



RESTORING HABEAS CORPUS, AMERICA'S INTEGRITY

By Michael Ratner 9376.B

This month, the Supreme Court heard arguments on whether the writ of habeas corpus should be granted to the men held by the U.S. government at the Guantánamo Bay detention facility in Cuba. Since there is no other adequate legal remedy for those imprisoned, it's up to the court of last resort to remedy six years of injustice and grant the Guantánamo detainees a fair hearing before an impartial panel.

First, some background on the cases, *Al Odah v. U.S.*, 03-343, and *Boumediene v. Bush*, 06-1195. Through a series of ill-conceived executive orders and laws written since the beginning of the so-called war on terrorism, Congress and the Bush administration have severely restricted the right of the men held at Guantánamo to test their detentions. The new laws they created, the Detainee Treatment Act and the Military Commissions Act, give no real opportunity to test the administration's determination that those at Guantánamo are "enemy combatants."

The Detainee Treatment Act calls for prisoners to undergo Combatant Status Review Tribunals — hearings to confirm what the administration has decided, that the prisoners are "enemy combatants." These proceedings have no resemblance

to a fair and constitutional process. Prisoners appear without attorneys. Confessions and other evidence elicited from torture are permissible. Determinations are made based on classified evidence that the detainees never see. And there is no real chance to present evidence or call witnesses. In the few cases in which the government doesn't get its desired result the first time, a prisoner may be subjected to multiple tribunals, until the panel finally confirms him as an "enemy combatant."

We know of the problems of Combatant Status Review Tribunals from some of the transcripts of those who went before the panels. In one case, a detainee was accused of associating with a member of al-Qaida. When he asked who it was, he was told the name was classified. He asked the panel how he could respond. The detainee never got the name and was found to be an "enemy combatant" based on that ambiguous association. Kafka is alive and well and sitting on the tribunals.

Panel members themselves have stepped forward to say that these proceedings are unfair.

"All of us [on one panel] found the information presented to lack substance," wrote Lt. Col. Stephen Abraham. But, he continued, "we were then ordered to reopen the hearing to allow the Recorder

to present further argument as to why the detainee should be classified as an enemy combatant."

But what of the argument that we are at war, facing a real enemy? Doesn't our "war on terrorism" mean that habeas corpus can be suspended, just like it was during the Civil War?

The Suspension Clause does say that habeas rights may be suspended "in cases of rebellion or invasion." But this "war" is not a rebellion like the Civil War, and no armies or throngs of individuals are poised to invade our borders. Even the Bush administration does not argue that; rather, it claims Guantánamo is outside the U.S., and there is thus no habeas there for noncitizens.

That issue was decided, however, in the Center for Constitutional Rights case *Rasul v. Bush*, 542 U.S. 466 (2004), the first time a petition from Guantánamo detainees reached the Supreme Court. In *Rasul*, the court upheld statutory habeas rights but in doing so pointed out that executive detentions have been anathema since King John signed the Magna Carta in 1215. Further, Justice Anthony Kennedy noted in his opinion that Guantánamo is under the complete jurisdiction and control of the United States. That's a strong indicator that those held at Guantánamo are protected by the Constitution.

Habeas, at its core, is about the underlying constitutional right to challenge arbitrary detention — if that were not the case, we'd be living in an authoritar-

ian state. And that's surely not what the Framers had in mind.

We know from the recent oral arguments that the administration is holding fast to its bogus new laws and would like to remand Detainee Treatment Act and Military Commissions Act appeals to the District of Columbia Circuit, meaning that a lower federal court would rule on whether the tribunals merely comply with the acts and not on whether those laws are viable to begin with. But even if the District of Columbia Circuit weighs in, it is a meaningless exercise; as we know from those who served on panels, those proceedings are shams.

The government's desire to keep the tribunals in the lower courts complements its wish to keep prisoners at Guantánamo as long as possible. It's an effort to hide illegalities and gross missteps in its "war on terrorism" as well as the torture and abuse they have committed.

After six years of delaying justice, the administration is looking to avoid a national embarrassment. It doesn't want to concede that the vast majority of the men imprisoned at Guantánamo should never have been plucked from their homes to begin with. Based on published reports (and the government's own estimates), the vast majority of 300 habeas petitions would not get to the stage of a hearing, because there is so little evidence. For the few that will get to a hearing, it is unlikely that there is enough independent evidence to hold them in detention. The government

will do anything to avoid conceding that its new laws are not a substitute for habeas and that the improper imprisonments have tarnished our national reputation.

The legal questions of Guantánamo underlie a moral question. Not too long ago, our country could claim that it was a nation guided by laws. But that basic assertion is hollow now.

The government's actions reveal us to be a nation lacking the moral authority needed to be the world's only superpower. But this recent hearing before the Supreme Court has shown that those of us guided by a code of ethics — and a code of laws — are not without hope.

Perhaps the Supreme Court will make the decision it should. Perhaps the six years will weigh on the court as it has on the Guantánamo detainees. Perhaps, after all this time and two favorable decisions, the court will cut the Gordian knot that the executive branch and Congress have been unwilling to untie.

Perhaps we will see the end of the nightmare that is Guantánamo.

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