THE QUIET DEATH OF HABEAS CORPUS

Pow Wow left a comment, in response to me and Candace Gorman, on Marcy's Gitmo Lawyers Information Gulag post that warrants highlighting and further comment. For convenience, here it is in full:

> **This** is what bmaz and hcgorman @ 12 are referencing:
>
> > Two Guantanamo detainees, Fahmi Al-Assani and Suleiman Al-Nahdi, have moved the D.C. Circuit to dismiss their habeas appeals (Al-Assani's motion is here, Al-Nahdi's is here). Both men lost their district court habeas cases in decisions by Judge Gladys Kessler; the Al Assani decision is here, the Al-Nahdi decision is here. Both men appealed, and **today, both men have given up their appeals as lost causes.**
> >
> > Their lawyer, **Richard Murphy**, explained in an email,
> >
> > > Judge Kessler denied our clients' habeas petitions and we appealed to the D.C. Circuit, but then stayed the appeals pending the outcome of several [other Guantanamo habeas] cases in which [Supreme Court] cert petitions had been filed. Once cert [review] was denied [by the Supreme Court] in all of the relevant cases coming out of the

> > > D.C. Circuit it became clear that the appeals were futile. **Under the detention standard that has been developed by the D.C. Circuit (which the Supreme Court has refused to review), *it is clear that the courts provide no hope for the men remaining at Guantanamo.***
>
> > This development strikes me as a big deal—albeit a quiet one that won't get a lot of press attention. […] — *Benjamin Wittes,* ***June 2, 2011***

That grim assessment of the current posture of Guantanamo *habeas* petitions, which, *for years*, have been pending before federal judges serving in the Judicial Branch of the United States Government, was further illuminated and reinforced by **this June 8, 2011** Benjamin Wittes post:

> > Habeas lawyer **David Remes** sent in the following comments on recent developments in D.C. Circuit case law. He emphasizes that he has been counsel in several of the cases discussed below and that the following represents his own opinion only:
>
> > > **I agree with my colleague Richard Murphy** (here) that for Guantánamo detainees, seeking habeas relief has proven to be **an exercise in futility.** The D.C. Circuit appears to be dead-set against

letting them prevail. It has not affirmed a grant in any habeas case, and it has remanded any denial that it did not affirm.

Moreover, the Supreme Court, having declared in *Boumediene* that detainees have a constitutional right to seek habeas relief, appears to have washed its hands of the matter. **It denied review in every case brought to it by detainees this Term, including one, *Kiyemba III*, which eliminated the habeas remedy itself.**

The D.C. Circuit has decided twelve habeas appeals on the merits. In four, the detainee prevailed in the district court; in eight, the government prevailed. The D.C. Circuit erased all four detainee wins. It reversed two outright (Adahi, Uthman) and remanded the other two (Salahi, Hatim). By contrast, the court affirmed six of the eight government wins (al-Bihani, Awad, Barhoumi, al Odah, Esmail, Madhwani), remanding the other two (Bensayah, Warafi).

In two critical non-

merits cases, the D.C. Circuit held in Kiyemba I and III that the district court cannot compel the government to release a detainee found to be unlawfully held; and in Kiyemba II, the court effectively barred the district court from enjoining the release of a detainee to a country where he fears he will be tortured. Because the Supreme Court denied review in both cases, only Congress can overrule them. Unless Congress removes from the Executive the discretion to decide whether to release a prevailing detainee, I don't see what practical difference legislation making substantive or procedural improvements in Guantánamo habeas litigation can make.

* * *

The D.C. Circuit's methodology is even more revealing. When a detainee prevails in district court, the D.C. Circuit fashions, if necessary, a rule that rationalizes reversal or remand. When a detainee loses in district court, the D.C. Circuit sometimes uses the appeal as an occasion to tilt the law even further against

detainees.

For example, in al-Bihani (who lost in district court), Judge Brown appeared to accept the government's contention that any guesthouse where an alleged al Qaeda member stayed is an "al Qaeda guesthouse," and that any detainee who stayed at an "al-Qaeda guesthouse" is, ipso facto, a member or supporter of al-Qaeda. She implicitly excluded the possibility that a guesthouse can be used by al-Qaeda members and still be a public guesthouse.

In al-Adahi (who won in district court), Judge Randolph created the "conditional probability" test. Under this test, as Lyle Denniston distilled it (here), "each assertion is to be considered, not for what it says by itself, but how it might make the next assertion seem more solid, and so on, so that the overall weight adds up to enough to support detention." Citing Judge Silberman's concurrence in Esmail, Steve Vladeck has suggested (here) that the test, in effect, reduces the "preponderance" standard

> > > to a “some evidence” standard.
>
> Or consider Uthman (who won in district court). In earlier cases, including al-Adahi, the D.C. Circuit criticized district court judges for taking an “unduly atomized” approach to the evidence when ruling for detainees, and instructed them to consider “all of the evidence” as a whole. Judge Kennedy did precisely that in granting Uthman’s petition. On appeal, however, Judge Kavanaugh cherry-picked the government’s evidence and tossed aside Uthman’s, reversing the district court and finding Uthman lawfully held.
>
> In Mahdwani (who lost in district court), Judge Henderson treated as “strong evidence” of culpability the fact that a detainee gave an exculpatory account of events that the district court does not credit. This conclusion isn’t logical or fair. There could be any number of reasons a detainee offered an exculpability account. Ironically, a detainee who says nothing is better off than a detainee who

> > > offers an account of the facts that the district court doesn't credit.
>
> ***
>
> Two factors appear to animate the D.C. Circuit's apparent determination to rule against detainees. The first, exemplified by Judges Randolph and Silberman, is **unabashed hostility to *Boumediene***. They have made quite clear that that they think Boumediene was wrongly decided, and Judge Randolph, in particular, takes every opportunity to undermine it. […]
>
> *– David Remes, 6/8/11*
>
> [Subsequent to this summary by Remes, the D.C. Circuit (*i.e*, a three-member appellate panel of Silberman, Kavanaugh and Rogers) handed down, on June 10th, its **thirteenth** Guantanamo *habeas* merits decision, **in *Almerfedi*** – **reversing**, of course, a writ of *habeas corpus* that had been **granted** – *i.e.*, that had nominally ordered the release of the prisoner Almerfedi, because he had been unlawfully detained without proof that he was an armed conflict "enemy combatant" – by a district court trial

> > judge. -*pow wow*]

What was that fancy rhetoric, again, that Supreme Court Justice Stephen Breyer was recently heard delivering *outside* the Court? Oh, right — from the emptywheel-linked Morris Davis commentary **"Torture: Finding Our Moral Compass":**

> **Justice Stephen Breyer spoke on the theme of justice and accountability** at the 2011 Day of Remembrance at the U.S. Holocaust Memorial Museum. He said, **"we need only look around today's world to understand that rights, rules, the obligations that the law sets forth; all of them are no more powerful *than the human will to enforce them.*"**

How can you "call the balls and strikes," Chief Justice Roberts & Company, *when you refuse to work the game?*

[David Remes, as emptywheel highlights and Charlie Savage indicates in the linked article, is the detainee lawyer (as opposed to "defense" lawyer, in this *habeas corpus* case) who forced the government's hand, to the extent described by Candace @ 5, on the *verboten* WikiLeaked Guantanamo documents. Despite, to date, no help — as I **noted** (with a lot of other detail) in emptywheel's April thread — from Judge Paul Friedman, who, since April, has uncomplainingly granted government requests for **three consecutive extensions of time** for the filing of its response (originally ordered due on **May 11**, in the "ordinary course" of the rules, but not submitted until

> yesterday, **June 10**) to the "emergency" motion that Remes had filed with Judge Friedman on behalf of his Guantanamo *habeas* client on **April 27**.]

Yes. Quite unfortunately, that is exactly right. First, let me say thanks to Pow Wow who here, as is so often the case, has taken the time to not just share superb knowledge and understanding, but made the effort to cite and explain exactly what is going on in detail. This is especially cool after I have basically done a sardonic hit and run comment as I had in Marcy's post.

To add on to Pow Wow's explication a bit, let me add a couple of things. First off, the two substantive quotes from Ben Wittes are spot on. This, in and of itself, is notable in that Ben is, by no stretch of the imagination, any dirty fucking hippy liberal as the proprietor of this blog and I somewhat proudly admit to mostly being. Ben is pretty conservative and is a key member of the Brookings Institute. His blog partner at Lawfare is Jack Goldsmith. In short, he certainly is no weak kneed French torture apologist as they say. So when Wittes is saying those things in complete agreement with me, Pow Wow, Marcy and the general skurvy radicals known to frequent this establishment, well, it is pretty telling. And damning.

Secondly, Al-Assani and Al-Nahdi did not lose after exhausting all levels of putative remedy, they just quit because the effort at justice was useless and a waste of what human energy and force they had left. Their resistance was futile and not only they but, very notably, their attorneys, knew it. Even Martin Luther King had at least the dream that justice would overcome; detainees Al-Assani and Al-Nahdi did not even reasonably have that. As Habeas Corpus is pretty much not just the "Great Writ", but indeed the linch pin and foundation on which every ounce and fiber of Anglo in general, and American in specific, rule of law is founded, this is simply a mind numbing and stunning thing.

Seriously. If human beings have no viable Habeas Corpus remedy in a country, then that country exists in an immoral void outside of any known understanding of the concept of “the rule of law”.

Third, I would like to highlight just exactly who has decreed this fundamental gutting of everything the United States of America is supposed to stand for, and was founded upon. It was not, as Pow Wow appropriately notes, the august robes of final judgment at the Supreme Court. No, the Supremes have indeed, like Pilates of modern justice, washed their hands of the critical murder. Notably, not even Anthony Kennedy, who authored *Boumediene*, voted in favor of accepting certiorari and defending his seminal, and critical, decision. But the *Kiyemba III* abdication was simply the crowning *coup de grace.* Instead, despite the early work on detainee litigation, and notably Habeas claims, which culminated in the groundbreaking, and somewhat refreshing, *Boumediene* decision penned by Tony Kennedy, the Supremes have abdicated their throne and left the law to the uniquely questionable discretion of the DC Circuit.

Did I mention *just exactly who* the judges at the DC Circuit, that have made the current sad and tragic law, is notable?? Look no further than Pow Wow’s comment. We have the smooth stylings of none other than Janice Rogers Brown, Lawrence Silberman and a chap who was actually an active part of the Bush/Cheney torture brigade prior to being elevated to the court, Brett Kavanagh. It would be impossible, even in the wildest Salvador Dali dream, to conjure up three judges more unsuitable for the task of deciding the viability, indeed existence, of Habeas Corpus in these circumstances.

And, make no mistake, what happens in the supposedly distinct and discreet realm of “detainee law” can, and absolutely will, eventually bleed into standard criminal law as we know it. Regular citizens do not want to believe that, and will poo poo the thought;

lawyers that ply the halls of high grade criminal law not only think it, they know it for a fact in their bones. The Fourth Amendment, Due Process and Fundamental Fairness only travel in one direction, and it is not the enlightened, proper and just direction.

When our children ask in the future how the Great Writ of Habeas Corpus, the foundation of law, died, this is the time and this is the answer.