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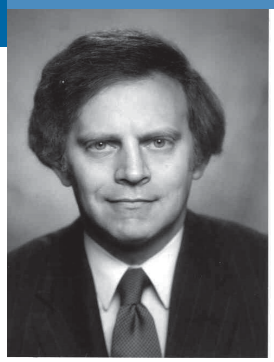
AMERICAN BAR FOUNDATION
Supporting the Study of Law, Legal Institutions, and Legal Processes

Fellows News

Fall 2004, Number 89

FROM THE CHAIR



James R. Silkenat

The Fellows, as an organization, has always had a bit of a split personality. On the one hand, we exist in order to support the important empirical research on law and the legal profession that is undertaken by the American Bar Foundation's prize-winning resident scholars. This is a noble and professionally rewarding exercise that in itself is sufficient justification for the existence of the Fellows.

A second purpose or rationale for the Fellows that has developed over the past 15 or 20 years is that the Fellows have become a real "community" of leading lawyers in each State (and, with the creation of the International Fellows program, around the world). This is a community of spirit, of support for the best aspects of the legal profession, that has engendered so much affection for the Fellows as a continuing institution of thoughtful men and women who care about the rule of law and who, because of their involvement with the Fellows, tend to care about each other.

This sense of community has manifested itself in a number of tangible ways. In New York over the past dozen years or so, for example, we have had monthly Luncheon Seminars for the Fellows in New York State on substantive legal topics of interest to the profession. Typically, we have had a guest speaker (whether the President of the Legal Services Corporation or the General Counsel of the United Nations, to name two recent examples) and a spirited discussion afterward. The Fellows organizations in a number of other States have also had a variety of stimulating educational programs or social events for their members. Minnesota, California, New Jersey, Florida, Oklahoma, Missouri, Arkansas, Colorado and the District of Columbia, among others, have each had significant successes in this vein. By meeting periodically and sharing views on the legal profession and on important issues of our day, the Fellows have become more than simply assorted individuals.

I have frequently been struck by this community of spirit that exists within the Fellows, both within each State and across the country. There is clearly more to the organization than merely a desire to support scholarly research about the law, as important as this is today. Our hope in the future (and this applies to all of the Fellows officers and staff) is to find additional ways to strengthen this sense of community within and among the Fellows.

Two ways in which this community of spirit and ideas has been expanded within the Fellows recently has been through: first, the creation of the Fellows Referral Network, which allows members of the Fellows to locate and identify other Fellows in a particular legal specialty or geographic location to help clients or other colleagues; and, second, the organization of special group study tours for members of the Fellows (through the People-to-People Organization) to foreign countries. The first such tour, to Russia, will be Chaired by former Fellows Chair, Steve Walther, next year. We will be giving you more details on both of these initiatives in the near future.

An additional "new initiative" for the Fellows will be to develop a closer relationship between the Fellows and the ABA Young Lawyers Division. This will start with a joint program and luncheon at the ABA Mid-Year Meeting in Salt Lake City in February.

We will be looking for additional ways to strengthen the "community" aspects of the Fellows in the coming months. In the meantime, if you have suggestions, reactions or criticisms, please let me know. I can be reached by phone at 212-492-3318 or by e-mail at silkenat.james@arentfox.com. I look forward to working with all of you this year.

In Memoriam

Maurice R. Bullock, *Midland, TX*
Charles H. Burton, *Bethesda, MD*
Herbert Y. C. Choy, *Honolulu, HI*
Richard P. Condit, *Bloomfield Hills, MI*
Charles T. Duncan, *Annapolis, MD*
Charles H. Gibbs, *Charleston, SC*
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John C. Nabors, *Dallas, TX*
Austin B. Noble, *Montpelier, VT*
Phil Peden, *Houston, TX*
Robert D. Raven, *San Fancisco, CA*
Kathleen S. Schoene, *St. Louis, MO*
Hart H. Spiegel, *San Francisco, CA*
Robert T. Thompson, *Greenville, SC*
Houston G. Williams, *Casper, WY*
Paul B. Young, *Pine Bluff, AR*
Robert C. Zampano, *New Haven, CT*

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Welcome New Fellows

CALIFORNIA
Jeffrey S. Brand, San Francisco
COLORADO
Jerry B. Tompkins, Grand Junction
FLORIDA
David R. Atkinson, Jr., West Palm Beach
Linda Conahan, Ft. Lauderdale
Raymond Miller, Miami
LOUISIANA
Edward D. Myrick, Lake Charles
MICHIGAN
John T. Berry, Lansing
NEVADA
Richard J. Morgan, Las Vegas
NEW HAMPSHIRE
Linda S. Dalianis, Concord
NEW YORK
Mark Meyer, New York
VIRGINIA
Robert S. Ballou, Roanoke
James S. Cremins, Richmond
James F. Douthat, Roanoke
Patricia K. Epps, Richmond
Lawrence H. Hoover, Jr., Harrisonburg
Reginald N. Jones, Richmond
Robert T. Mitchell, Jr., Winchester
William M. Moffet, Abingdon
Gregory L. Murphy, Alexandria
Susan M. Pesner, McLean
Betty A. Thompson, Arlington
Ronald R. Tweel, Charlottesville
Thomas W. Williamson, Jr., Richmond
WASHINGTON
James L. Robart, Seattle
WISCONSIN
Dean R. Dietrich, Madison
W. H. Levit, Jr., Milwaukee
INTERNATIONAL
Rudolf Coelle, Frankfurt
Roy C. Durling, Jr., Panama

CORRECTION: In the last edition of *Fellows News*, we welcomed **Beverly McQuery-Smith** as a new Fellow from New Jersey. She is a Fellow from New York. We regret the error.

State Happenings

OK The Oklahoma Fellows had their annual spring meeting on June 5, 2004, in Tulsa. Friday afternoon golf at Southern Hills Country Club, site of the 2001 U.S. Open, was followed by a cocktail reception at the Gilcrease Museum, noted for one of America's greatest collections of Western Art. The Saturday morning business meeting at the University of Tulsa College of Law included the election of two new Fellows and reports from the Oklahoma Supreme Court, the dean of the University of Tulsa College of Law, the vice president of the Oklahoma Bar Association, and the president of the Oklahoma Bar Foundation.

The next event for the Oklahoma Fellows will be the annual black tie dinner at the Petroleum Club in Oklahoma City on November 9, 2004, during the Oklahoma Bar convention, followed the next morning by a business meeting for the election of new Fellows.

OR The Oregon Fellows and Oregon ABA delegation are co-sponsoring a reception preceding the Oregon State Bar Annual Awards Dinner on Thursday, October 14, 2004. The law firm of Harrang Long Gary Rudnick PC is underwriting the reception.

FELLOWS HONORED BY THE AMERICAN INNS OF COURT

The following Fellows were awarded the Professionalism Award of the American Inns of Court:
Harry M. Reasoner, Houston Life Fellow
Jerold S. Solovy, Chicago Life Fellow
John J. Jurcyk, Kansas City Life Fellow
Joyce Hens Green, Washington D.C. Life Fellow

These awards are presented annually to recognize those lawyers and judges whose life and practice display dedication to the highest standards of the legal profession, the rule of law, and the demonstration of personal ethics and integrity as expressed in the Professional Creed of the American Inns of Court.

"The Enemy Combatant Cases and the Rule of Law"

Remarks of Douglass W. Cassel, Jr.*

Fellows Annual Business Breakfast

Atlanta, Georgia — August 6, 2004

It is an honor to speak before the Fellows who support the most important organization in our profession, and especially now. I have never felt so privileged and honored to be a lawyer and a member of the American Bar Association as I have in the last year. One year ago, under Neal Sonnett's leadership, the ABA House of Delegates adopted a very important resolution on the right of defendants before military tribunals to have real and effective access to counsel. Then in February, the House adopted a resolution on universal criminal jurisdiction over war crimes, the first time the ABA has gone on record on that subject. The House of Delegates is about to consider an extremely important resolution on torture. And during the course of the year, the ABA filed Amicus briefs before the Supreme Court in some of the enemy combatant prisoner cases that I'll speak about this morning. In all of these areas, in my view, the legal profession of this country, through its principal organization, has stood up at a time when its voice needed to be heard.

I've also been privileged for about the last two years to serve as a consultant to a number of the lawyers for the prisoners whose cases were recently decided before the Supreme Court. I did so because these cases involve far more than the liberty or the rights of a number of individuals. They involve even more, in my judgment, than the threat we currently face from terrorism. They take us back to the very foundations of the American system. They take us to who we are and what we stand for. I believe that these are some of the most important decisions the Supreme Court has rendered in the history of our Constitution.

In reading the opinions and briefs in these cases, I am reminded of and given a new appreciation for the genius of the founders of our constitutional system. They were students of history. They knew that throughout the millennia of recorded history up until the time they met in Philadelphia, freedom had been the exception and oppression the rule. Because of the nature of academic studies two centuries ago, they knew in ways that modern American students, and unfortunately some American lawyers, do not know, that Athenian democracy had been overthrown by the Oligarchs. They knew that the Roman Republic had been taken over by the Emperor Augustus and his successors.

And they knew especially the struggle for liberty and rule of law throughout English history. They knew from Blackstone and others what King John agreed to at Runnymede in the Magna Carta. They knew how the courts had struggled to develop what has since been called the bulwark of English liberty, the writ of habeas corpus. They knew about the struggle for parliamentary government. They knew about the development of the concept of rights in England. And they knew that none of this came easily.

They knew that planting freedom in America would be, at best, a perilous undertaking to sow a fragile flower on the soil of this continent. You all recall the story that as Benjamin Franklin emerged from the Constitutional Convention, he was asked what kind of government we would have. He answered, "A republic — if you can keep it."

That was very much on the minds of the founders. In order to keep their republic, they devised a number of safeguards, of which I think seven may be listed as among the essential safeguards of liberty.

First, the rule of law: the concept that no public official, not even the president, is above the law. Everything we do in this country must be authorized and regulated by law.

Second is constitutionalism. The president and the military have no powers other than those granted to them expressly or by necessary implication in a written document debated, negotiated, adopted, and made public.

Third is the separation of powers. The founders knew, as Lord Acton wrote in the decade of our founding, that power tends to corrupt, and absolute power to corrupt absolutely. So they attempted to divide power and to make sure that each branch was capable in a real way of asserting checks and balances on the others, to make sure that the government itself was capable of restraining its own tendency toward excess.

Very important within that scheme is the fourth essential safeguard of liberty, an independent judiciary, secure in its tenure, capable of reviewing the most sensitive actions undertaken by the executive branch and by the Congress.

Fifth, within the judicial framework there must be due process of law, as proclaimed for the first time in our tradition eight centuries ago in the Magna Carta.

Sixth is that ancient bulwark of English liberty, the writ of habeas corpus, part of the common law of all of the colonies before the organization of the United States of America, and one of the few express provisions for liberty recognized in the original Constitution, before the adoption of the Bill of Rights. The Constitution's Suspension Clause provided that the writ of habeas corpus shall not be suspended, except in cases of rebellion or invasion, and even then only if required by the public safety. The habeas corpus statute was one of the first acts adopted by Congress in 1789.

The seventh safeguard was a respect for the Law of Nations. In the Declaration of Independence this was phrased as a decent respect for the opinions of mankind. The Constitution treats the Law of Nations with respect, mandating that treaties be approved only by consent of two thirds of the Senate, and once thus approved and ratified, become part of the Supreme Law of the Land, binding the judges of all states, nothing in any state law or constitution to the contrary.

(I will not discuss an eighth essential safeguard of liberty, the concept of free and democratic elections, obviously extremely important, but which is not at issue in the enemy combatant cases.)

Having reminded us of some of our foundational principles, I hasten to add that there is no need to romanticize the founders. They were, after all, the founding *fathers*, not the founding mothers; there were no mothers voting in Philadelphia. They were indeed the founding *white* fathers; they wrote a constitution that expressly preserved, at least for a

continued

* Clinical Professor of Law and Director, Center for International Human Rights, Northwestern University School of Law, Chicago

time, the institution of slavery. And they were indeed the founding, white, *property-owning* fathers. These men were privileged and wanted to stay that way, both in their property and in their liberty. Each of these birth defects was eventually addressed as our republic evolved. But unless we had begun with the seven essential safeguards of liberty, there might not have been a republic to evolve.

Why go back this far in history? It is not to give us all a civics lesson or a history refresher. It is because all seven of these essential safeguards of liberty have been at stake — and in jeopardy — in the enemy combatant prisoner litigation before the United States Supreme Court over the last eight months, and before the federal courts over the last two years.

On June 28th, the Supreme Court decided three enemy combatant cases: *Rasul v. Bush* involving foreign citizens, approximately 600 of them (although only 16 were petitioners in the case) who have been held at the U.S. Naval Base in Guantanamo, Cuba for up to two-and-a-half years; as well as two cases involving United States citizens, Yaser Hamdi and Jose Padilla, who are being held as enemy combatants at a U.S. Navy brig in South Carolina.

In all three cases the administration had a common position, which deserves to be stated clearly, because it shows what a government is capable of asserting in times of trouble and pressure. The government's theory in these cases is that the president, as commander in chief, on the basis of secret information unknown to anyone outside the executive branch, has the authority to designate an individual as an enemy combatant, to imprison that person with no prior judicial authorization or express congressional authority, and to hold that person in prison without access to a lawyer, without access to courts, without charging the person with a crime or bringing him to trial, and indeed without any due process of law.

Moreover, two additional elements of this theory were advanced before our Supreme Court and litigated in the last few months. The president asserted the authority thus to imprison the person indefinitely, without limit in time. The only limit is when the war on terrorism is over. Fellows of the American Bar, I ask you, when will the war on terrorism be over, and how will we know if it ever does end?

Neither is there any geographical limitation. The government's theory was advanced not only for people captured on or near a battlefield. Some prisoners at Guantanamo were captured thousands of miles from Afghanistan, in Bosnia, where the war has been over for more than eight years. Some were captured in West Africa. One alleged enemy combatant was arrested, not by the military, but by the Chicago police, and not overseas, but at O'Hare Airport.

One way to restate the government's position is to quote Justice Sandra Day O'Connor in the *Hamdi* case. Referring to the extraordinary constitutional interests at stake, she wrote for the plurality, "Under the Government's most extreme rendition of this argument, '[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict' ought to eliminate entirely any individual process, …."

That was the position advanced by our government before the Supreme Court. If that position were upheld, there would be no effective, enforceable, accountable rule of law. There would be no role for an independent judiciary. The only constitutional limits on the president would be those he chose to recognize for himself. Liberty would depend entirely on the good faith and reasonable action of executive branch officials — the very lesson the founders knew that history had rejected.

Without getting into technicalities, there were in essence three principal defenses the administration put forward for its position. First is that the president is, after all, the commander in chief. We're at war, he needs to win it, he needs to protect the American people, and he needs to do whatever is necessary to accomplish that. Allowing him to lock up anyone he chooses to designate as an enemy combatant is essential to his war-making power. Such a power to arrest people indefinitely is nowhere to be found, of course, in any express language in the Constitution or statutes. So this was a proposed constitutional inference.

The second defense was, in essence, trust us. We are charged with the defense of this nation, we are good people, we act in good faith, we're not going to lock up innocent people, and we're not going to abuse or torture the people we do lock up. So there is no need to subject us to judicial review. Just trust us.

And third, since the asserted legal source of the power to lock these people up could not be found directly in American law, it was borrowed, so the government claimed, from international law. The president was merely exercising powers conferred on any nation under the laws of war.

Now, setting aside the question of whether the laws of war, in conferring powers on a nation, thereby confer them on a president without any judicial review, it is fair to recall that the International Committee of the Red Cross, various United Nations human rights bodies, the Inter-American Commission of Human Rights, and a long list of international law scholars and experts who submitted Amicus briefs to the Supreme Court, contend that international law authorizes no such power as the president asserted in these cases. On the contrary, international human rights and humanitarian law have both evolved in recent decades to require due process of law before prolonged, indefinite detention of people who claim, as do the prisoners in the *Rasul* case, to be innocent and to be neither combatants nor terrorists.

In the face of these arguments, the Supreme Court by a vote of six to three rejected the administration, position that it could hold foreign citizens at Guantanamo under these circumstances. And by a vote of eight to one the Court rejected the claim that the government could hold American citizens in these circumstances.

In the case involving foreign citizens, the *Rasul* case, the administration claimed that the reason foreign prisoners at Guantanamo could not have access to American courts was that they were not being held on American soil. Guantanamo, the administration argued, is not formally part of U.S. sovereign territory. On the issue of sovereignty, in my view, the administration is correct. The 1903 lease with Cuba, which the United States has used to occupy Guantanamo for more than a century, expressly provides that "ultimate sovereignty" over Guantanamo remains with Cuba. In my judgment, this means that if the United States ever decides to leave, Guantanamo will not go back to Spain, from whom we stole it fair and square, but to Cuba, which got its independence after we kicked out the Spaniards while keeping Guantanamo for ourselves.

But the same lease that reserves ultimate sovereignty for Cuba also

expressly provides that as long as the United States chooses to stay there, we exercise "complete jurisdiction and control" over the 45 square miles of Guantanamo. Even while asserting that there was no jurisdiction over the claims of foreign citizens at Guantanamo because it is not technically U.S. sovereign territory, the administration admitted that if any U.S. citizens were to be incarcerated at Guantanamo, U.S. courts would have jurisdiction over their claims. The administration also acknowledged that the U.S. has exercised jurisdiction *against* foreign citizens at Guantanamo. If a foreign citizen commits a crime on the Guantanamo naval base, U.S. courts have jurisdiction to prosecute them. So the narrow jurisdictional exception the administration attempted to carve out on the basis of the lack of formal sovereignty was only that foreign citizens could not be heard when they attempted to assert their rights.

Six members of the Court, in a five-member majority opinion written by Justice Stevens and a concurring opinion by Justice Kennedy, held that U.S. courts do have jurisdiction to hear challenges by prisoners at Guantanamo to the lawfulness of their detention, because U.S. courts have clear territorial jurisdiction over the custodians, and the custodians happen to be in Washington, D.C. The majority noted that habeas corpus traditionally depends, not on legal formalisms, but on the practical realities of physical control. And there was no question that the practical reality is that the United States, and no one else, physically controls Guantanamo and the prisoners.

The majority also noted that nothing in the habeas corpus statute, which was the basis of their ruling, carves out any distinction or discrimination against non-U.S. citizens. It refers to "persons." And the majority declined to read into the statute the administration's proposed, implicit exception for non-citizens.

The administration relied heavily on a 1950 decision coming out of World War II, the *Eisentrager* case. After a number of German spies were found guilty by a U.S. military commission in China of being spies and committing war crimes, the Supreme Court ruled that these convicted foreign war criminals had no access to U.S. courts for habeas corpus. In distinguishing the *Eisentrager* case, the *Rasul* majority said that among other differences, the prisoners in *Eisentrager* had a trial. They had lawyers, charges were served on them, they had an opportunity to consult with their lawyers and to present their own evidence and to be heard. Once they were found guilty, they were entitled to no further access to our courts.

But the Guantanamo prisoners claim to be neither combatants nor terrorists. Not only have they not had their day in court, they have not had so much as a single second in court. So the *Eisentrager* case on which the government heavily relied was not controlling.

This holding is extremely narrow. All *Rasul* formally holds is that U.S. courts have jurisdiction, period. In the follow-up litigation now underway, the administration argues that's all the Court held, and that the prisoners have no substantive rights whatsoever, not even a right of access to counsel. Therefore, while courts have jurisdiction to hear their claims, the proper exercise of that jurisdiction requires rejection of those claims out of hand.

The administration is technically right that the Court's holding was limited to jurisdiction. But there are at least three flaws in its argument. The first is that implicit in a right of access to courts is a right to assistance of counsel. How can we expect prisoners at Guantanamo from other cultures, speaking other languages, who are not lawyers, who have no knowledge of our legal system, on their own somehow to file a claim in federal court in Washington D.C.? It makes a mockery of the right of access to courts to say that people in those conditions should be required to take their chances in court, assuming they can even figure out how to get to court with no legal assistance. The government position that the prisoners have no right of access to lawyers runs contrary to the implicit message of a ruling that courts have jurisdiction to hear the prisoners' claims.

Secondly, admittedly in *dictum*, footnote 15 of the majority opinion says that if the prisoners are, as they claim, neither combatants nor terrorists, then their indefinite detention by the U.S. government without due process of law "unquestionably describe[s] 'custody in violation of the Constitution or laws or treaties of the United States'" (quoting the habeas statute). So in a footnote five members of the Court signal that while the holding is limited to jurisdiction, there are substantive rights at issue here, and that if these prisoners are innocent, it is clearly a violation of their rights to continue to hold them indefinitely.

A third, broader objection to the administration's narrow interpretation of this jurisdictional holding has to do with the seven safeguards of liberty. The administration's position, it seems to me, is inconsistent with the spirit of our Constitution and the understanding of our founders that liberty does not come or stay easily. It needs the rule of law, due process, and independent judicial review if it is to survive.

In the cases of the two United States citizens, one, Mr. Hamdi, was captured abroad in connection with hostilities in Afghanistan, while the other, Mr. Padilla, was arrested at O'Hare airport in Chicago. The Court's principal opinion in the two cases came in the *Hamdi* case.

In the *Hamdi* case, four of the nine Justices held that the president simply cannot detain an American citizen as an enemy combatant. The president has only two choices with regard to citizens. Either he must charge them with a crime, prove it, and jail them; or he must let them go. He cannot hold American citizens indefinitely as enemy combatants.

There were two separate opinions among those four Justices. Two Justices held that the Constitution does not permit the president (unless the writ of habeas corpus is suspended by Congress, which it has not been) to detain American citizens indefinitely as enemy combatants. The two Justices joining in that opinion were Justice Stevens and Justice Scalia. Two more Justices — Souter and Ginsburg — wrote that a statute does not permit the detention of American citizens as enemy combatants, specifically the Non-Detention Act, which provides that no American citizen can be detained without express authorization by Congress.

A four Justice plurality did agree with the government that neither the Constitution nor the Non-Detention Act prohibits detention of a citizen as an enemy combatant. However, there were two large caveats to their opinion. First, when they upheld the detention of an American citizen as an enemy combatant, they expressly did so, not in the context of the so-called "war" against terrorism — that amorphous, universal, never-ending war that the president has declared and that has no limits, but only in the context of a traditional, conventional war, namely the war

continued

between the United States and Afghanistan. The 16 prisoners whose cases were before the Court were all allegedly captured in or near Afghanistan. In that kind of a war — without expressing any opinion on the "war" against terrorism — Justices O'Connor, Rehnquist, Kennedy, and Breyer said yes, the president does have authority to hold American citizens as enemy combatants.

However, there was a second caveat to the president's authority: he must respect due process of law. What does due process mean? According to the plurality, it means three key elements and maybe a fourth. First, the prisoner must be given notice of the factual basis for his detention, the allegations against him. Second, he must have an opportunity to rebut the government's case by presentation of his own argument and evidence. And third, he must have that opportunity before a neutral decision-maker. The plurality left open the possibility that a neutral decision-maker might be a military tribunal, or might not be, depending on whether it has sufficient indicia of neutrality.

A fourth possible right appears in a somewhat ambiguous paragraph in which the plurality said that on remand, Mr. Hamdi, the U.S. citizen involved, will of course have the right to counsel. Some people read that to mean that the right to counsel is part of the plurality's due process package. Others read it more cautiously to say that the plurality simply recognized the fact that while the case was pending before the Court, and after it took *certiorari*, the government finally allowed Mr. Hamdi's lawyer, the federal defender from Virginia, to meet with him, so that the plurality was merely recognizing a *fait accompli*. Perhaps we shall see in future litigation how the Court reads this paragraph.

Only one Justice upheld the administration's argument hook, line, and sinker. That was Justice Clarence Thomas. But he was on the losing end of an eight to one vote.

The *Padilla* case I won't spend much time on, because it was decided on venue. The case was filed in New York, and a five-member majority of the Court said, in effect, that it should have been filed in South Carolina instead. But there was an important footnote in the *Padilla* dissent. The four dissenters wrote a footnote that said that the Non-Detention Act prohibits the "protracted, incommunicado detention of American citizens arrested [unlike Mr. Hamdi] in the United States." The important point is that of the four Justices who joined in this footnote, one was Justice Breyer, who was also a member of the plurality in *Hamdi*. If you do the arithmetic and count votes, you find that five Justices of the current Supreme Court (Ginsburg, Scalia, Souter and Stevens in *Hamdi*, plus Breyer in *Padilla*) are of the opinion that absent express congressional authorization, no American citizen arrested in the United States can be held indefinitely as an enemy combatant — even if he is accorded due process. If Americans are arrested in America, they must either be charged with a crime or released. They cannot be held as enemy combatants. So say five Justices of the Supreme Court, admittedly not in a holding, but as the summation of three separate opinions in two different cases.

Follow-up litigation is now actively under way in the district courts. A dozen or so law suits are pending on behalf of both foreign citizens at Guantanamo, and the two U.S. citizens I mentioned. The government is taking an extremely hard line in those cases. It is not yielding a millimeter of ground. It interprets the *Rasul* case as nothing more than a jurisdictional holding and argues that the prisoners have no rights and cannot see lawyers except by the government's grace and on its terms. Even in the U.S. citizen cases the government imposes restrictions on access to counsel. The upshot is that except for those two individuals, Hamdi and Padilla, who were already permitted to see their lawyers while their cases were pending before the Supreme Court, not one additional prisoner, some five weeks now after the Court's rulings, has yet been permitted to see a lawyer despite earnest efforts by a number of law firms in Washington.

I conclude, not with my words, but with the words of Justice Sandra Day O'Connor, writing for the plurality in the *Hamdi* case. Thanks in part to interventions as *amici curiae* before the Court in these cases by the American Bar Association, former federal judges, former American diplomats, former Judge Advocates General of the Navy and Marine Corps, former American prisoners of war, the Commonwealth Bar Association and the International Bar Association, and by Fred Korematsu, who challenged World War II Japanese-American internment camps before the Court 60 years ago, the Court was well aware that these are cases with implications for the rule of law, not only in the United States of America or at Guantanamo, but worldwide. As Justice O'Connor reminded us, "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." Furthermore, "[A]s critical as the Government's interest may be in detaining those who actually pose an imminent threat to the national security …, history and common sense teach us that an unchecked system of detention carries the potential to become a means of oppression and abuse …." And finally, the plurality's conclusion: "We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law,… "

Thank you very much.

Fellows in Print

Silkenat, James R., Co-Editor, *The ABA Guide to Foreign Law Firms* (ABA Press, 4th ed. 2004).

— Preface to Gross, *America's Lawyer-Presidents: From Law Office to Oval Office* (Northwestern University Press, 2004).

Thornburgh, Dick, "Empowering the 'Good Guys': How Lawyers Can Help Fix Corporate America," 26 *The Pennsylvania Lawyer* 12 (July/August 2004).

Tiemessen, John, "The Golden Retriever Rule: Alaska's Identity Privilege for Animal Adoption Agencies and for Adoptive Animal Owners," 21 *Alaska Law Review* 77 (2004).

Fellows in the News

AL Birmingham Life Fellow **Ephraim Taylor Brown, Jr.** became the first recipient of the Alabama State Bar's William D. Scruggs, Jr. Award. The Scruggs Award was created to honor Alabama's late state bar president, and recognizes dedicated service to the bar.

AR The Arkansas Bar Association honored El Dorado Life Fellow **Dennis Shackleford** with the James H. McKenzie Professionalism Award, recognizing his sustained excellence through integrity, character, and leadership to the profession and community.

DC Fellow **Margaret Colgate Love** was awarded a Soros Senior Fellowship for 2004 to study mechanisms for the restoration of rights to convicted felons.

Life Fellow **Rev. Robert F. Drinan, S. J.**, was awarded the 2004 ABA Medal, the Association's highest honor, in recognition of his exceptionally distinguished service to the cause of American jurisprudence.

The CPR Institute for Dispute Resolution awarded the designation "Best Book of the Year" to *Federal Dispute Resolution: Using ADR with the United States Government* (Jossey-Bass, 2004), written by Fellow **Jeffrey M. Senger**.

FL In June, Miami Life Fellow **Herman Russomanno** received the Dade Country Bar Association's 2004 David W. Dyer Professionalism Award at the 88th annual installation luncheon. The award recognizes a lawyer or member of the judiciary who "endeavors to the high level of humility, civility, compassion, and morality characteristic of Judge Dyer."

Tampa Life Fellow **Wm. Reece Smith, Jr.** is one of the inaugural recipients of a Stetson University College of Law Distinguished Service Award. These awards will be presented annually to one or more individuals who are not alumni, but have made significant, meritorious, and continued contributions that have benefited Stetson College of Law.

IL The Order of the Rising Sun was conferred upon **Clyde O. Bowles**, a Life Fellow from Chicago, by the Emperor of Japan. The Order, founded in 1875 is awarded for exceptional civil or military merit. The decoration was awarded to Mr. Bowles for the important role he plays in the activities of the the National Association of Japan-America Societies as well as with the Japan-America Society of Chicago.

MN Minneapolis Fellow **David Lillehaug** and the firm Fredrikson & Byron have been awarded the Constitutional Law Award by Mansfield, Tanick & Cohen, PA. The award is given to individuals and organizations for advancing First Amendment and other Constitutional rights.

Life Fellow **James L. Baillie** of Minneapolis just completed his term as president of the Minnesota State Bar Association. During the year he was selected as an "Attorney of the Year" by *Minnesota Lawyer* magazine.

NM Albuquerque Life Fellow **Roberta C. Ramo** was elected first vice president of the American Law Institute in May at the Institute's 81st Annual Meeting in Washington, D.C.

NY Life Fellow **Howard Holtzmann** of New York, was named a commander of the Swedish Royal Order of the Polar Star. The award was bestowed upon him at the recommendation of the Swedish government, in recognition of "outstanding achievements in international commercial arbitration."

OH At the recent convention of the International Society of Barristers, Cleveland Life Fellow **John D. Liber** was installed as the Society's 40th president.

PA Life Fellow **Louis H. Pollak** of Philadelphia, Senior District Judge of the U.S. District Court for the Eastern District of Pennsylvania, delivered the annual Robert P. Anderson Memorial Lecture at Yale Law School in April. His talk was on "Race, Law, and History."

Lynne Z. Gold-Bikin, Life Patron Fellow and Pennsylvania State Co-Chair from Norristown, was recently named one of the state's 100 super lawyers.

H. Reginald Belden Jr., a Life Fellow from Greensburg, was awarded the Pennsylvania Bar Medal at the most recent Pennsylvania Bar Association annual meeting. The Bar Medal, the highest honor conferred by the PBA, may be awarded to any member of the Association whose efforts have resulted in significant improvement in the administration of justice or the legal profession or who has performed outstanding service to the Association, the profession or the community in general. It has been conferred only eight times in the 110-year history of the Association.

The International Solvency Institute awarded Swarthmore Life Fellow **Geoffrey C. Hazard, Jr.**, the 2004 Gold Medal for developing the American Law Institute's Transnational Insolvency Project.

TX Life Benefactor Fellow **Charles O. Galvin** from Dallas, and Life Fellow **Franklin Jones, Jr.**, from Marshall were two of five lawyers recently honored by the Texas Bar Foundation for over fifty years of service, adhering to the highest principles and traditions of the legal profession.

Life Fellow **Shannon H. Ratliff**, of Austin, received the Ronald D. Secrest Outstanding Trial Lawyer's Award from the Texas Bar Foundation. The award recognizes an active trial lawyer who, by his or her practice, has demonstrated outstanding trial and advocacy skills, high ethical and moral standards, and exceptional professional conduct, thus enhancing the image of the trial lawyer.

Austin Life Fellow, **Lloyd P. Lochridge**, was awarded the Lola Wright Foundation Award. The award is presented in recognition for outstanding public service in advancing and enhancing legal ethics in Texas.

Charles W. Schwartz, a Houston Fellow, was the recipient of the Texas Bar Foundation's 2004 Dan Price Award. The award is presented to a practicing attorney in recognition of an unreserved commitment to clients and to the legal profession as a volunteer and legal writer.

WI Wisconsin Supreme Court Justice and Madison Fellow, the Honorable **Ann Walsh Bradley** has been chosen as a 2004 winner of the American Judicature Society's Herbert Harley Award. This national award is reserved for individuals whose outstanding efforts and contributions result in substantial, long-term improvements the justice system.

ARE YOU PART OF THE FELLOWS REFERRAL NETWORK?

The Fellows now offer, as a membership benefit, a searchable referral database containing the names and contact information for all Fellows. All Fellows are included in the database unless they wish to opt out. We are now in the process of adding area of practice specialization or concentration. To make this database as useful as possible, it would be helpful if you could provide current contact information, a listing of your areas of practice concentration, and your firm's website address. To obtain the form needed to update your information, visit The Fellows website: http://fellows.abfn.org, and click on "Fellows Referral Network" on the left side navigation bar.

To access the database, e-mail Sommer Lohrentz at slohrentz@abfn.org for your password.

Join Us in Salt Lake City

In addition to the usual array of events at the February Fellows meeting in Salt Lake City, we are pleased to announce that there will be a joint luncheon and seminar with the Young Lawyers Division on Friday, February 11, at 12:30. The seminar, entitled "After the JD: Now What Do I Do?" will be based upon ABF research on the career choices and professional practices of young lawyers. We hope that you will join us and participate in what will be a lively discussion of the contemporary marketplace for legal services.

More details about the other February events will be distributed and posted on The Fellows website (http://fellows@.abfn.org) as soon as they become available. You might wish to note that although the ABA is no longer mailing housing forms for this meeting, the relevant information regarding advance registration is available on the ABA's website at http://www.abanet.org/midyear/2005.

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Supporting the Study of Law, Legal Institutions, and Legal Processes

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