US seeks to bar testimony on torture in military trial of alleged 9/11 plotters

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Pretrial arguments began last week and continued Wednesday in the military commission trial in Guantánamo Bay, Cuba of the alleged 9/11 plotters over the US government's attempt to suppress any testimony by the defendants on their torture at the hands of the CIA.

The five defendants, including the alleged 9/11 mastermind Khalid Shaikh Mohammed, are charged with war crimes. Prosecutors are asking for the death penalty.

In April, the prosecution filed a motion for a "protective order." In that motion and a subsequent court filing, the government asked the presiding military judge to exclude from evidence as presumptively "classified" any and all statements by the defendants about their detention and abuse in CIA custody. The request extends to their treatment and conditions since they were transferred to Guantánamo.

The government's rationale is that because the defendants were "detained and interrogated in the CIA program" of secret detention, torture and abuse, they were "exposed to classified sources, methods, and activities" and therefore must be gagged to avoid revealing what the government did to them.

The reason for the government's request is nakedly political. It wants to ensure that the public will never hear the defendants' accounts of the rendition, torture and black site detention to which the CIA subjected them—in short, the US government's own war crimes. A secondary government motive is to keep the defendants from testifying to possible links between their activities and US intelligence operatives prior to the 9/11 attacks.

The government's argument is Orwellian. By its logic, no defendant could ever testify to abuse. Nor could plaintiffs who might seek redress in the civil courts for being unlawfully renditioned or tortured.

The government's arguments underscore the drumhead character of the military commissions established by George W. Bush and continued by Barack Obama.

Under the 2009 revision to the military commission rules applicable to these proceedings, evidence obtained by torture is not barred: coerced statements may be used as evidence if the judge determines they are "reliable" and "probative" and that their use is "in the best interest of justice."

Thus, when the government uses the defendants' own statements to prove their guilt, the defendants will not be able to testify that the statements were given under the extreme duress of torture. A trial under such circumstances is an utter sham.

The government's position is otherwise absurd because this very information has already been made public. President Obama previously released memos from the Office of Legal Counsel of the US Justice Department during the Bush administration detailing the torture to which the defendants were subjected. It is already public record that the CIA waterboarded defendant Mohammed 183 times, and that it used beatings, forced nudity, threats against family members—including children—stress positions, and deprivation of food against the defendants.

Similarly, the Red Cross and other bodies have released detailed findings of the treatment of these and other detainees at Guantánamo.

The American Civil Liberties Union (ACLU) and lawyers on behalf of 14 media companies have argued against the government's request, citing longstanding US Supreme Court case authority establishing that the public has a First Amendment right to observe these trial proceedings unless the government can show a

substantial likelihood that public testimony would result in harm to national security or another "compelling" government interest. This mirrors the constitutional right a criminal defendant has in US courts to a public trial.

The public gallery for observation of the trial is behind a sound barrier. The government has also asked the presiding military judge to allow a 40-second delay in the audio feed of the commission proceedings to the public so that a military censor can cut off the sound whenever the government wants to shroud from the public, press and trial observers testimony from the defendants.

In response to this proposal, the ACLU's lead counsel, Hina Shamsi, argued: "[E]very day courts around our country deal with classified information without the need to build a censorship chamber. Courts deal with hundreds of sensitive national security and terrorism cases without the need to build a soundproof wall between the courtroom and the American public. No other American courtroom has a government official sitting in the corner with a finger on a censor button. The reason this courtroom was built, the reason for the censorship regime that the government seeks to impose is the government wants to ensure that the American public will never hear the defendants' accounts of the torture, rendition and black site detaining to which the CIA subjected them."

The defendants have refused to participate in much of these proceedings, decrying them as sham. On Wednesday, a defendant charged in another prosecution with orchestrating the attack on the Navy destroyer USS Cole, Abd al-Rahim al-Nashiri, told the judge that he is being dragged about in "belly chains" and subjected to other abuse that renders him unable to contribute to his defense.

At Guantánamo, the circumstances in which much of the evidence was obtained are considered a national security matter, such that even defense lawyers with top secret security clearance are denied access.

The prosecutor has a power unknown in US federal court or any international tribunal: he can unilaterally veto a defense attorney's decision to call a witness. The lawyer must then argue its merits with the prosecutor in front of the judge. This locks in a prosecutorial advantage that undercuts an effective defense.

This is on top of severe limitations placed on communications between the defendants and legal counsel, and restrictions placed on defense access to exculpatory evidence. The rules are designed to allow the prosecution free rein on evidence, but keep the defense tightly controlled.

The presiding judge, US Army Colonel James Pohl, was expected to start ruling on these and other motions by Thursday, but a hurricane approached Wednesday evening and the proceedings were shut down.

In a related development, the prosecution's ability to prove that the crimes alleged meet the standard of war crimes under the 2009 law authorizing military commissions suffered a potentially devastating blow last week. One of only two cases tried to a verdict by the military commissions at Guantánamo, against Salim Hamdan, Osama bin Laden's driver, was reversed on appeal.

Hamdan was convicted in 2008 of providing material support for terrorism. A unanimous three-judge panel of the conservative District of Columbia Circuit found that this charge was not a war crime, and thus was outside the reach of the military commissions. The court noted that Hamdan was found guilty based on conduct that took place from 1996 to 2001, but the charge of material support for terrorism came into effect only with the passage of the Military Commissions Act of 2006.

Zachary Katznelson, a senior ACLU attorney, said the decision "strikes the biggest blow yet against the legitimacy of the Guantánamo military commissions, which have for years now been trying people for a supposed war crime that in fact is not a war crime at all."

The charges against Khalid Shaikh Mohammed and his four co-defendants do not include material support for terrorism.