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CHECKS AND BALANCES IN GUANTÁNAMO

Could the gulag's future hang on a real-estate deal?

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Given what was at stake last week during oral arguments before the US Supreme Court in Rasul v. Bush and Al Odah v. United States — two cases dealing with whether civilian courts have any authority to review the detentions of the 600-plus "enemy combatants" being held at Guantánamo Bay, in Cuba — the bloodlessness of the proceedings was striking. Arguments revolved primarily around legal technicalities: whether the most relevant doctrines lie in constitutional or statutory provisions; whether the detainees have wartime-prisoners' rights under international treaties signed by the United States; and various other aspects of American legal procedure. Indeed, you would barely have known that these cases are about keeping America a place where there are no Soviet-style gulags, no Chilean "disappeareds," no dark dungeons from which there is no exit and no word. (See "Crossing the Threshold," News and Features, March 5.)

Solicitor General Theodore B. Olson, who lost his wife during the September 11 terrorist attacks, argued the Bush administration's position: because the Guantánamo Bay detainees were captured during wartime and held outside the sovereign territory of the United States, no US court — indeed, no court at all — has jurisdiction over their fate. Only the US president and the military he commands, Olson asserted, have discretion over why and how long these enemy combatants can be held. In a rare illustrative moment, John J. Gibbons, a 79-year-old former federal judge who is representing the detainees, argued that Guantánamo Bay should not be a "lawless enclave" insulated "from any judicial scrutiny."

The 60 minutes of oral argument proved particularly anemic and hypertechnical, and that benefited the government's side. Some background: the US acquired a perpetual lease on the Guantánamo Bay naval base in 1903 as a condition of allowing Cuba its independence. As a result, the US exercises complete dominion over the enclave, but Cuba retains "ultimate sovereignty." In the courtroom, much time was thus spent parsing whether the phrase "ultimate sovereignty" meant — as Olson argued — that Cuba was in fact the highest sovereign

in Guantánamo, or if — as Gibbons argued — it meant only that sovereignty would revert back to Cuba when, and if, the US ever terminated the lease. Gibbons stressed that America's total control of the territory made the US, in practice, the current sovereign; in his only lighthearted line, he assured the court that a postage "stamp with Fidel Castro's picture on it wouldn't get a letter off the base." Olson, on the other hand, emphasized that although the US exercises total control over Guantánamo, it is merely a leaseholder whose rights over the land are subject to the conditions set by the lessor; we cannot sell or lease it to anyone else, and hence it is not legally part of the US in any technical sense. In other words, a case that will determine the fate of one of our threshold liberties — the writ of habeas corpus — was reduced to competing interpretations of a real-estate lease.

With the debate so focused on the details of the lease, the liberties at stake seemed less pressing and the government's innovations less staggering in their implications. Indeed, left unasked was this question: if US courts cannot assert any role whatsoever in overseeing the Guantánamo incarceration program, then what is to prevent the president from arresting anyone (even a US citizen) in Boston for any reason whatsoever and locking him or her up incommunicado in Guantánamo? If our courts are not allowed to second-guess the legality of a Guantánamo detention, how can we be certain that the inmates at Guantánamo were captured as combatants on foreign battlefields? How, in fact, can we tell whether US citizens are being held in the prison? We can't. Olson would have us simply take George W. Bush's word on these matters.

Five of the nine justices (Ruth Bader Ginsburg, David H. Souter, Stephen G. Breyer, Sandra Day O'Connor, and John Paul Stevens) posed questions that suggest a willingness to give the courts some jurisdiction over Guantánamo. Breyer, in particular, got at the heart of the problem when he observed: "It seems rather contrary to an idea of a Constitution with three branches that the executive would be free to do whatever they want ... without a check."

Meanwhile, it seems unlikely that the Supreme Court — which was assertive enough to confer the White House on a president who lost the popular vote and, arguably, the electoral vote, too — will agree that it has no role whatsoever in the Guantánamo cases. Though some justices remain unmoved by the administration's staggering assault on ancient revered liberties, they are unlikely to welcome incursions on the court's own power and prestige. Liberty needs their votes, too.