By Andy Worthington

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When it comes to Guantánamo, the prisoners held in the Bush administration's experimental prison have mostly been abandoned by those who should have acted on their behalf in all three branches of government – the executive branch, Congress and the judiciary.

In June 2004, for a brief moment, George W. Bush's excesses were checked by the Supreme Court, which, in *Rasul v. Bush*, took the unprecedented move of granting habeas corpus rights to prisoners seized in wartime, after recognizing that the Bush administration had shunted aside the Geneva Conventions in favor of a unprecedented system of arbitrary detention.

In this system, the US government decided that all its actions relating to terrorism and the perceived threat from al-Qaeda and the Taliban (essentially regarded as interchangeable with al-Qaeda because they had "hosted" Osama bin Laden in Afghanistan) constituted part of a "war on terror," and decided that everyone seized could be held, without anyone bothering to ascertain whether they had been seized by mistake, as "illegal enemy combatants," who literally had no rights whatsoever, either as human beings or as prisoners.

For the Bush administration and for Congress, however, although the Supreme Court's ruling was inconvenient, as it allowed lawyers to take on prisoners as clients, and to meet with them, it was not the end of their adherence to arbitrary detention, and they largely fought back against it. The President introduced a hastily invented review process for the prisoners (the Combatant Status Review Tribunals), which was heavily weighted in favor of the presumption that they had been correctly designated as "enemy combatants" on capture, and Congress went further, passing laws in 2005 and 2006 — the Detainee Treatment Act and the Military Commissions Act — that purported to strip the prisoners of their habeas corpus rights.

It was not until June 2008 that the Supreme Court once more took the opportunity to reassert its authority (in *Boumediene v. Bush*), arguing that the habeas-stripping provisions of the DTA and MCA were unconstitutional, and reiterating that the prisoners had habeas corpus rights,

and that, this time around, they were constitutionally guaranteed.

For opponents of Guantánamo and the "war on terror," what followed was a golden period for accountability, as, between October 2008 to July 2010, 38 out of 52 prisoners won their habeas corpus petitions, as judge after judge in the District Court in Washington D.C. concluded that the government had failed to meet its spectacularly low burden of establishing, "by a preponderance of the evidence," that the prisoners were involved with al-Qaeda and/or the Taliban.

In the majority of cases, the government accepted defeat, releasing — or not opposing the release — of 31 of these men, and 26 were subsequently released. The other five are Uighurs (Muslims from China's oppressed Xinjiang province), who are at risk of torture if repatriated, and who are still seeking a new home.

Beginning in January 2010, however, judges in the D.C. Circuit Court started pushing back against the lower court's rulings, at first by advocating for unfettered executive power in wartime (which the Obama administration had not even asked for), and then by whittling away at the requirements for ongoing detention decided by the District Court judges (who largely agreed that prisoners had to be demonstrably part of a chain of command).

The Circuit Court judges, led by Senior Judge A. Raymond Randolph, who was notorious, under George W. Bush, for supporting every piece of Guantánamo-related legislation that was subsequently overturned by the Supreme Court, also pushed to reduce, if not to eliminate entirely, the burden on the government to establish that its evidence was trustworthy, and the result, from July 2010 onwards, has been that five successful habeas petitions have either been reversed (three cases) or vacated, and sent back to the lower court to reconsider (two cases). In addition, the District Court judges, who were, essentially, ordered to lower the burden of proof and regard the government's alleged evidence as reliable, have, since July 2010, turned down the last eleven habeas petitions submitted by the prisoners. Details and links are in my article, Guantánamo Habeas Results: The Definitive List.

Fadel Hentif, a Yemeni, loses his habeas petition for having a watch and staying in a guesthouse

I have, previously, written about eight of these rulings, but have not provided any updates since summer, when I wrote about how Khairullah Khairkhwa, a former Taliban minister, lost his habeas petition in June. The next prisoner to lose was Fadel Hentif (also identified as Fadil Hintif), a Yemeni whose habeas petition was refused by Judge Henry H. Kennedy Jr. on August 1, 2011, although a heavily redacted version of the opinion was not made available until mid-September (PDF).

Hentif claimed to have traveled to Afghanistan to perform humanitarian aid work, which he said, "would be a chance to do something good in memory of his deceased father." After staying briefly in a guesthouse in Kandahar, he said that he was directed by the owner of the guesthouse to stay with a Yemeni in Kabul, who provided medical supplies to Afghans in need. Hentif said that he worked with this man for a while, and then traveled to Logar province and the city of Jalalabad before leaving for Pakistan, where he was seized and transferred to US custody.

In challenging his story, the US government claimed, primarily, that the guesthouse was affiliated with al-Qaeda, that Hentif had attended a training camp, that two men he met in Kabul were also affiliated with al-Qaeda, and that he had been present at the battle of Tora Bora at the end of 2001, which was a showdown between al-Qaeda and the Taliban, on the one hand, and US forces and their Afghan proxies on the other.

However, while Judge Kennedy found no evidence that Hentif had attended a training camp or had been at Tora Bora, and also found no evidence confirming his connection with suspicious individuals in Kabul, he was required, by a Circuit Court precedent, to conclude that "staying at an al-Qaeda guesthouse is 'overwhelming' evidence of an affiliation with al-Qaeda."

Shockingly, in reaching his conclusion that the respondents (the government) had "carried their burden by a preponderance of the evidence," he was also convinced by a piece of alleged evidence that, throughout Guantánamo's history, has been mocked by commentators; namely, his possession of a model of Casio watch allegedly linked to the detonation of IEDs (improvised explosive devices). Influenced, again, by the Circuit Court, which declared that "evidence that a detainee had a Casio watch on his person at the time of his capture was a 'telling fact,'" Judge Kennedy noted, "Although Casio watches of this model are not unique, the fact that Hentif possessed one is further support for respondents' contention that Hentif was part of al-Qaeda

or the Taliban."

What made the ruling particularly depressing was that, in January 2007, as was revealed in the classified military files released by WikiLeaks in April this year, Rear Adm. Harry B. Harris, Jr., the commander of Guantánamo at the time, recommended Hentif's release, based on assessments made by the Joint Task Force at Guantánamo. Nevertheless, he was not released by President Bush, was not released by President Obama, and, moreover, appeared to be a victim of the Justice Department's general indifference to the fate of the prisoners, as government lawyers could easily have been instructed not to challenge the habeas corpus petitions of any of the prisoners cleared for release by President Bush, or by President Obama's Guantánamo Review Task Force.

Abdul Qader Ahmed Hussein, a Yemeni, loses his habeas corpus petition for handling a gun in Afghanistan

On October 12, Judge Reggie B. Walton denied the habeas corpus petition of Abdul Qader Ahmed Hussein (also identified as Ahmed Abdul Qader), another Yemeni (PDF). Just 18 years old at the time of his capture, he was one of 15 prisoners seized in a guesthouse in Faisalabad, Pakistan, on the same night — March 28, 2002 — that a supposed "high-value detainee," Abu Zubaydah (actually the mentally damaged gatekeeper of a training camp that was not associated with al-Qaeda), and a handful of other allegedly significant prisoners were also seized from another completely different location.

Hussein was one of the few prisoners in the guesthouse to explain that he had spent time in Afghanistan, as most of the others said that they had traveled to Pakistan to study, or, in a few cases, to receive medical treatment. Whether under Bush or Obama, the administration has never been happy to accept this argument, claiming that everyone in the house had been in Afghanistan in some sort of military capacity, but officials do not have a good track record when it comes to establishing their story.

Of the 15, for example, although one died in Guantánamo in June 2006, in a disputed triple suicide , five of the remaining 14 have been released. Two of these men — Alla Ali Bin Ali Ahmed and Mohammed Hassan Odaini — were freed after convincingly winning their habeas corpus petitions, and the others were freed after administrative reviews. In addition, a sixth man, a Russian named Ravil Mingazov, won his habeas corpus petition in May 2010 , only to have the ruling challenged by the government. See here for a report by his attorney on his 18-month wait for what will almost certainly be a successful appeal on the part of the government, because of the Circuit Court's bias.

In Hussein's case, he said that he went to Afghanistan "to help the needy and the poor," and tried unsuccessfully to establish a charity organization. He admitted that he visited the "back line," encouraged by friends connected to the Taliban, but insisted that he "never participated in any kind of military activities." After leaving Afghanistan before the US-led invasion began, he said that he ended up in the house in Faisalabad, where he became friends with Fahmi Ahmed, another Yemeni, who is still held. "We shared the same vision and he has the same opinions," Ahmed said of him, adding, "He used to use hashish with me," whereas the other students in the house "were trying to inspire me to do the religious things, like look at my religion, because most of the students were studying the Koran and all things related to religious studies."

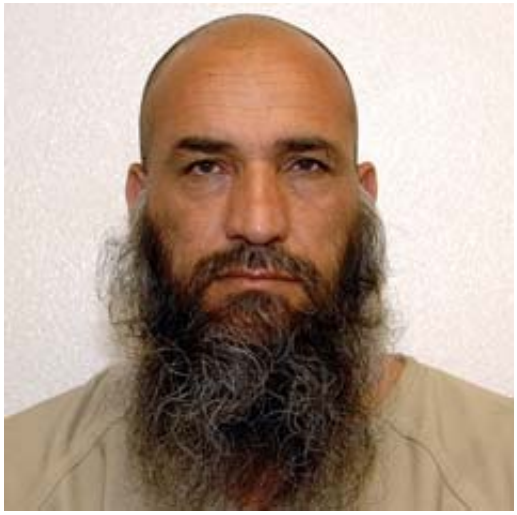
Reviewing his case, in light of the Circuit Court's rulings, Judge Walton denied Hussein's habeas petition for a variety of reasons that do not exactly encourage overwhelming support for the direction the habeas hearings have taken. Following a previous Circuit Court ruling (in the case of a Yemeni called Hussein Almerfedi), it was considered significant that Abdul Qader Ahmed Hussein had stayed at two mosques in Pakistan run by the vast and apolitical missionary organization Jamaat al-Tablighi, which is

regarded, by Justice Department lawyers and the Circuit Court, as a front for terrorism, even though it has millions of non-terrorist members worldwide, and using it to justify detention is akin to imprisoning Catholics for the actions of the IRA.

It was also considered significant that, while in Afghanistan, he was handed a Kalashnikov rifle "from three Taliban guards in an area near the lines of battle between the Taliban and Northern Alliance," and was shown how to use the gun by one of the Taliban guards. Judge Walton was also not impressed that it took him so long to leave Afghanistan, despite professing a desire to return home, and that he failed to enrol in university while staying in Faisalabad, despite claiming that he intended to do so.

Judge Walton concluded, "These facts, when viewed together, are more than sufficient to constitute the level of 'damning' circumstantial evidence that is needed to satisfy the government's burden of proof in this case," which, to my mind, only demonstrates that the Circuit Court's tampering with the burden of proof has had disastrous results, as Hussein now finds himself consigned to permanent imprisonment at Guantánamo, possibly for the rest of his life, based on little more than innuendo.

Karim Bostan, an Afghan, loses his habeas petition for alleged insurgent activities in summer 2002



On the same day as he delivered his ruling in Hussein's case, Judge Walton also denied the habeas petition of Karim Bostan (also identified as Bostan Karim), an Afghan whose case demonstrates another peculiarity of Guantánamo — the desire, on the part of successive US administrations, to hold, in a prison supposedly associated with terrorism, Afghans allegedly

involved in minor acts of insurgency against the US occupation of their country (PDF).

In Bostan's case, the evidence has always been thin, to put it charitably. A preacher and a shopkeeper, he was seized on a bus that traveled regularly between Afghanistan and Pakistan, and was reportedly "apprehended because he matched the description of an al-Qaeda bomb cell leader and had a [satellite] phone," which he had apparently been asked to hold by a fellow passenger, Abdullah Wazir (who was released from Guantánamo in December 2007). Other allegations were made by another Afghan, a young man named Obaidullah, who said in Guantánamo that he had made false allegations (and had also falsely incriminated Bostan), while he was being abused by US soldiers in Khost and Bagram. As he explained:

The first time when they [US soldiers] captured me and brought me to Khost they put a knife to my throat and said if you don't tell us the truth and you lie to us we are going to slaughter you … They tied my hands and put a heavy bag of sand on my hands and made me walk all night in the Khost airport … In Bagram they gave me more trouble and would not let me sleep. They were standing me on the wall and my hands were hanging above my head. There were a lot of things they made me say.

Despite this, Obaidullah lost his habeas corpus petition in October 2010, and is also a candidate for a trial by military commission , for which both the Bush and Obama administrations have decided that it is somehow appropriate to stretch the meaning of "war crimes" to include a young Afghan who allegedly stored and concealed explosives that could have been used to attack US forces, but never were.

In Bostan's case, Judge Walton's ruling revealed, shockingly, that his ongoing detention, possibly forever, was justified because he "was a member of the Jamaat al-Tablighi," and "met Obaidullah and Wazir through the Jamaat al-Tablighi," and because he took Abdullah Wazir's phone on the bus and apparently attempted to hide it and the "most likely explanation" for doing so "was his knowledge that the telephone could be used to detonate explosive devices."

Judge Walton decided that "these facts, when viewed collectively, demonstrate that the petitioner was more likely than not a 'part of' al-Qaeda," and just to reiterate how far the Circuit Court has drifted from any notions of fairness and proportion, it is worth noting that he specifically stated, "As the Circuit found in *Almerfedi*, a detainee's membership in Jamaat

al-Tablighi, together with other 'damning' circumstantial evidence, is sufficient as a matter of law to justify the detainee's detention."

The Circuit Court's overreach, in reversing the successful habeas petition of Adnan Farhan Abdul Latif

If these rulings should have reduced anyone who believed in US justice to some sort of state of despair, worse was to come on October 14, when the D.C. Circuit Court delivered its ruling in the government's appeal against the successful habeas corpus petition of Adnan Farhan Abdul Latif, a Yemeni who won his petition in July 2010 , reversing his successful petition in a shocking ruling that has finally seen the Circuit Court's scandalous destruction of habeas corpus picked up on by the mainstream media (PDF).

As the *New York Times* noted in an editorial last Sunday, the Supreme Court's 2008 habeas ruling in *Boumediene v. Bush* "has been eviscerated by the Court of Appeals for the District of Columbia Circuit," whose "wrongheaded rulings and analyses, which have been followed by federal district judges, have reduced to zero the number of habeas petitions granted in the past year and a half."

The *Times* followed up by urging the Supreme Court, which has refused to consider any significant Guantánamo appeals filed since *Boumediene*, to "reject this willful

disregard of its decision in *Boumediene v. Bush*, which, the editors added, "it can do so by reviewing" Latif's case.

In analyzing that ruling, the *Times* lamented that the Circuit Court had shamefully dismissed the considered opinion of the District Court judge in Latif's case, who, ironically, was Judge Kennedy. As the *Times* explained, it is "undisputed" that Latif "was in a car accident in Yemen in 1994 and sustained head injuries," and, in 2001, "went to Pakistan to seek free medical treatment, and eventually traveled to Kabul to find a Yemeni man who had promised to help him." Moreover, although the government contended that he "was recruited by an al-Qaeda operative and fought with the Taliban," Judge Kennedy "found that the government's evidence did not sufficiently support its contention, that incriminating evidence was not corroborated and that Mr. Latif had a plausible alternative explanation for his travels."

Crucially, however, in reversing Judge Kennedy's decision, the majority judges in the Circuit Court ruling, Judge Janice Rogers Brown and Judge Karen LeCraft Henderson (who have a history of extreme decisions in Guantánamo cases), "improperly replaced the trial court's factual findings with its own factual judgments," as the *Times* explained, noting also that the court "unfairly placed the burden on Mr. Latif to rebut the presumption that the government's main evidence was accurate," because "the government should bear the burden of proving by a preponderance of the evidence that his detention is warranted."

What this means, in practical terms, is not only that the Circuit Court has stepped way beyond its mandate, but, specifically, that the majority judges argued that "the government's intelligence report on the Latif case should have been given 'a presumption of regularity' and that unless there is 'clear evidence to the contrary,' trial judges must presume that this kind of report is accurate."

By this rationale, of course, the already severely lowered bar for detention would disappear completely, effectively making it impossible for the prisoners to argue against anything the government alleged against them. The irony, of course, is that the court had already gutted habeas of all meaning, but with this particular overreach may finally provoke a much needed and long overdue backlash. As Judge David Tatel, the third judge in the panel, noted in a strongly worded dissent, there was no reason whatsoever for his colleagues to make such an assumption about the intelligence report, which was "produced in the fog of war, by a clandestine method that we know almost nothing about."

In addition, Judge Tatel noted that it was "hard to see what is left of the Supreme Court's command" that the habeas review process be "meaningful," and the *Times* concluded by stating that "the appeals court has gone off on the wrong track," and reiterating that the justices of the Supreme Court "need to reaffirm the right of prisoners in Guantánamo to seek justice in federal court and to explain firmly and clearly what that entails."

It is to be hoped that the Circuit Court's shameful overreach will finally prompt the justices to act, and to restore the meaningful remedy that habeas was for the Guantánamo prisoners until 16 months ago.

In addition, there should be justice for Adnan Farhan Abdul Latif in particular, in part because he has well-documented mental health issues, as I explained when he won his petition , but also because he, like Fadel Hentif, was also cleared for release under George W. Bush, in December 2006 , in a recommendation that was cited in an updated recommendation in January 2008 released by WikiLeaks, and issued by Rear Adm. Mark H. Buzby, who was the commander of Guantánamo at the time.

As with Hentif, the Bush administration's failure to release him has been compounded under President Obama, who has failed to instruct the Justice Department to stop challenging the petitions of prisoners cleared for release, and, it seems clear, has been content to use the Yemeni prisoners as part of his political maneuvering.

With Yemen off-limits since January 2010, when Obama issued a moratorium on any further prisoner releases to Yemen following a hysterical response to the news that the failed Christmas plane bomber, Umar Farouk Abdulmutallab, had been trained there, it has suited the administration — with one notable exception — to prevent any political difficulties by appealing every successful habeas petition won by a Yemeni, regardless of whether there was any genuine reason for doing so, or whether, as in the cases of Fadel Hentif, Adnan Farhan Abdul Latif and the other 17 Yemenis cleared for release between 2004 and 2007 but still held, they are nothing but pawns in a political game.