



Your Tax Dollars at Work

by Gordon Mallon

This column started out as a report on how providers did in the last round of public defense contracting, but something else came up. I will, however, cover this briefly. I have spoken with several contractors and Kathryn Aylward of OPDS. In speaking with these folks, from one edge of the state to the other, there seems to be a general consensus: we did better than we have done in the past, but not nearly well enough. Across the state, our salaries are not able to keep up with what DA's make, and folks in the rural areas are still not able to attract new attorneys with the money available. But I didn't come here to whine. I have a suggestion that might be helpful. As you read this, we will be entering the campaign season for the Oregon primary. This will be followed, of course—like hallucinations follow a 5-day meth run—by the general election in November. During these time periods are various meet-the-candidate nights. Why not show up and tell the candidates your individual stories about how the lack of funding for indigent defense is hurting the justice system? Invite them to your offices. Invite them to court. At least this might prime the pump when the heavy lifting starts for the next legislative session.

Now the real subject of this column, the War on Terror™. Yesterday (as I write this) I heard on the radio that the Army had decided to prosecute six Guantanamo detainees for the attack on the World Trade Center, the Pentagon and the crash of Flight 93 in Pennsylvania. I heard Air Force Brigadier General Thomas Hartmann, a legal adviser to the military commission prosecuting the six, say that it would be up to the court to decide whether statements obtained "under duress" could be used as evidence. "Under duress" turns out to be a polite way to say "waterboarding," which most agree turns out to be a polite way to say "torture." Waterboarding is somewhat reminiscent of the practice during the Salem witch burnings of holding

someone under water for a lengthy period of time. If they drowned, they clearly were not witches and would receive a proper burial. If they did not drown they were clearly witches and would be burned at the stake. Of course, none of the Guantanamo detainees drowned (no proper burial for this lot). Perhaps the Salem trial by ordeal is not a fair comparison. Maybe the Spanish Inquisition is more apt. However, this is not a political column but a legal one. Let's take a look at the legal posture of this case.

This case will be tried before a military tribunal. The defendants will, at some point, be formally charged, and a decision will be made whether or not to seek the death penalty. It is a safe guess at this point to say the prosecution will be seeking death. No death-qualified defense attorneys are currently available to defend the detainees, and the military says the defendants will be afforded defense from qualified attorneys. After these heroic folks are found and get on the case, they will undoubtedly file motions to suppress the statements "obtained under duress." Here is where things get interesting. "Interesting?" you say. "How so?" you ask. "This is a no-brainer. The answer is clear under *Massiah*.¹ Statements 'obtained under duress' are not voluntary and so not admissible," you explain, with an ever-so-slight tone of condescension for the poor old country lawyer.

In any case, the military tribunal rules one way or the other and the case ends up in the United States Supreme Court. But what will the Supreme Court do? In an interview broadcast February 12th

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on the BBC, Justice Scalia weighed in on the subject. "I don't think these are easy questions at all, in either direction, but I certainly know that you can't come in smugly and [with] great self-satisfaction and say, 'Oh, it's torture and therefore it's no good.' You would not apply that in certain real-life situations."² Seems to be a message here. But let us assume for argument sake that the Supreme Court does not undo this basic tenant of constitutional law and at least five of them are willing to apply a Fifth Amendment analysis to this issue. This is something that General Hartmann almost seemed to relish in the sound bite I heard from him.

So let us recap, then ask a few questions, again positing certain facts not yet known to us. The military extracts confessions and other evidence under torture, then uses that information to obtain death sentences. The Supreme Court reverses and remands for a trial. We don't know if other evidence exists that is not fruit of the illegal interrogations, but for argument sake we will say there is not enough evidence for a conviction. So here are the questions: 1) If the military can't get convictions, do they turn the prisoners

loose? 2) If the military can't get convictions, who gets the blame in the eyes of the public—the administration lawyers who knew or should have known that the illegal activity would destroy their case, or the Supreme Court, which made the ruling? Remember who gives press conferences and who doesn't. 3) If somehow the Supreme Court upholds the receiving of evidence obtained by torture, does the new President—who would have opposed torture during his or her campaign—have the guts to pardon the detainees, or at least commute the death sentences? Whatever the answer to these questions, it would appear that what has been created here, to use the polite version of military slang, is one huge, vicarious charlie foxtrot. ☞

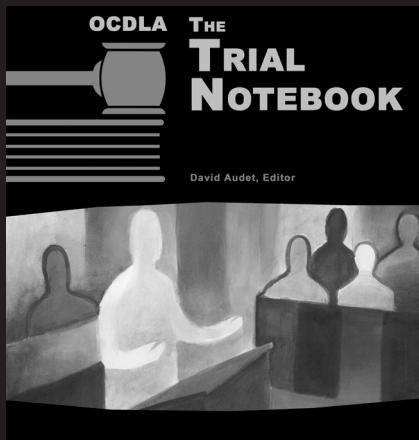
FOOTNOTES

¹ 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

² NPR web site <http://www.npr.org/templates/story/story.php?storyId=18921328>. Justice Scalia was applying an 8th Amendment cruel and unusual punishment standard to the question of torture used to interrogate.

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