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“Guantanamo: Round Three Before the Supreme Court”

Lawyers around the world are puzzled. How can the United States of America, self-proclaimed champion of human rights and inheritor from Britain of the Great Writ of *habeas corpus* -- by which prisoners may challenge the lawfulness of their detention before an independent judge -- deny this right to prisoners at Guantanamo?

More than 300 inmates now languish at Guantanamo, some for well over five years. Yet not a single *habeas* petition has been litigated to conclusion.

This week the prisoners' right to *habeas corpus* is being argued before the Supreme Court for the third time. In the first round in 2004, the Supreme Court ruled by 6-3 that the federal *habeas* statute applies to prisoners at Guantanamo.

With Administration support, Congress then passed a law which took away the right of *habeas* for prisoners at Guantanamo, substituting a more limited form of judicial review in its place.

That led to a second round. In 2006 the Court ruled by 5-3 that the new law was meant to bar only future petitions, not to undo the dozens of *habeas* petitions filed in the wake of its 2004 ruling.

On the eve of the 2006 elections, Congress then passed another law, making clear that even pending *habeas* petitions were barred.

That led to round three. In *Boumediene v. United States*, prisoners at Guantanamo argue that the new law violates the United States Constitution, which mandates, “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it.”

Since there has been no rebellion or invasion, they contend, their right of access to *habeas* may not be suspended.

The Government responds that Guantanamo prisoners, “as aliens held outside the sovereign territory of the United States,” have no rights under the U.S. Constitution. Thus, says the Government, they have no rights under the Suspension Clause.

At first glance, this constitutional argument appears quite different from the questions of statutory interpretation decided by the Court in the earlier rounds. But on closer examination, it largely parallels the statutory arguments.

In 2004 the Court found that the *habeas* statute applied to our naval base at Guantanamo, even though the base is not US sovereign territory, because our century-old lease with Cuba grants the US “exclusive jurisdiction and control” over the base. The issue now, then, is not whether the US Constitution applies in, say, France, but whether it protects people we imprison in a territory under our exclusive jurisdiction and control.

The Government next argues that even if the Constitution protects aliens imprisoned at Guantanamo, there has been no suspension of the writ, because *habeas* has never been available to aliens held outside US sovereign territory.

This, too, runs counter to the Court’s earlier ruling. When the Constitution was adopted, the Court concluded in 2004, the geographical reach of the writ of *habeas corpus* at common law “depended not on formal notions of territorial sovereignty, but rather on the practical question of ‘the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown.’” Under this test, *habeas* plainly reaches a territory under exclusive US jurisdiction.

Even so, the Government next argues, the writ does not protect captured enemy combatants in wartime. But this argument, as the prisoners note, assumes away the central issue: the very reason they want to go before an independent judge is because they say they are *not* enemy combatants. Mr. Boumediene, for example, was arrested while living as a civilian in peacetime Bosnia, far from any battlefield – unless the whole world is a battlefield.

In any event, the Government adds, Congress has given the Guantanamo prisoners an adequate substitute for *habeas*, by allowing judicial review of military detention decisions by the federal court of appeals. But this remedy, answer the prisoners, is too slow and too limited: the court can review only whether the military followed its own procedures, and whether those procedures are lawful and constitutional.

The court thus could not, say the prisoners, review the underlying issue: whether the prisoner is an enemy combatant who may be lawfully detained. The Government disputes this, suggesting that the court could review the sufficiency of the evidence.

Finally, the Government argues that if the Court were to reach the issue of whether the prisoners are lawfully held, it should uphold their detention. In contrast, the prisoners argue that the Government’s definition of “enemy combatant” – which includes anyone who “supports” the enemy – is far broader than allowed by the law of war. If Mr. Boumediene has committed a crime, he may be prosecuted, but he is not a military combatant.

Five current Justices ruled against the Government in both prior rounds. Their 2004 rulings suggest that the Government may well lose on whether the Constitution and the right of *habeas* extend to prisoners at Guantanamo. But the other issues are new. How the Court resolves them will say much about whether our country remains committed to the rule of law for everyone.

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.