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MEANS, ENDS AND 9/11

Extraordinary measures beget extraordinary consequences

For Police Issues by Julius (Jay) Wachtel. Would you give one of the terrorists allegedly responsible for 9/11 “burgers, fries and an apple pie”? [That’s what FBI Special Agent James M. Fitzgerald did](#) for Guantanamo prisoner Ammar al-Baluchi in January 2007. His kindness apparently paid off. During a four-day, thirty hour session the nephew of Khalid Sheikh Mohammed offered a detailed account of how he transferred more than one-hundred thousand dollars to the hijackers so they could carry out their evil deeds. That evidence will no doubt be used against Mr. al-Baluchi, his uncle and three other plotters at their joint trial, currently scheduled for 2021.

Mr. al-Baluchi’s junk-food feast was in sharp contrast with what he experienced four years earlier after his arrest in Pakistan. [A classified Senate account](#) leaked to The Washington Post describes what took place:

At the secret prison, Baluchi endured a regime that included being dunked in a tub filled with ice water. CIA interrogators forcibly kept his head under the water while he struggled to breathe and beat him repeatedly, hitting him with a truncheon-like object and smashing his head against a wall, officials said...

And no, the Government isn’t denying it. [A voluminous 2014 report](#) by the Senate Select Committee on Intelligence went into great detail about the “enhanced” techniques employed by CIA and military interrogators:

- Interrogation techniques such as slaps and...slamming detainees against a wall...were used in combination, frequently concurrent with sleep deprivation and nudity...
- The waterboarding technique was physically harmful, inducing convulsions and vomiting...Internal CIA records describe the waterboarding of Khalid Shaykh Mohammad as evolving into a “series of near drownings.”
- Sleep deprivation involved keeping detainees awake for up to 180 hours, usually standing or in stress positions, at times with their hands shackled above their heads...
- At least five CIA detainees were subjected to “rectal rehydration”...without documented medical necessity. The CIA placed detainees in ice water “baths.”
- At times, the detainees at COBALT were walked around naked or were shackled with their hands above their heads for extended periods of time...CIA officers

would scream at a detainee, drag him outside of his cell, cut his clothes off, and secure him with Mylar tape. The detainee would then be hooded and dragged up and down a long corridor while being slapped and punched.

Alas, the FBI's hands weren't entirely clean. According to [an extensive report](#) prepared by the DOJ's Office of Inspector General, FBI agents observed and on occasion participated in CIA and military interrogations in Iraq, Afghanistan and Guantanamo. Still, when their counterparts' techniques turned out to be "more aggressive" than what was acceptable within the bureau most agents reportedly stepped back. [Some even lodged official complaints.](#)

But some didn't. According to the DOJ report:

- An FBI agent utilized sleep disruption or deprivation as part of an interrogation strategy in Afghanistan
- FBI agents participat[ed] in an interrogation in Iraq in which detainees were placed in a stress position, given a "drink of water" in a forceful and inappropriate manner, and blindfolded with duct tape
- FBI agents made potentially threatening statements to detainees to the effect that unless they cooperated with the FBI they would be turned over to military or CIA interrogators who were permitted to use harsher techniques
- FBI agents utilized the military's "frequent flyer program" at GTMO [Guantanamo], which involved frequent detainee cell relocations and sleep disruption
- FBI agents participat[ed] in the isolation of Al-Sharabi [another prominent defendant] at GTMO in April 2003, including telling him that theirs were the only human faces he would see until he provided information

Mr. al-Baluchi and his four codefendants face execution. Since none is an American citizen, each was captured outside the U.S., and all are regarded as "enemy combatants" (technically, "alien unprivileged enemy belligerent"), their fate will be decided by a [military commission](#). Its work, which dates back to the Revolutionary War, was most recently addressed by the Supreme Court in [Hamdan v. Rumsfeld](#), a 2006 decision that requires commissions follow the [Third Geneva Convention](#) on the rules of war. Prohibitions of "cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment" were incorporated into the [Military Commissions Act \(MCA\) of 2009](#), which disallows the use of statements "obtained by torture or cruel, inhuman, or degrading treatment" (sec. 948r.)

What the rewrite didn't do was fully align MCA rules with the conventional military justice system (UCMJ) or with Federal codes. Thanks to *Hamdan's* permissive tone,

commission rules don't require that investigators deliver a *Miranda* warning or its "[Article 31](#)" military law equivalent before questioning. As long as there's no torture and such, all statements that commission judges consider credible and voluntary [are admissible](#):

[948r] (c) Other statements of the accused. A statement of the accused may be admitted in evidence in a military commission...only if the military judge finds (1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) that (A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or (B) the statement was voluntarily given.

(d) Determination of voluntariness. ...the military judge shall consider the totality of the circumstances, including, as appropriate, the following: (1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities. (2) The characteristics of the accused, such as military training, age, and education level. (3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

FBI agent Fitzgerald conceded that years earlier he sent questions for Mr. al-Baluchi to the CIA, which as he knew would probably not "ask nicely." During a pre-trial hearing, he also let it slip that a colleague, FBI agent James M. Fitzsimmons, [was present during Mr. al-Baluchi's interrogation](#) in Pakistan. (Unfortunately, what happened there was censored out.) Still, the answers the CIA interrogators extracted in a "not nice" fashion wound up being virtually identical to what Mr. al-Baluchi told the agent years later over a burger and fries. To help build the case that these accounts were indeed trustworthy, the Government took the extraordinary step of [secretly tape-recording Mr. al-Baluchi](#) telling another Guantanamo inmate about the money transfers.

Even so, Mr. al-Baluchi's defense lawyers insist that what their client experienced at the CIA's black sites [poisoned everything he later said](#). A former judge apparently agreed. Irritated because of what he considered excessive secrecy about the black site interrogations, [he barred the Government](#) from using statements made to the FBI's Guantanamo "clean team." That judge has since retired, and a final decision on the admissibility of statements made by the defendants at Guantanamo [is still pending](#).

Given the Government's determination to impose the ultimate punishment, the commission's decision doesn't seem hard to predict. Although there may be sufficient documentary and circumstantial evidence to prove a conspiracy, if electrocution is what the Government intends, little short of statements will do. That, in fact, may be why MCA section 948r(d)(3) was worded to suggest that the unholy effects of torture aren't necessarily permanent.

Our concern here, though, isn't with the morality of execution ([we've written against it](#)). Nor is it with the facts. Mr. al-Baluchi and his friends indisputably planned and helped implement the most horrendous act of terror our country has experienced. Instead, it's about the effects on that *other* system of justice – you know, the one that applies to “ordinary” Americans. Despite its many infirmities (scan our [Wrongful Conviction](#) section, then turn to [Conduct and Ethics](#) and [Use of Force](#)), the rules always seemed clear: if a case can't be crafted using morally and legally acceptable means, the ends – conviction and punishment – simply don't get done.

Then 9/11 happened. Horrendous in scope, ghastly in effect, the attack prompted America to expand its moral space to accommodate “dark sites.” Once the Department of Justice issued its notorious “[torture memos](#),” authorizing – indeed, *encouraging* horrendous physical and psychological abuse (um, “enhanced interrogation techniques”) it wasn't long before our nation's premier law enforcement agency stumbled into the quagmire. It's not just about Gitmo. “[Rope-a-Dope](#)” and “[Taking Bombs From Strangers](#)” describe a few of the many post-9/11 stings where gullible wannabes succumbed to the blandishments of FBI undercover agents who supplied everything from a rationale for terror to (inert) bombs.

Back to Gitmo. Ten years ago, in “[Torture: Who Decides?](#)”, we addressed the “[Dirty Harry](#)” problem, where a good end (e.g. saving a kidnap victim from imminent death) can only be accomplished through bad means (e.g. torturing the kidnapper.) While such go-arounds may in the real world occasionally prove unavoidable, minimizing their use might from time to time require the prosecution of a “good guy,” if for no reason other than to remind everyone that only the most extreme circumstances merit breaking the law.

Of course, no one envisions rounding up former black site crewmembers and throwing them in jail. On the other hand, [there are indications](#) that the Guantanamo five would plead guilty in exchange for prison terms. (So far this option has reportedly only been offered to and accepted by [a lesser prisoner](#).) The “cost” of doing so for the Guantanamo Five – no executions – is the price America would pay for using torture in the first place. All in all, it seems a fair exchange.

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