

Court Rules Detainees Have No Rights To Hearings

A three-judge panel of the U.S. Court of Appeals (D.C. Cir.) ruled on March 11, 2003 that suspected Taliban and al-Qaida fighters now held and interrogated at Guantanamo Bay in Cuba have no right to hearings in U.S. courts to challenge their detention. (See *Al Odah v. United States*, 2003 U.S. App. Lex is 4250 (D.C. Cir. 2003)).

The panel affirmed a federal district court ruling in 2002 that held that no U.S. court has jurisdiction over the detainees' claims. (*Rasul v Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002)). The opinion by Judge A. Raymond Rudolph cited *Johnson v. Eisentrager*, 339 U.S. 763 (1950), as precedent, a World War II case in which German nationals who were fighting alongside Japanese forces were captured in China after the surrender of Germany and before the surrender of Japan, then tried before a U.S. military tribunal in Shanghai. Upon conviction for espionage, the Germans appealed to the U.S. Supreme Court. The Supreme Court ruled that the petitioners lacked standing to invoke U.S. legal processes.

Because the Guantanamo prisoners are not on American soil, the civilian courts have no jurisdiction to consider their claims. "If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty," Rudolph wrote. Furthermore, following the attacks of September 11, Congress recognized the President's authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," he noted.

The Washington Post reported that during the 90-minute oral argument in December 2002, attorneys representing the detainees' families had urged the panel to give the detainees access to U.S. courts, under either United States or international law. The court should grant the detainees the right of *habeas corpus*, the attorneys said, because arrested persons are entitled to have a court adjudicate the lawfulness of their detention. They distinguished the detainees from the German prisoners in *Johnson*, arguing that they are not "enemy aliens." The Geneva Convention protocols (which would grant detainees rights as prisoners of war) and the Alien Tort Claims Act also grant legal protections to the detainees, the attorneys argued.

The U.N. High Commissioner for Human Rights expressed concern over indefinite detention of the detainees. "It is the legitimate right of any

government, including and in particular the United States, to do all it can to gather information (on terrorism)," Commissioner Sergio Vieira de Mello said. "But how long can you keep a person in legal limbo?"

Anthony Lewis, the 2002 Silha Lecturer, wrote a column anticipating the D.C. Circuit's ruling in *The New York Times* on February 24, 2003. "We rely on the courts to enforce what the Constitution promises us," Lewis wrote, citing the landmark case of *Marbury v Madison*, 5 U.S. 137 (1803), which established judicial review — the duty of the courts to say what the law is. But, Lewis continued, in time of war, U.S. courts have abdicated their function, "bowing to claims of national security." In the case of the detainees at Guantanamo Bay, "the government can impose solitary confinement, perhaps for life, if it simply avoids giving the prisoner a trial," Lewis wrote.

On Dec. 4, 2002, Camp Delta at Guantanamo Bay was opened to journalists for the first time. No photographs of the camp were permitted, but an *Associated Press* reporter and photographer were shown an empty sample cell where detainees are housed. The steel cells measure 8 by 6.8 feet and workers are building an additional 150 cells that should have been completed by the end of January 2003, increasing the total number of cells to over 960.

INS Final Rules Regarding Information About Detainees

On Jan. 29, 2003, the Immigration and Naturalization Service issued final rules requiring the identities of detainees housed in state and local jails to be kept secret. The agency regulations provide that all jails housing detainees pursuant to government contracts must not release any information about them. Instead, information may be "released in a uniform scheme" governed by the federal Freedom of Information Act (FOIA) and its exemptions, rather than by open records laws of the individual states.

The American Civil Liberties Union argued before a New Jersey state appeals panel in June 2002 that the INS had failed to follow administrative procedures to allow public notice and comment on the new rules. The INS responded that the rules were appropriate and were enacted quickly for "good cause."

Many of the detainees arrested in connection with the events of September 11 are incarcerated in state and local jails, including those suspected of terrorist involvement or violation of immigration laws as well as material witnesses.

ACLU files petition for *certiorari*

On March 6, 2003, the ACLU filed a petition on behalf of the North Jersey Media Group Inc. and the *New Jersey Law Journal*, asking the U.S. Supreme Court to decide whether the government violated the First Amendment when "special interest" hearings connected to terrorism investigations were closed. Rulings in *Detroit Free Press v. Ashcroft*, 303 F. 3d 681 (6th Cir. 2002) and *North Jersey Media Group v. Ashcroft*, 308 F. 3d 198 (3rd Cir. 2002) resulted in a split in the Sixth and Third Circuits on the issue. (See "Sixth, Third Circuit Courts Split on Deportation Hearings Question," in the Fall 2002 *Silha Bulletin*.)

Richard Reid's Letters Remain Sealed

On Jan. 28, 2003 a judge in the federal district court in Boston ruled that the letters written by "shoebomber" Richard Reid will not be released to the public. Judge William G. Young decided that the letters will remain under seal, denying the request for access filed by the *Boston Herald* and *The Boston Globe*.

Judge Young accepted the government's arguments, presented in an affidavit from FBI Special Agent Thomas Powers, who argued that release of the letters containing coded messages would threaten national security.

In December 2001, Reid, a member of al-Qaida, was arrested after boarding a flight from Paris to Miami with a bomb hidden in his shoe. In October 2002, Reid was convicted of attempted use of a weapon of mass destruction and attempted murder. Judge Young sentenced Reid to life in prison without parole on Jan. 30, 2003. The letters are correspondence between Reid and family members.

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