Guantanamo: A Long Train of Congressional, Executive, and Now, Judicial Abuses

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In a stunning contradiction of the principles enshrined in the Unites States Constitution, the US Supreme Court on April 3 denied petitions of certiorari to two plaintiffs who have been held in legal limbo for five years at Guantanamo Bay, Cuba. By doing so, the justices have added another burdensome car to the long train of abuses the federal government has sent barreling down the tracks at US citizens.

The cases were named *al Odah v. United States* and *Boumedienne v. United States*, and in both instances, the court declined to hear the plaintiffs' requests for habeas corpus hearings. The DC Circuit Court of Appeals had already ruled against the plaintiffs, citing the habeas-stripping provisions of the Military Commissions Act passed by Congress and signed into law by the president in 2006.[1]

In ruling to deny certiorari, and, hence, habeas corpus hearings for the plaintiffs, the US Supreme Court might appear to some observers to be upholding a long-held power of the Congress to limit the jurisdiction of the federal courts. Congress has done so numerous times in United States history, including a recent law restricting federal courts from hearing liability cases brought against gun manufacturers. But there are other principles at stake here, ones which the majority on the court, and many reporters, do not seem willing to discuss.

Missed in the *Odah* and *Boumedienne* rulings are the principles of the separation of powers between the three branches of the federal government, and the constitutional stricture against Congress ceding any of its granted powers to any other body. While these points may seem esoteric to some, especially during this time of so-called "war," they are essential and fundamental to insuring our liberties against government attenuation.

The roots of the April 3 ruling trace back to events just prior to the US invasion of Iraq, when then-White House Counsel Alberto Gonzales approached Congress and asked the representatives to do something not allowed under the US Constitution. He asked them to grant the president the power to use the military *without* a formal declaration of war. Such a declaration is the only power granted to Congress to facilitate the president's use of the US military. Instead, the Bush administration wanted Congress to grant him a "resolution for the use of military force", which seems an awfully cumbersome term when one could just, well, *declare war*.

The reason Gonzales and the Bush Administration did not want a formal declaration was obvious: the United States government is a signatory to the Geneva Accords. According to the treaty, which is easily found by utilizing a simple web search, all uniformed *and non-uniformed* enemies captured during

wartime in any signatory state (Iraq and Afghanistan are both signatory) would have to be treated according to Common Article Three of the Accords. This insures certain standards of behavior for those holding prisoners of war, prohibiting torture, and insuring that all signatory nations will afford humane treatment of their POWs.

According to US law prior to 2006, if the individuals captured on the battlefield in this undeclared "war on terror" were not going to be treated as POWs, then they would have to be tried under US criminal code, just like other terrorists in the past. This, of course, would require the courts to provide habeas corpus hearings to the arrested parties, unless Congress utilized its constitutional power to broadly suspend the Writ of Habeas Corpus for all Americans and those being tried under US law.[2]

Instead, what US citizens saw between late 2001 and 2004 was a federal government operating outside both the Constitution and the Geneva Accords, with the executive branch apprehending and holding suspected terrorists for long periods of time, without treating them as either POWs or criminals under US codes.

Enter the Supreme Court case *Hamdan v Rumsfeld*. In 2004, Salim Ahmed Hamdan, the captured and detained former driver for Osama bin Laden, filed suit for a habeas corpus hearing in US court. Held without trial, and as an "enemy combatant" without protection of the Geneva Accords, Hamdan requested what other terrorism suspects had typically received in US history: a hearing bound by US law, in which the evidence against him was presented. The Bush Administration fought the request, on the grounds that to reveal certain evidence against Hamdan could put intelligence operatives and soldiers at risk. Such an argument was valid to a point, but it overlooked the necessity to abide by the Constitution and the constitutional treaties agreed to by the US government.

In 2005, the Supreme Court found in favor of Hamdan, setting in motion a number of troubling and revealing actions by the executive branch and Congress that ought to alert even the most disinterested Americans that the "train of abuses" is getting longer and longer.

First, when the Supreme Court ruled in the *Hamdan* case that the administration had to either treat the "detainees" as prisoners of war or as criminals under US Code, and thus afford them the protection of habeas corpus hearings, the president, vice president, and Secretary of Defense Rumsfeld said that if they had to abide by the Geneva Accords, they would not be able to derive the valuable information from their "detainees" that had helped "save American lives." As powerful as such statements were, they contradicted Bush Administration claims of a year before, in which the same men repeatedly stated that the "detainees" were *being afforded all the protections of the Geneva Accords in Common Article Three*.

The two positions are incompatible. If the Supreme Court ruling that Hamdam should be tried under US criminal code or as a POW under the provisions of the Geneva Accord meant that the Bush Administration could no longer carry out the interrogations it had been conducting at a time when Administration members *claimed* they were affording the protections of the accords, then, clearly, the Bush Administration was *not* acting in accordance with the accords prior to the Hamdan ruling. If employees of the executive branch had been conforming, the ruling would have had no effect on their interrogation procedures.

To many Americans this might not sound like such a big deal. After all, the "detainees" or "enemy combatants," as they are called, are all foreigners suspected of terrorist activities against American citizens. But what needs to be remembered is that we have a system under which this country is supposed to operate, and that system is set down in the US Constitution. Avoiding it without trying to amend it is an injustice to the Founding Fathers who wrote the rule book for the operation of the United States, and to those of us who were under the mistaken impression that we operated under the rule of law.

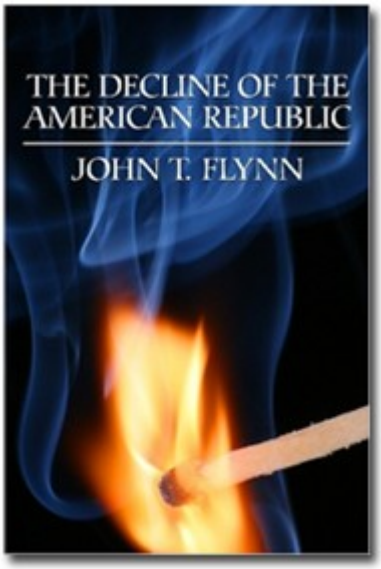
Those abuses aside, there is another aspect of the Supreme Court's actions that might resonate even more strongly with some Americans. Under the 2006 Military Commissions Act established by Congress in response to the *Hamdan* case, and upheld by the Supreme Court on April 3, 2007, *anyone* can now be labeled an "enemy combatant."

As a result, US citizens can now be designated "detainees" and held indefinitely without trial, or habeas corpus hearing, and if they *are* brought to trial, they can be put on the stand in quasi-federal courts created by the executive branch, not the legislative branch.

Unfortunately, Congress responded to the Hamdan ruling in precisely the wrong manner. It did not pass laws intended to stop the administration from creating its own "military tribunals", and it did not actually declare war, thus setting the US military on the proper track and arranging a POW system for capture, imprisonment, and trial under the Geneva Accords. It responded by *codifying* what the Supreme Court had just ruled against. Congress recklessly passed the Military Commissions Act, allowing the Bush administration to set up military courts not sanctioned by the accords, prohibiting federal courts from hearing any more cases requesting clarification as to the status of "detainees" as either POWs or criminals under US law, and ceding Congress's constitutionally provided power to suspend the Writ of Habeas Corpus.

There once was a time when Congress would not have been so quick to hand its powers over to other bodies. But we now have self-managing agencies such as the EPA, OSHA, and the FDA, and most Americans think they are justified, so why fuss over yet another hand-off to the executive branch, this time involving trials and the suspension of habeas corpus?

There are plenty of reasons to fuss. As it stands under the law, and the recent court rulings, American citizens can now be arrested by the federal government, held indefinitely without trial, questioned under standards we would not allow for our own soldiers if captured by other nations or subordinates of those nations, and never have a hearing to find out the evidence being presented against them. This is shameful and stunning, and is all derived from a legislative branch that is unwilling to do what the Constitution allows it to do: declare war.



When Thomas Jefferson wrote the Declaration of Independence, the "train of abuses" by the Crown that he cited filled half a page. Today, Jefferson's quill could fill volumes, and every abuse is being perpetrated by the very politicians and bureaucrats who swore an oath to uphold the government he helped establish. It is a sad commentary on the likelihood that any constitutional republic can long endure without growing to infringe on individual rights, and makes one wonder why anyone ought to put his trust in even the most limited of governments in the first place.