US appeals court emphatically overturns military tribunal ruling

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A federal appeals court in Washington, DC has overturned a US military tribunal ruling that a Chinese citizen held at Guantánamo Bay, Cuba is an "enemy combatant" and, in the process, heaped scorn on government claims and purported evidence. The opinion was issued June 20, but an unclassified version only became available Monday.

The ruling by a three-member panel of the US Court of Appeals for the District of Columbia is the latest in a series of judicial setbacks to the Bush administration over the fate of detainees seized in the so-called "global war on terror."

On June 12, the US Supreme Court ruled by a 5-4 margin that Guantánamo prisoners could file habeas corpus petitions challenging the legality of their confinement. The combined impact of the two rulings may be to call into question the ability of the government to proceed with its kangaroo court tribunals.

The latest decision, the first review of the military tribunal process, involves the fate of Huzaifa Parhat, a Muslim and a member of the Uighur minority in western China. The Uighurs complain of harassment and mistreatment by the Beijing regime, which accuses them, in turn, of "separatism" and "splittism."

According to Parhat's testimony, he fled China in May 2001 because of the central government's "oppression" and arrived at a Uighur camp in Afghanistan in June. In mid-October 2001, following the attack on the World Trade Center and the US-led invasion of Afghanistan, American aerial strikes destroyed the camp where Parhat was living. He and 17 other unarmed Uighurs eventually crossed over into Pakistan. Local residents gave them food and shelter, but turned them over to Pakistani officials, reportedly for a bounty, who handed them off to the US military. Parhat and most of the other Uighurs have been incarcerated in Guantánamo since June 2002.

Apparently, even US officials realized early on that Parhat was guilty of nothing except being in the wrong country at the wrong time. In 2003, a military officer of the Defense Department's Criminal Investigation Task Force, charged with reviewing the case, recommended Parhat's release under a conditional release agreement.

In December 2004, the Uighur detainee underwent his Combatant Status Review Tribunal (CSRT). These tribunals were set up to determine whether each detainee at Guantánamo met the criteria to be designated as an "enemy combatant," the category invented by the Bush administration to evade the Geneva Conventions on the treatment of prisoners of war.

An enemy combatant is defined by the military as "an individual who was part of or supporting Taliban or al Qaida 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."

Parhat's CSRT, like the others held for Guantánamo detainees, was a travesty of justice. The proceedings consisted of an unclassified session, at which the detainee was present and answered questions under oath, and a classified session, at which he was not present and during which the tribunal considered classified documents not made available to him.

Despite Parhat's denial that he belonged to Al Qaeda or the Taliban, or that he considered himself an enemy of the US, and his assertion that he had gone to Afghanistan to pursue resistance against China, the tribunal determined that he was an enemy combatant.

It rendered this decision based on government claims that Parhat belonged to a Uighur separatist movement known as the East Turkistan Islamic Movement (ETIM), and that the latter was "associated" with Al Qaeda and the Taliban. US officials argued that his membership in this group was proven by the fact that the Uighur camp at which he stayed in Afghanistan was run by an ETIM leader.

The CSRT was forced to acknowledge that "no source document evidence was introduced to indicate ... that the Detainee had actually joined ETIM, or that he himself had personally committed any hostile acts against the United States or its coalition partners."

The claim that the ETIM was affiliated with Al Qaeda and the Taliban and engaged in hostile acts against US forces was included in the classified documents, the ones that Parhat was not permitted to view. He has asserted that the source of the unseen documents was the Chinese government. (In 2002, at the time of his incarceration in Guantánamo, the Bush administration was attempting to curry favor with Beijing as part of the effort to build support for the coming invasion of Iraq.)

Despite its finding that Parhat was an enemy combatant, and theoretically a deadly foe of "the United States and its coalition partners," the December 2004 tribunal declared that "this Detainee does present an attractive candidate for release"! One of the government's difficulties apparently has been coming up with a country that would take Parhat and the other Uighurs, since officials determined that they would be abused or imprisoned if they were returned to China.

When the appeals court panel, which included two Republicans, among them the ultra-right David Sentelle, turned to the issue of the government's alleged evidence against Parhat, it could barely contain its derision.

The government, as noted above, provided no proof that Parhat was a member of the ETIM, simply alleging that the Uighur camp was operated by one of its leaders, Hassan Maksum. Parhat stated that he received training on a Kalashnikov rifle and pistol at the camp, performed guard duty and "helped to build a house."

As for the Defense Department's assertion that the ETIM was "associated" with Al Qaeda or the Taliban, Parhat's lawyers stressed that the organization had nothing to do with the September 11 attacks or harbored any organization that did.

The government case was based on four classified intelligence documents, a description of which was redacted from the publicly issued ruling. An additional source was an interview with one Uighur detainee, who claimed that the camp in question was provided by the Taliban so that the Chinese Muslim minority could fight Beijing.

The claim that the ETIM was engaged in hostilities against the US was

the flimsiest of all the government's allegations.

Garland for the appeals court noted that the intelligence documents repeatedly describe activities undertaken by the ETIM and its supposed relationship to Al Qaeda and the Taliban "as having 'reportedly' occurred, as being 'said to' or 'reported to' have happened, and as things that 'may' be true or are 'suspected of' having taken place. But in virtually every instance, the documents do not say who 'reported' or 'said' or 'suspected' those things. Nor do they provide any of the underlying reporting upon which the documents' bottom-line assertions are founded, nor any assessment of the reliability of that reporting. Because of those omissions, the Tribunal could not and this court cannot assess the reliability of the assertions in the documents. And because of this deficiency, those bare assertions cannot sustain the determination that Parhat is an enemy combatant."

The court notes that in its decision the CSRT was obliged to use the same sort of tortured, unconvincing language as the documents. For example, the military judges wrote: "The Tribunal found the Detainee to be an enemy combatant because of his *apparent* ETIM affiliation," and the "Detainee is considered to be an enemy combatant because he is *said to be* affiliated with the ETIM," etc.

On the basis of such unproven claims, Parhat has remained in detention for six years and faced (and perhaps still faces) years of imprisonment. A former fruit peddler, Parhat sent his wife a message from Guantánamo that she should remarry because his imprisonment in US hands "was like already being dead" (*New York Times*). He spends 22 hours a day in a six-by-nine foot isolation cell. His lawyers could not tell him about the court of appeals ruling because "he's sitting in solitary confinement," explained one of his defense team.

The court of appeals determined that the CSRT could make no legitimate ruling about Parhat's supposed enemy combatant status because of the unreliability of the evidence.

Trying to muster some sort of a case, Bush administration lawyers had argued that the claims about Parhat must be true because they appeared in several places. The court ridiculed this reasoning: "First, the government suggests that several of the assertions in the intelligence documents are reliable because they are made in at least three different documents. We are not persuaded. Lewis Carroll notwithstanding, the fact that the government has 'said it thrice' does not make an allegation true."

(This is a reference to Lewis Carroll's marvelous 1876 poem, about a disastrous expedition in pursuit of a nonexistent creature, *The Hunting of the Snark*. The leader of the expedition, The Bellman, announces in the opening lines, "I have said it thrice: What I tell you three times is true.")

The court continues: "In fact, we have no basis for concluding that there are independent sources for the documents' thrice-made assertions. To the contrary ... many of those assertions are made in identical language, suggesting that later documents may merely be citing earlier ones, and hence that all may ultimately derive from a single source."

The government's second argument is as priceless as the first: the claims about Parhat should be believed because officials wouldn't lie about such things.

The court explains: "[T]he government insists that the statements made in the documents are reliable because the State and Defense Departments would not have put them in intelligence documents were that not the case. This comes perilously close to suggesting that whatever the government says must be treated as true, thus rendering superfluous both the role of the Tribunal and the role that Congress assigned to this court. We do not in fact know that the departments regard the statements in those documents as reliable; the repeated insertion of qualifiers indicating that events are 'reported' or 'said' or 'suspected' to have occurred suggests at least some skepticism."

The court, explains Garland, rejects the government's contention that it can "simply assert as facts the elements required to prove that a detainee falls within the definition of enemy combatant. To do otherwise would require the courts to rubber-stamp the government's charges, in contravention of our understanding that Congress intended the court 'to engage in *meaningful* review of the record.'"

Accordingly, the appeals court panel directed the government to release Parhat, transfer him or convene a new CSRT to consider evidence in a more serious manner. He will not be released, of course, but there is no indication yet what the government's next move will be after this legal fiasco.

The court decision is intended to provide guidance to federal district judges, notes the Associated Press (AP), who are about to begin reviewing dozens of such cases now that the Supreme Court has ruled detainees can challenge their status in federal court.

Parhat's lawyer, Susan Baker Manning, told the AP, "The big issue now is, can any CSRT decision survive this kind of scrutiny?"

In a related development, Philip Alston, the United Nations Human Rights Council special rapporteur on extrajudicial, summary or arbitrary executions, issued a statement July 1 denouncing the trials under the Military Commissions Act (MCA) of six "alien unlawful enemy combatants" at Guantánamo Bay in connection with the September 11 attacks.

Alston said that the proposed trials "utterly fail to meet the basic due process standards required for a fair trial under international humanitarian and human rights law. Access to counsel has been severely limited. Second and third hand hearsay evidence can be used. The prosecution can withhold evidence from the accused. The opportunity for the defense to obtain witnesses is restrictive. It has been publicly stated that at least one of those facing trial was subjected to 'waterboarding,' and other forms of coercion during interrogations have been widely acknowledged.

"Yet the MCA does not prohibit all coerced statements from being admitted into evidence. The commissions are not sufficiently independent from the executive. This incomplete list of fundamental due process flaws suffices to demonstrate that the current procedures constitute a gross violation of the right to a fair trial. It would violate international law to execute someone following this kind of proceeding."

Alston also criticized the Defense Department for refusing to make public any information about the causes or circumstances of five reported deaths of detainees at Guantánamo in 2006-07.

On June 30, three Iraqis and a Jordanian filed federal lawsuits claiming they were tortured by US defense contractors while detained in Abu Ghraib prison in Iraq in 2003 and 2004. The suits allege that the victims were subjected to forced nudity, electric shocks, mock execution and other cruel treatment. Lead attorney Susan L. Burke told the media, "These innocent men were senselessly tortured by US companies that profited from their misery."

The contractors named as defendants are CACI International of Arlington, Virginia, and L-3 Communications Group of New York.

The four men were released from prison after as much as four years and four months without any charges being laid against them.