

UNITED STATES OF AMERICA v. Mohammed Jawad	Government Response to Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907 4 June 2008
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1. Timeliness: This motion is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court.

2. Relief Sought: The Accused seeks dismissal of all charges and specification with prejudice; the Government asks the Military Judge to deny the motion as a matter of law.

3. Overview: The Government asks the Military Judge to deny the instant motion as a matter of law. Assuming for the purposes of the motion that the allegations regarding Mr. Jawad's treatment during the period 7 May 2004 through 20 May 2004 to be true,¹ neither the Military Commissions Act of 2006, 10 U.S.C. § 948a et seq. (MCA) – the sole and controlling law applicable to the resolution of the motion – nor any other analogous or persuasive case law, military or federal, authorizes or warrants the relief sought.² On the contrary, the MCA specifically contemplates that detainees may have been subjected to “torture”³ or coercive techniques in the past, and provides *not* for the dismissal of charges, but rather that statements obtained by torture are inadmissible, and that even statements obtained through coercion may nonetheless be admitted into evidence if the Military Judge makes certain findings about the

¹ The motion as a whole seems to imply that counsel and those military personnel now assigned to Joint Task Force – Guantanamo (JTF – GTMO) have some personal, moral or ethical responsibility for actions allegedly committed by others over four years ago. The tone of the motion also seems to imply that those now involved in the Military Commissions or assigned to JTF-GTMO support, condone, or defend detainee abuse. These defense suppositions are untrue. While counsel must, as a matter of professional responsibility and military obligation, address the allegations in the defense motion, declining to accede to the defense motion and its requested relief, which Government counsel in good faith and reasonably disputes, cannot be interpreted as defending the underlying conduct itself.

² Again, the MCA specifically states that the Uniform Code of Military Justice, 10 U.S.C. § 801 et seq., (UCMJ) does not apply to the MCA, and any decisions interpreting the UCMJ, are not binding on Military Commissions. MCA, § 948b(c).

³ The defense motion uses the incendiary word “torture,” which, as the defense acknowledges, is a legal term with a particularized definition under the MCA and United States law (18 U.S.C. § 2340(2)). Def. Mot. at fn. 14. Even under the most expansive interpretation of these definitions, the conduct Mr. Jawad complains of cannot, as a matter of law, be considered torture. The Government asks the Military Judge to make this finding based the instant record and as a matter of law.

statements, set forth in the MCA. MCA, § 948r; see also Military Commission Rule of Evidence (MCRE) 304. Thus the Military Judge lacks the authority to grant the defense's requested relief under the applicable law.

If the Military Judge determines, notwithstanding the MCA's clear provisions, that it possesses some inherent or unstated equitable power to dismiss otherwise proper charges based upon alleged coercion, the Military Judge should decline to do so based upon the facts of this case. As described below, Mr. Jawad is accused of attempting to murder three individuals by tossing a grenade into his victims' passing vehicle. His victims suffered serious bodily harm, blinding one of them in his left eye, and forcing all three victims to undergo dozens of surgeries and prolonged periods of physical rehabilitation. Balanced against two weeks of sleep deprivation occurring four years ago, the request that the charges in this case be dismissed is without any legal or equitable support.

4. Burden and Standard of Proof: Under RMC 905(c), the defense bears the burden of proof by a preponderance of the evidence.

5. Facts:

A. On 17 December 2002, Mohammed Jawad threw a Soviet-manufactured hand grenade into a vehicle in which two U.S. Special Forces sergeants and their Afghan interpreter were riding. The victims had been driving through the streets of Kabul on a humanitarian mission. Jawad was dressed as an Afghan civilian, and he was approximately 18 years old at the time.⁴

B. Before throwing the grenade through the rear window of the vehicle in which the victims were riding, Jawad permitted other Coalition soldiers (including Turks and Germans) to pass by so that he could target Americans. During his subsequent interviews by Afghan and Coalition forces, Jawad admitted that he threw the grenade and boasted that, if given the chance, he would do so again.

⁴ Jawad has given conflicting accounts of his true age in December 2002—sometimes claiming to be 19 years old, at other times, 17; recently, he has taken to claiming to have been 16 years old at the time of the attack. A bone scan study later determined his age at the time of the attacks to be approximately eighteen.

C. The two Special Forces soldiers—one of whom almost bled to death—have endured dozens of surgeries and continue to suffer the effects of their wounds today. Their Afghan interpreter is now blind in his left eye, and underwent four surgeries at Walter Reed Army Medical Center. By contrast, photographs and medical examinations taken and conducted within hours after Jawad’s apprehension establish that he suffered no physical injuries before or after his capture.

D. The Special Forces unit appointed its battalion chaplain as a “human rights observer” to ensure that U.S. service members respected Jawad’s rights at all times during his subsequent interview by US forces, during which Jawad again confessed to having thrown the grenade.

E. Jawad himself claimed to be affiliated with Hezbollah – e Islami Gulbuddin, or “HIG,” a terrorist organization specially-designated as such by the US Department of State in February, 2003, presumably as a result of terrorist attacks carried out by its members in the Kabul area, of which Jawad’s may been among the first.

6. Law and Argument:

The resolution of the defense motion requires little discussion. The defense itself admits that there is nothing in the MCA or the Manual for Military Commissions authorizing dismissal based upon the post-apprehension coercion or even “torture” of a detainee. (Def. Mot. at 14.) Indeed, it is almost axiomatic that the MCA resulted from the recognition of the unique obstacles in bringing war criminals to justice, e.g., the difficulties collecting evidence on the battlefield, the necessity for fluid, ongoing intelligence collection,⁵ and the like. The MCA, passed by wide margins in both houses of Congress in 2006, recognized, as did the Detainee Treatment Act of 2005, also recognizes the harsh reality that an ongoing war sometimes necessitates (or results in) questioning of detainees using techniques that would not be permissible or appropriate had the

⁵ The defense avers that in May 2004 “there was no good basis to believe Mr. Jawad possessed critical intelligence,” as though Mr. Jawad’s affiliation with HIG, his admitted training at a HIG camp, and other factors, should have been ignored or that our military should have merely divined that Mr. Jawad had been entirely forthcoming about these terrorist affiliations in earlier questioning. Def. Mot. at 9. In fact, HIG has been declared a specially-designated terrorist organization by the US Department of State, and its founder, Hekmaktyar Gulbuddin, remains at large, four years after Mr. Jawad’s treatment in May 2004. To believe that there was no basis for continuing to question Mr. Jawad is unsupported.

subject of the questioning been a US citizen with Constitutional protections.⁶ The provisions in the MCA and the MCRE permitting the admissibility of statements obtained through coercive techniques are products of this recognition, as unsavory or regrettable as a realistic view of war and its consequences may seem. MCA, § 948r; MCRE 304.

The only rational conclusion from MCA's direction to the Commissions regarding the use of coerced statements is that dismissal of Commissions charges is not authorized; the only authorized remedy remains suppression of the statements utilizing the procedures and standards set forth in the MCA and the MCRE.

The defense implicitly concedes this conclusion by its remarkable assertion that its selective reading of what it calls the "Working Group report" (WG) – a broad report of investigation with which the defense candidly but ironically admits it does not fully endorse because the WG, in the defense's view, expresses support for interrogation techniques that are "too harsh" (Def. Mot. at fn. 9) – establishes the standards applicable to the defense motion. Def. Mot. at 10. However, "[t]he military, like the Federal and state systems, has hierarchical sources of rights. These sources are the Constitution of the United States; Federal Statutes, including the Uniform Code of Military Justice; Executive Orders containing the Military Rules of Evidence; Department of Defense Directives; service directives; and Federal common law." *United States v. Lopez*, 35 M.J. 35, 39 (CMA 1992). The WG report, a policy document at best, cannot serve as a basis for deciding the defense's motion.

The defense's reliance on RMC 907 is similarly misplaced. RMC 907 enumerates the bases for dismissal of Military Commissions charges; allegations of coercive treatment are not among them. Further, the defense cannot cite a *single* case where a dismissal of charges under the UCMJ for post-apprehension government misconduct has been upheld. *See* Def. Mot. pp. 14-16. Although dismissal under RCM 907 for unlawful pre-trial confinement is theoretically possible, as the defense notes in citing *United States v. Fulton*, 55 M.J. 88 (CAAF 2001) (Def. Mot. at 15), a diligent search of the case law has disclosed no appellate opinion upholding any such dismissal.

⁶ Again, this is not to imply that Government counsel supports Mr. Jawad's treatment or detainee abuse under any circumstances.

Even under US Constitutional jurisprudence,⁷ dismissal as a remedy for harsh post-arrest treatment is a rarity, even in instances where the post-arrest treatment vastly exceeded the conditions alleged by the accused in this case.

In *Chavez v. Martinez*, 538 U.S. 760 (2003), for example, the Court rejected the Ninth Circuit's ruling that "the mere use of compulsive questioning, without more, violates the Constitution." *Id.* at 767. Furthermore, there is no Fifth Amendment violation when coerced statements are not used later in criminal proceeding. "[M]ere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." *Id.* at 769.

In *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966), the government used a rectal probe in an effort to uncover narcotics thought to be concealed there. When this proved unsuccessful, a physician placed saline solutions in tube forced down the suspect's throat. The trial court suppressed the evidence on the ground that use of the evidence would "shock the conscience." *Id.* at 876.

The Ninth Circuit rejected this view, explaining, "[i]t would shock the conscience of law abiding citizens if the officers, with the knowledge these officers had, were frustrated in the recovery and use of this evidence. It is shocking to know that these appellants swallowed narcotics to smuggle it into and through the United States for sale for profit, and chose to run the risk of the lethal substance being freed in their stomachs. To paraphrase Judge Kaufman in *United States v. Guerra*, 334 F.2d 138, 147 (2 Cir. 1964):

"If we were mechanically to invoke *Massiah (Rochin)* to reverse this conviction, we would transform a meaningful expression of concern for the rights of the individual into a meaningless mechanism for the obstruction of justice."

Id. (Internal citation omitted.)

Other federal cases are in accord:

⁷ Of course, no court has yet held that the US Constitution applies to the aliens held at Guantanamo.

In *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984), the court held that force and physical abuse to locate kidnap victim did not violate due process:

We do not by our decision sanction the use of force and coercion by police officers. Yet this case does not represent the typical case of unjustified force. 6 We did not have an act of brutal law enforcement agents trying to obtain a confession in total disregard of the law. This was instead a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death. This record provides overwhelming evidence to support the conclusion that appellant understood his rights, had a clear and free mind not dominated by the earlier physical abuse and voluntarily made his confession to the police.

Id. at 773.

Thus the remedy the defense requests lacks any precedent, in military or federal law, even applying the greater protections afforded US citizens under the Constitution.

Moreover, the defense's assertion that there is no remedy for coercive treatment of a detainee before trial by Military Commission, is simply wrong. Again, the "remedy" is expressed in the MCA and MCRE themselves: suppression of statements derived as a result of such treatment.

Finally, Mr. Jawad's treatment from 7 May 2004 through 20 May 2004 – for whatever reason, and however it proceeded – may be unjustifiable coercion that resulted in inadmissible statements or other adverse consequences.⁸ The remedy sought, however, is unauthorized and/or inappropriate. US forces did not snatch Mr. Jawad, who resided in Pakistan until he joined HIG, from the streets of Kabul. Afghan police arrested Mr. Jawad at gunpoint after Mr. Jawad threw his grenade in an attempt to kill three human beings. The Prosecution will prove beyond a reasonable doubt that Mr. Jawad did so in violation of the MCA, and that he left his victims maimed, suffering unimaginable pain, and consigned them to a lifetime of suffering. Mr. Jawad and should be tried for those alleged crimes before a Military Commission.

⁸ Even the defense does not know the present state of Mr. Jawad's mental health; a motion for a mental examination – which the Government has not opposed in relevant part – is pending. Def. Mot. at 14.

7. Request for Oral Argument: Because the Government concedes the essential facts upon which the defense motion is premised, there is no need for an evidentiary hearing. Oral argument is appropriate unless the Military Judge is prepared to rule based on the pleadings.

8. Request for Witnesses: The prosecution opposes, obviously, the defense's request for witnesses. Conditions and events at Guantanamo are among the most investigated in the entire Global War on Terror. There is no showing at all that the high-ranking officers and former Secretary of Defense Rumsfeld are material or necessary.

9. Conference with Opposing Counsel: We have conferred, and respectfully disagree with each other.

10. Request for public release: The prosecution opposes the premature release of any of the pleadings before the Commission.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Darrel J. Vandeveld', with a stylized, cursive script.

Darrel J. Vandeveld

LTC, JA, USAR

Trial Counsel