. 2001, c. 41, could be used with respect to the ongoing Air India investigation and trial because the provisions are procedural and not substantive in nature. Three judges in dissent, however, held that the use of a novel procedure in the middle of the trial was an abuse of process that would give the Crown an unfair advantage of discovery of a witness.

As predicted, the Supreme Court upheld the novel procedure under the Charter, albeit with two judges dissenting on the basis that judges should not preside over police investigations. The majority relied on the Act's provision of use and derivative use immunity and extended the immunity to deportation and extradition hearings. Given the nature of international terrorism, these additions constitute important safeguards that Parliament did not contemplate.

The majority also stressed that both the judge and counsel for the subject should play an important role in ensuring the fairness of the hearing. This can be contrasted favourably with the sliding scale approach taken by the plurality in Hamdi v. Rumsfeld. A majority of the Canadian court in the companion case of R. v. Bagri (2004), 240 D.L.R. (4th) 147, 184 C.C.C. (3d) 515, also insisted on a rebuttable presumption that investigative hearings be open and concluded that the sweeping publication bans imposed in the case were overbroad.

It remains to be seen whether the open court presumption will deter officials from using investigative hearings or whether, as the majority acknowledges with regard to the very existence of the investigative hearing (ibid., at para. 41), courts will find that publication bans are justified to protect ongoing investigations and confidential security intelligence.

All in all, the courts are moderating the war against terror in the interests of legality, but the decisions this summer leave no room for complacency. The courts are split fairly evenly on many of these issues and the legal community must encourage judges to fulfil their anti-majoritarian and principle-preserving role at a time of perceived crisis.

Diluted due process can in some cases be almost as harmful as candid admissions that we have derogated from due process. This is especially the case if citizens uncritically accept the courts’ decisions or the government’s interpretation of the minimum standards of fairness required by the court. Citizens and judges alike should be vigilant that the war against terrorism is not continued or extended in unjustified ways that diminish the high ground that democracies should occupy in their struggle against terrorism.

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