

US judge rejects claim that Guantánamo detainees have no rights

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In a direct rebuke to the Bush administration, a federal district judge in Washington, DC, has ruled that the US government cannot deny the approximately 600 prisoners held by the United States military at Guantánamo Bay, Cuba, the constitutional right to due process of law. The judge also affirmed that those captured while fighting for the Taliban government of Afghanistan are entitled to prisoner of war status under the Third Geneva Convention.

In a 75-page decision on 11 consolidated habeas corpus petitions on January 31, Senior District Judge Joyce Hens Green shot down the Bush administration's arguments that neither the US Constitution nor any other domestic or international law limits the government's power to imprison non-citizens outside the territorial limits of the United States. The ruling was released in a heavily censored "unclassified" version. (*To read the complete opinion, go to:* <http://host3.uscourts.gov/02-299b.pdf>.)

Green was appointed by Jimmy Carter in 1979 and once served as the chief judge of the United States Foreign Intelligence Surveillance Court responsible for issuing secret search warrants based on alleged national security concerns. Her ruling reflects a deepening concern among elements of the judiciary that the Bush administration's "war on terror" is going too far in its assault on the US Constitution.

Since the September 11 terrorist attacks, the government has asserted it has the power to label anyone an "enemy combatant," a category invented by Bush administration advisors with no precedent in US or international law. The Bush administration claims, according to Green's ruling, that once someone is deemed an "enemy combatant" "it is legal to hold the detainee in custody until the war on terrorism has been declared by the President to have concluded or until the President or his designees have determined that the detainee is no longer a threat to national security."

Green added that the US government has "been unable to inform the Court how long it believes the war on terrorism will last.... Indeed, the government cannot even articulate at this moment how it will determine when the war on terrorism has ended.... At minimum, the government has conceded that the war could last several generations, thereby making it possible, if not likely, that 'enemy combatants' will be subject to terms of life imprisonment at Guantánamo Bay."

Last June, the US Supreme Court ruled in *Rasul v. Bush* that US courts have jurisdiction to decide habeas corpus petitions filed on behalf of Guantánamo prisoners. It rejected the Bush administration's claim that non-citizens held outside the United States have no such right to challenge their confinement. In a companion habeas case brought by a US citizen captured in Afghanistan and once imprisoned at Guantánamo Bay, Yassir Hamdi, the Supreme Court accepted the Bush administration's premise that people can be declared "enemy combatants," but required that the government give them due process to challenge the classification. [*See "The meaning of the US Supreme Court rulings on 'enemy combatants'"*]

At the same time, the Supreme Court ducked a third "enemy combatant" case—brought on behalf of US citizen Jose Padilla after he was detained at Chicago's O'Hare Airport—on the cowardly grounds that it was filed in

the wrong district court. The Padilla habeas petition has been refiled and is presently working its way back through the court system.

Nine days after the Supreme Court decided *Rasul*, Deputy Secretary of State Paul Wolfowitz created the "Combat Status Review Tribunal," or CSRT, supposedly to allow prisoners to challenge their status as "enemy combatants." The procedures outlined were a sham. Prisoners were denied access to attorneys and to "classified evidence" against them, and were presumed to be "enemy combatants" unless they could prove otherwise while locked up incommunicado at Guantánamo [*See "Pentagon plans military tribunals for Guantánamo prisoners"*]. CSRT proceedings over the last six months have resulted in the release of a handful of prisoners.

All the pending habeas petitions filed on behalf of Guantánamo prisoners were transferred to the District of Columbia federal court, where they were assigned to various judges. Under a coordination order, all the judges were asked to refer their cases to Judge Green for a decision on common legal issues. All did so, except Judge Richard J. Leon, a 2002 Bush appointee. Leon's career as a Republican Party hack dates back to 1988, when he served as the minority counsel for Senate Republicans during the Iran-Contra investigations. He issued his own opinion January 21, adopting all the Bush administration's legal positions.

Leon wrote: "Due to their status as aliens outside sovereign United States territory with no connection to the United States, it was well established prior to *Rasul* that the [Guantánamo detainees] possess no cognizable constitutional rights." In other words, outside the territorial borders of the United States, Bush has the unrestrained powers of a tyrant, entitled to kidnap people anywhere in the world and lock them up indefinitely.

The two opinions establish that, contrary to popular belief, many of the Guantánamo prisoners were not captured on Afghanistan battlefields during the 2001 US invasion. Among the habeas petitioners in Green's cases were nine men taken into custody in Gambia, Zambia or Bosnia, and one, Saifullah Paracha, seized last September in Thailand. Of the seven petitioners in Leon's case, six were seized in Bosnia and one, a French citizen, in Pakistan. (The US announced on February 8 that it is releasing all three French citizens imprisoned at Guantánamo).

Green began by summarizing—and rejecting—the Bush administration's main argument: "...although *Rasul* clarified that a detainee has every right to file papers in the Clerk's Office alleging violations of the Constitution, statutes, treaties and other laws, and although the Court has jurisdiction to accept the filing and to consider those papers, the Court must not permit the case to proceed beyond a declaration that no underlying substantive rights exist." Green noted that, on this basis, "detainees subject to criminal prosecution have been bestowed with more rights than detainees whom the military did not intend to prosecute for war crimes."

Last November, US District Judge James Robertson ruled that the procedures for military commissions trying Guantánamo prisoners for alleged war crimes were unlawful in that they failed to comply with the requirements for courts martial set forth in the Uniform Code of Military

Justice. The only prisoner presently facing war crimes charges is Australian David Hicks.

“From the beginning of 2002 through at least June 2004, the substantial majority of detainees not charged with war crimes were not informed of the bases upon which they were detained, were not permitted access to counsel, were not given a formal opportunity to challenge their ‘enemy combatant’ status, and were alleged to be held virtually incommunicado from the outside world,” Green wrote.

After reviewing 100 years of Supreme Court precedent, Green determined that the US government cannot deny anyone in a place under its control the guarantees of the Fifth Amendment, which states, “No person shall ... be deprived of life, liberty, or property, without due process of law.” She then demonstrated how Wolfowitz’s CSRT procedures failed to meet minimum due process standards.

Green began with Wolfowitz’s definition of “enemy combatant” as “an individual who was part of or supporting Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”

Green noted that the government began detaining people as “enemy combatants” in 2001, but did not publish any definition of the term until Wolfowitz’s July 7, 2004 order. She pointed out that this order’s “use of the word ‘includes’” authorized “the indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the US or its allies.” Green cited statements by Bush administration lawyers that they could detain a “little old lady in Switzerland who writes checks to what she thinks is a charity ... but really is a front to finance Al Qaeda activities,” “a person who teaches English to the son of an Al Qaeda member,” or “a journalist who knew the location of Osama Bin Laden but refuses to disclose it to protect her source.”

Under this definition, former basketball superstar center Hakeem Olajuwon of the Houston Rockets could be locked up for the rest of his life. The US government recently alleged that the Olajuwon-founded Islamic Da’Wah Center in Houston gave more than \$60,000 in 2000 and \$20,000 in 2002 to the Islamic African Relief Agency, which Washington shut down for supposedly giving money and other support to Al Qaeda.

Green went on to demonstrate how prisoners were denied any meaningful opportunity to respond to evidence against them at CSRT hearings. She cited the following colloquy between the CSRT panel and Mustafa Ait Idr, who is accused of associating “with a known Al Qaeda operative” while in Bosnia.

Idr: Give me his name.

CSRT Panel Member: I do not know.

Idr: How can I respond to this?

CSRT Panel Member: Did you know of anybody that was a member of Al Qaeda?

Idr: No, no...

CSRT Panel Member: No?

Idr: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnia, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation...

CSRT Panel Member: Mustafa, does that conclude your statement?

Idr: That is it, but I was hoping you had evidence that you can give me. If I was in your place—and I apologize in advance for these words—but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about

that.

[Laughter]

CSRT Panel Member: We had to laugh, but it is okay.

Idr: Why? Because these are accusations that I can’t even answer. I am not able to answer them. You tell me I am from Al Qaeda, but I am not an Al Qaeda. I don’t have any proof to give you except to ask you to catch bin Laden and ask him if I am a part of Al Qaeda. To tell me that I thought, I’ll just tell you that I did not. I don’t have proof regarding this. What should be done is you should get me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.

Green also pointed to the CSRTs’ reliance on evidence obtained through torture, such as the “confession” of Mamdouh Habib. According to Habib’s account, after his arrest in Pakistan he was sent to Egypt, where he was beaten “to the point of unconsciousness.” His captors locked him in a room that gradually filled with water, and forced him to suspend himself by his arms over an electrified cylinder, compelling him to make a Hobson’s choice between suffering pain from fatigue or electric shock.

Corroborating the prisoners’ claims of mistreatment, Green cited an FBI report that prisoners were “chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated [*sic*] on themselves, and had been left there for 18-24 hours or more.” According to the report, an FBI agent saw “a pile of hair” because the prisoner “had apparently been literally pulling his own hair out throughout the night.” Another time, “not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before.”

Citing the Geneva Convention’s ban on the mistreatment of prisoners of war, Green wrote that the Bush administration argues that “notwithstanding the *application* of the Third Geneva Convention to Taliban detainees, the treaty does not *protect* Taliban detainees because the President has declared that no Taliban fighter is a ‘prisoner of war’ as defined by the Convention” (emphasis in original). Green found the Bush administration to be in violation of the Convention, because it does not permit the determination of prisoner of war status “in such a conclusory fashion.”

Article 5 of the Third Geneva Convention requires that captives be treated as prisoners of war “until such time as their status has been determined by a competent tribunal.” According to Green, “although numerous [prisoners] ... were found by the CSRT to have been Taliban fighters, nowhere do the CSRT records for many of those [prisoners] reveal specific findings that they committed some particular act or failed to satisfy some defined prerequisite entitling the [US government] to deprive them of prisoner of war status.”

Judge Green certified her ruling for an immediate appeal to the Court of Appeals for the District of Columbia Circuit, and issued a stay until the appeal is resolved.



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