

US court sharply limits rights of Guantanamo prisoners

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The United States Court of Appeals for the District of Columbia Circuit on Tuesday issued a sweeping decision upholding the power of the government to detain Guantanamo prisoners indefinitely.

A three-judge panel of the court backed the Obama administration in opposing the habeas corpus appeal of Ghaleb Nassar al-Bihani, a Yemeni citizen who has been imprisoned at Guantanamo since early 2002.

The author of the decision, Judge Janice Rogers Brown, an appointee of George W. Bush, seized on the case as an opportunity to rule that the US president's power to detain alleged Islamist terrorists and other non-citizen "unlawful enemy combatants" is not limited by international law, and that Guantanamo prisoners who seek to contest the legality of their detention are not entitled to the constitutional guarantees and legal norms afforded to defendants in criminal cases.

The decision, unless overturned on appeal by the entire DC appeals court or the Supreme Court, will make it extremely difficult for alleged terrorist prisoners, many of whom, like al-Bihani, have been incarcerated under barbaric conditions for years without being charged or brought to trial, to successfully contest their detention by means of habeas corpus suits.

The ruling effectively weakens, if it does not outright violate, the 2008 US Supreme Court decision in *Boumediene v. Bush*, which overturned a provision of the 2006 Military Commissions Act barring the federal courts from hearing habeas corpus appeals from Guantanamo prisoners. Since that ruling, federal judges have ordered the government to release at least 30 prisoners, while at least 7 have had their appeals rejected.

Al-Bihani was a cook with an Arab brigade allied to the Taliban when the US invaded Afghanistan in October 2001. His brigade surrendered to the Northern

Alliance, which was allied with the US in the war, and he was sent to Guantanamo shortly thereafter. He maintains that he was a civilian contractor with the brigade and not a member of either the Taliban or Al Qaeda. He also maintains that he never fired at US or Northern Alliance forces, a fact that Judge Brown acknowledged in her decision.

In his original habeas corpus appeal, which was denied by a US federal district judge in 2008, and in his appeal to the DC Circuit appeals court, Al-Bihani maintained that he was being held illegally because he had been denied the protections for prisoners of war required under the Geneva Conventions and other international laws of war. Among other violations of international law, he cited provisions of the Geneva Conventions that require POWs to be released after the cessation of hostilities. Al-Bihani asserted that the war in which he was captured ended with the overthrow of the Taliban government.

In his appeal to the DC Circuit court, he argued that the judge in his original habeas corpus hearing had deprived him of his rights by setting a lower standard of proof for the government—preponderance of evidence rather than guilt beyond a reasonable doubt—and by allowing hearsay evidence.

In her decision, Judge Brown flatly rejected the contention that the United States was obliged to follow international law in relation to the detention of non-citizens captured in the so-called "war on terror." Brown wrote that Al-Bihani's arguments "rely heavily on the premise that the war powers granted by the AUMF (Authorization for Use of Military Force) are limited by the international laws of war. This premise is mistaken."

At another point, as if to flaunt her contempt for international law, she wrote, "... we have no occasion

here to quibble over the intricate application of vague treaty provisions and amorphous customary principles.”

Brown also upheld the broad interpretation of who is subject to executive detention under the AUMF that was handed down by the original trial judge, who said it applies to any individual “who was part of or supporting Taliban or Al Qaeda forces, or associated forces that engaged in hostilities against the United States or its coalition partners.” This definition could apply to anyone who is deemed to give political or even editorial support to such forces. Judge Brown noted that this definition is even broader than that advanced by the Obama administration, which requires that an individual “substantially support” these forces.

In a sentence that has the most ominous implications for the democratic rights of speech and political expression, and suggests a presidential power to lock up domestic political opponents, Judge Brown wrote: “Detention authority in fact sweeps wider, also extending at least to traditional POWs, and arguably to other categories of persons.”

As with most previous rulings by US courts, including the Supreme Court, the DC Circuit appeals court accepted fully the claim by the government—a claim taken over by the Obama administration from its predecessor—that the AUMF, passed by Congress one week after 9/11 to authorize military action against Afghanistan, sanctioned indefinite detention without trial, military commissions, and a host of other anti-democratic measures justified in the name of the war against terrorists.

The judge also rejected Al-Bihani’s contention that the war in which he was captured had ended, accepting the US government’s claim that the American people are locked in a war of indeterminate length against the Taliban and Al Qaeda.

On Al-Bihani’s assertion that his habeas corpus hearing was tainted because he was denied the normal rights of criminal defendants, Judge Brown argued that suggestions in previous Supreme Court rulings that Guantanamo prisoners could be provided with something less than the full protections of criminal courts allowed for curtailments of defendants’ rights that, in practice, make a mockery of due process.

She also rejected the application of constitutional and democratic norms on the grounds of military expediency. “From the moment a shot is fired,” she

wrote, “up to a detainee’s day in court, military operations would be compromised as the government strove to satisfy evidentiary standards in anticipation of habeas litigation.”

Judge Brown was joined in her decision by another Bush appointee, Judge Brett Kavanaugh. Both were allowed to join the DC Circuit court of appeals, the most powerful federal appeals court in the country, when congressional Democrats capitulated to Bush and dropped their efforts to stall their confirmation. Their ascension to the court was part of the stacking of the federal courts with right-wing ideologues carried out by successive Republican administrations and accelerated under George W. Bush.

The third judge on the panel, Judge Stephen Williams, a Reagan appointee, joined in rejecting Al-Bihani’s habeas corpus appeal, but wrote a separate concurring opinion that chastised Brown for arbitrarily injecting into her decision an attack on international law. He cited the paragraph quoted above about Al-Bihani’s “mistaken” view that the president’s detention powers are limited by international law, and noted that it was “hard to square with the approach that the Supreme Court took in *Hamdi* (a 2004 ruling asserting the right of “illegal enemy combatants” who are US citizens to challenge their detention in court).

He went on to note that the majority’s view of the applicability of international law “goes well beyond what even the *government* has argued in this case.”

He further criticized the majority’s defense of the procedures used by the district court in Al-Bihani’s original habeas hearing as “unnecessary” to the rendering of a ruling on his appeal.

In a separate concurring opinion attached to her own decision, Judge Brown argued that Congress should establish specific rules for hearing habeas corpus appeals from Guantanamo detainees. This was an implicit call for the president and Congress to adopt rules and standards that would make it all but impossible for those held without charge or trial to successfully challenge their detention in court.



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