

United States Senate

WASHINGTON, DC 20510

May 13, 2022

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

The Honorable Lloyd J. Austin III
Secretary of Defense
1000 Defense Pentagon
Washington, D.C. 20301-1000

The Honorable Antony Blinken
Secretary of State
U.S. Department of State
Washington, D.C. 20520

Dear Attorney General Garland, Secretary Austin, and Secretary Blinken:

We are deeply troubled that, according to *The New York Times*, prosecutors in the Guantanamo Bay military commissions have *again* argued in court that evidence obtained through torture can be used in the capital case against Abd al-Rahim al-Nashiri.

We thought it was settled when, just three months ago, the Justice Department overrode commission prosecutors' previous effort to evade U.S. anti-torture obligations and made the following commitment to the Court of Appeals for the District of Columbia Circuit:

The government recognizes that torture is abhorrent and unlawful, and unequivocally adheres to humane treatment standards for all detainees.... [T]he government will not seek admission, at any stage of the proceedings, of any of petitioner's statements while he was in CIA custody.

Unfortunately, commission prosecutors reportedly made a specious distinction between torture-derived statements from a witness rather than from the accused. Incredibly, they also reportedly argued that sleep depriving a man by shackling him to the ceiling, using him as a human ashtray, and forcing him "to scoop up a mixture of prisoners' feces and urine, and fuel that had spilled from the prisoners' toilet" with his bare hands—over a six-week period—did not meet the legal definition of torture.

The prosecutors' position flatly contradicts the President's unequivocal commitment to uphold U.S. anti-torture obligations, and his pledge to employ "the full efforts of the United States to eradicate torture in all its forms." Late last year, the State Department told the body that monitors compliance with the Convention against Torture that the principal statute governing the commissions does not allow what prosecutors claim it allows:

[T]he Military Commissions Act ... prohibits admission of any statement obtained by the use of torture or by cruel, inhuman, or degrading treatment ... in a military commission proceeding, except against a person accused of torture or such treatment as evidence that

the statement was made.... No other exception to this prohibition on admissibility of such statements is permitted in the rules governing admission of hearsay evidence or otherwise.

Thankfully, at oral argument last week before the D.C. Circuit in Mr. al-Nashiri's case, the Justice Department told the Court that the government sees no distinction between statements by the accused or a third party that are obtained through torture—both are prohibited. However, the Department's statement does not fully resolve our concerns for two reasons: First, if that is indeed the administration's position, why is it that military commission prosecutors are not adhering to it? Second, when pressed on whether the administration also believes it is barred from using evidence that the government discovers as a result of a torture-obtained statement (i.e., derivative evidence), the Department said that the government has not yet established a position on this question.

This entire episode is a step back amid otherwise encouraging administration progress toward closing Guantanamo and ending indefinite detention. News that the government is engaging in plea discussions with counsel for the men alleged to be most responsible for the September 11, 2001 attacks is a much-welcome development; it was clear from the recent Senate Judiciary Committee hearing we held on Guantanamo that negotiated resolutions are the only realistic option—and an uncontroversial one at that—for salvaging a modicum of justice for the victims of the 9/11 attacks from the largely failed commissions. We are also pleased to learn that the State Department has brought on Ian Moss, a senior official with extensive experience working on Guantanamo, to head up the State Department's closure efforts.

In the hope of putting the torture-derived evidence issue to rest for good, we would appreciate answers by June 1, 2022, to the following questions:

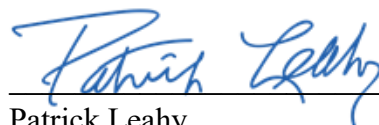
- Will the Department of Justice and the Department of Defense adhere, without exception, to the United States' obligation not to use any evidence obtained from torture or cruel, inhuman, or degrading treatment—whether that be defendants' statements, witnesses' statements, or any derivative evidence—in any proceeding for any purpose?
- Given what we know about the nature and extent of torture throughout the CIA's former rendition, detention, and interrogation program, and consistent with the promises the Justice Department made to the D.C. Circuit Court of Appeals, will the Department of Justice and the Department of Defense commit to not using any direct or derivative evidence, in any proceeding for any purpose, obtained from a person while he was in CIA custody?

Thank you for your prompt attention to this matter.

Sincerely,



Richard J. Durbin
United States Senator



Patrick Leahy
United States Senator