

US court upholds military trials for Guantánamo prisoners

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On July 15, the United States Court of Appeals for the District of Columbia Circuit ruled in favor of the Bush administration on the use of military commissions to try prisoners held at Guantánamo Bay, Cuba. The unanimous decision of the three-judge appeals court panel overturned a November, 2004 ruling by US District Court Judge James Robertson in the case of *Salim Hahmed Hamdan v. Donald Rumsfeld, et al.*

Judge Robertson's ruling forced the US government to put on hold all cases before its military commissions, also known as military tribunals. The Bush administration welcomed Friday's reversal by the appeals court as opening the way for it to proceed with its military trials of Guantánamo prisoners.

Friday's ruling has profoundly anti-democratic implications. Its basic content is to support the position of the Bush administration that prisoners captured in the so-called "war on terrorism" have none of the protections spelled out in the US Constitution or international treaties such as the Geneva Conventions.

In his November decision, Robertson ruled against the government on three grounds. He agreed with Hamdan's lawyers that Hamdan's rights under the Geneva Conventions had been violated. In particular, the Third Geneva Convention States, "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." In relation to the United States, this would require that Hamdan be tried by a court martial, which provides broader due process rights than the military commissions.

Robertson also ruled against the military commissions on the grounds that the presidential directive establishing them was a violation of the separation of powers, since there was no legislative act that authorized the president to take this step. He further argued that the US Uniform Code of Military Justice requires that all detainees be tried under the same conditions as US soldiers.

The appeals court ruling, written by Judge A. Raymond Randolph, overturned Robertson's decision on all three grounds.

The military commissions were established on the basis of a November 13, 2001 Presidential Military Order. The basic aim was to place prisoners captured in the "war on terrorism" outside the American criminal court system, with all of the due process rights and protections for the accused provided for within that system by the US Constitution and US and international laws. The order expressly stated that prisoners would have no recourse to any US, foreign or international court, with the final decision on the sentence or conviction lying with the president or the secretary of defense.

Prisoners tried in military commissions would be denied certain basic rights, such as the right to appeal and the right to view all evidence used against them. The president reserved for himself broad discretion to determine which prisoners would qualify for military commissions, including those the president had "reason to believe" were members of Al Qaeda or were involved in planning or carrying out acts of terrorism. No

procedure was established whereby a prisoner could challenge a determination that he would be tried by military commission.

This blatantly anti-democratic procedure was part of a broader attack on democratic rights, for which the attacks of September 11, 2001 provided the pretext. The presidential order was issued at the same time as the US government was rounding up thousands of mainly Muslim immigrants, in many cases holding them for weeks on end by using the legal ploy of calling them "material witnesses." Many of these were eventually deported, even though they had no connection to the terrorist attacks.

The assault on constitutional rights was later extended to US citizens, in particular in the cases of Jose Padilla and Yasser Hamdi, who were declared to be "enemy combatants," an invented category that has been used to create a legal limbo in which prisoners can be held indefinitely without charge.

The military commissions are separate from the "Combatant Status Review Tribunals" set up by the government following a June 2004 Supreme Court ruling, which stipulated that prisoners at Guantánamo must have some legal recourse to challenge their status as "enemy combatants." The review tribunals, which make a mockery of due process, have ruled that the vast majority of people held at the prison camp are, in fact, enemy combatants.

Hamdan, who has acknowledged that he was once a driver for Osama bin Laden, was captured in Afghanistan in November 2001. He has, however, denied being a member of Al Qaeda, and has said he did not take part in any terrorist attack.

In July 2003, he became one of a handful of prisoners who have so far been designated to stand trial before a military commission. In July 2004, he was formally charged with various offenses, including terrorism, attacking civilians and murder.

The appeals court ruling supports the administration's position on every basic point. Attorneys for Hamdan said they plan to appeal the decision to the Supreme Court.

All three judges on the appeals court panel are Republican appointees. Judge Stephen Williams was appointed by Ronald Reagan; Judge Raymond Randolph by George H.W. Bush, and Judge John Roberts by the current president.

In arguing against Hamdan's citation of the Geneva Conventions, the court ruling states that because treaties are compacts between nations, any violations of the treaties must be the subject of international negotiations and not individual lawsuits in US courts. It cites a comment in the Restatement (Third) of the Foreign Relations Law of the United States (1987), which says, "International agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts..." Thus, the ruling argues, even if Hamdan's rights were violated by his trial before a military commission, the federal courts have no jurisdiction to redress the matter.

The court, however, conveniently ignored the clause immediately

following the above quote, which reads, “but there are exceptions with respect to both rights and remedies. Whether an international agreement provides a right or requires that remedy be made available to a private person is a matter of interpretation of the agreement.” The basic content of the Geneva Conventions is intended to do precisely this—provide rights to individuals captured in warfare.

The quote cited by the appeals court panel, moreover, is merely a comment, and is contradicted by the basic text of the law, which states the precise opposite. One of its main provisions is that “cases arising under international law or international agreements of the United States are within the Judicial Power of the United States and, subject to Constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of the federal courts.”

As Judge Robertson noted in his decision last November, “Treaties made under the authority of the United States are the supreme law of the land... United States courts are bound to give effect to international law and to international agreements of the United States unless such agreements are ‘non-self-executing.’” A treaty is “non-self-executing” only under definite conditions, which the Geneva Conventions do not satisfy. Therefore, Robertson ruled that Hamdan could seek redress in US courts for any of his Geneva Convention rights that had been violated.

Francis Boyle, a leading American expert on international law and professor at the University of Illinois, Urbana-Champaign, called the appeals court’s reasoning on this point “ridiculous.” He noted that in the 1950s, the Department of Justice took the position that the Geneva Conventions are self-executing. “What good is a right if it cannot be protected in the courts?” Boyle asked. The decision is “part of an attempt by right-wing judges associated with the Federalist Society to gut and destroy all international treaties,” Boyle told the *World Socialist Web Site*.

The appeals court further argued that even if US courts could enforce the Geneva Conventions, Hamdan’s rights were not violated, since he does not fall within the purview of the Conventions. The Conventions stipulate rights for two different categories of prisoners: prisoners of war (POWs), who are captured during a conflict involving two states that are signatories to the treaty, and other prisoners captured in conflicts “not of an international character.” Those in the latter group are guaranteed less expansive rights than POWs, as detailed in Common Article 3 of the Third Geneva Convention.

According to the court’s argument, Hamdan is not a POW because he is a member of Al Qaeda, which is not a state and is not a signatory to the Geneva Conventions. The court, accepting uncritically the position of the Bush administration, assumes that Hamdan is a member of Al Qaeda. It offers no proof for this assertion.

Hamdan himself has denied that he is a member of the organization. The Geneva Conventions state that a prisoner captured in war must be guaranteed the rights of a POW “until such time as their status has been determined by a competent tribunal.” Hamdan has never appeared before such a tribunal. Therefore, under the terms of the Geneva Conventions, the refusal of the US to accord him POW status is arbitrary and illegal.

The court’s response to this plain fact is a crude example of sophistry and circular argumentation. “We believe,” writes Randolph, “the military commission is such a tribunal.” But Hamdan is subject to trial before a military commission only because he is, supposedly, not a POW. How then, can the military tribunal, whose jurisdiction over Hamdan is based on the premise that Hamdan is not a POW, be a “competent tribunal” for determining whether or not Hamdan is a POW?

This legally and intellectually absurd position underscores the fact that the court’s ruling is based not on an honest and serious consideration of the law, but rather on a political agenda—and a deeply anti-democratic one.

Regarding Hamdan’s rights under Common Article 3, the court declared that since the conflict with Al Qaeda is of an international character, he does not fall under this category either. One of the judges concurring with

Randolph on the decision as a whole nevertheless felt compelled to object to this reasoning. “The words ‘not of an international character,’” Judge Williams wrote, “are sensibly understood to refer to a conflict between a signatory nation and a non-state actor.” Even assuming that Hamdan is a member of Al Qaeda, therefore, he would fall under this category and would be guaranteed the rights of Common Article 3.

Finally, the appeals court rejected the argument that the decision to establish military commissions was not authorized by Congress and therefore was a violation of the separation of powers. Congress did grant the president authority to establish military commissions in the joint resolution passed following the attacks of September 11, 2001, the court argued.

This bipartisan resolution gave a broad mandate to the president to take action against “those nations, organizations, or persons” that he determines “planned, authorized, committed, or aided” the 9/11 attacks. Randolph wrote that this implies an authorization to try and punish enemy combatants.

However, there was nothing in the resolution about military commissions or military tribunals. This court’s reasoning on this issue could be extended to justify virtually any action taken by the president in the name of prosecuting a global “war on terrorism” of indeterminate duration.

The court’s decision is indicative of a judicial system increasingly dominated by partisans of the most right-wing sections of the US political establishment. Neal Kaytal, a law professor at Georgetown University who is one of the lawyers for Hamad, said in a statement that the ruling “is contrary to 200 years of constitutional law.” He added that the ruling “places absolute trust in the president, unchecked by the Constitution, statutes of Congress and longstanding treaties ratified by the Senate of the United States.”

Francis Boyle told the WWSW that the judges who made the decision “run a risk of prosecution for aiding and abetting war crimes.” He added, “This happened at the Justices Case at Nuremberg, following the Second World War. These are kangaroo courts in Guantánamo... Depriving people of their POW status is a grave breach of the Geneva Conventions, and the War Crimes Act of 1996 makes it a crime to violate the Geneva Conventions and other laws of war.”



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