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Torture Enters the Courtroom

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For the first time in American history, a federal judge last week authorized the government to admit as evidence in a criminal case in a public courtroom words uttered by the defendant that were obtained under torture.

The fruits of torture — which is any cruel or degrading or intentionally painful or disorienting behavior visited upon a person in captivity to induce compliance or to gratify the torturer — are not permitted in any court in the United States, and their inducement is criminal.

Here is the backstory.

Abd al-Rahim al-Nashiri, a low-level former member of the Taliban, is accused with others of plotting the suicide bombing of the USS Cole in October 2000 that killed 17 American sailors. He has been in U.S. custody since 2002 and at the U.S. Naval Base at Guantanamo Bay, Cuba, since 2004. When he was first captured, he was turned over to the CIA for interrogation, not the Department of Justice for prosecution.

The practice of the federal government immediately following 9/11, when it captured anyone overseas from whom it believed it could extract national security information, was to hand the person over to the CIA for torture — the feds call it "enhanced interrogation" — at a "dark site" in a foreign country with which the U.S. does not have an extradition treaty.

The reason for the location of the torture was the erroneous belief by DOJ and CIA officials that torture conducted or condoned by American personnel is not prosecutable if it occurs outside the U.S.

That has never been the law in the U.S., but it has been the practice of the DOJ and the CIA to shield their personnel with secrecy when they are caught engaging in torture in a foreign country.

However, because either the tortured person or someone connected to whatever the tortured person revealed was to be tried in a federal court, and because no federal court can admit evidence against a defendant that was obtained under torture, the feds devised a scheme around this.

That scheme called for FBI “clean teams” to interrogate the tortured person after the torture was completed, using conventional and lawful interrogation techniques. These techniques often proved more successful than CIA torture. Because these techniques were lawful, and the person being interrogated was advised of his rights and treated humanely by the FBI, the information thus obtained from him was usable in federal court.

At trial, a defendant can always demonstrate that he had been tortured, not to obtain the jury’s sympathy but to enable his lawyers to argue to the jurors that they should disregard as unconstitutional, immoral, unlawful and un-American whatever evidence the torture produced.

Al-Nashiri’s lawyers told the court and the prosecutors at Guantanamo Bay that they intend to argue at trial to the jury that the government has the wrong man and that the true plotters have already been killed by U.S. forces. The feds, in order to counter that argument, told the court that they have statements that al-Nashiri made during his torture that can arguably be used to question his defense.

If the trial judge in the court in Guantanamo Bay had followed the law — the Constitution, the statutes and the rules of procedure, all of which profoundly reject the fruits of cruel and unusual punishment and shocking behavior — as well as American history, he would have excluded from the trial whatever al-Nashiri told his torturers while they had a broomstick well into his rectum.

If the trial judge had followed the law and our values, he would have dismissed the case against al-Nashiri because the government’s behavior shocks the conscience. If the trial judge had followed the law, he would have ordered the torturers into his court room and had them arrested on the spot.

But the trial judge in this case did not follow American law and rejected American values and all sense of human decency when he authorized the government to introduce at trial a partial transcript of the statements al-Nashiri allegedly made under torture. He also broke with 230 years of precedent. He also gave judicial credibility to governmental barbarism and nihilism in the extreme, which holds that individual human beings are subject to the state and, since their rights come from the state, they and their rights exist at the pleasure of the state.

The government lies, cheats, steals and kills; and it has written laws that permit it to do so and make legal recourse against it nearly impossible.

But nothing it does is more damnable than torture.

Torture is the ultimate triumph of the state over a person and the ultimate degradation of personhood. It is a complete rejection of the values of the Declaration of Independence and the Constitution. And it doesn’t work.

The history of torture is the history of victims divorced from reality by overwhelming fear and unbearable pain and willing to say whatever the torturers demand in return for a cessation of the pain. Stated differently, the fruits of torture are divorced from the truth. As a truth-producing mechanism, torture is a failure.

Many appeals remain for al-Nashiri before his jury trial comes to pass; and torture — with all its sufferings by victim and perpetrators — is part of the history of his case. I trust that saner

judicial heads in the appellate process will prevail and this precedent-shattering and monstrous decision will soon be overturned. But its damage is done.

The government of the United States engages in torture and will continue to do so until the torturers are punished. And the prosecutors for whom the torturers work will someday try again to get the fruits of their barbaric behavior legitimized in an American courtroom.

When will the government stop the use of torture? Whom will it torture next? Why does it swear to uphold the Constitution and then trash it?

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