US appeals court upholds denial of habeas corpus rights to Guantánamo detainees

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The US District Court of Appeals for the District of Columbia ruled Tuesday that prisoners held by the US military at Guantánamo Bay do not have the right to challenge their indefinite detention in US courts.

The 2-1 ruling in the combined cases of *Al Odah v. USA* and *Boumediene v. Bush* defends the creation of a category of prisoners denied the most basic democratic rights. It upholds a central component of an October 2006 law, the Military Commissions Act, depriving "alien unlawful enemy combatants" of the writ of habeas corpus.

The case was brought by lawyers representing most of the 400 prisoners currently held at Guantánamo Bay.

As the *World Socialist Web Site* editorial board wrote at time of the passage of the Military Commissions Act, "The legislation adopted by the House of Representatives Wednesday and the Senate Thursday, legalizing the Bush administration's policy of torture and indefinite detention without trial, as well as kangaroo-court procedures for Guantánamo detainees, marks a watershed for the United States.

"For the first time in American history, Congress and the White House have agreed to set aside the provisions of the Constitution and the Bill of Rights and formally adopt methods traditionally identified with police states."

Habeas corpus is a cornerstone of democratic rights extending back at least as far as the Magna Carta of 1215. It grants a prisoner the right to go to court to challenge his or her detention, and is therefore a fundamental guarantee against arbitrary imprisonment. For this reason, it is being attacked as part of an attempt to establish unconstrained executive power in the United States.

In denying the right of habeas corpus to prisoners at Guantánamo Bay, the Military Commissions Act denies these prisoners all rights and legal protection. Shayana Kadidal, a lawyer for the Center for Constitutional Rights, which represents many of the detainees, noted in a press release, "This decision empowers the president to do whatever he wishes to prisoners without any legal limitation as long as he does it offshore, and encourages such notorious practices as extraordinary rendition and a contempt for international human rights law."

The basic issue involved in the case decided Tuesday is whether or not Congress acted constitutionally when it deprived the Guantánamo detainees of their habeas corpus rights. The majority on the appeals court panel (consisting of judges A. Raymond Randolph, who wrote the opinion, and David Sentelle) says that it did, while the dissenter (Clinton appointee Judge Judith Rogers) says it did not. The case will be appealed to the Supreme Court, where, with the addition of right-wing Bush appointees Chief Justice John Roberts and Associate Justice Joseph Alito, the appeals court decision stands a good chance of being upheld.

The Military Commissions Act was passed with substantial Democratic support in response to a 5-3 Supreme Court decision, issued in June of 2006, in *Hamdan v. Rumsfeld*. As part of the complex Supreme Court ruling in that case (which also declared unconstitutional the Bush administration's system of military commissions for prisoners at Guantánamo Bay), the court found that an earlier law depriving detainees at Guantánamo of habeas corpus rights, the Detainee Treatment Act (DTA), did not apply to cases already pending in US courts.

In response, the Military Commission Act denied courts the right to hear any cases, including those already pending. The act also gave a congressional stamp of approval to an anti-democratic system of military commissions, allowed for the use of coerced testimony in these commissions, allowed the president to "interpret" the Geneva Conventions, and protected administration officials from future prosecution by amending the War Crimes Act. These other aspects of the act were not at issue in the case decided Tuesday.

Asserting that the detainees do not have habeas corpus rights, the majority declares, "Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA (Military Commissions Act) was to overrule *Hamdan*." In insisting that the Military Commissions Act applies to all cases, including pending habeas corpus cases, the majority decision states, "It is almost as if the proponents of these words [in the act] were slamming their fists on the table, shouting, 'When we say "all," we mean all—**without exceptions!**'" (Emphasis in original).

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On the right of habeas corpus, the US Constitution states, "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it." Judge Randolph argues that this provision does not apply to non-citizens outside of US territory, and holds that Guantánamo Bay technically belongs to Cuba, not the United States. According to Randolph, none of the prisoners at Guantánamo Bay have a constitutional right to habeas corpus, and therefore Congress did not act unconstitutionally in depriving them access to US courts.

In the course of his ruling, Randolph makes a significant statement suggesting that habeas corpus could be denied to *anyone, including citizens*, so long as they are not detained within the United States. Discussing the meaning of habeas corpus under British common law, which Randolph takes to encompass the complete extent of the right of habeas corpus today, he writes, "When agents of the [British] Crown detained prisoners outside the Crown's dominions, it was understood that they were outside the jurisdiction of the writ. Even British citizens imprisoned in 'remote islands, garrisons, and other places' were 'prevent[ed] from benefit of the law,' which included access to habeas corpus."

In her dissent, Judge Rogers argues that the Military Commissions Act violates the Constitution. She notes that in previous Supreme Court decisions, including the 2004 case of *Rasul v. Bush*, the Court has ruled that prisoners at Guantánamo Bay are under the jurisdiction of the US and US courts, even if "ultimate sovereignty" rests with Cuba. Because of this, the Supreme Court ruled, "application of the habeas statute to persons detained at the [Guantánamo] base is consistent with the historical reach of the writ of habeas corpus." The majority in the present case essentially ignores the Supreme Court precedent in *Rasul*.

If the prisoners have a right to habeas corpus, Rogers argues, Congress cannot suspend this right (without providing an adequate alternative) except under cases of rebellion or invasion. Rogers points out that Congress did not invoke these exceptions when it passed the Military Commissions Act, and that these conditions do not, in fact, apply. Therefore, the Military Commissions Act is unconstitutional.

"The MCA purports to withdraw that right [of habeas corpus] but does so in a manner that offends the constitutional constraint on suspension," she writes. "The Suspension Clause limits the removal of habeas corpus, at least as the writ was understood in common law, to times of rebellion or invasion unless Congress provides an adequate alternative remedy."

Rogers devotes a substantial portion of her opinion to arguing against the government's position that the Combatant Status Review Tribunals (CSRTs) set up by the military are an adequate alternative to habeas corpus. The appeals court majority does not consider this question, but it may be a central issue in any Supreme Court appeal. The CSRTs—which are supposed to evaluate whether or not a prisoner is in fact an "unlawful enemy combatant"—deny the prisoners basic elements of due process.

The Court of Appeals ruling was issued by two extremely right-wing judges. Randolph was appointed to the DC Appeals Court by the first President Bush. He was the author of the appeals court ruling in *Hamdan*, upholding the current administration's military commissions, which was subsequently overruled by the Supreme Court. Joining Randolph in that earlier decision was Judge John Roberts, who is now Chief Justice of the Supreme Court.

Among Randolph's history of reactionary rulings was his decision in 2005 to throw out a lawsuit against Vice President Dick Cheney which sought to force Cheney to reveal details about Energy Task Force meetings held early in the Bush administration's first term.

Sentelle was a protégé of the ultra-right-wing, one-time segregationist Republican Senator Jesse Helms of North Carolina. He is best known for his role, while on the District Court of Appeals, in appointing Republican partisan Kenneth Starr as independent counsel in the Whitewater investigation of President Bill Clinton.

Starr transformed the investigation of a failed real estate venture long before Clinton became president into a prolonged campaign to unseat Clinton, culminating in the Monica Lewinsky sex scandal and Clinton's impeachment.

On the DC Court of Appeals, Sentelle has consistently ruled in favor of expanding presidential powers, attacking democratic rights, and defending the interests of big business.

The attack on habeas corpus has been possible only because of the complicity of the Democratic Party. The Democrats refused to mount a filibuster in the Senate against the Military Commissions Act in 2006. In the minority at the time, a filibuster was the only way for the Democrats to prevent passage of the bill, which had the support of almost all of the Republican legislators. A significant section of Democrats voted for the bill (34 in the House of Representatives and 12 in the Senate).

The Appeals Court ruling, including the dissent, can be found at:

http://news.findlaw.com/hdocs/docs/terrorism/boumedinebush2
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