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Judge Bars Torture Evidence in Ex-Guantánamo Detainee Trial

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A federal judge in Manhattan Wednesday barred testimony from the government's star witness in the trial of accused African embassy bomber Ahmed Khalfan Ghailani because the evidence was derived through torture.

Ghailani, a Tanzanian, was grabbed by the CIA in Pakistan in 2004 and disappeared for more than two years into the agency's overseas "black sites," including one in Poland, where he was subjected to "enhanced interrogation techniques," or torture. In 2006, he was transferred to Guantánamo together with other so-called "high value detainees" from whom the agency presumably believed it had forcibly extracted all of the information possible.

The Obama administration chose Ghailani as the first ex-Guantánamo detainee to be put on trial in a normal civilian court because of what it considered overwhelming evidence guaranteeing a guilty verdict.

The trial is widely seen as the precursor to the prosecution in federal court of Khalid Sheikh Mohammed, accused of organizing the 9/11 terror attacks, who was repeatedly interrogated under torture, subjected to waterboarding 183 times.

Ghailani is accused of conspiracy in relation to the August 7, 1998 bombing of the US Embassy in Dar es Salam, Tanzania, which killed at least 11 people and injured another 85.

One reason for the government's confidence is that four others accused in the conspiracy were apprehended in Africa and tried and sentenced to life in prison at a trial held in the same Manhattan federal court just months before the September 11, 2001 terrorist attacks on Washington and New York City.

The Justice Department's star witness, however, was Hussein Abebe, who was prepared to testify that he sold TNT to Ghailani that was subsequently used to blow up the embassy.

Ghailani has pleaded not guilty, insisting that he did not know that the explosives and other material that he is implicated in procuring were to be used in the attack on the embassy.

Judge Lewis Kaplan ruled in favor of a defense motion to exclude Abebe's testimony on the grounds that the identity of the witness had been obtained from Ghailani through torture at the CIA's clandestine prisons. Defense attorneys also argued that the case should be dismissed because of Ghailani's having been denied his right to a speedy trial in the 12-year-old case.

A federal prosecutor, Michael Farbiarz, argued last week that without putting Abebe on the

witness stand the government "has no way of putting such evidence in front of the jury at all." Previously, the prosecution had described Abebe as "a giant witness for the government."

The Justice Department, however, has not challenged the charge that Ghailani was subjected to torture, because it wants no public airing of the crimes carried out by CIA and military interrogators. Instead, it insisted that it had other means than the information extracted from Ghailani to discover the witness. The judge rejected this claim.

In issuing his ruling, Judge Kaplan said he was "acutely aware of the perilous nature of the world in which we live. But the Constitution is the rock upon which our nation rests." He continued: "We must follow it not only when it is convenient, but when fear and danger beckon in a different direction. To do less would diminish us and undermine the foundation upon which we stand."

The Constitution's Fifth Amendment, which insists that that no person "shall be compelled in any criminal case to be a witness against himself," has long been held by US courts to bar the admissibility of coerced confessions or other evidence obtained through police "third degree" methods or torture. International law also prohibits the use of torture evidence in criminal prosecutions.

In the same statement, however, Judge Kaplan made it clear that his ruling would, in the end, have no real consequence. His upholding of the Constitution would not extend so far as to prevent the government's unlawful imprisonment of the defendant, even if he were to be acquitted at trial.

The judge said, "It is appropriate to emphasize that Ghailani remains subject to trial on the pending indictment, that he faces the possibility of life imprisonment if convicted, and that his status as an 'enemy combatant' probably would permit his detention as something akin to a prisoner of war until hostilities between the United States and Al Qaeda and the Taliban end, even if he were found not guilty in this case."

Indeed, the Obama administration has asserted the "right" to continue to detain anyone accused of terrorism indefinitely, even if they are tried and found not guilty. In this, as in many other areas, the administration has defended and amplified the police-state powers claimed by the administration of George W. Bush in conducting Washington's "global war on terrorism."

Judge Kaplan's ruling provoked a predictable barrage from the administration's right-wing critics, who claimed that the exclusion of evidence based on torture proved that the Obama Justice Department was wrong to attempt the prosecution of terror suspects in civilian courts.

Typical was an article by Liz Cheney, the daughter of former Vice President Dick Cheney, one of the architect's of the US policies of torture and indefinite detention without charges or trial. "If the American people needed any further proof that this administration's policy of treating terrorism like a law enforcement matter is irresponsible and reckless, they received it today," she wrote.

Many of these critics have insisted that if those detained as "enemy combatants" are to be tried at all, it should only be before military tribunals that are less sensitive to the

Constitution and the admission of forced confessions and other evidence extracted by CIA and military torturers.

The reality, however, is that while attempting to stage a showcase trial with the prosecution of Ghailani, the Obama administration is continuing the use of military kangaroo courts for some detainees and the indefinite detention without charges for others. This multi-track system is designed to put a legal gloss on the illegal system associated with Guantánamo that was established under the Bush administration.

For example, the administration is moving ahead with the trial before a military commission of Omar Khadr, a Canadian citizen who was captured by US Special Forces troops in Afghanistan in 2002 when he was 15 years old.

In that trial, which began in August, Khadr is being prosecuted for alleged offenses—throwing a grenade at a US soldier and conspiring with Al Qaeda—committed when he was a child. He faces life imprisonment. The military judge has waved aside defense objections to the use of confessions forced from the youth under torture, including beatings, sensory and sleep deprivation, threats of gang rape and being used as a "human mop."

Upon taking office, Obama promised that he would shut down the prison camp at the Guantánamo naval base in Cuba by January 2010. Ten months later, 174 men remain imprisoned at the camp. Only 36 have been slated for prosecution. Meanwhile the US administration has indicated that it will continue to hold 48 of them without charges or trial in violation of US and international law because it lacks any evidence against them that it can produce in a court of law. The rest, many of whom US intelligence and the Pentagon acknowledge pose no threat, remain in legal limbo.

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