

# WHAT SHALL WE CONDONE?

Abd al Rahim al-Nashiri's lawyers end their letter to Navy Vice Admiral Bruce MacDonald—who will decide whether al-Nashiri will face the death penalty—with an appeal to his role in deciding what we as a nation will condone:

One pivotal and constant question has been—what shall we condone? Shall we condone a trial that allows evidence obtained from torture? Shall we condone a trial for a detainee who has been tortured?

Indeed, one of their most surprising arguments was a reminder that his predecessor, Judge Susan Crawford, refused to refer charges against Mohammed al-Qahtani because he had been tortured.

Your predecessor, Judge Susan Crawford, did not refer charges against Mohammed Al-Qahtani for his direct role in the September 11th Attacks because he was tortured. Judge Crawford stated, "His treatment met the legal definition of torture. And that's why I did not refer the case[.]" Here, the government's treatment of Mr. Al-Nashiri undoubtedly meets the legal definition of torture and cruel, inhuman and degrading treatment. Judge Crawford was able to review the interrogation records and other documents of Mr. Al-Qahtani's abuse before making her decision. In this case, we assume the CIA has not provided those records to you. Even without the cooperation of the CIA, sufficient evidence has been publicly released to prove that Mr. Al-Nashiri was tortured.

[snip]

In essence, the United States has lost its moral authority to seek the death penalty. Accordingly, you should not refer charges—or authorize the death penalty—against Mr. Al-Nashiri.

I find a few things surprising. First, the suggestion that MacDonald has probably not officially been informed of al-Nashiri's treatment. While I suppose that's possible (it's clear, for example, that the CIA limited how much Gitmo personnel learned of former CIA detainees), that would still be surprising. Though of course, at the very least, MacDonald has not seen the video tapes that were destroyed.

Also note that in this passage, at least, al-Nashiri's lawyers are calling on the government to drop charges entirely against al-Nashiri, based on the Crawford precedent. Not that the appeal will work (because, particularly given that KSM is now slotted for a Gitmo Military Commission, it would take charges and the death penalty for him off the table, too). But it is notable that they asked.

Much of the rest of the letter lays out reasons I expected: al-Nashiri's torture itself, the CIA's destruction of exonerating evidence, the dicey appellate record for MCs, the length of time since the alleged crimes and the delay in charging, and the safety restrictions on travel to Yemen now.

And then there's the predictable objection on legal grounds: al-Nashiri's lawyers argue that since we weren't at war when most of his alleged crimes occurred, an MC is an improper venue to try him. Powerfully, they cite Presidents Clinton and Bush to prove we were not at war.

When convened outside areas under martial law or military occupation, military commissions are strictly limited to the punishment of enemy forces for violations of the laws of war

committed in the context of and associated with hostilities.

The limitation was affirmatively recognized and enacted by Congress into the Military Commissions Act, when it mandated that “An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities.

Mind you, the government will cite Osama bin Laden’s declaration of war against the US in 1996, but it’s hard to see how that refutes President Clinton’s assertion that “America is not at war” delivered in his eulogy to those lost on the USS Cole.

If that’s not enough, though, al-Nashiri’s lawyers now have the legal opinion of Harold Koh’s conditions that define hostilities for Libya.

The question this letter asks—whether we as a country ought to impose the death penalty on someone we tortured—is a key question. But the legal argument may well be just as compelling.