

# KEY PROSECUTION WITNESS EXCLUDED OVER TORTURE IN NEW YORK TERROR TRIAL

Last Friday, I reminded the clueless media, and thus mostly uninformed public, there was a critical terror trial going on right in their midst in New York City, and doing so quietly and competently as was claimed was impossible by howlers such as Liz and Dick Cheney, Guiliani, Lindsey Graham and the right wing noise machine. The case is *US v. Ahmed Khalfan Ghailani*, and as I explained, although jury selection was well under way, there was a brief delay imposed by the trial judge, SDNY Judge Lewis Kaplan, until today so he could contemplate a motion to exclude a critical prosecution witness argued by the defense on the grounds the putative testimony was the product of torture and coercion.

The decision by Judge Kaplan was just issued and, in somewhat of a shock, he has ordered the witness, Hussein Abebe, excluded. From Bloomberg News:

A judge barred the U.S. from calling as a witness a Tanzanian miner who admits supplying explosives to Ahmed Ghailani, an alleged al-Qaeda terrorist charged with the 1998 bombing of the U.S. embassies in Africa.

U.S. District Judge Lewis Kaplan, in New York, denied a request by federal prosecutors to allow Hussein Abebe to testify that he sold five crates of dynamite to Ghailani before the blast. Abebe, whom prosecutors called a “giant” witness in their case, would provide a first-hand account of Ghailani’s role in the attacks, the government said.

Kaplan ruled that Abebe’s testimony is

too closely tied to coerced statements made by Ghailani while he was in CIA custody and must be excluded from the trial. The ruling, made public today, will delay the trial's start until Oct. 12 to give the government time to decide whether to appeal.

"The court has not reached this conclusion lightly," Kaplan wrote. "It is acutely aware of the perilous nature of the world in which we live. But the Constitution is the rock upon which our nation rests. We must follow it not only when it is convenient, but when fear and danger beckon in a different direction."

This is a critical ruling and, while it should not be this way, a refreshingly positive one for the health and sanctity of the Constitution and federal Article III courts. Hats off to Judge Kaplan, for while the legal basis seems quite clear on its face, the blowback pressure from the government and boogity boogity terrorism howlers described above (not to mention the Old Gluehorse McCain) will be intense. Here is the critical language from Kaplan's order:

Abebe was identified and located as a close and direct result of statements made by Ghailani while he was held by the CIA. The government has elected not to litigate the details of Ghailani's treatment while in CIA custody. It has sought to make this unnecessary by asking the Court to assume in deciding this motion that everything Ghailani said while in CIA custody was coerced.) In these circumstances, the Constitution does not permit Abebe to testify in this criminal trial unless the government has sustained its burden of proving that (1) the connection between Ghailani's coerced statements and Abebe's testimony is sufficiently remote or attenuated, or (2) there is another basis upon which that testimony properly may be received.

The Court has had the benefit of extensive evidentiary submissions, a three-day

hearing at which Abebe and representatives of the Federal Bureau of Investigation, the CIA, the Tanzanian National Police testified, legal briefs, and skilled argument. On the basis of that record – including importantly its assessment of the credibility of the only witnesses called to testify who actually were present when Abebe was persuaded to confess his role, to implicate Ghailani, and to cooperate with authorities – it now finds and concludes that the government has failed to prove that Abebe’s testimony is sufficiently attenuated from Ghailani’s coerced statements to permit its receipt in evidence. In a previous decision, it rejected the other bases advanced by the government for allowing Abebe to testify. *United States v. Ghailani*, \_\_ F. Supp.2d \_\_, 2010 WL 3430514 (S.D.N.Y. Aug. 17, 2010). Accordingly, the motion to preclude Abebe’s testimony is granted.

The Court has not reached this conclusion lightly. It is acutely aware of the perilous nature of the world in which we live. But the Constitution is the rock upon which our nation rests. We must follow it not only when it is convenient, but when fear and danger beckon in a different direction. To do less would diminish us and undermine the foundation upon which we stand.

Three cheers for Judge Lewis Kaplan, who made the tough, but required, decision. You would expect that of any Federal judge but, alas, that is not always the case in a Federal judiciary increasingly controlled by right wing ideologues. There is one note of caution on the celebration, and that is the concluding language

from Kaplan in his order:

Moreover, it is appropriate to emphasize that Ghailani remains subject to trial on the pending indictment, that he faces the possibility of life imprisonment if convicted, and that his status as an “enemy combatant” probably would permit his detention as something akin to a prisoner of war until hostilities between the United States and Al Qaeda and the Taliban end even if he were found not guilty in this case.

This brief order will be supplemented by an opinion containing the Court’s findings of fact and conclusions of law. In view of the classified nature of much of the evidence and in accordance with the Classified Information Procedures Act, that opinion will be filed with the Court Security Officer. A redacted version will be filed publicly as soon as possible.

As always, there may be no relief for those caught in the terrorism clutches of the United States government even when they are acquitted or ordered released. But, that is for another day, for today Judge Lewis Kaplan’s order should be cheered by those who believe the principles embodied in the Constitution – the rule of law – are more important than one man or one case, whether it involves terrorism or not. The trial is now on hold until at least Oct. 12 to give the government time to decide whether to appeal the exclusion ruling by Kaplan.