

The Supreme Court's Deference to the Pentagon

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Imagine a county sheriff that took a suspected drug-law violator into custody more than 10 years ago. Since then, the man has been held in jail without being accorded a trial. The district attorney and the sheriff promise to give the man a trial sometime in the future but they're just not sure when. Meanwhile the man sits in jail indefinitely just waiting for his trial to begin.

Difficult to imagine, right? That's because most everyone would assume that a judge would never permit such a thing to happen. The man's lawyer would file a petition for writ of habeas corpus. A judge would order the sheriff to produce the prisoner and show cause why the prisoner shouldn't immediately be released from custody. At the habeas corpus hearing, the judge would either order the release of the prisoner based on the violation of his right to a speedy trial or he would order the state to either try him or release him.

The same principle would apply on the federal level to, say, DEA agents who had been holding some suspected drug lord in jail for ten years without according him a trial. A federal judge would proceed to handle a petition for habeas corpus in the same manner that the state judge would. It is a virtual certainty that the federal judge would either order the prisoner's release or order the DEA to "try him or release him."

In either case, the judicial branch's order would be supreme over the sheriff and the DEA. They would be expected to comply with the judge's order. If they refused to do so, the judge would cite the sheriff or DEA officials with contempt and order them incarcerated until they complied with his order. The contempt order would be carried out by state law-enforcement personnel or by deputy U.S. Marshalls.

Not so, however, with the national-security establishment, specifically the Pentagon, the CIA, and the NSA. As Michael Glennon, professor of law at Tufts University, points out in his book *National Security and Double Government*, the national-security establishment has become the most powerful part of the federal government, one to which the judicial branch (as well as the other two branches) inevitably defers in matters that are critically important to the Pentagon, the CIA, or the NSA.

An excellent example of this phenomenon is the Pentagon's prison camp at Guantanamo Bay, Cuba. When the Pentagon initially established Gitmo as a prison camp after the 9/11 attacks, it did so with the intent that it would be totally independent of any interference or control by the federal judiciary. That's why it chose Cuba for the location of its prison — so that it could argue that the U.S. Constitution did not apply and the Supreme Court did not have jurisdiction to interfere with its operations. (It was an ironic position given the oath that all military personnel take to support and defend the Constitution.)

Maintaining the veneer of control, however, the Supreme Court ultimately held that it did in fact have jurisdiction over Guantanamo. But as a practical matter, the Court deferred to the ultimate power of the Pentagon, as manifested by the fact that there are prisoners at Guantanamo who have been incarcerated for more than a decade without being accorded a trial.

In other words, what the judiciary would never permit to happen under a local sheriff or the DEA has been permitted to happen under the Pentagon. That's because the judiciary knows that given the overwhelming power of the Pentagon (and the CIA and NSA), there is no way that some federal judge would be able to enforce a contempt order with some deputy U.S. Marshalls confronting, say, the 82nd Airborne Division.

Sure, the federal judiciary has issued habeas corpus releases on some prisoners at Guantanamo and the Pentagon has consented to complying with them. But that's all just for appearance sake, to maintain the veneer that everything is operating "normally." Federal judges know that whenever the Pentagon says "No more," that's the way it's going to be.

How do we know this? How do we know that the Pentagon, not the federal judiciary, is ultimately in charge and that when push comes to shove the judiciary will defer to the power of the military? We know it by virtue of the fact that there are some prisoners at Guantanamo who have been incarcerated for more than a decade without being accorded a trial. We know that judges would never permit that sort of thing to happen with a sheriff or the DEA.

There is another way we can recognize the supreme power of the Pentagon vis a vis the Supreme Court. After the Court took jurisdiction over Guantanamo, the Pentagon established its own "judicial" system to try terrorist suspects. I place the word "judicial" in quotation marks because it really isn't a judicial system in the way that we think of judicial systems here in the United States. The Pentagon's "judicial" system more closely resembles the "judicial" system that the communist regime in Cuba employs than the judicial system that exists here in the United States.

For example, trial is by military commission rather than trial by jury. Evidence acquired by torture is admissible. The accused is presumed guilty and can be tortured into making admissions and confessions. Hearsay evidence is admissible. Lawyer-client conversations can be monitored by military authorities, a grave breach of the attorney-client privilege that is recognized here in the United States. There is obviously no right to a speedy trial. In fact, the entire "trial," when it finally is permitted, is nothing more than what is called a "show trial" in communist countries. That's because a guilty verdict is preordained but is made to look like it has been arrived at fairly and justly.

There is one big thing to note about the Pentagon's "judicial" system at Gitmo: There is nothing in the Constitution that permits the Pentagon to establish and operate such a "judicial" system. The Constitution, which is meant to control the entire federal government, establishes one and only one judicial system to try terrorist suspects and other people accused of federal crimes. That system is the U.S. federal court system that the Constitution authorized the federal government to establish when the federal government was initially called into existence.

Thus, when the Supreme Court assumed jurisdiction over Guantanamo, it had the legal duty to immediately declare the Pentagon's "judicial" system in Cuba unconstitutional. After all, if

a local sheriff or the DEA established a new independent “judicial” system to try drug-war violators, federal judges wouldn’t hesitate to declare it illegal under our form of government. But this is the Pentagon that we are dealing with. The Supreme Court knows that the Pentagon will permit the judicial branch to go only so far when it comes to interfering with its operations.

In 1961, President Eisenhower issued a stark warning to the American people. He said that the military-industrial complex, which, as he pointed out, was a relatively new feature in American life, posed a grave threat to the freedom and democratic processes of the American people. The Pentagon’s prison camp, torture center, and “judicial” system at Guantanamo Bay confirms how right Eisenhower was.

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