



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

No End in Sight for the “Enemy Combatants” of Guantánamo **by Andy Worthington**

On the seventh anniversary of the opening of the “war on terror” prison at Guantánamo Bay, Cuba (on January 11, 2002), this is perhaps a rather bleak title, given that Barack Obama has [pledged to close the prison](#), but recent events in a U.S. District Court — largely overlooked in the mainstream media — have demonstrated how difficult it will be to deliver justice to the remaining prisoners, because of the veneer of legitimacy that covers the Bush administration’s self-declared right to seize anyone the president regards as an “enemy combatant” and hold him indefinitely without charge or trial.

Seven months ago, when the U.S. Supreme Court, which had granted habeas corpus rights to the Guantánamo prisoners in June 2004, reversed subsequent legislation that purported to strip them of their fundamental right to ask why they were being held, and made their habeas rights constitutional in [Boumediene v. Bush](#), there were high hopes that the subsequent habeas reviews would cut through the web of [coerced confessions](#) and [dubious intelligence](#) that the administration was using to justify holding the prisoners as “enemy combatants.”

At first, this was exactly what happened. Within a fortnight of the Supreme Court’s ruling, the first case to be reviewed dealt an unprecedented blow to the government’s claims, when three judges in a Washington, D.C., appeals court ruled that the government had [failed to establish](#) that Huzaifa Parhat was an “enemy combatant,” and condemned what purported to be evidence in the case for being akin to a nonsense poem by Lewis Carroll, the author of *Alice’s Adventures in Wonderland*.

Parhat is one of 17 Uighur prisoners — Muslims from China’s Xinjiang province, who had traveled to Afghanistan to escape Chinese oppression but had been sold to U.S. forces after fleeing to Pakistan following the U.S.-led invasion — and in the wake of his victory, the government dropped its case against the rest of the Uighurs, and was then humiliated in a District Court when Judge Ricardo Urbina [ordered the men’s release](#) into the United States, because their continued detention was unconstitutional, because they cannot be returned to China, where they face the risk of torture, and because no other country has been found that will accept them. The

government appealed, and has so far [succeeded](#) in keeping the Uighurs at Guantánamo, but their plight remains a significant blow to what little remains of Guantánamo's credibility.

The administration was dealt a second blow in November, in a Washington, D.C., District Court, when Judge Richard Leon, an appointee of George W. Bush and one of several judges dealing with the post-*Boumediene* habeas reviews, dismissed the government's case against five Bosnians of Algerian descent and [ordered their immediate release](#). In October 2001, the men had been suspected of a plot to blow up the U.S. embassy in Sarajevo, but after the Bosnian authorities arrested them, investigated the claim and found no evidence to justify it, they were kidnapped by U.S. agents on their release and flown to Guantánamo in the prison's opening weeks.

Disturbingly, the bomb plot was never mentioned in Guantánamo, and the men were, instead, brutalized and exploited for their knowledge of Arabs living in Bosnia, but when their habeas case finally came to court, Judge Leon ordered their release after concluding that the government had provided no credible evidence to justify its only surviving allegation against the men: that they had intended to travel to Afghanistan to take up arms against U.S. forces.

As with the case of Huzaifa Parhat, Judge Leon's ruling was a vindication for the many critics of the habeas-stripping legislation that was passed by a cowed Congress in the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006. However, Leon's decision to deny the habeas claim of the sixth plaintiff, Belkacem Bensayah, hinted at another obstacle to justice that had been largely overlooked in the celebrations following the Supreme Court's ruling.

Lawyers, human rights activists, and others concerned with due process had spent so long struggling just to get a day in court for the prisoners that they had, for the most part, neglected to scrutinize the fine print of the ruling. The prisoners were given the opportunity to ask a judge why they were being held, and the judges were empowered to order the men's release if the government failed to establish an adequate case against them, but the Supreme Court had not empowered the courts to question whether the very definition of an "enemy combatant" was sufficient to hold prisoners indefinitely without charge or trial if a plausible case was established that they were "part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the U.S. or its coalition partners," which "includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."

The problem, as Bensayah's case demonstrated, centered on the catch-all nature of the definition of an "enemy combatant," which appeared to have been kept deliberately vague by the administration. The definition above, for example, was approved by Judge Leon in October, but it was a sign of how imprecise the whole business is that, seven years after Vice President [Dick Cheney](#) and his close advisers came up with the concept of "enemy combatants," Leon was obliged to clarify the wording — choosing from several different versions — before reviewing any of the cases before him.

According to Leon ([PDF](#)), Bensayah fitted the definition of an “enemy combatant” not because he had been involved in a specific al-Qaeda plot, and not because he had raised arms against the United States in Afghanistan or anywhere else, but because the government provided what Leon regarded as “credible and reliable evidence,” from more than one source, establishing that Bensayah “planned to go to Afghanistan to both take up arms against U.S. and allied forces and to facilitate the travel of unnamed others to Afghanistan and elsewhere.” Leon also agreed that this evidence “link[ed] Mr. Bensayah to al-Qaeda and, more specifically, to a senior al-Qaeda operative,” and also demonstrated his “skills and abilities to travel between and among countries using false passports in multiple names.”

Because of the secrecy surrounding the disclosure of classified evidence, Leon was not allowed to reveal what has previously been disclosed [elsewhere](#): that the “senior al-Qaeda operative” was the “high-value detainee” Abu Zubaydah, seized in March 2002, who was held and tortured in secret CIA custody until his transfer to Guantánamo in September 2006. Notwithstanding [serious doubts](#) regarding Zubaydah’s status as a “senior al-Qaeda operative,” the difficulty raised by Judge Leon’s endorsement of the government’s evidence is, simply, that it allows the government to continue holding Bensayah indefinitely, without ever putting him forward for a trial, thereby reinforcing the government’s unjustifiable contention that prisoners seized in the “war on terror” are a new category of prisoner who can be held neither as prisoners of war protected by the Geneva Conventions nor as criminal suspects. It is as though the legal wrangling of the last seven years never took place, and today’s date is January 11, 2002.

What makes this scenario even more disturbing is that, on December 30, Judge Leon ruled that two more prisoners — the Yemeni Muaz al-Alawi, and the Tunisian Hisham Sliti — were also correctly detained as “enemy combatants.” In the case of al-Alawi (who is described in court documents as “Moath al-Alwi”), Leon ruled ([PDF](#)) that, “by a preponderance of the evidence,” the government had established that he “was part of or supporting Taliban or al-Qaeda forces,” because he “stayed at guest houses associated with the Taliban and al-Qaeda ... received military training at two separate camps closely associated with al-Qaeda and the Taliban and supported Taliban fighting forces on two different fronts in the Taliban’s war against the Northern Alliance.”

The problem with Leon’s ruling, of course, is that none of the allegations above relates to “hostilities against the U.S. or its coalition partners.” By Leon’s own account of the evidence, al-Alawi was in Afghanistan before the 9/11 attacks, and was fighting with the Taliban against the Northern Alliance. To counter this, he endorsed the government’s additional claim that, “rather than leave his Taliban unit in the aftermath of September 11, 2001,” al-Alawi “stayed with it until after the United States initiated Operation Enduring Freedom on October 7, 2001; fleeing to Khowst and then to Pakistan only after his unit was subjected to two-to-three U.S. bombing runs.”

In other words, Judge Leon ruled that Muaz al-Alawi can be held indefinitely without charge or trial because, despite traveling to Afghanistan to fight other Muslims before September

11, 2001, “contend[ing] that he had no association with al-Qaeda,” and stating that “his support for and association with the Taliban was minimal and not directed as US or coalition forces,” he was still in Afghanistan when that conflict morphed into a different war following the U.S.-led invasion in October 2001. As Leon admitted in his ruling, “Although there is no evidence of petitioner actually using arms against U.S. or coalition forces, the Government does *not* need to prove such facts in order for petitioner to be classified as an enemy combatant under the definition adopted by the Court.”

In the case of Hisham Sliti, Judge Leon ruled ([PDF](#)) that he too was “part of or supporting Taliban or al-Qaeda forces,” based on claims made by the government that Sliti traveled to Afghanistan as “an al-Qaeda recruit ... at the expense of known al-Qaeda associates and on a false passport provided to him by the same,” that he stayed in a guest house and a mosque, and attended a training camp, which also had connections to al-Qaeda, and that he was “instrumental” in “starting a terrorist organization with close ties to al-Qaeda.”

The problem with all of these allegations is that Sliti’s story actually suggests that all these conclusions are based on guilt by association. He may well have been connected with others who were involved in or interested in terrorism, but his own trajectory is that of a junkie rather than a jihadist, or, if you prefer, a tourist rather than a terrorist. Judge Leon disregarded Sliti’s own claim that he went to Afghanistan “to kick a long-standing drug habit and to find a wife,” but it was certainly true that he had been a drug addict in Europe (where he had been imprisoned in various countries on several occasions), and, as his lawyer Clive Stafford Smith has explained, he has a worldly cynicism that is fundamentally at odds with the fanatical rigor of al-Qaeda.

In his book [The Eight O’Clock Ferry to the Windward Side: Fighting the Lawless World of Guantánamo Bay](#), Stafford Smith described Sliti reminiscing at length about the quality of the European prisons compared to Guantánamo. “In Italy the prison was wide open for six hours a day,” he explained. “You could have anything in your room — I had a little fornello, a gas cooker. Can you imagine the Americans allowing that? Here, we call a plastic spoon a ‘Camp Delta Kalashnikov,’ as the soldiers think we’re going to attack them with it.” And in a [hearing at Guantánamo](#), Sliti recounted at length his various exploits in Europe, and told the board that he only ended up in Afghanistan because he had begun attending mosques in Belgium, where the country had been portrayed as “a clean, uncorrupted country where he could study Sharia and further his religious education,” but that what he found instead was that “I didn’t care for the country. It was very hot, dusty and [the] women were ugly. The atmosphere and environment didn’t agree with me.”

In conclusion, then, those concerned with the rule of law can only be dismayed by Judge Leon’s recent rulings, and can only conclude that the entire basis for holding prisoners as “enemy combatants” must be scrapped as soon as possible. If there is genuinely credible evidence that Belkacem Bensayah and Hisham Sliti were involved in any meaningful way with al-Qaeda, then

they should face a trial in a U.S. federal court. As for Muaz al-Alawi, he appears to be one of many prisoners who should have been detained as an enemy prisoner of war in accordance with the Geneva Conventions, to be held until the end of hostilities. We would then be discussing whether it is legitimate for the government to claim that the war in which he was captured is a “war on terror” that may last for generations, or if, in fact, he was captured as part of a specific conflict — namely, the invasion of Afghanistan and the overthrow of the Taliban government — which, in that particular context, came to an end many long years ago.

Note: For further doubts about Muaz al-Alawi’s case, readers may be interested to know that Judge Leon refrained from having to rule on [four additional allegations](#) based on demonstrably false confessions made by other prisoners: a claim by an unidentified “al-Qaeda operative” that he had met him at a training camp in 1998 (he traveled to Afghanistan in 2000), a claim that a “source” identified him as being captured in Afghanistan’s Tora Bora mountains (he was captured in Pakistan), a claim that he was observed “pulling security at the Kandahar, Afghanistan airport compound” belonging to Osama bin Laden, and a claim that he was a bodyguard for Osama bin Laden. As I have explained in a [previous article](#), the first of these latter two allegations was produced by a prisoner described as a notorious liar by the FBI, and the second was produced (and later recanted) by Mohammed al-Qahtani, a Saudi who was subjected to a notorious torture program at Guantánamo, during which he falsely accused 30 prisoners of being bodyguards for Osama bin Laden.

Andy Worthington is the author of [The Guantánamo Files: The Stories of the 774 Detainees in America’s Illegal Prison](#) (published by Pluto Press). Visit his website at: www.andyworthington.co.uk.

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