

KAPLAN'S DECISION NOT JUST ABOUT COERCION OF GHAILANI, BUT ALSO OF ABEBE

The usual suspects are out wailing that Judge Lewis Kaplan's order, excluding the testimony of Hussein Abebe from Ahmed Ghailani's trial, proves civilian courts don't work for terrorism. Glenn rounds up more of the whiners and notes that you really can't complain about Kaplan's decision and still claim to believe in rule of law.

I wanted to add just one detail to the discussion bmaz offered yesterday (and thanks to him and Mary for watching the likker cabinet while I was away).

Kaplan rejected Abebe's testimony not just because of the CIA's coercion of Ghailani, but also because of possible coercion of Abebe himself.

Mary noted Kaplan's suggestion that the witnesses put forth by the government either did not include all the witnesses who should have testified that Abebe would testify voluntarily, or weren't themselves credible. Here's what Kaplan said:

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.

And here's what Mary wrote about it:

It makes it sound as if the issue isn't just how attenuated the evidence from the coercion, but also how credible the witnesses. The "only witnesses called to testify who were actually present" – for some reason this makes me wonder if the court was aware that there were clearly other witnesses present when Abebe was being "persuaded" and they were purposefully not being provided to testify? And it makes you wonder about the persuasion. Being persuaded and being questioned have some different feel to the underlying words.

Kaplan's earlier order dismissing the government's other justifications for calling Abebe as a witness indicates the source of his skepticism—at least as it was before later hearings on the question [note, the earlier filing redacted Abebe's name, though I've put it in where it contextually must be the redacted word].

It is entirely possible that [Abebe] if he were to appear, would be a willing witness. But the burden of proof on the attenuation claim [in which the government relies on Abebe's willingness to testify to claim it had little to do with Ghailani's coerced testimony] is on the government. It has submitted no affidavit from [Abebe]. Moreover, there is evidence that arguably undermines the government's claim. The circumstances of [Abebe's] initial questioning, at least to the extent that the Court has been made aware of them, perhaps suggest that he is not simply a public spirited citizen who "has come forward [to] offer evidence entirely of [his] own volition." He was arrested by Tanzania, flew to a distant location, held there for days, and questioned by Tanzanian police before the FBI questioned him.

Indeed, he told the Tanzanian authorities at the time of his arrest “that he knew this day would come—that he had been waiting eight years for the authorities to locate him.” The record discloses nothing about what happened while he was in Tanzanian custody, and it is sketchy even about what took place after the FBI arrived. We know only that [Abebe] was released after he was questioned by the FBI and promised to appear as a witness in this case.

The suggestion, of course, is that Abebe may have himself been subject to physical coercion, and at the very least he was only freed after agreeing to testify in Ghailani’s trial, which doesn’t make him a very voluntary witness. Kaplan’s references to the credibility (or not) of the witnesses who testified as well as his suggestion that not everyone involved in Abebe’s interrogation did testify probably suggest he suspects that those other law enforcement officers involved (I’m guessing there has to be at least one Tanzanian official and one US official who didn’t testify) would not be able to testify that Abebe’s testimony was voluntary.

Mind you, for the usual suspects, piling coercion on top of coercion doesn’t much make a difference. And it seems that the government has at least one other witness who knew (perhaps identified through Ghailani’s torture) that a Hussein—who appears to be Abebe—was involved in the plot.

But it sure seems that the problem is not just that they tortured Ghailani and now want to use his testimony under torture to help convict him, but that they may have continued to coerce witnesses—in unknown ways—to get a conviction for Ghailani.