

By Andy Worthington

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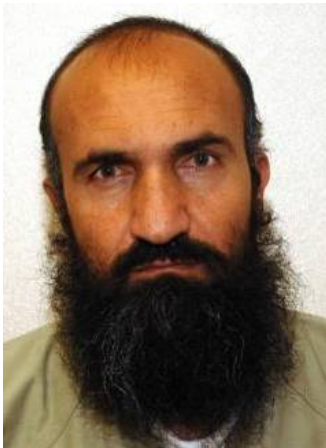
Last month, the third anniversary of [Boumediene v. Bush](#) (on June 12) passed without mention. This was a great shame, not only because it was a powerful ruling, granting the Guantánamo prisoners constitutionally guaranteed habeas corpus rights, but also because, after that bold intervention, which led to [the release of 26 prisoners](#) who subsequently won their habeas corpus petitions, the prisoners at Guantánamo have once more been abandoned by the courts.

The courts' failure has come about largely because a number of judges in the D.C. Circuit Court, where appeals against the habeas rulings are filed, have revealed themselves to be at least as right-wing as the architects of the "War on Terror" in the Bush administration. Led by Judge A. Raymond Randolph, whose previous claim to fame on national security issues was that he supported every piece of Guantánamo-related legislation that was subsequently overturned by the Supreme Court, the Circuit Court has, in the last year, succeeded in gutting habeas corpus of all meaning, when its relief is sought by any of the 171 men still held at Guantánamo.

Throughout this year, I have [followed](#) , with [despair](#) , the Circuit Court's [rulings](#) , which are [distressing](#)

on two fronts: firstly, because judges have whittled away at the lower courts' demands that the government establish its case "by a preponderance of the evidence," which is a very low standard in the first place; and secondly, because the Circuit Court has reinforced the misconception at the heart of the "War on Terror," almost delighting, it seems, in failing to acknowledge that soldiers are different from terrorists.

In fact, despite the Supreme Court's attempt to grant rights to the prisoners, both soldiers and terrorists are still, essentially, held at Guantánamo as a category of human being with almost no rights at all — what George W. Bush notoriously referred to as "unlawful enemy combatants."



Last month, just after the *Boumediene* anniversary, on June 23, Judge Ricardo Urbina delivered the 60th Guantánamo habeas ruling, turning down the habeas petition of Khairullah Khaikhwa, an Afghan prisoner ([PDF](#)). This was unsurprising, as Khaikhwa was the governor of the western province of Herat under the Taliban, and had also served as the Taliban's Minister of the Interior. Crucially, Khaikhwa's defense turned on his claim that he did not have a military role, but Judge Urbina agreed with the Justice Department that there was evidence indicating that "he served as a member of a Taliban envoy that met clandestinely with senior Iranian officials to discuss Iran's offer to provide the Taliban with weapons and other military support in anticipation of imminent hostilities with US coalition forces."

This may well be the case, although it does not detract from the ongoing, and largely unchallenged absurdity of holding prisoners at Guantánamo who were involved in military activity, rather than those who were involved with acts of international terrorism. Unless Khaikhwa was involved in the planning and execution of the 9/11 attacks, he should, I contend, have been held as a prisoner of war, and not as an "enemy combatant," and, very possibly, tried in Afghanistan for [the war crimes of which he has been accused](#) . These took place in 1998, when he was in charge as the Taliban took the northern Afghan city of Mazar-e-Sharif, and proceeded to massacre thousands of its inhabitants, the Hazara and the Uzbeks, who, along

with Tajiks and Pashtuns, make up the four main ethnic groups in Afghanistan.

It is to no one's credit that, nearly ten years after the 9/11 attacks, the deliberate confusion at the heart of the "War on Terror" — designed by senior Bush administration officials to allow them to set up an illegal interrogation camp at Guantánamo, and to coercively interrogate those it held, and even to torture them — still exists, imprisoning soldiers, and even military commanders like Khairkhwa, in an experimental prison associated with terrorism, possibly for the rest of their lives.



Last Friday, July 22, the Circuit Court reinforced its position, denying the appeal of Muaz al-Alawi (known to the authorities as Moath al-Alwi), who [lost his habeas petition 18 months ago](#), in January 2009. Al-Alawi was one of the first prisoners to lose his habeas petition, and his case was emblematic of the distortions required to equate soldiers with terrorists.

At the time Judge Richard Leon turned down his habeas petition, the Court first had to establish that, in order to be detained, prisoners were required to be “part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the US or its coalition partners,” which included “any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” As I explained at the time:

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 US 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 at US or coalition forces,” he was still in Afghanistan when that conflict morphed into a different war following the US-led invasion in October 2001. As Leon admitted in his ruling, “Although there is no evidence of petitioner actually using arms against US 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.”

Given the confused definition of who can legitimately be detained at Guantánamo, and the impact, in the last year, of the Circuit Court’s repeated assaults on the lower courts’ rulings, it was obvious that al-Alawi’s appeal would fail ([PDF](#)), but that is no cause for celebration.

As with the case of Khairullah Khairkhwa, the wrong questions are still being asked. Rather than asking whether these men can legitimately be held, what those who are disturbed by the ongoing existence of Guantánamo need to be asking instead is why the courts are justifying the ongoing — and possibly indefinite — detention of the Guantánamo prisoners, when that is inappropriate.

The majority of those still held were soldiers, who should be able to argue now that the conflict in which they were seized was finite, and cannot be an endless “War on Terror,” and the rest, accused of involvement with terrorism, should be tried for their alleged involvement in criminal activities.

