

By Carol Rosenberg

From [The New York Times](#) | Original Article

The Saudi defendant, accused of orchestrating the attack on the U.S.S. Cole in 2000, was waterboarded and subjected to other forms of torture by the C.I.A. in 2002 in a secret prison network.

The military judge in the U.S.S. Cole bombing case on Friday threw out confessions the Saudi defendant had made to federal agents at Guantánamo Bay after years of secret imprisonment by the C.I.A., declaring the statements the product of torture.

The decision deprives prosecutors of a key piece of evidence against [Abd al-Rahim al-Nashiri](#), 58, in the longest-running death-penalty case at Guantánamo Bay. He is accused of orchestrating Al Qaeda's suicide bombing of the warship on Oct. 12, 2000, in Yemen's Aden Harbor that killed 17 U.S. sailors.

"Exclusion of such evidence is not without societal costs," the judge, Col. Lanny J. Acosta Jr., wrote in [a 50-page decision](#). "However, permitting the admission of evidence obtained by or derived from torture by the same government that seeks to prosecute and execute the accused may have even greater societal costs."

The question of whether the confessions were admissible had been seen as a crucial test of a more than decade-long joint effort by the Justice and Defense Departments to prosecute accused architects of Qaeda attacks. The special Guantánamo court is designed to grapple with the impact of earlier, violent C.I.A. interrogations on war crimes trial, including death-penalty cases.

Similar efforts to suppress confessions as tainted by torture are being made in the case against [Khalid Shaikh Mohammed and four other prisoners](#)

who are accused of conspiring in the terrorist attacks of Sept. 11, 2001. Mr. Nashiri, like Mr. Mohammed, was waterboarded and subjected to other forms of torture in 2002 by C.I.A. interrogators, including contract psychologists, through a program of “enhanced interrogation.”

Testimony showed that the psychologists took part in a yearslong program that, even after the violent interrogation techniques ended, used isolation, sleep deprivation, punishment for defiance and implied threats of more violence to keep the prisoners cooperative and speaking to interrogators.

Prosecutors considered Mr. Nashiri’s confessions to federal and Navy criminal investigative agents at Guantánamo in early 2007, four months after his transfer from a C.I.A. prison, to be among the best evidence against him.

But prosecutors also sought, and received permission from the judge, to use a transcript from other questioning at Mr. Nashiri’s eventual trial.

In March 2007, he went before a military panel examining his status as an enemy combatant and was allowed to address allegations involving his role in Al Qaeda plots. He told military officers that he had confessed after being tortured by the C.I.A., but then recanted.

At the administrative hearing, Mr. Nashiri denied being a member of Al Qaeda or involvement in the plots but admitted to knowing Osama bin Laden and receiving funds from him for an unrealized shipping business project in the Persian Gulf.

Human rights and international law experts had been eagerly awaiting the decision as a test of a U.S. government theory that federal agents could obtain a lawful confession, untainted by previous abuse, if so-called clean teams questioned the defendants without threats or violence and repeatedly told former C.I.A. prisoners that their participation was voluntary.

But testimony in the pretrial hearings showed that after his capture in 2002, Mr. Nashiri was subjected to both authorized and unauthorized physical and emotional torture in an odyssey through the C.I.A. secret prison network — from Thailand to Poland to Afghanistan and then Guantánamo Bay — that included waterboarding, confinement inside a cramped box, rectal abuse and being tormented with a revving drill beside his hooded head to coerce him to answer interrogators’ questions about future and suspected Qaeda plots.

By the time he was questioned by federal agents in January 2007, [lawyers and experts argued](#), the prisoner was trained to respond to his interrogators' questions.

Colonel Acosta, who retires from the Army next month, agreed.

Mr. Nashiri had no reason to believe "that his circumstances had substantially changed when he was marched in to be interviewed by the newest round of U.S. personnel in late January 2007," Colonel Acosta said. "Any resistance the accused might have been inclined to put up when asked to incriminate himself was intentionally and literally beaten out of him years before."

"If there was ever a case where the circumstances of an accused's prior statements impacted his ability to make a later voluntary statement, this is such a case. Even if the 2007 statements were not *obtained by* torture or cruel, inhuman, and degrading treatment, they were *derived from* it."

Rear Adm. Aaron C. Rugh, the chief prosecutor, did not respond to a question of whether his team would appeal the ruling.

"It would be inappropriate to comment on the case while litigation is ongoing," the Pentagon's office of military commissions said in a statement. "The prosecution in that case remains committed to seeking justice for the [families of the victims of U.S.S. Cole](#)."

With a new judge expected later this year, prosecutors could seek reconsideration at the Guantánamo court or raise the issue with a Pentagon appeals panel, the Court of Military Commissions Review.

Separately, the panel is considering [a challenge to Colonel Acosta](#)'s status as the judge in the U.S.S. Cole case. Defense lawyers had asked him to step down earlier this year when he disclosed that he was applying for a post-retirement, civilian job as clerk of the Air Force Judiciary. Colonel Acosta refused, saying he had disclosed his application the day after he

applied for the job, and so there was no hidden bias in favor of the government.

Katie Carmon, one of Mr. Nashiri's lawyers, said there was no immediate plan to withdraw their challenge and called Colonel Acosta's decision suppressing the 2007 interrogations both "morally and legally correct."

"The government that tortured Mr. al-Nashiri has never been held accountable," she said. "But today's ruling is a small step forward as the government loses a critical part of its prosecution."