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USA: Judicial review and remedy still more myth than reality for Guantánamo detainees

09 April 2009 **AI Index: AMR 51/051/2009**

Ten months after the US Supreme Court ruled in *Boumediene v. Bush* that the detainees held in US military custody at Guantánamo Bay in Cuba were entitled to a "prompt" habeas corpus hearing in District Court to determine the lawfulness of their detention, only a handful of them have received such a hearing. Amnesty International details its concerns in a new report.

While President Barack Obama has ordered the closure of the Guantánamo detention facility by January 2010, the future remains uncertain for the approximately 240 detainees still held there as the executive review of their cases and of US detention policy ordered by the new President gets underway. So far, this executive review has led to the release of one detainee, to the United Kingdom. No Guantánamo detainee has been charged by the new administration.

The Bush administration responded to the *Boumediene* ruling by seeking to preserve as much executive control over the detainees as possible, and its litigation tactics ensured delays in habeas review. The change in administration has led to further delays.

In the case of a number of detainees previously charged for trial by military commission, the new administration is seeking to have their habeas corpus petitions dismissed on the grounds that the charges against them are still pending, even though the military commissions have been suspended. The detainees affected include Mohammed Jawad, an Afghan national who has been in US military custody since he was 16 or 17 years old, over six years ago.

Even if the courts refuse to dismiss the habeas petitions of these detainees – as a judge did in one case earlier this week, the litigation on this issue will still have delayed judicial review. Amnesty International is also concerned that "at the direction of the Secretary of Defense", the Pentagon is continuing to assess cases for "potential trial by military commission", according to a statement filed in court by the government in March. The organization is calling on the administration to abandon the commissions permanently, and to facilitate speedy habeas corpus review for any detainee seeking it.

In the seven months between *Boumediene* and the presidential inauguration, only nine of the 200 detainees challenging their detention as "enemy combatants" received decisions on the merits of their cases. During the first two and a half months of the new presidency, decisions were handed down in only three more cases, including one argued before inauguration.

Indefinite detention has continued in some instances despite orders by federal judges for the immediate release of the detainee. Two men seized in Bosnia and Herzegovina and taken to

Guantánamo in 2002 are still held four months after they were ordered freed. A Chadian national transported from US custody in Afghanistan to Guantánamo in 2002 at the reported age of 14 also remains in the naval base three months after his detention was ruled unlawful.

It is now six months since a District Court judge ordered the release into the USA of 17 Uighur detainees not considered by the Bush administration to be "enemy combatants". The new administration failed to halt its predecessor's appeal against the judge's release order, and in February 2009 the Court of Appeals overturned the release order. The new administration appears to be interpreting that reversal, *Kiyemba v. Obama*, as supporting the notion that when a District Court orders the immediate release of a detainee from Guantánamo, the administration need comply only to the extent that negotiations with other governments allow. In the case of the Uighurs, who are among those Guantánamo detainees who cannot be returned to their native countries because of the human rights violations they would face there, years of diplomatic negotiations have failed to find a third country solution. In an appeal just filed, lawyers for the Uighurs are seeking the US Supreme Court's intervention in the *Kiyemba* case. They argue that the decision by the Court of Appeals – effectively holding that the US courts are "powerless to remedy indefinite and illegal Executive detention of prisoners within their habeas jurisdiction" – would, if allowed to stand, "eviscerate" the *Boumediene* ruling.

Amnesty International considers it unacceptable that any Guantánamo detainee continues to be held without charge or trial. The detainees should be either charged with recognisable criminal offences for trial under fair procedures in existing federal courts or released immediately, into the USA if necessary. Consistent with this position, the organization also urges the administration to rely only on criminal justice grounds in seeking to justify in habeas corpus proceedings the continued detention of any detainee.

While the new administration appears to be rejecting "war on terror" as the catchphrase for US counter-terrorism efforts, and has dropped use of the term "enemy combatant" in the Guantánamo litigation, it has not yet rejected the substance of the insidious global war framework developed by its predecessor. Like the latter, it is citing as a basis for detention the Authorization for Use of Military Force, a broadly worded congressional resolution passed after the attacks of 11 September 2001 and exploited by the Bush administration.

The new administration appears also to be at least temporarily adopting its predecessor's opposition to judicial review of "conditions of detention" claims. In *Boumediene*, the Supreme Court declared as unconstitutional Section 7 of the 2006 Military Commissions Act (MCA), or at least that part of it which purported to strip the detainees of their right to habeas corpus. Section 7 consists of two parts, however. The Bush administration argued that *Boumediene* had left intact the second part – that "no court, justice, or judge shall have jurisdiction to hear or consider any other action… relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of anyone held as an "enemy combatant" by the USA.

The new administration has so far kept to this approach, arguing that the courts cannot consider challenges to any aspect of detention other than what it calls the "core habeas" question: the lawfulness of detention. Given the backdrop to the detentions – including secret transfers, ill-treatment and health-related consequences of years of indefinite confinement –

this is of acute concern. Under international law, anyone whose rights have been or are being violated in custody must be able to seek effective remedy, including through the courts.

Those Guantánamo detainees previously held in the USA's secret detention program – which President Obama has taken steps towards ending – face particular obstacles in challenging their detention and seeking judicial remedy for human rights violations. Amnesty International has urged the administration to ensure that classification of information is no longer permitted, by design or effect, to facilitate human rights violations or block accountability and remedy.

Hopes for a more transparent approach were dealt a blow in February 2009, when the Justice Department invoked the "state secrets privilege" in the same way as it had under the Bush administration to seek dismissal of a lawsuit brought by detainees who allege they were subjected to various human rights violations as part of the US program of 'rendition' and secret detention. The stance adopted by the new administration in a case brought against various former military officials by four UK nationals previously held in Guantánamo also raises concern. In a brief filed in federal court in March 2009, the Justice Department asserted that the *Boumediene* ruling had not altered the legal landscape as far as such a lawsuit was concerned, that the *Kiyemba* ruling by the Court of Appeals had clarified that "aliens held at Guantánamo do not have due process rights", and that such lawsuits brought by foreign nationals against US military officials should be dismissed on the purported basis that allowing the courts to hear actions in relation to "aliens detained during wartime would enmesh the courts in military, national security, and foreign affairs matters that are the exclusive province of the political branches".

The optimism prompted by President Obama's executive orders of 22 January 2009 has given way to disquiet about some of the positions adopted by the new administration.[1] It is not yet clear if this lack of progress towards compliance with the USA's human rights obligations can be attributed to inefficiencies inherent in the handover between administrations, or to the new administration adopting a "holding" position while it reviews its policy options on detentions.

In any event, resolution of the Guantánamo cases – as well as legislative and policy initiatives to ensure accountability and remedy – are already years overdue. Each day that passes without the full and clear rule of law being applied to each detainee's case is a day that compounds the years of unlawful US conduct. Amnesty International has welcomed the new administration's initial moves on detention and interrogation policy, but is concerned to ensure that the necessary urgency and resources are applied to ending the Guantánamo detentions swiftly and in a manner that complies with international law.

- For further information, see USA: Detainees continue to bear costs of delay and lack of remedy: Minimal judicial review for Guantánamo detainees 10 months after *Boumediene*, 9 April 2009, available at http://www.amnesty.org/en/library/info/AMR51/050/2009/en.

[1] Amnesty International addresses elsewhere the detentions in the US airbase at Bagram in Afghanistan, on which the new administration has adopted wholesale its predecessor's position. See: Out of sight, out of mind, out of court? 18 February 2009, http://www.amnesty.org/en/library/info/AMR51/021/2009/en; Federal judge rules that three Bagram detainees can challenge their detention in US court, 3 April 2009, http://www.amnesty.org/en/library/info/AMR51/048/2009/en.