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***“Guantanamo: Still a Law Free Zone”***

The imprisonment of suspected terrorists at the United States Naval Base in Guantanamo threatens our national security and our national interests. So say the Secretary of Defense and the Secretary of State, according to news reports. Unfortunately, they have not yet won over the White House. And this week’s duck by the Supreme Court – even if only temporary – is not helpful.

Shortly after taking over leadership of the Pentagon, the *New York Times* reports, Secretary Robert Gates recommended closing the prison at Guantanamo and moving the prisoners to military briggs in the United States. The Guantanamo prison, he argued, weakens us in the war against terrorism. Other countries are less willing to cooperate with us by turning over evidence, intelligence and suspects. And Al Qaeda could not ask for a better recruiting poster than displays of shackled, abused and humiliated Muslims at Guantanamo.

Gates’ plea was reportedly supported by Secretary of State Condoleeza Rice. No wonder: she gets bashed by critics of Guantanamo in nearly every capital she visits. Guantanamo, they point out, mocks international human rights standards. Her foreign policy portfolio confronts enough headaches, without the United States adding migraines of our own making.

But to date the Secretaries have reportedly been overruled by the President, at the urging of the Vice President. Bringing Guantanamo prisoners to the mainland would pose a threat – not of terrorism, but of law. Once on American soil, they would stand a better chance of being able to challenge the lawfulness of their imprisonment by filing *habeas* petitions.

Unfortunately, the Supreme Court has now bolstered that argument, at least for a while. This week the Court declined to hear – for now – the pleas of Bosnian, Kuwaiti and Algerian prisoners at Guantanamo to file *habeas corpus* petitions.

Like hundreds of others at Guantanamo, these prisoners have been held for over five years without criminal charges as “unlawful enemy combatants” – even though the Bosnians, for example, were arrested far from any combat zone, in Bosnia, years after the Yugoslav war ended. In 2004 the Supreme Court, noting that Guantanamo is entirely under American control, ruled that prisoners there had the right to file *habeas* petitions.

But Congress then amended the *habeas* statute to deny them that right. Lawyers for the prisoners argued that even so, the prisoners retained their right to *habeas* under both the common law and the Constitution, which forbids suspending *habeas* except in times of rebellion or actual invasion.

In February a federal court of appeals panel in Washington, by a 2-1 vote, ruled against the prisoners. Foreign prisoners at Guantanamo, it said, have no rights under the Constitution, including no right to *habeas corpus*.

This week the Supreme Court declined to hear the case. Three justices – Breyer, Ginsburg and Souter – dissented. *Habeas*, they reason, is meant to be speedy. Yet these prisoners have been held for five years with no *habeas* review, and will now probably have to wait another year before their claim of a right to *habeas* can be heard by the Supreme Court.

Two justices – Stevens and Kennedy – voted to deny review at this time, but made clear that they did so only because the prisoners have not yet exhausted other remedies.

But the other remedy available to the prisoners is likely to do nothing more than to keep them in prison longer. That remedy, provided by Congress when it took away *habeas*, authorizes judicial review of determinations by military panels that prisoners are enemy combatants. However, courts are allowed to review only two questions: whether the prisoners' constitutional rights were violated, and whether the military panel followed its own procedures.

The constitutional review is now meaningless: the court of appeals has already ruled that the prisoners have no constitutional rights. Unless and until the Supreme Court disagrees – and the five justices mentioned all made clear that they have not reached that question – the prisoners have no constitutional rights.

The procedural review is equally meaningless. Even if the military panels follow their own procedures, those procedures make a farce of any notion of a fair hearing. Prisoners who appear before the panels have no lawyers, no right to know key evidence or to confront key witnesses against them, no right to call their own witnesses from outside Guantanamo, and no right to know whether evidence against them has been obtained by coercive means, or to exclude such evidence.

In this context, the judicial review authorized by Congress is no more than a formality. It is certainly no substitute for *habeas corpus*, by which an independent court can review whether a prisoner is in fact held lawfully.

A year or so from now, these or similar cases will in all likelihood be back before the Supreme Court. The prisoners will have spent another year incarcerated without meaningful review by an independent court. Unless the White House relents – and the Supreme Court's stall only encourages it to dig in its heels – our national security and national interests will continue to be burdened by the stain of Guantanamo.

**Doug Cassel's commentaries are generally broadcast Wednesdays during the noon hour of the Worldview program on Chicago Public Radio, 91.5 FM, and rebroadcast at 9 PM in the evening. Views expressed are personal views of the author and not necessarily those of Notre Dame Law School, the Center for Civil and Human Rights or Chicago Public Radio.**