

“Friend of court” applications denounce Guantanamo Bay detentions as illegal

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19 January 2004

Last week 85 British MPs and more than 50 peers joined a list of over 10 organisations and individuals that have submitted *amicus curiae* applications to the US Supreme Court over the Bush administration’s illegal detention of Guantanamo Bay prisoners. *Amicus curiae* or “friend of the court” briefs allow interested parties to present information and legal opinion on current hearings.

The Supreme Court is due to begin considering formal arguments by lawyers for the families of 16 Guantanamo Bay prisoners next month. Their appeal challenges the US government’s right to incarcerate the prisoners without charge or access to their families or lawyers. It calls for the detainees to be given civil court trials or be released. While the Supreme Court is not expected to announce its ruling until June, it has to decide whether lower courts were wrong in previous rulings that the United States had no legal jurisdiction over the Guantanamo Bay detainees.

An extraordinary array of individuals and organisations has lodged *amicus* briefs in support of the appeal. They include the Commonwealth Lawyers Association, the Human Rights Institute of the International Bar Association, several former US federal court judges, more than 20 former US diplomats and a broad coalition of national and international non-government organisations.

Legal historians, as well as the National Institute of Military Justice and retired military officers, including the last two Navy judge advocate generals, have made submissions.

Others filing *amicus* briefs include three former US prisoners of war detained by the German and Japanese governments during World War II and who currently represent American POW organisations, and Fred Korematsu, an 84-year-old former shipyard welder.

Korematsu, who was born to a Japanese-American family, challenged the Roosevelt administration’s internment of 120,000 Japanese-Americans during World War II. When the US government rounded up his family

in 1942, he refused to go, was arrested and interned, without any formal hearing.

The legal action by British MPs and House of Lords members is the first time UK legislators have filed an *amicus* brief in a US court. It reflects growing anger within Britain over the detentions and the Blair government’s subservient relationship to Washington. Among those involved are former British cabinet members Robin Cook, Clare Short, Chris Smith and Ross Cranston, as well as Lord Donaldson and four other retired law lords.

The British MPs declare that the detentions are illegal under the US constitution, which derives from the English bill of rights, and the US executive must be “fully accountable” to the courts for its actions. Lord Donaldson told the British Broadcasting Corporation that the Bush administration’s detention of prisoners without charge or recourse to a civil court trial was a “complete negation of the rule of law”.

There are currently 10 British nationals, one resident and a British refugee held in Guantanamo Bay. Nine of the men, including Moazzam Begg whom the Pentagon has selected to face a military tribunal, were not captured by the American army or anti-Taliban forces in Afghanistan during the US-led attack on the impoverished country in 2001. They were kidnapped in other countries and handed over to US authorities.

Three of the British prisoners were seized by local authorities in Africa, interrogated and then handed over to the US military, which transported them to America’s Bagram airbase in Afghanistan and then Guantanamo Bay.

Other nationals kidnapped and sent to Guantanamo Bay include six Algerians, captured in Bosnia and then handed over to US officials in defiance of a Bosnian high court order to release them, a Sudanese assistant cameraman with Al Jazeera television and eight Russians, one of

whom had been imprisoned by the Taliban regime on spying allegations.

Two Australian citizens—28-year-old David Hicks and Mamdouh Habib, 47, are also incarcerated in Guantanamo Bay. Hicks, one of those listed to face a military tribunal, was captured by the Northern Alliance and handed over to the US military in late December 2001. Habib, married and a father of four, was seized by Pakistan security forces on October 5, 2001, before the US-led attack on Afghanistan. He was transferred to an Egyptian prison where he was held incommunicado for five months and then moved to Guantanamo Bay via Afghanistan.

Last week, Louise Christian, who is acting for four of the British prisoners, published a scathing attack on the Blair government in the *Guardian* newspaper. She described Guantanamo Bay as a “legal black hole” and said Prime Minister Tony Blair had participated in a full-scale assault on democratic rights.

She said Blair had “betrayed the most fundamental responsibility that any government assumes—the duty to protect the rule of law”. This went further than a failure to protect the British citizens incarcerated in Guantanamo Bay, she continued, but was “nothing less than collusion in an international experiment in inhumanity,” which was being “repeated and expanded around the world”.

Christian estimated that at least 15,000 people were being held without trial under the justification of the so-called “war on terrorism”. They included over 3,000 detained in Iraq; between 1,000 and 3,000 at the Bagram airbase; and an unknown number jailed in the British territory of Diego Garcia.

Five US military attorneys appointed by the Pentagon to defend Guantanamo Bay prisoners due to face military hearings also lodged an amicus brief last week. It is the first time that serving military lawyers have made this sort of legal submission to America’s highest court.

While the lawyers do not reject the Bush administration’s detention of prisoners in Guantanamo Bay, their brief denounces the planned military hearings as unconstitutional.

Under military tribunal rules, the US president, through his appointees, is effectively prosecutor, judge, jury and potential executioner. The military is allowed to monitor private conversations between defence counsel and their clients. A detainee’s civilian lawyer, even with a high-level security clearance, can be denied access to the evidence against the defendant or barred from attending closed court proceedings.

A seven-member panel of military officers appointed by

the Bush administration runs the tribunal, determining the innocence or guilt of prisoners on the basis of a majority vote. US Deputy Secretary of Defense Paul Wolfowitz, who can change any judge up until the moment of verdict, appoints all prosecutors and defending attorneys.

Even if prisoners are found not guilty of any charges, the US government is not obliged to release and repatriate them. Nor do the prisoners have any right to appeal to an independent civilian court. This violates fundamental precepts of international law, as well as established practice in the US military justice system.

The military defence attorneys’ amicus brief declares: “Unlike earlier wars, the struggle against terrorism is potentially never-ending. The Constitution cannot countenance an open-ended presidential power, with no civilian review whatsoever, to try anyone the president deems subject to a military tribunal, whose rules and judges have been selected by the prosecuting authority itself.”

“Under this monarchical regime,” the attorneys state, “those who fall into the black hole may not contest the jurisdiction, competency or even the constitutionality of the military tribunals....

“The government’s argument in this case has no logical stopping point,” it added, pointing out that because there was “no right to civilian review, the government is free to conduct sham trials and condemn to death those who do nothing more than pray to Allah.... This court has never given the president the ability to proclaim himself the superior or sole expositor of the Constitution in matters of justice”.

While US Defense Department officials have attempted to play down the military lawyers’ brief, claiming they were “not surprised” by it, the submission is unprecedented and indicates growing concern in sections of the military over the long-term legal implications of the Bush administration’s agenda.



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