

Military judges dismiss war crimes charges against Guantánamo prisoners

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United States military judges in separate cases threw out the war crimes charges against two Guantánamo prisoners on Monday. They did so on the grounds that the military commissions, as defined by the Military Commissions Act of 2006, are empowered to try “unlawful” enemy combatants, but the military review tribunals at Guantánamo had certified only that the two defendants were “enemy combatants.”

The decisions represent another setback for the Bush administration’s attempts to establish a system of drumhead military courts to railroad accused terrorists and sentence them to draconian penalties, including execution. All 380 detainees at Guantánamo have received the same “enemy combatant” designation after review by Combatant Status Review Tribunals (CSRTs) at the prison camp. As a result, Monday’s rulings could affect all of the detainees and hold up for some time the plans of the Bush administration to try about 80 of them before military commissions.

The Bush administration quickly denounced the rulings and said they would not seriously impede the military commissions system at Guantánamo.

Despite the judges’ rulings, the two prisoners—who have been at Guantánamo for more than five years—will continue to be jailed there in legal limbo, outside the provisions of the Geneva Conventions for the protection of prisoners of war and without access to United States courts, where they could seek habeas corpus to challenge the legality of their imprisonment.

Monday’s rulings highlight the lawless and barbaric character of the US military’s Guantánamo concentration camp and the illegal methods employed by the Bush administration in its never-ending “war on terror.” For years, Bush administration lawyers have maneuvered to create a legal black hole for alleged terrorists by labeling them “enemy combatants”—a newly coined category with no precedent in domestic or international law—solely to

place them beyond the reach of civilian courts, with their panoply of constitutional rights and due process protections, as well as the Geneva Conventions.

One of the cases involved charges against Salim Ahmed Hamdan, a Yemeni accused of once having been a driver for Osama Bin Laden. He was the petitioner in the case last June when the Supreme Court struck down the Bush administration’s attempt to establish military commissions without congressional authorization, ruling that the Geneva Conventions applied to Guantánamo prisoners. (See “Supreme Court rules against Bush administration’s military commissions”).

In response to the *Hamdan* decision, Congress passed the Military Commissions Act of 2006, sanctioning military tribunals to try “alien unlawful enemy combatants” for supposed war crimes, while cutting off their constitutional right to seek habeas corpus review in US courts.

This reactionary legislation, signed into law by Bush on October 17, 2006—the eve of the Republicans’ mid-term congressional election debacle—was enacted only through the complicity of the Democratic Party, which refused to muster the 40 votes necessary in the Senate to filibuster and block its passage. In all, 12 Democratic senators and 34 Democratic members of the House of Representatives voted for the law.

The military prosecutors have announced that they intend to appeal Monday’s dismissals. But underscoring the concocted and slapdash nature of the entire military commission program, the court designated to hear such appeals—known as the Court of Military Commissions Review—does not yet even exist.

In the only other proceeding before a military commission to occur so far, David Hicks in March accepted a plea bargain allowing him to return to his native Australia to serve a nine-month sentence. He is scheduled for release from Adelaide’s Yatala prison on

December 29, and his representatives have indicated that he does not intend to take any action based on this week's rulings.

In Monday's first ruling, Peter E. Brownback III, a United States Army colonel, issued a written order rejecting the charges against Omar Ahmed Khadr, Guantánamo's only Canadian detainee. Khadr was only 15 when he was captured by US forces in Afghanistan after the battlefield death of his father. Khadr was scheduled to be arraigned on charges that he committed a war crime when he threw a grenade at US soldiers during a firefight.

Hamdan's charges were thrown out later that day by Navy Captain Keith Allred.

The reasoning of both military judges was the same. The jurisdiction of the military commissions extends only to alleged offenses "committed by an alien unlawful enemy combatant," and excludes "jurisdiction over lawful enemy combatants." The Military Commissions Act provides that a finding by a Combatant Status Review Tribunal that a person is an "unlawful enemy combatant" is dispositive for purposes of jurisdiction by military commissions."

CSRTs, which have been ongoing in Guantánamo for years, provide for no such finding. They have only the option of calling a prisoner an "enemy combatant" or "no longer an enemy combatant."

Although Major Beth Kubala, speaking for the Pentagon's Office of Military Commissions, called the decisions "a technical matter," the rulings could derail the commissions altogether. In effect, the Bush administration has become entangled in its own pseudo-legal maneuvers.

The Geneva Conventions provide that captured belligerents can be stripped of their rights as prisoners of war and tried for war crimes only "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people." Because the CSRTs do not allow the accused legal representation or the right to participate fully in the proceedings, they cannot comply with the Geneva Conventions' standard and therefore with international law.

Moreover, the standard "enemy combatant" is amorphous and covers anyone accused of resisting US military operations anywhere in the world, regardless of whether the conduct was justified under the laws of war.

The authors of the Military Commissions Act of 2006 undoubtedly stipulated that the commissions could try only "unlawful" enemy combatants in order to give the

appearance that the law was not an outright rejection of the Geneva Conventions and other international and national laws. However, they failed to take into account the legal mandate and procedures of the already existing CSRTs.

Monday's rulings reflect opposition within sections of the US military to the Bush administration's flouting of the Geneva Conventions and use of illegal methods such as torture. There are concerns over the impact of such policies in undermining the authority and image of the US internationally, as well as fears that American troops, if captured in battle, will forfeit the protections of the Geneva Conventions and face similarly illegal and barbaric treatment as that meted out by the US.

Even Secretary of Defense Robert Gates has publicly called for the closure of Guantánamo and the trial of its detainees in the US. He has, according to press reports, been opposed within the Bush administration by the faction headed by Vice President Dick Cheney.

The chief military defense lawyer at Guantánamo, Col. Dwight Sullivan of the Marines, said of Monday's decisions, "Once again there's a fundamental impediment to the military commission proceeding, once again the military commission system has demonstrated that it's a failure. Once again we see a demonstration that we can't just set up another system of justice and call it justice."

The human cost of the Guantánamo program is particularly evident in the case of Khadr. Held in extreme isolation and subjected to extended interrogation and torture, Khadr was denied contact with his mother for four years. His lawyers claim he is "wasting away" in a basement cell. Many reporters covering Monday's hearings noted that he looked unhealthy and did not seem to be responding to the proceedings in a mentally appropriate manner, staring blankly at his image on a television monitor rather than watching the proceedings.



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