

US appellate court rejects British victims' suit for Guantánamo torture damages

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On January 11, the United States Court of Appeals for the District of Columbia Circuit dismissed a case brought by four British citizens seeking money damages to compensate them for having been tortured by the US government. The four individuals were held for more than two years at the United States Naval Base in Guantánamo Bay, Cuba.

With an outlandish display of convoluted and specious logic, the three-judge panel issued a precedent establishing that non-US citizens outside US national borders cannot seek any redress in any US court for torture or other deprivations of constitutional and statutory rights inflicted by US government officials.

Ironically, the decision was issued on the sixth anniversary of the Guantánamo Bay's opening, which was marked by protests and demonstrations around the world. About 200 demonstrators, many wearing orange jumpsuits, marched from the US Capitol to the Supreme Court building in Washington, DC. Others demonstrations took place in London, Sydney, Rome, Athens and Madrid. Terry Hicks, the father of freed Australian Guantánamo prisoner David Hicks, participated in a protest in the Australian city of Adelaide.

Incarcerating as many as 800 prisoners at its peak, the Guantánamo prison population today is reportedly around 275.

To reach its politically pre-determined result—ratifying the Bush administration's creation of a legal "black hole" beyond both domestic and international law—the three-judge panel concluded that Guantánamo Bay prisoners: (1) cannot sue under the Alien Tort Statute (ATS) or the Geneva Conventions because their torturers acted within the scope of their federal employment; (2) have no rights under the US Constitution because they are neither US citizens nor within US territorial jurisdiction; and (3) are not "persons" protected by the Religious Freedom Restoration Act (RFRA).

Shafiq Rasul, Asif Iqbal, Ruhel Ahmed and Jamal Al-Harith were captured in Afghanistan by General Rashid Dostum, a Northern Alliance warlord, on November 28, 2001. They were turned over to the US military and held in Guantánamo until their release in March 2004. (See "Britain: Freed Guantánamo Bay detainees detail beatings and abuse")

The following October, attorneys from the Center for Constitutional Rights (CCR) in New York City filed a

complaint for damages in federal district court, alleging that then secretary of defense Donald Rumsfeld and Richard Myers, chairman of the Joint Chiefs of Staff, along with several high ranking military officers, expressly approved and promulgated policies to abuse and torture Guantánamo Bay prisoners.

The CCR complaint sets out in detail the "cruel, inhuman and degrading" conditions to which the plaintiffs were subjected. They were placed in "wire cages of about 2 meters by 2 meters" exposed to the elements, including scorching sunlight, and often were removed only once a week for a two-minute shower and again once a week for "five minutes recreation while their hands remained chained."

Throughout their ordeal, the prisoners were repeatedly "beaten, shackled in painful stress positions, threatened by dogs, subjected to extreme temperatures and deprived of adequate sleep, food, sanitation, medical care and communication," while being subjected to repeated, lengthy and coercive interrogations.

In addition to such physical and mental abuse, the plaintiffs allege "they were harassed while practicing their religion, including forced shaving of their beards, banning or interrupting their prayers, denying them copies of the Koran and prayer mats and throwing a copy of the Koran in a toilet bucket."

The government and military defendants filed a motion to dismiss the complaint. Under the Federal Rules of Civil Procedure, the reviewing court must accept all the factual allegations of the complaint as true and deny the motion to dismiss unless established law absolutely precludes recovery under any reasonable interpretation of the facts. In March 2005 the trial judge dismissed parts of the case, but allowed the claim that the defendants interfered with the prisoners' religious freedom to go forward. Both sides appealed. Last Friday's decision followed almost three years later.

Circuit Judge Karen LeCraft Henderson—appointed by George H.W. Bush to fill the seat vacated by Kenneth W. Starr in 1990—issued a 43-page opinion disposing of each claim on the most reactionary grounds possible.

Henderson was joined by Judge A. Raymond Randolph, also appointed by the first president Bush. Randolph has previously authored two noxious decisions upholding the Bush

administration's assault on democratic rights. In *Al Odah v. United States*, he ruled that Guantánamo prisoners have no habeas corpus rights (See "US appeals court upholds denial of habeas corpus rights to Guantánamo detainees"), and in *Hamdan v. Rumsfeld* he ruled that Guantánamo prisoners can be tried before military commissions that do not comply with the Uniform Code of Military Justice (See "US court upholds military trials for Guantánamo prisoners").

The Supreme Court later reversed both of these earlier decisions. Because of subsequent Congressional actions, however, the issues presented by them remain unresolved.

Henderson wrote that the four plaintiffs could not sue the defendants under the Alien Tort Statute or the Geneva Conventions because each defendant was acting "within the scope of his employment."

Henderson made the extraordinary declaration, "Torture is a foreseeable consequence of the military's detention of suspected enemy combatants." On this basis, she rejected the plaintiffs' argument that the immunity for federal employees acting within the scope of employment should not apply because the defendants torture policy "was never authorized," was "seriously criminal," "has long [been] condemned" by the United States and was a "substantial departure from the government's 'normal method' of detaining and interrogating persons of interest."

Henderson then dismissed the constitutional claims based on denial of due process and cruel and unusual punishment by claiming, "Guantánamo detainees lack constitutional rights because they are aliens without property or presence in the United States."

The argument is absurd as the US government exercises complete jurisdiction over the military base at Guantánamo, which it occupies pursuant to a perpetual \$1 lease extracted from the Cuban government in 1903. The opinion also defies recent Supreme Court precedent directly on point. Even if this were not the case, the Bill of Rights to the US Constitution constitutes a restriction on US governmental power, not a grant of rights or special privileges limited to US citizens or people within the national borders.

The appellate court's position means that under the Constitution anyone in the executive branch of the US government can go anywhere outside the strict territorial boundaries of the United States itself, capture anyone not a US citizen, and then subject him or her to extreme physical, mental and emotional abuse without any concern for liability in any US court arising from violations of US or international law.

Finally, the appellate court rejected the plaintiffs' claim that the defendants "inhibited and constrained religiously motivated conduct central to Plaintiffs' religious beliefs," when they "imposed a substantial burden on Plaintiffs' abilities to exercise or express their religious beliefs" and "regularly and systematically engaged in practices specifically aimed at disrupting Plaintiffs' religious practices."

In the most patently offensive part of her opinion, Henderson wrote that the Religious Freedom Restoration Act, which provides that the "Government shall not substantially burden a person's exercise of religion," cannot be used by the British plaintiffs tortured at Guantánamo Bay because "persons"—as used in the statute—do not include "aliens ... located outside sovereign United States territory."

This argument was too much for the third member of the panel, Judge Janice Rogers Brown, a right-wing judge appointed by George W. Bush, who enjoys a well-deserved reputation as a judicial loose cannon. Brown attacked the majority's reasoning, but not its result. "There is little mystery that a 'person' is an individual human being ... as distinguished from an animal or thing," Rogers wrote, adding that the opinion "leaves us with the unfortunate and quite dubious distinction of being the only court to declare those held at Guantánamo are not 'person[s].' This is a most regrettable holding in a case where plaintiffs have alleged high-level US government officials treated them as less than human."

Eric Lewis, a law partner in Washington, DC's Baach Robinson & Lewis, who argued the appeal for the plaintiffs, called it "an awful day for the rule of law and common decency when a court finds that torture is all in a day's work for the Secretary of Defense and senior generals.... It is an awful day for our tradition of respect for religious freedom and for our moral standing in the world when a court finds that these detainees are not 'persons' whose rights to observe their religion with dignity and without harassment are worthy of protection."

The Center for Constitutional Rights announced that it will be filing a petition for review in the Supreme Court.



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