



NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

Use of Evidence Obtained by Torture, Cruel, Inhuman and Degrading Treatment and Other Forms of Coercion

Rulings:

- *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 of the Accused Made While in U.S. Custody)

Allegations of torture and other forms of coercive interrogation techniques used by U.S. interrogators against detainees at Guantanamo Bay, detention facilities in Afghanistan, and CIA “black sites” plague U.S. efforts to prosecute certain detainees. It is, therefore, no surprise that this issue was raised in several military commissions.

The Military Commissions Act (“MCA”) of 2006 bans the use of evidence obtained through torture and imposes a partial ban on evidence obtained through other means of coercion. The law reads:

§ 948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements

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

(b) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE. – A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

(c) STATEMENTS OBTAINED BEFORE ENACTMENT OF DETAINEE TREATMENT ACT OF 2005. – 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) STATEMENTS OBTAINED AFTER ENACTMENT OF DETAINEE TREATMENT ACT OF 2005. – 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.

Salim Hamdan alleged Afghan and U.S. captors tortured and abused him during various interrogations. Capturing forces found surface-to-air missiles in the vehicle he was driving when he was captured at a roadblock in Afghanistan. *United States v. Hamdan*, 1 M.C. 121 (2008). After a firefight, Afghan forces detained and allegedly beat him before transferring him to U.S. custody. *Id.* at 122. Closely following capture, he was interrogated at least twice by U.S. forces. Two interrogation sessions were videotaped. *Id.* In the tape, Hamdan is seen seated on a dirt floor with his hands bound in front of him and an armed figure standing behind him. *Id.* He was subsequently moved to a different detention facility, where he was interrogated, according to him, “in the manner of torturing.” *Id.* During this time, his feet and hands were tied, a bag was placed over his head, he was knocked down repeatedly, and he was forced to “duck walk.” *Id.* Hamdan’s next stop was Bagram Air Base. He explained that it was very cold and he was isolated with his hands and feet restrained 24 hours a day. Sometimes interrogators questioned him with a knee in his back. Another detainee told Hamdan that one detainee had been beaten and left on the tarmac to die. *Id.* Hamdan eventually provided a long statement to U.S. interrogators that helped identify people and locations of interest. He denied any knowledge of missiles in his car. *Id.* at 122-123. In May 2002, Hamdan was moved to Guantanamo Bay, Cuba, where he made several more statements. *Id.* at 124. At Guantanamo Bay, Hamdan claims he was briefly touched in the crotch area by a female interrogator, and was placed in different camps and cells under different levels of security, sometimes in solitary confinement. *Id.* at 127. One, he received medical attention within minutes after an investigator’s intervention. *Id.* at 128. Hamdan claimed that he was once force-fed and restrained in a chair until he soiled himself. *Id.*

Finally, Hamdan alleges that he was a participant in “Operation Sandman” from June 10 through July 31, 2003. *Id.* Judge Allred ruled that “Operation Sandman” was an effort by camp commanders to maintain discipline in the camp and “did not involve sleep deprivation.” *Id.* However, various reports from the *New York Times* and human rights groups like Amnesty International and Human Rights First allege otherwise. “Operation Sandman” was “described as an interrogation plan devised with military psychiatrists for systematically interrupting a detainee’s sleep.” Glaberson, William, “Detainee’s Lawyers Make Claim on Sleep Deprivation” *New York Times*, July 15, 2008. Defense lawyers alleged to the *New York Times* that the use of the program was an unexplained entry on almost 600 pages of detention records provided to them in discovery and pointed to medical studies detailing the detrimental effects of prolonged sleep deprivation on an individual as

evidence that “[s]leep deprivation of that nature for 50 days would constitute torture.” *Id.*

In light of Hamdan’s allegations, defense lawyers sought a medical expert. Dr. Emily Keram conducted extensive interviews and testing of Hamdan and diagnosed him with Post Traumatic Stress Disorder. *United States v. Hamdan*, 1 M.C. 121, at 128. He apparently suffered from nightmares and recurring intrusive thoughts. *Id.*

Judge Allred ruled on each set of statements separately. With respect to the initial filmed interrogations, he ruled that the totality of the circumstances rendered the statements reliable and possessing sufficient probative value to be admitted. *Id.* at 135. According to Judge Allred, “[t]he statements were made some days after Hamdan had been rescued from his ATF [Anti-Taliban Forces] captors, and while he was in the hands of American soldiers who checked on him and assured his safety several times a day. They are corroborated by other photographic and testimonial evidence that will be produced at trial.” *Id.* Judge Allred ruled that, in accordance with Military Commission Rule of Evidence (“M.C.R.E.”) 304(c)(1), the “interests of justice will best be served by the admission of the statements into evidence.” *Id.*

With respect to the other non-videotaped statements, Judge Allred required the government to produce and submit to cross-examination under oath an official involved in the taking of the statements with the ability to authenticate and describe the conditions under which they were made. *Id.* A few statements were ordered excluded outright. *Id.* at 136. Among these were statements Hamdan made in Afghanistan in connection with his allegations that he was forced to “duck walk,” repeatedly knocked down, and restrained while in prolonged isolation. *Id.* Judge Allred ruled that, under those circumstances, the interests of justice would not be served by their admission because of the highly coercive environments and conditions under which the statements were made. *Id.*

Judge Allred ruled that Hamdan also had been exposed to a variety of coercive influences while held at Guantanamo Bay. *Id.* They were not related to interrogations. Some were “rationally related to good order and discipline” of the detainees, and some were in response to misconduct. *Id.* Simply because coercive practices and techniques were “in the air,” was not enough to trigger the exclusion of those statements. *Id.* Judge Allred ruled that the coercion must be particularly related to the statements at issue in order to have them suppressed. *Id.* Therefore, none of the statements made by Hamdan at Guantanamo Bay were excluded. *Id.*

The issue of evidence obtained by torture was also litigated in Mohammed Jawad’s military commission. *United States v. Jawad*, 1 M.C. 345 (2008). Jawad allegedly threw a hand grenade into a vehicle in which two American service members and their Afghan interpreter were riding on December 17, 2002. *Id.* Jawad, then under the age of 18

years, was subsequently apprehended by Afghan police and transported to an Afghan police station for interrogation. *Id.* Some evidence indicated Jawad was under the influence of drugs. *Id.* At the interrogation “most, if not all, present were carrying firearms, which were visible to the accused. During the interrogation, someone told the accused, ‘You will be killed if you do not confess to the grenade attack,’ and, ‘We will arrest your family and kill them if you do not confess,’ or words to that effect.” *Id.* Judge Henley determined the threat was credible, causing Jawad to admit to guilt. *Id.* at 346.

Judge Henley ruled that the prohibition on statements obtained through torture applied to “statements obtained by use of death threats to the speaker or his family...” *Id.* at 346. Torture did not require actual infliction of physical or mental injury. *Id.* The relevant inquiry is whether the threat was specifically intended to inflict severe physical or mental pain or suffering. *Id.* Judge Henley believed the threat met the threshold of torture within the meaning of M.C.R.E. 304. *Id.* Statements made at that interrogation were, therefore, inadmissible. *Id.*

In a separate opinion, Judge Henley considered statements made by Jawad while in U.S. custody in the hours and days after the torture at the Afghan police station. *United States v. Jawad*, 1 M.C. 349 (2008). “Armed U.S. government personnel took control of the accused...He was handcuffed, hooded and transported to” a U.S. base. *Id.* “Upon arrival at [the U.S. base], the accused was strip-searched and photographed. He was subsequently questioned by a U.S. interrogator for several hours. The accused still appeared to be under the influence of drugs. He was not provided Afghan or American legal counsel or told that his statements to the Afghan police could not be used against him. The accused initially denied any complicity in the attack but subsequently admitted to ‘rolling a grenade under the American’s vehicle and walking away as it exploded,’ or words to that effect. The interrogation at [the U.S. base] ended in the early morning hours of December 18, 2002. However, the accused remained in U.S. custody until he was transferred to Guantanamo Bay, Cuba, on or about February 6, 2003.” *Id.* at 349-350.

Judge Henley ruled that Jawad’s statements made to the U.S. authorities were tainted by Jawad’s earlier confession to the Afghan police. *Id.* at 350. Therefore, the government needed to demonstrate that the “second confession was not itself directly produced by the existence of the earlier unlawful confession.” *Id.* at 351.

Judge Henley identified several non-exclusive factors used to determine whether the coercion actually carried over to the second confession: (1) Jawad’s age and education; (2) that he was under the influence of drugs and deprived of sleep; (3) the repeated and prolonged nature of the questioning; (4) the temporal proximity between the arrest, the first confession and the second; (5) that Jawad remained in custody the entire time and was hooded and handcuffed while transferred to the U.S. base – in other words, there was no break in the stream of events from Jawad’s initial apprehension and interrogation by the Afghan police to the second

confession; (6) that, after arriving at the U.S. base, the U.S. interrogator used techniques to maintain the shock and fearful state associated with Jawad's initial apprehension by the Afghan police, to include blindfolding and placing a hood over his head; (7) the absence of a cleansing statement; (8) that, while the actual U.S. interrogator may have been unaware of Jawad's exact statements to the Afghan police, agents of the U.S. government were aware that he had confessed to throwing the grenade before arriving at the U.S. base; and (9) the change in locations of the interrogations and the identities of the interrogators. *Id.*

These factors helped Judge Henley examine the totality of the circumstances. *Id.* He ruled that "the effect of the death threats which produced [Jawad's] first confession to the Afghan police had not dissipated by the second confession to the U.S. government interrogator." *Id.* Therefore, statements made in U.S. custody on December 17 and 18 could not be used. *Id.* The government appealed the decision to the Court of Military Commission Review, but before the Court could issue an opinion, President Obama ordered a stay in all commission cases while the government examined detainee and military commission policy.

One of President Obama's proposed changes is that "in all cases where the degree of coercion used to obtain a statement is disputed, a military judge may admit the statement only if he or she finds that it was not obtained using interrogation methods that constitute cruel, inhuman, or degrading treatment (and if the statement is reliable and sufficiently probative, and that the interests of justice would be served by admission of the statement into evidence)." See *Changes to the Manual for Military Commissions, Action Memo from Jeh C. Johnson, General Counsel for the Secretary of Defense* (May 13, 2009). In passing the Defense Authorization Act of 2010, the Senate passed similar language to amend the MCA. Further proposals are currently under consideration. Certainly, in whatever form they may take, allegations that evidence was obtained through torture or other coercive techniques will continue to plague the military commissions.