# NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

## *The Right against Self-Incrimination*

Rulings:

- *United States v. Hamdan*, 1 M.C. 112 (2008) (Ruling on Motion to Suppress Statements of the Accused)
- *United States v. Hamdan*, 1 M.C. 121 (2008) (Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices)
- *United States v. Jawad*, 1 M.C. 345 (2008) (Ruling on Defense Motion to Suppress Out-of-Court Statements of the Accused to Afghan Authorities)
- *United States v. Jawad*, 1 M.C. 349 (2008) (Ruling on Defense Motion to Suppress Out-of-Court Statements by the Accused Made While in U.S. Custody)

The right against self-incrimination is enshrined in the Fifth Amendment of the U.S. Constitution. Along with other due process guarantees, the Fifth Amendment expressly provides that "No person… shall be compelled in any criminal case to be a witness against himself." Since these words were penned, their scope and meaning have been subject to much interpretation. As a general rule, the right against self-incrimination allows an accused to ask for the suppression of statements that might be harmful to her defense, if she can show that those statements were made involuntarily or in the absence or violation of the *Miranda* warnings. Both the "involuntary" standard and the *Miranda* warnings are meant to protect individuals from the presumptively coercive environment of a custodial interrogation. Additionally, the standard and the warnings constitute two separate tests through which an accused may challenge self-incriminating evidence.

The Supreme Court has recognized exceptions to this rule and has promulgated decisions concerning the non-applicability of the right against self-incrimination to non-citizens and to citizens accused in extraterritorial proceedings. Additionally, the Court has also ruled that the right may not be invoked where the considerations of public safety – such as when police officers are engaging an armed suspect – override the requirement to give the *Miranda* warnings prior to any questioning. However, many scholars and several decisions have examined the applicability of the right to non-citizens like Salim Hamdan, justifying either a full application of the Fifth Amendment, or a modified version of its substantive points.

In *Hamdan*, the defense asked the military judge to suppress thirty-six statements taken from Hamdan between November 2001, when he was arrested, and January 2004, when he was first informed of his right against self-incrimination. *U.S. v. Hamdan*, 1 M.C. 112 (2008). The defense argued that various provisions of the Military Commissions Act ("MCA") of 2006, the Uniform Code of Military Justice ("UCMJ"), the Geneva Conventions, and the United States Constitution's *Ex Post Facto* Clause allowed suppression of self-incriminating statements where the

**Article 31, UCMJ:**

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

…..

(d) No statement obtained in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

accused had no prior or proper warning that the statements could be used against him. *Id.*

This was the first time the issue of self-incrimination had been raised at a military commission and squarely called for a clarification of how these various provisions were to be applied. In his denial of the defense's motion, Judge Allred upheld a narrow construction of the right against self-incrimination which was acknowledged to be "at odds with what would normally obtain under our law." *Id.* at 116. Judge Allred grounded his justification for removing defendants like Hamdan from the traditionally expansive reach of the Fifth Amendment in the MCA's express rejection of Article 31 of the UCMJ. *Id.*

Article 31 preceded *Miranda v. Arizona*, 384 U.S. 436 (1966) by 15 years. The UCMJ provides for a much broader scope of application: for those persons covered by the UCMJ, the privilege to suppress self-incriminating statements attaches not only to ones made during custodial interrogations but to *any statement* from an accused or a person suspected of an offense. Section 948r(a) of the MCA is more limited than the UCMJ or application of this right in federal civilian court: the privilege attaches only to those statements made in a commission proceeding, as when the accused is giving testimony before the military judge. It was clear to Judge Allred that Hamdan's right to self incrimination was very different than the Fifth Amendment right.

The defense made an argument for a broader right against self-incrimination gleaned from international law. In considering the application of the Geneva Conventions of 1949, Judge Allred ruled that first, these treaties were either not self-executory or were not ratified by the United States; and secondly, even assuming they did apply, "Congress has expressly determined that the MCA satisfies them." *Id.* at 115. In short order, the international law argument was dismissed.

With respect to the argument concerning the *Ex Post Facto* Clause, the defense argued that admission of the statements would constitute a violation by "exposing [Hamdan] to a less generous evidentiary rule than was in effect when he made his statements." *Id.* Judge Allred ruled that this argument could not be applied to Hamdan because the *Ex Post Facto* Clause – like the Constitutional privilege under the Fifth Amendment – did not apply to Hamdan. *Id.* Based on the foregoing analysis, Judge Allred ruled that, because no statute extendssthe privilege to custodial interrogations like Hamdan's, he could not invoke the right against self-incrimination for statements made outside of the commission proceedings, even in the absence of prior warning. *Id.* at 116.

The defense then filed a second motion to suppress, this time based on the involuntary standard. *U.S. v. Hamdan*, 1 M.C. 121 (2008). Under MCA §§ 948r(c) and (d), statements may be suppressed if they are found to have been obtained by coercive measures, in reference to the provisions of the Detainee Treatment Act ("DTA") of 2005. The defense alleged that all of Hamdan's out-of-court statements should be

**§ 948r, MCA:**

(a) No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

…..

(c) A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that –

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

(2) the interests of justice would best be served by admission of the statement into evidence.

(d) A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that –

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;

(2) the interests of justice would best be served by admission of the statement into evidence; and

(3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.

suppressed because they were the result of coercive interrogation techniques. *Id.* The defense also reiterated its arguments with respect to the Fifth Amendment. Less than a week after Judge Allred's denial in the previous ruling, the Supreme Court promulgated its decision in the case of *Boumediene v. Bush*, 553 U.S. ___ (2008), which held that the constitutional writ of habeas corpus was available to Guantanamo Bay detainees, including the accused. In the fallout of *Boumediene*, the argument that other sections of the Constitution apply to Guantanamo Bay detainees gained steam.

After *Boumediene*, Judge Allred granted the motion to suppress, in part. In so doing, he addressed the implications of *Boumediene*. Judge Allred went into a detailed discussion of previous Supreme Court decisions on the non-application of the Fifth Amendment to extraterritorial cases. *Hamdan* at 128-131. This analysis led Judge Allred to rule that the *Boumediene* decision was not meant to result in the blanket application of constitutional provisions to Hamdan, but instead serves only as guidance for considering application of constitutional provisions on a case-by-case basis. *Id.* Judge Allred "[d]istill[ed] from the Court's analysis…a set of factors to consider when analyzing the extraterritorial application of the Constitution in Guantánamo Bay." These factors were citizenship and status; site of apprehension and detention; practical considerations; adequacy of alternative right; necessity to prevent injustice; and whether application would be anomalous or impractical. According to Judge Allred, an evaluation of these factors with respect to Hamdan provided no basis for application of the Fifth Amendment to his case.

In assessing the applicability of the involuntariness standard, Judge Allred examined the "undisputed facts" with respect to Hamdan's circumstances since the time of his detention. He also analyzed the definition of "torture" provided by Military Commission Rule of Evidence 304(3) and § 948r(c)(2) of the MCA. Judge Allred ruled that the facts of some of Hamdan's interrogations in Panshir and Bagram met the definition of "torture." Therefore, those statements were suppressed in "the interests of justice."

In *U.S. v Jawad*, 1 M.C. 345 (2008), 1 M.C. 349 (2008), decided five months after the second *Hamdan* ruling, Judge Henley excluded statements of Mohammed Jawad that were elicited as a result of torture. Both motions are narrowly based upon the granted part of the *Hamdan* ruling on coercion and were, thus, also granted on grounds that mirrored the *Hamdan* factual analysis. These rulings are discussed in *NIMJ Briefs on the Guantanamo Military Commission: Use of Evidence Obtained by Torture, Cruel, Inhuman and Degrading Treatment and Other Forms of Coercion.*