Judicial Conference of Australia

Detention Without Trial - The Relevance for Australia of the US Supreme Court Decisions in Hamdi, Rasul and Rumsfeld

Author: Dr James Renwick • 3 September 2005

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'Great cases, like hard cases, make bad law'[1]

1. Your Honours, it is a privilege to be speaking at this colloquium.

2. The right to personal liberty - that is, to freedom from arbitrary detention - has been described as '*the most elementary and important of all common law rights*'.[2] It is a right which is at the heart of the three important cases of Hamdi, Rasul, and Padilla[3] each delivered by the Supreme Court of the United States on 28th June last year. The right was also considered last year by nine members of the House of Lords in A v Secretary of State[4], and by High Court of Australia last year in a series of cases concerning, first, the Kable[5] principle and, secondly, migration detention and related matters.

3. Those cases arose directly out of the response of the United States to the so called 'war' on terror. I say 'so called', not to downplay the significance of what is undoubtedly an important, concerted, international campaign, but to draw a distinction between a campaign against an ideology or movement which takes many forms, as opposed to an armed conflict, following a declaration of war, between nation states.

4. This campaign has raised a number of difficult legal questions, including:

- The treatment and classification of prisoners of war and enemy combatants;
- The detention without trial of suspected terrorists.

5. The three United States' cases consider these issues. I will consider the cases of Rasul and Hamdi first, as they concerned apprehension on the

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[1] Mr. Justice Holmes, dissenting in Northern Securities Co. v. United States, 193 U.S. 197, 400-401 (1904) said: "Great cases, like hard cases, make bad law. For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

[2] In Williams v R (1986) 161 CLR 278, Mason and Brennan JJ said at 292: "The right to personal liberty is", as Fullagar J described it, "the most elementary and important of all common law rights" *Trobridge v Hardy* (1955) 94 CLR 147 at 152. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England "without sufficient cause" (*Commentaries on the Laws of England* (Oxford 1765), Bk 1, pp 120–1, 130–1. He warned: "Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper there would soon be an end of all other rights and immunities."

[3] Rumsfeld v Padilla (2004) 124 S Ct 2711; Hamdi v Rumsfeld; (2004) 124 S Ct 2633; Rasul v Bush; (2004) 124 S Ct 2686.

[4] [2004] UKHL 56.

[5] Kable v Director of Public Prosecutions for New South Wales (1996) 189 CLR 51

battlefield in Afghanistan; and Padilla separately, as he was apprehended in the United States.

Rasul and Hamdi

6. In late 2001, asserting its right of collective self-defence[6] a military coalition, which included the United States and Australia,[7] commenced military operations in Afghanistan against both the Taliban and Al Quaeda. The operations led to prisoners being taken on the battlefield and then detained. Australia did not capture and hold such people in Afghanistan, but the United States did.

7. In previous armed conflicts, such as the first Gulf War, the Geneva Convention On The Treatment Of Prisoners Of War was applied to enemy soldiers. In 2002, however, Mr Bush determined that the Convention was inapplicable to every member of Al Quaeda and the Taliban, and that there was no occasion to hold hearings to determine the Convention's applicability on a case by case basis to those captured in Afghanistan. [8]

8. Between 500 and 700 of those who were captured - none of them United States citizens - were sent to the US Naval Base at Guantanamo Bay, Cuba. Some – including an Australian, Mr Habib - have been released. Those that remain are held there under a presidential order.[9] They are liable, under that order, to be charged (as four have been) with

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[6] And also breach of UN Security Council resolutions: see Resolution 1267 (1999): failure of the Taliban authorities to respond to the demands in paragraph 113 of Resolution 1214 (1998), namely, to stop providing sanctuary and training for international terrorists and their organizations, and to `cooperate ... to bring indicted terrorists to justice', constitutes a threat to international peace and security; 1333 (2000) and then 1368 and 1373 (2001) which speak of the inherent right of self defence.

[7] Which contributed 'A Special Forces Task Group which operated in Afghanistan for almost a year, performing a range of missions.' http://www.defence.gov.au/opslipper/

[8] Judge Alberto Gonzales, then counsel to Mr. Bush, and now his Attorney-General, wrote to him on January 25, 2002, arguing to this effect. He began by noting that the President had already called the conflict "*a new kind of war*". He then went on as follows:-"*It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for the (Convention). The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians and the need to try terrorists for war crimes …In my judgment [he wrote] this new paradigm renders obsolete (the Convention's) strict limitations on questioning of enemy prisoners*":-The Torture Papers- The Road to Abu Ghraib – Cambridge University Press 2005, p119.

[9] Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, see www.defenselink.mil/news/commissions.html

breaches of the laws of war, and then tried by military commissions,[10] a type of tribunal which has a long history in the United States.[11]

9. The first case, Rasul v Bush, was a habeas corpus petition brought by a Guantanamo detainee, Rasul (and others, including the Australians, David Hicks and Mamdouh Habib). It was and is clear that the writ of habeas corpus remains available to every individual detained within the United States.[12] But Guantanamo Bay is not within the United States. It is land leased to the United States in Cuba. The lease stipulates that the leased land is Cuban sovereign territory. The United States therefore argued that its courts lacked jurisdiction to consider the habeas petition. It relied upon a case decided shortly after World War 2 called Eisentrager.[13] This had held that a US federal court lacked authority under the Constitution to grant habeas relief to German citizens captured by US forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in occupied Germany.

10. But the Supreme Court in Rasul distinguished Eisentrager, as considering only a constitutional right to habeas, and held that United States' courts had jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with

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[10] The lawfulness of the procedures to be used by the Commissions is the subject of litigation in the unrelated case of Hamdan - a man said to be Usama Bin Laden's bodyguard – but that is a topic for another day.

[11] See my article, *The workings of US military commissions*, NSW Law Society Journal, September 2003 page 74. They key authority is that of a unanimous Supreme Court in Ex Parte Quirin, which stated:- "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war". Quirin, 317 U.S. at 27-28.

[12] The Constitution (Art.I, §9, cl. 2) provides "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it".

[13] 339 U.S. 763

hostilities. This was under a statutory[14] grant of jurisdiction, in part because there was jurisdiction over the petitioners' custodians.[15] As a result, there have been limited reviews of the status of the detainees. I will consider the relevance of this decision for Australia later on.

Hamdi

11. Mr Yasser Hamdi was a US citizen.[16] He was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. It was alleged that he had been carrying a weapon against American troops on a foreign battlefield; and that he was an enemy combatant. There was no question that, as a US citizen, he would have had standing to bring a habeas petition, regardless of the place he was detained. So he was brought straight back to the United States. He was there held in military custody under a Presidential order for 2 1/2 years. He petitioned for habeas. He relied upon a statutory provision which states that "*[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress*".[17]

12. Despite this provision, the United States Supreme Court held that his detention was authorised by a Congressional resolution empowering the President to "*use all necessary and appropriate force" [against] "nations, organizations, or persons" [that he determined had] "planned, authorized, committed, or aided"* the September 11, 2001 attacks.

13. The majority wrote '*it is of no moment that the [Congressional resolution] does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force,"* Congress had clearly and unmistakably authorized detention in the narrow circumstances considered here.[18]

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[14] Congress has granted federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(a), (c)(3).

[15] The District Court has jurisdiction to hear petitioners' habeas challenges under 28 U. S. C. §2241, which authorizes district courts, "within their respective jurisdictions," to entertain habeas applications by persons claiming to be held "in custody in violation of the . . . laws . . . of the United States," §§2241(a), (c)(3). Such jurisdiction extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."

[16] Only two United States citizens were captured in Afghanistan. The other, Mr John Walker Lindh, was convicted, following a plea of guilty, of supplying services to the Taliban and carrying an explosive during the commission of a felony, for which he was sentenced to imprisonment for 20 years.

[17] 8 U. S. C. §4001(a)

[18] Hamdi, 124 S.Ct. at 2640-41

14. Nevertheless, the Court also held that the due process clause demanded that Hamdi be given a "meaningful opportunity" to contest the factual basis for that detention before a US court.

15. Exactly what that "meaningful opportunity" would have entailed remains unknown as, in a settlement, Mr Hamdi was released on the basis that he renounce his United States citizenship and be deported to Saudi Arabia. He was never charged.

Padilla

16. Finally, there is Mr Padilla. Padilla was also a United States citizen. He was apparently overheard while in Pakistan planning to set off a radioactive bomb in the US. He was held in New York as a material witness – a procedure which has no equivalent here - in connection with a grand jury investigation into the September 11, 2001 attacks.

17. Mr Bush issued an order (which is in your materials) to Secretary Rumsfeld designating Padilla an "enemy combatant" and directing that he be detained in military custody. Padilla was later moved to a Navy brig in South Carolina, where he has been held ever since. His counsel then filed a habeas petition in New York, naming as respondents the President, the Secretary, and Melanie Marr, the brig's commander. Ultimately, the Supreme Court ducked the question of the lawfulness of his custody by holding that only Commander Marr was the proper respondent, and that in any event the case could only have been begun in the place where he was actually held, that is, South Carolina. So the case had to be started again, this time in South Carolina. This was then done.

18. Then, in February 2005, Judge Floyd of the federal district court in South Carolina held that the United States could not hold Padilla indefinitely without access to a court, and must charge or release him. The Judge said '*the Court finds that the President has no power, neither express nor implied, neither constitutional nor statutory, to hold [Padilla] as an enemy combatant*.'

19. In March, 2005 the Government filed its notice of appeal and sought to stay the district court's order. Padilla's lawyers have sought expedited review before the Supreme Court in order to fully resolve the matter. And there this important case rests for the moment.[19]

20. Apart from the fact that one of these cases concerned Australian citizens, what is their significance for Australia?

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[19] See http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_padilla.htm

Comparisons with Australia

21. In my view, if they do nothing else, the US cases bring into focus five questions of common interest with Australia, namely:

- the limits of executive power;
- deference to the executive on matters of national security and international relations;
- the extent to which detention can be divorced from punishment following a criminal trial by a judge and jury independent of the executive branch;
- the way in which, contrary to the notion that human rights are universal, the availability of constitutional guarantees may differ depending on the location of the Applicant, and whether he or she is a citizen; and
- the relationship between public international law and domestic law.

In order to further consider these questions, I ask: "how might the three US cases be decided here?"

22. In my opinion, the limited question of jurisdiction in Rasul would have been decided the same way here, but for slightly different reasons. That is because there is no doubt there is jurisdiction in federal courts - in the narrow sense of authority to entertain an application - for an application in the nature of the writ of habeas corpus, whenever persons are actually detained by officers of the Commonwealth, and wherever that may be. The lack of jurisdictional argument about this matter in the 'Tampa' case - Ruddock v Vadarlis[20] - proves the point.

23. The much more difficult question is the one Rasul did not answer, which is whether there could, as a matter of constitutional law, be detention without trial of both citizens and non-citizens who were enemy combatants, for the purpose of preventing them from returning to a battlefield upon which Australian soldiers were then engaged. This is where the rights of citizens and non-citizens begin to diverge, depending also on the place of detention.

24. Clearly, executive power will not suffice for lengthy detention within Australia.[21] The reason for this lies in some old but vital law and history. As Justice Scalia reminds us in his dissent in Hamdi, the Petition of Right accepted by Charles I in 1628, expressly prohibits executive imprisonment

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[20] (2001) 110 FCR 491

[21] The Tampa case does not help here. It decided only a limited question, namely that the executive power of the Commonwealth extended to a power to prevent the entry of non-citizens to Australia, and to do such things necessary to effect that exclusion - for example restraining a person or boat from proceeding into Australia or compelling that person or boat to leave.

without formal charges.[22] This provision is no dead letter:- it is still the law in New South Wales: it being mentioned in the Second Schedule to the Imperial Acts Application Act (NSW).

25. Furthermore, the Bill of Rights - that is the Bill of Rights 1688 - which is also, and for the same reason, still the law in NSW provides that the suspension of laws or their execution by "*regal*" that is "*executive*" authority and without consent of parliament is illegal. This provision was among the reasons for the decision of the High Court in A v Hayden[23] – the remarkable ASIS Sheraton Hotel raid case – that there was no power in the executive government to authorise a breach of the law, nor was a general defence of superior orders available in Australian criminal law.

26. But if executive power will not suffice, will legislative power – and what constitutional limits then apply?

27. While, unlike the United States, we have, in s 75(v) of the Constitution, entrenched jurisdiction to review actions of officers of the Commonwealth, including as to the lawfulness of detention by such officers,[24] we have no bill of rights and a very few, limited, constitutional rights. (I note that the topic of bills of rights will be discussed later today).

28. Thus, there is no equivalent in the Australian constitution of the US 5th and 14th amendments which, relevantly provide for a right not to be deprived of life, liberty or property by either Federal or State laws, without due process of law.

29. As Justice Dawson pointed out in Kruger v The Commonwealth[25] the 1898 Australian Constitutional Convention expressly rejected a proposal to incorporate due process rights, largely based on the 14th Amendment.

30. Although, in 1988 the Australian Constitutional Commission recommended a new s 124J of the Constitution which would have provided that '*everyone has the right not to be arbitrarily arrested or detained*', that recommendation was never put to a vote at a referendum.

31. My panel colleagues have or will be considering detention without trial, and the important recent High Court cases concerning:

- migration detention under Commonwealth laws:- Al Kateb v Godwin[26]/Minister for Immigration v Al Khafaji,[27] Secretary, Department of Immigration v Behrooz[28]), and

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[22] He noted that this law was the direct result of the King detaining without charge several individuals who failed to assist England's war against France and Spain, and who were denied habeas corpus by the courts notwithstanding they had not been charged with any offence. Why were they detained? Because of the asserted interest of the State in protecting the country. In the United States, that was part of the constitutional background which led to the passage of the due process clauses in the 5th and 14th Amendments.

[23] (1984) 156 CLR 532

[24] This was largely because our constitutional founders had read Marbury v Madison 1 Cranch p175. See, eg Quick and Garran, The Annotated Constitution of the Australian Commonwealth, p 778-780.

[25] (1997) 190 CLR 1 at 61,

- the theoretically indefinite detention under State laws of persons in gaol whose term of imprisonment has ended, because they are considered to be an "*unacceptable*" risk to society if released – (the Court held that the Kable principle was not infringed by such a law): Fardon v A-G for Queensland.[29]

32. While I leave detailed analysis to my panel colleagues, in my view, these cases -and the detention cases in the World Wars noted by Justice McHugh in Al Kateb[30] - make it clear enough that, in certain circumstances, persons who were an unacceptable risk to security (citizens and non-citizens alike), could be detained, for long periods, without trial, in Australia, under authorising legislation. A fundamental reason for this at the federal level in Australia is that, in legal theory at least, preventive detention can be divorced from punitive detention.

33. To the extent that such an Australian law relied upon the extended aspect of the defence power (as it would need to for citizens), there would be a question, as there was in the Communist Party[31] case, as to how far the Court would defer to executive and even legislative views as to whether the geo-political circumstances of the time supported an expanded reading of the defence power.

34. Deference, however, if it was ever very substantial (and it wasn't that substantial in the Communist party case) should not be overstated. Of course, if we were to have a bill of rights, deference would be diminished. As Lord Bingham said in A v Secretary of State last year:

"*The Court's role under the [Human Rights Act] is as the guardian of human rights. It cannot abdicate this responsibility … [J]udges nowadays have no alternative but to apply the Human Rights Act … Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts*".[32]

Consequently, if there was such a law (as opposed to a joint resolution of Congress –whose equivalent has no legal force in Australian law) Hamdi would have been decided similarly. The ultimate question in Padilla (where the executive power as commander in chief was relied upon to justify detention) would have been the same result as that arrived at in February by Judge Floyd, that is, executive power will not suffice.

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[26] [2004] HCA 37

[27] [2004] HCA 38

[28] [2004] HCA 36.

[29] [2004] HCA 46. It was apparent from the questions from the Bench in that case that the High Court was looking ahead to the possibility that the Commonwealth might pass a law permitting suspected terrorists to be detained because of the risk and danger to the community.

[30] Lloyd v Wallach (1915) 20 CLR 299; Ex parte Walsh [1942] ALR 359. Little v The Commonwealth (1947) 75 CLR 94.

[31] Australian Communist Party v Commonwealth (1951) 83 CLR 1

[32] [2004] UKHL 56 at [41]

Some undecided matters

35. There remain some harder cases, where the answers are not at all clear. Thus, the position of enemy aliens, at home and overseas, or aliens dealt with overseas by or at the request of the Commonwealth, is much more difficult.

36. There is old authority suggesting an enemy alien cannot sue in times of war,[33] but whether that remains good law is unclear.

37. The limits of the executive power overseas are much less clear, and this is an area where the murky relationship between public international law and domestic law can have an impact.

38. As to aliens suing for acts performed/conducted overseas, a current case in the Supreme Court of Victoria may decide that question.[34] Ali v Commonwealth[35] concerns the fall out of the Tampa affair, insofar as some of the asylum seekers on the Tampa ended up in the Republic of Nauru. A memorandum of understanding was entered into between Australia and Nauru. The Plaintiffs allege that their detention in Nauru is at the request and/or by the agents of the Commonwealth, and seek a declaration that they have been falsely imprisoned by the Commonwealth plus damages. The Commonwealth argues that the question whether agents of the Commonwealth acted unlawfully in Nauru in relation to the Plaintiffs, all of whom are aliens, involve Acts of State[36] insofar as such alien plaintiffs allege the Commonwealth engaged in tortious conduct outside Australia and in the exercise of the prerogative and that accordingly, no Australian Court has jurisdiction to consider those matters, which are not justiciable. The matter has not yet been finally heard.

39. The Act of State doctrine, which has a number of aspects[37] but is the subject of very few recent decisions, and the closely linked doctrine of non-justiciability, [38] probably provides the key to answering these difficult questions.

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[33] Johnstone v Pedlar (1921) 2 AC 262

[34] See its Nauruan counterpart which the High Court is reserved on in Ruhani v Director of Police [2005] HCATrans 205.

[35] [2004] VSC 6

[36] Acts of State are a defence to an action brought by an alien where the act complained of was committed outside the State's jurisdiction and it was committed on the order of the Crown or the subsequent ratification of the Crown: see Buron v Denman (1848) 154 ER 450. The defence is similarly available to acts committed within the jurisdiction to enemy aliens but it is not available to actions by an alien within jurisdiction or to citizens wherever the act occurs: Hogg and Monahan, Liability of the Crown, 3 Ed, (2000), p189.

[37] Buttes Gas & Oil Co v Hammer (No3) [1982] AC 888; Buron v Denman

(1848) 2 Exch 167

[38] Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia

40. Thank you for inviting me to speak to you.

[2003] FCAFC 3;