

US military judge orders witness names withheld from Guantánamo detainee

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The identity of witnesses who will testify against a Guantánamo detainee next year will be kept secret, a military judge ordered October 15. The decision, which was not disclosed to the public at the time it was issued, gives further license for the illegal detentions and drumhead military courts at the prison.

The judge, Colonel Peter Brownback, issued the blanket order prohibiting disclosure of all witnesses in the upcoming trial of Omar Khadr, a Canadian, who is likely to be the first detainee to face prosecution by a military commission. His trial could go forward as early as May 2008.

Khadr's lawyers, who were given witness information, were ordered not to reveal names to their client or anyone else. The ruling makes it virtually impossible for the defense to either establish the veracity of claims made against Khadr or argue against them.

Documents obtained by the *New York Times* and first reported on December 1 make it clear that military prosecutors sought the measure as a precedent for future military commissions. The order stipulates that the prosecution may either dispense with or extend the secrecy protections three weeks before trial. According to the *Times*, prosecutors have suggested they may pursue an extension of secrecy over all information identifying witnesses in any way.

Invoking the standard official claim of an omnipresent security threat, prosecutor Major Jeffrey Groharing wrote to Brownback, "It is conceivable, if not likely, that Al Qaeda members or sympathizers could attempt to target witnesses." Witnesses in Khadr's upcoming trial may include US military personnel who were present during his capture in 2002.

Khadr's military defense lawyer, Navy Lieutenant Commander William Kuebler, told the *Times* that, with the decision, the military was depriving his client of an open trial and treating him as though he were already

convicted. "Instead of a presumption of innocence and of a public trial," Kuebler said, "we start with a presumption of guilt and of a secret trial."

Nevertheless, Brigadier General Thomas W. Hartmann, a senior official in the Pentagon's Office of Military Commissions, insisted the commission system was open to public scrutiny. "But there are certain things that simply must be protected," he told the *Times*. "It is so fundamental that we're in this global war on terror. We need to protect our soldiers, sailors, airmen and marines and there's nothing nefarious about it."

Similarly, Pentagon spokesman Jeffrey Gordon told the Associated Press Saturday, "Military Commissions have been designed to be open and transparent while at the same time protecting national security and the safety of our military men and women."

Like every attack on democratic rights by the Bush administration, the use of secret testimony is justified by the so-called "war on terror" and national security. By this reasoning, there is to limit to the arbitrary powers of the executive branch and military since the US is said to be embroiled in a never-ending war against an amorphous enemy.

"It is '1984,'" Joshua Dratel, a lawyer for another detainee, told the *Times*. "No system in the United States would operate this way."

Not only is the intent of the ruling aimed at instituting anti-democratic and secret measures, but the process of the hearing itself was conducted in such a way as to keep the process secret. Arguments from the defense and prosecution were submitted to Brownback through e-mail, and the 700-page ruling was not made available to the public or the press for more than a month and a half, despite repeated complaints from the media.

The *Times* quoted an October 11 message from Kuebler to Brownback in which he expressed concern over the credibility of the process. "The manner in which this is

being dealt with (i.e., off the record, via e-mail),” he wrote, “creates an added level of difficulty by making it appear that the government is trying to keep the secrecy of the proceedings a secret itself.”

Khadr was 15 years old when he was captured in Afghanistan after allegedly throwing a grenade at US soldiers during a firefight at an Al Qaeda compound. For five years he has been held on suspicion of being a trained Al Qaeda operative.

There is nothing legal in Khadr’s detention. He was deemed an “enemy combatant” in spite of international protections against the prosecution of child soldiers, as well as laws distinguishing between wartime battle and war crimes. In the five years of his detention, Khadr has been brutally beaten and abused by his captors, has only spoken with his mother once, and has been denied access to civilian lawyers of his choosing.

Proceedings against him were halted in 2006 when the Supreme Court rejected Bush’s military commissions as unconstitutional. However, under the Military Commissions Act, passed by Congress in September 2006, Khadr was re-charged with murder, attempted murder, spying, conspiracy, and providing material support for terrorism.

The 2006 law is a flagrant violation of the US Constitution, stripping Guantánamo prisoners of their right of habeas corpus—i.e., the right to contest their incarceration in a civilian court. It was passed because Democratic leaders in Congress refused to block it by means of a Senate filibuster.

Last June, the military judge presiding over Khadr’s Combatant Status Review Tribunal (CSRT) dismissed all charges against Khadr as improper. At that time, the State Department announced that the US would not have to release him in spite of the dismissal. In September, the ruling was reversed and war crimes charges were again reinstated.

Khadr filed an appeal with the Washington, D.C., federal circuit court in October after the military court refused to consider an appeal. However, under the Military Commissions Act, no civilian court has jurisdiction to consider an appeal in a war crimes case until the military issues its final ruling, and the D.C. court rejected his appeal without consideration.

The witness secrecy ruling is yet one more example of the unconstitutional character of the Guantánamo prison and the entire array of repressive measures enacted in the name of the “war on terror.” The implications of secret evidence, unnamed witnesses, and non-disclosed rulings

go far beyond the fate of individual detainees. The fundamental democratic rights of the American people are the ultimate target of such precedents.

The right of detainees to fair hearings is at stake in arguments scheduled Wednesday before the Supreme Court, where a petition from Guantánamo detainees for federal hearings will be heard. The Bush administration is adamantly opposing any such move, arguing that the president, by virtue of his wartime powers as commander-in-chief, has the unlimited right to declare any individual an “enemy combatant” and order him or her imprisoned by the military without any legal recourse.

Lawyers representing the detainees note that the military CSRTs are drumhead proceedings and are not a substitute for legal hearings in civilian court. “CSRTs exist just to confirm the desired result,” Jonathan Hafetz, a lawyer representing one of the detainees petitioning the Supreme Court, told Bloomberg News on December 3. “It’s a totally loaded, rigged process.”

In its brief on the Supreme Court review, the Justice Department reiterated the Bush administration’s insistence that habeas corpus rights for foreign prisoners held outside the country did not apply. “The detainees now enjoy greater procedural protections and statutory rights to challenge their wartime detentions than any other captured enemy combatants in the history of war,” the brief declares. “Yet they claim an entitlement to more.”

The denial of habeas corpus has been carried out with the full collaboration of the Democrats. In 2004 and 2006, the Supreme Court overturned the military commissions set up by executive order, and ruled that detainees had a legal right to a review of their imprisonment in accordance with the due process provisions of the Constitution.

Rather than drafting protections against executive branch abuses, Congress, with the complicity of the Democrats, rubber-stamped Bush’s drumhead courts and passed a law prohibiting the courts from hearing complaints from Guantánamo prisoners.



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