In three rulings on prolonged military detention of so-called “unlawful enemy combatants” in the “war” against terrorism, the United States Supreme Court in June 2004 shielded the rule of law from some of the more extreme excesses of the Bush Administration. However, the Court also yielded some ground and left open a number of troublesome questions.

To appreciate the Court’s rulings, one need only contemplate the deep wound to the rule of law, had the Court sustained the Administration’s most sweeping – and chilling – assertion of executive power. Based on his authority as commander in chief of the military, the President claimed the right, without prior judicial authorization and without express constitutional or statutory authority, on the basis of secret intelligence information unseen by anyone outside the executive branch, to designate individuals he suspects of involvement in international terrorism as “enemy combatants,” and then to imprison them indefinitely, for as long as the “war” on terrorism may last, without criminal charges, access to lawyers or courts, due process of law or even status hearings under the Geneva Conventions.

This presidential claim was not limited to persons captured on or near the battlefield in Afghanistan, but extended to the entire world. For example, among “enemy combatants” imprisoned at the United States Naval Base in Guantanamo Bay, Cuba, are individuals arrested far from any battlefield in West Africa and Bosnia-Herzegovina. Similarly, U.S. citizen Jose Padilla, imprisoned as an enemy combatant at a Navy brig in South Carolina, was originally arrested, unarmed and in civilian clothes, at a civilian airport in Chicago.

This assertion by the chief executive of the global superpower of a right to imprison persons he deems enemy combatants indefinitely, without due process of law, would have seriously undermined, at least in the context of counter-terrorism measures, the fundamental international norm against prolonged arbitrary detention, embodied in such international human rights instruments as the International Covenant on Civil and Political Rights (art. 9) and in such humanitarian law.
treaties as the Third Geneva Convention of 1949 (art. 5). (The U.S. is a party to both treaties, without relevant reservation.)

Fortunately, relying mainly on U.S. domestic constitutional and statutory law, the Supreme Court rejected the Administration’s claim by a vote of 6 to 3 in the case of foreign citizens imprisoned offshore at Guantanamo, and by 8 to 1 in the case of a U.S. citizen (Yasir Hamdi) imprisoned in the United States.

In the Guantanamo case,1 the Administration argued that United States courts have no jurisdiction to hear petitions for relief by foreign citizens imprisoned outside the sovereign territory of the United States. Even though the 1903 lease by which the United States occupies Guantanamo expressly grants the United States “complete jurisdiction and control” over the base, the lease reserved “ultimate sovereignty” over the base to Cuba.

The Administration’s denial of jurisdiction was limited and selective. It conceded that U.S. courts have jurisdiction over claims for relief by U.S. citizens at Guantanamo, as well as jurisdiction to prosecute crimes committed at Guantanamo by foreign nationals. Only claims for relief by foreign citizens at Guantanamo were said to fall outside the jurisdiction of U.S. courts.

Rejecting the Administration’s formalistic argument, the Supreme Court majority emphasized the practical nature of the traditional Anglo-American writ of habeas corpus, by which judges review the lawfulness of executive detentions. U.S. control of Guantanamo suffices to warrant the exercise of jurisdiction by American courts over the custodians in Washington who order the detention of prisoners at Guantanamo.

Basing its ruling on the U.S. statute which recognizes habeas corpus, the majority noted that nothing in the statute purports to discriminate between U.S. and foreign citizens. Its ruling, however, was narrow. The “holding” – the portion of the opinion that has binding precedential weight – was only that U.S. courts have jurisdiction. The Court expressly declined to reach the questions that might arise once prisoner petitions are brought before U.S. courts.

Seizing on this point, the Administration now argues in subsequent litigation that even though U.S. courts have jurisdiction, foreign nationals imprisoned at Guantanamo have no legally enforceable rights in U.S. courts – not even to assistance of counsel for purposes of filing their petitions. This argument is untenable for at least three reasons. First, albeit in dicta (non-binding reasoning), the majority in a footnote indicated that if the two Australian and twelve Kuwaiti prisoners in