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U.S. Can Use Evidence Gained by Torture

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WASHINGTON - Evidence gained by torture can be used by the U.S. military in deciding whether to imprison a foreigner indefinitely at Guantanamo Bay, Cuba, as an enemy combatant, the government concedes.

Statements produced under torture have been inadmissible in U.S. courts for about 70 years. But the U.S. military panels reviewing the detention of 550 foreigners as enemy combatants at the U.S. naval base in Cuba are allowed to use such evidence, Principal Deputy Associate Attorney General Brian Boyle acknowledged at a U.S. District Court hearing Thursday.

Some of the prisoners have filed lawsuits challenging their detention without charges for up to three years so far. At the hearing, Boyle urged District Judge Richard J. Leon to throw their cases out.

Attorneys for the prisoners argued that some were held solely on evidence gained by torture, which they said violated fundamental fairness and U.S. due process standards. But Boyle argued in a similar hearing Wednesday that the detainees "have no constitutional rights enforceable in this court."

Leon asked whether a detention based solely on evidence gathered by torture would be illegal, because "torture is illegal. We all know that."

Boyle replied that if the military's combatant status review tribunals "determine that evidence of questionable provenance were reliable, nothing in the due process clause (of the Constitution) prohibits them from relying on it."

Leon asked whether there were any restrictions on using torture-induced evidence.

Boyle replied that the United States never would adopt a policy that would have barred it from acting on evidence that could have prevented the Sept. 11, 2001, terrorist attacks even if the data came from questionable practices like torture by a foreign power.

Several arguments underlie the U.S. court ban on products of torture.

"About 70 years ago, the Supreme Court stopped the use of evidence produced by third-degree tactics largely on the theory that it was totally unreliable," Harvard Law Professor Philip B. Heymann, a former deputy U.S. attorney general, said in an interview. Subsequent high court rulings were based on revulsion at "the unfairness and brutality of it and later on the idea that confessions ought to be free and uncoerced."

Leon asked whether U.S. courts could review detentions based on evidence from torture conducted by U.S. personnel.

Boyle said torture was against U.S. policy and any allegations of it would be "forwarded through command channels for military discipline." He added, "I don't think anything remotely like torture has occurred at Guantanamo" but noted that some U.S. soldiers there had been disciplined for misconduct, including a female interrogator who removed her blouse during questioning.

The International Committee of the Red Cross said Tuesday it has given the Bush administration a confidential report critical of U.S. treatment of Guantanamo detainees. The New York Times reported the Red Cross described the psychological and physical coercion used at Guantanamo as "tantamount to torture."

The combatant status review tribunals comprise three colonels and lieutenant colonels. They were set up after the Supreme Court ruled in June that the detainees could ask U.S. courts to see to it they had a proceeding in which to challenge their detention. The panels have reviewed 440 of the prisoners so far but have released only one.

The military also set up an annual administrative review which considers whether the detainee still presents a danger to the United States but doesn't review enemy combatant status. Administrative reviews have been completed for 161.

Boyle argued these procedures are sufficient to satisfy the high court.

Noting that detainees cannot have lawyers at the combatant status review proceedings and cannot see any secret evidence against them, detainee attorney Wes Powell argued "there is no meaningful opportunity in the (proceedings) to rebut the government's claims."

Leon suggested that if federal judges start reviewing the military's evidence for holding foreign detainees there could be "practical and collateral consequences ... at a time of war."

And he suggested an earlier Supreme Court ruling might limit judges to checking only on whether detention orders were lawfully issued and review panels were legally established.

Leon and Judge Joyce Hens Green, who held a similar hearing Wednesday, said they would try to rule soon on whether the 59 detainees may proceed with their lawsuits.