

Judge rules Afghan militant has been held in Guantánamo illegally, in what lawyers say is the first such ruling in 10 years

By Spencer S. Hsu

A federal judge has found that a former Afghan militant has been held unlawfully at the Guantánamo Bay detention camp, the first time in 10 years that a detainee has won such a case against the U.S. government, his lawyers said.

U.S. District Judge Amit P. Mehta in Washington this week entered a final order and two classified opinions in the case of Asadullah Haroon Gul, but it's unclear if or when he'd be released. One opinion granted Gul's petition questioning the legality of his confinement after finding he was not part of al-Qaeda, but another ruled against his second claim, finding that the end of hostilities in Afghanistan did not merit his release.

The government could appeal the order, and others previously granted habeas have sometimes languished for years. But the decision marks a significant legal turn involving the prison that remains a global symbol of U.S. excesses of power after the Sept. 11, 2001, terrorist attacks on New York City and the Pentagon. The facility became infamous for its detention of some prisoners who had been subjected to brutal mistreatment, including waterboarding and secret interrogations, but who had not been charged. Guantánamo, which has held nearly 800 detainees, now houses 39.

Spokeswomen for the court and the Justice Department declined to comment, but a U.S. official confirmed that the petition was granted Tuesday and that the opinion was undergoing classification review before it is released.

"This is a landmark victory for the rule of law and a much-needed reminder to the US government that there are limits on what it may do in the name of national security," Gul's attorney, Tara Plochocki, said in a written statement.

Gul's counsel Mark Maher, with the nonprofit group Reprieve, said the judge's ruling this week "affirmed what Asad has known for so long."

"He should be home with his family, and his detention is unlawful," Maher said. The basis of the ruling remains classified, but in public opening statements in May before evidentiary hearings conducted over weeks, U.S. prosecutors said they would rely on the detainee's purported sensitive statements to interrogators and to an unnamed witness and al-Qaeda courier to support his detention.

Gul, 40, was captured in 2007 by Afghan forces, turned over to the United States, and remains one of the last 39 detainees at the prison at Guantánamo Bay, Cuba. He is also one of only two Afghans who remain out of 219 sent there after the U.S. intervention in Afghanistan in 2001. President Biden formally ended the U.S. war in Afghanistan in August.

Three of the last four presidents, including Biden, have said the facility should close. But the U.S. government continues to grapple with what to do with a small group of prisoners who have never been charged but are seen as posing ongoing threats. The government is also struggling with where to house another dozen prisoners winding glacially through a dysfunctional military commission process or how to account for individuals whose convictions by the commission have been overturned by U.S. courts.

Twenty years after 9/11, the case of five men accused in the attacks remains in pretrial proceedings, and the Supreme Court recently took up the case of Guantánamo terrorism suspect Abu Zubaida, who was captured after the 9/11 attacks and is requesting more information about his CIA-sponsored torture.

Earlier this month, in a separate proceeding, the U.S. government determined that it was safe to transfer Gul, who has never been charged with a crime, out of Guantánamo. He is among 13 men who have been recommended for transfer by the multiagency Periodic Review Board (PRB), on the basis that they are not considered to pose a threat to U.S. national security. Among factors in its decision, the PRB cited Gul's "lack of a leadership role in extremist organizations and his lack of a clear ideological basis for his prior conduct."

Three of the men have been held for more than a decade, and clearance is no guarantee of release. Lawyers for those detainees say their continued detention despite having been cleared necessitates action by a court.

Gul's lawyers challenged his detention in federal court in July 2016 and argued in a hearing this spring that Biden's troop withdrawal announcement effective September 2021 amounted to a declaration that the U.S. war in Afghanistan was ending and that all prisoners of said war should be released.

Early this year, the U.S.-backed Afghan government of President Ashraf Ghani also filed a court brief in support of Gul's release, saying his continued detention was "detrimental" to U.S.-Afghan relations.

Gul "is a prisoner of war — a war that has been over for many years," Plochocki argued in May for Gul's legal team, which includes the law firm Lewis Baach Kaufmann Middlemiss. Plochocki said the fact that Gul remains detained has "gotten ridiculous," saying he is one of about 20 men still at the prison "who have not been and never will be charged with a crime."

Prosecutors argued that Gul's detention, while lengthy, remained justified.

Gul at the time of his capture was a member of Hezb-i-Islami Gulbuddin (HIG), a militant group then allied with al-Qaeda that resisted U.S. forces in 2001.

The HIG made peace with the government in Kabul in September 2016. Hundreds of its members have been freed from Afghan prisons, and its former CIA-backed leader, Gulbuddin Hekmatyar, continues to have a presence in the country's political dialogue. The U.S. government also has freed scores of Taliban figures from Guantánamo, including high-ranking members who now hold leadership roles in Kabul.

But prosecutors argued that Gul's ties to al-Qaeda went deeper and that the U.S. government remained at war with al-Qaeda.

Gul made several trips to training camps specializing in chemicals and explosives, helped transport money, communications and individuals, and carried out "other operational taskings" for al-Qaeda operatives, U.S. prosecutor Stephen McCoy Elliott said in May. Gul also became close to the only other Afghan still at Guantánamo, Muhammad Rahim al-Afghani, a former interpreter for Osama bin Laden who helped the latter escape Afghanistan in late 2001, Elliott alleged.

The government's position in Gul's habeas case appears fundamentally at odds with the position reached by the PRB — a body composed of representatives from the CIA, the Defense Intelligence Agency, the Department of Homeland Security and the Justice Department. The purpose of the board is to determine whether a detainee still poses a viable threat to U.S. national security, and, earlier this month, the board found that Gul did not.

But although the board assesses a detainee's dangerousness and makes a recommendation on that basis, it does not make a determination on whether the person's detention by the government is legal; that is where a habeas ruling comes in.

"The decision for the habeas petition is whether or not it's legal, and the decision for the PRB is whether or not it's wise," Maher said in an interview last week, likening the PRB to a "parole board."

At Gul's hearing in May, prosecutors said they would provide the judge with classified evidence to support their allegations of Gul's ties to al-Qaeda. They asserted that Gul had trained with a student organization associated with Khalid Sheikh Mohammed — the alleged mastermind of the terrorist attacks of Sept. 11, 2001 — and provided "substantial support" to al-Qaeda up to the time of his capture as evidenced by his purported disclosure of the locations of three of the group's operatives, the prosecutor said.

The hearing for Gul was the first involving a Guantánamo Bay prisoner petitioning for federal court review in two years and was scheduled before Biden announced the planned withdrawal of all U.S. troops from Afghanistan by the 20th anniversary of the 9/11 attacks, a process thrown into turmoil by the swift collapse of the U.S.-backed government and the return of the Taliban to Kabul.

Federal judges granted about 70 percent of 53 habeas petitions brought to them between 2008 — when the U.S. Supreme Court recognized a constitutional right by Guantánamo inmates to seek federal court review of the legality of their detention — and 2010, when the U.S. Court of Appeals for the District of Columbia Circuit sharply curbed that decision.

Since then, every petition opposed by the government has been rejected, and previously granted petitions appealed by the government reversed.