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## Supreme Court Rewards Administration's Delay and Obfuscation Strategy On Guantánamo

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### Breaking News



The Supreme Court this morning said that it would not review the case of the Guantánamo detainees. Three Justices (Souter, Breyer, and Ginsburg) voted to grant the detainees a hearing. But you need four votes for a case to be heard (and five votes to win). Justices Kennedy and Stevens issued a statement saying there was no reason to set aside traditional rules that require "the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus." What this means is that the detainees--many of whom have been detained for more than five years without any form of independent review--have been denied an opportunity to expeditiously vindicate their constitutional rights.

Generally, when the Court decides not to hear a case, this has little consequence. That is not the case here. The Court's decision not to hear this case is a major blow to human rights values. It leaves on the books a wretchedly bad (and intellectually dishonest) opinion from the D.C. Circuit Court of Appeals, and rewards the Administration's deeply nefarious strategy of delay and obfuscation around Guantánamo.

Readers who haven't been following the rather complex chain of litigation around Guantánamo may find some background helpful. The first group of Guantánamo detainees arrived in Cuba in January 2002. Some had been picked up off the battlefield in Afghanistan, but many others had been handed in by Afghan or Pakistan allies, keen for the \$5000 bounty offered by the United States. None of them had been screened through the battlefield hearings required by the laws of war and the Geneva Conventions.

The Center for Constitutional Rights and a small group of private lawyers filed habeas suits on the detainees' behalf, arguing that they had a right to challenge the factual and legal basis of their detention in federal court. The government, perhaps aware that many of its detention decisions could not be defended, threw up a series of barriers, arguing principally that Guantánamo lay outside the jurisdiction of the federal courts. In 2004, the Supreme Court rejected this argument, and it looked like the detainees would get their day in court.

But the Government hadn't emptied its quiver. In short order, it managed to finagle the passage of first the Detainee Treatment Act and then the Military Commission Act, both of which purported to strip the federal courts of power to hear the cases. In February this year, the Court of Appeals in Washington DC held that the Military Commissions Act had indeed done so. In an opinion that rested on a distorted and partial view of history, the D.C. Circuit held that the Guantánamo detainees had no constitutional rights. Hence, it dismissed their five-year-old case.

That was the decision that the Supreme Court could have taken for review. But didn't. The result? The detainees can have recourse to a narrow and arguably insufficient channel of review left open by the Detainee Treatment Act: But they must start from scratch with no guarantee that the channel of review available will be meaningful--or a sham.

(The question of how future challenges will proceed is complex. The government successfully argued that review be confined to an appellate court, which lacks the power to find facts and depends on the Army for building a record. The *best* case scenario might be that the Court of Appeals requires the military to restructure their fact-finding procedures. But this is a long shot).

This is bitter news. It is deeply unfair and inflicts grave harms today on the detainees. Five years after their first detention, many of the detainees, I am told, are at the end of their psychological tethers. There have been multiple suicide attempts. Given the endless and the uncertainty of their confinement, this is hardly surprising. Detention without end, often for no reason at all, is a kind of torture (even if it doesn't meet the strict legal definition of that term).

I'm happy to field questions about the decision.

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