

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

Defense Motion
to Suppress Out-of-Court Statements of the
Accused Based on Coercive Interrogation
Practices

4 April 2008

- 1. Timeliness:** This motion is filed within the time frame permitted by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's orders dated 20 December 2007, 15 February 2008, and 28 March 2008.
- 2. Relief Sought:** Defendant Salim Ahmed Hamdan moves for an order suppressing videotaped statements and all other out-of-court statements made by Mr. Hamdan in Afghanistan and Guantanamo. All such statements were obtained as the result of coercive interrogation techniques and are inherently unreliable.
- 3. Overview:** Under long-established principles governing the admission of evidence, testimony obtained through coercive interrogation techniques should be excluded. Regardless of whether such techniques ever generate reliable intelligence (which is doubtful), they have never in modern Anglo-American jurisprudence been viewed as a means of obtaining reliable evidence for use in a criminal prosecution.¹

This Commission should suppress all out-of-court statements obtained from Mr. Hamdan by the Government, whether in Afghanistan or Guantanamo, including videotaped testimony obtained in Afghanistan at or near the time of his capture. The coercive interrogation techniques used by and on behalf of the United States to obtain such statements render them unreliable and deprive them of all probative value. Because the interests of justice would not be served by the admission of this inherently unreliable evidence, it should be excluded under the standards set

¹ The distinction between interrogation for intelligence purposes and for evidentiary purposes was clearly stated by General Geoffrey D. Miller, a former commander of the detention operation in Guantanamo. Miller told the *Washington Post* in 2004 that "interrogations are designed primarily to yield intelligence, not evidence for a court." Scott Higham et al., *Guantanamo—A Holding Cell in War on Terror*, Wash. Post, May 2, 2004, at A01 (Attachment A).

forth in the Military Commissions Act of 2006 ("MCA"), 10 U.S.C. § 948r(c). The MCA affords this Commission the discretion to determine the admissibility of evidence obtained through coercive techniques, and Mr. Hamdan respectfully requests that all such evidence be suppressed.

The interest of justice in suppressing evidence obtained through coercion is recognized under the common law because of the fundamental unreliability of such evidence, under Common Article 3 of the Geneva Conventions because admission of such evidence is contrary to judicial guarantees recognized as indispensable by civilized peoples, and under the Fifth Amendment to the U.S. Constitution as a violation of due process, all of which govern and inform the standards of admissibility in this Commission.

Mr. Hamdan's statements also should be suppressed because the Prosecution has failed to provide access to all the interrogators who obtained the statements and to provide documents and records relating to the interrogations requested by the Defense (including possible videotapes of interrogations conducted at Guantanamo as well as other moments of Mr. Hamdan's confinement there), as detailed in the Defense's submissions on its pending motions to compel discovery. *See* Mil. Comm'n R. Evid. 304(d)(3).

4. Burden of Proof: When an appropriate motion or objection has been made by the Defense under Mil. Comm'n R. Evid. 304(c), the Prosecution has the burden of establishing the admissibility of the evidence.

5. Facts:

A. The Prosecution has failed to answer in full the Defense's discovery requests, which, among other things, seek interrogation plans, procedures, manuals, records (including videotapes) and notes relating to Mr. Hamdan, as well as the identities and contact information for all interrogators of Mr. Hamdan. The Defense reserves the right to present additional facts and evidence in support of this

motion when the Prosecution fully complies with the Defense's outstanding discovery requests, which are the subject of pending motions to compel.

- B. The Defense intends to call Dr. Emily Keram, a clinical and forensic psychiatrist who has examined Mr. Hamdan, as an expert witness in support of this motion.² Dr. Keram will testify regarding the following facts, among others, and her professional opinion regarding the effect of these facts on Mr. Hamdan's mental state at the time he made statements:

Takta Pol

- (1) Mr. Hamdan was captured at a roadblock in the village of Takta Pol, Afghanistan in November 2001. Within minutes after his arrival at the roadblock, he saw the local Afghani forces shoot and kill an Arab traveling in a vehicle that had arrived at the roadblock ahead of him.
- (2) Afghanis, part of the coalition forces, initially captured Mr. Hamdan. They beat Mr. Hamdan and bound him with electrical wire. Mr. Hamdan was convinced they would kill him, a fear that was well founded. *See, e.g., On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction*, 19 Dec. 2007, at 4 ¶ 31 ("Major Smith took control of the accused from the Afghan forces who, he feared, would kill the accused if he remained in their control.").
- (3) The Afghani captors told Mr. Hamdan they had found missiles in his car. Mr. Hamdan denies that he had such weapons, but felt he had no choice but to go along with whatever his captors said, as he risked being killed if

² The Defense has requested approval of additional hours for Dr. Keram from the Convening Authority. The Convening Authority has not yet finally granted or denied the request, instead informing the Defense that it would make a final determination after seeing this motion. Dr. Keram assisted in the preparation of this motion without compensation because of the Convening Authority's refusal to date, but due to the lack of funding she was unable to fully review all the materials she ordinarily would have reviewed for such a motion. The Defense will require approval of and funding for Dr. Keram in advance of the hearing on this motion in order to put on her testimony in support of this motion, and that approval must be far enough in advance that she has enough time to prepare.

he dared to contradict his captors' efforts to associate him with the missiles. For these reasons, he did not disagree with his captors' statements about the missiles.

- (4) After a day or two in captivity, Mr. Hamdan's Afghani captors put a hood over his head and walked him down a hall at gunpoint. Mr. Hamdan thought that they were about to kill him.
- (5) Mr. Hamdan's initial videotaped interrogation occurred at this point, with an armed man standing behind him as he knelt on the floor of a mud brick house. Mr. Hamdan did not know the identity or nationality of the persons conducting the interrogation, but he saw they were Westerners.
- (6) In addition to the testimony of Dr. Keram, the Defense relies on the Affidavit of Salim Ahmed Hamdan, 9 Feb. 2004 (Attachment B). Mr. Hamdan's Afghani captors told him they had received U.S. \$5,000 for him from the Westerners. Mr. Hamdan saw the money when one of the guards showed it to another guard. *See id.* at 10.

Panjshir Valley

- (7) After a few days, Mr. Hamdan was flown by helicopter out of Takta Pol. He was taken to the Panjshir Valley in Afghanistan, a Northern Alliance stronghold. He was left in the custody of men loyal to Ahmad Shah Massoud. The enmity between Massoud's men and Arabs, including Yemenis such as Mr. Hamdan, is well known.
- (8) In addition to Massoud's men, an American and two Egyptians were present during Mr. Hamdan's time in the Panjshir Valley. These three conducted interrogations of Mr. Hamdan. The American was the same person who had been present during Mr. Hamdan's initial interrogation in

Takta Pol. He did not wear a military uniform and did not identify himself or his nationality.

- (9) Mr. Hamdan was extremely afraid of the Egyptians because it is well known in his community that Egyptians torture people.
- (10) Mr. Hamdan recalls that during one interrogation, he was seated cross-legged on the floor with his hands bound behind his back. The Egyptians, armed, stood on either side of him. They each had one booted foot pressed down on one of Mr. Hamdan's thighs. While Mr. Hamdan was being questioned, the Egyptians pulled Mr. Hamdan's bound arms up behind his head to cause pain.

Bagram

- (11) On December 28, 2001, Mr. Hamdan was taken from the Panjshir Valley to Bagram Air Base. It was only at this point that he learned he was in U.S. custody, when he saw a U.S. flag flying. Mr. Hamdan's condition as illustrated in the Capture Photographs from this time illustrates that his fear of being killed was not unreasonable.³
- (12) Mr. Hamdan was present when another detainee was beaten to death by guards in Bagram.
- (13) Mr. Hamdan saw other detainees severely beaten and left lying on the tarmac in extremely cold weather.
- (14) Mr. Hamdan was aware that the International Committee of the Red Cross was visiting other detainees, but they never visited him. Mr. Hamdan was afraid that his existence as a prisoner would never be reported or

³ The Capture Photographs are classified SECRET. Both the Defense and Prosecution have copies of the Capture Photographs and they are available to the Military Judge upon request, per Military Commissions Trial Judiciary Rule of Court 2.2(1).

acknowledged, that he was completely at the mercy of his captors, and that his survival depended on his cooperation.

Kandahar

- (15) At the end of January, 2002, Mr. Hamdan was moved from Bagram to detention in Kandahar.
- (16) At Kandahar, guards who were escorting Mr. Hamdan to interrogations would hold him in a "duck march" position. They would routinely ram his head into a post as they walked by it on their way to the interrogation. Then they would back up and ram his head into the post once more. One of the first English words Mr. Hamdan learned was "again," which the guards would say before ramming his head into the post again.
- (17) The guards at Kandahar threatened to kill Mr. Hamdan. The interrogators at Kandahar threatened him with death, torture, and life in prison.
- (18) Mr. Hamdan recalls that from his initial interrogations in Afghanistan, he was "physically abused," subjected to "sub-freezing temperatures," made to "sit motionless on benches with other prisoners for days," beaten and kicked, and threatened with death and torture. Affidavit of Salim Ahmed Hamdan at 10, 9 Feb. 2004 (Attachment B).
- (19) Under these conditions of pervasive fear, threat, and abuse, Mr. Hamdan cooperated with his interrogators by showing them locations where he had seen and driven Osama bin Laden.

Guantanamo Bay

- (20) In April or May 2002, Mr. Hamdan was transported from Afghanistan to Guantanamo Bay Naval Station, where the Government's aggressive interrogation techniques continued. Some of those techniques are alluded to in the written standard operating procedures that were in place at

Guantanamo. *See* Camp Delta Standard Operating Procedures (SOP) (Mar. 28, 2003) (selected pages at Attachment C) (FOUO). For example, the SOP details a [REDACTED] " for the detainees, the purpose of which "[REDACTED] [REDACTED] " experienced by detainees [REDACTED] Central to the management plan is a regime of [REDACTED] " and [REDACTED]

- (21) At Guantanamo, the conditions of Mr. Hamdan's confinement have varied as part of an interrogation regime. For example, Mr. Hamdan ordinarily was moved to solitary confinement two to five days before being interrogated. Solitary confinement creates extreme psychological distress for Mr. Hamdan.
- (22) On the pretext of a cell inspection, the guards would place everything in the cell except the bedding—all of Mr. Hamdan's comfort items—in a box. They would place the box on top of the cell for one to three days, where Mr. Hamdan could see it. When this happened, Mr. Hamdan knew that an interrogation was coming. If he cooperated with the interrogation, he would get his comfort items back.
- (23) If he cooperated with interrogators, he would receive family letters. He did not receive family letters when he did not cooperate with interrogators.
- (24) A female interrogator touched him in a manner that was sexually humiliating and degrading. She placed Mr. Hamdan's leg between her legs as they sat face to face, and placed his knee into her crotch. Because of Mr. Hamdan's religious beliefs and values, this was extremely humiliating and was tantamount to an assault. Mr. Hamdan was aware that other detainees had been subjected to even more egregious sexual

assaults. He feared that he also would be the victim of even worse sexual degradation.

- (25) In a letter to his family dated October 2002, Mr. Hamdan described the conditions he endured at Guantanamo: ". . . the Americans are treating us so bad from food to clothing. . . . [T]hey beat us up and torture us. . . . [I] don't think I'll be able to write to you anymore because the bad treatment we get here. [T]hey play their music and torture us, thay [sic] make fun of the Qur'an and the Islamic religion." The handwritten notation at the bottom of the letter, "Hold[,] False Statement[,] Mistreatment" suggests that this letter was never released for delivery by Guantanamo authorities. (Attachment D.)
- (26) Mr. Hamdan suffers from severe sciatica that requires medical treatment. On many occasions interrogators determined when and whether Mr. Hamdan would receive treatment for this condition. (In addition to the testimony of Dr. Keram, the Defense relies on excerpts from Mr. Hamdan's Guantanamo medical records. One record states, "Ben Gay to lower back—then cover with moleskin—special request for medical attention per FBI" Bates No. 001060 (emphasis in original). Another states, "No Rec time per Intel." Bates No. DIS000993. Because exercise is an important component of sciatica treatment, this notation shows interrogators playing a role in Mr. Hamdan's medical care. Both of these medical records are submitted as Attachment E.)
- (27) Mr. Hamdan asked the interrogators whether he would be put on trial. The interrogators told Mr. Hamdan that if he cooperated with them there would be no trial, that he had done nothing wrong, that he was only a driver, that they would write a good report for him, and that they would

recommend his release. He believed that they had the ability to get him released. He believed the interrogators because of the American reputation for human rights and the reputation of the American justice system. (In addition to the testimony of Dr. Keram, the Defense relies on Mr. Hamdan's affidavit, Attachment B.)

- (28) He learned that the interrogators had lied and tricked him when he was moved to Camp Echo, told that the interrogations were over, and assigned a lawyer. He was very confused.
- (29) As recently as November 2007 and March of 2008, when he was desperate to improve the conditions of his solitary confinement, Mr. Hamdan requested to speak to interrogators, thinking that if he told them something, they would give orders to improve his conditions. *See* D019 - Defense Motion for Relief from Punitive Conditions of Confinement and for Confinement Credit, or, Alternatively, Abatement at 3, ¶ F; accompanying Declaration of Andrea J. Prasow, ¶ 5, Attachment G, filed 1 Feb. 2008.

6. Law and Argument:

The MCA gives this Commission wide discretion to suppress Mr. Hamdan's out-of-court statements obtained through coercive techniques, where the degree of coercion is disputed. As demonstrated by the facts discussed above, and as Dr. Keram will further testify at this Commission's evidentiary hearing, Hamdan's initial videotaped testimony taken close to the time of Mr. Hamdan's capture and his subsequent statements in Afghanistan and Guantanamo were obtained as a result of highly aggressive interrogation techniques. Among the interrogation techniques used against Mr. Hamdan are physical and psychological abuse, including beatings, threats of death or continued abuse, isolation, making medical care contingent on cooperation with interrogators, sexual indignities, and promises offered to induce hope of improved treatment

and conditions of confinement and release. While coercive interrogation techniques may sometimes succeed in eliciting actionable intelligence, they have never been viewed as a means of obtaining reliable or probative evidence to be used in the prosecution of an accused. Under the standards of the MCA and customary international law, this Commission should therefore grant Mr. Hamdan's motion to suppress his out-of-court statements.

A. Under the Evidentiary Standards of the MCA, Mr. Hamdan's Out-of-Court Statements Obtained Through Coercive Interrogation Techniques Should Be Suppressed

Under the MCA, this Commission may only admit statements obtained through coercion prior to December 30, 2005 if the Commission finds that the statements are reliable and probative and that their admission into evidence serves the interests of justice. 10 U.S.C. § 948r(c);⁴ *see also* M.M.C. Preamble 1(g); Mil. Comm'n R. Evid. 304(c). Because Mr. Hamdan's out-of-court statements are neither reliable nor probative, they should not be admitted into evidence.

1. Coerced Testimony Is Neither Reliable nor Probative

Precisely because of the unreliability of involuntary testimony obtained through coercion, the United States has long and consistently recognized as axiomatic the inadmissibility of involuntary testimony obtained through coercion—whether cruel, degrading, or inhuman treatment or "torture"—both in the context of military tribunals and civilian courts. *See, e.g., United States v. Monge*, 2 C.M.R. 1, 4 (C.M.A. 1952) (noting that a confession "following inducements calculated to arouse either hope or fear is just as untrustworthy in a court-martial as it is in a civilian criminal court"). As the court noted in *Monge*,

⁴ "A statement obtained before December 30, 2005 . . . in which the degree of coercion is disputed may be admitted only if the military judge finds that (1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) the interests of justice would best be served by admission of the statement into evidence." 10 U.S.C. § 948r(c). This Commission may not admit statements made after December 30, 2005 if they were obtained by "cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005." 10 U.S.C. § 948r(d)(3).

Judicial suspicion of pre-trial confessions has led to the universal adoption of a rule that involuntary confessions will not be received in evidence against an accused. Many courts have based this rule of exclusion on reasoning that, where the confession is produced by inducements engendering either hope or fear, the accused is deprived of his freedom of will, and the presumption that an innocent man will not convict himself is overcome. *The resulting confession is deemed untrustworthy as evidence.*

Id. at 3 (emphasis added). The Court of Military Appeals has succinctly stated the rule: "coerced testimony cannot be accorded judicial consideration in the assessment of the accused's guilt or innocence." *United States v. Hurt*, 41 C.M.R. 206, 211 (C.M.A. 1970) (citing *Harrison v. United States*, 392 U.S. 219 (1968)). Both military and civilian courts have recognized that testimony may be rendered unreliable solely because of the means used to procure it. *United States v. Trojanowski*, 17 C.M.R. 305, 309 (C.M.A. 1954) (assuming that "the slapping was sufficient coercion to render the incriminatory admission involuntary"); *United States v. McLernon*, 746 F.2d 1098 (6th Cir. 1984) (reversing conviction that was based on confession obtained by threat of torture); *People v. Douglas*, 788 P.2d 640, 655 (Cal. 1990) ("the exclusion is based on the idea that coerced testimony is inherently unreliable"). In fact, the United States Supreme Court has frequently rejected interrogation techniques reminiscent of totalitarian regimes, which employ "unrestrained power to seize persons suspected of crimes against the state" and "wring from them confessions by physical and mental torture." *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944) (further noting that "[s]o long as the Constitution remains the basic law of our Republic, America will not have that kind of government").

This strong repudiation of abusive interrogation and the admission of the resulting coerced testimony has long roots in Anglo-American jurisprudence. *See, e.g., The King v. Rudd*, (1775) 168 Eng. Rep. 160, 161 (K.B.) (holding that "confessions under threats or promises" may not be used at trial); *The King v. Warickshall*, (1783) 168 Eng. Rep. 234, 235 (K.B.) ("no credit ought to be given" to "a confession forced from the mind by the flattery of hope, or by the torture of fear" and it "cannot be received in evidence").

While U.S. courts have shown a strong intuitive distrust of testimony obtained through coercion, there is also a large and growing body of empirical data showing that coerced testimony is unreliable. *See, e.g.*, Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* 235-40, 260-73, 316-20 (1992) (analyzing British and American cases in which defendants were charged or convicted on the basis of coerced confessions later shown to be false); Richard J. Ofshe, *Coerced Confessions: The Logic of Seemingly Irrational Action*, 6 *Cultic Stud. J.* 1 (1989) (analyzing cases in which police interrogation techniques elicited false confessions).

Intuitively and empirically, involuntary testimony induced by threat or promise is known to be inherently unreliable and should be suppressed here.

2. There Can Be No Reasonable Dispute That Mr. Hamdan's Statements Were Involuntary and Were Obtained Through Coercive Interrogation Techniques

The Government has used coercive interrogation techniques to obtain testimony from Mr. Hamdan. As the facts set forth above and the testimony of Dr. Keram will indicate, Mr. Hamdan's statements in Afghanistan were made when he was under fear of beatings, cruel treatment, and even death. Mr. Hamdan's statements at Guantanamo were made under a regime of interrogations and conditions of confinement carefully calibrated alternatively to induce fear and hope and to disorient and confuse, all to extract "cooperation" and statements.

Mr. Hamdan's experiences are fully consistent with reports of treatment of other detainees in U.S. custody. *See, e.g.*, Neil A. Lewis & Eric Schmitt, *Inquiry Finds Abuses at Guantanamo Bay*, N.Y. Times, May 1, 2005 (detailing pervasive abuse of detainees as part of effort "to devise innovative methods to gain information") (Attachment F); Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. Times, Jan. 1, 2005 (describing FBI and International Red Cross reports of abusive interrogation tactics, including physical abuse and use of isolation, deception, and other psychological methods) (Attachment G). A Spanish judge recently dropped terrorism charges against two former Guantanamo detainees, ruling that they

had undergone "torture and mistreatment" that led to "grave deterioration" of their mental health rendering it too inhumane to prosecute them. Daniel Wools, *Spain: Freed detainees too damaged to extradite*, Miami Herald, Mar. 6, 2008 (Attachment H).

The conditions of Mr. Hamdan's solitary confinement and the Government's aggressive interrogation techniques are consistent with standard operating procedure at Guantanamo. See Camp Delta Standard Operating Procedures (SOP) (Mar. 28, 2003) (selected pages at Attachment C) (FOUO). For example, the SOP details a [REDACTED], "the purpose of which [REDACTED] experienced by detainees [REDACTED]. Central to the management plan is a regime of [REDACTED]."

As Dr. Daryl Matthews stated in his March 2004 declaration, prolonged periods of isolation alone—setting aside physical abuse—frequently cause "hallucinations, perceptual distortions, derealization experiences, depression, anxiety, mood liability, difficulties in concentration and memory, paranoid thinking," among other impacts. Declaration of Daryl Matthews, MD, PhD (Mar. 31, 2004), ¶ 13 (Attachment I). These conditions make an isolated detainee such as Mr. Hamdan "particularly susceptible to mental coercion and false confession." *Id.* ¶ 14.

Dr. Keram has spent many hours with Mr. Hamdan in order to assess his psychiatric symptoms, and she has observed similar behavior. Declaration of Emily Keram, MD (Feb. 1, 2008) (Attachment J). Dr. Keram observed symptoms of Posttraumatic Stress Disorder including "nightmares, intrusive thoughts, memories and images, amnesia for details of traumatic events, lack of future orientation, anxiety, irritability, insomnia, poor concentration and memory, exaggerated startle response, and hypervigilance." *Id.* ¶ 5.

These professional evaluations confirm the intuitive and empirical bases supporting the rule prohibiting admission of coerced testimony. Such testimony is obtained only after first creating a mental state that is susceptible to coercion. Coerced testimony is inherently

untrustworthy and lacking in any probative value in a criminal proceeding. It should therefore be suppressed pursuant to MCA § 948r.

B. Even if the MCA Permitted the Use of Evidence Obtained Through Coercion, Such Evidence Should Be Suppressed Under Other Controlling Authority

Even if the MCA allowed this Commission to admit into evidence Mr. Hamdan's involuntary out-of-court statements—which, in light of their unreliability, it does not—consideration of coerced testimony would violate other important controlling law, including Common Article 3 of the Geneva Conventions and the Fifth Amendment to the U.S. Constitution.

1. Common Article 3

The admission into evidence of statements obtained as a result of cruel, inhuman, and degrading treatment violates Common Article 3 of the Geneva Conventions.⁵

Common Article 3, and also Article 75 of Protocol I, prohibits torture, both physical and mental, and "[o]utrages upon personal dignity, in particular humiliating and degrading treatment." Common Article 3, ¶ 1(c); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), art. 75, ¶ 2(b), *opened for signature* 8 June 1977, 1125 U.N.T.S. 3;⁶ *see also*

⁵ It was Congress's intention that military commissions established pursuant to the MCA would comply with Common Article 3. *See United States v. Khadr*, No. 07-001, at 14-15 (C.M.C.R. Sept. 24, 2007) ("Congress, clearly aware of the *Hamdan* decision when it drafted the MCA, appears to have embraced the minimal safeguards guaranteed by Common Article 3 requiring that even 'unlawful enemy combatants' be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'") (citing MCA § 948b(f) and quoting Common Article 3). Accordingly, the Defense believes that recent testimony before a Senate Committee concerning the standards established by the MCA presented an erroneous view of the law. *See The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and Is an End in Sight?: Hearing of the Terrorism, Technology and Homeland Security Subcomm. of the S. Judiciary Comm.*, 110th Cong. (2007) (statement of Brig. Gen. Thomas Hartmann, Legal Adviser to the Convening Authority for Military Commissions) ("SEN. FEINSTEIN: So in other words, if you believe you can prove something from evidence derived from waterboarding, it will be used? GEN. HARTMANN: If the evidence is reliable and probative, and the judge concludes that it is in the best interest of justice to introduce that evidence, ma'am, those are the rules we will follow."). Indeed, the credibility of American military justice requires that such a position be repudiated at the first opportunity, as (1) the use of such coercive techniques is repugnant to American conceptions of decency and must not receive even indirect judicial sanction, and (2) evidence obtained through such methods can never be deemed reliable.

⁶ Available at <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>.

International Covenant on Civil and Political Rights ("ICCPR"), art. 14(3)(g), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (no one shall "be compelled . . . to confess guilt").⁷

In addition, the admission of evidence obtained as a result of torture or coercion unquestionably is not allowed by "the judicial guarantees which are recognized as indispensable by civilized peoples." Common Article 3, ¶ 1(d); *see* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 15, U.N. Doc. A/RES/39/46 (Dec. 10, 1948); U.N. Human Rights Comm. general cmt. no. 7: Torture or cruel, inhuman or degrading treatment or punishment (1982).

In fact, the United States has long recognized that the use in a tribunal of evidence obtained through torture is itself punishable under the Geneva Conventions. After World War II, the United States prosecuted officers of Axis powers for their participation in military tribunals that relied on evidence obtained by torture. *See Trial of Sawada*, Case No. 25, 5 Law Reports of Trials of War Criminals 1, 2 (1948) (prosecuting Japanese officers for "unlawfully and willfully trying, prosecuting and adjudging" U.S. airmen in reliance on evidence obtained by "various forms of torture," "in violation of the laws and customs of war").

If this Commission were to construe the MCA as authorizing the admission into evidence of Mr. Hamdan's coerced testimony, such a ruling would violate the protections guaranteed by Common Article 3.

2. Admission of Involuntary Statements Obtained Through Coercion Violates the Fifth Amendment to the U.S. Constitution

Admission of Mr. Hamdan's coerced out-of-court statements would also violate the Fifth Amendment to the U.S. Constitution. The Supreme Court has noted that the language of the Fifth Amendment is a "crystallization" of the common law doctrine excluding involuntary confessions.⁸ *Bram v. United States*, 168 U.S. 532, 543, 544, 545 (1897) (noting that the

⁷ Available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

⁸ Mr. Hamdan is entitled to invoke the protections of the U.S. Constitution for reasons articulated by detainees and supporting amici, including Mr. Hamdan, in the pending U.S. Supreme Court cases *Boumediene* and *Al-Odah*, and

"temptation to press the witness unduly" and "to browbeat him if he be timid or reluctant" is so odious that it "became clothed in this country with the impregnability of a constitutional enactment") (quoting *Brown v. Walker*, 161 U.S. 591, 596, 597 (1896)).

Military courts have applied this principle, suppressing coerced testimony precisely because it is inherently unreliable and its admission into evidence would violate minimum constitutional guarantees. See, e.g., *United States v. Lewis*, 12 M.J. 205, 208 (C.M.A. 1982) ("The prohibitions of . . . the Fifth Amendment against coerced confessions are based on the concept that *involuntary statements must be excluded because of their inherent potential for unreliability.*") (emphasis added).

This Commission should exclude all coerced out-of-court statements of Mr. Hamdan because the admission of such statements would violate the guarantees of the Fifth Amendment.

C. Mr. Hamdan's Statements Also Should Be Suppressed Because the Prosecution Has Failed to Produce Documents and Answer Relevant Discovery Requests Relating to Those Statements

The Military Commission evidentiary rules provide:

If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement or otherwise to obtain information necessary to specify the grounds for a motion to suppress, the military judge may, subject to the requirements and protections of Mil. Comm'n R. Evid. 505, make any order required in the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

Mil. Comm'n R. Evid. 304(d)(3). As the Military Judge knows from the parties' briefing on the Defense's pending motions to compel discovery, the Prosecution has not yet provided access to

for the reasons stated in D012 - Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction Over Ex Post Facto Charges and the Defense Reply to the same motion. At a minimum, Mr. Hamdan is entitled to invoke fundamental rights, which include the right not to be compelled to incriminate oneself. See *Mitchell v. United States*, 526 U.S. 314, 334 (1999) (recognizing the fundamental right embodied in the Fifth Amendment not to be compelled to testify against oneself); *United States v. Bowles*, 1 C.M.R. 474, 474 (N.B.R. 1951) ("The fundamental right against self-incrimination is as binding upon courts-martial as it is upon civil courts, and its infringement constitutes a lack of due process which is not rectified by the fact that the record contains other clear and compelling evidence of guilt.").

all the interrogators who obtained Mr. Hamdan's statements and has not yet provided all documents, plans, and standard operating procedures relating to interrogations of Mr. Hamdan. For this reason, too, then, suppression of Mr. Hamdan's out-of-court statements made in Afghanistan and Guantanamo is required.

7. Request for Oral Argument: The Defense requests oral argument. Oral argument is necessary to provide the Commission with the opportunity to fully explore the legal issues raised by this motion. As provided by R.M.C. 905(h), "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions."

8. Request for Witnesses: The Defense believes the following witness will materially assist the Commission in considering this motion: Dr. Emily Keram. The Defense reserves the right to identify additional witnesses, if necessary, to rebut the arguments presented by the Prosecution.

9. Conference with Opposing Counsel: The Defense has conferred with opposing counsel. The Prosecution objects to the requested relief.


10. Attachments:

- A. Scott Higham et al., *Guantanamo—A Holding Cell in War on Terror*, Wash. Post, May 2, 2004, at A01
- B. Affidavit of Salim Ahmed Hamdan, 9 Feb. 2004 (English translation)
- C. Selected pages from Camp Delta Standard Operating Procedures (SOP) (Mar. 28, 2003) (FOUO)
- D. Letter from Salim Hamdan to Mohammed Ali Kassem, Oct. 30, 2002
- E. Selected medical records from Mr. Hamdan's confinement
- F. Neil A. Lewis & Eric Schmitt, *Inquiry Finds Abuses at Guantanamo Bay*, N.Y. Times, May 1, 2005
- G. Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y.

Times, Jan. 1, 2005

- H. Daniel Wools, *Spain: Freed detainees too damaged to extradite*, Miami Herald, Mar. 6, 2008
- I. Declaration of Daryl Matthews, MD, PhD (Mar. 31, 2004)
- J. Declaration of Emily Keram, MD (Feb. 1, 2008)

Respectfully submitted,

By: 
LCDR BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
Assistant Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301
(703) 588-0450

PROF. CHARLES SWIFT
Emory School of Law
(404) 727-1190
Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 359-8000
Civilian Defense Counsel