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https://www.justsecurity.org/77697/course-correction-still-needed-on-anti-torture-obligations/

Public Facing Advocacy Writing

by Scott Roehm and David Luban

August 9, 2021

Al Hela v. Biden, Al-Nashiri, Biden administration, Convention Against Torture, Military Commissions, Military Commissions Act, torture

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Shortly after Joe Biden won the 2020 presidential election, Mark Hamill (Luke Skywalker from the iconic Star Wars movies) shared a meme that pictured each of President Obama, President Trump, and President-elect Bidens faces alongside one of the Star Wars movie titles. Obama was paired with A New Hope, Trump with The Empire Strikes Back, and Biden with Return of the Jedi. The tweet went viral. Whatever one thinks of those analogies, the Star Wars reference is apt now for at least one reasonJedi Master Yodas perhaps most famous teaching is one that *every* Biden administration official whose responsibilities touch on U.S. anti-torture obligations needs to follow: Try not. Do. Or do not. There is no try.

Both of us wrote recently about military commission chief prosecutor Gen. Mark Martins brazen attempt to use torture-derived evidence in the capital case against Abd-al-Rahim al-Nashiri, and the commissions astonishing ruling permitting it. In the several months since, the Biden administration appears to have come to its senses. Three developments in particular suggest a desire to course correct: The Presidents statement on International Day in Support of Victims of Torture, Martins resignation, and prosecutors partial retreat from the torture tainted evidence it offered in *U.S. v. al Nashiri*.

The first two are meaningful steps in the right direction. The third was a blown opportunity to leave no doubt that the government would abide by the prohibition on tortures exclusionary rule going forward, not only in *al Nashiri* but in all commission cases. Instead, the prosecutors hedged, and in so doing left the door open to additional torture-related rights violations. Thats especially concerning because when it comes to issues involving post-9/11 U.S. torture, its safe to assume past is prologueif theres any crack in the door, somebody, at some point, is going to try to sneak through.

On June 26, the 34th anniversary of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (known as the CAT), the President reaffirm[ed] the United States unequivocal ban on torture and opposition to all forms of inhumane treatment. Torture goes against everything we stand for as a nation, he said, and we must never again resort to its use. We know that [torture] is prohibited universally, and violates U.S. and international law, Biden continued.I pledge the full efforts of the United States to eradicate torture in all its forms.

Two weeks later, notwithstanding having previously obtained an extension to serve in his role until Jan. 1, 2023, Martins announced his retirement (effective Sept. 30). According to the New York Times, Martins decision came after repeatedly butting heads with Biden administration lawyers over positions his office had taken on the applicable international law and the Convention Against Torture at the Guantnamo court

The stage was thus set for a formal confession of error in *al-Nashiri*. Prosecutors could, and should, have withdrawn the torture-derived evidence they submitted; moved to vacate Judge Acostas decision authorizing its use; and promised to never again offerin any commission proceeding, for any purposeany statement or derivative evidence obtained from an individual while being subjected to the CIA torture program.

They took the first step, filing a motion that asks Judge Acosta to strike from the record the specific statements they had submitted that al-Nashiri made while being tortured at CIA black sites. The motion includes what at first blush appears to be the kind of blanket commitment the government should have made, but on closer inspection clearly isnt: The Government *has not sought*and will not seekto use statements obtained from torture or cruel, inhuman, or degrading treatment *to obtain a conviction* before a Military Commission. (Emphasis added).

To understand what this does and does not say, we must recall what Judge Acosta had ruled: that the ban on using torture-derived statements applies only to admitting them as evidence at trial, not using them in interlocutory proceedings. He held this even though the Military Commissions Act (MCA) explicitly states that no statement obtained by the use of torture or by cruel, inhuman, or degrading treatment shall be admissible in a military commission. (One of us analyzed the issue here.)

The Governments motion promises only to refrain from using such statements to obtain a conviction. That could be read as a broad commitment not to use them at all. But the Government gives its game away when it says that it has not sought to use such statements. But it *did* seek to use them in the earlier interlocutory proceeding. Apparently, what the Government means by the slippery phrase to obtain a conviction is something narrow: introducing them in a trial.

In other words, all that prosecutors are promising is to abide by Judge Acostas erroneous decision. What they dont promise is to abide by the plain terms of the statute, which excludes torture-derived statements from the military commissions altogether. Their unwritten subtext is clear: It really is ok to use torture-derived evidence in some circumstances, those are the only circumstances where weve tried to use it, and wed like to preserve that option. Rather than asking Judge Acosta to vacate his opinion, prosecutors are looking to moot al-Nashiris appeal before the Court of Military Commission Review (CMCR) while (in their words) reserv[ing] the Military Judges authority and responsibility to apply the Military Commission Rules of Evidence (M.C.R.E.) and decide interlocutory matters

Contrast the governments reluctant (yet calculated) approach with the way it took aim at a different torture-related ruling, in *U.S. v. Khan*, which properly analyzed U.S. anti-torture obligations and would have *benefitted* commission defendants. There, over prosecutors objection, the judge determined that Mr. Khans treatment at CIA black sites violated the jus cogens universal right to be free of torture under U.S. and international law, and held that he had authority to remedy that outrageous treatment by awarding Khan sentencing credit for his torture. The government asked the judge to vacate the decision (on the boldly-worded assertion that it didnt reflect a proper and wise interpretation of the law). When he refused, the government made vacating the decision a condition of Khans plea deal.

The governments failure to stand down in *al Nashiri*, in the way that both international law and the Presidents June 26 pledge require, raises the stakes even higher in *al Hela v. Biden*, the much-discussed habeas case now pending before the U.S. Court of Appeals for the D.C. Circuit. The basic question thereanalyzed in depth here, here, and hereis whether the Due Process Clause applies at Guantnamo.

After intense internal debate, the government took no position on that question in its July 9 brief. Its silence is deeply problematic for myriad reasons, including two directly relevant to the torture evidence issue.

First, its hard to see how Judge Acosta could have reached the same decision if hed had to contend not only with the MCA, but also with the Due Process clause. Al-Nashiris petition challenging that decision at the CMCR explains why:

For decades, the Supreme Court has made it clear that when the actions of the executive branch violate[ ] the decencies of civilized conduct[,] the Due Process Clause is likewise violated When the Government engages in conduct that is brutal, those fundamental conceptions are breached, traditional ideas of fair play and decency are contravened, and the rights implicit in the concept of organized liberty are violated. In other words, [T]o sanction the [Governments] brutal conduct . . . would be to afford brutality the cloak of law. Nothing could be more calculated to discredit law and thereby to brutalize the temper of a society. [(Citations omitted)].

Second, *al-Nashiri* was probably the exception in the sense that defense counsel *knew* torture-derived evidence was at issue. What if the government had submitted al-Nashiris black site statements ex parte? Have prosecutors made secret submissions involving torture tainted evidence before, and might they again? Application of the Due Process Clause would go a long way toward eliminating that risk, too.

As the National Association of Criminal Defense Lawyers explains in its amicus brief in *al Hela*:

A due process concern [is] raised when a court relies on ex parte submissions in resolving an issue that is the subject of an adversarial proceeding. The reason for such a concern is not confounding; fairness can rarely be obtained by a secret, one-sided determination of facts decisive of rights. Indeed, [i]t is the hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. As such, where classified information is at stake, [t]he government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. (Citations omitted).

Allowing ex parte submissions, which the government uses routinely in the commissions, is especially dangerous where, as in both *al Hela* and *al Nashiri*, theres a real risk of erroneous deprivation of liberty, and in al-Nashiris case of his life.

It isnt too late for the Biden administration to fix these problems, and the fixes arent complicated. One of us has proposed that Defense Secretary Austin and Attorney General Garland issue department-wide guidance barring the use of any statement made by, or evidence otherwise derived from, any person while in CIA or foreign government custody or control in connection with the torture program (and that Austin implement that guidance by amending the Manual for Military Commissions). The Department of Defenses General Counsel also has supervisory authority over the commissions prosecutors (as well as the defense) and is responsible for interpreting the law for the Department she could issue a memorandum of law or make a public statement to further clarify the Biden administrations position on the inadmissibility of torture evidence at any stage in the commissions proceedings as a matter of domestic and U.S. international legal obligation.

With respect to the application of Due Process at Guantnamo, as Ryan Goodman recently noted, oral argument in *al Hela* (scheduled for Sept. 30) provides the government another opportunity to do the right thing as a matter of law and policy.

No more caveats, qualifications, or half-measures. The prohibition on torture is absolute. The governments commitment to upholding it must be, too.

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