

Between SCOTUS And A Hard Place

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It was a bad week for the administration in the courts and in Congress. Don't let the absence of dramatic revelations, or the inundation of disappointing Supreme Court decisions, distract from the subtle incisions that were made. The cuts that may be hardly visible now, but in time they may yield more light that we have seen these past five years.

The real damage has come from the courts—and include in this, rather surprisingly, one quasi-court. It's not merely the real courts that dealt the administration a blow this week, but also the second-tier military commission system at Guantánamo established in the 2006 Military Commissions Act, or MCA. On June 4, two military commission judges halted war-crimes trials of Guantánamo detainees. They pointed to a mismatch between way the military had categorized the detainees (as “enemy combatants”) and the MCA's threshold requirement for military commission jurisdiction (that the defendant be an “unlawful enemy combatant”). A technical problem, the product of the Administration's effort to slip in a lever to secure greater detention authority into the MCA, this hitch is now assuming larger significance because of new events.

On Friday, one of those judges declined to rehear his decision. While the government technically has the right to appeal this decision before July 5, it can't—because it hasn't set up the Court of Military Commission Review that hears such appeals! So confident has the government been about its prospects in these kangaroo trials, that it failed to set them a review mechanism for legal errors. As a result, it is now stuck.

When the military commissions first dismissed the two cases, I argued that the Administration would rig a work-around, overturning the June 4 decision and moving forward with the trial. Last week's events mean that the Government's two ways of doing a work-around just closed up. The first way was through the commissions themselves. But not only has one commission declined to solve the government's problem. And, rather deliciously, the government cannot appeal because of its own fecklessness in not setting up the appeals mechanism.

The real surprise is the closure of this second avenue: The other “fix” was that the Government would simply get the detainees reclassified as “unlawful enemy combatants.” They could have done this by having new Combatant Status Review Tribunals, or CSRTs, which initially did the classifying.

But this second avenue was blocked on Friday by the Supreme Court. The Court unexpectedly agreed to hear the Guantánamo detainees’ challenge to their detention. On April 2, the Court had declined to hear the same case, but it has now reversed course. The last time the Court granted a like petition for rehearing was in 1947, so it is (almost) no exaggeration to say this is a once-in-a-lifetime event.

This sudden change of judicial mind has several implications.

First, the Guantánamo detainees will have the chance to argue that they are entitled to at least the minimal protections of the Constitution. (And there is a good chance they will win this argument—although the law here is rather murky). Constitutional rights here most importantly include the right to challenge the factual and legal basis of their lock-ups. That is, they will be able to challenge the adequacy of the CSRTs, which initially classified them as “unlawful enemy combatants.”

Second, with the CSRTs under new scrutiny in the highest court in the land, the Government is going to have an awfully hard time going back and getting a do-over of the CSRTs with new rules in order to qualify detainees for the military commissions. It’s rather bad form to monkey with a legal system the Supreme Court just agreed to review. As a result, a likely unintended consequence of Friday’s grant of certiorari is that the Government cannot fix its military commission problem, at least by getting new CSRTs.

Suddenly, and unexpectedly, the Government is stuck: It can’t go forward in the military commissions because it hasn’t built the appeal system yet, and it can’t go back because the Supreme Court just cut that road off—at least for now.

Third, and perhaps most important, the Supreme Court’s decision may cast light on the moral, human rights and national security train wreck that is Guantánamo because it will entail examination of the CSRTs. This affects every one of the Guantánamo detainees, and puts into spotlight the whole gamut of detention policies around the world.

The Court has agreed to hear a range of questions that go to the fundamental issue of whether and what rights to due process the detainees have. Suddenly, the whole CSRT system is under scrutiny of a kind it’s never faced. That means we will likely learn much more about how inadequate those procedures are, the extent to which they have relied on evidence gained by torture and abuse and how few safeguards they have against error. To judge by the affidavit of Stephen Abraham, a 26-year veteran of military intelligence who served at Guantánamo, the answers will make interesting fare. Abraham reports a wholly sham process, in which “[w]hat were

purported to be specific statements of fact [used to justify detentions] lacked even the most fundamental earmarks of objectively credible evidence.”

If the CSRT process used in 2004 to classify Guantánamo detainees as “enemy combatants” is indeed examined by the Court, I believe it will fail. Any independent-minded assessment of that system will demonstrate it was a sham from the start, a Potemkin process for a Soviet-style policy of mass detention without discrimination, mercy or decency. (I do not mean that no Justices will vote to uphold the system. To the contrary, some will. They will be wrong, legally and morally).

And Congress., which itself is stirring from a long slumber, can move this along too. Last week in addition, Senator Patrick Leahy issued subpoenas respecting the NSA’s warrantless wiretapping program. White House Counsel Fred Fielding and Acting Attorney General Paul Clement have already asserted executive privilege. Although the ACLU has already put a ticker on their website marking the days to the subpoenas’ compliance deadline, it is unlikely that the White House will comply. In all likelihood, it will take full advantage of the lethargic judicial process and work to ensure that inauguration precedes compliance. Given the conservative tilt of the courts and the quality of the government’s trial advocacy—Clement, who will likely defend the executive’s position in court, is a spectacularly good lawyer—the process will not be quick.

The larger importance of the subpoenas should not, however, be missed: For the first time in six years, Congress is pushing back on a national-security issue against executive stonewalling. But NSA wiretapping is but one issue among many that demands oversight. These should not be the first or last subpoenas. Indeed, the Court’s action last week makes a compelling case for more subpoenas.

For years, the Administration has been telling us that Guantánamo contained the “worst of the worst,” and that the operations there were all “humane.” Now that the issue is before the Supreme Court, the issue of detainee treatment and classification should be at the top of the agenda. As the case comes to the Court, there is much Congress can do to ensure that the American people—not to mention the Justices—have as complete an understanding of the true facts about detention policy. Congress can use its investigative power to ensure that the Administration cannot paper over the truth at Guantánamo. It can make sure that the Court has before it a more unvarnished truth, rather than the anodyne propaganda the administration circulates.

The subpoenas from the Judiciary Committee, in other words, cannot be the culmination of oversight efforts. With the road opened by the Courts, Congress must now make sure that a true and right path can be seen out of the tangled mire into which the Administration has sunk our country.