

US Supreme Court in surprise order sets hearing for Guantánamo prisoners

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Last Friday, the Supreme Court reversed itself unexpectedly by granting the petition for review (certiorari) filed in two consolidated cases challenging the provision of last October's Military Commissions Act that stripped prisoners at Guantánamo Bay of their right to habeas corpus. The case, filed on behalf of 45 prisoners by attorneys from the Center for Constitutional Rights at the New York University School of Law, is scheduled for argument next fall.

The order came as a shock because the original petition failed to get the required four votes when it was considered last April, and five votes are needed to grant a petition for rehearing and reverse a prior high court ruling. Underscoring the highly unusual circumstances involved, sixty years have transpired since the Supreme Court last reversed a decision denying a petition for certiorari.

The petitioners in the lead case, *Boumediene v. Bush*, are six Algerians arrested by Bosnian police in 2001 on suspicion of involvement in terrorism. The following year, the Supreme Court of Bosnia and Herzegovina ordered them released for lack of evidence.

They were immediately taken into custody by the US military, shackled, hooded and shipped to Guantánamo. The other case, *Al-Odah v. Unites States of America*, involves 39 prisoners, most taken into custody in Afghanistan or the bordering areas of Pakistan following the 2001 United States invasion.

Last week's high court action adds to the already considerable political pressure building on the Bush administration to close its Guantánamo prison and to abandon its plans to have military commissions there hand down draconian sentences, including execution, for supposed war crimes. Secretary of Defense Robert M. Gates openly supports closing Guantánamo, which has become a diplomatic embarrassment for the United

States.

Proposals are presently circulating to transfer prisoners to facilities in the United States, where they would be provided access to courts, or to prisons in places such as Afghanistan, where the Bush administration could claim they are no longer captives of the United States and therefore not entitled to habeas corpus.

Currently, there are believed to be about 375 prisoners at Guantánamo. Many have been held for more than five years. None has been convicted of a war crime. Only ten have even been charged, and the only conviction was of David Hicks, who made a plea deal so that he could be transferred to his native Australia to serve a token nine-month sentence and then move on with his life.

Last week's action was the latest in a series which began after the September 11 terrorist attacks and the United States invasion of Afghanistan, when Bush authorized military commissions to try supposed "terrorists" for war crimes. For years no charges were filed or proceedings commenced.

In June 2004, the Supreme Court ruled that Guantánamo prisoners could file habeas corpus petitions and could not be held indefinitely without some form of due process. Former Secretary of Defense Donald Rumsfeld then set up a Combat Status Review Tribunal (CSRT) procedure to determine in closed proceedings and on secret evidence, including statements obtained by torture, whether Guantánamo detainees were "enemy combatants" or "no longer enemy combatants."

Congress responded to the ensuing deluge of habeas corpus petitions by passing in December 2005 the Detainee Treatment Act, which outlawed their filing. Six months later, the Supreme Court ruled that Bush's

proposed military commissions did not provide due process, and that the Detainee Treatment Act's ban on habeas corpus petitions did not deprive the federal courts of jurisdiction over those already on file. Congress then passed the Military Commissions Act, which contains an explicit ban on habeas petitions filed by Guantánamo prisoners.

The United States Court of Appeals for the District of Columbia Circuit ruled last February 20, in a 2-1 decision, that Congress has the power to eliminate habeas corpus for aliens being held outside the territory of the United States, drawing an absurd distinction from United States citizens and people within US borders, who have a constitutional right to habeas corpus. (See "US appeals court upholds denial of habeas corpus rights to Guantánamo detainees").

It was the prisoners' petition for review of that decision the Supreme Court denied April 2. Three associate justices—Stephen G. Breyer, David H. Souter and Ruth Bader Ginsburg—dissented from the decision not to hear the case. Two others—John Paul Stevens and Anthony M. Kennedy—filed a joint statement to explain their reasons for not casting the fourth vote, claiming that review should wait until after the detainees exhausted their limited right to appeal under the Detainee Treatment Act. (See "US Supreme Court refuses to hear Guantánamo appeals").

The somewhat baffling failure of Stevens to join his fellow liberals by voting for review last April was widely interpreted to reflect his lack of confidence that Kennedy, a conservative who has emerged as a "swing" vote, but usually aligns with the four reactionary justices, would side with him were the case accepted. Last week's reversal required the votes of both Stevens and Kennedy, signaling that there may be a five-vote majority prepared to hold at least some provisions of the Military Commissions Act unconstitutional.

Prior to the brief order, the prisoners' lawyers filed an affidavit by Lt. Col. Stephen Abraham exposing the CSRT procedure as a sham. Praising the Supreme Court's decision to hear the case, the lawyer who submitted the affidavit, David Cynamon, said "The Abraham declaration proves what everyone has long surmised, that the CSRT process is just a kangaroo court that doesn't provide any meaningful review. It seems to be the straw that broke the camel's back."



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