MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI

AE 335B

DEFENSE REPLY TO THE GOVERNMENT'S RESPONSE TO THE DEFENSE MOTION TO SUPPRESS CUSTODIAL STATEMENTS MADE BY MR. AHMED MOHAMMED AHMED HAZE (AL-DARBI) TO FEDERAL LAW ENFORCEMENT AGENTS BETWEEN 24 AUGUST - 3 SEPTEMBER 2002 AND DERIVATIVE EVIDENCE, AS REQUIRED BY 10 U.S.C. § 948R AND THE FIFTH AMENDMENT

2 February 2015

1. Timeliness: This reply is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.e.(1).

2. Reply:

A) 10 U.S.C. § 948r is a Congressionally Mandated Remedy Created to Prevent the Use of Any Evidence Derived From Torture in a Military Commission.

10 U.S.C. §948r and M.C.R.E. 304 have no counterpart in federal or military practice. Because the use of torture or "enhanced interrogation techniques" represented such a dramatic deviation from American values and principles of the rule of law, Congress enacted 10 U.S.C. §948r. This statutory remedy demands that evidence obtained and derived from such practices be excluded in any trial by military commission.

Congressional concern over the abusive "treatment of enemy combatants and terrorists suspects detained in Iraq, Afghanistan, and other locations" manifested itself in the "McCain Amendment" to the enacted Detainee Treatment Act of 2005. (Attachment A at 2, 4; 42 U.S.C. § 2000dd). The treatment at issue was defined broadly by Congress, which sought to "define[d]

"cruel, unusual, and inhuman treatment or punishment" to cover those acts prohibited under the Fifth, Eighth, and Fourteenth Amendments." (Attachment A at 6,7). The 2009 MCA specifically incorporates the McCain Amendment's definition of "cruel, inhuman or degrading treatment" and expands it to include "torture." 10 USC § 948r.

Whereas the judicially created exclusionary remedy for violations of the 4th and 5th Amendments are more narrowly tailored and require standing, this statutory provision applies to *any* evidence obtained through the use of torture or cruel, inhuman, or degrading practices. This includes any evidence obtained from a third party or evidence obtained by non-U.S. law enforcement officials using such practices, a much more expansive and deliberate protection than the traditional exclusionary remedy under the Constitution. M.C.R.E. 304[1] comports with the Congressional directive in 10 U.S.C. § 948r in that the rule first and foremost requires the exclusion of any statement obtained through torture, or by cruel, inhuman, or degrading treatment. M.R.C.E. 304(a)(3), again a rule with no federal or military counterpart, specifically grants the accused the right to challenge the admissibility of any evidence derived from a third party that were produced by coercion.

The clear intent of Congress was to preclude the government from profiting from torture in the military commission process and ensure some semblance of traditional American due process was followed. It is no secret that the use of torture and cruel, inhuman, and degrading treatment produces inherently unreliable information. The Senate Select Committee on Intelligence's recently released Committee Study of the Central Intelligence Agency's Detention

[1] The rule simply states: "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." M.C.R.E. 304(d), emphasis added. The meaning of "this rule" is clear- it encompasses any challenge under M.C.R.E. 304. The prosecution provides no legal authority to deviate from the plain language of the rule, which places the burden of proof for admissibility on the prosecution. The defense has raised the issue of admissibility under M.C.R.E. 304, therefore the burden of proof remains with the prosecution.

and Interrogation Program ("Torture Report"), states: "As the Study describes… the CIA itself determined from its own experience with coercive interrogations, such techniques do not produce intelligence, will probably result in false answers, and had historically proven to be ineffective." (Forward, page 3 of 6).[2]

Not only is this evidence inherently unreliable, the methods used to obtain such evidence are a black mark on American history and permitting the use of this evidence in any military commission would be akin to condoning these methods. Because the use of torture and cruel, inhumane, and degrading treatment is such a drastic departure from American values and ultimately creates unreliable statements, Congress sought to eradicate any evidence obtained and derived from its use within the military commissions.

The prosecution's reliance on the judicially crafted remedies to 4th and 5th Amendment violations ignores the clear mandate set forth in 10 U.S.C. §948r. The prosecution's attempt to inject "standing"[3] as a requisite to this clear prohibition of evidence of any type that is the product of torture frustrates the clear intent of Congress. The plain definition of the word derivative is "something that comes from something else; a substance that is made from another substance."[4] Simply put, derivative evidence from torture evidence is also evidence that comes from torture. When Congress banned the use of any evidence obtained from torture or cruel, inhuman, or degrading treatment, it necessarily banned the use of any derivative evidence from such treatment as well. The prosecution's attempt to cast this as a standing issue disregards the

[2]The unclassified executive summary in its entirety is available at: http://www.intelligence.senate.gov/study2014/sscistudy1.pdf, last accessed 30 January 2015.

[3] To be clear, the defense asserts that Mr. Al-Nashiri has standing to challenge any evidence that was obtained through the use of torture or cruel, inhuman, or degrading methods, regardless of the source, under 10 U.S.C. § 948r. This statute grants standing to challenge evidence obtained from a third party, as does M.C.R.E. 304(a)(1) and M.C.R.E. 304(a)(3). The prosecution ignores this, and instead suggests the Commission restrict the statute by operating under judicial framework created for Constitutional 4th and 5th Amendment violations. While the defense concurs that Constitutional protections do apply in this Commission, in this instance the statute provides broader protections and is controlling.

[4] http://www.merriam-webster.com/dictionary/derivative (Last accessed 30 January 2015)

purpose of 10 U.S.C. § 948r. For example, under the prosecution's proposed "standing" requisite, if persons A, B, and C were tortured and gave statements which led to evidence, the prosecution would still benefit from the use of torture, so long as the torture evidence obtained from person A was only used against person B and person C (and vice versa). A hypothetical person D could be convicted with the statements of A, B and C. If that were the case, the Congressional prohibition on the use of evidence derived from torture would be meaningless. Congress clearly did not intend for such a result. Congress demanded the end of any use of torture and cruel, inhuman, and degrading treatment period and enacted legislation to ensure that any evidence derived from its use be inadmissible in a military commission. Standing is no exception to this prohibition. To inject standing into the statutorily created remedy and prohibition against using such evidence would be to create a judicial exception that would swallow the rule.

B) Mr. Al-Darbi's 2002 Statements Were a Product of Torture and any Subsequent Statements by Mr. Al-Darbi Are the Derivative Product of Torture

The prosecution asks this Commission to operate in a historical vacuum in asking the Commission to ignore the 2002 statements of Mr. Al-Darbi.[5] The evidentiary rules do not permit such a myopic view—all underlying circumstances and history must be examined when determining the voluntariness of any statement. While the prosecution asks this court to turn a blind eye to the deplorable abuse that created the 2002 statements of Mr. Al-Darbi, it is this very treatment that created subsequent 2007 statements and possible testimony in this Commission. Any statement by Mr. Al-Darbi would be obtained and derived from the use of torture, or at the very least cruel, inhuman, and degrading practices. Additionally there is not sufficient

[5] Although the prosecution now claims the 2002 statements are irrelevant, these statements were contained in the referral binder, Tab N, which was provided to and considered by the Convening Authority in his determination to refer charges against Mr. Al-Nashiri.

attenuation from the 2002 statements to render any subsequent statement from Mr. Al-Darbi voluntary. These statements are intertwined; all of these statements are a product of torture, or at a minimum cruel, inhuman, or degrading practices and therefore inadmissible in this Commission.

Before the Commission can rule on the voluntariness of Mr. Al-Darbi's statements and testimony, it must allow a full evidentiary hearing on the matter. A fair hearing is necessary to determine both the underlying factual issues and the voluntariness of Mr. Al-Darbi's statements. Based on the discovery provided to the defense thus far, albeit incomplete and "ongoing" according to the prosecution's latest assertions in AE333A and AE319N, there is strong evidence that indicates Mr. Al-Darbi's statements and testimony are the product of coercion and should be ruled inadmissible under M.C.R.E. 304 and 10 U.S.C. §948r. Notably, nowhere in the prosecution's response does it deny that Mr. Al-Darbi was subjected to torture or cruel, inhuman, or degrading practices, nor that the information obtained from this abusive treatment lead to the apprehension of Mr. Al-Nashiri. Instead they submit—while simultaneously denying the relevance of the 2002 statements—that even arguing this causal connection "would actually provide reliability, credibility, and probative weight to the very statements the defense seeks to suppress." AE 335A at 8. This ignores the simple fact that any evidence obtained from the use of torture, or cruel, inhuman, or degrading treatment is inadmissible under the rules; reliability is irrelevant. "Whether a confession was made freely, voluntarily, and without compulsion or inducement of any sort is distinct from the question of whether the confession is accurate or reliable." *United States v. Karake*, 443 F. Supp. 2d 8, 50 (D.D.C. 2006)(citations omitted).

"The critical question with respect to attenuation is not the length of time between a previously coerced confession and the present confession, it is the length of time between the

removal of the coercive circumstances and the present confession." *Karake*, 443 F. Supp. 2d at 89. Mr. Al-Darbi's 2002 statements were the subject of torture, or at a minimum cruel, inhuman, and degrading treatment. The treatment of Mr. Al-Darbi prior to these statements was so deplorable that it resulted in the court-martial of PFC Damien Corsetti. This coercive treatment did not end after the 2002 statements and the coercive circumstances of Mr. Al-Darbi's remained present when he was interrogated by federal agents in Guantanamo Bay. In his July 2009 declaration, Mr. Al-Darbi vividly describes the ongoing abuse and states "I made numerous false statements to the interrogators at Bagram and Guantanamo because of the abuse and coercion I suffered." Attachment B at 8. He clearly repudiates all of his statements made prior to 2009, to include the 2007 statement the government dismissively claims is not related to treatment in 2002.

The prosecution ignores that the facts and circumstances involved with the 2002 treatment of Mr. Al-Darbi, American law enforcement and military members at Bagram, undisclosed rendition sites, and GTMO, were also present during Mr. Al-Darbi's interrogation in 2007. These constant strains were also in place when Mr. Al-Darbi signed a plea agreement instead of continuing to face indefinite detention at the hands of his abusers. This was precisely the issue in *Karake*. "Indeed, the Court need not determine whether the Rwandans' coercive practices had a continuing or residual effect that rendered defendants' subsequent statements involuntary because those practices were *ongoing throughout* the Americans' interrogations through the continuing presence of a cast of Rwandan officials, which reasonably caused defendants to fear for their safety." *Karake*, 443 F. Supp. 2d at 90. As if being in the indefinite custody of the same officials that abused him were not enough, the prosecution insists that Mr. Al-Darbi entered into a pretrial agreement "voluntarily." AE 335A at 6. But the prosecution's

argument ignores that Mr. Al-Darbi was subject to indefinite detention in a remote penal facility-the same facility where he suffered from abusive treatment at the hands of the same officials that "offered" this agreement. There can be no freely entered agreement, no meeting of the minds, and no voluntariness when the prosecution has the power to hold a person indefinitely until they agree to "cooperate." The prosecution's conclusory one-line statement that the statements and testimony are not related ("they were not") is unsupported and defies any basic understanding of human nature. This Commission must reject the prosecution's request to look the other way.

As the Torture Report makes clear, this case is awash with evidence directly obtained or derived by torture. If Mr. Al-Nashiri is to be prosecuted at all, this Commission must comply with the congressionally mandated requirement that no evidence derived by torture be admissible in this case, and that necessarily includes derivative evidence.

4. Additional Witnesses: None

5. Additional Attachments:

A. CRS Report for Congress, Interrogation of Detainees: Overview of the McCain Amendment, Updated 23 Oct 2006 (13 pages)
B. Declaration of Mr. Al-Darbi dated July 2009 (9 pages)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 2 February 2015, I electronically filed the forgoing document with the Trial Judiciary and served it on all counsel of record via e-mail.

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ATTACHMENT

A

Order Code RL33655

CRS Report for Congress

Interrogation of Detainees: Overview of the McCain Amendment

Updated October 23, 2006

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Interrogation of Detainees: Overview of the McCain Amendment

Summary

Controversy has arisen regarding U.S. treatment of enemy combatants and terrorist suspects detained in Iraq, Afghanistan, and other locations, and whether such treatment complies with U.S. statutes and treaties such as the U.N. Convention Against Torture and Other Forms of Cruel and Inhuman or Degrading Treatment or Punishment (CAT) and the 1949 Geneva Conventions. Congress approved additional guidelines concerning the treatment of detainees via the Detainee Treatment Act (DTA), which was enacted pursuant to both the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (P.L. 109-148), and the National Defense Authorization Act for FY2006 (P.L. 109-163). Among other things, the DTA contains provisions that (1) require Department of Defense (DOD) personnel to employ United States Army Field Manual guidelines while interrogating detainees, and (2) prohibit the "cruel, inhuman and degrading treatment or punishment of persons under the detention, custody, or control of the United States Government." These provisions of the DTA, which were first introduced by Senator John McCain, have popularly been referred to as the "McCain Amendment." This report discusses the McCain Amendment, as modified and subsequently enacted into law.

This report also discusses the application of the McCain Amendment by the DOD in the updated 2006 version of the Army Field Manual, particularly in light of the Supreme Court's ruling in *Hamdan v. Rumsfeld*. In addition, the report discusses the Military Commissions Act of 2006 (P.L. 109-366), which was signed into law on October 17, 2006. The Act includes provisions that reference or amend the McCain Amendment. For a discussion of the provisions in the DTA that limit judicial review of challenges to U.S. detention policy, see CRS Report RL33180, *Guantanamo Detainees: Habeas Corpus Challenges in Federal Court*, by Jennifer K. Elsea and Kenneth Thomas.

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Interrogation of Detainees: Overview of the McCain Amendment

Amidst controversy regarding U.S. treatment of enemy combatants and terrorist suspects detained in Iraq, Afghanistan, and other locations, Congress approved additional guidelines concerning the treatment of persons in U.S. custody and control via the Detainee Treatment Act (DTA), which was enacted pursuant to both the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (P.L. 109-148), and the National Defense Authorization Act for FY2006 (P.L. 109-163). Among other things, the DTA contains provisions that (1) require Department of Defense (DOD) personnel to employ United States Army Field Manual guidelines while interrogating detainees, and (2) prohibit the "cruel, inhuman and degrading treatment or punishment of persons under the detention, custody, or control of the United States Government." These provisions, added to the defense appropriations and authorization bills via amendments introduced by Senator John McCain, have popularly been referred to as the "McCain Amendment."[1] As subsequently modified, the McCain Amendment also provides certain legal protections and assistance to U.S. personnel engaged in the authorized interrogation of a terrorist suspect.

Summary and Analysis of the McCain Amendment

The McCain Amendment, as modified and enacted into law, contains three provisions, which are described in the following sections.

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[1] On October 5, 2005, the Senate adopted a floor amendment (S.Amdt. 1977) proposed by Senator McCain to the House-passed defense appropriations bill, restricting the types of interrogation techniques employed by U.S. personnel. On November 4, 2005, Senator McCain proposed an identically worded amendment (S.Amdt. 2425) to S. 1042, the National Defense Authorization Act for FY2006, which also was adopted by the Senate. The Senate subsequently substituted the language of S. 1042, as amended, for the House-passed version of H.R. 1815, and then passed the amended bill by unanimous consent. The conference committees appointed to resolve differences between the House- and Senate-passed versions of the defense appropriations and authorization bills retained the McCain Amendment in the conference report and added identical provisions providing certain legal protections and assistance to U.S. personnel subjected to legal action on account of their involvement in the authorized interrogation of a terrorist suspect. The Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (P.L. 109-148), as amended and passed by the House and Senate, was signed into law on December 30, 2005. The National Defense Authorization Act for FY2006 (P.L. 109-163), as amended and passed by the House and Senate, was signed into law on January 6, 2006.

Applying U.S. Army Field Manual Standards

The first provision of the McCain Amendment provides that no person in the custody or effective control of the DOD or detained in a DOD facility shall be subject to any interrogation treatment or technique that is not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.[2] An exception to this general requirement is made for individuals being held pursuant to U.S. criminal or immigration laws. The McCain Amendment does not require non-DOD agencies, such as non-military intelligence and law enforcement agencies, to employ Field Manual guidelines with respect to interrogations they conduct.

The United States Army Field Manual addresses intelligence interrogation under FM 34-52, detailing certain procedures for the treatment and questioning of persons by military personnel.[3] At the time the McCain Amendment was enacted, FM 34-52 also contained a section regarding the applicability of the 1949 Geneva Conventions. According to the Manual, these Conventions, including the 1949 Geneva Convention on the Treatment of Prisoners of War, were to be "strictly observed and enforced by the United States Forces without regard to whether they are legally binding upon this country and its specific relations with any other specific country."[4] In applying these standards, the Field Manual required soldiers to adhere to the Geneva Convention's prohibition against "cruel treatment and torture" and "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment."[5]

The McCain Amendment does not prevent DOD from subsequently amending the Field Manual. As discussed later, an updated version of the Army Field Manual was released on September 6, 2006. The 2006 Manual contains general requirements that are similar to those in the earlier version of the Manual, requiring all detainees to be treated in a manner consistent with the Geneva Conventions, and prohibiting the use of torture or cruel, inhuman, and degrading treatment in any circumstance. It further provides that the only authorized interrogation techniques or approaches are those included in the Manual.

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[2] P.L. 109-148, Title X, § 1002 (2005); P.L. 109-163, Title XIV, § 1402 (2006).

[3] At the time the McCain Amendment was enacted, the Field Manual provisions concerning interrogation had last been revised in 1992. Department of the Army Field Manual 34-52, Intelligence Interrogation (1992), *available at* [http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/FM34-52IntelInterrogation.pdf] [*hereafter* "1992 FM"]. An updated and revised Field Manual was released on September 6, 2006. Department of the Army Field Manual 34-52, Human Intelligence Collector Operations (2006) [hereafter "2006 FM"], *available at* [http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/dod/armyfm2223humanintel.pdf].

[4] 1992 FM, *supra* note 3.

[5] Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 , entered into force Oct. 21, 1950. For additional background, see CRS Report RL32567, *Lawfulness of Interrogation Techniques under the Geneva Conventions*, by Jennifer K. Elsea.

Prohibition on Cruel, Inhuman, or Degrading Treatment or Punishment

The second provision of the McCain Amendment prohibits persons in the custody or control of the U.S. government, regardless of their nationality or physical location, from being subjected to "cruel, inhuman, or degrading treatment or punishment."[6] The amendment specifies that this restriction is without geographical limitation as to where and when the government must abide by it. Unlike the first section of the McCain Amendment, this provision covers not only DOD activities, but also intelligence and law enforcement activities occurring both inside and outside the United States. This provision does not appear to prohibit U.S. agencies from transferring persons to other countries where those persons would face "cruel, inhuman, or degrading treatment or punishment," so long as such persons were no longer in U.S. custody or control. However, such transfers might nonetheless be limited by applicable treaties and statutes.[7] The McCain Amendment also provides that this provision may "not be superseded, except by a provision of law enacted after the date of the enactment of this act which specifically repeals, modifies, or supersedes the provisions of this section."[8]

In interpreting whether treatment falls below this standard, the McCain Amendment defines "cruel, unusual, and inhuman treatment or punishment" to cover those acts prohibited under the Fifth, Eighth, and Fourteenth Amendments to the Constitution, as stated in U.S. reservations to the U.N. Convention Against Torture and Other Forms of Cruel and Inhuman or Degrading Treatment or Punishment (CAT).[9] The Constitution applies to U.S. citizens abroad, thereby protecting them from the extraterritorial infliction by U.S. state or federal officials of cruel, inhuman, or degrading treatment or punishment that is prohibited under the Fifth, Eighth, and/or Fourteenth Amendments.[10] However, noncitizens arguably only receive constitutional protections after they have entered the United States.[11]

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[6] P.L. 109-148, Title X, § 1003; P.L. 109-163, Title XIV, § 1402.

[7] *See* CRS Report RL32890, *Renditions: Constraints Imposed by Laws on Torture*, by Michael John Garcia.

[8] P.L. 109-148, Title X, § 1003; P.L. 109-163, Title XIV, § 1402.

[9] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [*hereafter* "CAT"]. Ratified by the U.S. in 1994, CAT prohibits parties from engaging in torture, and also requires them to take measures to end "cruel, unusual, and inhuman treatment or punishment" within territories under their respective jurisdiction. *Id.* at arts. 1-3, 16.

[10] *See, e.g.*, Reid v. Covert, 354 U.S. 1, 6 (1957) ("When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

[11] *See, e.g.*, Verdugo-Urquidez v. United States, 494 U.S. 259, 270-71 (1990) ("aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country"). *But see* Rasul v. Bush, 124 S.Ct. 2686, n.15 (2004) (noting in dicta that petitioners' allegations that they had been held

(continued...)

The McCain Amendment prohibits persons under U.S. custody or control from being subjected to "cruel, inhuman, or degrading treatment or punishment" of any kind prohibited by the Fifth, Eighth, and Fourteenth Amendments, *regardless of their geographic location or nationality.* Accordingly, it appears that the McCain Amendment is intended to ensure that persons in U.S. custody or control abroad cannot be subjected to treatment that would be deemed unconstitutional if it occurred in the United States.[12]

The scope of the Fifth, Eighth, and Fourteenth Amendment prohibitions upon harsh treatment or punishment is subject to evolving case law interpretation and constant legal and scholarly debate.[13] The types of acts that fall within "cruel, inhuman, or degrading treatment or punishment" contained in the McCain Amendment may change over time and may not always be clear. Heightening this uncertainty is the possible difficulty of comparing situations that might arise in the context of hostilities and "the war on terror" with interrogation, detention, and incarceration within the U.S. criminal justice system. Courts have recognized that circumstances often determine whether conduct "shocks the conscience" and violates

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[11] (...continued)
in Executive detention for more than two years "in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing — unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States'") (citing federal habeas statute 28 U.S.C. § 2241(c)(3), under which petitioners challenged their detention). Whether the *Rasul* ruling meant only that federal habeas jurisdiction extended to Guantanamo, or more broadly found that non-citizens detained at Guantanamo possessed constitutional rights, has been subject to conflicting rulings by district courts. *Compare* Khalid v. Bush, 355 F. Supp.2d 311 (D.D.C. 2005) (holding that while federal habeas statute covers Guantanamo detainees, non-citizens detained there do not receive constitutional protections) *with* In re Guantanamo Detainees, 355 F. Supp.2d 443 (D.D.C. 2005) (reading *Rasul* to mean that persons detained at Guantanamo are owed constitutional protections). For further information, see CRS Report RS22173, *Detainees at Guantánamo Bay*, by Jennifer Elsea.

[12] The McCain Amendment also appears aimed at resolving controversy concerning U.S. implementation of CAT Article 16, which obligates CAT parties to prevent cruel, inhuman, or degrading treatment or punishment within territories under their jurisdiction. When the U.S. ratified CAT, it did so with the reservation that the "cruel, inhuman, or degrading treatment or punishment" prohibited by CAT covered only those types of actions prohibited by the U.S. Constitution. There is some legal dispute as to whether CAT Article 16, as read in light of U.S. reservations, applies to non-citizens held outside the United States. For further background, see CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia.

[13] The Eighth Amendment's prohibition on "cruel and unusual punishment" concerns the imposition of a criminal punishment. Ingraham v. Wright, 430 U.S. 651 (1977). The constitutional restraint of persons in other areas, such as pre-trial interrogation, is found in the Due Process Clauses of the Fifth Amendment (concerning obligations owed by the U.S. Federal Government) and Fourteenth Amendment (concerning duties owed by U.S. state governments). These due process rights protect persons from executive abuses which "shock the conscience." *See, e.g*, Rochin v. California, 342 U.S. 165 (1952).

a person's due process rights.[14] Accordingly, a U.S. court might employ a different standard to determine whether interrogation techniques employed against a criminal suspect are unconstitutionally harsh than it would use to assess whether those same techniques were unconstitutional if employed against an enemy combatant in a war zone.

Nevertheless, types of treatment in a criminal law context that have been deemed prohibited under the Fifth, Eighth, and Fourteenth Amendments may be instructive to a reviewing court. A sampling might include, *inter alia*:

- handcuffing an individual to a hitching post in a standing position for an extended period of time that "surpasses the need to quell a threat or restore order";[15]
- maintaining temperatures and ventilation systems in detention facilities that fail to meet reasonable levels of comfort;[16] and
- prolonged interrogation over an unreasonably extended period of time,[17] including interrogation of a duration that might not seem unreasonable in a vacuum, but becomes such when evaluated in the totality of the circumstances.[18]

Again, whether such conduct would also be considered "cruel, inhuman, or degrading punishment or treatment prohibited by the Fifth, Eighth, and Fourteenth Amendment" when employed in other circumstances (e.g., against terrorist suspects or enemy combatants abroad), or whether different constitutional standards could govern such conduct, remains unclear.

Conduct that has not been deemed to violate the Fifth, Eighth, and/or Fourteenth Amendments includes, *inter alia*:

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[14] E.g., County of Sacramento v. Lewis, 523 U.S. 833, 850-851 (1998) (noting that conduct that shocks in one circumstance might not be considered so egregious in another); Miller v. City of Philadelphia, 174 F.3d 368, 375 (3rd Cir. 1999) ("The exact degree of wrongfulness necessary to reach the 'conscience-shocking' level depends upon the circumstances of a particular case"). Nevertheless, there may be some actions which are constitutionally prohibited no matter what the circumstance. *See Lewis*, 523 U.S. at 856 (1998) (Kennedy, J., concurring).

[15] Hope v. Pelzer, 536 U.S. 730 (2002).

[16] Chandler v. Crosby, 379 F.3d 1278 (11th Cir. 2004).

[17] Haynes v. Washington, 373 U.S. 503 (1963). *See also* Greenwald v. Wisconsin, 390 U.S. 519 (1968); Davis v. North Carolina, 384 U.S. 737 (1966) (holding that confession of escaped convict held incommunicado for 16 days was involuntary, even though he was interrogated only an hour each day he was held).

[18] *See* Leyra v. Denno, 347 U.S. 556 (1954); Johnson v. New Jersey, 384 U.S. 719 (1966); Ashdown v. Utah, 357 U.S. 426 (1958).

- the double-celling of those in custody, at least so long as it does not lead to deprivations of essentials, an unreasonable increase in violence, or create other conditions intolerable for confinement;[19]
- solitary or isolated confinement, so long as such confinement is within a cell in acceptable condition and is not of an unreasonable duration;[20] and
- in detention situations, the use of constant lighting in prisoner cells when the detainees' inconvenience and discomfort is outweighed by the need to protect safety and welfare of the other detainees and staff.[21]

Again, it is not clear that these and similar treatments may never be deemed constitutionally impermissible outside the criminal context, including when such treatments are used upon enemy combatants or terrorist suspects who have not been charged with a criminal offense.

On September 6, 2006, the Army released an updated version of the Field Manual that implements the requirements of the McCain Amendment. The Manual prohibits cruel, inhuman, and degrading treatment. Eight techniques are expressly prohibited from being used in conjunction with intelligence interrogations:

- forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner;
- placing hoods or sacks over the head of a detainee; using duct tape over the eyes;
- applying beatings, electric shock, burns, or other forms of physical pain;
- waterboarding;
- using military working dogs;
- inducing hypothermia or heat injury;
- conducting mock executions; and
- depriving the detainee of necessary food, water, or medical care.[22]

In addition, the Manual restricts the use of certain other interrogation techniques, but these restrictions may be due to other legal obligations besides those imposed by the McCain Amendment.[23]

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[19] Rhodes v. Chapman, 452 U.S. 337 (1981).

[20] Hutto v. Finney, 437 U.S. 678 (1978). The Court indicated that factors involved in the determination of constitutionality under the Eighth Amendment's "cruel and unusual"prohibition include the physical conditions of the cell and the length of time of confinement.

[21] Shanks v. Litscher, 02-C-0064-C, 2003 U.S. Dist. Lexis 24590 (W.D. Wis. Jan. 29, 2003).

[22] 2006 FM, *supra* note 3, at 5-75.

[23] The Manual provides that three interrogation techniques may only be used with higher-level approval: (1) "Mutt and Jeff", a good-cop, bad-cop interrogation tactic where a detainee is made to identify with the more friendly interrogator; (2) "false flag," where a

(continued...)

Protection of U.S. Personnel Engaged in Authorized Interrogations

The conference committees established to resolve differences between the House- and Senate-passed versions of the defense appropriations and authorization bills inserted an additional provision into the McCain Amendment, providing certain legal protections and assistance to U.S. personnel engaged in authorized interrogations.[24] As modified, the McCain Amendment provides a legal defense to U.S. personnel in any civil or criminal action brought against them on account of their participation in the authorized interrogation of suspected foreign terrorists. The amendment specifies that a legal defense exists to civil action or criminal prosecution when the U.S. agent "did not know that the [interrogation] practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful." A good faith reliance on the advice of counsel is specified to be "an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful." The McCain Amendment further states that the specification of a "good-faith" defense neither extinguishes any other defenses available to U.S. personnel nor accords such personnel with immunity from criminal prosecution.

In addition, the McCain Amendment permits the U.S. government to employ legal counsel for and pay the court costs of U.S. personnel in any legal actions brought against them in foreign judicial tribunals and administrative agencies on account of such persons' participation in authorized interrogations.

Recent Legislative Developments

In the 2006 case of *Hamdan v. Rumsfeld*,[25] the Supreme Court rejected the Bush Administration's long-standing position that Common Article 3 of the 1949 Geneva Conventions was inapplicable to the present armed conflict with Al Qaeda. Among other things, Common Article 3 prohibits protected persons from being subjected to violence, outrages upon personal dignity, torture, and cruel or degrading treatment. As a result of the Court's ruling in *Hamdan*, questions arose regarding permissible interrogation tactics that could be used against Al Qaeda suspects, and whether U.S. personnel could face criminal liability for the harsh interrogation of such persons

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[23] (...continued)
detainee is made to believe he is being held by another country known to subject prisoners to harsh interrogation; and (3) separation, by which detainees are separated so that they cannot coordinate their stories. Separation may not be used against "lawful combatants," as this tactic is prohibited under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, but is permitted in some circumstances against unlawful combatants. *Id.* at Appendix M.

[24] P.L. 109-148, Title X, § 1004; P.L. 109-163, Title XIV, § 1404.

[25] 126 S.Ct. 2749 (2006).

under the War Crimes Act,[26] which made it a criminal offense to commit *any* violation of Common Article 3. Several bills introduced in response to the *Hamdan* decision contained provisions that referenced the McCain Amendment. One of these proposals, S. 3930, the Military Commissions Act of 2006 (P.L. 109-366), was signed into law on October 17, 2006.[27]

With respect to criminal conduct, the Military Commissions Act amends the War Crimes Act provisions concerning Common Article 3, so that only *specified* violations would be punishable (as opposed to *any* Common Article 3 violation, as was previously the case). The Military Commissions Act criminalizes torture and certain less severe forms of cruel treatment against persons protected by Common Article 3,[28] but it does *not* criminalize all conduct that violates the standards of the McCain Amendment (i.e., cruel, inhuman, or degrading treatment of the kind

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[26] 18 U.S.C. § 2441. For background on the War Crimes Act and the amendments made to it by the Military Commissions Act of 2006 (S. 3930; P.L. 109-366), see CRS Report RL33662, *The War Crimes Act: Current Issues*, by Michael John Garcia.

[27] On September 6, 2006, the Bush Administration submitted draft legislation to Congress authorizing military commissions to try detainees, amending the War Crimes Act, and specifying conduct complying with Common Article 3. White House Press Release, *Fact Sheet: The Administration's Legislation to Create Military Commissions* (Sept. 6, 2006), *available at* [http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html]; Draft Legislation, Military Commissions Act of 2006, *available at* [http://www.law.georgetown .edu/faculty/nkk/documents/MilitaryCommissions.pdf]. In response, several legislative proposals were thereafter introduced concerning these matters, including S. 3901, the Military Commissions Act of 2006, introduced by Senator John Warner; S. 3861, the Bringing Terrorists to Justice Act of 2006 and S. 3886, the Terrorist Tracking, Identification, and Prosecution Act of 2006, both introduced by Senator Bill Frist; and H.R. 6054, the Military Commissions Act of 2006, introduced by Representative Duncan Hunter. S. 3861, S. 3886, and H.R. 6054 were largely identical to the draft legislation proposed by the Bush Administration, while S. 3901 somewhat differed. Soon thereafter, three other bills were introduced: S. 3929 and S. 3930, which were both entitled the Military Commissions Act of 2006 and were introduced by Senator Mitch McConnell; and H.R. 6166, also entitled the Military Commissions Act of 2006, which was introduced by Representative Duncan Hunter. Reportedly, S. 3929/S. 3930 and H.R. 6166 reflected an agreement reached by the Bush Administration and certain lawmakers to resolve differences in the approach taken by S. 3901 and that taken by S. 3861, S. 3886, and H.R. 6054. Kate Zernike & Sheryl Gay Stolberg, *Differences Settled in Deal Over Detainee Treatment*, NY TIMES, Sept. 23, 2006, at A9. H.R. 6166 was passed by the House on September 27, 2006, while S. 3930 was passed by the Senate on September 28, 2006, and by the House on September 29, 2006. Although the provisions of S. 3929/S. 3930 and H.R. 6166 were largely similar, there were initially some differences between the bills. However, S. 3930 was subsequently amended so that it contained the same provisions as House-passed H.R. 6166, and this amended version of S. 3930 was thereafter passed by the House and Senate and enacted as P.L. 109-366.

[28] For purposes of international law, "torture" is considered a particularly severe form of cruel or inhumane treatment. *See* CRS Report RL32438, *U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, by Michael John Garcia, at 2, 17-18.

prohibited under the Fifth, Eighth, and Fourteenth Amendments).[29] The Military Commissions Act also retroactively applies the McCain Amendment's provision establishing a defense for U.S. personnel relating to the authorized treatment of detainees, so that defense could be employed by U.S. personnel charged with a War Crimes Act offense based on conduct that occurred between September 11, 2001, and December 30, 2005.

The Military Commissions Act also includes provisions concerning authorized conduct under Common Article 3 more generally. Under U.S. treaty obligations, U.S. personnel cannot commit *any* violation of Common Article 3, even though the Military Commissions Act amends the War Crimes Act so that U.S. personnel would only be subject to criminal penalty for *severe* violations of Common Article 3. The Military Commissions Act provides that it is generally a violation of Common Article 3 to engage in conduct (1) inconsistent with the McCain Amendment or (2) enumerated in the War Crimes Act, as amended by the Military Commissions Act, as constituting a "grave breach" of Common Article 3. It should be noted that most, if not all, activities specified by the War Crimes Act, as amended, as "grave breaches" of Common Article 3 (e.g., rape, murder, torture, cruel treatment) are probably already be impermissible under McCain Amendment standards. Additionally, the McCain Amendment arguably imposes less stringent requirements concerning the treatment of detainees than the plain text of Common Article 3, and may permit U.S. personnel to engage in more aggressive means of interrogation than Common Article 3 might otherwise allow.[30]

The Military Commissions Act also authorizes the President, pursuant to an Executive Order published in the Federal Register, to more restrictively interpret the meaning and application of Convention requirements and promulgate administrative regulations implementing this interpretation. Although the President is generally permitted to interpret the Geneva Conventions so as to enlarge the scope of conduct deemed not to violate them, the Act does not permit the President to interpret and apply the Conventions so as to permit "grave breaches." Presidential interpretations of the Conventions are deemed authoritative (if published and concerning non-grave breaches) as a matter of U.S. law to the same degree as other administrative regulations, though judicial review of such interpretations might be more limited.[31]

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[29] *See* CRS Report RL33662, *supra* note 26, at 6-8. One proposal considered by the 109th Congress, S. 3901, would have amended the War Crimes Act to expressly criminalize treatment of persons protected under Common Article 3 that violated McCain Amendment standards.

[30] For example, it is unclear whether the McCain Amendment's prohibition upon "cruel, inhuman, and degrading treatment" is coextensive with Common Article 3's restrictions on "violence against the person" and "outrages upon personal dignity."

[31] The Military Commissions Act prohibits the Geneva Conventions from being invoked in habeas or civil proceedings to which the United States or a current or former agent of the United States is a party. This bar could be interpreted in a fashion that would prevent any judicial challenge to the interpretation and application of the Conventions except in criminal proceedings. Persons might still be able to indirectly challenge the application of the Conventions in some non-criminal cases, to the extent that Convention provisions are

(continued...)

The Military Commissions Act amends the McCain Amendment to require the Federal Government to provide or employ counsel and pay fees related to any prosecution or civil action against U.S. personnel for authorized detention or interrogation activities.

In addition, the Act includes a provision restating the McCain Amendment's prohibition on cruel, inhuman, and degrading treatment or punishment of persons under the detention, custody, or control of the U.S. Government. It further requires the President to establish administrative rules and procedures ensuring compliance with this provision. Accordingly, it would appear that detainees are required in all circumstances to be treated in a manner consistent with McCain Amendment standards, even if the President interprets the Geneva Conventions as not requiring such treatment.

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[31] (...continued)
incorporated into another source of law that may be invoked in a judicial proceeding.

ATTACHMENT

B

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DECLARATION OF AHMED AL DARBI

Pursuant to 28 U.S.C. § 1746, I certify that the following is true and correct to the best of my knowledge:

INTRODUCTION

1. My name is Ahmed Mohammed Ahmed Al Darbi.

2. I am a Saudi national who has been imprisoned at the U.S. Naval Station at Guantánamo Bay, Cuba ("Guantánamo") for nearly six years. The U.S. military has assigned me Internment Serial Number ("ISN") 768 at Guantánamo.

3. In June 2002, I traveled by air from Dubai, United Arab Emirates to Baku, Azerbaijan. While I was at customs in the Baku airport, waiting to be processed for entry, I was taken into custody by local Azerbaijani authorities. I did not know why Azerbaijani authorities apprehended me and I had no reason to know that they would. I was held in Azerbaijani custody for about two months.

4. In August 2002, the Azerbaijani authorities turned me over to U.S. agents. These agents [redacted]. They then blindfolded me, wrapped their arms around my neck in a way that strangled me, and cursed at me. [redacted], and somebody else kept saying "fuck you" in my ear. I was terrified and feared for my life, because I did not know who had seized me, which government's custody I was in, or where they were taking me. They did not tell me where we were going.

5. I was eventually taken to a place that I now know was Bagram Air Force Base in Afghanistan ("Bagram"). I was imprisoned at Bagram for about eight months. At Bagram, my detainee number was [redacted]

6. In late-March 2003, I was transferred to Guantánamo.

BAGRAM

Treatment and interrogations during the first two weeks at Bagram

7. During about the first two weeks at Bagram, I was kept in complete isolation, and I did not even know I was in Afghanistan.

8. U.S. agents began interrogating me on my second day at Bagram. These interrogations took place in a room different from the isolation cell where I was held the rest of the time.

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9. While I was questioned, I was kept for many hours in painful positions. For example, I would be forced to kneel with my hands cuffed above my head, often through the night, so that I was not allowed to sleep. This position caused very sharp pain in my knee-caps. If my hands began to fall or I tried to stretch to relieve the pain in my back while I knelt, the interrogators kicked me in the back.

10. Sometimes I was also forced to lean against a wall with my forehead pressing against the wall and my hands shackled behind my back, but with my feet away from the wall. In this position, all my weight rested on my forehead. I had to hold this position for hours. This hurt my head and neck. It was impossible to sleep in this position.

11. I was often hooded during these interrogations. The hood they used had a sort of rope or drawstring that they would pull tight around my neck. The darkness, combined with little sleep, would leave me disoriented.

12. During these interrogations, they would ask me repeatedly about Usama Bin Laden and his whereabouts. Of course, I knew nothing about this.

13. When I was not being interrogated in an interrogation room, I was put in an isolation cell where the temperature was high and the light was kept brightly lit most of the time. Often they also would blast loud music into my cell.

14. During these first two weeks, I hardly slept at all. I was purposely kept awake much of the time, and it seemed that every time I started to fall asleep, they would hit me to keep me awake. Also, during that period, I was not allowed to pray.

15. I was not allowed to use a normal restroom during this time. Instead, [redacted]. The only thing that helped this problem was that I often did not eat much. I was not given much food at the time and the food they did give me was inedible, so I didn't have very much in my stomach. Due to the constaint strain and stress this situation placed on me, [redacted].

16. The U.S. military guards and interrogators also took many photographs of me that humiliated me. [redacted] and take off my hood so that I could see what was going on, and so that I would be recognizable. There would be several U.S. agents, male and female, standing around when these photographs were taken.

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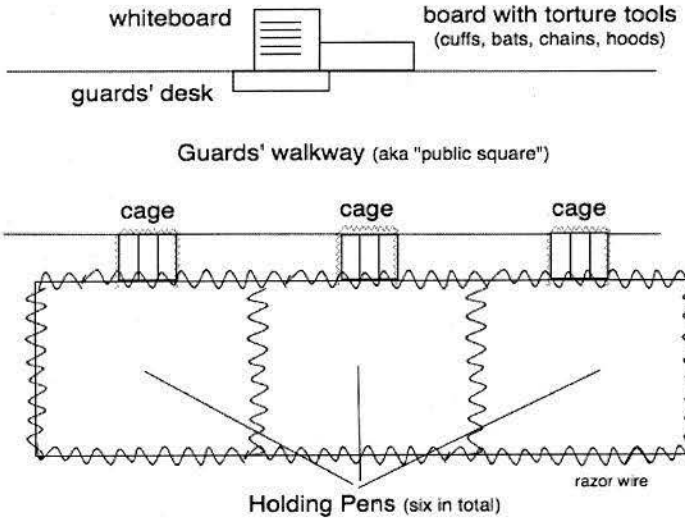
17. After approximately the first two weeks, I was taken out of isolation. I was moved to a cage attached to a holding pen for other prisoners. This was a small cage surrounded by fencing and razor wire. The cages doubled as a passageway for the guards between the general holding pens and a public area or walkway in front of the cages. From what I remember, there were six holding pens in total, and each one connected to a cage that was used to isolate and suspend detainees by the arms. There were signs outside the holding pens displaying the names New York, Pennsylvania and Nairobi, which I understood to be the sites of different terrorist attacks after one of the guards, in a state of agitation and rage, once shouted at me "your brothers did this!" as he pushed me from behind.

18. I was hooded or goggled for much of this time. I recall that there was a whiteboard outside of the cage, where the numbers assigned to me and other detainees were recorded in red, green and blue. Next to the numbers were symbols indicating what techniques were to be used on us. Next to the whiteboard was another board, where they hung baseball bats, chains, cuffs, hoods, and other instruments guards would use on the prisoners at Bagram. Below is a sketch of how I remember the area:



19. Much of the time I was in this cage, U.S. military personnel shackled my hands above my head to the upper part of the cage's door, so that I would swing with the gate as it opened and shut. Sometimes, military personnel would cuff my hands to the gate outstretched in different directions so that my back would be twisted, almost horizontal. This was very painful. Frequently, U.S. personnel beat me while I was hanging in the cage.

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20. Occasionally, the guards would unlock the cuffs and tell me I could sleep. To me it felt like they only allowed me to sleep once or twice a week, but I do not know for certain. I do know that I was very sleep-deprived at this time. After what felt like a short time of sleep to me, the guards would wake me abruptly by rushing in as a group, shouting loudly, and they would then hang me from the top of the cage's gate by my wrists again.

21. I had to insist to be allowed to use the restroom. The guards and interrogators would not always release me, and I often could not relieve myself because of how long I had gone without relieving myself, which cause me sharp pains. When I was allowed to use the restroom, I had to remain completely shackled.

Interrogations during the next three months at Bagram

22. After the first two weeks, approximately, for about the next three months at Bagram, the interrogations that began on my second day at Bagram continued and became more abusive. U.S. personnel would play blaring music, shine bright lights in my eyes, kick me, and drag me around the room. Some kneed me in the chest, stomach and genitals and threw me against the wall. I was often thrown to the ground and then pulled around the room by my handcuffs.

23. Other times a sand bag or hood was placed over my head and tightened around my neck, and then they would grab my head and shake it violently while swearing at me and they would also pour water over my head while my head was covered. Also, I was sometimes forced to hold a chair over my head for a long period of time during interrogations.

24. On several occasions, the U.S. agents sprayed water on my face and then blew a powder that I think was pepper onto me. The water absorbed the powder and it burned my skin and made my nose run. At other times hairs were ripped from my chest and my head by the U.S. agents. Other times agents blew cigarette smoke in my face and they would also throw their cigarette butts at me along with the full contents of the trash can.

25. Sometimes, during interrogations, U.S. personnel would throw me to the ground and make me lie on my stomach, with my arms outstretched above my head. I remember that a U.S. military guard or interrogator by the name of Damien Corsetti was often present during my interrogations. Corsetti was a big, heavy man and he had a tattoo of the Virgin Mary on his left arm. He sometimes stepped on my handcuffs while I was lying on the floor with my arms above my head. This caused my handcuffs to tighten painfully around my wrists. These particular handcuffs were not of the "double-lock" sort that could not be tightened past a given point.

26. There are a few incidents that occurred only once but that I remember very well because they were so shocking to me. During one interrogation, a U.S. agent that I recall was Corsetti kneeled on my chest. Corsetti was a big, heavy

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man. He put his knees on my chest and pressed down on me with all his weight. I couldn't breathe, and he stayed on me for so long that I thought I was going to die. Another guard or interrogator pulled him off me because I stopped breathing.

27. Another time, about a month after my transfer to Bagram, I was suspended in the cage, and a guard or interrogator called me [redacted] There was a U.S. military guard in the cage who pressed his finger hard into the soft flesh under my jaw. I started to choke, and afterwards the area swelled badly.

28. There are other things that happened to me during these interrogations that I do not wish to describe in a document that might become public. I do not want my family to know the details about what happened to me. [redacted].

29. [redacted]. The U.S. agents also threatened to send me to Israeli, Egyptian, or Afghan jails for torture and rape.

30. [redacted].

31. [redacted].

32. [redacted].

33. [redacted]

34. [redacted].

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35. These are only some of the humiliating things that were done to me. I was frightened, and there were times I wished I would die. I felt that anything could happen to me and that everything was out of control. During this time the interrogators took my "confessions," pressuring me into making false statements about myself and others.

36. The military guards and interrogators would show me pictures of people, and told me I must identify them and confess things about them. After they tortured me, I would say what they wanted me to say. I was fed detailed statements and names of individuals to whom I was to attribute certain activities.

37. The military guards and interrogators told me that I had to repeat these same statements to other interrogators, and threatened to continue abusing me—or to make it even worse—if I did not cooperate. I found out that these "other interrogators" were FBI interrogators, because they identified themselves. After I had been interrogated and tortured by the military guards and interrogators, they would let the FBI interrogators into the room. The FBI interrogators would interrogate me without the military guards and interrogators. They would ask for the same details that I had discussed with the military interrogators and guards. I tried to repeat the same statements, because I was afraid of the threats made by the military guards and interrogators. I never signed anything at Bagram.

38. I remember that I usually spoke to the same three FBI interrogators. They identified themselves as "Tom," "Jerry," and there was third one whose name I cannot remember, but those were not their real names anyway. Tom was tall, Jerry was short; both were young, white males.

39. I do not think the FBI interrogators were present during the interrogations by the U.S. military interrogators or guards, or when the torture was happening. Also, I do not think the military guards and interrogators were present during the interrogations by the FBI. But the military interrogators continued to abuse me during the time I was being interrogated by the FBI—even though I did what the military guards and interrogators told me to do and tried to repeat statements the military guards and interrogators had fed me to the FBI.

40. Eventually, the FBI interrogators stopped questioning me. I was then moved to the communal holding pen with the other prisoners.

Hard labor at Bagram

41. I also was forced to perform degrading, hard labor at Bagram, in full view of the other detainees and the guards.

42. Many mornings I had to replace the full port-a-potty buckets with empty buckets. I had to do this in front of everybody. [redacted]. Once, when I complained that I could

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not change the port-a-potty while shackled, a guard punched me in the side, and kept hitting me even after I was on the floor. Other U.S. military personnel came over and one of them choked me while the other punched me in the kidneys and ribs.

43. Often I was forced to sweep the floor in the public, walkway area. Once, I was forced to scrub the entire floor using only a toothbrush. [redacted].

44. I was also forced to carry boxes filled with water bottles while my hands were cuffed together. I could carry two boxes but the guards often tried to make me carry as many as four, and would hit me when I struggled. This labor caused me sciatic pain and back pain for several years.

Witnessing the abuse of Dilawar

45. When I was in the communal holding pen, an Afghan prisoner by the name of Dilawar was shackled in a hanging position in the cage adjacent to my pen. I remember that this was the same cage where I had been suspended.

46. I recall that Dilawar had been hanging hooded for about two days and was screaming and moaning. A U.S. guard told Dilawar that he would release him if he would clean the floor. I spoke a little Pashto and some English, so the guard ordered me to translate this instruction for Dilawar. I was then ordered to clean the floor with him. After we were done, the guard chained Dilawar to the top of the cage once more. Dilawar started screaming again.

47. Then the next shift of guards came on. They ordered Dilawar to stop screaming. They then brought a shorter chain and used it to suspend him wholly off the floor by his wrists. Dilawar moved his body only slightly and that is when the guards began beating him.

48. At first two guards were beating Dilawar, kneeing him in the legs and punching him in the chest as he was suspended in the cage. They then moved him to the walkway area, outside the cage, and several guards beat him. By this point, Dilawar had stopped moving or crying. I witnessed this entire event.

49. Dilawar was then moved somewhere out of my sight. Days later, I heard Dilawar had died. This made me fearful that I would meet the same fate.

GUANTÁNAMO

50. On or about March 23, 2003, I was moved to Guantánamo. Once there, I was kept in solitary confinement for two months. I was held in Camp Delta, Camp 2, Oscar Block.

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51. Painfully loud music was often played in my cell. Sometimes they played a repetitive song composed of what sounded like a cat's meow. It was very hard to sleep because the cells were chilled to extremely cold temperatures, and there was extremely bright lighting and also the loud music.

52. Sometimes, U.S. personnel would throw my Koran to the ground, and they would scatter gruesome photos of bloodied and mutilated bodies on the ground.

Interrogations at Guantánamo

53. I remember that I was interrogated every day for what seemed like five to six hours, and sometimes also at night, from the middle of the night until dawn. The interrogation rooms stank of urine.

54. During the interrogations, they did not let me go to the restroom to relieve myself, [redacted].

55. The interrogations at Guantánamo were conducted mostly by the FBI interrogators. Tom, the FBI interrogator who had questioned me at Bagram, was the first who interrogated me in Guantánamo, as I recall. I remember that he told me that if I did not stick with my Bagram confessions, I would not "escape Bagram." I was told that if I did not cooperate, I would be sentenced to death and executed, or that I would be tortured, raped, and sexually abused in either Camp X-Ray at Guantánamo, or sent back to Bagram or to other countries.

56. Shortly after I arrived at Guantánamo, Tom asked me to sign a written statement but I refused to sign the statement.

57. In or about April or May 2003, while I was still in solitary confinement, the FBI interrogators again told me to sign a written statement. Tom told me that prison authorities could send me to Camp X-Ray where horrible things could happen to me or send me to another country, such as Egypt or Israel, where people would make me sign the statement. I was scared that the abuse I suffered at Bagram would be renewed at Guantánamo or elsewhere, or that I might be sent back to Bagram.

58. The interrogators at Bagram and Guantánamo fed me particular details in my statements and forced me to identify individuals based on photographs or to ascribe to those individuals certain conduct. Although I never signed any written statements, I made numerous false statements to the interrogators at Bagram and Guantánamo because of the abuse and coercion I suffered.

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CONTINUING EFFECTS OF TORTURE

59. To this day, I frequently feel anxious, depressed and worried. I feel not quite right, not quite like myself. I have recurring nightmares of the U.S. guards and interrogators from Bagram chasing me. Whenever anybody wakes me, I wake up screaming in shock and panic. I have headaches. I feel that I am emotionally unstable, and I know that I go through personality changes and mood swings, which were not typical for me before I came into U.S. custody. Sometimes I lose physical control [redacted].

60. I feel that I need mental health counseling, but I do not feel comfortable talking with the mental health or medical personnel here at Guantánamo. They have been complicit in the torture: I have seen and heard that they put patients in garments that leave them practically nude, that they forcibly medicate patients, and that they prescribe addictive drugs to patients so that interrogators can manipulate those men during interrogations. I would prefer an independent mental health expert identified by my attorney and defense counsel, Ramzi Kassem.

RETURNING TO SAUDI ARABIA

61. If I am released, I would like to go home to Saudi Arabia and move on with my life. I want to put this chapter behind me, find work, and take care of my wife and two children. My daughter is nine years old now and my son is seven. I have never met my son. I have already missed many years of their lives. Also, my parents are elderly and I have heard that my father is sick. I would like to join my brothers and sisters in taking care of them in their old days.

62. Of course, I am willing to participate in the Saudi reintegration program for repatriated detainees and abide by its rules and conditions upon my return home.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Guantánamo Bay, Cuba

Executed on this 1 day of July, 2009

Ahmed Mohammed Ahmed Al Darbi