

By Len Goodman

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Shawali Khan is one of the 171 men being indefinitely detained at Guantánamo Bay. He has been there now for more than nine years. He has never been charged with a crime. Moreover, the evidence against Khan is so weak that if this case were in the U.S. court system, this evidence would be insufficient to even support an arrest warrant. Yet, because Khan is alleged to be al-Qaeda, the U.S. Courts have found that the government may detain him indefinitely.

Khan is an uneducated Afghan man in his late forties who grew up on a pomegranate farm outside of Kandahar. About a year before 9/11, after a drought destroyed their crops, Khan moved with his father and brother to Kandahar City where he found work as a shopkeeper. In November of 2002, Khan was captured by Afghan warlords and sold to the Americans. At this time, the Americans were paying bounties of about \$10,000 to Afghans who turned in al-Qaeda fighters. No actual evidence or corroboration was required.

Khan was subsequently sent to Gitmo based on the word of a single informant that he was an al-Qaeda fighter. The fact that Kandahar in 2002 was considered “Taliban Central” and had no known al-Qaeda presence was overlooked or ignored by American intelligence officials who were eager to fill empty cages at Gitmo.

Khan was finally granted a habeas corpus hearing in the spring of 2010, his eighth year of captivity. The government called no witnesses but merely introduced “intelligence reports” which indicated that an unidentified Afghan informant had told an unidentified American intelligence officer that Khan was an al-Qaeda-linked insurgent.

The federal appellate courts have ruled in the Gitmo cases that the government’s evidence must be presumed accurate. To try and refute this evidence, my co-counsel and I demanded the informant’s file to determine how much cash he was paid and what kind of track record and reputation he had for truth telling. Government counsel declared that the file was “not reasonably available.” We then asked for the name of the informant so that we could conduct

our own investigation. But the government refused to declassify the informant's name, thus prohibiting us from speaking it to our Afghan investigator, who was then in Kandahar interviewing Khan's family and neighbors, or even to our client.

Despite these restrictions, we were able to raise enough doubts about the veracity of the informant to cause the Judge to insist on some corroboration from the government. Government counsel then advised the court that at the time of capture, Khan possessed a highly incriminating hand-written note. We demanded to see the note, given that Khan was functionally illiterate at the time of capture. The government said that the note was not preserved. But it did have an "intelligence report" which said that Khan had the note. So we asked to see the report to see if it was, as we suspected, based on information supplied from the informant. The government declared that the report had been classified above the level of our security clearance. We then proposed that our colleague, Joseph Margulies, who has the highest level security clearance, would sign on as co-counsel for Khan for the limited purpose of reviewing the secret report. The government then announced that it would provide a "summary" of the secret report which would be classified down to the security level of counsel. The court accepted this summary as corroboration of the informant and denied Khan's habeas petition.

Because the government's summary of its super-secret report describing the missing hand-written note remains classified, I can't write about what it says. However, in April 2011, WikiLeaks released over the internet the official Department of Defense file on Khan, which the government quickly classified. While I can't describe the contents of any classified material, I can report that Khan's official file reveals that the government's summary of its secret report is false. In September, we filed a motion demanding Khan's release based on the fact that the government's "corroboration" evidence was a fraud. This petition is currently sitting on the Judge's desk. Presumably the Judge is struggling to reconcile the law which says the government's evidence must be believed with the clear proof that government's lawyers are lying about their evidence.

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