

Injustice at Guantanamo : Torture Evidence and the Military Commissions Act

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The Bush administration has announced its intention to try six alleged al Qaeda members at Guantánamo under the Military Commissions Act. That Act forbids the admission of evidence extracted by torture, although it permits evidence obtained by cruel, inhuman or degrading treatment if it was secured before December 30, 2005. Thus, the administration would be forbidden from relying on evidence obtained by waterboarding, if waterboarding constitutes torture.

That's one reason Attorney General Michael Mukasey refuses to admit waterboarding is torture. The other is that torture is considered a war crime under the U.S. War Crimes Act. Mukasey would be calling Dick Cheney a war criminal if the former admitted waterboarding is torture. Lawrence Wilkerson, Colin Powell's former chief of staff, has said on National Public Radio that the policies that led to the torture and abuse of prisoners emanated from the Vice President's office.

The federal government is working overtime to try and clean up the legal mess made by the use of illegal interrogation methods. In a thinly-veiled attempt to sanitize the Guantánamo trials, the Department of Justice and the Pentagon instituted an extensive program to re-interview the prisoners who have undergone abusive interrogations, this time with "clean teams." For example, if a prisoner implicated one of the defendants during an interrogation using waterboarding, the government will now re-interrogate that prisoner without waterboarding and get the same information. Then they will say the information was secured humanely. This attempt to wipe the slate clean is a farce and a sham.

In *Brady v. Maryland*, the US Supreme Court held that a prosecutor has a duty to give criminal defendants all evidence that might tend to exonerate them. Yet the CIA admitted destroying several hundred hours of videotapes depicting interrogations of Abu Zubaydah and Abd al-Ramin al-Nashiri, which likely included waterboarding. The administration claims Abu Zubaydah led them to Khalid Sheikh Mohammed, one of the defendants facing trial in the military commissions. So the government has destroyed potentially exonerating evidence. Moreover, the CIA's "enhanced interrogation techniques" are classified so they can be kept secret from the defendants, and CIA agents cannot be compelled to testify or produce evidence of torture.

A report just released by Seton Hall Law Center for Policy and Research reveals more than 24,000 interrogations have been conducted at Guantánamo since 2002 and every interrogation was videotaped. Many of these interrogations were abusive. "One Government document, for instance, reports detainee treatment so violent as to "shake the camera in

the interrogation room” and “cause severe internal injury,” the report says.

The Military Commissions Act contains other provisions that deny the defendants basic due process. It allows a trial to continue in the absence of the accused, places the power to appoint judges in the hands of the Secretary of Defense, permits the introduction of hearsay and evidence obtained without a warrant, and denies the accused the right to see all of the evidence against him. Defense attorneys are not allowed to meet their clients without governmental monitoring, and all of their notes and mail must be handed over to the military.

Will the U.S. Supreme Court be able to rectify the situation of abusive interrogations if and when a case comes before it? Not if Justice Antonin Scalia has his way. Once again, Scalia is acting as a loyal foot soldier in the President’s “war on terror.” In a BBC interview that aired this week, Scalia defended the use of torture to extract information from prisoners in some cases.

Scalia’s remarks mean he has prejudged the issues in future cases in which the Constitution might dictate the suppression of evidence because of illegal police interrogation techniques, or the right to compensation of a person whose civil rights have been violated. Justice Scalia should recuse himself from any case that presents these issues.

Bush is meanwhile threatening to veto a bill Congress passed that would forbid the CIA from subjecting prisoners to interrogation techniques banned by the U.S. Army Field Manual. John McCain, the tortured POW who led the charge in 2005 against cruel treatment, has now hitched his wagon to Bush’s star. Presidential candidate McCain voted to allow the CIA to continue to ply its cruelty.

When Bush vetoes the bill, Congress should stand firm for the rule of law and basic standards of human decency and override his veto. Dick Cheney and other officials who participated in formulating the abusive interrogation policies should be investigated under the U.S. War Crimes Act. And the Democratic-controlled Congress should repeal the Military Commissions Act that Bush rammed through the Republican-controlled Congress.

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