

The following text may be printed, copy/pasted, or downloaded and emailed.

What the Detainee Treatment Act Really Means for Guantanamo Detainees

Jonathan Hafetz (op-ed)
JURIST.com
April 21, 2006

With courts poised to decide whether the Detainee Treatment Act of 2005 (DTA) strips them of habeas corpus jurisdiction over detentions at Guantánamo, it's worth considering what the writ's elimination could really mean for the 500 people imprisoned there without charge. Quick to minimize the act's significance because statutes that affect substantive rights are presumed not to apply retroactively, the US government says the DTA simply replaces habeas review in the district court with "exclusive review" in the court of appeals. But closer inspection shows why that argument is false and how the government would use the DTA to cut off meaningful access to the courts.

While the US Supreme Court is reviewing the statute's application to the handful of detainees charged with crimes in military commissions, the U.S. Court of Appeals for the District of Columbia Circuit is considering the DTA's application to pending Guantánamo detainee cases. At last month's oral argument, the circuit panel pressed the government about the scope of judicial review under the new act. The government responded that the DTA prevents Guantánamo detainees from presenting evidence of their innocence in court, a right they clearly have on habeas corpus.

Eliminating any judicial inquiry into the facts would be particularly troubling because the detainees were never given a fair hearing in the first place. Instead, they were subjected to the Combatant Status Review Tribunal (CSRT), an ad hoc proceeding that denies fundamental safeguards, including a neutral decisionmaker, assistance of counsel, and the right to see and confront the government's evidence. The CSRT, moreover, allows for the use of evidence secured by torture if it deems that evidence "reliable." If, as the government argues, the DTA is applied to pending habeas corpus cases, it will allow for indefinite executive detention without any meaningful opportunity to rebut the government's allegations, eviscerating a core guarantee of the Great Writ since common law.

The DTA also jeopardizes detainees' access to counsel, another critical safeguard of habeas corpus which the government has tried to undermine since the Supreme Court ruled in *Rasul v. Bush* that the writ extends to Guantánamo. Federal magistrate judge Alan Kay recently rebuked the government for its latest roadblock, a requirement that attorneys obtain proof of their authority to represent a Guantánamo detainee before they are even permitted to meet their client. Judge Kay held that requirement violated the protective order governing counsel access at Guantánamo and imposed an unacceptable Catch-22 on detainees whose only meaningful way to communicate with the outside world is through another prisoner who already has an attorney with access to the base. The government has sought reconsideration of Judge Kay's decision, arguing that the DTA deprives the court of jurisdiction to enforce the protective order. While this motion targets attorneys who have yet to meet their clients, future ploys to curtail counsel access for other detainees are but a short step away.

Why does the government want to cut off attorney visits? For one thing, lawyers help detainees put the government to its proof by contesting the basis for their detention. Lawyers also prevent the government from operating Guantánamo as a secret prison in which details of prisoner abuse remain hidden from the public. Indeed, counsel access is a principal reason we know about the continued detention of innocent men, prolonged hunger strikes and abusive force-feedings, and

attempted prisoner suicides. In short, take away counsel access to Guantánamo, and you take away a critical means of discovering the truth about the detentions there.

There is another reason why the government will use the DTA to limit counsel access. Attorneys constitute the embodiment of precisely what the government still refuses to accept at Guantánamo: the rule of law. Both a concept and a culture, the rule of law subsumes within it notions of independent judicial review, established rules, and principled limits on executive power. More concretely, access to counsel means that the government's allegations will be subjected to the crucible of the legal process, where they will be rigorously tested and assessed. Under the DTA, that process, and the critical role lawyers play in it, would be undermined. All that would remain is narrow appellate review of a one-sided CSRT determination (in which no attorney participated), a veritable rubber-stamp for unlawful executive detention.

Just as startling is the government's assertion that the DTA prevents a federal judge from ordering the release of innocent individuals. To be more precise, the government says that review under the DTA is limited to detainees who challenge a CSRT determination finding them "enemy combatants." Individuals who the government concedes are not enemy combatants, but who nonetheless remain imprisoned at Guantánamo because they cannot safely be returned to their home countries, are therefore out of luck. No court, the government says, has the power to order these men's release under the DTA, even if they do not present a danger to anyone. At least nine individuals are already in this permanent state of legal limbo, with more surely to follow. The legality of their detention is pending before another panel of the D.C. Circuit.

Denying a judicial remedy to these "non-enemy combatants" turns habeas corpus on its head. The writ has always provided two core guarantees: searching review into the legality of a prisoner's confinement; and release when there is no lawful basis for the detention. The DTA fails on both accounts.

For the DTA to pass muster under the Constitution's Suspension Clause, it must provide an adequate and effective substitute for habeas corpus. But the act does not even come close - it cuts off meaningful judicial review, jeopardizes counsel access, and denies a remedy to the innocent. If the DTA is interpreted to eliminate habeas corpus jurisdiction over detentions at Guantánamo, it will undermine the most critical substantive right against unlawful executive detention in the American legal system. And, it will give the government the green light to push Guantánamo backwards towards its pre-Rasul state of secrecy and lawlessness.

Jonathan Hafetz is Associate Counsel at the Brennan Center for Justice at NYU School of Law and author of an amicus brief on behalf of British and American Habeas Corpus Scholars in the Guantánamo detainee appeal.