

Guantanamo Case May Mean Greater Wartime Role for U.S. Courts

By Greg Stohr and Jeff St. Onge



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Dec. 3 (Bloomberg) -- Having rebuked the Bush administration twice over its handling of suspected terrorists at Guantanamo Bay, the U.S. Supreme Court now has Congress in its sights.

In a case that will be argued Dec. 5, the justices will consider whether lawmakers, at President George W. Bush's urging, constitutionally barred inmates from challenging their detention in federal court through so-called habeas corpus petitions.

A decision allowing habeas petitions by Guantanamo inmates would be an assertion of a powerful wartime role for the judiciary -- one that perhaps even Congress and the president together

can't take away. Some 300 inmates are at Guantanamo's Camp Delta, set up in 2002 to detain accused al-Qaeda fighters captured after the Sept. 11 attacks.

"This case is really about the ability of the courts to check the political branches," said Shayana Kadidal, a lawyer at the New York-based Center for Constitutional Rights, which represents more than 250 prisoners.

The Bush administration contends that the Constitution and its guarantee of habeas rights don't cover enemy prisoners held outside the country, in this case on Cuban territory that the U.S. occupies under a 1903 lease. Habeas corpus is a legal device that dates back to 14th-century England and lets inmates claim they are being wrongfully held.

Even some supporters of the administration position say the court is unlikely to embrace it, largely because probable swing vote Justice Anthony Kennedy has hinted he will back the inmates. Kennedy was in the majority in 2006 when the court said Bush needed congressional authorization to try Guantanamo prisoners on criminal charges in military tribunals.

Kennedy and Stevens

The latest inmate appeals were initially rejected by the Supreme Court in April. Three justices dissented and two others, Kennedy and John Paul Stevens, said they would defer consideration "despite the obvious importance of the issues."

In June, after a military officer criticized Guantanamo hearings he helped oversee, the court reversed itself and granted the inmates a hearing. That step required the assent of at least five of the nine justices.

"The way it was granted here is a bad omen," said Richard Samp, a Washington lawyer who filed a brief supporting the administration.

In 2004, Kennedy joined a 6-3 decision that said a federal statute let Guantanamo inmates file habeas petitions. He wrote that Guantanamo "is in every practical respect a United States territory." Congress responded with two laws that explicitly barred courts from considering Guantanamo petitions.

Constitutional Rights

The question now is whether the inmates have constitutional habeas rights that Congress can't take away without providing an adequate substitute. Solicitor General Paul Clement, who will argue for the government, contends the court has never extended habeas rights to foreign fighters captured and held abroad.

``This court's precedents confirm that such aliens have no constitutional right to petition our courts for a writ of habeas corpus," Clement argued.

Clement points to a 1950 ruling that barred habeas petitions by German soldiers who were captured by U.S. forces in China, convicted of war crimes and incarcerated in occupied Germany.

Former Solicitor General Seth Waxman, who will argue on behalf of the Guantanamo prisoners, contends those men are in a different situation.

Quoting from Kennedy's 2004 opinion, Waxman said the Guantanamo inmates face ``indefinite detention without trial."

Prisoner Appeals

The inmates before the high court include six Algerian natives seized in Bosnia in 2002. A second appeal was filed by 39 prisoners, most taken into custody in Afghanistan or the bordering areas of Pakistan.

Inmates appear before a Combatant Status Review Tribunal, or CSRT, a military panel that decides whether the men are ``enemy combatants" who should remain in detention. A 2005 law gives inmates only a limited right to appeal that conclusion to a federal court in Washington.

Lawyers for the prisoners say those procedures are a poor substitute for habeas rights. During CSRT hearings, shackled inmates appear before a panel of three officers.

The inmates can't have a lawyer present, are barred from seeing much of the evidence against them and in most circumstances can't call witnesses in their defense. In a number of cases, a second CSRT was convened after the first panel concluded an inmate wasn't an enemy combatant.

``CSRTs exist just to confirm the desired result," said Jonathan Hafetz, who represents detainee Jaralla Saleh Mohammed Kahla al-Marri. ``It's a totally loaded, rigged process."

Prisoners Released

Officials at Guantanamo say the CSRTs have led to the release of 38 prisoners. Another 14 have been set free as a result of annual reviews of each prisoner's status, and 200 inmates have been transferred to other countries.

CSRTs are a ``robust, thorough, methodical process," said Navy Captain Ted Fessel, who runs the Guantanamo office that administers the tribunals.

Samp said that requiring more would place an unacceptable burden on soldiers.

``You'll have to stop fighting while you start to document all of the circumstances," said Samp, chief counsel for the [Washington Legal Foundation](#). Soldiers will have to ``get down the names of all the witnesses and read the guy his Miranda rights and all sorts of things."

The cases are Boumediene v. Bush, 06-1195, and Al-Odah v. United States, 06-1196.

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