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Legal Rights of Detainees

News Hour with Jim Lehrer

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The right of habeus corpus

JEFFREY BROWN: Starting with you, Mr. Wilner, remind us what habeas corpus is and how would it affect your clients?

TOM WILNER: Well, habeas corpus was really a fundamental right developed under the common law. It really was to enforce the rights granted by the Magna Carta. The Magna Carta said that no person shall be deprived of his liberty without jury by his peers and accordance with the law of the land and habeas corpus was developed to enforce that. Really what it does, it requires judicial review, independent review of the facts and circumstances to see whether there's a reason to hold somebody.

JEFFREY BROWN: And your clients were part of the Supreme Court case that was decided last year?

TOM WILNER: Yes. We filed our case in May of 2002 asking basically for some sort of independent hearing to determine whether there was really a legitimate basis for holding our people. The problem is the government under their policies denied any hearings. It put people down in Guantanamo on the say-so basically of bounty hunters and we brought a case saying look, there's got to be an independent review to see whether these people are in fact innocent or whether they're not.

JEFFREY BROWN: Professor you support the proposal by Sen. Graham. Why should detainees not be able to petition the courts?

JOHN YOO: Well, the thing to remember is the Graham amendment just goes halfway towards restoring the law as it existed as of last summer before the Supreme Court overruled its own precedents and extended habeas corpus to enemy prisoners during wartime held outside the United States.

If you believe that 9/11 was the start of the war, we have never in our history allowed enemy fighters who we captured and held outside the US to bring and get access to the federal courts to the writ of habeas corpus.

In 1950, the Supreme Court declared in a case called Johnson versus Eisentrager written by Justice Jackson, who was a Nuremberg prosecutor, which said that the federal courts would not entertain these kind of cases for the very reason that they were worried that the civil authorities and military opinions would come into conflict; they didn't want to interfere with military relations; they didn't want to recall soldiers back from the field to have to testify and most importantly, they did not want there to be distractions and diversions of resources from the war abroad to a legal defensive back at home.

JEFFREY BROWN: How do you respond to that? Is that different in wartime?

TOM WILNER: I think that Professor Yoo has really mischaracterized the situation in the law. And, as you'll see, he puts a lot of emphasis on holding people outside the United States. I think he's misinterpreted Eisentrager, as really the Supreme Court said he did by a six to three decision in a pretty conservative court, so they disagreed with him.

But the really essential thing, first of all in World War II people did have the right to habeas corpus in foreign battles. The fact is that the Supreme Court said in a lot of cases, look, these people have been given fair hearings so you really don't need to enforce the right.

What's really at stake here is whether people should have a hearing to determine whether or not they're innocent or guilty. It is not about extending legal rights to terrorists or to enemy combatants; it is about a fair process to determine whether they are terrorists or not. And that's what's at stake here. That's what habeas corpus guarantees; that's all this case has ever been about.

The process: determining who is a terrorist

JEFFREY BROWN: Well, Professor Yoo, there was a piece in the Washington Post by another lawyer who has clients down there, and he was talking about how his clients had been seen as innocent by the military down there, and yet they still could not get a hearing.

So what kind of protections are there for people if they do not have access to a writ of habeas corpus?

JOHN YOO: Well, first the Graham amendment recognizes that the Defense Department has itself set up procedures that are called combatant status review tribunals run by the military to examine the legal status of every detainee in Guantanamo Bay, and in fact, the Graham amendment -- this is why I said it went halfway -- the Graham amendment still allows people in Guantanamo Bay to appeal the findings of those tribunals to the D.C. Circuit Court of Appeals as your piece noted.

That is a much more protective procedure than even required in the Geneva Conventions for people who fight on behalf of nations and obey the laws of war, which al-Qaida does not. So already, there's a procedure in place, and already even the Graham amendment allows federal courts in DC to review those findings.

Let me also say, think about the implications if we had a different rule. In World War II we captured hundreds of thousands of Germans and Italians. We didn't give all of them federal habeas corpus review; they didn't get any review. Johnson versus Eisentrager, again, from 1950, said that the federal courts could not exercise review in those cases.

So the question is whether we want to extend to terrorists -- people who don't obey laws of war -- more generous procedures, even going beyond what the Defense Department has already set up that don't even apply to regular soldiers in wartime.

JEFFREY BROWN: You don't think that this process that goes through the court of appeals is enough?

TOM WILNER: No, I don't. Let me start off with the last thing that Professor Yoo said. And I think this is a problem and it's been the problem of this administration since the beginning; it assumes the answer.

He says don't extend these rights to the terrorists at Guantanamo Bay; that assumes that they're terrorists. There are a lot of innocent people at Guantanamo Bay, and they have got to be given a fair process. That's the issue: Are they terrorists or not?

The CSRT process, which the government put in place, the Graham amendment recognizes is not a fair process; it requires for the future that it be changed so that it can't base its process based on statements taken through torture.

But what it does, it says here that the process that was applied which was unfair is locked in place for the people who are already at Guantanamo; they can only appeal to the court of appeals by saying did the government follow the procedures in place which were patently unfair -- even Graham admits it.

And let me say Judge Joyce Green looked at that process. She was former head of a foreign intelligence court and she said it doesn't meet the basic requirements of due process because it didn't allow the people to confront or to see or rebut the evidence against them and it allowed statements procured through torture.

Let me just say also the World War II analogy is very different. We've got to understand in World War II it was easy to know who an enemy combatant was; he was wearing a Nazi or a Japanese uniform. The problem we recognize after that, when we pick up people who are dressed as civilians they can be bad guys but they can also be people picked up by mistake.

For instance, we are dressed as civilians and we're not bad guys. You need a process, and the military had such a process in Vietnam and the last Gulf War where they reviewed this and they released most of the people reviewed.

Professor Yoo, when he was in the government here, denied people that process. The reason we are bringing a habeas case is because the government never gave them a hearing, a fair hearing.

JEFFREY BROWN: Professor Yoo?

JOHN YOO: Well, first of all, this combatant status review tribunal is that process. Second, I think the fundamental confusion here is that some people don't believe that 9/11 was the start of the war. You can hear it in the phrases, oh, they are guilty or innocent. Those are ideas that come out of the criminal justice system.

In wartime you don't detain people because they are guilty. You detain people who are members of the enemy to prevent them from attacking the United States in the future. It is not about guilt or innocence, there's no punishment; there's no conviction; the detention is just to be preventative.

JEFFREY BROWN: I'm sorry, Professor Yoo, isn't the question how to determine the proper designation for these people?

JOHN YOO: That's quite right. But that decision, until last summer when the Supreme Court changed the law had always rested in the hands of the military. The military, you know, Mr. Wilner is quite right -- the military has run these tribunals in the past; they had made these kind of determinations, but neither in the Geneva Conventions or American law before last summer had there ever been a requirement that after the military made

that call that the enemy combatant could go to federal court, you know, an American civil court to have it review the decisions made by military commanders and officers in the field outside the United States about enemy prisoners.

Looking ahead in Congress

JEFFREY BROWN: We just have a few seconds here Mr. Wilner, but Sen. Specter, you saw in our piece, was calling for a slower process, more hearings on this. Is that what you'd like to see?

TOM WILNER: Well, actually, I think we are on a floor debate trying to amend the first statute passed by the first Congress of the United States in 1789, the Habeas Corpus Act, one of the most basic rights in the common law. We stand for this, to amend this and revoke it on a floor debate without any committee consideration is wrong, I think. But, clearly, it should not -- any revocation should not be applied retroactively to take habeas corpus rights away from innocent people at Guantanamo who never had a hearing.

JEFFREY BROWN: All right. Thomas Wilner and John Yoo, thank you both very much.