

# Bush administration claims police-state powers in Guantánamo arguments before US Supreme Court

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On April 20, the United States Supreme Court held oral arguments in the consolidated cases of *Rasul v. Bush* and *Odah v. United States*, habeas corpus petitions filed on behalf of prisoners held at the Guantánamo Naval Station in Cuba.

Although the cases supposedly turn on the narrow technical issue of whether foreign nationals held by the US military abroad can file habeas corpus petitions, the overriding political question of whether the courts should regulate the Bush administration's so-called "war on terror" dominated the lawyers' arguments and the comments of the justices. The dispute clearly reflected in juridical form the deepening contradiction between bourgeois democratic norms and the explosion of US militarism.

The Guantánamo facility is a concentration camp operated by the US military since January 2002. Many, but not all, of its prisoners were captured in Afghanistan following the fall of the Taliban. While apparently no US citizens are currently held at Guantánamo—one identified there, Yasser Hamdi, was transferred to a brig in South Carolina two years ago—there are nationals of at least 44 different countries, mostly from US allies, including Australia and Great Britain. None has been charged with any offense, given a trial or provided the opportunity to consult with a lawyer. Although some have been released, those remaining have no idea when they might be freed or what legal or diplomatic efforts are being undertaken on their behalf.

Guantánamo prisoners are held under conditions that flagrantly violate basic human rights. In addition to being isolated from each other as well as the outside world, the captives are subjected to lengthy interrogations and both mental and physical abuse. Mistreatment has driven captives to admit to acts they did not commit and to implicate falsely other prisoners in wrongdoing. (See "Britain: Freed Guantánamo Bay detainees detail beatings and abuse".

The Guantanamo imprisonments violate multiple provisions of the Geneva Conventions, which protect prisoners of war from isolation and interrogation, and require their immediate release following the cessation of hostilities. There are some exceptions for "illegal combatants," but the Conventions require that a competent tribunal first make a finding that captured fighters are, in fact, guilty of criminal wrongdoing and therefore do not have a right to all of the protections guaranteed to regular prisoners of war. All prisoners of war are presumed to be lawful combatants, and the burden of proof is on the power holding the combatants to prove otherwise.

There have been no tribunals for the Guantanamo prisoners, and the Bush administration has never produced evidence that these captives were combatants, much less war criminals.

All of the petitioners in the case before the US Supreme Court allege that they never took up arms against the United States.

By claiming that the US courts do not have jurisdiction over the

prisoners' habeas corpus petitions, the Bush administration is seeking to deny them any procedure for disputing their imprisonment. According to a lower court's ruling in a companion case, "[A]t oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantánamo, the US government has never before asserted such a grave and startling proposition." (See "Two appellate courts rule against Bush administration detentions").

Access to a court through a petition for a writ of habeas corpus is among the most fundamental democratic rights of humanity. For centuries in Anglo-American jurisprudence, courts have issued the "great writ"—its literal meaning is "to have the body"—so that persons in custody can challenge the legality of their confinement.

As the late Associate Justice William Brennan explained in a famous 1963 decision (*Fay v. Noia*), during the high court's more liberal Warren Court phase, "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty.... Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."

The federal habeas corpus statute, enacted in 1789, makes the writ available to "any prisoner detained under the authority of the United States." In 1842, it was explicitly made applicable to foreign nationals. Following the Civil War, in 1867, Congress expanded the scope of the statute to include "all cases where any person may be restrained of his or her liberty in violation of the constitution or of any laws or treaties of the United States." The Geneva Conventions are, of course, just such treaties.

A simple reading of the statute would seem to leave no question that the Guantánamo prisoners are entitled to a hearing on whether their imprisonment violates the Geneva Conventions, the US Constitution or federal law. The Bush administration, however, is claiming that *Johnson v. Eisentrager*, a 1950 Supreme Court decision denying habeas corpus to German spies captured in China after World War II, established a precedent that federal courts do not have jurisdiction over habeas corpus petitions of aliens being held by the US military outside the "sovereign" territory of the United States. The brief filed on behalf of the Guantánamo prisoners explained why that case does not apply:

"In *Johnson*, the Court was asked to grant post-conviction habeas review to enemy aliens who were convicted of war crimes by a military commission. The commission had been created pursuant to explicit Congressional authorization during a declared war. The prisoners were convicted, sentenced, and imprisoned in occupied enemy territory

temporarily controlled by the US military as an incident of our wartime operations. At trial, the prisoners had the right to challenge the lawfulness of their detention. They also enjoyed due process protections that insured against the conviction of an innocent person. In fact, six of the original twenty-seven defendants were acquitted and released.”

None of the *Johnson* factors appears in the Guantánamo cases. The US Congress has not voted on and passed an official declaration of war. Nor has it authorized the creation of any commission to try soldiers captured in the Afghan conflict. The Guantánamo prisoners are not “enemy aliens,” but are, for the most part, citizens of US allies. The territory is not one “temporarily controlled by the US military,” but a permanent US base. Most importantly, there are no charges and no procedures whatsoever by which prisoners can establish their innocence.

The oral argument in the Guantánamo cases was widely anticipated as providing the first opportunity for an insight into the thinking of the Supreme Court justices on the Bush administration’s sweeping assertion of “war-time” powers following the September 11 terrorist attacks. As a result, a line of people waited overnight for a seat in the gallery, a highly unusual occurrence for the Supreme Court.

New Jersey lawyer John J. Gibbons, a former chief judge of the Third Circuit Court of Appeals, argued first, stating the case for the prisoners. He began by hammering on the central political issue: “What’s at stake is the authority of the federal courts to uphold the rule of law.” He explained that under the administration’s legal theory, these prisoners could be kept out of court and “neither the length of the detention, the conditions of their confinement nor the fact that they have been wrongfully accused makes the slightest difference.” Gibbons accused the administration of “creating a lawless enclave, insulating the executive branch from any judicial scrutiny, now or in the future.”

United States Solicitor General Theodore Olson, arguing for the Bush administration, began his remarks with the assertion that “The United States is at war.” (The Constitution provides that only the Congress can declare war, and it has not done so.) Associate Justice John Paul Stevens quickly asked Olson whether the existence of a state of war made any difference in his legal position, and Olson conceded that it did not.

Nevertheless, Olson continued with his argument that the “war on terror” rendered the democratic right to habeas corpus inexpedient, warning that “stepping across that line”—that is, acknowledging the Guantánamo prisoners’ right to habeas corpus—“would be impossible to go back from with respect to prisoners in the battlefield,” with dangerous implications for “battlefield decisions in Iraq.”

His argument amounted to the assertion that the Bush administration has the unfettered right to seize anyone it wants anywhere in the world in its open-ended, undefined and indefinite “war on terror” and to lock him or her up indefinitely, subject to interrogations and torture, without charges or access to lawyers.

Some of the nine justices made their positions fairly clear. Associate Justice Antonin Scalia, the ideological leader of the court’s extreme right wing, who is frequently touted as a “strict constructionist” (i.e., one who supposedly adheres to the letter of the Constitution and federal laws), said he did not believe the statute provided for habeas jurisdiction, and sarcastically described the Supreme Court as the wrong place to rewrite laws. Gibbons shot back that jurisdiction “couldn’t be plainer.... It’s been plain for 215 years. If there is a federal detention...there is habeas jurisdiction. I don’t see any ambiguity in that statute.”

Chief Justice William Rehnquist, who usually votes with Scalia, seemed prepared to rule that foreigners detained outside the United States were not entitled to habeas corpus. He questioned whether Guantánamo qualifies as US “sovereign” territory because the lease-treaty with Cuba provides that the island nation retains ultimate sovereignty.

“Cuban law has never had any application inside that base,” Gibbons replied, referring to his own service there while in the Navy. He quipped

that “a stamp with Fidel Castro’s picture on it wouldn’t get a letter off the base.”

Associate Justice Clarence Thomas followed his usual practice of saying nothing, and can be expected to vote with Scalia and Rehnquist to deny habeas corpus.

All four of the so-called “liberals” seemed sharply opposed to Olson’s positions. Besides Stevens, who said he rejected the *Johnson* precedent on the basis that those prisoners received hearings, Associate Justice Ruth Bader Ginsburg was openly hostile to Olson. She rejected his warnings of dire consequences for the US military. The prisoners’ advocates were not asking to have “a lawyer there,” she told Olson. “They are saying, ‘Look, we are claiming that our people are innocent...and all we want is some process to determine whether they are indeed innocent, and it doesn’t have to be a court process.’”

Associate Justice David Souter was skeptical of the claim that the prisoners were not within US jurisdiction, observing that bringing them to Guantánamo was “the same thing in functional terms” as bringing them to Washington, D.C.

Associate Justice Stephen Breyer, referring to the importance of “several hundred years of British history,” said, “I’m still honestly most worried about the fact that there would be a large category of unchecked and uncheckable actions dealing with the detention of individuals that are being held in a place where America has the power to do everything.”

Later, he added, “It seems rather contrary to an idea of a constitution with three branches that the executive would be free to do whatever they want, whatever they want without a check.”

Associate Justices Sandra Day O’Connor and Anthony Kennedy, the Supreme Court’s so-called “swing votes,” both appeared uncomfortable with Olson’s arguments. O’Connor seemed to agree with Stevens that the *Johnson* precedent did not apply because the German captives had hearings. Kennedy at one point stressed that the language of the habeas corpus statute extends jurisdiction to “any prisoner detained under the authority of the United States,” suggesting that he would apply the law literally and allow the petitions. It is highly likely that their votes will determine the outcome of the cases.

It is an ominous indication of the frailty of democratic rights in contemporary America that their retention, for the present, rests with the likes of O’Connor and Kennedy, conservative Republicans responsible for many of the High Court’s most reactionary decisions over the last 15 years, including halting the Florida vote count to hijack the 2000 election for George W. Bush.

Regardless of the Supreme Court’s final vote on the case—a decision is expected by the end of June—the US political and military elite will not willingly submit to any legal restraints on its conduct. Moreover, its unlawful actions are not restricted to aliens abroad. The same police-state measures employed in Guantánamo Bay are being implemented against US citizens in the United States.

On April 28, the Supreme Court will be hearing oral arguments in the cases of Yasser Hamdi, a US-born man captured with other Taliban fighters in Afghanistan and declared an “enemy combatant” by the Bush administration, and Jose Padilla, the Brooklyn native picked up in Chicago two years ago, who has been imprisoned by the Bush administration ever since without charges. As in the case of Hamdi, the Bush administration asserts it has a right to hold Padilla indefinitely, without filing charges or allowing him legal counsel, simply because President Bush has declared him an “enemy combatant.”



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