



USA: CAPITAL INJUSTICES

MORE DAMAGE TO RULE OF LAW PRINCIPLES, MORE SHAMBLES AT GUANTÁNAMO, MORE EXECUTIONS

I think what the President is focused on is being effective – effective in advancing and protecting human rights and advancing the rule of law

National Security Advisor H.R. McMaster, White House press briefing, 2 November 2017

“SHOULD GET DEATH PENALTY!” capitalized President Donald Trump in a tweet on 1 November, the day after a driver of a rental truck left eight people dead and another dozen injured on a cycle path in Manhattan. The President’s tweet was one in a series of comments that flouted the presumption of innocence in relation to the suspect in the New York attack. Everyone has the right to be presumed innocent, and treated as innocent, unless and until they are convicted in a fair trial. This norm of customary international law requires authorities to refrain from giving their opinion about the guilt of an accused before the end of criminal proceedings. “Even those who have made confessions are entitled to the presumption of innocence”, noted a US federal appeals court in August in the case of a detainee facing capital trial by military commission at the US naval base at Guantánamo Bay.¹ President Trump would do well to read that ruling.

For a moment, it looked like the New York suspect might himself be headed to Guantánamo to join the 41 men still there, most of them held without charge or trial, some facing unfair trials by military commission. Asked if he was considering sending him to the naval base, President Trump replied, “I would certainly consider that. Send him to Gitmo, I would certainly consider that, yes.” The infection of the body politic by a now 16-year-old global “war” framework was illustrated when two senior US Senators, John McCain and Lindsey Graham, urged the administration to transfer the suspect to military custody for detention and interrogation as an “enemy combatant”. The White House Press Secretary also told journalists that “we would consider this person to be an enemy combatant, yes.”

In the event, on 1 November Sayfullo Habibullaevic Saipov, a national of Uzbekistan, was charged under a criminal complaint filed in federal court in New York. The President transmitted another tweet on 2 November: “Would love to send the NYC terrorist to Guantanamo but statistically that process takes much longer than going through the Federal system...” A follow-up message added: “...There is also something appropriate about keeping him in the home of the horrible crime he committed. Should move fast. DEATH PENALTY!” He dispatched another missive from his Twitter account on 3 November in which he described the accused as a “Degenerate Animal”.

“Terrorists should know”, said US Attorney General Jeff Sessions in New York on 2 November, “this Administration will use all lawful tools at our disposal, including prosecution in Article III [federal] courts and at Guantánamo Bay.”² He pointed to the case of Mustafa Muhammad Muftah al-Imam, who had just been “apprehended overseas” and was “on his way to America to face justice”. This was not a case of extradition. This Libyan national was seized by US forces in Libya on 29 October and transferred to a ship offshore before being flown to the USA where he appeared in federal court in Washington, DC on 3 November. He is charged in relation to the 11 September 2012 attack on a US diplomatic compound in Benghazi in which four US officials were killed. At least one of the charges is

¹ In Re: Khalid Shaikh Mohammad, US Court of Appeals for the DC Circuit, 9 August 2017, ordering recusal of judge on Court of Military Commission Review for his prior public opinion about the defendant’s guilt.

² Attorney General Sessions Delivers Remarks in New York City about Defending Our National Security, 2 November 2017, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-new-york-city-about-defending-our-national>. Speaking about Guantánamo earlier in March, Attorney General Sessions had displayed a lack of respect for the presumption of innocence when he said that Guantánamo is “just a very fine place for holding these kind of dangerous criminals”, and “I don’t think we’re better off bringing these people to federal court... where they get discovery rights to find out our intelligence, and get court-appointed lawyers and things of that nature.” As for the prospect of new detainees arriving at the base, he said “there’s plenty of space... It’s a perfect place for it... I see no legal problem whatsoever with doing that.” See Guantánamo, impunity, and global anti-torture day, 25 June 2017, <https://www.amnesty.org/en/documents/amr51/6574/2017/en/>.

punishable by the death penalty if Attorney General Sessions authorizes it.³

Meanwhile, at “Camp Justice” in Guantánamo on 1 November, US Air Force Colonel Vance Spath handed down a sentence. Colonel Spath is the military commission judge overseeing proceedings against ‘Abd al-Rahim al-Nashiri. Fifteen years ago this month, this Saudi national was taken into custody in Dubai, transferred to secret US detention and tortured. He was subjected by the USA to four years of enforced disappearance before being brought to Guantánamo in 2006 for trial by military commission.⁴ The government intends to seek the death penalty against him for “war crimes” it says were committed in Yemen in a “war” it has now backdated to 2000 despite the then US President having expressly pointed out at the time that “America is not at war”.⁵

The sentence being handed down by Colonel Spath was not against ‘Abd al-Nashiri, however. His trial has yet to begin, 11 years after his transfer to the naval base. The “defendant” occupying Colonel Spath’s time on 1 November was Brigadier General John Baker of the US Marine Corps, the Chief Defense Counsel for Military Commissions, whom Colonel Spath found guilty of “contempt”. The situation stemmed from a decision by Brig. Gen. Baker on 11 October to find “good cause” to grant the request of three civilian members of ‘Abd al-Nashiri’s defence team to be excused from the case on the grounds that their continued involvement would be unethical. This in turn stemmed from information indicating that the government was violating the prohibition on improper monitoring of attorney-client meetings at Guantánamo. The precise information remains classified, but according to a brief filed in federal court on 1 November, ‘Abd al-Nashiri’s lawyers had “discovered evidence that unambiguously contradicted the prosecution’s previous assurances” that the “intrusion issue” did not affect the spaces in which they met with ‘Abd al-Nashiri. They evidence, the brief asserts, “is compelling and would provide no reasonable attorney with confidence that they could maintain attorney-client confidentiality”. The right to such confidentiality is a fundamental fair trial right.

The use and effect of classification runs deep in the military commission cases. In September 2017, Colonel Spath had denied ‘Abd al-Nashiri’s counsel’s motions for discovery and relief on the attorney-client monitoring issue. The rulings are classified. In a brief filed in federal court on 1 November, the lawyers tried to relay what the gist of what they contained, without revealing classified information: “Col Spath concluded, as a matter of law, that [‘Abd al-Nashiri’s] entitlement to attorney-client confidentiality extends only to the prohibition on counsel for the prosecution using his client-attorney communications as evidence. In other words, Col Spath determined that [‘Abd al-Nashiri] had no expectation of confidentiality when conferring with counsel, except insofar as his communications might be used against him in military commission proceedings.” Moreover, because of the classification, ‘Abd al-Nashiri’s lawyers “could not even inform [him] of the broader risks to confidentiality”.⁶

The withdrawal of the three civilian lawyers leaves ‘Abd al-Nashiri without a lawyer versed in death penalty defence (so-called “learned counsel” to which the capital defendants at Guantánamo are entitled). Instead he is left with a single military lawyer who stressed in an affidavit that he only graduated from law school in 2012, has never represented anyone charged with murder, let alone had any involvement in a capital case, and that he considers himself “not competent to proceed in the absence of Learned Counsel and, if required to proceed, cannot provide effective assistance of counsel to the accused”. He emphasised his belief that he, too, was labouring under the “same ethical problems” that caused the three civilian lawyers to withdraw from the case.

On 27 October, Colonel Spath denied a motion to delay proceedings in ‘Abd al-Nashiri’s case pending

³ In June 2014, another suspect in the Benghazi attack had been similarly seized in Libya, and spent the next 13 days incommunicado aboard the USS New York being interrogated by intelligence and law enforcement agents as the vessel crossed the Atlantic. The US administration later said it had decided against flying Abu Khatallah to the USA because transferring him to a plane in a member state of the abolitionist European Union might have meant being forced to give up its option of pursuing the death penalty against him. In 2016, the Obama administration decided not to seek the death penalty.

⁴ For more on his case, see USA: Broken promises: Failure to close Guantánamo is part of a deeper human rights deficit, 10 January 2017, <https://www.amnesty.org/en/documents/amr51/5433/2017/en/>

⁵ The President’s Radio Address, President Bill Clinton, 14 November 2000 (“This week an apparent terrorist attack claimed the lives of brave American sailors off the coast of Yemen... [E]ven when America is not at war, the men and women of our military risk their lives every day”).

⁶ *Al Nashiri v. Trump*, Memorandum of law in support of petitioner’s motion for a preliminary injunction, In the US District Court for DC, 1 November 2017.

appointment of new learned counsel, and ordered the three civilian lawyers to appear at a hearing on 31 October, saying that he had found no reason to warrant their excusal. The three did not attend the 31 October hearing. At the latter, Colonel Spath ordered Brig. Gen. Baker to testify, but he invoked his “right to refuse to be a witness in this case”. Colonel Spath ordered him to rescind his permission for the three lawyers to withdraw from the case; Brig. Gen. Baker again refused. Colonel Spath said he would hold “a contempt hearing” the following day. He also told the remaining military defence lawyer, a Lieutenant in the US Navy JAG Corps, that if he refused to proceed with the al-Nashiri case, “you too, at noon tomorrow, will be here for a contempt hearing”. Colonel Spath said “we are going to move forward”, even without learned counsel, and “if we need to come back and redo some things, we’ve got all the time in the world, as we’ve demonstrated for the last nine years”. As President Trump would tweet the next day, this military commission “process takes much longer than going through the Federal system”.

At the session on 1 November, Brig. Gen. Baker sought to object to the contempt proceedings, asserting that “this court does not have personal jurisdiction over me”. Colonel Spath ordered him to sit down and said: “I’m denying you the opportunity to be heard. Thank you. It’s a summary proceeding”, and threatening his removal from the room if he continued to speak.⁷ He then found Brig. Gen. Baker in contempt for refusing to testify, for refusing to rescind his excusal of the three lawyers, and for not having them travel to Guantánamo for the 31 October hearing. He sentenced Brig. Gen. Baker to 21 days of confinement and a fine of \$1,000. The confinement began immediately, but shortly before 1pm on 3 November the Convening Authority for military commissions deferred the remainder of the sentence pending his “final action” on Colonel Spath’s findings. This decision occurred an hour before a federal judge in Washington, DC had been due to rule on a habeas corpus petition seeking Brig. Gen. Baker’s release.

Back to the death penalty. On the evening of 8 November, a week after President Trump emphasised his support for the death penalty, state executioners in Florida and Texas carried out the USA’s 22nd and 23rd executions of the year. In the days before the Florida execution, a state Supreme Court Justice and a federal appeals court judge expressed serious concerns in relation to the case.⁸ As for the case in Texas of Ruben Cárdenas Ramírez, a Mexican national denied his consular rights after arrest, his execution violated international law and an order of the International Court of Justice. Two UN experts had said the execution would be “tantamount to an arbitrary deprivation of life”.⁹ The Inter-American Commission on Human Rights had also called for the execution to be halted and reiterated its appeal for the prisoner to get a new trial.¹⁰ Mexican President Enrique Peña Nieto condemned the execution.

UN treaty monitoring bodies and other UN experts have long called for the detentions and military commission trials at Guantánamo to end and for the detention facility there to be closed. The UN General Assembly has passed numerous resolutions calling for a moratorium on executions pending abolition of the death penalty.

It is barely two weeks since President Trump proclaimed United Nations Day with a call for governments to be held accountable.¹¹ A good place for the USA to start would be to stop all use of the death penalty, abandon military commissions and end the detentions at Guantánamo.

⁷ All quotes from hearings taken from “unofficial/unauthenticated” transcripts provided by US Department of Defense Office of Military Commissions.

⁸ See Amnesty International Urgent Action update, <https://www.amnesty.org/en/documents/amr51/7419/2017/en/> and original action at <https://www.amnesty.org/en/documents/amr51/7363/2017/en/>

⁹ UN experts urge US to halt Texas execution of Mexican Rubén Cárdenas Ramírez, 6 November 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22360&LangID=E>. See also Amnesty International Urgent Action, 12 October 2017 <https://www.amnesty.org/en/documents/amr51/7252/2017/en/> and update at <https://www.amnesty.org/en/documents/amr51/7423/2017/en/>

¹⁰ IACHR urges United States to comply with recommendations in death penalty case, 7 November 2017, http://www.oas.org/en/iachr/media_center/PReleases/2017/175.asp

¹¹ “The United Nations was founded on the vision that diverse nations could cooperate to preserve sovereignty, enhance security, build prosperity, and promote human rights and fundamental freedoms... We expect member states to hold the United Nations accountable, just as we expect people around the world to hold their own governments accountable”. President Donald Trump proclaims October 24, 2017, as United Nations Day, <https://www.whitehouse.gov/the-press-office/2017/10/24/president-donald-j-trump-proclaims-october-24-2017-united-nations-day>