

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

You Have My Body

The Guantanamo detainees try to fight their way into court.

Emily Bazelon (op-ed)
Slate.com
March 22, 2006

Saber Lahmar is an Algerian who was living in Sarajevo in 2001. In October of that year, Bosnian police arrested him, reportedly because the United States said that he and five other men were planning to bomb the British and American embassies in Bosnia-Herzegovina. After a three-month investigation, on Jan. 17, 2002, the Bosnian Supreme Court ordered all six men to be released. But before dawn the next morning, U.S. forces seized them all and flew them to Guantanamo Bay.

Fast-forward to June 2004 and *Hamdi v. Rumsfeld* and *Rasul v. Bush*, the Supreme Court's rulings that the Guantanamo detainees can't be detained forever merely on the president's say-so. The court found that the detainees have the right to "a meaningful opportunity to offer evidence" that they are not enemy combatants. In response, the Bush administration established "combatant status review tribunals"-panels of three military officers who would review whether a detainee is, in fact, the bad guy the government says he is.

When Lahmar appeared before his CSRT, he asked for the Bosnian court records, as evidence that he'd been found not guilty. The CSRT took a recess and asked the State Department to find the court record. The State Department said the Bosnian government didn't have it. Lahmar had no right to a lawyer before the CSRT. So it didn't matter that two months earlier, the lawyer who was trying to get Lahmar's case heard in federal court had filed the Bosnian court record in D.C. district court. The document was also online, the lawyer says. But the CSRT found that it wasn't "reasonably available." And then it agreed with the government that Lahmar was an enemy combatant.

In court arguments today before a panel of three judges of the D.C. Circuit Court of Appeals, government lawyers had this response to Lahmar's story: Tough luck, sucker.

The law that's before the court is the Detainee Treatment Act, which Congress passed last December. Here's the sequence: In *Rasul*, the Supreme Court ruled that the Guantanamo detainees could challenge their detentions in federal court by bringing petitions via the writ of habeas corpus. Traditionally, detainees have been able to bring habeas petitions if they are held without trial—a good fit for the Guantanamo detainees. So good, in fact, that when the cases of Lahmar and the others were first argued before the D.C. Circuit in September, things went badly for the government.

No matter—Congress to the rescue. The DTA cut off the habeas corpus claims of some Guantanamo detainees. The first question before the court today is which ones. The detainees argue that Congress didn't clearly state that the DTA applies to them, or to the hundreds of other detainees who filed their habeas petitions in federal court before the law was passed. "If Congress had really wanted to revoke habeas jurisdiction over pending cases, it would have said so," detainee lawyer Thomas Wilner told the court.

Appearing for the government, Deputy Assistant Attorney General Gregory Katsas naturally disagreed. "The act ousts the court's habeas jurisdiction over that set of claims effective immediately," he said, referring to the claims of Lahmar and the other detainees.

"Are you saying they don't have any rights?" asked Judge David Sentelle. "All the Supreme Court gave them in Rasul is the right to file a piece of paper, based on which we cannot possibly grant release?"

Yes, Katsas answered, that's the deal. They can file their habeas petitions, but courts must ignore them.

Judge Judith Rogers pushed a bit: "Can a court hear factual evidence" from the Guantanamo detainees? she asked. "No," Katsas replied. The DTA limits the court to whatever evidence was presented before the CSRT. No new inquiries.

Rogers tried again. "So, their common law rights aren't protected under the suspension clause?" She was referring to the provision of the Constitution that allows Congress to suspend the writ of habeas corpus only in the case of an "invasion" or "rebellion."

"The threshold question is whether the suspension clause applies at all to aliens who are being held abroad," Katsas answered. "It doesn't." For support, he cited *Johnson v. Eisentrager*, a 1950 case in which the Supreme Court rejected the habeas appeals of 21 Nazi spies captured on foreign soil. "If we're right, these detainees have no suspension clause rights."

It's not at all clear that the government is in fact right, given that Rasul rejected the premise that Guantanamo Bay—a U.S. military base on Cuban soil—is a foreign land and thus beyond the reach of American law. But Judge A. Raymond Randolph brushed that small matter aside. Congress didn't suspend habeas by passing the DTA, Randolph insisted. It merely modified the writ. "The Constitution doesn't say the executive is forbidden from modifying habeas," Randolph said. "If this is a modification, then the suspension clause doesn't come into play."

"But if the modification is so substantial that it reduces habeas beyond its historical core," then it effectively suspends the writ, retorted Stephen Oleskey, another lawyer for the detainees. Oleskey told Saber Lahmar's story. He reminded the court that the CSRTs hear evidence obtained through torture and give the detainees no chance to challenge that evidence because it's kept classified.

It was a relief, after nearly an hour of wrangling over how to parse a badly written statute, to hear about the real case of a real person. But it wasn't at all clear that Saber Lahmar's plight would move the D.C. Circuit any more than it had moved the CSRT or the government. Randolph's conservative record includes authorship of the D.C. Circuit decision in *Hamdan v. Rumsfeld*, a ruling that gave the administration a free hand to try however it pleases the handful of Guantanamo detainees who have actually been charged with crimes.

Sentelle, like Randolph, is a Republican appointee. Rogers was appointed by President Clinton. It was hard to tell exactly where Sentelle and Rogers stood today, but neither seemed likely to jettison the DTA entirely in these cases, as the detainees' lawyers urged.

The best hope for Lahmar and the others may be the U.S. Supreme Court, which will probably have to figure out what to do with the DTA when it hears Hamdan's appeal next week. Chief Justice John Roberts won't take part in that case, since he signed on to Randolph's opinion before he moved up to the high court. So, the odds are better for the detainees than they might be otherwise. It was hard to be too optimistic today, though. "Tough luck" seemed like all Saber Lahmar would ever get to hear.