



Justice Delayed and Denied at Guantanamo

by AZIZ HUQ

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In June of this year, the Supreme Court issued what Ronald Dworkin **hailed** as "one of the most important Supreme Court decisions in recent years" when it held that the detainees at the Guantánamo Bay Naval Base are entitled to make "habeas corpus" challenges against the government's purported bases for detaining them.

Indisputably, the 5-4 judgment in *Boumediene v. Bush* was a major civil liberties victory. It should indeed have major repercussions beyond Guantánamo because it makes clear that at a minimum, constitutional rules ensuring fair process limit governmental actors in all the territorial United States. This might sound like old news, but in fact it should precipitate the end of some troubling practices at the borders. When a non-citizen now arrives in the United States, immigration officials can place that person in "expedited removal," which means they can be shipped back to a place where they may fear torture without any judicial review. Since 9/11, the Department of Homeland Security has expanded the use of " **expedited removal**" in ways that can be squarely challenged now.

Equally, Justice Kennedy's ruling should put an end to the government's bizarre legal theory that it can allow a person into the country without legally "admitting" them, so that they have no legal or constitutional rights. Most recently, the government relied on this peculiar legal limbo to resist the legal suit brought by Canadian citizen Maher Arar, who was **seized** at JFK and sent for torture to Syria. Confined in the government's care, Arar should benefit no less from the shield of due process than anyone else.

But at Guantánamo itself, the good news of the *Boumediene* decision has yet to translate into concrete results. Paradoxically, the most successful of the detainees' suits has not been in a habeas case but in another suit called *Parhat v. Gates*.

One of a clutch of Uighur Muslims detainees at the Cuban base, Hozafa Parhat invoked the more limited judicial remedy that Congress fashioned in 2005 when it tried to snuff out habeas (under the Detainee Treatment Act). Even using this tightly constricted channel of review, Parhat was able to convince a panel of the conservative-tilted DC Circuit Court of Appeals that his detention was unlawful because the government simply had **no evidence** of a link to Al Qaeda, or any other group fighting the United States.

Parhat has a case that is much more straightforward than many of the other detainees because the evidence against him is numbingly weak. Faced with the prospect of unwillingly having to release someone the Administration has labeled the "worst of the worst," the government has managed to stymie progress with the startling new, and potentially devastating, argument that it is now proffering: the courts may have power to take evidence, hear cases and issue decisions ordering release, but only the government has "**wind up**" **authority**--i.e., power to decide how and when an illegal detention ends.

The government's chutzpah, at least, is grounds for wonder. Faced with the ruling that it has held a

legally innocent person for years on end, the government says it can still hold him, because even though it does not have the power to detain them it has... the power to decide how to let him go.

But the most important consequence to flow from the Boumediene judgment is the fact that detainees could pursue their habeas corpus petitions, some filed as long ago as 2002. The Supreme Court, however, did not say anything about how those habeas cases should be litigated--or, more important, how quickly.

From the angle of accountability, this is a crucial question: surely the Administration that is responsible for the injustice and chaos of Guantánámo ought to be responsible for explaining what it has done. Delay until the next administration will be exponentially harmful to the detainees, since any new White House will get the benefit of some breathing room on this and other matters. Add to this the fact that DC interest groups are already lining up with their **Guantánámo fixes**, complete with catchy acronyms, and it is possible to envisage now the prolonged debate that will ensue, adding fresh delay to the detainees' tab.

Yet such delay is looking increasingly inevitable. Initially, Chief Judge Hogan of the DC District Court, before whom the lion's share of habeas cases are consolidated, ordered the government to begin producing answers to the detainees' challenges, beginning with the first fifty on August 29, 2008.

Just before midnight on August 29, however, the government filed a motion telling Judge Hogan that they could file only ten returns because of the time it was taking to have the CIA review all of the material in the answers. In seeking an extension, the government in effect sought to ensure that adjudication of the cases would have to await a new Administration.

Regrettably, Chief Judge Hogan granted the government's request and rejected the detainees' appeal for sanctions, relying as he did so on a classified and undisclosed declaration from CIA director Michael Hayden. As in so many instances in the past, the emergent needs of litigants have yielded to secret claims for secrecy.

Professor Dworkin was only half-correct in singing the Supreme Court's praise. True, the Court dodged a morally shabby result. But the Court left open plenty of space for this administration to wiggle free of any reckoning for its callous and reckless errors. That the government has decided to seize that opportunity, and back out of the room fighting, might be unsurprising, but nonetheless it is cause for dismay.

About Aziz Huq

Aziz Huq directs the liberty and national security project at New York University's Brennan Center for Justice. He is co-author of ***Unchecked and Unbalanced: Presidential Power in a Time of Terror*** (New Press, 2007). He is a 2006 recipient of the Carnegie Scholars Fellowship and has published scholarship in the *Columbia Law Review*, the *Yearbook of Islamic and Middle Eastern Law*, and the New School's *Constellations Journal*. He has also written for *Himal Southasian*, *Legal Times* and the *American Prospect*, and appeared as a commentator on *Democracy Now!* and NPR's *Talk of the Nation*. [more...](#)