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“The United States: Shaming Ourselves at Guantanamo”

The damage done to America’s standing in the world by Bush Administration lawlessness at Guantanamo is incalculable and – for years and perhaps decades – irreversible. Our country has now imprisoned hundreds of prisoners at Guantanamo for years on end as “enemy combatants.” We rely on “intelligence” information often amounting to nothing more than flimsy hearsay accusations by witnesses with axes to grind or who bear the scars of torture in foreign dungeons.

If the evidence is often lacking, the process is worse. Initially the Pentagon held the prisoners with no legal process at all. Only after briefs were filed in the Supreme Court in 2004, challenging the lawfulness of the detentions, did the Pentagon invent a kangaroo court process known as Combatant Status Review Tribunals.

This June two separate military judges threw out cases against prisoners at Guantanamo on the ground that these so-called tribunals had not even bothered to ask the right question: whether the prisoners were *unlawful* enemy combatants. Later that month a former member of one tribunal filed an affidavit in federal court alleging that the tribunals rely on vague and incomplete information and are under heavy Pentagon pressure not to release prisoners.

This officer – a military intelligence officer who is also a lawyer -- had served on a tribunal that unanimously determined that a prisoner should be set free. But military superiors rejected the tribunal’s finding. Another panel then decided that the prisoner must remain behind bars. This officer was never assigned to another case.

This discontent within the military has finally brought the constitutionality of the Guantanamo detentions before the Supreme Court. In 2004 the Court ruled that prisoners at Guantanamo had a right to file *habeas corpus* petitions, asking federal judges to review the legality of their detentions.

However, the Court’s ruling was based on the federal *habeas* statute. In 2005 Congress responded by amending the statute. The amendment barred *habeas* for prisoners at Guantanamo. Instead it substituted an extremely limited judicial review of whether Combatant Status Review Tribunals follow their own procedures.

In 2006 the Court stepped in again. It interpreted the new amendment to bar only *future habeas corpus* petitions, but not the hundreds of petitions already pending in federal court. But then, on the eve of last year’s elections, Congress succumbed to White House pressure and amended the statute again. This time it left little doubt that even cases already pending must be dismissed.

That posed a constitutional question: Does the elimination of *habeas* for prisoners at Guantanamo violate Article I, section 9 of the Constitution, which allows suspension of *habeas* only in cases of “rebellion or invasion”? That, in turn, raised an even more basic question: Do prisoners at Guantanamo – foreign nationals not within United States territory – have any rights under the Constitution at all?

This April the Supreme Court declined to hear a pair of cases – *Boumediene* and *Al Odah* -- raising these constitutional issues. Three justices dissented. Two more – Justices Kennedy and Stevens – wrote separately that although review was not yet ripe, they would continue to monitor developments.

On June 4, two military courts ruled that the Combatant Status Review Tribunals had failed to ask the basic question of whether the enemy combatants at Guantanamo were “unlawful.” That was apparently enough for Justices Kennedy and Stevens. That same day, the Supreme Court ordered the government to answer a petition to rehear the April decision denying review.

In late June, for the first time in more than half a century, five justices of the Supreme Court voted to reverse an earlier decision not to hear a case. *Boumediene* and *Al Odah* are now likely to be argued before Christmas, and to be decided by the Court early next year.

If the Court rules the denial of *habeas* unconstitutional, its ruling will come none too soon. The dozens of friend-of-the-court briefs already filed in support of the prisoners make clear the stakes for our national credibility. A group of nearly 400 European Parliamentarians tells the Court that the case comes down to whether the rule of law will survive the terrorist threat. The bar associations of 53 Commonwealth nations tell the Court that under the British system, independent courts and not the military would decide whether prisoners can be held indefinitely.

And 25 former American diplomats, in a brief which I had the privilege of submitting on their behalf, advise that our nation “cannot credibly champion the rule of law in the world, while being seen to disregard it in our own affairs.”

The Court, of course, confronts only a constitutional question: whether detentions at Guantanamo without *habeas corpus* violate the Suspension Clause. Congress has both a broader mandate and a broader responsibility: to act in the interest of the people of the United States. Until Congress finds a way to put an end to the global scandal of Guantanamo, the least that is required by our national interest is, in the words of the diplomats, “to restore meaningful judicial review for prisoners at 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.