MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	AE 045 DEFENSE MOTION TO SUPPRESS OUT-OF-COURT STATEMENTS OF THE ACCUSED DUE TO VIOLATION OF RIGHTS AGAINS SELF-INCRIMINATION 9 June 2015

1. Timeliness: This request is filed within the timeframe established by Rule for Military Commission 905, is timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c.(1) and pursuant to the motion schedule promulgated by the Military Judge's scheduling order, AE020D.

2. Relief Requested: The Defense respectfully requests the Commission suppress custodial statements made by Mr. Hadi al Iraqi to federal law enforcement agents between May 2007 and January 2009.

3. Overview:

Both the Fifth Amendment of the U.S. Constitution and the Military Commissions Act ("M.C.A.") prohibit compulsory self-incrimination. U.S. CONST. amend. V ("No person shall…be compelled in any criminal case to be a witness against himself."); 10 U.S.C. § 948r ("No person shall be required to testify against himself or herself at a proceeding of a military commission under this chapter."). The M.C.A. continues by stating: "A statement of the accused

may be admitted in evidence in a military commission under this chapter only if the military judge finds (1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and… (2) the statement was voluntarily given."[1]

It is well settled that, by its very nature, custodial interrogation entails "inherently compelling pressures." *Miranda v. Arizona*, 384 U.S. 436 (1966). The physical and psychological isolation of custodial interrogation can "undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely." *Ibid.* Indeed, the pressure of custodial interrogation is so immense that it "can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States*, 556 U.S. 303, 321 (2009) (citing Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N. C. L. Rev. 891, 906-907 (2004)); *see also Miranda*, 384 U.S., at 455.

Recognizing that the inherently coercive nature of custodial interrogation "blurs the line between voluntary and involuntary statements," *Dickerson*, 530 U.S., at 435, 120 S. Ct. 2326, 147 L. Ed. 2d 405, the Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. Prior to questioning, a suspect "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S., at 444; *see also Florida v. Powell*, 559 U.S. 50 (2010) ("The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed"). And, if a suspect makes a statement during custodial interrogation, the burden is on the Government to show, as a prerequisite to the statement's admissibility as evidence in the Government's case in chief, that

[1] 10 U.S.C. 948r(c)(1) and (2)(B)

the defendant "voluntarily, knowingly and intelligently" waived his rights. *Miranda*, 384 U.S., at 444, 475-476; *Dickerson*, 530 U.S., at 443-444.

"*Miranda* is considered a prophylactic rule because the substance of the warnings have no actual source in the language of the Fifth Amendment. Instead, *Miranda's* requirements are a judicial creation designed to protect the self-incrimination clause." *United States v. McFarland*, 424 F. Supp. 2d 427, 434 (N.D.N.Y. 2006); *Chavez v. Martinez*, 538 U.S. 760, 769 (2003). The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel.

The Uniform Code of Military Justice requires a *Miranda* like warning for individuals subject to the code prior to questioning.[2] While the Military Commissions Act specifically exempts Military Commissions from this provision, it is silent as to whether *Miranda* or the protections of the Fifth Amendment apply. This Commission should hold that they do. Otherwise the requirement of "voluntariness" will be rendered so hollow as to be non-existent.

Not only has Mr. Hadi al Iraqi never been read any *Miranda* warnings, the very first thing he did when questioned by FBI investigators in May 2007 was to ask about his rights, specifically requesting legal counsel. Mr. Hadi al Iraqi was inexplicably told "he was in DoD custody and was not entitled to legal counsel because he had not been charged with a crime." Because the Accused was clearly in custody and had no freedom to leave the interrogation, none of the statements he made following his request for legal counsel can possibly be considered "voluntary." Accordingly, the custodial statements made to federal law enforcement agents between 8 May 2007 and 22 January 2009 must be suppressed.

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[2] 10 U.S.C. 831b, Article 31b U.C.M.J.

4. Burden of Proof and Persuasion: Generally, as the moving party, the Defense bears the burden to demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Statement of Facts:

a. Since October 2006 until the present, Mr. Hadi al Iraqi has been in the custody of the United States. From October 2006 until his arrival at Guantanamo Bay in April 2007, the accused was in CIA custody at undisclosed locations.[3] During that custody, agents of the United States interrogated Mr. Hadi al Iraqi. In April of 2007, Mr. Hadi al Iraqi was brought to the Guantanamo Bay Naval Air Station, where he has remained incommunicado to the present day. Many of the details of Mr. Hadi al Iraqi's conditions of confinement are classified[4]. It is safe to say that at no time has he been free to leave.

b. Between May 2007 and January 2009 Mr. Hadi al Iraqi was questioned by investigators with the FBI without being provided Miranda rights, nor was he provided an attorney. Those interrogations were reduced to writing by the agents in five summaries, dated 8 May 2007, 29 June 2007, 30 November 2007, 2 April 2008, and finally 22 January 2009.

c. In the very first interrogation, Mr. Hadi al Iraqi requested legal counsel. "Hadi asked the interviewers about his rights and whether he would be receiving legal counsel…Hadi was told he was in DOD custody and was not entitled to legal counsel because he had not been charged with a crime. Hadi was told he would not be kept at GTMO in an unknown

[3] Attachment B – For the sake of brevity we have attached only those pages of the unclassified Executive Summary of the Senate Intelligence Committee Study on CIA Detention and Interrogation Program that refer to Mr. Hadi al Iraqi. The entire 525 page Executive Summary can be found at: http://www.feinstein.senate.gov/public/index.cfm?p=senate-intelligence-committee-study-on-cia-detention-and-interrogation-program

[4] The defense reserves the right to supplement this motion with a classified companion filing detailing the classified conditions of confinement when they are disclosed to the defense.

status forever. Hadi was told the U.S. government is in the process of deciding what to do with Hadi and the interview would be part of that process." [5]

d. In the final statement in January 2009 the FBI agents for the first time noted that they informed Mr. Hadi al Iraqi that he did not have to answer their questions. They further noted that he reiterated his request for a lawyer and they subsequently terminated the interrogation, asking him no substantive questions.[6]

6. Argument:

A) The Fifth Amendment and *Miranda* Require the Suppression of the Challenged Statements.

"The touchstone for *Miranda* warnings is whether the suspect is in custody when interrogated." *United States v. Barnes*, 713 F. 3d 1200, 1204 (9th Cir. 2014)(citing *Rhode Island v. Innis*, 446 U.S. 291 300 (1980). A suspect is in custody for *Miranda* purposes when the "suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" *California v. Beheler*, 463 U.S. 1121, 1125 (1983). Whether the suspect is "in custody" is an objective inquiry, which focuses on two issues: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave." *J.D.B. v. North Carolina*, 131 S. at 2401. Relevant factors include the location and duration of the questioning, statements made during the interview, the presence or absence of physical restraints during the interview, and whether the suspect was released at the end of the questioning. *Howes v. Fields*, 132 S. Ct. 1181, 1189-90 (2012). Given the manner and conditions in which Mr. Hadi al Iraqi was confined,

[5] Attachment C – Excerpt of statement by Mr. Hadi al Iraqi dtd 8 May 2007
[6] Attachment D – Statement by Mr. Hadi al Iraqi dtd 22 January 2009

there can be no credible argument he was not in custody for *Miranda* purposes when the challenged statements were obtained.

> Accordingly, *Miranda* "prescribed the following four now-familiar warnings:
>
> > A suspect must be warned prior to any questioning (1) that he has the right to remain silent, (2) that anything he says can be used against him in a court of law, (3) that he has the right to the presence of an attorney, and (4) that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Florida v. Powell, 175 L. Ed. 2d 1009, 1018 (2010). It does not appear that the interrogating agents reviewed any of the above rights with Mr. Hadi al Iraqi before questioning him, and they most certainly mislead him regarding his rights regarding counsel. "Under *Miranda*, any suspect subject to custodial interrogation must be advised of his right to have a lawyer present." *Montejo v. Louisiana*, 556 U.S. 778, 779 (2009). "When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief." *Oregon v. Elstad*, 470 U.S. 298, 317 (1985).

Compare the treatment of Mr. Hadi al Iraqi, who was questioned for approximately six months for intelligence purposes, and then re-interrogated by FBI investigators without any rights advisement with the treatment of Al Qaeda suspect Ahmed Abdulkadir Warsame. Mr. Warsame, "a Somali national in his mid-twenties, was captured in the Gulf region by the U.S. military on April 19, 2011, and was questioned for intelligence purposes for more than two months. Thereafter, Warsame was read his Miranda rights, and after waiving those rights, he spoke to law enforcement agents for several days."[7]

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[7] Attachment E – Warsame Press Release, dated 5 July 2011

The prosecution has cited Federal court practice repeatedly in this commission case, both in their defense of the common allegations on a charge sheet that would never appear in a court martial charge sheet, and their defense of their various theories of joint criminal enterprise liability. Given the circumstances of his statements, Mr. Hadi al Iraqi's statements would never be admitted against him in a Federal court prosecution. The admissibility of Mr. Hadi al Iraqi's unwarned and uncounseled statements in this Commission can similarly be easily resolved by applying the black-letter law set forth in *Miranda* nearly fifty years ago and as currently practiced by the United States Government with al Qaeda suspects being tried in Federal Court.

The defense expects the prosecution will argue the admissibility of Mr. Hadi al Iraqi's statements hinges—not on the applicability of *Miranda*—but on the applicability of the Fifth Amendment of the U.S. Constitution to these proceedings. Any such argument should be rejected by this Commission, just as it was by the Supreme Court in *Boumediene v. Bush*, 553 U.S. 723, 765 (2008):

> Yet the Government's view is that the Constitution has no effect [in Guantanamo], at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.
>
> Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." *Murphy v. Ramsey*, 114 U.S. 15 (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will, is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in

> which Congress and the President, not this Court, say "what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803).

Id. Instead, "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764. These practical concerns, as in the Insular Cases relied upon by the Court, include matters such as "friction with the host government." *Id.* at 770. And they also include whether the location is in "an active theater of war." *Id.*

Here there is no indication the application of the Constitution would "cause friction with the host government." *Id.* "No Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there. While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base." *Id.* Guantanamo, "while technically not part of the United States, is under the complete and total control of our Government." *Id.* At Guantanamo, the federal government's power is at its apogee. In fact, there may be no other location on earth where the federal government does not have to consider state or foreign sovereignty. Where the government's control is "total," there can be no argument as to the applicability of the Constitution.

Miranda warnings were even provided in international waters in the eastern Mediterranean Sea in *United States v. Yunis*, 859 F. 2d 953, 956 (D.C. Cir. 1988). "The agents then gave Yunis a form, on which the warnings required under *Miranda v. Arizona*, 384 U.S. 436 (1966), were written in Arabic."

While it may be debatable whether *Miranda* is applicable on an actual battlefield or in international waters, "no law other than the laws of the United States applies at the naval station." *Boumediene*, 553 U.S. at 751. "[A]s early as *Balzac* in 1922, the Court took for granted that even in unincorporated Territories the Government of the United States were bound to provide to noncitizen inhabitants 'guarantees of certain fundamental personal rights declared in the

Constitution." *Boumediene*, 553 U.S. at 758; *citing Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922). Nor is it debatable that "[t]he requirement of warnings and waiver of rights is…fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Dickerson v. United States*, 530 U.S. 428, 480 (2004)(*citing Miranda*, 384 U.S. at 479); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)("The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants."). Accordingly, the challenged custodial statements must be suppressed not only for failure to comply with the *Miranda* rule, but because they violate Mr. Hadi al Iraqi's Fifth Amendment right against self-incrimination, which is precisely what *Miranda* was crafted to protect.

B) Regardless of the Applicability of the Fifth Amendment, *Miranda's* Prophylactic Warnings are Required if the Right Against Self-Incrimination Found in 10 U.S.C. § 948r is to Have Any Meaning.

For most of their history, the warnings required by *Miranda* remained judicially created prophylaxis, and were "not themselves protected by the Constitution but [were] instead measures to insure that the right against compulsory self-incrimination [was] protected." *Duckworth v. Eagan*, 109 S. Ct. 2875, 2880 (1989)(*citing Michigan v. Tucker*, 417 U.S. 433, 444 (1974)); *United States v. Patterson*, 812 F. 2d 1188, 1193 (9th Cir. 1987)("*Miranda* violations do not abridge the Fifth Amendment constitutional privilege against self-incrimination, but instead involve prophylactic standards laid down to safeguard that privilege). It was not until *Dickerson v. United States*, 530 U.S. 428 (2000), the "Court made pellucid that the *Miranda* warning is not mere prophylaxis for the Fifth Amendment right against self-incrimination." *United States v. Seale*, 600 F. 3d 473, 498 (5th Cir. 2010)(DeMoss, J., dissenting). The warning had become

"part of our national culture," and comprised a constitutional right in and of itself. *Dickerson*, 530 U.S. at 443-44.

The Court fashioned the warnings because "the Court concluded that the possibility of coercion inherent in custodial interrogations unacceptably raises the risk that a suspect's privilege against self-incrimination might be violated." *United States v. Patane*, 542 U.S. 630, 639 (2004); *United States v. Gecas*, 120 F. 3d 1419, 1429 (11th Cir. 1997)("The rule barring the initial compulsion, however, is prophylactic. The Self-Incrimination Clause protects against conviction based on self-incrimination; it does not protect against the mere compulsion of testimony by a court."). Importantly, Mr. Hadi al Iraqi's statements were not simply taken in the "inherently coercive" environment occasioned by being in police custody; they were taken after he was detained and questioned in a CIA black site for approximately six months.[8] *See Columbe v. Connecticut*, 367 U.S. 568, 635 (1961)(holding that confession made after four nights and five days during which defendant was questioned repeatedly was not voluntary and denied defendant due process of law). When questioned by the FBI, Mr. Hadi al Iraqi had no one to advise him that these "clean teams" were there to try to get admissible versions of statements he had already been making to the CIA. How could he possibly make a truly voluntary statement under such circumstances? The answer is that he could not, and therefore his statements must be excluded.

Courts have long distinguished between cases involving merely "a simple failure to administer the warnings, unaccompanied by any actual coercion ..." and cases involving "a *Miranda* violation that amounts to actual coercion based on outrageous government misconduct...." *Compare Oregon v. Elstad*, 470 U.S. 298, 309 (1985) *with Gardner v. McArdle*, 461 Fed. Appx. 64, 66 (2nd Cir. 2012) *and United States v. Alden*, 50 Fed. Appx. 869, 871 (9th

[8] Attachment B

Cir. 2002)("The defendant does not point to sufficient evidence either that the confession was coerced or involuntary, or that the officers employed unusual or improper interrogation techniques."). Under these circumstances, and if the prohibition on self-incrimination found in 10 U.S.C. § 948r is to be anything but dead letter, federal law enforcement officers should be required to provide the warnings that are "part of our national culture." *Dickerson*, 530 U.S. at 443-44; *United States v. Carignan*, 342 U.S. 36, 55 (1951)(Douglas, J., concurring)(During detention without arraignment, "the accused is under the exclusive control of the police, subject to their mercy, and beyond the reach of counsel or of friends. What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country—the free as well as the despotic, the modern as well as the ancient.").

"Even if police had warned appellant of his right to remain silent, such warning may well be meaningless in the coercive milieu of secret police interrogation." *Alston v. United States*, 348 F. 3d 72, 73 (D.C. Cir. 1965). But this Commission does not need to reach that question because here, experienced federal law enforcement officers, not only declined to provide the *Miranda* warnings that have been given to hundreds of other terrorism suspects, they also pointedly told Mr. Hadi al Iraqi he had no right to counsel prior to questioning. "Respect for law, which is the fundamental prerequisite of law observance, hardly can be expected of people in general if the officers charged with enforcement of the law do not set the example of obedience to its precepts. *Trilling v. United States*, 260 F. 2d 677, 690 (D.C. Cir. 1958)(*en banc*)(Bazelon, C.J., concurring).

"A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960). If *Miranda* warnings were

required to give effect to the Fifth Amendment's self-incrimination clause for the garden variety police interrogation, similar warnings are required to give effect to the self-incrimination clause found in 10 U.S.C. § 948r, especially where the accused specifically requested counsel.

7. Conclusion:

"[T]he *Miranda* rule reflects a principle fundamental to a democratic society. The Fifth Amendment protects *all* persons; it ensures that no individual need incriminate himself unless he chooses to speak in the unfettered exercise of his own will. *Miranda* is designed to make that protection meaningful for the man who has neither the education, the experience, nor the counsel that would enable him to make an informed decision." *United States v. Frazier*, 476 F. 2d 891, 906 (D.C. Cir. 1974)(*en banc*).

"Rights intended to protect all must be extended to all, lest they so fall into desuetude in the course of denying them to the worst of men as to afford no aid to the best of men in time of need." *Goldman v. United States*, 316 U.S. 129, 142 (1942)(Murphy, J., dissenting). The challenged statements must be suppressed for failure to comply with *Miranda*, the Fifth Amendment, and the M.C.A.

8. Oral Argument: The defense requests oral argument on this motion.

9. Witnesses: None

10. Conference with Opposing Counsel: The defense has conferred with the prosecution, and they object to this motion.

11. List of Attachments:

A. Certificate of Service

B. Excerpts from Executive Summary of SSCI Study of the Central Intelligence Agency's Detention and Interrogation Program

C. Excerpt of Statement of Mr. Hadi al Iraqi, dated 8 May 2007

D. Statement of Mr. Hadi al Iraqi, dated 22 January 2009

E. *Warsame* press release, dated 5 July 2011

Respectfully Submitted,

//s//
THOMAS F. JASPER, Jr., LtCol, USMC
Detailed Defense Counsel

//s//
ROBERT B. STIRK, Maj, USAF
Assistant Detailed Defense Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on 9 June 2015, I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

//s//
ROBERT B. STIRK, Maj, USAF
Assistant Detailed Defense Counsel

ATTACHMENT B

~~UNCLASSIFIED~~

~~TOP SECRET~~ [redacted] ~~NOFORN~~

Senate Select Committee on Intelligence

Committee Study of the Central Intelligence Agency's Detention and Interrogation Program

Foreword by Senate Select Committee on Intelligence Chairman Dianne Feinstein

Findings and Conclusions

Executive Summary

Approved December 13, 2012

Updated for Release April 3, 2014

Declassification Revisions December 3, 2014

~~TOP SECRET~~ [redacted] ~~NOFORN~~

~~UNCLASSIFIED~~

L. The Pace of CIA Operations Slows; Chief of Base Concerned About "Inexperienced, Marginal, Underperforming" CIA Personnel; Inspector General Describes Lack of Debriefers As "Ongoing Problem"

(~~TS//[redacted]//NF~~) In the fall of 2004, CIA officers began considering "end games," or the final disposition of detainees in CIA custody. A draft CIA presentation for National Security Council principals dated August 19, 2004, identified the drawbacks of ongoing indefinite detention by the CIA, including: the need for regular relocation of detainees, the "tiny pool of potential host countries" available "due to high risks," the fact that "prolonged detention without legal process increases likelihood of HVD health, psychological problems [and] curtails intel flow," criticism of the U.S. government if legal process were delayed or denied, and the likelihood that the delay would "complicate, and possibly reduce the prospects of successful prosecutions of these detainees."[867] CIA draft talking points produced a month later state that transfer to Department of Defense or Department of Justice custody was the "preferred endgame for 13 detainees currently in [CIA] control, none of whom we believe should ever leave USG custody."[868]

(~~TS//[redacted]//NF~~) By the end of 2004, the overwhelming majority of CIA detainees—113 of the 119 identified in the Committee Study—had already entered CIA custody. Most of the detainees remaining in custody were no longer undergoing active interrogations; rather, they were infrequently questioned and awaiting a final disposition. The CIA took custody of only six new detainees between 2005 and January 2009: four detainees in 2005, one in 2006, and one—the CIA's final detainee, Muhammad Rahim—in 2007.[869]

(~~TS//[redacted]//NF~~) In 2004, CIA detainees were being held in three countries: at DETENTION SITE BLACK in Country [redacted], at the [redacted] facility [redacted] in Country [redacted], as well as at detention facilities in Country [redacted]. DETENTION SITE VIOLET in Country [redacted] opened in early 2005.[870] On April 15, 2005, the chief of Base at DETENTION SITE BLACK in Country [redacted] sent the management of RDG an email expressing his concerns about the detention site and the program in general. He commented that "we have seen clear indications that various Headquarters elements are experiencing mission fatigue vis-à-vis their interaction with the program," resulting in a "decline in the overall quality and level of experience of deployed personnel," and a decline in "level and quality of requirements." He wrote that because of the length of time most of the CIA detainees had been in detention, "[the] detainees have been all but drained of actionable intelligence," and their remaining value was in providing "information that can be incorporated into strategic, analytical think pieces that deal with motivation, structure and goals." The chief of Base observed that, during the course of the year, the detention site transitioned from an intelligence production facility to a long-term detention facility, which raised "a host of new challenges." These challenges included the need to address

[867] CIA PowerPoint Presentation, CIA Detainees: Endgame Options and Plans, dated August 19, 2004.
[868] September 17, 2004, DRAFT Talking Points for the ADCI: Endgame Options and Plans for CIA Detainees.
[869] The CIA took custody of Abu Faraj al-Libi, Abu Munthir al-Magrebi, Ibrahim Jan, and Abu Ja'far al-Iraqi in 2005, and Abd al-Hadi al-Iraqi in 2006.
[870] The first detainees arrived in Country [redacted] in [redacted] 2003. CIA detainees were held within an existing Country [redacted] facility in Country [redacted] from [redacted] to [redacted] 2003, and then again beginning in [redacted] 2004. For additional information, *see* Volume I.

writing, and informed the Committee that "numerous false allegations of physical or threatened abuses and faulty legal assumptions and analysis in the report undermine its overall credibility."[981] The ICRC report was acquired by *The New York Review of Books* and posted on the *Review*'s website in April 2009.[982] The Committee found the ICRC report to be largely consistent with information contained in CIA interrogation records.[983]

3. The CIA Considers Future of the Program Following the Military Commissions Act

(~~TS//[redacted]//NF~~) As noted, in June 2006, the U.S. Supreme Court case of *Hamdan v. Rumsfeld* prompted the OLC to withdraw a draft legal memorandum on the impact of the Detainee Treatment Act on the CIA's enhanced interrogation techniques.[984] The administration determined that the CIA would need new legislation to continue to use the CIA's enhanced interrogation techniques.[985] The Military Commissions Act addressed the issues raised by the *Hamdan* decision and provided the president the authority to issue an Executive Order detailing permissible conduct under Common Article 3 of the Geneva Conventions. The bill passed the Senate on September 28, 2006, and the House of Representatives the following day.[986]

(~~TS//[redacted]//NF~~) On November [redacted], 2006, when Abd Hadi al-Iraqi was rendered to CIA custody, the draft Executive Order and an updated OLC memorandum had not yet been prepared.[987] Although Abd al-Hadi al-Iraqi was consistently assessed as being cooperative,

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[981] CIA Comments on the February 2007 ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody. At a Committee Hearing on April 12, 2007, CIA Director Hayden emphasized the close relationship the CIA had with the ICRC ("I believe our contacts with the ICRC have been very useful. I have met with [redacted], the [redacted] for the Red Cross, on several occasions at CIA. It appears that [redacted] is a runner and he's promised to bring his gear with him next time he comes to Langley so that we can jog on the compound."), but emphasized the errors in the ICRC report, stating: "While CIA appreciates the time, effort, and good intentions of the ICRC in forming its report, numerous false allegations of physical or threatened abuses and faulty legal assumptions and analysis in the report undermine its overall credibility." (*See* SSCI Hearing Transcript, dated April 12, 2007 (DTS# 2007-3158).) As is described in more detail in Volume II, Director Hayden's statements to the Committee regarding the ICRC report included significant inaccurate information.

[982] *See* Assets/nybooks.com/media/doc/2010/04/022/icrc—report.pdf and detainee reviews and reports in Volume III.

[983] CIA officers in RDG and OMS prepared a number of documents disputing the ICRC allegations. *See* document entitled, "CIA Comments on the February 2007 ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody." *See* Volumes I and III for additional information.

[984] Email from: [redacted]; to: [REDACTED]; cc: [redacted], John Rizzo; subject: FW: Summary of *Hamdan* Decision; date: June 30, 2006, at 4:44 PM.

[985] Acting Assistant Attorney General Bradbury told the Department of Justice's Office of Professional Responsibility (OPR) that officials from the Departments of State, Defense, and Justice met with the president and officials from the CIA and the NSC to consider the impact of the *Hamdan* decision, and that it was clear from the outset that legislation would have to be enacted to address the application of Common Article 3 and the War Crimes Act to the CIA interrogation program. As the OPR report noted, "*Hamdan* directly contradicted OLC's January 22, 2002 opinion to the White House and the Department of Defense, which had concluded that Common Article 3 did not apply to captured members of al Qaeda." *See* Department of Justice Office of Professional Responsibility; Report, Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of Enhanced Interrogation Techniques on Suspected Terrorists, July 29, 2009 (DTS #2010-1058).

[986] S. 3930 passed the Senate by a vote of 65-34 (Record Vote Number: 259) and the House by a vote of 250-170 (Roll no. 508). It was signed into law on October 17, 2006.

[987] [redacted] 6361 [redacted]

interrogators also believed he was withholding information on operational plots and the locations of high-value targets.[988] The CIA believed his [redacted] in February 2007 supported this conclusion,[989] prompting discussions at CIA Headquarters about the possible use of the CIA's enhanced interrogation techniques against him. By the end of the month, however, the CIA had determined there was "insufficient intelligence…that [Abd al-Hadi al-Iraqi] possesses actionable information…to justify the use of" the CIA's enhanced interrogation techniques.[990]

(~~TS//[redacted]//NF~~) In October 2006, a panel of CIA interrogators recommended that four CIA enhanced interrogation techniques—the abdominal slap, cramped confinement, nudity, and the waterboard—be eliminated, but that the remainder of the interrogation techniques be retained.[991] Under this proposal, the CIA would have been authorized to subject detainees to dietary manipulation, sleep deprivation, the facial slap, the facial grasp, the attention grab, walling, stress positions, and water dousing. There are few CIA records describing the panel's deliberations, or the CIA's response to its recommendations. The panel proposed dropping two of the CIA's enhanced interrogation techniques—nudity and the abdominal slap—that the CIA director had proposed retaining in March 2006, while recommending that the CIA retain three other techniques— walling, stress positions, and water dousing—that had not otherwise been requested for retention.[992]

4. The CIA Develops Modified Enhanced Interrogation Program After Passage of the Military Commissions Act

(~~TS//[redacted]//NF~~) In the spring of 2007, the OLC completed a draft of a legal opinion concluding that the use of the CIA's seven proposed enhanced interrogation techniques—sleep deprivation, nudity, dietary manipulation, facial grasp, facial slap, abdominal slap, and the attention grab—would be consistent with the requirements of Common Article 3 of the Geneva Conventions and the Military Commissions Act. This draft generated significant disagreement between the State Department's legal advisor, John Bellinger, and the Acting Assistant Attorney General Steven Bradbury, resulting in Secretary of State Rice refusing to concur with the proposed Executive Order.[993]

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[988] *See*, for example, [redacted] 1335 (021946Z NOV 06); [redacted] 1340 (041114Z NOV 06); [redacted] 1343 (041805Z NOV 06); [redacted] 1370 (071318Z NOV 06); [redacted] 1574 (230910Z NOV 06); [redacted] 1624 (271250Z NOV 06); [redacted] 1703 (040918Z DEC 06); [redacted] 1860 (181622Z DEC 06); [redacted] 1931 (081606Z JAN 07); [redacted] 1956 (151211Z JAN 07); [redacted] 2007 (251057Z JAN 07).

[989] [redacted] 2065 (081633Z FEB 07)

[990] Email from: [redacted], [redacted]CTC/LGL; to: [redacted], [redacted], [REDACTED], [redacted]; subject: What needs to occur before we ask for EITs on [redacted]; HEADQUARTERS [redacted] (272015Z FEB 07); date: February 9, 2007.

[991] *See* October 23, 2006, Memorandum for Director, CIA from [redacted], Chief, [redacted].

[992] *See* October 23, 2006, Memorandum for Director, CIA from [redacted], Chief, [redacted] and DCIA Talking Points for 9 March 2006 Principals Committee Meeting.

[993] February 9, 2007, letter from John B. Bellinger III, Legal Adviser, Department of State, to Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice. At the time, there were internal disagreements within the CIA about whether the CIA should have a detention and interrogation program. An April 2007 Sametime communication between the chief of CTC and another senior CIA leader described these disagreements and how CIA leadership responded to them. According to [redacted], "[REDACTED] was carping to [REDACTED] and Jose [Rodriguez] last Friday… that he and [Michael] Sulick (!) had a long talk

#	*CIA Detainees*	*Date of Custody*	*Days in CIA Custody*
110	**Janat Gul**	[redacted]2004	92[redacted]
111	**Ahmed Khalfan Ghailani**	[redacted]2004	73[redacted]
112	**Sharif al-Masri**	[redacted]2004	81[redacted]
113	Abdi Rashid Samatar	[redacted]2004	65[redacted]
114	**Abu Faraj al-Libi**	[redacted]2005	46[redacted]
115	Abu Munthir al-Magrebi	[redacted]2005	46[redacted]
116	Ibrahim Jan	[redacted]	31[redacted]
117	**Abu Jn'far al-Iraqi**	[redacted]2005	28[redacted]
118	Abd al-Hadi al-Iraqi	[redacted]2006	17[redacted]
119	**Muhammad Rahim**	[redacted]2007	24[redacted]

~~TS[redacted]NF~~

KEY

Bold Text: Detainees in bold text were subjected to the CIA's enhanced interrogation techniques.

Italics Text: Detainees in italics have not been previously acknowledged by the CIA to the SSCI.

#: Detainee number on main detainee spreadsheet; based on date of CIA custody. Number is based on a designation made by the SSCI, not the CIA.

Sources: CIA Fax to SSCI Committee Staff, entitled, "15 June Request for Excel Spreadsheet," June 17, 2009 (DTS #2009-2529); CIA detainee charts provided to the Committee on April 27, 2007; document in Committee records entitled, "Briefing Charts provided to committee Members from CIA Director Michael Hayden at the closed Hearing on April 12, 2007, concerning EITs used with CIA detainees, and a list of techniques" (DTS #2007-1594, hearing transcript at DTS# 2007-3158); and CIA operational cables and other records produced for the Committee's Study of the CIA's Detention and Interrogation Program.

** Gul Rahman, listed as detainee 24, was the subject of a notification to the Senate Select Committee on Intelligence following his death at DETENTION SITE COBALT; however, he has not appeared on lists of CIA detainees provided to Committee.

ATTACHMENT C

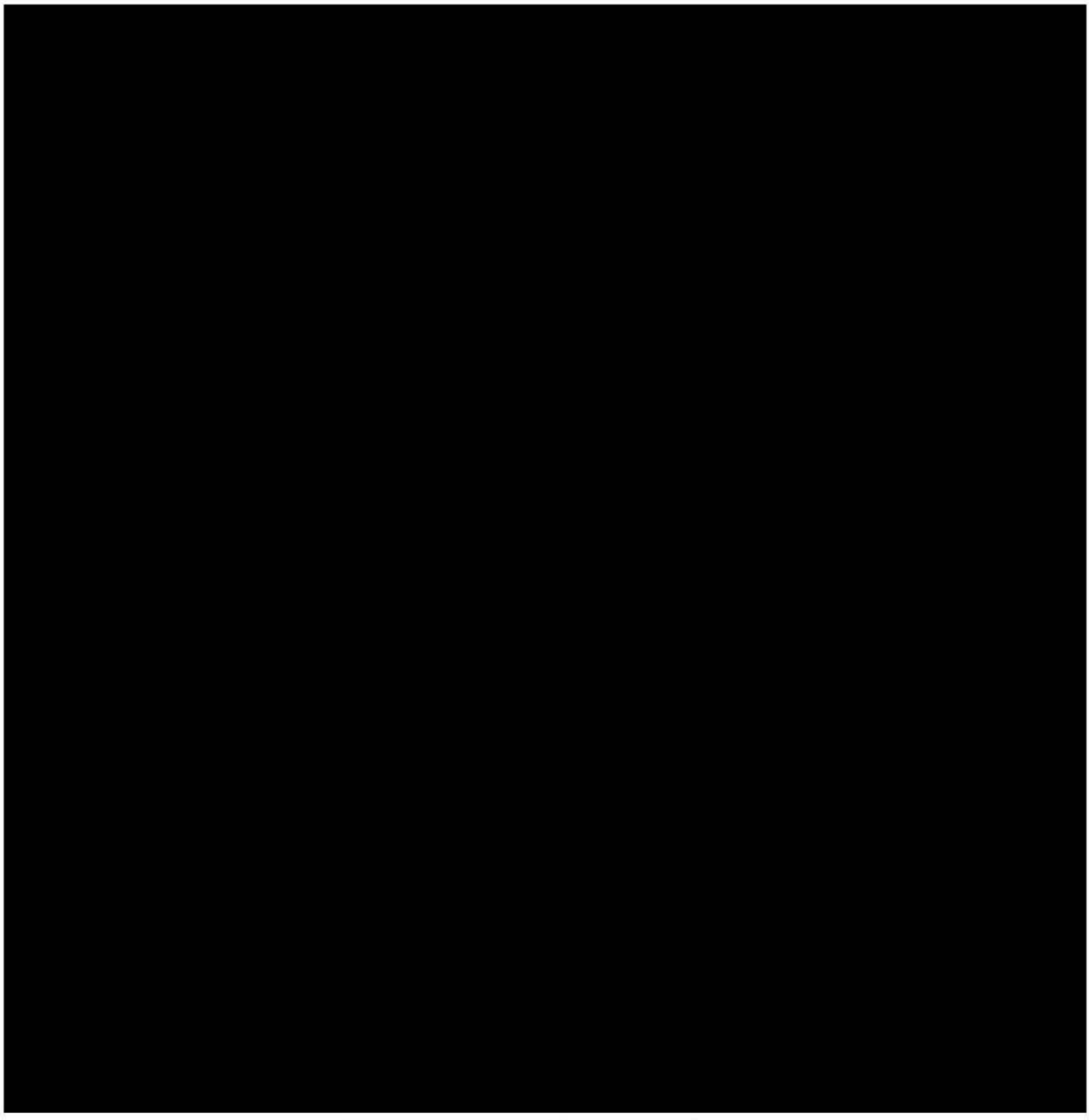
[redacted]

[redacted]

ATTACHMENT D

[redacted]

~~UNCLASSIFIED//FOUO-LES~~



~~UNCLASSIFIED//FOUO-LES~~

~~UNCLASSIFIED//FOUO-LES~~

~~UNCLASSIFIED//TOUO-LES~~

[redacted]

ATTACHMENT E

United States Attorney
Southern District of New York

FOR IMMEDIATE RELEASE
JULY 5, 2011

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ACCUSED AL SHABAAB LEADER CHARGED WITH PROVIDING MATERIAL SUPPORT TO AL SHABAAB AND AL QAEDA IN THE ARABIAN PENINSULA

PREET BHARARA, the United States Attorney for the Southern District of New York, JANICE K. FEDARCYK, the Assistant Director-in-Charge of the New York Office of the Federal Bureau of Investigation ("FBI"), and RAYMOND W. KELLY, the Police Commissioner of the City of New York ("NYPD"), announced today that AHMED ABDULKADIR WARSAME, aka "KHATTAB," aka "FARAH," aka "ABDI HALIM MOHAMMED FARA," aka "FAREH JAMA ALI MOHAMMED," has been indicted on charges of providing material support to al Shabaab and al Qaeda in the Arabian Peninsula ("AQAP"), two designated foreign terrorist organizations, as well as conspiring to teach and demonstrate the making of explosives, possessing firearms and explosives in furtherance of crimes of violence, and other violations.

WARSAME, a Somali national in his mid-twenties, was captured in the Gulf region by the U.S. military on April 19, 2011, and was questioned for intelligence purposes for more than two months. Thereafter, WARSAME was read his Miranda rights, and after waiving those rights, he spoke to law enforcement agents for several days. Warsame arrived in the Southern District early this morning, and was arraigned before U.S. District Judge COLLEEN McMAHON in Manhattan federal court earlier today.

Manhattan U.S. Attorney PREET BHARARA said: "As alleged, Ahmed Warsame was a conduit between al Shabaab and al Qaeda in the Arabian Peninsula -- two deadly terrorist organizations -- providing material support and resources to them both. Protecting Americans from the threat of terrorism both here and abroad is, and always will be, our number one priority."

FBI Assistant Director-in-Charge JANICE K. FEDARCYK said: "This defendant is charged not only with providing material support to two notorious terrorist organizations, but with using automatic weapons and explosives to commit violence in the name of their 'cause.' The mission of the FBI is to protect innocent lives not just in the United States, but everywhere the law permits us to."

NYPD Commissioner RAYMOND W. KELLY said: "Capturing and bringing Warsame to justice is a body blow to any al Qaeda affiliate that aspires to fill the vacuum of a diminished al Qaeda central. I want to congratulate our military and the NPYD detectives and FBI agents whose collaborative work on the Joint Terrorism Task Force helps to protect New York and the rest of the nation from terrorism on a daily basis."

According to the Indictment unsealed today in the Southern District of New York:

From at least 2007 until April 2011, WARSAME conspired to provide and provided material support to al Shabaab, resulting in the death of at least one person. He allegedly fought on behalf of al Shabaab in Somalia in 2009 and provided other forms of support to the terrorist organization, including explosives, weapons, communications equipment, expert advice and assistance, and training. In addition, WARSAME is alleged to have possessed and used destructive devices, machine guns, and an AK-47 semi-automatic assault weapon in Somalia in furtherance of crimes of violence.

The Indictment further alleges that from about 2009 until April 2011, WARSAME conspired to provide, and provided material support to AQAP, in the form of money, training, communications equipment, facilities, and personnel. While he was in Yemen in 2010 and 2011, WARSAME allegedly received explosives and other military-type training from AQAP. In addition, he allegedly possessed and used grenades and an AK-47 semi-automatic assault weapon in Yemen in furtherance of crimes of violence.

According to the charges, WARSAME also worked to broker a weapons deal with AQAP on behalf of al Shabaab. He is also charged with conspiring from about 2009 until April 2011 to teach and demonstrate the making of explosives, destructive devices and weapons of mass destruction, and to distribute such information to others.

Al Shabaab was designated by the U.S. Department of State as a foreign terrorist organization in February 2008. AQAP was so designated in January 2010.

* * *

The indictment charges WARSAME with nine separate counts:

- Count One: Conspiracy to provide material support to al Shabaab, causing death;
- Count Two: Providing material support to al Shabaab, causing death;
- Count Three: Use, carrying, and possession of firearms (machine guns and destructive devices) in furtherance of crimes of violence (in Counts One and Two);
- Count Four: Conspiracy to provide material support to AQAP;
- Count Five: Providing material support to AQAP;
- Count Six: Use, carrying, and possession of firearms (machine guns and destructive devices) in furtherance of crimes of violence (in Counts Four and Five);
- Count Seven: Conspiracy to teach and demonstrate the making of explosives;
- Count Eight: Conspiracy to receive military-type training from AQAP; and
- Count Nine: Receiving military-type training from AQAP.

If convicted, WARSAME could face a mandatory sentence of life in prison. The maximum sentences for each of the charges is reflected in the attached chart.

Mr. BHARARA praised the extraordinary investigative work of the JTTF, which principally consists of agents from the FBI and detectives from the NYPD. He also thanked the Department of Defense, the National Security Division of the Department of Justice, and the other agencies that provided assistance.

This case is being handled by the Terrorism and International Narcotics Unit of the U.S. Attorney's Office for the Southern District of New York, with assistance from the Counterterrorism Section of the Justice Department's National Security Division. Assistant U.S. Attorneys BENJAMIN NAFTALIS and ADAM S. HICKEY are in charge of the prosecution.

The charges contained in the Indictment are merely allegations, and the defendant is presumed innocent unless and until proven guilty.

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U.S. v. Warsame - Maximum Penalties

Statute (Title 18)	Count	Description	Maximum Penalties
§ 2339B	1 2	Conspiracy to provide material support to a foreign terrorist organization, and provision of material support to a foreign terrorist organization, causing death (al Shabaab).	Maximum of life in prison.
§ 924(c)	3	Use, carrying, and possession of firearms (machine guns and destructive devices) in furtherance of crimes of violence (Counts 1 and 2).	Mandatory minimum of 30 years in prison (consecutive to any other term). Maximum of life in prison.
§ 2339B	4 5	Conspiracy to provide material support to a foreign terrorist organization, and provision of material support to a foreign terrorist organization (AQAP).	Maximum of 15 years in prison.
§ 924(c)	6	Use, carrying, and possession of firearms (machine guns and destructive devices) in furtherance of crimes of violence (Counts 4 and 5).	Mandatory minimum of 30 years in prison (consecutive to any other term). Maximum of life in prison.*
§§ 842(p), 844(n)	7	Conspiracy to teach and demonstrate the making of explosives.	Maximum of 20 years in prison.

* A second 18 U.S.C. § 924(c) conviction in this context would carry a mandatory term of life in prison.

§§ 2339D, 371	8	Conspiracy to receive military-type training from a foreign terrorist organization.	Maximum of five years in prison.
§ 2339D	9	Receipt of military-type training from a foreign terrorist organization.	Maximum of 10 years in prison.