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## U.S. Supreme Court Watch

### Gibbons Leads High Court Challenge To Guantanamo Bay Detentions

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In a case that pits the power of a wartime president against the authority of the federal courts, the Supreme Court last Tuesday addressed the prickly question of whether foreign nationals picked up in the war on terror and held at Guantanamo Bay, Cuba, should have access to U.S. courts.

Retired judge John Gibbons — arguing on behalf of 16 detainees from Kuwait, Britain and Australia — urged the justices to open the military detention of more than 600 individuals at the U.S. naval base at Guantanamo Bay to judicial scrutiny, saying the current situation amounts to “a lawless enclave.”

Gibbons, of Newark’s Gibbons, Del Deo, Dolan, Griffinger & Vecchione, pressed the Court to reject the government’s position that the federal courts have no jurisdiction over claims brought by noncitizens held outside U.S. territory.

“It’s been plain for 215 years. If there is federal detention and there is a proper respondent before the Court, as there is, there is habeas corpus jurisdiction,” Gibbons asserted. “I don’t see any ambiguity in that statute.”

But Solicitor General Theodore Olson, presenting the case for the Bush administration, cautioned that opening the courthouse doors to the habeas corpus claims of detainees held

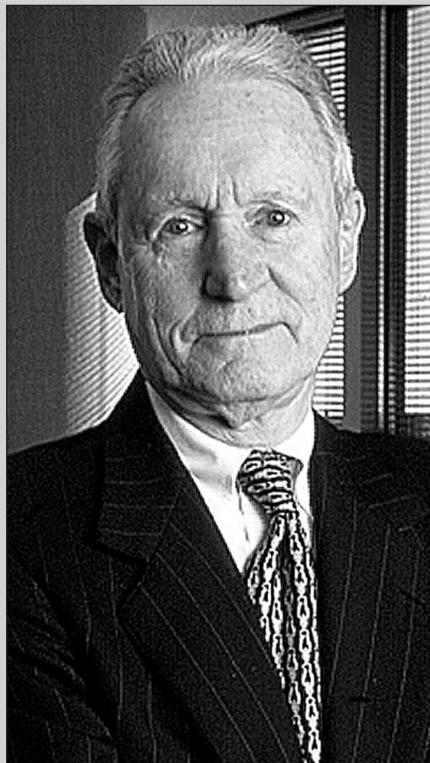


PHOTO BY CARMEN NATALE

**LAWLESS ENCLAVE:** Former Judge John Gibbons maintained that for all practical purposes, Cuban sovereignty over Guantanamo Bay is meaningless. ‘A stamp with Fidel Castro’s picture on it wouldn’t get a letter off the base,’ he said.

at Guantanamo would place the judicial branch in the unprecedented position of second-guessing the military’s handling of captured enemy fighters.

“Stepping across that line would be impossible to go back from with respect to prisoners in the battlefield,”

Olson said.

Tuesday’s consolidated arguments in *Rasul v. Bush*, No. 03-334, and *Al Odah v. United States*, No. 03-343, stem from claims brought by family members of detainees held as unlawful combatants at Guantanamo Bay.

In both cases, the U.S. Court of Appeals for the D.C. Circuit ruled that federal courts have no jurisdiction to hear petitions from foreign citizens held outside U.S. borders. The decision relied heavily on a World War II precedent, *Johnson v. Eisentrager*, in which the Supreme Court found that German soldiers convicted of war crimes before military commissions and imprisoned in Germany could not seek relief from U.S. courts.

In the Guantanamo case, a pivotal question facing the justices is whether the U.S. naval base at Guantanamo Bay is fundamentally American soil or foreign soil. Under the terms of a 100-year-old agreement with Cuba, the United States has “complete jurisdiction and control” over the property, while Cuba retains “ultimate sovereignty.”

Gibbons maintained that for all practical purposes, Cuba’s sovereignty over Guantanamo Bay is meaningless.

“If the reference in the lease meant that Cuban law somehow applied in the United States Navy base at Guantanamo Bay, that would be one thing. But Cuban law has never had any application inside that base,” Gibbons told the Court. “A stamp with Fidel Castro’s picture on it wouldn’t get a letter off the base.”

In its brief, the government argues that “sovereignty, not mere control, is the touchstone” for determining federal court jurisdiction.

Justice Antonin Scalia seemed to

side with the government, even quoting passages of the government's brief.

"[The treaty] says the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the leased area. Now I take that to mean that they are sovereign even during the term of the lease. You may say it's artificial, but there it is," Scalia said.

But several justices seemed troubled by the prospect that executive branch actions at Guantanamo Bay could be immune to judicial review.

"If we go with you, it has the virtue of clarity. It is a clear rule. If you're not a citizen and you're outside the United States, you don't get a foot in the door. Against you is that same fact," Justice Stephen Breyer told Olson. "It seems rather contrary to an idea of a constitution with three branches that the executive would be free to do whatever they want without

a check."

The Guantanamo case marks the first significant challenge to Bush administration policies in the war on terror to reach the Supreme Court.

While the underlying jurisdictional question in the Guantanamo case is relatively narrow, public interest in the case has been intense both at home and abroad. A diverse group weighed in with amicus briefs, most opposing the government's position.

Among those urging the Supreme Court to assert jurisdiction over foreign prisoners held at Guantanamo: a group of retired U.S. military officers; a band of former U.S. prisoners of war; 175 members of the British Parliament; and Fred Korematsu, name plaintiff in the case challenging the exclusion of Japanese-Americans from the vicinity of military installations during World War II.

Both lawyers faced aggressive questioning from the justices, who at

times seemed more interested in debating one another than in getting answers from the parties.

Justice Anthony Kennedy pressed Gibbons as to whether a certain period of time should be required for a habeas claim of a battlefield detainee to become ripe.

"I understand that your clients have been detained approximately two years," Kennedy said. "Supposing they had only been detained six months, how much would that weaken your case?"

Justice Ruth Bader Ginsburg questioned the government's reliance on *Eisentrager*, calling it a "very difficult decision to understand."

"I would say it's at least ambiguous," Ginsburg stated.

Next week the Supreme Court will hear arguments in *Rumsfeld v. Padilla* and *Hamdi v. Rumsfeld* — two cases challenging the detention of U.S. citizens as enemy combatants. ■



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