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Without prejudice

## Democracy's chance

The US Supreme Court is about to decide whether Guantanamo is above the law. Justice is at stake

**Nick Cohen****Sunday June 27, 2004****[The Observer](#)****Tools**

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Later this week, possibly tomorrow, the United States Supreme Court will deliver its verdict on whether Guantanamo Bay can remain beyond the rule of law. Credulous viewers of Fahrenheit 9/11 - who leave the cinema believing America is under the control of oil executives and Saudi royals who bought the Bush family and stole the 2000 election with the connivance of Supreme Court judges - may be shocked by the verdict. Lawyers for the detainees are convinced they will win and that the court will deliver a verdict which will humiliate the Bush and Blair administrations. (Assuming, that is, they have the intellectual capacity to be shocked by discordant information.)

Predicting the decisions of judges is a dangerous game, and it's foolhardy for journalists to try to report tomorrow's news today, although that never stops us having a punt. Lawyers are often in a fantasy world when they wait for a verdict. Even in private, they rarely admit their client is as guilty as Crippen and is going to be sent down. Civil liberties lawyers in particular have to have an optimistic disposition. If they didn't, the repeated triumphs of experience over hope would be too much for them.

None the less, from the moment the Supreme Court stunned the Bush administration by agreeing to hear the Guantanamo appeal, the US Centre for Constitutional Rights, which brought the case, and the civil liberties law firms and pressure groups

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which have been supporting it, have been remarkably cheerful. Their confidence springs from the enormity of what Bush has done.

He has created a parallel justice system in which suspects can be picked up in secret and interrogated without restraint. Their defence counsels are appointed by the Pentagon and can refuse to keep confidential instructions confidential. Their prosecutors, also appointed by the Pentagon, can keep evidence from them even if it proves their innocence. Their judges at the military tribunals, who once again are Pentagon appointees, can change the rules of the court at any time, order that their trials be held in secret and refuse to compel the attendance of witnesses who might clear their names. At the end of the hearing, they can be executed if found guilty.

An acquittal isn't unalloyed good news. The innocent can continue to be detained for as long as the war on terrorism continues, and there is nothing anyone can do about it. No check on the parallel justice system is allowed from the world outside Guantanamo. No appeal to the civilian courts is permitted.

Leaving everything else aside, Guantanamo is an affront to the professional self-interest of judges. The Bush administration is telling them that they're not fit to interfere. Judges hate being told they can't interfere. Interfering is what judges do. The detainees' lawyers have been confident from the start because their case is a simple appeal to the self-respect of the judiciary. All they have asked is for the Supreme Court to assert its right to interfere and allow the men in Cuba to challenge the legality of their imprisonment. That's it. They're not asking for the whole system to be declared illegal or for Bush to be indicted, simply for judges to do what judges are meant to do and state that no government, however well-intentioned, can be allowed unfettered power.

In one of the many appeals from Guantanamo whose progress depends on the Supreme Court verdict, the Bush administration gave a second argument against itself. A San Francisco court asked its lawyers if their demand that Guantanamo be exempted from judicial oversight meant that the judges wouldn't be able to lift a finger if the military tortured or summarily executed prisoners. That's right, came the reply, there's nothing you could do.

At the time, it was a theoretical answer. The court was testing

the argument by taking it to the extreme and the US government was accepting the logic of its position and maintaining that it was beyond the reach of the courts whatever it did. The argument doesn't seem theoretical now. It's not that conclusive evidence has emerged that the Bush administration ordered the torture of prisoners in Iraq.

Instead there has been a restless struggle against the restrictions of civilised conduct. Donald Rumsfeld briefly approved the stripping of prisoners at Guantanamo Bay and their intimidation with dogs. A casuist lawyer whose opinion was sought by the administration redefined torture to mean 'the equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function, or even death'. Anything else was OK. The White House claims it didn't act on this scandalous advice. But, if it had to ask ...

If the Supreme Court goes against Bush it will also go against Blair. More than any other issue Guantanamo has exposed the contradictions in the government and in the character of Tony Blair himself. Both have been moulded by the two great events of our time: the destruction of the Berlin Wall and the destruction of the Twin Towers.

More than any other leader of the 1990s, Blair accepted the best side of the world after the Cold War. His rule has been a decisive break from the idea that nation states should be free to do what they want within their own borders. At home he brought in the Human Rights Act and helped establish the International Criminal Court to try the perpetrators of crimes against humanity regardless of whether their countries had given them immunity from prosecution.

His wars have been against the remnants of totalitarianism: ethnic cleansers in the former Yugoslavia; Islamo-fascists in Afghanistan; secular fascists in Iraq.

Yet because of 11 September, it's impossible to see the Ministry of Defence as the armed wing of Amnesty International. The fear of a terrorist attack beyond the imagination of previous generations justifies imprisonment without trial, secret justice or no justice at all. The tensions between the spirits of 1989 and 2001 account for the rampant confusions of our times.

On the one hand, Blair is an anti-fascist leader. On the other, he puts his name to the abuse of human rights. On the one hand,

his critics seem like traditional left-wingers when they condemn the human rights abuses. On the other, they seem like fellow travellers of tyranny when they take to streets to oppose the overthrow of fascist regimes.

On the one hand, Lord Goldsmith, Blair's Attorney-General, condemns Bush for establishing a system at Guantanamo Bay which crossed the red lines of democracy by breaking 'principles on which there can be no compromise'. On the other, David Blunkett, Blair's Home Secretary, says he wouldn't mind crossing a few red lines himself and compromising the principle that terrorist suspects are innocent until proved guilty beyond reasonable doubt.

This isn't wishful thinking. For foreign terrorist suspects the line has been crossed and they are interned in Belmarsh, Broadmoor and Britain's other mini-Guantanamos. British indefinite detention without trial is not the same as American - there is minimal if inadequate judicial oversight in Britain - but the wretched lot of the prisoners in Belmarsh isn't so different.

Ever since 11 September, Blair has said that he demands concessions from Bush in private, not in public. There is therefore no way of being certain that he hasn't fought manfully to uphold basic standards when the two men are alone in the White House. But all the available evidence suggests that he hasn't. Last week, to pick one of many examples, the United Nations forced America to abandon its attempt to give its forces immunity from prosecution before the International Criminal Court. Countries from around the world put pressure on the US, but not Britain. Steve Crawshaw, the director of Human Rights Watch, reports that Britain failed to act as a candid friend by advising America that its position was unsustainable. It stuck with the US to the humiliating end and failed to stand up for the court it helped to establish.

As for Guantanamo, whatever Lord Goldsmith may say the British bureaucracy has given the prison camp its blessing. Whitehall tacitly accepted its legitimacy when it sent MI5 and MI6 officers to interrogate British detainees.

There is a possibility that a majority of the judges on the Supreme Court will this week say what the Prime Minister should have said and declare that Guantanamo can't continue as it is. The leak to the Guardian last week of a belated appeal from Blair to Bush to release the four remaining British detainees suggests that Whitehall suspects that the court will do

that.

If it doesn't, of course, you can give up on American democracy.

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