DC CIRCUIT LIMITS DETAINEE'S PROCEDURAL RIGHTS

Two of the most conservative members of the DC Circuit, Janice Rogers Brown and Brett Kavanaugh, have ruled that detainees captured on the battlefield do not have access to all the procedural habeas rights a domestic criminal would.

The case involves Ghaleb Nassar al-Bihani, who argued, firstly, that he was not legally detained under international law. As a cook (a contractor, he said) for a Taliban unit, he was not at war with the US, and in any case the war against the Taliban is over.

> Al-Bihani challenges the statutory legitimacy of his detention by advancing a number of arguments based upon the international laws of war. He first argues that relying on "support," or even "substantial support" of Al Qaeda or the Taliban as an independent basis for detention violates international law.
>
> [snip]
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> Al-Bihani interprets international law to mean anyone not belonging to an official state military is a civilian, and civilians, he says, must commit a direct hostile act, such as firing a weapon in combat, before they can be lawfully detained. Because Al-Bihani did not commit such an act, he reasons his detention is unlawful.

Al-Bihani argues further that he was not accorded all his procedural rights.

> Drawing upon Boumediene's holding, Al-Bihani challenges numerous aspects of the habeas procedure devised by the

> district court. He claims the district court erred by: (1) adopting a preponderance of the evidence standard of proof; (2) shifting the burden to him to prove the unlawfulness of his detention; (3) neglecting to hold a separate evidentiary hearing; (4) admitting hearsay evidence; (5) presuming the accuracy of the government's evidence; (6) requiring him to explain why his discovery request would not unduly burden the government; and (7) denying all but one of his discovery requests. In support of these claims, Al-Bihani cites statutes prescribing habeas procedure for review of federal and state court convictions and analogizes to a number of cases concerning review of detentions related to criminal prosecutions. Brief for Petitioner-Appellant at 48–49. By referencing these sources, Al-Bihani traces the district court's supposed errors to its failure to accord him procedural parity with safeguards found in review of criminal proceedings.

Rogers and Kavanaugh start by dismissing the notion that international law should limit the government.

> Before considering these arguments in detail, we note that all of them rely heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war. This premise is mistaken. There is no indication in the AUMF, the Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739, 2741–43, or the MCA of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF.

Under domestic law, they argue, al-Bihani was legally detained (curiously they argue this would be true for contractors, too).

> Under those sources, Al-Bihani is lawfully detained whether the definition of a detainable person is, as the district court articulated it, "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners," or the modified definition offered by the government that requires that an individual "substantially support" enemy forces.

They go on to argue (credibly) that the conflict in question is still ongoing.

But then they dismiss his procedural challenge by ruling that detainees captured on the battlefield are not entitled to the same habeas rights as a criminal defendant.

> Al-Bihani's argument clearly demonstrates error, but that error is his own. Habeas review for Guantanamo detainees need not match the procedures developed by Congress and the courts specifically for habeas challenges to criminal convictions. Boumediene's holding explicitly stated that habeas procedures for detainees "need not resemble a criminal trial," 128 S. Ct. at 2269. It instead invited "innovation" of habeas procedure by lower courts, granting leeway for "[c]ertain accommodations [to] be made to reduce the burden habeas corpus proceedings will place on the military."

They blather for a bit about how habeas is like a tree, with its procedural rights having grown over the years. they they chop down that tree (or rather, invent a new arm of it) arguing,

> This brief account of habeas' evolving nature serves to make clear that, in the shadow of Boumediene, courts are neither bound by the procedural limits created for other detention contexts nor obliged to use them as baselines from which any departures must be justified. Detention of aliens outside the sovereign territory of the United States during wartime is a different and peculiar circumstance, and the appropriate habeas procedures cannot be conceived of as mere extensions of an existing doctrine. Rather, those procedures are a whole new branch of the tree.

In other words, detainees may have habeas rights, but those don't look like the habeas rights others have.

The third member of the panel, Stephen Williams, only concurred in ruling against Bihani's habeas petition and finding on that grounds there was no need to do the analysis the two other judges had done.

> Because the petitioner's detention is lawful by virtue of facts that he has conceded—a conclusion that the majority seems not to dispute—the majority's analysis of the constitutionality of the procedures the district court used (i.e., Maj. Op., Section II B) is unnecessary.

Which suggests that he is skeptical of this ruling on habeas procedures. And, as Lyle Denniston points out, this ruling is likely to be further challenged.

Still, this launches yet another round of long legal challenges to determine just what sort of basic rights our legal system includes.