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Guantanamo military judge rules against evidence "derived from torture"

An exceptional legal ruling issued from the depths of America's secretive apparatus of military tribunals has thrown a wrench into the latest government efforts to whitewash the notorious Central Intelligence Agency (CIA) torture program.

This ruling—and the depraved and sadistic war crimes that it once again brings to light—underscores the hypocrisy with which the US government now claims to be defending "human rights" and the so-called "rules-based international order" abroad.

The ruling in question is a 50-page pretrial decision issued August 18 by Army Colonel Lanny J. Acosta Jr. in favor of Guantanamo Bay prisoner Abd al-Rahim al-Nashiri, who allegedly played a role in the October 2000 bombing of the USS Cole in Yemen. Al-Nashiri, who has been imprisoned for two decades without trial, is currently being prosecuted in the secretive pseudo-legal apparatus of military tribunals that was established as part of the "war on terror" and about which many Americans to this day remain unaware.

Camp X-Ray at Naval Base Guantanamo Bay, Cuba, on January 11, 2002. [Photo: DoD photo by Petty Officer 1st class Shane T. McCoy, U.S. Navy]

Under this framework, if a person is arrested and prosecuted as a vaguely defined "enemy combatant," the judge, the prosecutors and even the "jury" all consist of military officers. The lopsided procedural rules are designed to favor prosecutors with every conceivable advantage. The US asserts the power to prosecute citizens of any country under this system, including US citizens. Those found guilty can be sentenced to death and executed.

After being abducted by the CIA in Dubai in 2002 without charges or trial, al-Nashiri was one of numerous victims subjected to extensive and systematic torture at Guantanamo Bay and at secret CIA dungeons known as "black sites" located around the world. He was repeatedly sexually assaulted by American torturers in a perverted and sadistic practice known as "rectal feeding."

The depravity of al-Nashiri's torture exceeds the most depraved of the depraved films in the horror film genre—and is all the more horrifying because it really happened, and at the direction and with the approval of the highest levels of the US government.

In an effort to extract a "confession," American torturers operated a power drill next to al-Nashiri's blindfolded head and told him they were going to drill into his skull. They told him that they would bring his mother into the torture chamber and force him to watch them rape her. They strapped him into excruciating "stress positions" reminiscent of the Catholic Inquisition and crammed his body into a small box. He was "waterboarded" repeatedly and subjected to meticulous and protracted sleep deprivation.

He was housed naked in a cold cell. Interrogators struck him in the head repeatedly and blew cigar smoke in his face. In one torture session, described by Acosta in his ruling, al-Nashiri was forcibly rubbed and scraped on his "buttocks and genitals" with "a stiff boar brush that was then forced into the Accused's mouth." Al-Nashiri reported that he was then "sodomized with the brush."

Many of the torture techniques were designed by professional psychologists with the specific intent of destroying the victims' sanity while leaving their bodies relatively intact. In addition to their physical injuries, many of the victims of this torture program now suffer from extreme psychological trauma. The sexual assaults, in particular, have been noted to have had a severe effect. In the cases of some victims, the trauma—left untreated for years—was so severe that they are now effectively incompetent. They can no longer think or function normally.

In 2007, confronted with the possibility that the "evidence" the torturers extracted with these methods would be found inadmissible, even within the network of secret military tribunals that was subsequently instituted, the government brought in a supposed "clean team" to extract all of al-Nashiri's alleged confessions a second time, purportedly without the taint of torture.

In his ruling, Acosta flatly rejected the admissibility of the "clean team" evidence, finding that it was still categorically tainted by torture because "any resistance the accused might have been inclined to put up when asked to incriminate himself was intentionally and literally beaten out of him years before.

"Even if the 2007 statements were not *obtained* by torture or cruel, inhuman, and degrading treatment, they were *derived* from it," Acosta wrote. As he is scheduled to retire next month, Acosta's ruling has the character of a parting shot.

Acosta also rejected government claims that the "rectal feeding" was justified for supposed medical reasons. "Since the early 20th century, medical knowledge has concluded that there is no medical reason to conduct so-called 'rectal feeding,'" he wrote. "Although fluids can be absorbed through the rectum in emergencies, food or nutrition cannot."

Reporting on the decision and its implications, the *New York Times* limited itself to two articles buried far from the front pages. If the conduct described in Acosta's ruling had been perpetrated by the government of Russia or China, the *Times* would have produced dozens of articles and editorials brimming with moral indignation and demands for accountability.

But the language employed by the *Times* is nevertheless remarkable for its candor, acknowledging on August 26 that the CIA torture program represents a “legacy of state-sponsored torture.”

The rest of the “mainstream” media has scrupulously ignored these reports by the “newspaper of record.”

The existence of a massive torture program operated by the American military and intelligence agencies does not only implicate the individual torturers in war crimes. The fact that nobody has ever faced accountability or consequences incriminates all branches of government, the military, and both political parties, together with all the media, corporate, and academic institutions that have complacently reconciled themselves to this reality—in short, the entire US political establishment.

Aside from the tiny handful of courageous and principled attorneys representing the victims—who have faced harassment, intimidation and arrest for their efforts—all of official America will forever bear the unwashable stain of the torture program.

During the 2008 elections, Barack Obama as a candidate promised repeatedly to close the Guantanamo Bay torture camp. But as president, not only did he fail to do so, he actively shielded CIA torturers from accountability with the policy of “looking forward, not backward.” Meanwhile, Obama administration Attorney General Eric Holder openly defended the military commissions at Guantanamo Bay, as well as the president’s power to order the CIA to abduct or kill anyone, anywhere in the world, without charges or trial.

In 2014, the Senate Intelligence Committee published official findings, albeit heavily redacted and released only in summary form, that exposed the global scope of the torture program, as well as the criminal CIA efforts to cover it up. But to this day, the full report remains secret and none of the perpetrators has ever been brought to justice. The only significant prosecution to date related to the torture program was the conviction of CIA agent John Kiriakou, who was jailed by the Obama administration for publicly acknowledging the CIA’s use of waterboarding in 2007.

As details regarding the torture program began to come to light, in 2005 the CIA systematically and deliberately destroyed videotapes showing the torture being inflicted, including the torture of al-Nashiri. The destruction of these tapes by the CIA was the legal equivalent of hoisting a black flag with the skull and crossbones on the high seas. Not only was this a flagrantly illegal act in broad daylight, it was an unrepentant affirmation that the CIA will never allow itself to be held accountable by anything resembling a democratic

process. And it worked: Nobody ever went to jail for the destruction of the tapes, not under Obama, Trump or Biden.

In any criminal prosecution conducted under anything resembling basic democratic norms, the deliberate destruction of evidence by the government, or the torture of the accused, would make a conviction impossible.

The US media apparatus, which at this point functions as little more than an industry for the production of war propaganda, relentlessly accuses Russia of "war crimes" and violations of "international law." But across both Democratic and Republican administrations, the US has refused to accept the jurisdiction of the International Criminal Court because war criminals like those responsible for the treatment of al-Nashiri would immediately be subject to international arrest warrants.

This includes Republican primary presidential candidate and current Florida Governor Ron DeSantis, who has bragged about his role as a Naval officer in Guantanamo Bay in 2006. Mansoor Adayfi, who was a teenager when he was transported to Guantanamo Bay, has reported that DeSantis was present when he was tortured for his participation in a hunger strike. Under international law as well as American law, this would make DeSantis legally culpable, if not as a direct participant in torture, then at a minimum as a co-conspirator or accomplice in a war crime for his failure to intervene.

In al-Nashiri's case, the European Court of Human Rights (ECHR) already ruled in 2014 that Poland violated international human rights law by permitting the CIA to torture him at a "black site" on its territory.

The CIA torture program was not an accidental or secondary byproduct of America's "war on terror" but an essential centerpiece. The principal idea of the "war on terror," which was launched in 2001 with the support of leading Democrats and Republicans alike, was that America confronted a "state of emergency" following the events of September 11, 2001, under which ordinary constitutional democratic rights and norms had to be suspended on an "emergency" basis.

This "state of exception," a legal concept lifted from Nazi jurist Carl Schmitt, meant that the US military could be unshackled to wage aggressive ("preemptive") war anywhere in the world, while the government was free to ride roughshod over democratic rights at home.

Externally, this manifested itself in the eruption of military aggression against Iraq, Afghanistan, Syria and Libya, and at home in attempts to normalize unlimited government

surveillance, the abrogation of democratic rights, dictatorial executive powers, military tribunals, assassination and torture. It was under this framework that the infamous "torture memos" were drafted and circulated at the highest level of the Bush administration—and then put into effect against victims such as al-Nashiri.

The open-ended "Authorization to Use Military Force" in 2002, which not only authorized the unprovoked invasion of Iraq but proved central to the legal framework of the "war on terror," was passed with the votes of then-Senator Biden, as well as Democratic senators Chuck Schumer, Dianne Feinstein, Hillary Clinton and John Kerry.

The essential legal framework of the "war on terror" remains on the books to this day, including the authoritarian USA PATRIOT Act of 2001 (which passed the Senate with a bipartisan vote of 99-1), laws establishing the Department of Homeland Security in 2002 (which passed the Senate 90-9), and the Military Commissions Act of 2006 (with 12 Democratic senators voting in support).

The CIA torture program is one acute symptom of the protracted crisis and decay of American democracy, which has been characterized in the wake of the liquidation of the USSR by three decades of endless military violence, a political establishment lurching further and further to the right and deepening political, economic and social dysfunction.

From the standpoint of dominant sections of the American ruling class, to prosecute the torturers would implicate too many individuals in leading government positions and would tarnish the credibility of too many institutions—individuals and institutions now considered essential to shoring up the official displays of "unity" behind the ongoing NATO proxy war in Ukraine and behind future plans for "great power conflict" abroad and repression at home.

Unsurprisingly—but revealingly—the *New York Times* has reported that the Biden administration's military prosecutors are "already appealing" Acosta's ruling. The appeal amounts to yet another effort to shield the torturers from accountability and consequences. It further implicates the entire American political establishment in an episode constituting some of the most depraved, brutal and sadistic criminality to this point in the 21st century.

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