

# JUDGE RULES TORTURE DOESN'T VIOLATE DUE PROCESS

In a ruling that anticipates how the government will ignore torture as it tries alleged detainees in civilian court, Judge Lewis Kaplan rejected Ahmed Khalfan Ghailani's efforts to get his indictment for contributing to the 1998 embassy bombings dismissed because he was tortured while in US custody.

As Kaplan argues, Ghailani could only use the Due Process Clause to dismiss evidence collected as a result of his torture.

The Due Process Clause, so far as is relevant here, protects against deprivations of liberty absent due process of law. The deprivation of liberty that Ghailani claims may occur if this case goes forward is his imprisonment in the event of conviction. In seeking dismissal of the indictment, however, he does not deny that he is being afforded every protection guaranteed to all in the defense of criminal prosecutions. Rather, Ghailani in effect argues that the case should be dismissed to punish the government for its mistreatment of him before he was presented in this Court to face the pending indictment.

For a due process violation to result in consequences adverse to the government in a criminal case – for example, the suppression of evidence or the dismissal of an indictment – there must be a causal connection between the violation and the deprivation of the defendant's life or liberty threatened by the prosecution. That is to say, relief against the government in a criminal case is appropriate if, and only if, a

conviction otherwise would be a product of the government misconduct that violated the Due Process Clause. For only in such circumstances may it be said that the deprivation of life or liberty that follows from a criminal conviction flows from the denial of due process. This conclusion thus rests directly on the text of the Due Process Clause itself.

But since the government is trying Ghailani for his involvement in the 1998 bombings, rather than for any actions about which they asked him under torture, the alleged torture is irrelevant to this indictment (remember, Ghailani was picked up in 2004 in the pre-election scare about terror). So long as the government relies only on evidence untainted by the torture, Kaplan argues, then it is irrelevant to this trial.

Of course, the government did hedge, somewhat, about whether they were going to rely exclusively on untainted evidence.

The government has identified one possible exception: a percipient witness whose identity remains classified and whose testimony may constitute fruit derived from statements made by the defendant in response to interrogations while in CIA custody. The government maintains that there is no basis for suppressing this potential witness's testimony, and the issue is sub judice before this Court.

But that's not enough to get this indictment dismissed.

What's perhaps most curious about the ruling is Kaplan's claim—which he doesn't elaborate—that Ghailani may have some remedies against his torturers.

If, as Ghailani claims, he was tortured

in violation of the Due Process Clause, he may have remedies. For the reasons set forth above, however, those remedies do not include dismissal of the indictment.

The closest Kaplan comes to explaining what Ghailani's remedies might be is to discuss, abstractly in the context of precedent, what such remedies might be, leaving aside the question of whether someone tortured under Cheney's torture program actually has access to those remedies.

"[A defendant] is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct."<sup>18</sup> Rather, the proper remedy is money damages or criminal prosecution of the offending officers.<sup>19</sup>

Only, he doesn't have access to those remedies, as the Jeppesen and Yoo suits make pretty clear.

I don't know why those whiners are so worried about trying Khalid Sheikh Mohammed in civilian court.