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# Guantanamo Detainees' Fate at Stake

## Boumediene v. Bush hearing at the Supreme Court

By Prof. Marjorie Cohn
Global Research, December 05, 2007
marjoriecohn.com 5 December 2007

Theme: Crimes against Humanity, Law and Justice

The Supreme Court will hear arguments on Wednesday in Boumediene v. Bush. Most of the 34 detainees whose fate hangs in the balance in this case were brought to Guantánamo after being picked up by bounty hunters or tribesmen in Afghanistan and Pakistan. Yet the Bush administration has fought hard to keep them away from any independent court where they could contest the legality of their confinement.

In February, two judges on a three-judge panel of the D.C. Circuit Court of Appeals upheld the provision of the Military Commissions Act of 2006 that strips the statutory rights of all Guantánamo detainees to have their habeas corpus petitions heard by U.S. federal courts. The Supreme Court will decide in Boumediene whether these men still have a constitutional right to habeas corpus.

If the lower court decision is left to stand, they can be held there for the rest of their lives without ever having a federal judge determine the legality of their detention.

**Background on the Guantánamo cases**

In June 2004, the Supreme Court decided Rasul v. Bush, which upheld the right of those detained at Guantánamo to have their petitions for habeas corpus heard by U.S. courts, under the federal habeas statute.

The ink was barely dry on Rasul when Bush created the Combatant Status Review Tribunals, ostensibly to comply with the Rasul ruling. But these tribunals amounted to an end-run around Rasul. They were established to determine whether a detainee is an enemy combatant.

At the end of last term, the Supreme Court struck down Bush's military commissions in Hamdan v. Rumsfeld because they did not comply with due process guarantees in the Uniform Code of Military Justice and the Geneva Conventions. Military commissions are criminal courts to try prisoners for war crimes.

Then, in October of last year, in another end run, this time around Hamdan, Bush rammed the Military Commissions Act of 2006 through a Congress terrified of appearing soft on terror in the upcoming midterm elections. The Act does many things, but it notably amends the habeas corpus statute to strip statutory habeas rights from all Guantánamo detainees.

Do detainees retain constitutional right to habeas corpus?

The two-judge majority in Boumediene upheld the Military Commissions Act's stripping of statutory habeas jurisdiction that the Supreme Court had recognized in Rasul.

Art. I of the Constitution contains the Suspension Clause, which says that Congress can suspend the right of habeas corpus only in times of rebellion or invasion when the public safety may require it. We are not now in a state of invasion or rebellion, and Congress did not make such a finding.

The two-judge majority in Boumediene said: (1) in the absence of a statutory habeas right (which Congress eliminated in the Military Commissions Act), the Constitution only protects the right of habeas corpus that was recognized at common law in 1789; (2) the law in 1789 did not provide the right of habeas corpus to aliens held by the government outside of the sovereign's territory; and (3) Guantánamo is outside U.S territory for constitutional purposes, even though the U.S. has complete control over it.

This reasoning is erroneous for three reasons.

First, the Supreme Court held in INS v. St. Cyr that the Constitution protects the writ as it existed in 1789 "at the absolute minimum." The high court in Rasul cited St. Cyr.

Second, although the Boumediene majority relies on the treaty that says Cuba, not the U.S., has sovereignty over Guantánamo, the Supreme Court rejected that argument in Rasul, when it said: "By the express terms of its agreements with Cuba, the United States exercises 'complete jurisdiction and control' over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. . . Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under §2241."

Third, although the Rasul Court was analyzing the pre-Military Commissions Act habeas statute, it also cited Johnson v. Eisentrager, which construed the constitutional right of habeas corpus. The Supreme Court in Eisentrager denied habeas jurisdiction to German citizens who had been captured by U.S. forces in China, then tried and convicted of war crimes by an American military commission in Nanking.

The Eisentrager court listed six factors to determine whether an alien is entitled to constitutional habeas jurisdiction in U.S. courts. These factors were cited in Rasul, which said:

"In reversing that determination, this Court [in Eisentrager] summarized the six critical facts in the case:

"We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of habeas corpus. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States."

"On this set of facts, the [Eisentrager] Court concluded, "no right to the writ of habeas

corpus appears."

The Rasul court continued:

"Petitioners in these [Guantánamo] cases differ from the Eisentrager detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

"Not only are petitioners differently situated from the Eisentrager detainees, but the Court in Eisentrager made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' constitutional entitlement to habeas corpus."

Combatant Status Review Tribunals not adequate substitute for habeas corpus

In Boumediene, the Bush administration asked the Court of Appeals to review the Combatant Status Review Tribunals. But the court declined, saying it had an inadequate record before it.

The Combatant Status Review Tribunals do not provide a meaningful opportunity to challenge detention. The prisoner is not entitled to an attorney, only a "personal representative," and anything the detainee tells his personal representative can be used against him. After reviewing the cases of 393 detainees, a Seton Hall legal team found that in 96 percent of the cases, the government had not produced any witnesses or presented any documentary evidence to the detainee before the hearing. Detainees were allowed to see only summaries of the classified evidence offered against them, and that evidence was always presumed to be reliable and valid. Requests by detainees for witnesses were rarely granted.

In addition, the personal representatives said nothing in 14 percent of the hearings and made no substantive comments 30 percent of the time. Some personal representatives even advocated for the government's position. In three cases, the detainee was found to be "no longer an enemy combatant," but the military continued to convene tribunals until they were found to be enemy combatants. These detainees were never told of the favorable ruling and there was no indication they were informed or participated in the second or third hearings.

As the dissenter in Boumediene pointed out, the procedure set up in the Detainee Treatment Act for reviewing decisions of the Combatant Status Review Tribunals "is not designed to cure these inadequacies. The court may review only the record developed by the CSRT to assess whether the CSRT has complied with its own standards. Because the detainee still has no means to present evidence rebutting the government's case – even assuming the detainee could learn of it contents – assessing whether the government has more evidence in its favor than the detainee is hardly the proper antidote."

The suspension of habeas corpus will certainly have profound effects on non-citizen detainees. Consider the case of Abu Bakker Qassim, an Uighur from China who was held at Guantánamo for four years. He wrote in the New York Times: "I was locked up and mistreated for being in the wrong place at the wrong time during America's war in

Afghanistan. Like hundreds of Guantánamo detainees, I was never a terrorist or a soldier. I was never even on a battlefield. Pakistani bounty hunters sold me and 17 other Uighurs to the United States military like animals for $5,000 a head. The Americans made a terrible mistake."

Rasul v. Bush was a 6-3 decision. Justices Stevens, Souter, Ginsburg, Breyer, O'Connor and Kennedy voted with the majority. The dissenters were Justices Scalia, Thomas and Rehnquist.

The Supreme Court should reverse the Court of Appeals decision in Boumediene, probably in a 5-4 vote with Chief Justice Roberts and Justice Alito voting with the dissent. Surely the Court will not decide that Bush has succeeded in placing the detainees beyond the reach of our federal courts by sending them to Guantánamo. It should also conclude that the judicial review of the decisions of Combatant Status Review Tribunals does not provide an adequate substitute for constitutional habeas corpus.

*Marjorie Cohn is a professor at Thomas Jefferson School of Law and the President of the National Lawyers Guild. She is the author of "Cowboy Republic: Six Ways the Bush Gang Has Defied the Law." Her articles are archived at www.marjoriecohn.com.*



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*Articles by:* **Prof. Marjorie Cohn**