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Driving the Conversation:

If you were the decider, how would you decide the fate of a Guantanamo detainee?

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Roger Pilon, Vice President for Legal Affairs, Cato Institute:

...The “law” keeps changing, and there’s plenty of blame to go around for that...

I take “how” to be the operative word in today’s question. How? I would apply the law, because the process that is due an accused under “due process of law” is a function of the applicable law – natural, “international,” constitutional, or statutory – and that should settle the matter. It hasn’t, because the “law” keeps changing, and there’s plenty of blame to go around for that.

In the abstract, the process due, given multiple unknowns, should reflect the need to strike a balance between the rights of the accused and those of alleged past and potential victims of the accused. And it’s always contextual: it’s ranged from summary judgment under certain battlefield conditions to the extraordinary process we afford the accused under current American criminal law.

The focus thus shifts from how to who decides what process is due. Historically, the executive, directly responsible for enforcement, decided, with gradual but uneven judicial oversight. As democracies evolved, legislatures crafted rules, again with uneven judicial oversight.

But it’s a complex business, nowhere more clear than in the War on Terror. It’s one thing to craft rules for domestic trials in the comfort of peace, quite another for and during a war of uncertain dimensions. The Bush administration did so, but the Court found the rules wanting, adding that Congress, the people’s branch, should craft such rules – war being the quintessential political act. Congress did, but the Court found those rules wanting too. So the Court – the branch most removed from the people, least responsible to them, and least conversant with the facts of war – wrote rules itself. And there followed, barely a month later, a lower court’s 5-4 decision applying those rules, generating seven separate opinions running over some 216 pages. Thus, the “law” that is to be applied.

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