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Supreme Court restores habeas corpus, strikes down key part of Military Commissions Act

BY GLENN GREENWALD

(updated below)

In a major rebuke to the Bush administration's theories of presidential power -- and in an equally stinging rebuke to the **bipartisan political class** which has supported the Bush detention policies -- the U.S. **Supreme Court** today, in a **5-4 decision** (.pdf), declared Section 7 of the Military Commissions Act of 2006 unconstitutional. The Court struck down that section of the MCA because it purported to abolish the writ of habeas corpus -- the means by which a detainee challenges his detention in a court -- despite the fact that the Constitution permits suspension of that writ only "in Cases of Rebellion or Invasion."

As a result, Guantanamo detainees accused of being "enemy combatants" have the right to challenge the validity of their detention in a full-fledged U.S. federal court proceeding. The ruling today is the first time in U.S. history that the Court has ruled that detainees held by the U.S. Government in a place where the U.S. does not exercise formal sovereignty (Cuba technically is sovereign over Guantanamo) are nonetheless entitled to the Constitutional guarantee of habeas corpus whenever they are held in a place where the U.S. exercises effective control.

In upholding the right of habeas corpus for Guantanamo detainees, the Court found that the "Combatant Status Review Tribunals" process ("CSRT") offered to Guantanamo detainees -- mandated by the John-McCain-sponsored Detainee Treatment Act of 2005 -- does not constitute a constitutionally adequate substitute for habeas corpus. To the contrary, the Court found that such procedures -- which have long been criticized as sham hearings due to the fact that defendants cannot have a lawyer present, government evidence is presumptively valid, and defendants are prevented from challenging (and sometimes even knowing about) much of the evidence against them -- "fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review." Those grave deficiencies in the CSRT process mean that "there is considerable risk of error" in the tribunals' conclusions.

The Court's ruling was grounded in its recognition that the guarantee of habeas corpus was so central to the Founding that it was one of the few individual rights included in the Constitution even before the Bill of Rights was enacted. As the Court put it: "the Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." The Court noted that freedom from arbitrary or baseless imprisonment was one of the core rights established by the 13th Century Magna Carta, and it is the writ of habeas corpus which is the means for enforcing that right. Once habeas corpus is abolished -- as the Military Commissions Act sought to do -- then we

return to the pre-Magna Carta days where the Government is free to imprison people with no recourse.

In its decision, the Court emphasized (and revived) some of the most vital principles of our system of Government which have been trampled upon and degraded over the last seven years (emphasis added):

The Framers' **inherent distrust of government power** was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty. . . .

Where a person is detained by executive order rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. . . . The habeas court must have sufficient authority to conduct a meaningful review of both the cause of detention and the Executive's power to detain. . . .

Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and interdict. There are further considerations, however. **Security subsists, too, in fidelity to freedom's first principles.** Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to separation of powers. . . .

The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system, they are reconciled within the framework of law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, part of that law.□

In ruling that the CSRTs woefully fail to provide the constitutionally guaranteed safeguards, the Court quoted Alexander Hamilton's Federalist No. 84: "The practice of arbitrary imprisonments, in all ages, is **the favorite and most formidable instruments of tyranny.**" It is that deeply tyrannical practice -- implemented by the Bush administration and authorized by a bipartisan act of Congress -- which the U.S. Supreme Court, today, struck down.

The Military Commissions Act of 2006 was -- and remains -- one of the great stains on our national political character. It was passed by a **substantial majority in the Senate (65-34)** with the support of **every single Senate Republican** (except Chafee) and 12 Senate Democrats. No filibuster was even attempted. It passed by a **similar margin in the House**, where 34 Democrats joined 219 Republicans to enact it. One of the most extraordinary quotes of the post-9/11 era came **from GOP Sen. Arlen Specter**, who said at the time that that the Military Commissions Act -- because it explicitly barred federal courts from hearing habeas corpus petitions brought by Guantanamo detainees -- "sets back basic rights by some 900 years" **and was** "patently unconstitutional on its face" -- and Specter then proceeded to **vote for it**.

The greatest victim of the 9/11 attack has been our core, defining constitutional liberties. Of all the powers seized by this administration in the name of keeping us Safe, the power to imprison people indefinitely with no charges and no real process is the most pernicious.

Passage of the Military Commissions Act was **spearheaded by John McCain**, who was **anointed by cowardly Senate Democrats to speak for them** and negotiate with the White House. Once McCain blessed the Military Commissions Act, its passage was assured. Barack Obama voted

against it, and once its passage appeared certain, **Obama offered an amendment** to limit it to

five years. That amendment failed, rendering the MCA the law of the land without any time limits.

The Supreme Court today did what the Founders envisioned it should do: it protected our basic constitutional guarantees from erosion and assault by a corrupt majority within the political class. In so doing, the Court took a mild though important step in reversing some of the worst and most tyrannical excesses of the last seven years. **Patrick Henry warned** long ago of the unique dangers of allowing executive imprisonment without meaningful process:

Is the relinquishment of the trial by jury and the liberty of the press necessary for your liberty? Will the abandonment of your most sacred rights tend to the security of your liberty? Liberty, the greatest of all earthly blessings -- **give us that precious jewel, and you may take everything else!** . . . Guard with jealous attention the public liberty. **Suspect everyone who approaches that jewel.**

In his concurring opinion in **Brown v. Allen (1953)**, Justice Jackson wrote:

Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.

Our political and media elite were more than willing -- they were eager -- to relinquish that right to the President in the name of keeping us Safe from Terrorists. Today, the U.S. Supreme Court, in what will be one of the most celebrated landmark rulings of this generation, re-instated that basic right, and in so doing, restored one of the most critical safeguards against the very tyranny this country was founded to prevent.

UPDATE: Three of the five Justices in the majority -- John Paul Stevens (age 88), Ruth Bader Ginsburg (age 75) and David Souter (age 68) -- are widely expected by court observers to retire or otherwise leave the Court in the first term of the next President. By contrast, the four judges who dissented -- Antonin Scalia, Clarence Thomas, John Roberts and Sam Alito -- are expected to stay right where they are for many years to come.

John McCain **has identified** Roberts and Alito as ideal justices of the type he would nominate, while Barack Obama has identified Stephen Breyer, David Souter and Ginsberg (all in the majority today). It's not hyperbole to say that, from Supreme Court appointments alone, our core constitutional protections could easily depend upon the outcome of the 2008 election.

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