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Supreme Court Decision Could Begin Guantánamo's Unraveling

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The Supreme Court's decision today to hear challenges to the detentions at Guantánamo is a highly significant one that mark a watershed in the Bush Administration's detention policy. It could mark the beginning of Guantánamo's unraveling -- notwithstanding the string of disappointing rulings to come from the Court in this past week.

The Court's action is very unusual as a procedural matter. The detainees case had been decided back in February by the Court of Appeals for the D.C. Circuit, which issued a decision saying that the detainees at Guantánamo neither had the right to enter a federal court to challenge their detention nor any constitutional rights against unlawful imprisonment and abusive treatment. One of the most striking features of that decision was that it repeated, almost verbatim, arguments that the D.C. Court had used in rejecting the detainees' arguments for a hearing in 2003 -- arguments that were reviewed and rejected by the Supreme Court in 2004 in the landmark case of Rasul v. Bush.

The detainees appealed to the Supreme Court -- but at the beginning of April, the Court denied their petition. To hear a case, at least four of the nine Justices need to vote to "grant certiorari." The denial meant that at least six of the nine Justices had voted against a hearing. But in a revealing statement that accompanied this denial, Justices Kennedy and Stevens warned the Government not to "prejudice the position of petitioners" in seeking review in this Court." After the dismissal, the Government nevertheless urged that the detainees' habeas corpus petitions -- many pending unheard since 2002 -- ought to be dismissed as a consequence of the Court's action.

What happened today is that the Court took the unusual course of reversing that decision, and ordering that the detainees' case be heard in the fall as part of the October 2007 Term of the Supreme Court (the Court's terms run from October to October, with the Justices largely in recess over the summer).

What's especially notable about the grant is the number of votes it took to get it -- not four, but five. It takes five votes to grant a rehearing -- just like it takes five votes to win (really, all you need to understand the Supreme Court is some elementary arithmetic, although the fractured opinions in the schools cases, the Establishment Clause case, the school speech and campaign finances cases would challenge even an Einstein's maths).

That means that between April and now, we have gone from a situation in which three Justices wanted to hear the case -- to a situation in which five Justices want to hear the case. In all likelihood, this includes Justices Stevens, Souter, Ginsburg, and Breyer -- and Justice Kennedy. The fact that Justice Kennedy likely voted to grant is intriguing, and should inspire cautious optimism. Clearly something is troubling him that wasn't in April.

Could it be the Government's position that one of the detainees at Guantánamo should not be allowed to talk to his lawyer because he might reveal state secrets--by talking about the coercive techniques that were used to interrogate him? Could it be the continued suicides of detainees at Guantánamo? Could it be the affidavit of Stephen Abraham, a 26-year veteran of military

intelligence, an Army reserve officer, and California lawyer, stating from his first experience that the procedures used to sift combatants from the innocent are essentially a farce? (In deciding to hold people indefinitely, "[w]hat were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence")

The list is so long that one is spoiled for choice.

The Administration clearly had concerns about the growing evidence that the procedures used at Guantánamo were a sham, and that the crescendoing evidence of mistreatment and abuse there was too difficult to ignore. Hence the editorials by Colonial Morris Davis in the *New York Times* and James Taranto in the *Wall Street Journal* signaled a concerted effort to swing the tide of elite opinion.

The effort failed. Now the Court will decide what procedures are necessary and constitutional for the Guantánamo detainees to challenge the elementary fact of their detention (and remember -- that is all that is at stake -- the basic fact that the Government has detained people and whether that is legal). Now the detainees will have a chance to argue that the evidence against them is largely non-existent. That most of the detainees are wholly innocent of any connection to al-Qaida. That they are being held not because they are an embarrassment to an Administration that has proven itself incapable of ever, ever admitting an error, and prefers instead to compound old mistakes with new blunders, putting us further into illegality.

Now ... well, we'll see in the fall.

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