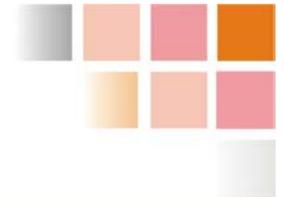


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BOFAXE



Severe Setback in the Battle for Rights of Guantanamo Detainees

Replies and Comments

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Focus

Authorization for Use of Military Force, 18 September 2001, Public Law 107-40, 115 Stat. 224.

Order for Detention, treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001, 66 Fed Reg 57,833.

Legal documents re Guantanamo Bay, Cuba naval base

- 1903 lease; 1934 treaty;
- U.S.: complete jurisdiction and control
- Cuba: ultimate sovereignty

Definition of "enemy combatant" published in July 2004

"An individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."

On 19 January 2005, the U.S. District Court for the District of Columbia issued its second recent decision regarding the Guantanamo Bay detainees, *Khalid v. Bush*. (*Hamdan*, discussed in Bofaxe 289E, was the first case decided on 8 November 2004). All cases concerning these detainees have now been transferred to the DC District Court, which is the federal court of first instance, i.e., the trial court.

The Petitioners in the *Khalid* case are 7 foreign nationals, 5 Algerian-Bosnians, one Algerian, and one Frenchman. All were captured *outside* Afghanistan: 6 in Bosnia and one in Pakistan.

The petitioners challenged the legality of their detention under the U.S. Constitution, certain federal statutes and under international law. Further, they asked the court to issue a writ of *habeas corpus*.

One of the most stunning parts of the decision is its conclusion. Indeed, the Court declares that "[...] no viable legal theory exists by which it could issue a writ of *habeas corpus* under these circumstances." On the surface it seems to fly in the face of the *Rasul* decision of the U.S. Supreme Court of 28 June 2004.

The District Court further states: "[...] the petitioners are asking this court to do something no federal court has done before: evaluate the legality of the Executive's capture and detention of non-resident aliens, outside the U.S. during a time of armed conflict." This clearly reflects the holding in the 1950 decision of *Eisenstrager* and one may sincerely wonder whether the District Court has read the decision of the U.S. Supreme Court in *Rasul*.

The District Court also declared: "The President's 'war power' must include the power to capture and detain our enemies" and asserted that the Supreme Court in *Hamdi* had acknowledged the same. This latter statement concerning the *Hamdi* decision is accurate.

However, it appears that the District Court accepts a decision of the Supreme Court, *Hamdi*, when it supports its own conclusion but argues that another decision of the Supreme Court, *Rasul*, does not stand for what it clearly spells out, when it does not suit its judgment.

Moreover, the District Court in the *Khalid* case continues to find the *Eisenstrager* decision controlling despite the fact that the *Rasul* court had vitiated the controlling status of this 1950 decision of the U.S. Supreme Court. Regarding a non-U.S. national, held in Guantanamo, the *Rasul* court found that U.S. courts have jurisdiction to hear the detainees' petition. The *Rasul* court based its decision on the findings that Rasul and the other petitioners were:

- not nationals of countries at war with the U.S.;
- never granted access to any tribunal;
- not charged or convicted of any wrongdoing;
- for more than 2 years imprisoned in a territory over which the U.S. exercises exclusive jurisdiction and control.

In *Rasul* the Supreme Court held that the federal courts had jurisdiction and distinguished and, to all intents and purposes, overruled *Eisenstrager*. Yet the District Court in the *Khalid* case maintains, "Nothing in *Rasul* alters the holding articulated in *Eisenstrager*." It is very difficult to understand how this court can come to this conclusion.

With the *Hamdan* decision of the same District Court but a different judge, of 8 November 2004, there are now two diametrically opposed decisions of the Court. This makes the need for a hearing before and a decision by the appeals court, the U.S. Court of Appeals for the DC Circuit, a foregone conclusion. Moreover, one should not forget that finally the matter of the rights of the Guantanamo detainees will have to be decided by the final court of appeals, the Supreme Court of the U.S.

Responsibility

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