

US Supreme Court rejects appeals by Guantanamo detainees and Jose Padilla

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On Monday, the US Supreme Court declined to review appellate court decisions that shut the door to judicial review of the indefinite detention of Guantanamo prisoners. It also let stand an appellate ruling tossing out a civil law suit by US citizen Jose Padilla against government officials for their roles in disappearing, imprisoning and torturing him.

In 2008, in the case *Boumediene v. Bush*, the Supreme Court had ruled that Congress's denial to inmates at Guantanamo Bay of the right to petition a court for release under the ancient writ of habeas corpus was unconstitutional.

The US Constitution states, "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The *Boumediene* Court held that because the writ had not been suspended, prisoners, including foreign nationals, had to be given meaningful court review of the basis for their confinement.

Some federal courts at the trial level began to order the release of some prisoners, many of whom, such as Tofiq al-Bihani and Moath al Alwi, were low-level Taliban personnel—cooks in those cases—who could not conceivably present a security threat. However, the government appealed such rulings to the US Circuit Court of Appeals for the District of Columbia, which eviscerated the Supreme Court's directive. The lower courts were reprimanded and hamstrung from engaging in meaningful review of the basis the government offered for imprisonment.

One such case involved Adnan Latif, a Yemeni captured near the border between Afghanistan and Pakistan in December 2001. He maintained that he had traveled to Pakistan to seek medical treatment. The US government alleged he was a Taliban fighter.

A federal district judge ruled in Latif's favor, concluding that, because of transcription and other errors, a government report of an interview with him was "not sufficiently reliable to support a finding by a preponderance of the evidence that Latif was recruited by an Al Qaeda member or trained and fought with the Taliban."

The DC Circuit reversed that finding, ruling that the government's "evidence" was entitled to "a presumption of regularity" and that lower court judges should require that a detainee's "self-serving account must be credible—not just plausible."

Giving broad deference to the government's position in matters such as whether statements of dubious accuracy are reliably recorded renders the requirement of meaningful judicial review virtually meaningless.

In the majority opinion denying Latif's petition, Circuit Judge Janice Rogers Brown cited dissents rather than the binding majority opinion from the Supreme Court's ruling in the *Boumediene* case.

She snidely referred to the majority decision's impracticality and "airy suppositions."

This caused Judge David Tatel to dissent in the Latif case and characterize the DC Circuit Court decision as an "assault on *Boumediene*."

In a different case, involving Ghaleb Nassar al-Bihani, a Yemeni citizen who has been imprisoned at Guantanamo since early 2002, the DC appellate court refused to grant habeas corpus in another ruling authored by Judge Brown.

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 maintained that he was a civilian contractor with the brigade and not a member of either the Taliban or Al Qaeda. There was no evidence he ever fired at US or Northern Alliance forces.

Brown, upholding a broad interpretation of who is subject to executive detention, said it included as any person 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 was even broader than that advanced by the Obama administration, which conceded that "substantial support" of these forces would be required.

Brown wrote, "Detention authority in fact sweeps wider, also extending at least to traditional POWs, and arguably to other categories of persons." This could easily extend to those who engage in speech or other political expression critical of US war aims.

Al-Bihani also argued 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, including provisions 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.

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." Also rejected was al-Bihani's contention that the war in which he was captured had ended. Brown accepted the US government's claim that the American people are locked in a war of indeterminate length against the Taliban and Al Qaeda.

In denying the appeals of Latif, al-Bihani and five other Guantanamo prisoners on Monday, the Supreme Court has in effect rendered its prior ruling in *Boumediene* a dead letter, a parchment dissolving to dust.

Jonathan Hafetz, a law professor at Seton Hall University who was

part of the legal team on the Boumediene case before the Supreme Court, told the WWSWS that this is “a troubling sign that the Supreme Court is not itself troubled by the way the appellate court in Washington DC has narrowly interpreted the Supreme Court’s requirement of meaningful habeas review.” He is further quoted in the *Los Angeles Times* as stating that the “Court has effectively abandoned its commitment to ensuring that individuals held in long-term detention at Guantanamo obtain meaningful review of their imprisonment.”

Professor Hafetz emphasized to the WWSWS that keeping Guantanamo prisoners detained for an indefinite time period was unprecedented in light of the prolonged nature of the detentions, in most cases exceeding 10 years. Only those accused of war crimes historically have been subject to prolonged incarceration.

Those accused of war crimes such as the alleged planners of 9/11 will get a trial of sorts, if only in the guise of a military commission. But most others of the 169 prisoners remaining in Guantanamo may not see the light of day for many years, if ever, on the mere say so of the government as to their prior association with Al Qaeda or the Taliban, however attenuated.

The failure of the Supreme Court to take up Jose Padilla’s appeal is equally chilling and of considerable political significance.

President George W. Bush in 2002 declared Padilla to be an “enemy combatant.” US military personnel seized Padilla from a civilian jail in New York and secretly transported him to a naval brig in South Carolina, a military prison.

Padilla was held incommunicado for two years without access to his family or legal counsel. His only human interaction was with interrogators or with guards delivering food through a slot in the door or standing watch when he was allowed to shower.

For nearly four years, Padilla was subjected to continuous physical and psychological torture, suffering permanent brain damage. His torture included round-the-clock sensory deprivation and sleep prevention.

Padilla was denied a mattress, blanket, sheet and pillow, forced to sleep on a steel slab. Banging, glaring artificial light, noxious odors, and extreme temperature variations impeded his sleep efforts. Interrogators shackled him for hours in painful “stress” positions, punched him, threatened to transfer him to a foreign country or Guantanamo, and threatened to kill him.

The imprisonment and torture of Padilla on its face violated the most basic constitutional rights, including the Fifth Amendment’s proscription against deprivation of liberty without due process of law and the Eighth Amendment’s ban on cruel and unusual punishment. Padilla’s “disappearance” left him unable to challenge his confinement before a judge by a writ of habeas corpus. Basic constitutional legal protections such as indictment by a grand jury, the right to a speedy trial, the right to an attorney, the right to confront witnesses, and proof beyond a reasonable doubt before a jury were utterly denied during his military incarceration.

In 2007 Padilla and his mother brought a civil lawsuit against top military and executive officials in the Bush administration, including Donald Rumsfeld, John Ashcroft and Paul Wolfowitz, as well as the military officers at the brig where Padilla was held. Padilla and his mother sought a declaration that Padilla’s rights were violated and damages of one dollar from each of the defendants.

In 2011, a federal district court, and then the Fourth Circuit Court of Appeals, tossed out the lawsuit on the grounds that “deference” had to be shown to the executive branch and the military on matters

involving national security. The Fourth Circuit wrote that a judicially devised damages action “would expose past executive deliberations affecting sensitive matters of national security to the prospect of searching judicial scrutiny. It would affect future discussions as well, shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability.”

This amounts to an argument that the judiciary should abandon entirely its historic role as a check on executive power during wartime—in this case, the unending so-called “war on terror.” So long as the executive branch cites interests of “national security,” executive and military officials are given free rein to violate the Constitution with impunity.

In a press release, Padilla’s lead attorney on the case, Ben Wizner of the American Civil Liberties Union, stated: “The Supreme Court’s refusal to consider Jose Padilla’s case leaves in place a blank check for government officials to commit any abuse in the name of national security, even the brutal torture of an American citizen in an American prison. To date, not a single victim of the Bush administration’s torture regime has received his day in court.”

The votes of a minimum of four of the nine Supreme Court Justices is required to grant a petition for the Supreme Court to hear an appeal of a case. It is not known whether any justice voted to hear the Guantanamo appeals or that of Jose Padilla. What is known is that not a single justice, whether appointed by a Republican or Democratic president, wrote a dissent from the Court’s denial of these petitions.

The Supreme Court’s actions Monday confirm that the judicial branch of government will increasingly and freely abdicate its constitutional role as a check on the arbitrary exercise of power by the executive branch and the military. Basic democratic rights, including the rights to due process and habeas corpus, will effectively be gutted.

Justices on the right wing of the Supreme Court, such as Antonin Scalia, and those such as Justice Janice Brown of the DC Court of Appeals, do little to hide a jurisprudence that would have ably served the Nazis and their policies of mass detention and murder. But even ostensibly liberal judges no longer rise to defend fundamental rights.

At the same time, the Obama administration expands upon the assault on democratic rights undertaken during the Bush Administration. It is the Obama administration’s Justice Department that has advocated these judicial travesties, along with apologetics for the assassination of US citizens and massive spying.

It is plain to see that the scaffolding of a police state is being constructed. This arises organically out of the present needs of the ruling oligarchy: to maintain its control over society’s resources, drive down the living standards of the people, and brook no opposition to its destructive policies.



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