GlobalResearch
Center for Research on Globalization

Guantánamo Justice After Seven Years

By Prof. Marjorie Cohn
Global Research, November 24, 2008
Jurist 24 November 2008

Theme: Crimes against Humanity, Law and Justice

Since the Bush administration began transporting men and boys to Guantánamo Bay in January 2002, it has tried to prevent them from presenting their cases before a neutral federal judge. Indeed, the naval base was turned into a prison camp precisely to keep the detainees away from impartial courts. The government argued that federal courts had no jurisdiction over men detained on Cuban soil. Twice, the Supreme Court rejected that argument, finding that the United States exercises complete jurisdiction and control over the Guantánamo Bay base.

Finally, on November 20, in a stunning development, U.S. District Court Judge Richard J. Leon ordered the government to release five Guantánamo Bay detainees "forthwith." Finding that the government failed to prove the men were "enemy combatants," the judge, in a rare comment, urged senior government leaders not to appeal his ruling. "Seven years of waiting for a legal system to give them an answer . . . in my judgment is more than enough," he said.

The five detainees the judge ordered released are Lakhdar Boumediene, Mustafa Ait Idir, Hadj Boudella, Saber Lahmar and Mohammed Nechla. Judge Leon did, however, find that a sixth detainee, Belkacem Bensayah, was properly classified an enemy combatant.

It was the Supreme Court's June 12, 2008 decision in *Boumediene v. Bush* (see Supreme Court Checks and Balances in Boumediene) that allowed Judge Leon to review the enemy combatant classifications. The high court upheld the Guantánamo detainees' constitutional right to habeas corpus and made clear they were "entitled to a prompt habeas corpus hearing." Judge Leon adopted the definition of "enemy combatant" used by the Combatant Status Review Tribunals, which is "an individual who was 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. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."

The six detainees in this case are native Algerians who were residing in Bosnia and Herzegovina , over a thousand miles from the battlefield in Afghanistan . All six held Bosnian citizenship or lawful permanent residence as well as native Algerian citizenship. Arrested by Bosnian authorities in October 2001 for alleged involvement in a plot to bomb the U.S. Embassy in Sarajevo , they were ordered released from prison on January 17, 2002 and then turned over to U.S. personnel who transported them to Guantánamo on January 20, 2002. They have been there ever since.

President Bush had withdrawn the alleged bomb plot as a basis for their detention. He argued instead that the men planned to travel to Afghanistan in late 2001 and take up arms

against the United States and allied forces. Judge Leon found the government had failed to prove these allegations by a preponderance of evidence in the cases of all but Bensayah.

The judge said the Justice Department and intelligence agencies had relied solely on a classified document from an unnamed source. He wrote that "while the information in the classified intelligence report, relating to the credibility and reliability of the source, was undoubtedly sufficient for the intelligence purposes for which it was prepared, it is not sufficient for the purposes for which a habeas court must now evaluate it." He added, "To allow enemy combatancy to rest on so *thin* a reed would be inconsistent with this Court's obligation under the Supreme Court's decision in *Hamdi* to protect petitioners from the risk of erroneous detention."

The government did, however, present additional evidence which persuaded Judge Leon that Bensayah was "an al-Qaida facilitator" who planned to take up arms against the United States and facilitate the travel of unnamed others to do the same. That, wrote the judge, "constitutes direct support of al-Qaida in furtherance of its objectives" and "this amounts to 'support' within the meaning of the 'enemy combatant' definition governing this case."

Bosnian authorities have indicated they are willing to take the five detainees once they are released.

In October, another federal district judge in Washington, Ricardo M. Urbina, ordered that 17 Uighur detainees be released from Guantánamo. The judge didn't hold an evidentiary hearing because the government conceded the men were not enemy combatants. But the 17 men from western China languish in custody because the government has appealed Judge Urbina's ruling.

President-elect Barack Obama has pledged to close the Guantánamo prison when he takes office. The National Lawyers Guild has urged Obama to ensure that the prisoners are released, repatriated, resettled, or brought to trial (if there is probable cause to believe they have committed a crime) in strict accordance with international human rights and humanitarian law, and the principles of fundamental justice pertaining to criminal proceedings. This includes but is not limited to, the Four Geneva Conventions of 1949, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights. The United States has ratified all of these treaties which makes their provisions binding U.S. law under the Supremacy Clause of the Constitution.

The Guild opposes the creation of national security courts to try the detainees. Although Obama said in August, "It's time to better protect the American people and our values by bringing swift and sure justice to terrorists through our courts and our Uniform Code of Military Justice," three Obama advisers told the Associated Press that the President-elect is expected to propose a new court system to deal with "sensitive national security cases."

Concerns have been cited about disclosure of classified information in civilian courts and courts-martial. However, the Classified Information Procedures Act (CIPA) provides an adequate method of protecting classified information in existing U.S. courts. CIPA allows a judge to assess the importance of sensitive evidence before it is disclosed in open court and, if necessary, create a nonclassified substitute for use at trial. Former federal prosecutors Richard B. Zabel and James J. Benjamin, Jr. studied the 107 post-9/11 cases and prepared a 171-page white paper for Human Rights First called *In Pursuit of Justice:*

Prosecuting Terrorism Cases in the Federal Courts. They wrote, "[w]e are not aware of a single terrorism case in which CIPA procedures have failed and a serious security breach has occurred." National security courts, they write, "would give the government more power and make it easier for the government to secure convictions."

President-elect Obama should send those prisoners he intends to try to U.S. civilian and military courts, which are well-suited to protect national security concerns. He should eschew the creation of a new system of courts with reduced due process, which will raise many of the same concerns as Bush's dreaded military commissions.

Marjorie Cohn is a professor at Thomas Jefferson School of Law and the president of the National Lawyers Guild. She is the author of Cowboy Republic: Six Ways the Bush Gang Has Defied the Law and her new book, Rules of Disengagement: The Politics and Honor of Military Dissent (with Kathleen Gilberd, will be published in March by PoliPointPress. Her articles are archived at **www.marjoriecohn.com**.
