

BREAKING! TORTURE IS ILLEGAL! EXCEPT WHEN CONSISTENT WITH THE INTERESTS OF JUSTICE!

Thanks to BoxTurtle for linking to the manual for military commissions rushed out last night in time for the Omar Khadr hearing.

There are a number of interesting details in it, but since Khadr's hearing today pertains to torture—whether statements he made after allegedly being tortured will be admissible—I thought I'd start with what the manual says about torture. And, ironically, there's a big section on torture ... in the section describing potential charges under military commissions. Here's how the manual describes the crime of torture:

(11) TORTURE.

a. Text. "Any person subject to this chapter who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct."

The details for the most part track the analysis

done by OLC on torture, including the language on intent:

(3) The accused intended to inflict such severe physical or mental pain or suffering;

But there's also this, which appears to be a potential loophole:

(6) The conduct took place in the context of and was associated with hostilities.

Now, given that torture is laid out all nice and tidy like that in the military commission manual, you'd think that the discussion of whether evidence collected through the use of torture is admissible might also include some comment about what happens to the people who did the torture if evidence is deemed inadmissible because it was collected using torture. But it doesn't.

Here's what the manual says about statements collected using torture.

(1) Exclusion of Statements Obtained by Torture or Cruel, Inhuman, or Degrading Treatment. No statement, obtained by the use of torture, or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a trial by military commission, except against a person accused of torture or such treatment as evidence that the statement was made.

Which would seem to say no evidence collected using torture will be admissible in these military commissions, unless it's to try to someone for torture.

Except there's this loophole:

(5) Derivative Evidence.

(A) Evidence Derived from Statements Obtained by Torture or Cruel, Inhuman, or Degrading Treatment. Evidence derived from a statement that would be excluded under section (a)(1) of this rule may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection, unless the military judge determines by a preponderance of the evidence that—

(i) the evidence would have been obtained even if the statement had not been made; or

(ii) **use of such evidence would otherwise be consistent with the interests of justice.** [my emphasis]

That is, to exclude evidence collected using torture, the defendant has to make a timely motion to suppress that evidence. Fair enough.

But the military commission can still use the evidence if it decides the evidence would have been obtained anyway (this seems to be a giant wall of protection for evidence collected using a clean team, meaning that evidence that matches tortured confessions but was collected using other means can still be used even if the evidence also came out in a tortured confession).

Or, more troubling, if the military judge decides that using evidence collected using torture “would otherwise be consistent with the interests of justice.”

Here’s what the manual has to say about “interests of justice:”

The intention of Mil. Comm. R. Evid. 304(a)(5) is that the “interests of justice” standard generally will restrict the admission of evidence derived from statements obtained by

torture or cruel, inhuman, or degrading treatment (other than where the evidence would have been obtained even if the statement had not been made). The admission of evidence derived from a statement that was made incident to lawful conduct during military or intelligence operations and that would not be excluded under section (a)(1) of this rule generally should be regarded as consistent with the interests of justice for purposes of section (a)(5)(B) of this rule.

So torture is illegal. Except when it consists of "lawful conduct during military or intelligence operations," in which case torture can be regarded as "consistent with the interests of justice."

Here's what the manual says about statements made by others under torture (I originally didn't find this section—this is an update):

(3) Statements from persons other than the accused allegedly produced by coercion. When the degree of coercion inherent in the production of a statement from a person other than the accused offered by either party is disputed, such statement may only be admitted if the military judge finds that—

(A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;

(B) the interests of justice would best be served by admission of the statement into evidence; and

(C) the statement was not obtained through the use of torture or cruel, inhuman, or degrading treatment as defined in section 1003(d) of the Detainee Treatment Act, Pub. L. 109-148 (2005) (codified at 42 U.S.C.

2000dd(d)).

Since this section requires that the coerced statement both serve the interest of justice and that it not be obtained through use of torture, it seems that self-incrimination through torture is allowed, when consistent with the interests of justice, but not the incrimination of others.