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## **Guantánamo and the Courts, Part 2: Obama's Shame**

**by Andy Worthington**

In the [first part](#) of this three-part series examining the Guantánamo prisoners' attempts to secure their release via the U.S. courts, I examined the Bush administration's record in the seven months after [the Supreme Court's ruling](#), in June 2008, that the prisoners had constitutionally guaranteed habeas corpus rights, and explained how, despite obstruction by the Justice Department, District Court judges reviewed 26 cases, and in all but three found that the government had failed to establish, "by a preponderance of the evidence," that it was justified in holding the men. This second article (and the final part next week) examine the Obama administration's record, in its first seven months in office, presenting an under-reported story of ongoing obstruction by the Justice Department, apoplectic judges, and, in the majority of the cases in which a judge has been able to make a ruling, more humiliation for the government.

### **Bush's Justice Department lives on in two depressing court rulings**

On his second day in office, President Obama issued [a number of Executive Orders](#), which appeared to tackle the worst excesses of the Bush administration's "war on terror," and included pledges to uphold the absolute ban on torture and to close Guantánamo within a year. Given the repeated defeats of the Bush administration's detention policies in the courts, it was not unreasonable to suppose that Obama would move swiftly to overhaul the Justice Department, which had been rocked by scandals indicating that it had become heavily politicized during the Bush years. Accordingly, it was anticipated that Obama would focus on putting in place new staff who would take on board the Supreme Court's statement that "the cost of delay can no longer be borne by those in custody," would prevent the obstruction that was all too apparent in the dying days of the Bush administration, and would urgently review the prisoners' files to prevent further humiliation by taking unjust and unwinnable cases to court.

Before any of this could happen, Judge Leon provided a further demonstration of why the administration urgently needed to review its policies regarding the Guantánamo prisoners, by ruling, on January 28, that Ghaleb al-Bihani, a Yemeni, could continue to be held as an "enemy

combatant” because he had worked as a cook for the Taliban. As [I explained in an article](#) at the time,

Concluding that it was “not necessary” for the government to prove that he “actually fire[d] a weapon against the U.S. or coalition forces in order for him to be classified as an enemy combatant,” Leon declared, “Simply stated, faithfully serving in an al-Qaeda-affiliated fighting unit that is directly supporting the Taliban by helping prepare the meals of its entire fighting force is more than sufficient to meet this Court’s definition of ‘support.’” He added, “After all, as Napoleon was fond of pointing out, ‘An army marches on its stomach.’”

However, what no one realized back in January was that the Obama administration’s focus was not on the courts, but on the inter-departmental [Detention Policy Task Force](#) established to review the prisoners’ cases as part of the Executive Orders issued on Obama’s second day in office. This prioritizing of the Task Force may not have been intended to sideline the court reviews that had been fought for since the prison first opened in January 2002 because the Obama administration, understandably, wanted to try to establish whom it was actually holding at Guantánamo.

In addition, it may well be that the focus on an executive review that was essentially unaccountable (with its uncomfortable echoes of the Bush administration’s *modus operandi*) was not specifically intended to compete with the habeas reviews, but in reality that is what happened, and as the months passed the judges and defense attorneys realized, to their horror, that the change of administration had made absolutely no difference to the way in which they were treated by the Justice Department.

For the first few months after Judge Leon’s contentious ruling in the case of Ghaleb al-Bihani, the obstruction continued as though the Bush administration was still in power, and, to make matters worse, it seemed that no one in the media cared. Few reporters or editors, for example, realized the significance of [the Court of Appeals’ ruling](#) in February, in the case of the Uighurs (Muslims from China’s oppressed Xinjiang province), which [overturned Judge Urbina’s heroic ruling](#) in October, when he ordered them to be brought to the U.S. mainland because they could not be returned to China because of fears that they would be tortured, and because holding innocent men at Guantánamo was unconstitutional.

The decision, by a handful of notoriously conservative judges, including Judge A. Raymond Randolph, who had backed every Bush administration policy that was later overturned by the Supreme Court, was supported by the Justice Department, even though it effectively gutted the Supreme Court’s habeas ruling, preventing judges from being able to order the release of prisoners who were cleared in their courts.

## **The government's sleight-of-hand regarding "enemy combatants"**

The whole question of what was going to happen to Guantánamo's "enemy combatants" only really hit the media's radar in March, when, in what can only be regarded as a skilful piece of PR, the government announced, in response to a court request for clarification of the meaning of the term "enemy combatant," that it had dropped the use of the phrase, and had adjusted its definition of those who could be detained so that, instead of holding people who were "part of, or supporting, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners," individuals who supported al-Qaeda or the Taliban "were detainable only if the support was substantial." As [I explained at the time](#):

As benign-sounding propaganda ... this announcement has the alluring veneer of the "change" that Barack Obama promised throughout his election campaign, but in practical terms nothing has actually changed. The prisoners are now nobodies, with no label whatsoever to define their peculiar extra-legal existence, and the entire rationale for holding them without charge or trial — and the egregious errors made along the way — remain unaddressed.

Specifically, the government's sleight-of-hand was revealed in two ways. The first emerged in the Justice Department's explanation of what "substantial support" entailed:

In spite of claiming that these men must have "substantially supported" the Taliban, al-Qaeda, or other associated groups, the Justice Department specifically stated that it has the authority to detain not only "those who were part of al-Qaeda and Taliban forces," but also other "members of enemy forces," even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations," and adds, "Evidence relevant to a determination that an individual joined with or became part of al-Qaeda or Taliban forces might range from formal membership, such as through an oath of loyalty, to more functional evidence, such as training with al-Qaeda (as reflected in some cases by staying at al-Qaeda or Taliban safe houses that are regularly used to house militant recruits) or taking positions with enemy forces."

Moreover, the government continued to assert that the fundamental basis of the Bush administration's detention policies was sound. To reach this conclusion, the Justice Department asserted that it was acting according to the [Authorization for Use of Military Force](#) (the founding document of the "war on terror," passed by Congress shortly after the 9/11 attacks, which

authorized the president “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”), and was drawing on “the international laws of war to inform the statutory authority conferred by Congress,” even though, by doing so (as I also explained at the time):

[The Obama administration] has failed to demonstrate that it has any willingness to pour scorn on the Bush administration’s claims that prisoners can be held without being either criminal suspects or prisoners of war, has endorsed its predecessor’s decision to equate the Taliban with al-Qaeda, even though there was never any justification for doing so, has [overlooked the fact](#) that the majority of the prisoners were bought for bounties and were never screened according to the Geneva Conventions, has ignored the fact that the evidence against them (whether of “substantial” support or not) was often extracted through the use of torture, coercion or bribery, and has also defended the Bush administration’s self-proclaimed right to detain demonstrably peripheral figures in the Afghan conflict as “terror suspects.”

Again, few commentators grasped how fundamentally Obama was following the unprecedented policies laid down by the Bush administration, but what is even more shocking, looking back on this period, is how the ongoing habeas litigation was almost completely ignored, even though the most extraordinary scenes were taking place in the courts, as District Court judges, appalled by the persistent obstruction they were encountering, heaped unprecedented scorn on the government’s lawyers.

### **Judge Colleen Kollar-Kotelly’s criticism of the government in the case of the Kuwaitis**

On April 10, [AFP reported briefly](#) on two of these cases, although there were clearly others that never surfaced at all. The first involved the remaining four Kuwaiti prisoners in Guantánamo, in which Judge Colleen Kollar-Kotelly, appalled by a government lawyer who “repeatedly missed deadlines,” wrote that “compliance was not optional,” and added that the court had “serious concern about counsel’s ability to read and comprehend its Orders.” This story actually began at a hearing on February 12, when, after ordering the government to provide a vast amount of material relating to the cases, Judge Kollar-Kotelly lost her patience with the Justice Department prosecutor, and ordered the DoJ to “assign new counsel.” She explained that her orders had been issued on three separate occasions, “and not only has Respondents’ counsel failed to produce an Opposition to date, he has provided *no* explanation for his non-compliance with the Court’s orders.”

At the hearing on April 6, Judge Kollar-Kotelly prefaced her ruling ([PDF](#)) with a quote from a case in 1969: “[T]here are standards which a government counsel should meet to uphold the dignity of the government ... their conduct [must] reflect that they are officers of the court as well as advocates for a cause.” It was a sign of what was to come. She followed up by referring to a meeting preceding her previous ruling in February, at which she “explained to Respondents’ counsel and his supervisor (whom the Court requested to be in attendance) that its Orders were not aspirational, and that counsel’s compliance was not optional.... The Court further explained that the course of conduct chosen by counsel — simply ignoring the Orders of the Court as if they were not issued — would not be tolerated.”

However, it was soon clear that the judge’s Order of February 12, “requiring Respondents to assign new counsel to this case,” seemed “to have only been partially received,” as the government followed up by filing a Motion for Reconsideration, which involved what she described as “a shockingly revisionist version of the events that transpired.” She then ran through the history of the government’s non-compliance in the case, including what she described as the supervisor’s “flippant justification” for the DoJ’s non-compliance: that “Respondents were very busy with other Guantánamo cases, and that counsel did not have time to file the Opposition or (apparently) an appropriate motion for an extension.” After explaining that “counsel’s workload was not an acceptable excuse for violating the Orders of this Court,” Judge Kollar-Kotelly added that the exchange with counsel’s supervisor convinced her to order the appointment of new counsel because the supervisor “did not seem to have grasped the import of what had transpired.”

Dealing with further call for delays, in which the government described its non-compliance as an “honest misunderstanding” and a “procedural defect,” warned that appointing new counsel would “make compliance with future deadlines difficult,” and claimed that the Attorney General had “exclusive authority to designate which Department of Justice attorneys will represent the United States in court,” Judge Kollar-Kotelly rejected each argument, referring to the government’s “feigned confusion,” dismissing one particular claim because it “defie[d] logic,” and taking particular exception to the suggestion about the Attorney General’s powers, pointing out that, “although the Attorney General has the right to designate [the DoJ’s] representative in a given hearing, that authority does not trump the Court’s ability to maintain control over its own proceedings, including the enforcement of its Orders through sanctions.”

Despite this unprecedented rebuke to the government, it appeared that the rot seeped up the chain of command in the Justice Department, with Attorney General Eric Holder ignoring a subsequent letter from the Kuwaitis’ counsel, David Cynamon, in which it was pointed out that, as a result of the government’s obstruction — particularly in providing exculpatory evidence to the defense (in other words, evidence that tended to undermine the government’s case) — it had been left to the prisoners’ lawyers to stumble across exculpatory material “purely by good fortune.” Cynamon explained that, in the case of one of the Kuwaitis, his military defense counsel

“happened to find a document on a government database suggesting that one of our clients is likely the victim of mistaken identity” and that “habeas counsel in other cases have provided us with classified government documents casting doubt on the credibility of certain informants in our case.”

### **Judge Emmet G. Sullivan’s criticism of the government in the case of Ayman Batarfi**

The Kuwaitis’ case was not the only example of judicial anger at the government’s obstruction. In the case of [Ayman Batarfi](#), a Yemeni doctor accused of being involved with al-Qaeda, Judge Emmet G. Sullivan was equally outraged by government lawyers’ “repeated” delays in providing unclassified exculpatory material to the defense. At a status hearing on April 1, Judge Sullivan ran through another case history that was damning for the government, referring to a hearing on March 19, in which he required the Justice Department “to show cause why the government and its attorneys should not be held in contempt for violating” an order in January to produce relevant information, including exculpatory evidence.

This was bad enough — although it appeared to be typical behavior, as the Kuwaitis’ case also showed — but what enraged Judge Sullivan was that, when Batarfi’s defense team explained that they had discovered, in Batarfi’s medical records (which had, after some delay, been provided by the government), “a highly exculpatory record” pertaining to one of the government’s main witnesses against their client, and added that they “believed they were entitled to all other similar records” regarding this particular prisoner, “the government,” as Judge Sullivan described it, “took [the] position that this had been a, quote, inadvertent production, and sought to, in the government’s words, sequester the document.”

Judge Sullivan proceeded to ask the government why the exculpatory evidence had not been produced in September 2008, following the Court’s order to produce exculpatory evidence by that date, stated that the Court would “require an explanation as to why the government took the position that this document was, quote, inadvertently produced, end quote,” and would also require an explanation as to why it took until March 2009 to produce the document. He was also concerned that, at the hearing on March 19, it emerged that the witness in question was a main witness in a number of other habeas cases. “Was this document and any other produced as exculpatory evidence in those cases?” Judge Sullivan asked. “And if not, why not?”

The answer, of course, is that the government had no interest in making all exculpatory evidence available on a case-by-case basis, and, as a result, clearly had no interest in cross-referencing cases to make sure that, where relevant, exculpatory evidence was made available to defense counsel in other cases. Outraged by this, and clearly struggling to contain his anger, Judge Sullivan told the government lawyers, “To hide — and I don’t use that word loosely — to hide relevant and exculpatory evidence from counsel and from the Court under any circumstances, particularly here where there is no other means to discover this information and where the stakes

are so very high and do indeed include indefinite detention, is fundamentally unjust, outrageous and will not be tolerated.”

He added,

Fortunately, Dr. Batarfi’s counsel have been diligent and tireless in their efforts, but no one, Dr. Batarfi and not this Court, should have to rely on luck to discover evidence critical to a just resolution.... In the face of repeated failures to comply with this Court’s orders, to produce exculpatory evidence, even after orders to show cause and the requirement of no fewer than four declarations from officials at the highest levels of our government, how can this Court have any confidence whatsoever in the U.S. government to comply with its obligation and to be truthful to the Court?

In response to the apparent meltdown of Batarfi’s case, the government appeared to take matters into its own hands, expediting a review by the Justice Department, and seeking to prevent further humiliation by announcing that he had been cleared for release. Judge Sullivan accepted this, of course, as he would clearly have granted Batarfi’s habeas petition had the case proceeded, but he made a point of telling the government:

While the Court on the one hand applauds the government’s belated decision to transfer Dr. Batarfi, the Court must note the disturbing pattern in this and other cases. Time and again we have seen that only once finally pressed to present evidence to justify a petitioner’s detention does the United States belatedly, quote, withdraw, end quote, charges or allegations and/or transfer the detainee.

Judge Sullivan also said that he had “some serious concerns” about whether the sudden decision to release Batarfi was “another ploy not to return Dr. Batarfi to his country of origin but to continue with his deprivation of his fair day in court” — and with good reason, as, at the time of writing, Batarfi, like Yasim Basradah, is still at Guantánamo, despite Judge Sullivan’s request for status reports every 14 days. Perhaps the saddest aspect of the government’s disgraceful conduct can be gauged by comparing its evasions, obstructions, and, ultimately, its refusal to release prisoners like Batarfi, who could surely have been sent back to Yemen the day after the ruling, with Judge Sullivan’s own analysis of the pressing urgency of bringing justice to the Guantánamo prisoners:

I’m not going to continue to tolerate indefinite delay on the part of the United States government. I mean, this Guantánamo issue is a travesty. It ranks up there

with the internment of Japanese-American citizens years ago. It's a horror story in the American system of jurisprudence, and quite frankly, I'm not going to buy into an extended indefinite delay of this man's stay at Guantánamo, or anyone else on my calendar.

### **Two more rulings; one weak, the other far-reaching**

At the same time that Judge Sullivan was berating the government in the strongest terms possible, two other cases also proceeded to rulings. In the first, that of Hedi Hammamy, a Tunisian, Judge Richard Leon sowed further confusion by ruling that his detention was justified, even though he had previously had his transfer from Guantánamo approved by a military review board under the Bush administration. As [I explained at the time](#), Judge Leon's ruling did not exactly inspire confidence, as he relied on an untested allegation by the Italian authorities that Hammamy had been involved in a terrorist cell in Italy and extrapolated from this allegation that the apparent discovery of Hammamy's identity papers in a cave in Afghanistan's Tora Bora mountains demonstrated that he was involved with al-Qaeda and/or the Taliban, even though Hammamy "has always denied being in Tora Bora, and has claimed that his papers were in fact stolen from him, and that the government has evidence that this is the case."

The second ruling concerned [Yasim Basardah](#), a Yemeni and a well-known and contentious informer within Guantánamo, whose copious "confessions," ironically, had been and would continue to be pulled apart in other habeas cases (including, very possibly, those mentioned above). Basardah's habeas petition was granted on March 31 by Judge Ellen Segal Huvelle, who provided her own slant on the necessary circumstances for ongoing detention by looking closely at the government's justification for holding prisoners (the Authorization for Use of Military Force) and how this was affected by the Supreme Court's ruling in [Hamdi v. Rumsfeld](#), a case decided in June 2004, which focused on an American-born Saudi, Yaser Hamdi, who, at the time, was being held at Guantánamo.

In a ruling that may have implications for other rulings in the future (PDF), Judge Huvelle drew conclusions suggesting that the "enemy combatants" of Guantánamo were akin to prisoners of war, but with the ability to be released if it could be demonstrated that they no longer posed a threat to the United States. She noted that the AUMF "does not authorize unlimited, unreviewable detention," but instead authorizes holding people "in order to prevent any future acts of international terrorism"; in other words, "the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle, and it certainly cannot be read to authorize detention where its purpose can no longer be attained."

From *Hamdi*, Judge Huvelle drew on the Supreme Court's assertion that the Executive "may detain combatants for a limited purpose only"; namely, "to prevent the captured

individuals from returning to the field of battle and taking up arms again,” and, in passing, noted two orders that appear to have bypassed the authorities — an insistence that “indefinite detention for the purpose of interrogation is not authorized” and a requirement that the “detention of combatants must be ‘devoid of all penal character’” — and a conclusion that also appears to have been overlooked: a requirement that the prisoners are to be “treated humanely and in time exchanged, repatriated or otherwise released.”

With reference to Basardah, Judge Huvelle concluded that the relevant issue was not the Yemeni’s admitted involvement with the Taliban — he claimed elsewhere that he only joined up for the money — but the fact that he “can no longer constitute a threat to the United States,” because it is “undisputed” that his involvement with the Guantánamo authorities as an informer “is known to the world, and thus, any ties with the enemy have been severed, and any realistic risk that he could rejoin the enemy has been foreclosed.” She added, granting his habeas petition, “As a result, the Executive’s asserted justification for his continued detention lacks a basis in fact as well as in law.”

It seems astonishing to me now that the barrage of criticism to which the government was subjected by the courts in March and April, which cannot have failed to resonate through the corridors of power in the Justice Department, did not lead to an urgent rethink of the government’s entire policy regarding the Guantánamo habeas cases, but in the months since there has still been no change, and although the ongoing obstruction has prevented a large number of cases from reaching a point where a judge can make a ruling, those that have proceeded to a ruling have, if anything, humiliated the government even more thoroughly than the litany of embarrassments described above.

These rulings, and some dark conclusions regarding the government’s attitude to the habeas cases and the legitimacy of the courts, will be discussed next week in the final part of this series of articles.

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**This article was originally published in August 2009.**