

Military Torturers at Guantanamo Bay

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After a jury in 2006 declined to impose the death penalty on Zacarias Moussaoui, who had just pleaded guilty to being the 20th 9/11 hijacker, the government announced that another person was the 20th. Yet, that person, Mohammed al-Qahtani, was ordered released from the U.S. Naval prison at Guantanamo Bay, Cuba, last week.

Here is the backstory.

Moussaoui had been living in Minnesota and taking flying lessons when he was arrested in August 2001 for an immigration violation. When officials questioned him, the answers he gave aroused their suspicions about what he intended to do with a plane once he was qualified to fly.

The FBI conducted a criminal investigation, and shortly after 9/11, Moussaoui was indicted in Virginia for conspiracy to commit acts of terrorism on 9/11. The government sought the death penalty. Five years later, he pleaded guilty during his trial.

The court then conducted a penalty-phase trial before the same jury that had been hearing the case prior to the guilty plea. The jury declined to impose the death penalty with some jurors revealing their beliefs that he had nothing to do with 9/11, but was a jihadi wanna-be. The judge sentenced him to life in prison without possibility of parole.

Stung by the jury’s verdict on the death penalty, the government changed its characterization of Moussaoui as the 20th hijacker and declared that Mohammed al-Qahtani was the real 20th hijacker.

In August 2001, Qahtani had attempted to enter the United States at the Orlando International Airport where Mohamed Atta, one of the true hijackers, was waiting to greet him. Immigration officials rejected Qahtani’s paperwork and sent him back to Dubai. U.S. forces arrested him in Pakistan in December 2001 and accused him of being Osama bin Ladin’s bodyguard.

He was transferred to the military prison at Guantanamo Bay where he was tortured for two months in 2002 and 2003 by the military, pursuant to orders issued by Secretary of Defense Donald H. Rumsfeld. He told his torturers what he thought they wanted to hear. His torture was so persistent and horrific that Army medics were frequently called upon to prevent his death and to revive him from his frequent blackouts so that the torture could resume.

When detailed logs of his torture were leaked to the media, Susan J. Crawford, President George W. Bush's emissary overseeing tortures and prosecutions at Gitmo, acknowledged publicly that "we tortured (him)" and thus it would be impossible to try him.

Last week, the government decided to release Qahtani — whom it believes was the true 20th hijacker — to officials in Saudi Arabia. The stated reason for his release is his diminished mental capacity. The true reason is that he has become an embarrassment for the government.

Gitmo prosecutors, who had nothing to do with the torture, told the Bush Departments of Justice and Defense that no judge would permit a prosecution where the principal evidence against the accused was obtained from his torture. Successive teams of prosecutors told the Obama, Trump, and Biden DOJs and DODs the same. Only the present administration has acted upon this.

Qahtani's case is a lesson in the clash between human rights and unbridled government. If Rumsfeld had listened to government lawyers, he'd have known that the American civilian and military legal systems are based on the inalienability of certain rights and values, and among them are bodily integrity, the presumption of innocence and the rule of law.

The Supreme Court jurisprudence on bodily integrity prohibits the introduction of anything into or upon the body of any person against his will. This includes everything from face masks, to whips and chains, to chemicals in the veins. The rule of law in America makes the intentional infliction of pain and severe discomfort by the government upon a prisoner a felony.

Neither Bush nor Rumsfeld had the legal authority to permit government agents to commit felonies, though we now know that they did.

But the big picture in Qahtani's case is the admirable role played by the Supreme Court in assuring that the Constitution means what it says and the cowardly role played by the government, which argued that the Constitution doesn't apply at its prison in Cuba.

In six Supreme Court cases involving the rights of Gitmo detainees, the Bush administration lost five. The sixth involved the location of the trial of an American detainee in the U.S.

But the jurisprudence that emerged from the five cases that the government lost clearly reflects the truism that the Constitution restrains the government wherever it goes, and its protections extend to all persons, not just Americans. The latter is so for two reasons — textualism and Natural Law.

The court held in these Gitmo cases that because the Constitution is the supreme law of the land and because the government is the creature of the Constitution, the creature cannot escape the restraints imposed upon it by its creator.

Moreover, the critical constitutional clauses reflecting the treatment of prisoners and

defendants protect all “persons,” not just Americans. Because all persons have natural rights rooted in our humanity, the government is bound to respect those rights. Were this not so, then nothing could prevent the government from doing as British monarchs did — remove prisoners to foreign lands, torture them there, and then bring them home for trial and execution.

Yet, that horrific Bush-inspired scenario actually happened. After Bush lost at the Supreme Court, the government outsourced its torture and now finds itself as a witness in cases against the foreign torturers whom it hired to torture its prisoners.

Even worse, the man jurors found was not the 20th hijacker is in prison for life, and the man the government says was the 20th hijacker will soon be free. This is what happens when the government breaks its own laws and violates the Constitution that we have hired it to uphold.

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