
Guantanamo: A Constitutional Debacle

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When President George W. Bush formulated the concept of an American Devil's Island in Cuba, he did so heedless of the damage to the Constitution his experiment in torture and confinement without end would bring about. Bush made the case that torture and confinement at the U.S. Naval Base at Guantanamo Bay would allow the government to do its job.

He boasted that the Constitution shouldn't restrain him, federal laws wouldn't apply, and federal judges couldn't interfere.

He was, of course, wrong on all counts. The Supreme Court ruled on six Gitmo cases; and the government lost five. In the case in which the government prevailed, the court ruled that the detainee filed his complaint in the wrong city.

The five cases that the government lost established that federal courts do have jurisdiction over the place where the government goes for more than just a fleeting moment. The court knew that British kings would often have prisoners whom they wished to torture or detain without trial brought to foreign colonies for those purposes. The Framers of the Constitution abhorred that practice and wrote the Constitution so it wouldn't happen here.

As a result of the five Supreme Court rulings, the basic rights that all persons have who are confined anywhere by the government must be recognized and honored at Gitmo. This is so because the detainees are persons and their rights are natural to humanity. It is also because those rights are spelled out in the Constitution, without distinction between good persons or bad persons, Americans or foreigners, persons in the U.S. or outside of it.

Stated differently, all human beings confined by the government have the right to due process, no matter where they are confined. This means they must be given notice of the charges against them, they have a right to remain silent, to the services of a lawyer, to confront the evidence against them, to call witnesses in their own behalf and to challenge the government's evidence.

They have the right to a speedy trial with a professional judge and a neutral jury. And they have the right to appeal.

I offer this brief background in order to address the legal and constitutional debacle that Gitmo has become. In 21 years, at \$100 million a year, only two trials have led to convictions by juries and seven have led to guilty pleas. Of those nine convictions (a guilty plea is a conviction), four have been overturned on appeal and two appeals are pending. Thirty detainees remain at Gitmo, 16 of whom have been cleared for release.

The principal remaining defendant is the alleged 9/11 mastermind, Khalid Shaikh Mohammed. Initially, the government claimed that Osama bin Laden was the 9/11 mastermind. But after it decided to kill bin Laden without any charges or due process, the government changed its mind and decided that KSM — as the government calls him — was the mastermind.

KSM was tortured at a CIA black site in Poland for three years. Thereafter, he was brought to Gitmo and interrogated without torture by FBI agents. They failed to give him his Miranda warnings about his right to remain silent, the consequences of waiving that right and the right to a loyal attorney at no cost to him. Nevertheless, KSM asked for a lawyer and the agents simply ignored him.

During the interrogation, KSM made some admissions about the 9/11 plot, but he did so fearful that he would soon be tortured again. This meant nothing to the FBI agents or the prosecutors in the case. But it is quite meaningful to federal judges. All evidence obtained under torture, or influenced by realistic fears of torture, or tainted in any way by torture, is inadmissible in any American court. Moreover, no statement from a defendant who has not been Mirandized may be used against him in court without an express written waiver.

The lead FBI agent who failed to Mirandize KSM and who ignored his request for an attorney is a 33-year veteran of the FBI who testified that he knew the Miranda procedures well and he knew that the failure to abide them could render KSM's statements totally inadmissible. But he thought the warnings did not apply at Gitmo, even though the Supreme Court ruled in 2004 that the Miranda warnings do apply and KSM's FBI interrogation was in 2007.

This is not brain surgery. It is criminal procedure 101.

Meanwhile, Abu Zubaydah, a Gitmo detainee arrested in Pakistan in 2002, is awaiting his release. After a year of CIA torture in Thailand, he was moved to Gitmo in 2003 and has been there since. He has not been charged with any crime or offense, and the government admits it has no evidence of wrongdoing on his part — not just insufficient evidence, but no evidence. However, he is known as the "forever prisoner" since the government claims he is too dangerous to release.

The concept of a forever prisoner — uncharged, untried and unfree — is unprecedented, unknown and unheard of in the history of American law. Basic due process demands that he be charged and tried speedily or released.

Both KSM and Zubaydah were awaiting rulings from the fourth judge in their cases when that judge announced his retirement. Now a fifth judge will be assigned to both cases. His first job will be to read the files amassed by his four judicial predecessors — all 450,000 pages.

You can't make this up.

The French prime minister Georges Clemenceau once remarked that "military justice is to justice as military music is to music." But this is tragedy, not comedy. The defendants are human beings who have the same rights as anyone in America. If rights are lost because of government ineptitude or politics or willful blindness, they are not rights, but government giveaways. And then our rules-based system of rights and laws becomes a humanitarian and a constitutional fiasco.

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