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Further Thoughts on the Court's Refusal to Hear the Guantánamo Detainee Appeals

Guest Blogger

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The Supreme Court this week narrowly declined to hear the habeas appeals of the Guantánamo detainees. The detainees had sought review of the D.C. Circuit's decision in *Boumediene v. Bush* and *Al Odah v. United States*, upholding the jurisdiction-stripping provisions of the Military Commissions Act of 2006 (MCA). In a joint statement respecting the denial of certiorari, Justices Stevens and Kennedy explained that the detainees should first exhaust their remedies in the D.C. Circuit available under the Detainee Treatment Act of 2005 (DTA). It is too early to assess the long-term impact of the certiorari denial and, as Marty Lederman points out in his excellent summary similar challenges are expected to reach the Court through DTA petitions. Still, the Court's refusal to hear the cases provides a window into some troubling legacies of the Guantánamo detainee litigation.

Nearly three years have passed since the Court handed down *Rasul v. Bush*, ruling that Guantánamo detainees have the right to habeas relief and directing district courts to consider their petitions in the first instance. Though the Court also suggested in *Hamdi v. Rumsfeld*, decided the same day as *Rasul*, that a lawfully constituted military tribunal might provide this inquiry in the narrow circumstances of a traditional combatant captured on an actual battlefield (citing, for example, standard hearings provided under U.S. army regulations), where no such process was provided, habeas was expected to fill in the gap. Yet, *Rasul* has become an increasingly distant memory: as much time has passed since *Rasul* as between *Rasul* and the arrival of Guantánamo's first prisoners in January 2002. And still no detainee has had anything approaching his day in court.

It is difficult to see a principled basis for exhaustion, especially after more than five years of detention without charge. As the dissent from the certiorari denial explained, the D.C. Circuit has already held that the detainees have no constitutional rights, period. So, until that ruling is reversed by the Court, the underlying Combatant Status Review Tribunal (CSRT) process that the D.C. Circuit reviews under the DTA need not comply with basic constitutional safeguards, including the right to see the government's evidence, to the assistance of counsel, to be free from detention based on evidence gained through coercion, and to compel production of exculpatory evidence.

The Court's refusal to hear the detainee cases highlights the continuing absence of meaningful review in the new system of indefinite executive detention that has taken root in the so-called "war on terror." The CSRT, recall, was concocted nine days after Rasul to help avert district court hearings. It is so deeply flawed that it would pose a challenge for any court to uphold under even a cramped due process analysis. (Since the D.C. Circuit found the detainees had no Fifth Amendment rights, it was relieved from having to try.). The DTA and MCA, in turn, sought to eliminate the basis for those hearings under the habeas statute, described in Hamdi as providing a "skeletal outline" for adjudicating the factual and legal basis for a prisoner's confinement. What habeas provides – and what the administration most fears – is the possibility that a federal judge will examine whether a detainee is actually an "enemy combatant" (even under the CSRT's virtually limitless definition), an inquiry that, in many cases, would require assessing whether any statements were wrung by coercion from the petitioner or from another detainee.

The Court's refusal to hear appeals in Boumediene and al Odah, then, marks merely the latest chapter in the United States' ongoing failure to provide a fair and lawful process to those it imprisons. It is this failure that has made Guantánamo a lightning rod for criticism and prompted calls for its closure at home and abroad. (Matters reached a new low in recent weeks with the nakedly political deal struck in the David Hicks case, the first "conviction" by Guantánamo's military commission, and by the release of CSRT records redacting allegations of torture in the name of "national security"). To be sure, the courthouse doors still remain open to the Guantánamo detainees. But it is difficult to see what it is to be gained by subjecting detainees to more delay and to a process intended, as one MCA supporter put it, to "get the lawyers out of Guantanamo." Guantánamo was designed by the Executive to create a prison beyond the law. The record of the other two branches in coming to grips with the fall-out from this ill-advised decision has been disappointing at best, resulting in the human rights debacle that Guantánamo has come to symbolize.