US Supreme Court hears arguments on habeas corpus for Guantánamo prisoners

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On Wednesday the US Supreme Court heard oral arguments on whether the more than 300 non-citizens presently incarcerated at Guantánamo Bay have the right to seek habeas corpus—the procedure by which a prisoner obtains judicial review of the legal basis for his detention, a bedrock democratic right dating to the Magna Carta.

The lawyers' arguments and the questions and statements made by eight of the nine justices—Associate Justice Clarence Thomas followed his usual practice of saying nothing—revealed continuing divisions on the extent to which basic democratic rights should be dismantled in the name of the so-called "global war on terrorism."

Associate Justice Anthony Kennedy, a conservative judge who has emerged as the swing vote, appeared to side with the four moderate associate justices, John Paul Stevens, Ruth Bader Ginsburg, David Souter and Stephen Breyer, against the hard-core right-wing bloc of Chief Justice John Roberts and associate justices Thomas, Antonin Scalia, and Samuel Alito. While there is no way to predict the court's ruling, expected to be issued before the end of the term next June, it is unlikely to result in the immediate release of any prisoners.

The petitioners in the lead case, *Boumediene v. Bush*, are six Algerians arrested in Sarajevo shortly after the September 11, 2001 attacks. A companion case, *Al-Odah v. Unites States of America*, was brought by another 39 prisoners taken into custody in Afghanistan or Pakistan following the 2001 United States invasion of Afghanistan.

The case marks the third time the rights of Guantánamo Bay prisoners have been before the Supreme Court during the six years they have languished in the brutal concentration camp.

In June 2004, the court in *Rasul v. Bush* rejected the Bush administration's claim that because Guantánamo Bay was technically part of Cuba under a perpetual $1 lease to the United States, prisoners could not file habeas corpus petitions. At the same time, however, it decided in *Hamdi v. Rumsfeld* that the prisoners could be deemed "enemy combatants" and held indefinitely so long as they received some minimum of "due process."

In response to *Hamdi*, the Bush Administration established a drumhead Combat Status Review Tribunal (CSRT) procedure—prisoners are denied lawyers and, in most cases, access to the evidence against them—while Congress passed the Detainee Treatment Act (DTA), which deprived Guantánamo prisoners of any access to US courts beyond a cursory review of CSRT determinations.

In June 2006, the Supreme Court decided in *Hamdan v. Rumsfeld* that Bush's proposed military commissions did not provide due process, and that the DTA's ban on habeas petitions was not meant to apply to those already on file. In response, the Bush administration, with the complicity of Congressional Democrats, rammed through the Military Commissions Act (MTA), banning all habeas petitions filed by Guantánamo prisoners.

Yesterday's argument reviewed the decision by the United States Court of Appeals for the District of Columbia Circuit upholding that provision.

The prisoners were represented by Seth P. Waxman, who served as President Bill Clinton's solicitor general, the lawyer responsible for representing the executive branch before the Supreme Court. Waxman began by pointing out that all the petitioners "have been confined at Guantánamo for almost six years, yet not one has ever had meaningful notice of the factual grounds of detention or a fair opportunity to dispute those grounds before a neutral decision-maker." Under the Court of Appeals ruling, Waxman added, "they have no prospect of getting that opportunity although each claims to be innocent."

Waxman soon began exhibiting the vacillations that characterize the Democratic response to the Bush administration's attack on democratic rights. Rather than the government's stripping the prisoners of their right to habeas corpus, Waxman characterized "the principal question" to be whether the CSRT and DTA procedures "adequately substitute for the writ of habeas corpus." He thus conceded that foreign citizens can be kidnapped by the US military far away from any battlefield and held for the duration of the "war on terror" as "enemy combatants" so long as they received some form of due process.

Waxman's ducking of the central issue visibly surprised Ginsburg, who exclaimed, "Mr. Waxman, how could that be? The DC Circuit... ruled that there was no access to habeas, end of case." What Ginsburg meant is that without the power to seek habeas corpus, there can be no basis for a court to determine whether a prisoner has received due process.

Associate Justice Scalia then pounced on Waxman, claiming that Congress had the power to strip the Guantánamo prisoners of habeas rights because there was no precedent "in the 220 years of our country or, for that matter, in the five centuries of the English empire in which habeas was granted to an alien in a territory that was not under the sovereign control of either the United States or England."

After arguing with Scalia at length about the meaning of several old, obscure precedents, Waxman asserted that the *Rasul* decision resolved whether the United States exercised sovereign control over Guantánamo Bay, making the question irrelevant. Roberts challenged Waxman with the MTA's provision "which says that the base at Guantánamo is not part of the United States." Waxman responded: "If our law doesn't apply [in Guantánamo Bay], it is a law-free zone."

That is exactly the point. For the last six years the Bush administration has been fashioning in Guantánamo Bay a "law-free zone" where its prisoners can be stripped of democratic rights

altogether.

Roberts made the absurd suggestion to Waxman that for the Supreme Court to rule that Guantánamo Bay was subject to US law would be "an act of war" against Cuba, and questioned, "What is the reaction of the Cuban government to be to that?"

Kennedy openly mocked Roberts' position, asking Waxman, "You're not heartened by the prospect that the detainees could apply to the Cuban courts?" The courtroom broke into laughter.

Kennedy picked up on Waxman's earlier concession, and suggested that even if the prisoners are entitled to file for habeas corpus, the case should be sent back to the Court of Appeals to decide whether the kangaroo procedures provided by the CSRT and DTA are an adequate substitute.

Waxman responded that the cases should be sent back to the trial courts for review, rather than the Court of Appeals, to expedite the prisoners' claims, but nevertheless conceded that "DTA review may very well be an adequate substitute" for habeas corpus.

To this, Souter responded that the CSRTs cannot possibly provide due process because they are military commissions, and the military commanders "have already said these people belong where they are."

Paul D. Clement, the Bush administration solicitor general, argued next, claiming that "the DTA and the MCA... represent the best efforts of the political branches, both political branches, to try to balance the interest in providing the detainees in this admittedly unique situation additional process with the imperative to successfully prosecute the global war on terror." Under his formulation, "the global war on terror"—unlimited by place or time—trumps any individual right to judicial relief. That is the formula for dictatorship.

Breyer questioned whether the "additional process" was a "substitute for having withdrawn the writ of habeas corpus." Clement responded that "at common law in 1789"—the year the Constitution was drafted—a prisoner held outside the United States could not petition for habeas corpus. "But aren't you simply rearguing *Rasul*?" Souter responded. "Not at all," Clement said. *Rasul* did not decide "the availability of the writs to prisoners of war."

At this point, the moderate justices jumped on the glaring hypocrisy of the Bush administration's position. Souter stated: "The problem with your prisoner-of-war point is the United States is not treating them as prisoners of war. They have not been adjudicated prisoners of war, or otherwise, under the Third Geneva Convention, and that argument on the government's part is entirely circular."

Ginsburg added, "General Clement, I remember in a prior hearing about Guantánamo that the Government was taking the position firmly that these detainees were not prisoners of war and, therefore, were not entitled to the protection of the Geneva conventions."

With Clement getting pounded, Scalia jumped in, drawing an absurd distinction between what the Geneva conventions mean by "prisoner of war" and what the rights of "prisoners of war" are under the Constitution. ("Prisoners of war" are not mentioned anywhere in the document.)

This exchange exemplifies the intellectual charlatanry of the Bush administration and Scalia, and the utterly anti-democratic forces they represent. Working backwards from their goal to keep the Guantánamo Bay prisoners in legal limbo unprotected by either international or domestic law, their manipulation and distortion of legal principles invariably leads them into gross contradictions. The Guantánamo Bay detainees are not "prisoners of war" when they seek the protection of international law, Scalia asserted, but they become so when they seek the protection of domestic US law.

Scalia followed this sophistry with the question: "If we had to either charge or release these people, what would they be charged with? Waging war against the United States? Is there a statute that prevents non-citizens from waging war against the United States and provides criminal penalties?" Clement responded, "Not as such."

After pointing out that murder and assault are, in fact, crimes for which such individuals could be charged, Stevens, the fourth member of the court's moderate-liberal bloc, asked Clement whether it was his position that "these are combatants picked up on the battlefield, and they may be detained indefinitely without proving they committed a crime?" Clement responded, "That is our position."

The oral argument ended with Waxman, during his rebuttal, giving an example of the absurd results possible in the CSRTs. A Mr. Kurnaz, a resident of Germany, "was told at his CSRT, as many of these individuals were not, that he was being held because he associated with a known terrorist. And he was told the name... somebody called Selcook Bilgen," who blew himself up in a suicide bombing. Kurnaz was unable to defend himself, other than to deny knowing Bilgen was a terrorist.

Provided counsel for his habeas proceeding, however, Kurnaz' lawyer obtained an affidavit "from the supposedly deceased Mr. Bilgen, who is a resident of Dresden never involved in terrorism and fully getting on with his life."

The fact that the availability of rights as fundamental as habeas corpus are openly debated at the highest level of the US government—indeed, whether the US can constitutionally carve out "a law-free zone" for incarcerating, torturing and even executing people outside both domestic and international law—presents a stark warning to working people everywhere.

These anti-democratic measures are not being implemented simply to detain a few Islamic fundamentalists on a Caribbean island. Elements of the ruling elite are becoming increasingly conscious that growing social inequality domestically and the diminishing economic power of the United States overseas is inevitably leading to sharpening class conflicts and the need for more and more repressive powers.

Workers should have no illusions that they can entrust the defense of their democratic rights to the Supreme Court as a whole or its moderate wing. This is the same institution, it should be recalled, that sanctioned the theft of the 2000 election and handed power to Bush.

It is also necessary to stress the political responsibility of the Democratic Party for the assault on habeas corpus and all of the other attacks on democratic rights. The Democrats facilitated the passage of both the Detainee Treatment Act and the Military Commissions Act, which sanctioned the prison camp at Guantánamo, the deprivation of all due process rights and the dictatorial power of the president to imprison any individual for life simply by declaring him or her an "enemy combatant."