



boumediene v. bush/al odah v. u.s.: the supreme court decision

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On June 12, 2008, the Supreme Court ruled in an historic decision in *Boumediene v. Bush/Al Odah v. United States* that the detainees at Guantánamo Bay have a constitutional right to habeas corpus, to challenge their detention before a neutral judge in a real court. The men at Guantánamo have been struggling for this basic right to be recognized since 2002, when the first prisoners were brought to Guantánamo Bay, and when the Center for Constitutional Rights' first challenge to their detention was filed. In 2004, in *Rasul v. Bush*, the Supreme Court upheld the detainees' statutory right to habeas corpus, and in 2006, in *Hamdan v. Rumsfeld*, the high court rejected the Bush administration's framework for military commissions and upheld the rights of the detainees under the Geneva Conventions.

In the decision, the Court strongly criticized the President and Congress's attempt to declare that because Guantánamo was outside the sovereign territory of the United States, the Constitution did not apply. The Court firmly stated that "To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say 'what the law is.'" Furthermore, the Supreme Court held that the procedures created by the Detainee Treatment Act were not an adequate substitute for real habeas hearings and emphasized that the length of our clients' detention required an end to further delays.

With Justice Kennedy writing for the majority, the opinion begins with a lengthy survey of historical habeas cases in which common law courts considered cases of noncitizens imprisoned without trial. Acknowledging the uniqueness of the Administration's practices at Guantánamo, the Court found that no historical habeas case offered by either side was directly on point and, instead, turned to the fundamental principles underlying the purpose of habeas corpus: to allow the courts to act as a check against the abuse of Executive power. "[F]rom an early date, it was understood that the King, too, was subject to the law." The Court emphasized that the Suspension Clause of the U.S. Constitution was designed by the Founders to "protect against the cyclical abuses of the writ by the Executive and Legislative Branches." It noted that the "Framers view freedom from unlawful restraint as a fundamental precept of liberty." And central to the protection of this liberty is the "duty and authority of the Judiciary to call the jailer to account." These separation-of-power principles guided the Court's reasoning throughout its opinion.

background

The decision in *Boumediene v. Bush/Al Odah v. United States* is the third Supreme Court decision to affirm the rights of Guantánamo detainees and comes after a very long legal battle.

Over six years ago, on January 11, 2002, the first prisoners were brought from Afghanistan to Guantánamo Bay Naval

Base in Cuba. They were quickly labeled as "terrorists," "terrorism suspects" and the "worst of the worst," with no access to the courts to determine their legal rights and no evidence laid out against them. In fact, the government sought to keep secret even the names of detainees. One month after these first 20 men arrived, the Center for Constitutional Rights filed the first case on behalf of detainees at Guantánamo, seeking a habeas corpus hearing in which the legitimacy of their detention would be reviewed by an impartial federal judge.

CCR's case, *Rasul v. Bush*, worked its way up to the Supreme Court where, in a historic decision, the high court ruled that Guantánamo detainees could legally challenge their detention in a court of law. Since that decision was rendered on June 28, 2004, the Bush administration has done everything possible to evade the court's decision and strip the detainees of access to the courts.

Shortly following the *Rasul* decision, the administration created Combatant Status Review Tribunals, or CSRT's. These proceedings, in which detainees do not have access to attorneys and in which decisions are made on the basis of coerced, secret, and often nonexistent evidence, are widely viewed as sham proceedings by attorneys and human rights activists. In December 2005, Congress passed the Detainee Treatment Act, which purported to protect detainees from abuse, but actually undermined the *Rasul* decision and attempted to prohibit future habeas corpus claims by detainees.

On June 29, 2006, the administration's plans for Guantánamo as an extra-legal zone of operation were again damaged by a decision of the Supreme Court, when, in *Hamdan v. Rumsfeld*, the court ruled that the administration's planned military commissions violated U.S. and international law. In addition, accepting an argument made by CCR in a key amicus brief, the court ruled that the protections of the Geneva Conventions applied to Guantánamo detainees.



Detainees at Guantánamo Bay Naval Base (2002)

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The response of the administration - and Congress - to the Hamdan decision was, again, not to recognize the detainees' rights, but instead to craft the Military Commissions Act of 2006, legislation that attempted to strip the federal courts' jurisdiction to hear detainees' habeas claims retroactively, and allows the government to arrest and hold any non-citizen - including U.S. legal residents - anywhere in the world, at any time, and hold them indefinitely, should he or she be labeled an "enemy combatant" or even merely "awaiting" such a determination.

CCR's post-Rasul case, *Al Odah v. United States*, consolidated with *Boumediene v. Bush*, was filed shortly after the Rasul decision on behalf of Kuwaiti detainees, now includes detainees from Bahrain, Yemen, Libya, Kuwait, and one British resident originally from Jordan, currently held at Guantánamo.

Both the *Al Odah* and *Boumediene* habeas corpus petitions were filed in July 2004, shortly after the historic Rasul v. Bush Supreme Court decision that affirmed the detainees' right to challenge their detention.

In January 2005, District Judge Joyce Hens Green held in *Al Odah* that detainees possess "the fundamental right to due process of law under the Fifth Amendment" and that certain detainees are protected by the Geneva Conventions. U.S. District Judge Richard Leon reached the opposite conclusion in *Boumediene*, ruling that the detainees possess no substantive rights to vindicate through habeas corpus. The two cases were consolidated and appealed to the D.C. Circuit Court of Appeals.

On February 20, 2007, two years after the cases were first appealed, a divided panel of three judges of the D.C. Circuit Court of Appeals ruled 2-1 in the consolidated case that the Guantánamo detainees have no constitutional right to habeas corpus review of their detentions in federal court. Because the court also found the MCA eliminated any statutory right of access to the courts under habeas corpus, it dismissed their cases.

On April 2, 2007, the Supreme Court announced that it would not be hearing the cases of the Guantánamo detainees for the time being. The Court denied the Center for Constitutional Rights (CCR) and co-counsel's motion to hear the case with three justices dissenting and two issuing a statement that the detainees should exhaust the process set up by the Detainee Treatment Act (DTA).

On June 29, 2007, the Supreme Court, in a rare reversal, announced that it would in fact hear the consolidated *Al Odah* and *Boumediene* cases in the coming court term (2007-2008). This marked the third time in the history of the detention camp at Guantánamo Bay that the Supreme Court will hear a case concerning the rights of the detainees.

On December 5, 2007 the Supreme Court of the United States heard arguments in *Boumediene v. Bush/Al Odah v. United States*. The *Boumediene/Al Odah* case was the first to directly challenge the constitutionality of the Military Commissions Act of 2006 and its stripping of habeas corpus jurisdiction from the federal judiciary.

The court's opinion in *Boumediene v. Bush/Al Odah v. U.S.* was issued on June 12, 2008.

what now?

Moving forward from this historic victory for Executive accountability, we hope that the lower courts will quickly move to hold hearings in the over 200 pending individual habeas corpus cases where detainees are challenging their indefinite detention without charges. We anticipate that many of these cases will be decided swiftly because the government lacks any factual or legal basis for imprisoning the men. Without this decision these men might have remained in detention forever without ever having a real chance to argue for their release before an impartial court. With habeas these men - so many of whom have been officially cleared for release by the military - would never have been locked up and abused because no court was watching. We believe the majority of them will be released once the executive is forced to show up in front of a federal judge and justify their detention with hard evidence.

Other significant issues may be litigated as well: most detainees are being held in solitary confinement, including dozens who are cleared for release; most are losing their minds as a result. In habeas proceedings, petitioners should be able to argue for more humane conditions of confinement. Many detainees are also cleared for release to countries where they may face torture; these men are basically in the position of refugees and countries that can offer them asylum will have to be found before they can be released. A significant issue for the habeas cases will also be challenges to the government's reliance upon information obtained through torture or unlawful coercion to justify the detentions.

Major General Jay Hood, former commander at Guantánamo, admitted to the Wall Street Journal that "[s]ometimes we just didn't get the right folks," but innocents remain at the base because "[n]obody wants to be the one to sign the release papers. ... there's no muscle in the system." Historically, the federal courts have been that muscle. This decision ensures that they will be.

Ultimately, the administration's strategy with Guantánamo was to run out the clock and leave its mess - much like the war in Iraq - to the next president to clean up. The Supreme Court's decision - a historic victory for Executive accountability to the courts - will, we hope, prevent this administration from doing so.

take action! what you can do...

DISTRIBUTE these factsheets and other literature about Guantánamo Bay and the Military Commissions Act in your community, place of worship, school or workplace. Literature available from CCR at www.ccrjustice.org

WRITE letters to the Presidential Candidates demanding that they implement the decision of the Supreme Court - and go beyond, to close Guantánamo and restore the Constitution, online at www.ccrjustice.org.

DONATE to the Center for Constitutional Rights at www.ccrjustice.org

Please contact us at LKates@ccrjustice.org or call us at 212-614-6443 to find out how you can get involved, or for assistance with your events, programs and activities.