

# JUDGE KAPLAN: GOVERNMENT COULDN'T USE ABEBE AS WITNESS IN MILITARY COMMISSION, EITHER

I'm going to have a longer post about some curious details revealed in Judge Lewis Kaplan's order refusing the government request to have Hussein Abebe testify against Ahmed Khalfan Ghailani. But I wanted to point to a footnote in which Kaplan anticipated the critics now claiming that if Ghailani had been tried in a military commission, the government could have called Abebe as a witness (thanks to twolf for help with this file).

It is very far from clear that Abebe's testimony would be admissible if Ghailani were being tried by military commission, even without regard to the question whether the Fifth Amendment would invalidate any more forgiving provisions of the rules of evidence otherwise applicable in such a proceeding.

Military commissions are governed by the Military Commissions Act, 10 USC 948a et seq. (the "MCA"). Evidence in such proceedings is governed by the Military Commission Rules of Evidence ("MCRE"). U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS (2010 ed.).

MCA 948r(a) and MCRE 304 preclude or restrict the use of "statements obtained by torture or cruel, inhuman, or degrading treatment," and evidence derived therefrom, and could require exclusion of Abebe's testimony. Even if they did not, the Constitution might do so, even in a military commission

█ proceeding.

Those crazy Article III judges pointing to  
inconveniences like the Constitution again!