

Bush and His Torturers. Guantanamo “Plea Negotiations”

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Last week, prosecutors and defense counsel at Guantanamo Bay, Cuba, completed three weeks of plea negotiations. At the end of the three weeks, the military judge presiding over the trials of the five plotters of the attacks on 9/11 signed an order reflecting that progress had been made and anticipating a continuation of the negotiations in May.

Among the defendants is Khalid Shaikh Mohammed, the admitted and acknowledged mastermind of the attacks.

All five have been defendants in the same capital murder prosecution for 10 years. None has had a jury trial. What were the lawyers negotiating?

Here is the backstory.

Shortly after the 9/11 attacks, President George W. Bush opened a military prison at the U.S. Naval Base at Guantanamo Bay, Cuba, to house persons arrested for 9/11-related attacks and other acts in what he called the war on terror.

Bush believed that since Cuba is outside the United States, the Constitution would not restrain the government there, federal laws would not apply there and federal judges could not interfere with the government’s behavior there.

Bush’s CIA began a program of systematic torture of detainees by CIA and foreign intelligence personnel at so-called black sites in foreign countries. Much of the torture was inflicted on people who knew nothing of value to the CIA. The victims of CIA torture, whether they had information of value or not and whether they revealed what they had or not, were transferred to Gitmo.

Bush’s extraconstitutional behavior embraced the false belief — soon corrected by the U.S. Supreme Court — that it could confine detainees without charges for the remainder of their

lives.

While the foreign torture was being conducted by the CIA on some detainees and others were being housed at Gitmo, the U.S. military tried its hand at torturing some of the prisoners it was supposed to be protecting.

When FBI agents arrived at Gitmo to interrogate detainees and informed them of their right to counsel, the torture stopped; it is a federal crime. The prisoners secured lawyers who filed complaints with the U.S. District Court in Washington, D.C., which was assigned to hear these cases.

The complaints revealed horrific torture, and they were met with the government's horrific and tortured interpretations of the Constitution. In six cases that eventually found their way to the Supreme Court, the detainees argued that their constitutionally protected rights to due process had been violated.

The Bush administration argued that the judicial branch had no jurisdiction over the government's behavior at Gitmo, because Gitmo is outside the U.S. It also argued that, even if federal courts did have jurisdiction over the government at Gitmo, the detainees had no valid claims to present to the courts because the Constitution only protects Americans.

Congress jumped into this fray by suspending the right to habeas corpus for those at Gitmo. The right to habeas corpus is an ancient personal right in which the prisoner may compel his jailer to bring the prisoner to a neutral judge and legally justify the prisoner's confinement. The Constitution permits Congress to suspend habeas corpus only when, in cases of rebellion or invasion, the public safety may require it.

The Bush administration lost five of six Gitmo cases in the Supreme Court. The case it won involved the location at which a detainee who is an American citizen was to be tried.

The jurisprudence of the remaining five cases held that wherever the government goes and confines people against their will, the Constitution goes with it, since all who exercise government power have taken an oath to do so consistent with the Constitution. Moreover, since there was no invasion or rebellion at Gitmo, the suspension of habeas corpus was nullified.

The court held that since the two operative amendments to the Constitution — the Fourth and the Fifth — protect all "people" and every "person" from the government, their protections are not limited to Americans only.

All this litigation eventually forced the government to commence the process for military jury trials with the full panoply of constitutional protections. Gitmo was established by Bush's executive order on Jan. 11, 2002. In 20 years, there have been no jury trials of any 9/11 defendants.

Now, back to the current negotiations. They were initiated by the government because the Departments of Defense and Justice — after continual changes of judicial and prosecutorial personnel — now no longer want to try anyone, particularly those defendants who have been tortured.

That's so because numerous military judges at Gitmo have consistently ruled that

defendants may subpoena records of their torture and inform juries of it.

Those of us who believe that the Constitution means what it says argued that 9/11 was a series of federal crimes and the defendants should have been accorded constitutional protection from Bush's torturers and tried in federal courts where their alleged crimes occurred — in New York City, Washington, D.C., and Shanksville, Pennsylvania.

Had the feds done that, these cases would have been completed, and the defendants either convicted or acquitted, and the government would not be spending \$100 million a year on Gitmo. But Bush's disdain for constitutional norms has wrecked the rule of law in these cases and made it nearly impossible to try any of them — thus, the plea negotiations that are now under way.

The lawyers are negotiating dropping the death penalty and protecting the defendants' religious liberties, medical treatment and creature comforts in prison, in return for guilty pleas.

The fanaticism of George W. Bush — under whose incompetent watch the attacks of 9/11 occurred and who killed hundreds of thousands of Iraqis to produce regime change because Saddam Hussein "tried to kill my daddy" — continues to haunt and demean the American judicial system.

Because Bush irreparably assaulted the Constitution he swore to uphold, the government is afraid to try the men who killed 3,000 Americans.

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