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Historic Guantanamo Bay ruling has wide implications

The US Supreme Court ruling on Monday that the approximately 600 foreign nationals held at Guantanamo Bay could now challenge their detention in American courts is a major setback for the Bush administration.

It had fought hard to keep the prisoners held at the US military base in Cuba outside the American justice system. The decision follows the revelations of ill treatment of detainees in Iraq, and last week's decision by the UN Security Council not to renew a mandate that sought to frustrate the work of the International Criminal Court. The Supreme Court overruled an earlier Court of Appeals decision to the effect that federal courts lacked jurisdiction to hear petitions from the detainees as they were being held outside US territory.

The members of the Supreme Court seemed aware of the historic nature of the decision and its wider implications for the review of executive decisions by the judiciary. According to Justice O'Connor, a state of war does not grant the president a blank cheque when it comes to the rights of US citizens, and by implication, all those detained by the US in the "war on terror".

A majority of the court declared that due process demands that those detained as enemy combatants be given a meaningful opportunity to contest the factual basis for that detention before a judge or neutral decision maker. The judgments handed down, while dispassionate in the analysis of the legal arguments, are occasionally punctuated by passionate reference to the protection of civil liberties. The liberal and conservative wings of the court found common ground in the conclusion that the US president had gone too far. However, the judgments still leave many questions unanswered. Lawyers will now have to move swiftly to test the scope of the ruling.

The problem of how to deal with prisoners of war is not a new one, and even the Old Testament and the Koran call for humane treatment of those captured in the course of armed conflict.

Not surprisingly, prisoners of war have traditionally been among the most vulnerable groups in situations of armed conflict. There has been, however, a detailed international convention dealing with the rights of prisoners of war since 1949 - the Third Geneva Convention. This provides for a form of permissible internment of enemy combatants so long as hostilities continue.

A fundamental issue to be determined at the outset is the question of recognition of prisoner of war status during armed conflict. Under international humanitarian law, combatants are obliged to comply with the laws of war. However, violations of those laws shall not deprive them of their status or of their right to be prisoners of war. If a captive is denied such status, then as the current situation regarding the Guantanamo Bay detainees demonstrates, evading the protections and responsibilities provided under international humanitarian law is all too easily achieved.

To date the Bush administration has disregarded the provisions of the convention with impunity. The Supreme Court decision will allow each detainee to have the legality of his detention reviewed by a federal court.

It does not mean that those detained will automatically be released. Nor does it prevent trial by specially constituted military commissions. There had been significant criticism of these commissions and their rules of procedure, especially the lack of an appeal to a civilian court.

The judgments remove all those detained from a legal limbo. It is the court's most important statement in many years on the balance and tensions between personal liberties and national security. Unfortunately, however, the justices did not address the related human rights implications of the prisoners' seizure and detention without trial, and denial of access to a lawyer.

Under Article 1 of the Third Convention, the US has agreed to "respect and ensure respect for the convention in all circumstances". Adherence to the Geneva Convention will not preclude charges of war crimes or other serious offences being brought against individuals detained, if evidence is available to support such charges.

In the "war on terror" the temptation for states and counter-terrorist forces to violate basic legal restraints is enormous. There have been many instances where the conduct of states and the mistreatment of prisoners have contributed to the growth of terrorist activities. Even the perpetrators of the most serious crimes must be accorded basic human rights. A denial of prisoner of war status to captured enemy "combatants" does not make them legal pariahs. Such persons must be granted a fair trial and accorded protection under the Geneva Conventions.

In the long term the US has most to lose by its current policy regarding the Taliban and al-Qaeda detainees. Conflicts in Iraq and elsewhere show that US soldiers will continue to need the very protection their own government denied those captured in Afghanistan. A true measure of the strength of a democracy and its commitment to human rights can be determined by the manner in which it responds to crisis and real threats, even of the proportions caused by the September 11th atrocities.

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