

Dude, Where Are My Rights?

By Col. Daniel Smith, U.S. Army (Ret.) | November 21, 2006

Guantanamo, CIA secret prisons, and Abu Ghraib represent the first round of the Bush administration's assault on constitutional guarantees. Now they've introduced Round Two with an attack on *habeas corpus*: the right to "present one's body" before an impartial interlocutor to contest the basis for unexplained, secret, or wrongful incarceration. *Habeas corpus* is the oldest civil right in the western world and the foundation of constitutional democracy.

This renewed battle against civil liberties comes as no great surprise. In his acceptance speech at the 2000 Republican National Convention, George Bush signaled to the convention and the country the exclusive, closed nature of a future administration that would seek to gather as much power as possible for its insular agenda. "I do not need to take your pulse before I know my own mind," he proclaimed.

What is surprising, however, is the timing of the expansion. On November 7, the country sent a warning to the president: get on board with the "feel" of the nation—its pulse—or risk personal political isolation for the next two years and continued minority status for his party beyond 2008. In a post-election news conference, Bush said he had felt the changing pulse. It was, he said, a "thumping," which is the loudest noise a pulse can make.

But clearly not everyone in the administration has absorbed the change. This week, administration lawyers were arguing before the District of Columbia Circuit Court of Appeals that the administration could continue to hold indefinitely and without trial the 440 detainees incarcerated in Guantanamo Bay.

Obscured by legalese, the arguments of the administration lawyers represent a threat not only to those detained at Guantanamo. As James Madison argued in a 1788 speech to the Virginia Convention, "I believe there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpation." The attack on *habeas corpus* is just such a gradual and silent encroachment on liberty.

To Try or Not to Try

Since the first bombs fell on Afghanistan October 8, 2001, the Bush administration has fought tooth and nail to prevent Congress and the courts from "interfering" in the handling, treatment, and disposition of detainees from Afghanistan, Iraq, and elsewhere in the "global war on terror."

At first, the administration relied on self-proclaimed "inherent presidential power" stemming from the president's role in wartime as commander-in-chief. However, on June 30, 2006, the U.S. Supreme Court ruled in *Hamdan v. Rumsfeld* that detainees could not be stripped peremptorily of the right to contest the "wartime" status assigned them by executive branch fiat.



Specifically, the main points of the June 30 ruling reaffirmed the rights of detainees to exercise Fourth Amendment guarantees against arbitrary detention (and mistreatment while being detained). They could challenge, in a properly constituted legal venue, their detention by the executive branch and appeal adverse rulings concerning their detention. And they should expect to be treated during their detention in accordance with the standards set in Common Article 3 of the Geneva Conventions.

Other deficiencies of the military commissions include their absolute control over the type and the amount of evidence—if any is presented. The presiding military judge can summarily exclude a detainee from his own trial on the basis that classified “evidence” is to be introduced and only those with the proper security clearance can remain in the courtroom.

This is a clear violation of the equal protection guarantees under the Constitution.

Subsequently, the Republican-controlled Congress largely nullified the Supreme Court decision by passing the “Military Commissions Act of 2006,” which became law on October 17 with President Bush’s signature. In that legislation, Congress declared that federal district courts could not hear *habeas corpus* cases from the Guantanamo detainees because the Pentagon had established an annual

“status review” procedure. This review, through Combatant Status Review Tribunals (CSRT), evaluates whether a detainee remains a security threat to the United States. If the answer is yes, the accused cannot appeal the CSRT decision through the regular federal appeals system. If the answer is no or a “qualified” no, a detainee can remain incarcerated. The tribunals, which have virtually unchecked authority, effectively control the fate of the detainees.

Ironically, CSRT procedures have created a new sub-group whose rights continue to be violated: innocent but incarcerated. U.S. law forbids extradition of anyone to a country that routinely engages in torture. So a “cleared” detainee cannot be deported back to his country of origin or to the country where he was captured. Thus, those who fall into this category are still jailed in “Gitmo.” U.S. authorities also are having difficulty finding new home countries for the many ex-detainees who refuse to return to their countries of origin after being tainted as “terrorists.” In still other cases where a continued threat is deemed small by the CSRT, foreign governments refuse to accept the detainee because of U.S. insistence that the returned individual be jailed for a number of months or even years.

And just to make sure that none of the 440 detainees somehow circumvents the CSRT procedure, the Military Commissions Act extends the “jurisdiction” of the tribunals retroactively to September 2001.

Degraded Courts

The military tribunals—the “parallel” courts loosely modeled after the U.S. military court system—are designed to operate with lower standards and degraded guarantees compared to the U.S. courts-

martial system. Should a detainee ever be tried and convicted, the Military Commissions Act directs that only the District of Columbia U.S. Court of Appeals can hear appeals. The law also specifies that the president has ultimate review authority over any conviction.

Limiting the appeal channels to only one circuit is so unusual that it raises suspicions of malice aforethought. The administration argues that, with only one circuit appeals court involved in reviewing Guantanamo cases, the provision will avoid contradictory rulings that would have to be resolved by the U.S. Supreme Court.

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Torture Revelations?

The Central Intelligence Agency finally admitted publicly on November 13 the existence of two classified memos from the White House that authorized “aggressive” interrogation of detainees in secret prisons and the use of a “strict” detention regimen. But the agency then insisted that the content of the memos continues to be so sensitive that they cannot be redacted and released to the public.

After all that has happened—five years after detainees “disappeared” into the prison at

Guantanamo Bay, five years after the interrogation “excesses” at the secret CIA prisons, three years after the abuses at Abu Ghraib, and more than one year after publication of the 22 “torture memos” from the Pentagon, Justice, National Security Council, and the White House—little on this topic of torture and interrogation techniques has not been touched on or hinted at. However, the memos might point to “who knew what and when” about torture in the CIA secret prisons. For instance, the real role of Vice President Cheney, known to have often visited CIA headquarters, remains shadowy.

This year’s election was a referendum not only on the wars in Iraq and Afghanistan but a repudiation of the administration’s war of fear. The public wants a more vigilant and active Congress that can claw back the constitutional and statutory rights that the Bush administration grabbed for itself.

Cheney has been caricatured as the Bush administration’s “invisible man” for his insistence on keeping the workings of government under wraps and his penchant to be at “undisclosed locations.” And last week, he gave stand-up comedians new grist when it was revealed that he said not a word during the post-election meeting between Bush and the new congressional leadership.

Indefinite Detention

Cheney is the *eminence grise* of the Bush White House, particularly on national security and energy. He is also a strong proponent of the theory of the unitary presidency that underlies the governing practices of the Bush White House. By extension, he would not shy away from proposing administrative action by Bush or congressional action to restrict further civil liberties and expand government surveillance.

And so we return full circle to *habeas corpus*.

Most media concentrated on the Guantanamo case argued in Washington on November 13, but ignored an equally important case on the same day just down the road in Richmond, Virginia. There, Justice Department lawyers argued in the Fourth U.S. Circuit Court of Appeals that the Military Commissions Act also empowers the government to hold indefinitely any immigrant, legal or illegal, arrested on suspicion of terrorism. As with the

Guantanamo 440, those arrested would not be permitted to challenge their detention in civilian courts—a right heretofore normally accorded alien residents.

This single-minded pursuit of the further curtailment of individual rights belies the president's assurances that he has felt the nation's pulse. This year's election was a referendum not only on the wars in Iraq and Afghanistan but a repudiation of the administration's war of fear. The public wants a more vigilant and active Congress that can claw back the constitutional and statutory rights that the Bush administration grabbed for itself or simply accepted from a compliant legislature.

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