UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**D-029** **Defense Reply** In Support of Defense Motion to Suppress Out-of-Court Statements of the Accused Based on Coercive Interrogation Practices 18 April 2008

1. Timeliness: This brief is filed within the time frame permitted by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's orders of 20 December 2007 and 15 February 2008.

2. Relief Sought: Defendant Salim Ahmed Hamdan seeks 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. Law and Argument:

The Government does not dispute Mr. Hamdan's statements regarding the coercive nature of his confinement or the circumstances of his interrogation. The Prosecution does not deny that Mr. Hamdan was hooded and beaten prior to interrogation, that he was held motionless in painful positions for protracted periods, that he witnessed another detainee beaten to death, that he was "ghosted" from the ICRC while at Bagram, that he was subject to sexually offensive and degrading contact by a female interrogator, that he was personally threatened with death, torture, and life in prison, that he has been held in solitary confinement for many months at a time (including at present), that his medical treatment was subject to the manipulation of his interrogators, that he was falsely promised recommendations of release in return for his cooperation, or any of the other allegations of deceptive, cruel, inhuman, and coercive interrogation techniques employed by the United States over several years of detention.

Instead of disputing any of this, the Government raises two equally unpersuasive arguments. First, the Prosecution attempts to shift the burden of persuasion onto Mr. Hamdan to provide corroboration that every single utterance was the product of coercive interrogation. The

Prosecution dismisses Mr. Hamdan's "sweeping and uncorroborated allegations," Resp. at 2, as if it were unusual that Mr. Hamdan—detained in isolation and interrogated in secret—somehow failed to obtain "proof" and "corroboration" of the pervasive mistreatment he has endured. Notwithstanding the Government's absurd effort to shift the burden of proof, the record before this Commission contains ample corroborating evidence in the form of observations of organizations that have accessed U.S. facilities. *See* Motion, Attachments A, C, F, G. Among them are the International Committee of the Red Cross, F.B.I. officials, and reporters, as the *New York Times* reports:

> The information from the various sources frequently matched, providing corroboration of the use of specific procedures, which included prolonged sleep deprivation and shackling prisoners in uncomfortable positions for many hours. One F.B.I. agent wrote his superiors that he saw such restraining techniques several times. In the most gruesome of the bureau memorandums, he recounted observing a detainee who had been shackled overnight in a hot cell, soiled himself and pulled out tufts of hair in misery.

Id., Attach. G at 2.[1] The Government's own standard operating procedures for Guantanamo Bay called for "[redacted]" and "[redacted]" in order to "[redacted]" by the detainee. *Id.*, Attach. C (detailing the euphemistically termed "[redacted]"). The Government is therefore wrong to contend that Mr. Hamdan's description of the Government's coercive techniques is uncorroborated; every scrap of evidence before this Commission corroborates a broad systematic pattern of coercive interrogation. The Government is also wrong to argue that Mr. Hamdan has offered no support for his claim that the Government's coercive interrogation techniques have undermined the reliability of his statements. Indeed, the expert affidavits state unequivocally that prolonged periods of isolation—an undisputed component of the [redacted]

[1] Indeed, additional details regarding the systematic program of harsh interrogation techniques at Guantanamo continue to emerge. *See, e.g.*, Philippe Sands, *The Green Light*, Vanity Fair, May 2008, available at http://www.vanityfair.com/politics/features/2008/05/guantanamo200805, submitted as Attachment A hereto.

[redacted]"—makes detainees '[redacted]" *Id.*, Attachs. I and J.

The Government's second argument is more disturbing, however. The Prosecution contends that, even if we assume (as we must) that Mr. Hamdan's statements were obtained as a result of coercion, the MCA gives the Government a license to coerce detainees and gives this Commission a license to admit into evidence statements obtained through coercion. The Government is wrong. This Commission should reject the Government's plea to construe the MCA in a way that plainly violates United States and international law. Whether or not U.S. criminal evidentiary standards or international law are controlling in this Commission, they nevertheless provide persuasive reasoning on the inherent untrustworthiness and unreliability of statements obtained through coercion. The Court of Military Appeals has reasoned that "involuntary statements must be excluded because of their ***inherent potential for unreliability***." *United States v. Lewis*, 12 M.J. 205, 208 (C.M.A. 1982) (emphasis added). Regardless of whether that case is binding on this Commission, its reasoning is instructive. Neither the MCA nor the Government's arguments magically transform coerced statements into reliable testimony. The Government urges this Commission to adopt a posture on evidentiary issues that is contrary to every established standard, erroneously asserting that Congress intended to jettison the most fundamental principles of humanity and due process. This Commission should decline to do so, as the standards at issue here are at the very heart of the "judicial guarantees which are recognized as indispensable by civilized peoples."

In opposing the Defense motion to suppress coerced statements, the Prosecution fundamentally mischaracterizes Mr. Hamdan's argument: "the Defense claims that everything Hamdan said to anyone, ever, under any circumstances, is *per se* 'coerced' and, therefore, *per se* unreliable." Response at 3. That is not Mr. Hamdan's position. Mr. Hamdan merely asserts that, where the United States has implemented a formal process of indefinite detention, isolation, deception, violence, threat of violence, humiliation, and sexual degradation, the Government

may not then offer any resulting statements into evidence for the purpose of proving the guilt of the accused. Such a use of coerced testimony is neither mandated nor supported by the MCA and is directly at odds with U.S. and international law.[2]

A. The Government Has Not Met Its Burden to Support Admission of Mr. Hamdan's Statements Obtained through Coercion

The Prosecution argues that the defense "baldly asserts without any legal or factual justification that the burden rests upon the Government" to show the admissibility of challenged evidence. Response at 1. In fact, the Defense cited to the relevant rule, which provides that, "When an appropriate motion or objection has been made by the defense under this rule, ***the prosecution has the burden of establishing the admissibility of the evidence.***" Mil. Comm'n R. Evid. 304(e) (emphasis added). The Prosecution bears the burden of establishing the admissibility of Mr. Hamdan's statements, and the Prosecution has failed to meet its burden.

The Government's astonishing position is that it is entitled to use evidence that it obtained through coercion. The Government contends that the MCA authorizes the use of unquestionably coerced testimony, so long as the testimony has some other indicia of reliability. Response at 6 (contending that "Congress irrefutably intended to make all probative and reliable statements, *even those that were allegedly coerced,* admissible before military commissions.") (emphasis added). The MCA, however, does not authorize the admission into evidence of statements that were unquestionably the product of coercion. *Id.* The statute provides that, when "the degree of coercion is disputed," resulting statements may be admitted only if "the totality of the circumstances renders the statement reliable" and "probative." 10 U.S.C. § 948r(c). Where no evidence is offered to dispute the degree of coercion, however, the MCA contains no provision for the admission of coerced statements. Here, the Prosecution offers no evidence to dispute Mr.

[2] It is untrue that the Defense has failed to specifically identify the statements it wishes to exclude. Its opening brief on this motion called for the exclusion of "videotaped statements and all other out-of-court statements made by Mr. Hamdan in Afghanistan and Guantanamo." D-029 Defense Motion to Suppress at 1. This would include, but is not limited to, the so-called "capture videotape" (obtained at a point when Mr. Hamdan reasonably feared death at the hands of his captors should he contradict their assertions) introduced by the Prosecution at the 5-6 December 2007 hearing, as well as the testimony of Agents Crouch and McFadden introduced at that hearing.

Hamdan's claims that coercive interrogation techniques were used to extract statements from him. Because the Prosecution has offered no evidence to dispute either the fact or the degree of coercion,[3] MCA § 948r(c) does not control and this Commission should follow the uniform guidance of the case law (cited in the Defense motion) governing the inadmissibility of coerced testimony.

Moreover, even if the Government had offered *any* facts to dispute the degree of coercion conclusively shown by the evidence before this Commission, the Government incorrectly construes the MCA as shifting the entire evidentiary burden onto Mr. Hamdan. Under the Government's tortured construction of the MCA, Mr. Hamdan has the burden of proving that each individual utterance was the product of coercion. Response at 3, 6 ("Hamdan does not allege that a single one of his specific statements was ever coerced."). The Government's reasoning turns the burden of persuasion on its head. *See* Mil. Comm'n R. Evid. 304(e) ("the prosecution has the burden"). The MCA does not shift the burden to the accused, who has alleged mistreatment in the interrogation process, to "dispute the degree of coercion." The Government's suggestion that the accused must "dispute" what he has expressly alleged is nonsensical. Instead, it is the Government's burden under the MCA, once an accused has shown coercive interrogation, to dispute the degree of coercion, and the Government has failed to do so here. Furthermore, it is neither just nor reasonable to require an accused to parse coerced from voluntary utterances, where an entire interrogation statement is corrupted by a "[redacted]" calibrated to "[redacted]" and to induce statements in a climate of fear, intimidation, and confusion. The Prosecution assumes a fiction that detainees are coerced on a sentence-by-sentence basis and are able to parse voluntary

[3] The Government's sole attempt to rebut Mr. Hamdan's statements is a general and unsupported assertion that "Hamdan's allegations of mistreatment are false." Response at 2. The unverified assertion of counsel cannot be sufficient to meet the Government's burden to establish admissibility. The Government has offered no evidence to rebut Mr. Hamdan's substantial and specific statements of mistreatment, statements fully corroborated by all neutral observers and confirmed by psychiatrists who have evaluated Mr. Hamdan. And unlike Mr. Hamdan, the Government had the ability to obtain evidence by contacting personnel responsible for interrogating Mr. Hamdan. The Prosecution failed to do so.

assertions from those obtained under duress. As Dr. Keram has stated in her declaration, and as she will testify at hearing, she has spent about 70 hours with Mr. Hamdan, and has observed him display a broad range of severe psychiatric symptoms, which collectively pervade every part of Mr. Hamdan's mental state. *See, e.g.*, Motion, Attach. J at ¶¶ 5-7 (describing symptoms resulting from detention in solitary confinement). The Prosecution's argument unrealistically posits a detainee's ability to discern coerced from voluntary answers while reduced to a fear-induced delusional mental state.

Contrary to the Prosecution's argument, Mr. Hamdan does not contend merely that his interrogators were selectively coercive—using violence to compel answers to specific questions that could then be identified by Mr. Hamdan as coerced statements—but that the total regime of detention and interrogation was designed to induce fear and despair, and promote psychological disorientation and dependence. This regime of fear, disorientation, and dependence is precisely the circumstance that renders any resulting statements involuntary and therefore inadmissible. *See United States v. Hurt*, 41 C.M.R. 206, 211 (C.M.A. 1970) (holding that "coerced testimony cannot be accorded judicial consideration in the assessment of the accused's guilt or innocence"); *United States v. Monge*, 2 C.M.R. 1, 4 (C.M.A. 1952) (statements resulting from "inducements calculated to arouse either hope or fear is just as untrustworthy in a court-martial as it is in a civilian criminal court").[4]

Because Mr. Hamdan has provided substantial evidence that his out-of-court statements were obtained through coercive interrogation techniques, and because the Prosecution has

[4] The Government dismisses these and other cases as "completely irrelevant" because Mr. Hamdan is before a military commission, "not in federal court and not before a court-martial." Response at 3. The Government is obviously eager to remove from this Commission's consideration all established case law from every other civilian and military tribunal and pretend that coerced statements may be deemed reliable in this context. The question, though, is not whether these cases are strictly controlling in this proceeding, but whether this proceeding is so fundamentally different from any other civilian and other military tribunals that their universally accepted reasoning does not apply. Are statements induced by fear more trustworthy simply because they are offered as evidence before this Commission? Even if the Prosecution had disputed the degree of coercion applied to Mr. Hamdan, thereby triggering MCA § 948r(c), the Government is unable to overcome the common-sense suspicion of coerced statements, which is reflected in the case law cited by the Defense.

offered no evidence to dispute the degree of coercion used to obtain those statements, this Commission should suppress Mr. Hamdan's out-of-court statements.

B. The Government Has Failed to Show that Mr. Hamdan's Coerced Statements Are Reliable or Probative

Even if the Prosecution had offered any evidence to dispute Mr. Hamdan's claim of coercion, the Government has not met its burden of demonstrating that Mr. Hamdan's statements are reliable or probative. As a result, under the Government's own incorrect interpretation of the MCA, Mr. Hamdan's coerced statements should not be admitted. Instead of proving that the statements are reliable or probative, the Government simply exaggerates the evidence in order to make it sound probative. For example, the Government refers to Mr. Hamdan's affidavit (Motion, Attach. B), which describes Mr. Hamdan's decision to return to Kandahar during the American offensive: "I heard that the Northern Alliance was attacking Kandahar where my wife and daughter were living and . . . I decided to return to them." The Government refers to these statements, but mischaracterizes them as "readily admit[ting]" "helping Osama Bin Laden evacuate al Qaeda facilities in Kandahar before the September 11, 2001 attacks, and protecting the world's most wanted terrorist for several weeks after September 11, 2001." Response at 7. The Government cannot show that the evidence is reliable or probative merely by misrepresenting it.

C. Admission of Mr. Hamdan's Statements Would Violate Other Controlling Law, Which Mr. Hamdan Is Entitled to Invoke

The Prosecution does not contest that the U.S. Constitution, Common Article 3 of the Geneva Conventions, and customary international law all prohibit the admission into evidence of statements obtained through coercion. The Government simply insists that this Commission operates in a legal vacuum, untouched by the quaint niceties of the Constitution, treaties, and international law. The Government is wrong.

1. The Constitution's Structural Limits on the Power of Congress Apply

The Prosecution once again dismisses Mr. Hamdan's claim that this Commission is governed by the U.S. Constitution. Response at 11. However, as we have consistently argued, this Commission was created by the executive branch in conjunction with an act of Congress. The Prosecution and the Military Judge and some of Defense counsel are members of the U.S. military. Every act taken in conjunction with this proceeding, aside from live hearings at the trial level and overseas witness interviews, occurs in the United States. It is an unremarkable proposition that the United States, including this Commission and the United States in its prosecution of Mr. Hamdan, must act in conformity with the U.S. Constitution. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality op.).

The Prosecution's argument to the contrary hinges on the fact that Mr. Hamdan is a not a U.S. citizen and has no voluntary ties to or presence in sovereign U.S. territory. Response at 11. But these facts do not compel the result the Prosecution seeks. And, in arguing that this Commission and this prosecution somehow can operate completely apart from and without any regard for the Constitution, the Prosecution overlooks controlling authority and misconstrues other precedent.

a. The Prosecution's Position Conflicts with Binding Supreme Court Precedent

The Prosecution's view—that non-citizens outside the sovereign territory of the United States cannot invoke the Constitution—squarely conflicts with binding Supreme Court precedent. To begin, the Prosecution overlooks and fails to mention *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Then, as now, Mr. Hamdan was not a U.S. citizen. 126 S. Ct. at 2759. Then, as now, Mr. Hamdan was in the custody of the U.S. military at the naval base at Guantanamo Bay, Cuba after being captured abroad and brought there involuntarily. *Id.* Nonetheless, the Supreme Court considered and decided, at Mr. Hamdan's behest, whether the President had acted outside of and in excess of his powers. Starting from the proposition that "trial by military commission is an extraordinary measure raising important questions about the balance of powers

in our constitutional structure," *id.* (emphasis added), the Court held that the President had exceeded his constitutional authority in convening a military commission that did not comply with the law of war. *Id.* at 2775.[5] Thus, *Hamdan* addressed a structural constitutional argument based on the Separation of Powers. If the Prosecution's view of the role of the U.S. Constitution were correct, *Hamdan* could not have been decided as it was.

Similarly, the Prosecution's argument conflicts with another recent decision of the Supreme Court, *Rasul v. Bush*, 542 U.S. 466 (2004). In *Rasul*, the Supreme Court held that the habeas statute (as in effect at that time) could be invoked by detainees at Guantanamo Bay. 542 U.S. at 484. Notably, the Court expressly noted that the claims alleged by the detainees in their habeas petitions "describe 'custody in violation of the Constitution or laws or treaties of the United States.'" *Id.* at n.15 (quoting 28 U.S.C. § 2241(c)(3)). Statutory habeas is only available when the Constitution or laws or treaties of the United States are violated. Surely if detainees cannot assert any claims at all based on the Constitution, the Supreme Court would have so noted in *Rasul*.

In addition, the Prosecution's view conflicts with *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The Prosecution cites *Eisentrager*, Response at 11, but ignores its most relevant aspect. In *Eisentrager*, German nationals were convicted of war crimes by a United States military commission conducted in China after the Second World War. *Eisentrager*, 339 U.S. at 766. Upon conviction, they were detained at Landsberg Prison in occupied Germany. *Id.* They sought habeas corpus in the United States District Court for the District of Columbia. *Id.* On review, the Supreme Court held that nonresident enemy aliens in the service of the enemy do not

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[5] For example, the Court reaffirmed the holding from an earlier case that in Article 15, "Congress had simply preserved what power, *under the Constitution* and the common law of war, the President had had before 1916 to convene military commissions . . . ." *Id.* at 2775 (emphasis added). The Court noted that the President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers," citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring), a classic decision of constitutional law. 126 S. Ct. at 2774 n.23. Summing up the issue to be decided, the Court stated, "Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified *under the Constitution* and laws . . . ." *Id.* at 2775 (emphasis added) (internal quotation marks omitted).

have "access to our courts," *id.* at 776, and do not have a constitutional "right of personal security or an immunity from military trial and punishment," *id.* at 785.

But the Supreme Court in *Eisentrager* did *not* refuse to consider the German nationals' claims of constitutional error in the military commission itself on the grounds that the petitioners could not invoke the Constitution, as the Prosecution urges this Commission to do. Instead, the Supreme Court considered *on the merits* two constitutional arguments raised by the petitioners. *Id.* at 785-88. Neither this Commission (nor the D.C. Circuit, as discussed below regarding *Boumediene*) can overrule the Supreme Court or ignore its on-point, binding precedent.

b. *Boumediene* Does Not Govern This Question

The only case that even arguably supports the Prosecution's argument is the 2-1 decision of the D.C. Circuit in *Boumediene*. It is a matter of weeks or months until this decision is replaced by a decision of the Supreme Court, and thus its authority is tenuous at best. But further, *Boumediene* does not govern, for the following reasons.

First, the portion of *Boumediene* on which the Prosecution relies is dicta. *Boumediene* addressed whether the strip of habeas jurisdiction in § 7 of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (2006), codified at 28 U.S.C. § 2441(e), violated the Constitution's Suspension Clause. *See* U.S. Const. art. I, § 9, cl. 2. On this question, the court's holding was that the constitutional right to habeas extends only to habeas as understood at common law in 1789, which in the court's view simply did not extend to "aliens held at an overseas military base leased from a foreign government." *Boumediene*, 476 F.3d at 991. That holding alone was sufficient to resolve the case, and the court's subsequent discussion of whether "the Constitution . . . confer[s] rights on aliens without property or presence within the United States," *id.*, was unnecessary and thus dicta.

Second, the *Boumediene* majority's alternative conclusion that non-citizens held at Guantanamo Bay may not invoke the Constitution, 476 F.3d at 991, cannot be interpreted as reaching claims raised in a military commission, because to do so would conflict with

Eisentrager, which the *Boumediene* majority called "controlling." *See* 476 F.3d at 991. The *Boumediene* petitioners are detainees that have not been charged in a military commission, *id.* at 984, and the issue in *Boumediene* is whether such detainees may assert the constitutional right to habeas notwithstanding the MCA's jurisdiction strip. Thus, the D.C. Circuit in *Boumediene* focused on the portion of *Eisentrager* addressing constitutional claims unrelated to the power and authority of the military commissions that tried the German nationals. In contrast to the *Boumediene* petitioners, Mr. Hamdan faces criminal charges in this Commission. The portion of *Eisentrager* relevant to this proceeding is the section, discussed above, in which the Supreme Court considered constitutional claims regarding the commission on the merits. *Eisentrager*, 339 U.S. at 785-88. The D.C. Circuit is powerless to overrule the Supreme Court, and thus the portion of the *Boumediene* decision addressing whether detainees can raise constitutional arguments must be construed as not reaching constitutional claims raised in or directly relating to the conduct of a military commission.

Third, the *Boumediene* majority flouted binding Supreme Court precedent when it concluded that Guantanamo Bay is not U.S. territory and that for this reason detainees cannot invoke the Constitution. For this conclusion, the D.C. Circuit relied on cases generally stating that Cuba retains sovereignty over Guantanamo Bay and also § 1005(g) of the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680, which states that "'United States' . . . does not include" the naval base at Guantanamo Bay. *See Boumediene*, 476 F.3d at 992; *see also Rasul v. Myers*, 512 F.3d 644, 667 n.18 (D.C. Cir. Jan. 11, 2008) (following *Boumediene* and stating that Guantanamo Bay is not sovereign U.S. territory).

But the D.C. Circuit ignored *Rasul v. Bush*, 542 U.S. 466 (2004). The Supreme Court's holding on the reach of habeas in *Rasul* was premised on the habeas statute, rather than constitutional habeas. 542 U.S. at 473, 484. In deciding this question, however, the Court was confronted with the same issue addressed by the D.C. Circuit in *Boumediene*—what is the nature of the United States' interest in and control over Guantanamo Bay. In *Rasul*, six justices of the

Court all reached the conclusion that Guantanamo Bay is functionally U.S. territory for purposes of determining what law applies. Rejecting the argument that the habeas statute should not be applied "extraterritorially," *id.* at 480, the five-justice majority said:

> Whatever traction the presumption against extraterritoriality [for congressional legislation] might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained *within the territorial jurisdiction of the United States*. By the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.

Id. at 481 (internal quotation marks and citations omitted) (emphasis added).[6] Concurring in the judgment, Justice Kennedy reached the same conclusion. Distinguishing *Eisentrager*, he stated:

> . . . Guantanamo Bay is in every practical respect a United States territory, and it is far removed from any hostilities. . . . In a formal sense the United States leases the Bay . . . . At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States . . . .

Id. at 487 (Kennedy, J., concurring in the judgment).

Because the Fifth Amendment to the U.S. Constitution applies with full force in the context of this Commission, and because the Prosecution has not disputed that the admission of coerced statements violates the Fifth Amendment, this Commission should rule consistently with that the constitutional mandate and suppress Mr. Hamdan's coerced out-of-court statements.

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[6] The Prosecution cites *Rasul*'s discussion of the facts surrounding the United States' lease of Guantanamo Bay, Response at 11, but does not mention the Court's conclusion in *Rasul* that the naval base is "within the territorial jurisdiction of the United States." *Rasul*, 542 U.S. at 481.

2. Common Article 3 and Customary International Law Apply

The Prosecution further argues that Common Article 3 of the Geneva Conventions is irrelevant to the Government's effort to use coerced statements in the prosecution of Mr. Hamdan.

Common Article 3, a part of all four Geneva Conventions, applies in this proceeding and sets forth minimum protections that must be afforded to Mr. Hamdan. The United States Supreme Court has already held that Common Article 3 applies to Mr. Hamdan, can be invoked by him, and applies in this case. *Hamdan*, 126 S. Ct. at 2796.[7] Congress also recognized the applicability of Common Article 3 when enacting the Military Commissions Act of 2006 ("MCA"), 10 U.S.C. §§ 948a-950w. *See* 10 U.S.C. § 948b(f) (stating that military commissions established under the MCA comply with Common Article 3).

Common Article 3's protections are for all persons, regardless of status. Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Colum. J. Transnat'l L. 811, 817-18 (2005) ("Common Article 3 assures that any person detained has certain rights 'in all circumstances' and 'at any time and in any place whatsoever,' whether the detainee is a prisoner of war, unprivileged belligerent,

[7] Any contention that Common Article 3 provides no protection to Mr. Hamdan based on MCA § 948b(g) ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights") must be rejected, as Congress cannot validly strip Mr. Hamdan of preexisting rights recognized by the Supreme Court in this very case. Such an effort would constitute an impermissible intrusion into the judicial function. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) ("Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was."); *United States v. Klein*, 80 U.S. 128, 146 (1871) (striking down a statute that prevented courts from giving effect to a presidential pardon, which would violate separation of powers by "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it"); *see also Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution.") (quoting *Marbury*, 5 U.S. (1 Cranch) 173, 177 (1803)). In addition, such an application of MCA § 948b(g) would operate as an invalid Bill of Attainder and ex post facto law. *See Cummings v. Missouri*, 71 U.S. 277, 320 (1866) ("deprivation of any rights, civil or political, previously enjoyed may be punishment" and constitute a bill of attainder); *Collins v. Youngblood*, 497 U.S. 37, 49 (1990) ("A law that abolishes an affirmative defense" violates the Ex Post Facto Clause); *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925) ("[A]ny statute . . . which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.").

terrorist, or noncombatant."); *see also Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) (describing the mandates of Common Article 3 as the "most fundamental requirements of the law of war").

In particular, Common Article 3 prohibits "the passing of sentences . . . without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Common Article 3, ¶ 1(d). The meaning of "judicial guarantees" can be derived from several international law sources. First, Article 75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3, sets out a specific list of "generally recognized principles of regular judicial procedure." Protocol I, art. 75. While the United States did not ratify Protocol I, its objections to Protocol I were on account of provisions other than Article 75, and it is widely accepted that Common Article 3 should be interpreted in light of Article 75. *See United States v. Khadr*, No. 07-001, at 15 n.24 (C.M.C.R. 2007) (looking to Article 75 as a source of "judicial guarantees" recognized under Common Article 3); *Hamdan*, 126 S. Ct. at 2797 (plurality op.) (stating that the United States "regard[s] the provisions of Article 75 [of Protocol I] as an articulation of safeguards to which all persons in the hands of an enemy are entitled"); William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (2003).

Second, the meanings of these terms stem from customary international law. Common Article 3 "merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed." International Committee of the Red Cross, *Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War* 36 (Jean de Preux ed., 1960); *see also Prosecutor v. Delalic*, No. IT-96-A, Judgment (International Criminal Tribunal for the former Yugoslavia, Feb. 20, 2001) at 143 (noting that it is "indisputable that Common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian

principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based"). Customary international law arises through the general and consistent practice of states, acting out of a belief of legal obligation. Restatement (Third) of Foreign Relations Law § 102(2) (1987). While not dependent on treaties for its existence, customary international law can be determined in part by looking to treaties as evidence of the practices of states. *See, e.g.*, *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 255 (D.N.J. 1999) ("Plaintiffs have cited numerous treaties, court decisions and United Nations resolutions, not as a source of their substantive rights but rather as evidence of the content of customary international law."); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 716 n.15, 717 (9th Cir. 1992) (looking in part to treaties to determine that official torture violates customary international law).

To assist in ascertaining the meaning of "judicial guarantees which are recognized as indispensable by civilized peoples," this Commission can look to the International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S. 171, ratified by the United States on June 8, 1992 and as of 2007 by 159 other countries. Article 14 of the ICCPR lists several judicial guarantees that are customary international law and demonstrate the meaning of "judicial guarantees recognized as indispensable by all civilized peoples" in Common Article 3.

These sources of international law, applicable to Mr. Hamdan, recognize that the use of coercion to obtain evidence and the admission of such evidence for the purpose of establishing guilt or innocence of the accused violate the judicial guarantees which are recognized as indispensable by civilized peoples.

4. <u>Attachments</u>:

A. Philippe Sands, *The Green Light*, Vanity Fair, May 2008, as available on-line at http://www.vanityfair.com/politics/features/2008/05/guantanamo200805.

Respectfully submitted,

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