YOU HAVE A RIGHT TO SPEEDY TRIAL … UNLESS THEY NEED TO TORTURE YOU FIRST

As we've discussed some in comments, Judge Lewis Kaplan rejected Ahmed Khalfan Ghailani's challenge to his trial for the African embassy bombings on speedy trial grounds. Kaplan rejected Ghailani's argument that, since the government had held him for five years before charging him, he had been denied the right to a speedy trial. Mostly, Kaplan ruled that, since the government got no advantage from waiting, the delay did not infringe on Ghailani's rights.

This has been read to suggest that civilian judges would reject a similar challenge on the part of Khalid Sheikh Mohammed, meaning one possible barrier to a civilian trial for him, too, has been eliminated. That's probably true. But it bears note that Kaplan did find government excuses for some of the delays in charging Ghailani unpersuasive.

> In sum, the only reason for the delay of this prosecution during the period September 2006 through late February or early March 2007 was the fact that the executive branch decided to hold Ghailani at Guantanamo and not to proceed with the prosecution. The government's justification for the roughtly one-year delay from February or March 2007 until March 28, 2008 is weak. The time during which the military commission proceedings were pending, March 28, 2008 until January 2009, also weighs against the government because the government and not the defendant was responsible for it. The same is true with respect to the interval from the suspension of the military commission prosecution in January 2009 until

> Ghailani eventually was produced in this Court.

Now, I think the argument that Kaplan used here will still largely hold sway. But some future judge may well look more skeptically on the current delay in charging KSM. After all, this delay — to let the political winds blow over until such time as KSM can be charged in a civilian court (if that's what is happening) — is something the government is doing to gain advantages over KSM. Eric Holder has explained unambiguously that one reason he thinks we stand a better chance of trying KSM in civilian courts is to be able to impose the death penalty, and there's actually a greater risk that KSM's torture might lead a military commission to compensate for the treatment. The Attorney General, that is, has repeatedly said he wants to try KSM in civilian court because it holds certain advantages over military commissions for the government; and the only possible way to move forward in civlian courts is to wait until either Rahm and Lindsey say it's okay or until the election passes. I don't think it'll happen, but there is an argument to be made that the current delay in charging KSM is designed to gain an advantage and therefore could be judged to violate his right to a speedy trial.

But that's not what I find most interesting about this ruling. It's the way Kaplan decides that the two years Ghailani was held — and, Ghailani says, abused — at a black site didn't violate his right to a speedy trial. Here's the argument:

> The CIA interrogated Ghailani for the first two years in the reasonable belief that Ghailani had important intelligence information. While some of the methods it widely is thought to have used have been questioned and, to whatever extent they actually were used, might give rise to civil claims or even criminal charges, 139 no one denies that the agency's purpose was to protect the

> United States from attack.
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> "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." While the Speedy Trial Clause conceivably might have been violated if a prosecution were delayed for the purpose of extended use of appalling or unlawful methods of interrogation even for important national security reasons, that is not the case. There was no prolonged delay here for any such purpose. The two year delay attributable to the CIA interrogation served a valid purpose. The balance of considerations with respect to that period, especially in the light of the lack of substantial prejudice to Ghailani's Speedy Trial Clause-protected interests, tips heavily in favor of the government.
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> 139 But see Detainee Treatment Act of 2005, 42 USC 2000dd-1(a) (establishing qualified defense for government personnel charged with offenses or liability in connection with officially authorized operational practices "that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States").

This is a lovely example of the muddlespeak one has to resort to to make an argument that is not entirely persuasive. "While some of the methods it widely is thought to have used have been questioned"? That construction is all the more ridiculous given that a few of the documents Kaplan cites on torture—like the Bradbury CAT memo, the CIA's Combined Techniques document, and a version of the OMS guidelines are publicly available. And how does Kaplan decide that Ghailani's trial hasn't been delayed just for

torture? Because John McCain subsequently declared it retroactively legal?

In fact, Kaplan submitted a Supplement we don't get to see analyzing Ghailani's treatment in detail (Ghailani, interestingly, submitted affidavits describing both the treatment he received while still in Pakistani custody and what happened when he was moved to the CIA black site, though the opinion repeatedly stops short of naming Pakistan in spite of the fact that the Bush Administration was leaking boastfully about their successes in Pakistan during the pre-2004 election period when Ghailani was captured). The Supplement, among other things, notes that Ghailani was tortured for a period that "was not of sufficient length to be material to this motion." As to why they kept him at the black site for two full years, then, Ghailani argued that his intelligence value "quickly dissipated," while the government argued that he continued to have intelligence value.

So Kaplan reviewed both the government's version and Ghailani's version of the abuse he was subject to, and apparently decided it was justified even if it might have been against the law had McCain not retroactively declared it legal.

What's interesting, though, are the documents he relied on, particularly given the way they map onto the requests CIA was making in the time period after they captured Ghailani.

First, he relies on an undated version of the CIA's OMS Guidelines on Detainee Interrogations. It differs from the OMS Guidelines dated September 4, 2003 that was included with the CIA IG Report (itself dated May 7, 2004, just two and a half months before Ghailani was captured on July 25, 2004) in that it doesn't include water dousing as a "standard measure." And it differs from the OMS Guidelines produced sometime before January 15, 2005, in that it puts the limit for "standard" sleep deprivation at 72 rather than 48 hours, and it doesn't include water dousing or tossing and walling as

enhanced techniques.

Perhaps that means there was a different version of OMS Guidelines in place from May 7, 2004 to January 2005 that were the operative guidelines when Ghailani was abused in August or September 2004. That would be interesting not least because CIA formally got water dousing—the technique preset on both other OMS guidelines but not on the list Kaplan saw—approved on August 26, 2004. That approval may well have been approved for use with Hassan Ghul, but it was included in all the subsequent approvals.

And then, for description of the techniques, Kaplan cites the Bradbury memo from May 30, 2005. While it's true that the Bradbury memos all appear to have been retroactive (at least one of them names Ghul personally), they obviously weren't in effect during Ghailani's abuse. Further, it is possible the letters from the period included one specific to Ghailani, but if so, why not provide the list actually approved for Ghailani? Finally, there are some differences between the descriptions that appear in the Bradbury memos, those used in the July-August approval letters in 2004 (which should have been what authorized Ghailani's treatment), and the Bybee Memo.

Did Kaplan ever see a contemporaneous document pertaining to Ghailani's abuse, rather than the retroactive descriptions? And if so, why not?

I guess it doesn't matter anyway. Kaplan has basically concluded that if the government can persuasively argue that government believed the torture necessary at the time, then they can torture a detainee as long as he still has intelligence value without infringing on the detainee's right to a speedy trial.