

COURT SLAPS GOVERNMENT OVER USE OF TORTURE EVIDENCE

You might not know it from the asleep at the wheel major media, but the Bush/Cheney war on terror foundation has taken some serious hits recently, from news of the murder of Gul Rahman at the Salt Pit, to the selective prosecution of David Passaro, to the finding by Judge Walker that the wiretapping was illegal, to widely acclaimed terror pros Steve Kappes and Phil Mudd both suddenly bailing from their high ranking intelligence jobs. You can add to the list a hard slap down by a Federal Court of the government's continued use of bogus evidence obtained by brutal torture to try to justify continued detention of detainees at Guantanamo. 

On Wednesday, Judge Henry H. Kennedy of the DC District Court issued his written opinion in the Habeas Petition by Uthman Abdul Rahim Mohammed Uthman, and it is a testament of what it looks like when a legitimate court encounters the unconscionable torture and innuendo evidence the US Government, under both the Bush and Obama Administrations, has been relying on to hold the detainees at Gitmo.

Uthman had been captured in the Afghanistan/Pakistan border region (allegedly in the general area of Tora Bora, although that was never established) with a large group of others all rounded up en masse. Uthman claims he was a teacher innocently traveling, the DOJ asserted he was a key bodyguard for bin Laden. The evidence proffered against Uthman came almost exclusively from two other detainees, Sharqwi Abdu Ali AI-Hajj and Sanad Yislam Ali Al Kazimi, who both assert they fabricated the statements in response to severe torture.

Here is how the handling of Hajj and Kazimi was described by Uthman, and found credible by the court:

Uthman has submitted to the Court a declaration of Kristin B. Wilhelm, an attorney who represents Hajj, summarizing Hajj's description to her of his treatment while in custody. The declaration states that while held in Jordan, Hajj "was regularly beaten and threatened with electrocution and molestation," and he eventually "manufactured facts" and confessed to his interrogators' allegations "in order to make the torture stop." After transfer to a secret CIA-run prison in Kabul, Afghanistan, Hajj was reportedly "kept in complete darkness and was subject to continuous loud music."

Uthman has also submitted a declaration of Martha Rayner, a Professor at Fordham University Law School who represents Kazimi, regarding Kazimi's description of his treatment in detention. Rayner reports that while Kazimi was detained outside the United States, his interrogators beat him; held him naked and shackled in a dark, cold cell; dropped him into cold water while his hands and legs were bound; and sexually abused him. Kazimi told Rayner that eventually "[h]e made up his mind to say 'Yes' to anything the interrogators said to avoid further torture." According to Rayner's declaration, Kazimi was relocated to a prison run by the CIA where he was always in darkness and where he was hooded, given injections, beaten, hit with electric cables, suspended from above, made to be naked, and subjected to continuous loud music. Kazimi reported trying to kill himself on three occasions. He told Rayner that he realized "he could mitigate the torture by telling the interrogators what they wanted to hear." Next, Kazimi was moved to a U.S. detention facility in Bagram, Afghanistan, where, he told Rayner, he

was isolated, shackled, “psychologically tortured and traumatized by guards’ desecration of the Koran” and interrogated “day and night, and very frequently.” Kazimi told Rayner that he “tried very hard” to tell his interrogators at Bagram the same information he had told his previous interrogators “so they would not hurt him.” (citations omitted)

The DOJ shamelessly attempted all types of circuitous and bootstrapped argument to try to buck up the tortured proof they were passing and the court properly called them on it at every turn. The decision is only twenty pages long and is a quick read; it is worth it to see just how many layers of unsupported and flimsy innuendo the government, through those beacons of ethical virtue at the Obama DOJ, will ply a court with and maintain a presumably straight face. It is stunning.

In order to give you an idea of the soundness of Judge Kennedy’s ruling, I will leave the legal citations in the quote from his discussion of the applicable law and his conclusion thereon:

Uthman asserts that the proximity in time between the torture Hajj and Kamizi described and their interrogations by the CITF investigator, however cordial, renders their statements unreliable. In general, “resort to coercive tactics by an interrogator renders the information less likely to be true.” *Mohammed v. Obama*, 2009 WL 4884194, at 23 (D.D.C. Dec. 16, 2009) (citing *Linkletter v. Walker*, 381 U.S. 618, 638 (1965)). To determine admissibility in analogous situations criminal cases, courts assess the voluntariness of statements made after the application of coercive techniques based on a totality of the circumstances test. *Id.* (citing *United States v. Karake*, 443 F. Supp. 2d 8, 87 (D.D.C. 2006)); see also *Schneckloth v.*

Bustamante, 412 U.S. 218,226 (1973) (“In determining whether a defendant’s will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances. “). Judges of this Court have adopted this test in the cases of other Guantanamo Bay detainees seeking release. See, e.g., Mohammed, 2009 WL 4884194, at 23; Anam v. Obama, – F. Supp. 2d -,2010 WL 58965, at 4 (D.D.C. Jan. 6, 2010). The test calls for considering, inter alia, “the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators.” Mohammed, 2009 WL 4884194, at 23 (quoting Oregon v. Elstad, 470 U.S. 298, 310 (1985)) (internal quotation mark omitted).

Respondents do not argue that the alleged torture of Hajj and Kazimi is sufficiently attenuated from the interviews at which they gave the relevant statements to support a conclusion that despite the coercion, the statements are nonetheless reliable. The interviews on which the relevant FM40s are based occurred in Bagram, where torture of Hajj was ongoing and where Kazimi had arrived directly from the CIA prison, at which he was tortured, only about a month earlier. Therefore, the Court concludes that there has been no “break in the stream of events ... sufficient to insulate the statement from the effect of all that went before.” Clewis v. Texas, 386 U.S. 707, 710 (1967). Accordingly, the Court will not treat Hajj and Kazimi’s statements as true.

Again, the full decision is worth a read. As you do, keep in mind that the standard in evaluating the lawfulness of the detention of the

individuals held at Guantanamo Bay is the government may detain only "those who are 'part of' the 'Taliban or al Qaida forces,'" and the key question is whether an individual 'receive[s] and execute[s] orders' from the enemy force's combat apparatus". It is not a hard standard, but there does have to be *some* credible evidence.

Also critical to keep in mind is the fact that the burden of proof in a Habeas proceeding is only a civil one of "preponderance of the evidence"; commonly accepted to mean anything at all more than 50%, i.e. anything that makes the asserted proposition more likely than not. It is the lowest possible burden of proof. Judge Kennedy couldn't find the government was even close to the mark on the lowest possible scale in a civil case. Just think what this says about the ability of the government to meet any criminal burden of proof such as "beyond a reasonable doubt".

Uthman Abdul Rahim Mohammed Uthman has been being held by the US government in brutal captivity at Gitmo since January of 2002 – over eight years – based on evidence that would not be sufficient to convict him of a parking ticket. And then remember that, as one of the far less than 200 detainees remaining at Guantanamo, Uthman is supposed to be one of the worst of the worst and that the government has a solid case on. Thanks to the Bush and Obama Administrations, this is who we are now as a country. Any more questions as to why Lindsay Graham and the Obama Administration are fighting for military commissions?

(Graphic by the one and only Darkblack)