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Guantánamo and the Courts, Part 3: Obama’s Continuing Shame **by Andy Worthington**

In the [first part](#) of this three-part series examining the Guantánamo prisoners’ attempts to secure their release via the U.S. courts, I looked at how, after [the Supreme Court’s ruling](#) in June 2008 holding that the prisoners had constitutionally guaranteed habeas corpus rights, the Bush administration lost 23 of the 26 cases reviewed in the District Courts. The [second part](#) examined the Obama administration’s record in its first four months in office, revealing how the new government behaved as though Bush was still in power, obstructing the defense teams, angering judges, and humiliating itself in court, and this final part brings the story up to date, explaining how, incredibly, the Obama administration has learned nothing from its humiliation and continues to present worthless and unwinnable cases to District Court judges, perpetuating the injustice at Guantánamo, to the dismay of those who thought that it would thoroughly repudiate the discredited policies of the Bush administration.

A “mosaic” of intelligence is not evidence

After unprecedented criticism by judges, and another defeat, in the case of the contentious Yemeni prisoner Yasim Basardah, the next humiliation for the government came on May 11, when Judge Gladys Kessler granted the habeas petition of another Yemeni, [Alla Ali Bin Ali Ahmed](#), who has always stated that he traveled to Pakistan as a student. Ali Ahmed was seized in March 2002 at a guest house close to a university in Faisalabad, Pakistan, with approximately 16 other men who also ended up at Guantánamo, essentially because the house appears to have been tangentially connected to [Abu Zubaydah](#), the supposed “high-value detainee” who, according to the FBI and his lawyers, was no more than the gatekeeper for an independent training camp (run by the CIA’s most notorious “ghost prisoner,” [Ibn al-Shaykh al-Libi](#)) that had little to do with al-Qaeda.

In a ruling that set off reverberations through other habeas cases, Judge Kessler dismissed allegations by four separate witnesses, including one “whose credibility has been cast into serious doubt — and rejected” by Judge Richard Leon in the case of Mohammed El-Gharani because he

“has made accusations against a number of detainees” at Guantánamo and because “many of those accusations have been called into question by the government,” and another, diagnosed by military medical staff as having a “psychosis,” whose mental state was only discovered “through the diligent work of his counsel, and not as a result of the government’s obligation to provide him exculpatory information.”

Moreover, Judge Kessler was dismissive of the government’s overall approach to the evidence, based on a “mosaic” theory of intelligence-gathering, stating that, although it “may well be true” that “use of the mosaic approach is a common and well-established mode of analysis in the intelligence community ... at this point in this long, drawn-out litigation the Court’s obligation is to make findings of fact and conclusions of law” to consider the government’s case. After pointing out that the mosaic theory “is only as persuasive as the tiles which compose it and the glue which binds them together,” she then proceeded, as I explained at the time, “to highlight a catalog of deficiencies in the tiles and the glue,” which, essentially, involved demonstrating how the government had only succeeded in creating an unconvincing construct composed primarily of unsupported inferences, multiple levels of hearsay, and guilt by association, and had no hesitation in granting Ali Ahmed’s habeas petition.

Ali Ahmed’s case was notable not only because of Judge Kessler’s comprehensive demolition of unreliable witnesses and dubious “mosaics” of intelligence, but also because she suggested that [her ruling had ramifications](#) for the cases of some, or all of the other men seized with Ali Ahmed, when she stated, “It is likely, based on evidence in the record, that at least a majority of the [redacted] guests were indeed students, living at a guest house that was located close to a university.”

Suspending habeas corpus in the case of the last Tajik at Guantánamo

In contrast, the next case, on June 22, was both more straightforward and more damaging for the government’s credibility, although it was preceded by a stealthy operation designed, for once, to prevent criticism, when, on June 3, the government told another judge, Reggie Walton, that it would “no longer defend” the detention of [Umar Abdulayev](#), a Tajik refugee seized by opportunistic Pakistani intelligence agents. What made this case unusual — beyond the fact that Abdulayev is desperate not to be returned to his home country, after receiving threats from Tajik intelligence agents at Guantánamo — was that the decision not to proceed with the case was taken by the administration’s Detention Policy Task Force (the inter-departmental review board which, as I explained in Part Two of this article, is effectively competing with the courts to assess the prisoners’ cases, but without any outside scrutiny), who then asked the Justice Department to ask the court to indefinitely stay his habeas appeal.

The decision was greeted with dismay by Abdulayev’s lawyers, who complained that the Task Force’s decision was “not a determination that [Abdulayev’s] detention was or was not

lawful” and that it therefore “does nothing towards removing the stigma of being held in Guantánamo or being accused of being a terrorist by the United States.” Their conclusion, as expressed to me by Andrew Moss, was that the writ of habeas corpus, granted by the Supreme Court, is “effectively suspended.”

Prosecuting a Syrian who was tortured by al-Qaeda

This story did not surface until July, but in the meantime, the other case mentioned above, that of [Abdul Rahim al-Ginco](#), a troubled young Syrian who had traveled to Afghanistan after falling out with his father, provided a devastating blow to what remained of the government’s credibility.

Al-Ginco (also identified as Abdul Rahim Janko) has never denied that he spent five days at an al-Qaeda-affiliated guest house in Kabul, and 18 days in January and February 2000 at al-Farouq, a military training camp, but although, in theory, this meant that he was eligible to be held as an “enemy combatant,” the kind of mitigating factors identified by Judge Huvelle in the case of Yasim Basardah — regarding the demonstrable severance of prisoners’ links with al-Qaeda and/or the Taliban — were even more pronounced in his case, because, at the end of his 18 days at al-Farouq, he was imprisoned by al-Qaeda and tortured until he admitted that he was a U.S. and Israeli spy, and was then imprisoned for 18 months by the Taliban, until he was “liberated” by U.S. forces in early 2002.

Al-Ginco’s long ordeal at Guantánamo was based on the discovery of a videotape containing his “confession,” after being tortured by al-Qaeda, but in a sure sign of incompetence that went all the way to the highest levels of the U.S. government, it was regarded instead as a martyrdom tape, proving that al-Ginco was a terrorist. Over seven years later, it was left to Judge Leon to highlight the absurdity of the government’s position, and he did so without mincing his words. As I explained in an article at the time:

Judge Leon ... mocked the government for “taking a position that defies common sense,” by asking the court to address whether a relationship with al-Qaeda or the Taliban “can be sufficiently vitiated by the passage of time, intervening events, or both.” Concluding that “the answer, of course, is yes,” he then dismantled the government’s case point by point, stating, “To say the least, five days at a guest house in Kabul combined with eighteen days at a training camp does not add up to a longstanding bond of brotherhood,” adding that al-Ginco’s torture “evinces a total evisceration of whatever relationship might have existed!” and that his abandonment in the Taliban prison “is even more definitive proof that any preexisting relationship had been utterly destroyed,” and concluding that an analysis of all these factors “overwhelmingly leads this Court to conclude that the

relationship that existed in 2000 — such as it was — no longer existed *whatsoever* in 2002 when [he] was taken into custody.”

Mohamed Jawad: The Afghan teenager who was tortured

Again, inexplicably, the government refused to take on board the lesson delivered by Judge Leon, insisting on pursuing the case of [Mohamed Jawad](#), an Afghan who was just a teenager when he was seized after an attack on two U.S. soldiers in Kabul in December 2002. What made this case particularly astonishing was that Jawad had already been put forward for a trial by Military Commission at Guantánamo (the “terror trials” introduced by former Vice President [Dick Cheney](#) in November 2001, and revived by Congress in 2006, after the Supreme Court ruled them illegal), and a military judge had determined on two separate occasions, last [October](#) and [November](#), that the basis of the government’s case — a confession made in Afghan custody, shortly after his capture, and another made hours later in U.S. custody — were inadmissible because they had been obtained through treatment that constituted torture.

Although Jawad’s military defense attorney, Lt. Col. David Frakt, had demonstrated time and again that the government had no case and had persistently abused Jawad, and although his former prosecutor, Lt. Col. Darrel Vandeveld (who [resigned last September](#) because of his disillusionment with the inability of the Commission system to deliver justice in Jawad’s case) described the exclusion of Jawad’s confessions as proof that the case was “eviscerated,” and followed up, in January, with [a detailed statement](#) in support of Jawad’s habeas petition that should have brought the proceedings to an abrupt halt, the government plunged on regardless, eventually facing [a sustained and withering put-down](#) by Judge Ellen Segan Huvelle.

In a 30-minute hearing in July, Judge Huvelle repeatedly stressed that the government did not have a single reliable witness and that the case was “lousy,” “in trouble,” “unbelievable,” and “riddled with holes,” and she responded to the government’s concession that it would not rely on any subsequent statement made by Jawad in Guantánamo but that it had discovered a new witness and wished to present new evidence, by repeatedly expressing fears that the government was planning to “come up with some other alternative to going forward with the habeas and pull this rug from under the Court at the last minute.”

As I explained at the time, “The very fact that a judge in a U.S. District Court can, genuinely, fear that the government will attempt to usurp her authority spells out, succinctly, the dangers of the place in which the Obama administration finds itself,” and although Judge Huvelle proceeded to [grant Jawad’s habeas petition](#), and it is likely that he will soon be returned to Afghanistan, the Justice Department continues to defy reality by maintaining that it may be able to bring a new case against Jawad at the last minute, which only serves to confirm Judge Huvelle’s fears that the courts are up against a government that has no respect for the judiciary.

One Kuwaiti down, three to go

While all this was taking place, Judge Kollar-Kotelly finally broke the obstruction of the Justice Department in the case of one of the Kuwaitis to the extent that she could make a ruling, and duly granted the habeas petition of [Khalid al-Mutairi](#), a charity worker caught up in the chaos of the U.S.-led invasion of Afghanistan in October 2001. I discussed the feebleness of the government's supposed evidence against al-Mutairi in an article two weeks ago, before the judge's ruling had been made available ([PDF](#)), but her opinions only confirm what I already diagnosed: that "there is nothing in the record beyond speculation" that al-Mutairi had been involved in any way with al-Qaeda.

Moreover, expanding on passages that were redacted in the allegations on which I based my article, Judge Kollar-Kotelly chastised the government for relying, for three years, on a "typographical error in an intelligence report," in which al-Mutairi's prisoner number had accidentally been assigned to a report about another prisoner who had manned an anti-aircraft weapon in Afghanistan, and also discussed passages in the government's evidence that revealed the "agitated" state that al-Mutairi was in when, implausibly, he admitted to fighting with Osama bin Laden in Afghanistan in 1991, and, on another occasion, when he claimed that "he was Osama bin Laden."

A bitter conclusion

Khalid al-Mutairi's victory means that, of the 33 cases in which judges have now delivered a ruling, 28 — or 85 percent of the total — have ended in defeat for the government. If extended to the whole of Guantánamo's remaining population, this figure suggests that 174 of the 205 prisoners whose habeas cases have not been decided would have their petitions granted, leaving 36 prisoners (31 plus the five who lost their habeas petitions) to be dealt with by the government.

Noticeably, these figures correspond, more or less, with analyses of the numbers of prisoners with any meaningful connection to terrorist activities that have been cited over the years by intelligence officials, and, most recently, by [Col. Lawrence Wilkerson](#), the former chief of staff to former Secretary of State Colin Powell, but it is unlikely that the government will be impressed by these figures, as senior officials still seem hell-bent on humiliating themselves in the courts at every opportunity.

As these cases have unfolded, I have often found myself wondering why the government has allowed this to happen — beyond its fascination with its own unaccountable review as the primary key to closing Guantánamo — and have been tempted to conclude that senior officials are aware that allowing the courts to make the decisions prevents them from having to honestly confront Republican critics — and critics in their own party — who could stir up trouble if the

government, rather than the courts, confronted them with the true scale of the Bush administration's incompetence.

Others, however, have a different take. Lt. Col. Frakt suggested that the problem, essentially, was that the Obama administration had decided "to maintain the status quo while they tried to understand the Guantánamo cases," but had failed to realize the extent to which, because "the liberal-minded, justice-oriented career attorneys who were at the DoJ in 2000 had left in droves during the Bush years," the lawyers handling the habeas cases "were all holdovers from the Bush administration, which had packed the DoJ with ardent right-wingers."

However, David Cynamon, one of the attorneys for the four remaining Kuwaitis in Guantánamo (including Khalid al-Mutairi), was less charitable. In an email exchange, he explained to me after Judge Kollar-Kotelly's ruling that his "biggest surprise, and disappointment" is that the Obama administration "has followed the Bush 'scorched earth defense' strategy to the letter: no negotiation or even discussion with habeas counsel re: the merits of any particular case, fight every request for discovery, delay every case for as long as possible, and, then, when the case can no longer be put off, throw every piece of mud that you can find at the wall, whether or not the mud makes any sense or has any connection with any other mud, and hope that the Court will substitute mud for evidence." He added, bitterly, "And the coup de grace: if the Court rules against you, just ignore the decision. The Executive decides when and under what conditions to release a detainee, and the judiciary can go screw itself."

These are harsh words, but they appear to be true. Of the 28 men cleared by the courts, 19 are still at Guantánamo, and although, as I pointed out in an article two weeks ago, 15 of these men cannot be repatriated safely, and the process for repatriating Mohamed Jawad seems to be underway (notwithstanding any last-minute stupidity on the part of the DoJ), there seems to be no good reason why the others — Khalid al-Mutairi, Yasim Basardah and [Ayman Batarfi](#) (the Yemeni doctor whose case collapsed in March, as discussed in Part Two) — cannot be repatriated tomorrow, especially, as, in Batarfi's case, it is now four months since Judge Emmet G. Sullivan compared his detention to the shame of the internment of Japanese-Americans in World War II and demanded his immediate release.

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