

The Runaway Executive: Trying to Escape Accountability Yet Again

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The Bush administration's blatant disregard for the legal process has become so routine that almost nothing it does is surprising at this point. Its most recent machination is to try to circumvent judicial review in the case of two Uighurs, an ethnic group from western China, detained without charge at Guantánamo. The men had been imprisoned for more than four years even though the government concedes they are "non-enemy combatants," or, in other words, innocent.

The case, *Qassim v. Bush*, was scheduled for oral argument in the U.S. Court of Appeals for the District of Columbia Circuit on Monday morning, May 8. However, late the previous Friday afternoon the government moved to dismiss the case as moot, asserting that the two detainees in *Qassim*, along with three other Uighurs, had been transferred to Albania for resettlement as refugees. The government claimed its extensive efforts to find a safe home for the Uighurs, who could not be returned to China for fear of torture, had finally "come to fruition."

It is difficult to believe the timing of the release was coincidental. It is far more likely that the government transferred the Uighurs to avoid an adverse ruling and to insulate its conduct from judicial scrutiny. A loss in *Qassim* would invalidate a key aspect of the government's detention regime at Guantánamo and reinforce the vitality of habeas corpus, which guarantees both the right to test the lawfulness of a prisoner's detention and an effective remedy where that detention is illegal. Further, the government feared that the court might order the Uighur's release in the United States where they could seek asylum, which, as Georgetown law professor David Luban observes, is the least we owe them after four-plus years' wrongful imprisonment at Guantánamo.

If the government succeeds in mooting the *Qassim* case, the district's court decision grudgingly upholding the Uighurs' continued detention would stand, and the administration would remain free to indefinitely detain the next group of non-enemy combatants. (There at least four more still in legal limbo). In short, the system of detention-without-remedy at Guantánamo would remain intact.

Such last-minute ploys have become the modus operandi of an Executive branch bent on avoiding accountability for its detention and interrogation policy. In *Hamdi v. Rumsfeld*, for example, the Supreme Court rejected the government's contention that it could detain the petitioner, Yasser Hamdi,

without due process, and ordered that he be given a fair hearing. Then, when confronted with its hearsay allegations being tested in federal court, the government agreed to release Hamdi even though it had previously said he was a dangerous terrorist whose detention was crucial to national security.

More recently, the government ducked Supreme Court review in the case of Jose Padilla, an American citizen imprisoned by the military for three-and-a-half years without charge. Just before its brief opposing Padilla's petition for certiorari was due, the government announced it had criminally charged Padilla and sought his transfer to civilian custody. Even though the Court ultimately declined to review the legality of Padilla's military detention, three Justices warned the government against any future manipulation of the legal process.

The Executive's attempt to avert a ruling in Qassim is thus part of an all-too-familiar pattern of circumventing the checks and balances at the heart of the Constitution. Sure, Congress still has the power to pass laws, but the President consistently says those laws do not bind him. As Charlie Savage of The Boston Globe recently reported, President Bush has issued signing statements claiming the authority to disobey more than 750 statutes since he took office, far more than any predecessor. When taken to court over its failure to follow the law, the administration simply moots the case to prevent the Judiciary from invalidating its action. This way, the President remains accountable to no one but himself.

The D.C. Circuit has granted a continuance of the oral argument in Qassim to give the Uighurs' counsel an opportunity to investigate the circumstances surrounding their clients' last-minute transfer to Albania. But even if the Uighurs' release in Albania is unconditional and consistent with U.S. obligations under international law (including the Convention Against Torture), there are good reasons to avoid dismissing the case on mootness grounds. Clearly, this is a situation capable of repetition, yet evading review. The government can continue to detain other concededly innocent detainees, forcing them to conduct protracted litigation before shipping them off to another country at the eleventh hour to avert a court order halting the illegal practice. If that is how the government is permitted to operate, the bedrock democratic principles of accountability and the rule of law will be empty slogans.