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Democracy Dies in Darkness

Supreme Court won't stop Ohio order for prisoners to be moved or released because of coronavirus

By **Robert Barnes**

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The Supreme Court on Tuesday refused to shelve a judge's order that hundreds of at-risk inmates at a federal prison in Ohio be expeditiously moved because of an outbreak of coronavirus.

The court left open the door for the Trump administration to try again "if circumstances warrant." It said a new filing could be appropriate later, after the case proceeded through lower courts.

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Justices Clarence Thomas, Samuel A. Alito Jr. and Neil M. Gorsuch would have granted the administration's request now.

Courts across the country are seeing a rising number of lawsuits involving the coronavirus risk to prisoners. But the Trump administration had asked the Supreme Court to stop an order from a federal judge in Ohio regarding an outbreak at one of the worst hit, the Elkton Federal Correctional Institution.

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One in 4 inmates tested were positive for the virus, and nine inmates have died. Based on a directive from U.S. District Judge James Gwin, prison officials identified 837 prisoners who were particularly vulnerable because of their age or underlying medical conditions.

The low-security prison houses inmates in dormitory-like settings, which lawyers said makes an outbreak of the virus more likely to spread to inmates and corrections workers.

“There is a continued risk of harm to others, including prison staff, if inmates remain in the prison and the virus continues to thrive among the dense inmate population,” Gwin wrote last month.

Last week, he gave corrections officials new deadlines. He noted that even Attorney General William P. Barr had said prison officials should be identifying prisoners who could be released on home detention or by other means.

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“By thumbing their nose at their authority to authorize home confinement, [officials] threaten staff and they threaten low security inmates,” Gwin wrote.

Gwin said officials should consider compassionate release, home confinement or transfer to a different prison.

A panel of the U.S. Court of Appeals for the 6th Circuit refused to put Gwin’s order on hold, and the government went to the Supreme Court.

In a short order, the Supreme Court said the Justice Department was appealing only Gwin’s original order, not the amended one he issued after he said corrections officials were dragging their feet.

“The government has not sought review of or a stay of the May 19 order in the U.S. Court of Appeals for the Sixth Circuit,” the unsigned order said. “Particularly in light of that procedural posture, the court declines to stay the district court’s April 22 preliminary injunction without prejudice to the Government seeking a new stay if circumstances warrant.”

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In asking the Supreme Court to step in now, Solicitor General Noel Francisco said the lower court had gone too far.

“A judicial order peremptorily requiring the removal of over 800 inmates from a federal prison based on an alleged Eighth Amendment violation — in the midst of a pandemic — presents extraordinarily significant questions and should not be imposed without this court’s review,” Francisco wrote.

He added: “This extraordinary pandemic poses risks to those inmates, but it also poses risks to the population as a whole, and [the Bureau of Prisons] has worked diligently to mitigate the risks at Elkton.”

The American Civil Liberties Union, representing the inmates who initiated the lawsuit, said prison officials have lost control of the situation.

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“People have a constitutional right to health, safety, and dignity while incarcerated — something that Elkton has proven it cannot provide right now,” David Cole, the ACLU’s national legal director, said in a statement. “Around the country, courts have been slow to step in and take responsibility to protect the tens of thousands of incarcerated people who are at risk from this virus.”

The Federal Bureau of Prisons reported on its website Tuesday that 1,577 federal inmates and 181 staff have confirmed positive test results for the virus nationwide. Additionally, 3,180 inmates and 413 staff have recovered. There have been 64 federal inmate deaths.

‘Come on, we’re human beings’: Judges question response to coronavirus pandemic in federal prisons

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The Supreme Court last month rejected an application from older Texas prisoners who said corrections officials were not doing enough to protect them from the virus.

In April, a district judge in Houston agreed with prisoners that the pandemic threatened hundreds of prisoners at a state geriatric prison in Grimes County, Tex.

But a panel of the U.S. Court of Appeals for the 5th Circuit put the judge's order on hold, saying that Texas prison officials were taking steps to address the problem and that federal judges need not intervene in prison management.

The Supreme Court rejected the attempt to overturn the circuit decision, but Justices Sonia Sotomayor and Ruth Bader Ginsburg expressed concern about prison conditions.

“It has long been said that a society’s worth can be judged by taking stock of its prisons,” Sotomayor wrote. “That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm.”

There may be times, she continued, when prison conditions “could open the courthouse doors where they would otherwise stay closed.”

That day, the justices received a new request brought by Louisiana inmate Christopher Marlowe, who is serving his sentence at the state’s B.B. Rayburn Correctional Center for attempted second-degree murder.

Marlowe suffers from diabetes, which makes him susceptible to serious complications should he contract covid-19, the disease caused by the coronavirus.

As of mid-May in Louisiana, his lawyers told the court, “374 prisoners and 134 Louisiana Department of Corrections staff have contracted the virus. Ten prisoners and three staff have died.”

But again, a panel of the 5th Circuit put on hold a district judge’s order requiring new plans involving hygiene and social distancing.

The Supreme Court has not yet addressed the Louisiana request.
