



Camp X-ray, Guantánamo Bay, Cuba (BBC)

## Justices to Hear Case of Detainees at Guantánamo

by Paul Wolf, 10 November 2003

Date: Mon, 10 Nov 2003 22:55:07 -0500  
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### **Justices to Hear Case of Detainees at Guantánamo**

By Linda Greenhouse, *The New York Times*, 11 November 2003

WASHINGTON, Nov. 10 -- Setting the stage for a historic clash between presidential and judicial authority in a time of military conflict, the Supreme Court agreed on Monday to decide whether prisoners at the United States naval base at Guantánamo Bay, Cuba, are entitled to access to civilian courts to challenge their open-ended detention.

The court said it would resolve only the jurisdictional question of whether the federal courts can hear such a challenge and not, at this stage, whether these detentions are in fact unconstitutional. Even so, the action was an unmistakable rebuff of the Bush administration's insistence that the detainees' status was a question "constitutionally committed to the executive branch" and not the business of the federal courts, as Solicitor General Theodore B. Olson argued in opposition to Supreme Court review.

In accepting the cases, the court moved from the sidelines to the center of the debate over whether the administration's response to the terrorist attacks of Sept. 11, 2001, reflects an appropriate balance between national security and individual liberty.

While the court does not indicate why it grants review in a particular case, the justices might well have been persuaded that no matter what the ultimate answer to the question of whether judicial review is even available, they are the ones who have to provide it.

"It is for the courts and not the executive to determine whether executive action is subject to judicial review," the appeal filed on behalf of 12 Kuwaitis told the court.

The two appeals the court accepted were filed on behalf of 16 detainees, the Kuwaitis in one group and two Britons and two Australians in the other, all seized in Afghanistan and Pakistan during United States-led operations against the Taliban in late 2001 and early 2002. They have all been held for more than 18 months without formal charges or access to any forum in which they can contest the validity of their detention.

The men assert that they were not fighters either for the Taliban or for Al Qaeda; most say they were humanitarian volunteers who were captured by bounty hunters.

The two separate lawsuits, seeking a federal court hearing on the validity of the open-ended detention, were combined by the Federal District Court here. That court then ruled, in a decision affirmed in March by the United States Court of Appeals for the District of Columbia Circuit, that on the basis of a World War II-era Supreme Court precedent, the federal courts lack jurisdiction over the military detention of foreigners outside United States territory.

The applicability of that 1950 decision, *Johnson v. Eisentrager*, is at the heart of the dispute before the Supreme Court. The justices also combined the two cases, *Rasul v. Bush*, No. 03-334 (the Britons' and Australians' case), and *Al Odah v. United States*, No. 03-343 (the Kuwaitis' case), and will hear them in late March, with a decision expected by early summer.

One central issue is the status of the naval base at Guantánamo Bay, which while indisputably a part of Cuban territory has been administered by the United States under a 1903 lease that grants it many of the attributes of sovereignty and uses the phrase "complete jurisdiction and control."

By contrast, the *Eisentrager* decision denied judicial review to German intelligence agents who were captured in wartime China and were being held in Germany after conviction as war criminals by military tribunals.

How to characterize Guantánamo Bay is of such importance because it is clear that noncitizens do have certain constitutional rights if they are within United States territory. On the other hand, the court has frequently invoked the *Eisentrager* precedent, even out of its wartime military context, to stand for the proposition that outside the territorial reach of the United States, aliens have no such rights.

The brief filed for the Britons and Australians by the Center for Constitutional Rights, a liberal public interest law firm in New York, told the court that "we alone exercise power at Guantánamo Bay" and that the base should therefore be treated for jurisdictional purposes as part of the United States. In the administration's view, not only is that conclusion incorrect but it is not one that the court is free to make. The determination of sovereignty over a particular territory is "not a question on which a court may second-guess the political branches," Solicitor General Olson said in his brief.

It was evident on Monday that this, too, was a question on which the justices want to have the final word. That conclusion emerged from a comparison of how the administration phrased the question presented by the two cases with how the justices phrased it in their order granting review. Solicitor General Olson said the question was whether the federal courts had jurisdiction to decide the legality of detaining "aliens captured abroad in connection with ongoing hostilities and held outside the sovereign territory of the United States at the Guantánamo Bay Naval Base, Cuba."

The Supreme Court, by contrast, said it intended to decide the jurisdiction of the courts to hear challenges to "the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba." The court's question incorporated no assumption about whether the base was or was not "outside the sovereign territory of the United States."

Pamela S. Falk, a professor of international law at the City University of New York, recalled on Monday that when she first visited the Guantánamo base 10 years ago, she did not have to clear United States customs on her return flight to Fort Lauderdale, Fla., an indication that she was not considered to have left the United States at any time during her journey.

But when she visited again in July and returned by way of Puerto Rico, she had to clear customs there, reflecting a policy change that she said should not deprive the Supreme Court of the opportunity to decide "the fundamental question of the rights of anyone being held in U.S. custody."

If the justices decide that the federal courts do have jurisdiction, the cases will go back to district court in the first instance for a decision on the merits of the detainees' claims. Lawyers for the Kuwaiti group, from the law firm of Shearman & Sterling, describe what the detainees are asking for as modest relief: to be informed of any charges against them, to be allowed to meet with lawyers and family members and to obtain "access to an impartial tribunal to review whether any basis exists for their continued detentions."

Without those rights, their brief says, their detention violates the Constitution as well as domestic and international law.

Lawyers for the Britons and Australians make similar arguments. Both cases were originally filed as petitions for a writ of habeas corpus, the procedure deeply rooted in English law for challenging confinement.

Several of the detainees in these cases have been placed by the government in the first group of the 660 Guantánamo detainees to go before military commissions, when those operations begin in the coming months. But even if some do get a hearing before a commission, their Supreme Court cases would not become moot because the issue of access to a civilian federal court would remain.

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## **Notes on Guantánamo Habeas Corpus Cases**

I've been following these cases, here are my notes. - Paul

*Gherebi v. Bush*, 262 F.Supp.2d, 1064 (C.D.Cal.,2003) - (judge troubled by possibility of prisoners being "detained indefinitely without access to counsel, without formal notice of charges, and without trial." Habeas corpus under international law, including Law of Nations and the International Covenant on Civil and Political Rights mentioned but not briefed)

*Coalition of Clergy v. Bush*, 189 F.Supp.2d 1036 (C.D.Cal.,2002)

*Rasul v. Bush*, 215 F.Supp.2d 55 (D.D.C.2002) (follows *Johnson v Eisentrager*)

*Al Odah v. United States*, 321 F.3d 1134 (D.C.Cir.2003) (Australian citizen)

## **Other Relevant Cases**

*Johnson v. Eisentrager*, 70 S.Ct. 936 (U.S. 1950) (jurisdiction of civil courts of the United States *vis-a-vis* military authorities in dealing with enemy aliens overseas; "a contrary result would unreasonably hamper military efforts")

Supreme Court noted that petitioners had been "formally accused of violation of the laws of war and fully informed" of the charges against them. *Johnson* at 936.

Military commissions have jurisdiction to adjudicate charges that a captured detainee violated the laws of war. *Id.* at 936

"[T]he doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to advance every argument in their support ...." *Id.* at 936.

*Zadvydas v. Davis*, 533 U.S. 678 (2001) (citing very limited instances when preventive, potentially indefinite detention has been upheld)

*INS v. St. Cyr*, 533 U.S. 289 (2001) (noting "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction").

*Ex parte Quirin*, 317 U.S. 1 (1942)

*In re Yamashita*, 327 U.S. 1 (1946)

*United States v. Bin Laden*, 132 F.Supp.2d 168 (S.D.N.Y.2001) (Johnson prisoners were a "specific kind of non-resident alien--'the subject of a foreign state at war with the United States' ")

*Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir.2001) (a "clear international prohibition exists against prolonged and arbitrary detention" under the ICCPR)

### **Guantánamo Bay Treaty**

Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 (6 Bevens 113)

Relations with Cuba, May 9, 1934, U.S.-Cuba, T.S. No. 866 (6 Bevens 1161)

Note that Cuba has not ratified the ICCPR, but habeus corpus is mentioned in numerous international agreements.

### **Sovereignty**

*Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948) (recognizing distinction between "sole power" and "sovereignty"; United States not sovereign over American military base in Bermuda, even though lease from Great Britain granted United States "substantially the same rights" as over Guantánamo Bay)

*Cuban Am. Bar Ass'n, Inc. v. Christopher*, 43 F.3d 1412 (11th Cir.1995)

### **Military Commissions**

Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, Presidential Military Order, 66 Fed.Reg. 57833-57836 (Nov. 16, 2001).

Military Commission Order No. 1 : Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (March 21, 2002). Guaranteeing, "inter alia, the presumption of innocence, the right against self-incrimination, burden of proof on the Government, the choice of civilian defense counsel to serve alongside military defense counsel, the right of cross-examination and presentation of proof by the defense and proof beyond a reasonable doubt." Ruth Wedgwood, "Al Qaeda, Terrorism, and Military Commissions," 96 *Am. J. Int'l L.* 328, 337 n. 35 (2002).

Military Commission Instructions (April 30, 2003).

## International Law

- Habeas Corpus Act 31 Car. II c. 2
- Geneva Conventions of 1949:
  - Convention (I)** for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949
  - Convention (II)** for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949
  - Convention (III)** Relative to the Treatment of Prisoners of War; August 12, 1949
  - Convention (IV)** Relative to the Protection of Civilian Persons in Time of War, August 12, 1949
- Vienna Convention on the Law of Treaties
- International Covenant on Civil and Political Rights

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