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Courting Ignorance

Editorial
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WITH HIS LATEST EXPLANATION for the continued confinement of almost 500 detainees at the Guantanamo Bay naval base in Cuba, President Bush sounds like the proverbial teenager who killed his parents and then asked for mercy from the court because he was an orphan.

In an interview with German television, Bush said: "I very much would like to end Guantanamo; I very much would like to get people to a court. And we're waiting for our Supreme Court to give us a decision as to whether the people need to have a fair trial in a civilian court or in a military court."

It's true that the Supreme Court is deliberating on a challenge brought by one Guantanamo detainee, Salim Ahmed Hamdan, to the procedures devised by the Pentagon for military commissions. Hamdan, a former driver for Osama bin Laden, is one of 10 detainees slated for trials by the commissions. Prosecutors are considering charges against at least 25 others.

But Hamdan's lawsuit doesn't prevent the administration from closing Guantanamo; it could have moved him to U.S. soil and charged him with a criminal offense. Nor does the unresolved Hamdan case prevent the administration from freeing other detainees against whom a case cannot be made.

That isn't the only problem with the president's comments. From his seemingly respectful reference to the court, one wouldn't guess that the Bush administration resisted any review by the Supreme Court of its handling of Guantanamo detainees, arguing unsuccessfully in 2004 that federal courts lacked jurisdiction. More recently, at oral arguments in the Hamdan case, the U.S. solicitor general argued (a) that a recent act of Congress stripped the high court of jurisdiction over Hamdan's claim but (b) that even if the court had jurisdiction, it should defer any judgment until Hamdan's trial had taken place.

The notion that this administration takes its cues from the Supreme Court is also belied by the way it behaved after the justices ruled in 2004 that Guantanamo detainees were indeed entitled to a hearing. The administration went ahead with rules for military commissions that fell short of the due process provided in other tribunals (though it has made some revisions in the rules).

A decision in the Hamdan case is expected by the end of next month, but there is no guarantee that it will provide the clean-cut resolution Bush suggested. The justices could call for new regulations -- or legislation -- to conform the military commissions to constitutional requirements. Meanwhile, Guantanamo presumably could remain open.

Conversely, as ACLU Legal Director Steven R. Shapiro pointed out Monday, the president does not need Supreme Court approval to shut down Guantanamo or to give its inmates a fair trial. To use a term familiar to the president, he, not the court, is the "decider" when it comes to prolonging the detention of all those at Guantanamo.