

# Rasul v Bush

## Synopsis

In early 2002, the Center for Constitutional Rights (CCR) filed two habeas corpus petitions, *Rasul v. Bush* and *Habib v. Bush*, challenging the U.S. government's practice of holding foreign nationals captured in connection with its war on Afghanistan and al-Qaida in indefinite detention, without counsel and without the right to a trial or to know the charges against them. The Supreme Court, over the administration's objections, agreed in November 2003 to hear the cases of the Guantanamo detainees together with *al Odah v. Bush*. The arguments were heard on April 20, 2004; in a historic ruling on June 28th, 2004, the Court ruled that the detainees have access to U.S. Courts to challenge their detention.

## Description

The Center for Constitutional Rights began this case in February 2002, shortly after the first detainees were sent to Guantánamo. Representing two Australians—David Hicks and Mamdouh Habib—and two men from the U.K.—Shafiq Rasul and Asif Iqbal, CCR filed a petition seeking a writ of habeas corpus in the District Court for the District of Columbia. The petition challenged the Presidential Executive Order of November 13, 2001, which authorized indefinite detention without due process of law, as a violation of international law and the U.S. Constitution. It was shortly after 9/11 and a very different climate existed in the United States at that time: no other legal organization was willing to join us in our efforts, and CCR received scores of death threats and hate mail.

The core contention of the litigation was that the United States cannot order indefinite detention without due process. The detainees have the right to challenge the legality of their detention in court. To make that challenge meaningful, they have the right to be informed of the charges they face, and the right to present evidence on their own behalves and to cross-examine their accusers. The failure of the Bush Administration to provide these protections raises serious questions about their commitment to the U.S. Constitution and international law.

## 'Rasul v. Bush' in the Courts

After CCR filed the first habeas petitions, the government filed a major motion to dismiss, claiming, among other arguments, that the "detention" is not based upon military orders, but on the President's common law war powers." The government also claimed that the matter was a political question not under the jurisdiction of the courts. On August 7, 2002, the district court dismissed the petition, adopting the ruling in *Habib v. Bush* that a petition for habeas corpus is not available for non-U.S. citizens detained outside of United States jurisdiction.

CCR appealed to the Court of Appeals for the D.C. Circuit, arguing that if U.S. courts do not have jurisdiction to review the Executive detentions at Guantánamo, then no court has jurisdiction to review them: that would mean that the U.S. could act in any way it chose without being subject to any laws anywhere in the world. CCR argued that under American constitutional tradition and international law, courts must be able to review the lawfulness of these Executive detentions.

On March 11, 2003, the D.C. Circuit rejected the appeal. The court ignored the fact that the detainees had not been declared "enemies" of the United States by any lawful international or domestic tribunal and are therefore languishing in U.S. military captivity without any legal basis. Approving the power of the President

to act lawlessly in these matters, the Circuit concluded that the consequence of its interpretation of the law "is that no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. §2241, to the Guantánamo detainees, even if they have not been adjudicated enemies of the United States."

At the time, CCR President Michael Ratner stated, "The right to test the lawfulness of one's detention is a foundation of liberty that has roots going back to the Magna Carta. The U.S. is not only denying the detainees fundamental rights, but is jeopardizing any claim that it is a country ruled by law. I fear for the rights of all of us. The court's ruling, that the U.S. Constitution does not run to those jailed in territory over which the U.S. has 'complete jurisdiction and control,' is utterly erroneous. Every detained person has a right to his or her day in court."

On September 2, 2003, CCR filed a petition for certiorari in the United States Supreme Court seeking review of the lower court decisions. By now it had been two years since 9/11, and the long-term detentions at Guantánamo without hearings were causing alarm among a wider sector of the population. A remarkable array of individuals and organizations filed amicus (friend of the court) briefs in support of the petition.

On November 10, 2003, over the objections of the Administration, the Supreme Court granted certiorari in *Rasul v. Bush*. Our written argument was filed on January 14, 2004, and dozens of groups filed amicus briefs with the Court in support of CCR's case, including former American POWs; former diplomats; former state department officials; former judges; military lawyers; Japanese-American internee Fred Korematsu; and the House of Lords. On April 20, 2004, the Supreme Court heard arguments, and, in a major blow to the Bush Administration on June 28th, 2004, they ruled in favor of the detainees. Finally, after two and a half years of litigation, CCR won the first phase of the Guantánamo cases.

While this case was pending, two of CCR's named clients—Rasul and Iqbal—were released from Guantánamo to British authorities and freed completely shortly after their arrival in England. They have issued an open letter to the president and the U.S. Senate Armed Services Committee detailing the abuse they received and witnessed at Guantánamo.

A third client in the suit, Australian David Hicks, was designated for a military tribunal, and as a result was given access to a military lawyer, Major Michael D. Mori. From the moment he was designated, he was removed from contact with the other detainees and awaited charges in solitary confinement for six months. CCR's fourth client, Mamdouh Habib, is reportedly in very bad physical and psychological condition, and the Australian government asked that his condition be looked into.

### **CCR Legal Team for *Rasul v. Bush***

**Michael Ratner**, President

**Joseph Margulies**, Cooperating Attorney and lead counsel

**Jeffrey Fogel**, Legal Director

**Barbara Olshansky**, Assistant Legal Director

**Steven Macpherson Watt**, Human Rights Fellow

**Shane Kadidal**, Staff Attorney

**Irene Baghoomians**, former Staff Attorney