

THE HIGH COURT

Robert Barnes

Supreme Court declines to clarify rights of Guantanamo detainees

It felt like an epic decision in June 2008 when a bitterly divided Supreme Court decided that terrorism suspects detained at Guantanamo Bay had access to federal courts to challenge their confinement.

Boumediene v. Bush established the role of the judiciary in wartime, and seemed to settle important issues about separation of powers. It featured soaring rhetoric about the republic's enduring guarantees.

"The laws and Constitution are designed to survive, and remain in force, in extraordinary times," Justice Anthony M. Kennedy wrote for the five-member majority.

And it produced a dramatic, ominous dissent from Justice Antonin Scalia, delivered to a packed but silent courtroom.

"It will almost certainly cause more Americans to be killed," he said. "The nation will live to regret what the Court has done today."

The country can be thankful that Scalia's prediction has not come true. And in the small world of Supreme Court experts and detainee attorneys who follow the dwindling number of prisoners still held at the naval base in Cuba, there is a renewed debate about the meaning of *Boumediene*.

Perhaps, said Robert Chesney, a University of Texas law professor who has been a careful student of the process, the decision "was never as important as its most vigorous supporters and opponents said it was."

Although delivered in broad strokes and powerful language, the ruling left the details of how to provide hearings for the detainees up to the (not entirely grateful) judges of the D.C. Circuit. The bottom line is that while Guantanamo's population has declined from around 270 at

the time of the decision to 172 today because of decisions of the executive branch, not a single release has come as the direct result of a judicial order.

A string of rulings has gone against the detainees. For instance, the circuit court decided that because of the unusual nature of the hearings, the government may rely on hearsay evidence that would not be allowed in federal court. It has said that a preponderance of evidence, the lowest standard, is enough to make the case for continued detention.

The Obama administration has fought all attempts by lawyers for detainees to have the Supreme Court review those rulings. And while the news was overshadowed by the administration's concession that alleged Sept. 11 mastermind Khalid Sheik Mohammed and his co-defendants will be tried by a military commission rather than federal jury — a separate issue — the court last week turned away three detainee challenges arising from *Boumediene*.

One group active in representing the detainees, the Center for Constitutional Rights, decried what it called the court's refusal "to defend its *Boumediene* decision and other precedents from the open defiance of the D.C. Circuit."

The government told justices that there is no reason for them to believe anything other than "lower courts have properly performed the task that this court assigned them in *Boumediene v. Bush*."

"Open defiance" may go a bit far in describing the D.C. Circuit's rulings, but there is no doubt that the court's action in *Boumediene* — and its inaction since — has left few happy.

While detainee advocates complain about the court's

timidity, D.C. Senior Circuit Judge A. Raymond Randolph has received wide attention for a speech he gave last year in which he compared the justices to characters in "The Great Gatsby," who have created a mess they expect others to clean up.

And his fellow Senior Circuit Judge Laurence H. Silberman, a conservative judicial icon, joined in on Friday. In a concurring opinion to a unanimous ruling denying a detainee appeal, he criticized the court for not weighing in on the standards lower courts should use, saying "taking a case might obligate it to assume direct responsibility for the consequences of *Boumediene v. Bush*."

He criticized the *Boumediene* ruling as a "defiant — if only theoretical — assertion of judicial supremacy."

The court, as is its way, did not explain last week why it declined the detainee cases. Perhaps it agrees with the government that the lower court is properly implementing *Boumediene*.

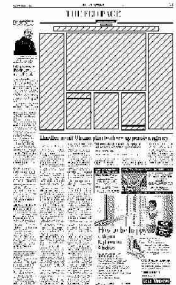
Perhaps the justices believed that the three detainee cases it considered had problems that made them bad vehicles for review.

One thing that is clear is that it is not the same court that decided *Boumediene* — two of the justices in the majority, David H. Souter and John Paul Stevens, have retired.

The court last week did not act on all of the detainee cases that have been filed. Although it seems unlikely the court would accept one of them, it is possible that one or more justices could be preparing a dissent to such a decision.

Even that would provide some insight on how the court feels about its landmark decision.

barnesr@washpost.com





BILL O'LEARY/THE WASHINGTON POST

While the Guantanamo Bay population has declined, not a single release has come from a judicial order.