GlobalResearch
Center for Research on Globalization

Guantánamo and the US Supreme Court: Coming Up Short on Habeas for Detainees

By Prof. Marjorie Cohn
Global Research, April 03, 2007
3 April 2007

Region: USA
Theme: Law and Justice, Police State & Civil Rights

The Bush administration has stopped the Supreme Court from giving the Guantánamo detainees their day in court – at least for now.

In *Boumediene v. Bush* and *Al Odah v. United States*, forty-five men challenged the constitutionality of the habeas corpus-stripping provision of the Military Commissions Act that Congress passed last year.

On Monday Justices Stephen Breyer, David Souter and Ruth Bader Ginsburg fell one vote short of the four needed to grant review of the lower court decision which went against the detainees. It was no surprise that Justices John Roberts, Samuel Alito, Antonin Scalia and Clarence Thomas voted to deny review.

Two justices – John Paul Stevens and Anthony Kennedy – declined review on procedural grounds, saying the detainees had to exhaust their remedies before appealing to the high court. That means they must first go through the appeals process of the Combatant Status Review Tribunals (CSRT's).

The CSRT's are used to determine whether a detainee is an unlawful enemy combatant. They deny basic due process protections such as the rights to counsel, to see evidence, and to confront adverse witnesses.

The procedure for challenging a CSRT decision is found in the Detainee Treatment Act (DTA). It is limited to determining whether the decision was consistent with the CSRT's standards and procedures, and whether the use of those standards and procedures was legal and constitutional.

There are two issues the Supreme Court would have to decide if it did review this case. First, do the Guantánamo detainees have a constitutional right to habeas corpus? In 2004, the Court held in *Rasul v. Bush* that the habeas statute applied to those detainees because the United States maintains complete jurisdiction and control over Guantánamo.

Second, even if the Court applied its *Rasul* reasoning to constitutional habeas corpus, it would then need to determine whether the procedure for contesting Combatant Status Review Tribunal decisions constitutes an adequate substitute for habeas corpus.

It should have been a no-brainer for Justices Stevens and Kennedy to vote to hear this case. The DTA's review procedures cannot cure the sub-standard standards of the Combatant Status Review Tribunals.

Since Justice Stevens authored the Court's two prior decisions upholding rights for the Guantánamo detainees, his vote in this case is puzzling. But if he provided the fourth vote for review, there's no guarantee he could garner the five votes needed to overturn the lower court ruling. Justices Stevens and Kennedy left open the option of future review if "the government has unreasonably delayed proceedings" or causes the detainees "some other and ongoing injury." Justice Stevens evidently thought it prudent to side with Justice Kennedy at this point to cultivate the latter's vote on the merits down the road.

Meanwhile, the detainees languish in confinement that could last the rest of their lives if they are denied the right to have a U.S. judge hear their habeas corpus petitions. Of the 755 men and boys held at Guantánamo in the past five years, Bush has called only 14 of them "high value detainees." Just 10 – not including any of the 45 men appealing the current case – have been charged with a crime.

Although the Supreme Court has stood up to the Bush administration in the past, it is precariously balanced and cannot be relied upon to consistently provide justice. Congress has finally shown the will to challenge the Bush agenda – on the Iraq war, and the U.S. Attorney firing scandal. The ball is in Congress's court to rescind the habeas-stripping provisions of the Military Commissions Act.

http://jurist.law.pitt.edu/forumy/2007/04/coming-up-short-on-habeas-for-detainees.php

Marjorie Cohn is a professor at Thomas Jefferson School of Law, president of the National Lawyers Guild, and the U.S. representative to the executive committee of the American Association of Jurists. Her new book, Cowboy Republic : Six Ways the Bush Gang Has Defied the Law, will be published in July. See ***http://www.marjoriecohn.com/*** *Marjorie Cohn is a frequent contributor to Global Research.*

Comment on Global Research Articles on our Facebook page

Become a Member of Global Research

Articles by: Prof. Marjorie Cohn