US Supreme Court upholds habeas corpus for Guantánamo Bay prisoners

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The United States Supreme Court ruled 5-4 Thursday that prisoners held as "enemy combatants" at Guantánamo Bay, Cuba can immediately file habeas corpus petitions in US district courts challenging the legality of their confinement. Most have been held at the US naval base under brutal conditions, enduring solitary confinement and torture, for more than six years. None has ever had the merits of his case reviewed by a court of law.

The majority opinion in the case, *Boumediene et al v. Bush*, was authored by Justice Anthony Kennedy, considered the "swing" vote on the court, and joined by the four high court liberals—John Paul Stevens, Ruth Bader Ginsburg, David Souter and Stephen Breyer.

The ruling does not question the executive branch's ability to declare someone an "enemy combatant," an unprecedented power the Supreme Court upheld four years ago in *Hamdi v. Rumsfeld*. (See "The meaning of the US Supreme Court rulings on 'enemy combatants'") Nor does Kennedy order the release of any prisoner.

Nevertheless, Kennedy's opinion is a rebuke to a cornerstone of the Bush administration's so-called "global war on terror." By holding unconstitutional the provision of the 2006 Military Commissions Act (MCA) stripping Guantánamo Bay prisoners of their habeas corpus rights, the Supreme Court has stopped the Bush administration from continuing to use the naval base as a legal limbo, where it can imprison people indefinitely without regard for either domestic or international law.

"Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person," Kennedy wrote for the majority, underlining the importance of the decision for the continued credibility of the judiciary. "Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention."

The four right-wing justices joined together in two particularly vicious dissents, one authored by Chief Justice John Roberts and the other by Associate Justice Antonin Scalia, who all but labeled Kennedy a traitor, stating that his opinion "will almost certainly cause more Americans to be killed."

In *Hamdi*, a highly fractured court—none of the opinions received a majority vote—ordered that the government establish tribunals to determine whether individuals are in fact "enemy combatants." That same day the court also decided *Rasul v. Bush*, recognizing that Guantánamo prisoners were entitled to file petitions for habeas corpus under the terms of the congressional Habeas Corpus Act.

In response, Bush administration lawyers established Combat Status Review Tribunals (CSRTs)—kangaroo courts where prisoners are denied lawyers and, in most cases, access to the evidence against them—and Congress passed the Detainee Treatment Act (DTA), which revoked habeas corpus for Guantánamo prisoners, giving them access to US courts only for a cursory review of whether CSRT procedures were followed correctly.

In June 2006 the Supreme Court decided in *Hamdan v. Rumsfeld* that the DTA's ban on habeas petitions did not apply to those already filed. The Bush administration, with the complicity of key congressional Democrats, rammed through the Military Commissions Act (MCA), which contained a provision depriving federal courts of jurisdiction over all habeas petitions filed by Guantánamo prisoners.

It was that provision the Supreme Court on Thursday held to violate the clause in the body of the Constitution which 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." Neither the Bush administration nor Congress invoked the so-called "suspension" clause of the Constitution to justify their revocation of habeas corpus rights.

Kennedy began his analysis with a review of the central role played by the writ in England, outlining its "painstaking" development from the reign of Edward I, through the Magna Carta, to its formal legal embodiment in the Habeas Corpus Act of 1679, "described by Blackstone as the 'stable bulwark of our liberties.'"

"The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty," Kennedy wrote. Thus "habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights."

Because habeas corpus constitutes a judicial check on unlawful imprisonment by the executive branch, "the Framers deemed the writ be an essential mechanism in the separation-of-powers scheme." Quoting The Federalist No. 84, Kennedy wrote, "'The practice of arbitrary imprisonments has been, in all ages, the favorite and most formidable instrument of tyranny.'"

Kennedy rejected Scalia's principal argument—that habeas corpus rights do not extend to non-citizens outside the sovereign territory of the United States—with the observation that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."

Turning to the specifics of habeas jurisdiction over Guantánamo Bay—nominal Cuban territory occupied by the United States pursuant to a $1 perpetual lease extracted over 100 years ago from the nascent Cuban government—Kennedy exposed the Bush administration's underlying quasi-legal machinations.

"The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint." According to Kennedy, this would enable the executive and legislative branches "to switch the Constitution on or off at will."

Because "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers," Kennedy ruled that "the test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain."

Kennedy concluded that "before today the Court has never held that non-citizens detained by our Government in territory over which another

country maintains de jure sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001 to the present, is already among the longest wars in American History... The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding."

Chief Justice Roberts began his dissent with the preposterous claim that the majority opinion "strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants." In fact, these procedures, which include the use of "evidence" obtained through torture, have been denounced by civil liberties organizations in the US and around the world, and even the former chief military prosecutor at Guantánamo has called them a travesty of due process.

The current military trials of alleged 9/11 conspirators being held at Guantánamo feature tape delays of statements by the accused designed to censor their charges concerning the abuse and torture inflicted upon them as well as other revelations that might prove damaging to the US government.

One effect of Thursday's Supreme Court ruling may be to halt these trials indefinitely.

Roberts continued: "The critical threshold question in these cases, prior to any inquiry about the writ's scope, is whether the system the political branches designed protects whatever rights the detainees may possess. If so, there is no need for any additional process, whether called 'habeas' or something else."

In other words, the "political branches"—the executive and Congress—are free to "design" procedures for "whatever rights" they deem to exist. This is a formula for judicial abdication and the establishment of a police state.

It is a testament to the dire state of democratic rights in the United States and the degraded condition of American democracy that a shift in a single vote on the high court would be sufficient to make such a sweeping repudiation of democratic rights the law of the land.

Scalia's dissent is an exercise in hysterical fear-mongering, something that would appear more suited for a Fox Cable News broadcast or talk-radio show than a high court opinion. Both the tone and content of his opinion makes clear it was intended as an appeal to the most reactionary forces in the United States and an effort to whip up such layers against the court majority.

Despite the fact that, according to Kennedy, none of the petitioners in *Boumediene et al v. Bush* "is a citizen of a nation now at war with the United States," and "each denies he is a member of the Al Qaeda terrorist network that carried out the September 11 attacks or of the Taliban regime," Scalia claimed, "Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war."

"America is at war with radical Islamists," Scalia continued. "The enemy began by killing Americans and American allies abroad: 241 at the Marine barracks in Lebanon, 19 at the Khobar Towers in Dhahran, 224 at our embassies in Dar es Salaam and Nairobi, and 17 on the USS Cole in Yemen... On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, DC, and 40 in Pennsylvania... It has threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one. Our Armed Forces are now in the field against the enemy, in Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed."

Besides crudely conflating legitimate acts of resistance to neo-colonial occupation forces with terrorist acts abroad, Scalia ignores the fact that there has never been a shred of evidence presented in any court of law linking any of the Guantánamo prisoners to any of these incidents.

Asserting that the majority opinion "warps our Constitution" by "invoking judicially brainstormed separation-of-powers principles to establish a manipulable 'functional' test for the extraterritorial reach of habeas corpus (and, no doubt, for the extraterritorial reach of other constitutional protections as well)," Scalia concludes, "most tragically, it sets our military commanders the impossible task of proving to a civilian court ... that evidence supports the confinement of each and every enemy prisoner."

In other words, the United States judiciary should turn over responsibility for deciding who belongs in jail to the military. Scalia's opinion is nothing less than a demand that democratic rights in the US be lifted and police state powers be granted to the executive branch and the military under the pretext of fighting the so-called "war on terror"—a "war," never declared by Congress, of indefinite duration and geographical scope against an essentially undefined enemy.

Besides Chief Justice Roberts, Associate Justices Clarence Thomas and Samuel Alito concurred with this justification for military dictatorship.

Both dissents were answered in a brief concurrence with Kennedy issued by Justice Souter, who wrote: "After six years of sustained executive detentions in Guantánamo, subject to habeas jurisdiction but without any actual habeas scrutiny, today's decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation."

The court battle was led by attorneys from the Center for Constitutional Rights (CCR) in New York City. "This decision ensures that the executive does not falsely claim credit for detaining and incapacitating terrorists, when in many documented cases they have just swept up innocent men and hidden them from scrutiny," said CCR President Michael Ratner. He continued: "It rightfully discourages Congress and the President from establishing deceptive, extra-legal proceedings in times of crisis and confirms our qualms about inventing extralegal and inhumane processes to detain human beings—no matter who they are or where they come from."

President Bush, appearing with Prime Minister Silvio Berlusconi of Italy at a Rome press conference, said, "We'll abide by the court's decision"—suggesting that he had a choice. He added, "[I]t was a deeply divided court, and I strongly agree with those who dissented."