EXHIBIT A

UNITED STATES OF AMERICA v. MOHAMMED JAWAD	**D-021** **RULING ON DEFENSE MOTION TO SUPPRESS OUT-OF-COURT STATEMENTS BY THE ACCUSED MADE WHILE IN U.S. CUSTODY**

1. On or about December 17, 2002, in Kabul, Afghanistan, the Accused allegedly threw a hand grenade into a vehicle in which two American service members and their Afghan interpreter were riding. All suffered serious injuries. The Accused, at the time under the age of 18 years,[1] was subsequently apprehended by Afghan police and transported to the [redacted] Police Station for interrogation around 1530 hours. At this point, the Accused presented no threat to the public and appeared to be under the influence of drugs. Present at the police station were several high-ranking Afghan government officials. Most, if not all, present were carrying firearms, which were visible to the Accused. The Accused initially denied throwing the grenade. The Afghan interrogators did not believe him. Someone then 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.[2] The speaker meant what he said; it was a credible threat. The Accused then admitted to throwing a grenade into

[1] The government has implicitly conceded that, at the time of the charged offenses, the Accused was less than 18 years old. Specifically, the United States has stated: "At Guantanamo, the United States is detaining Omar Khadr and Mohammed Jawad, the only two individuals captured when they were under the age of 18, whom the United States Government has chosen to prosecute under the Military Commissions Act of 2006." *See* United States Written Response to Questions Asked by the Committee on the Rights of the Child, 13 May 2008, available at: http://www.state.gov/g/drl/rls/105437.htm (last visited 16 September 2008). The results of a bone scan analysis submitted by the trial counsel are consistent with this statement, as the analysis indicated that the Accused was approximately 18 years old as of October 26, 2003. This would mean the Accused was approximately 17 years old as of the date of the charged offenses.

[2] These findings of fact come primarily from the Accused's September 26, 2008 declaration which the Military Commission admitted into evidence as a remedy for the Government's inability to provide timely discovery to the Defense.

the vehicle, and stated that he was happy if it caused the Americans to die and he would do it again. The Accused was not released. Afghan government officials then informed U.S. military authorities, who had previously requested the Afghans turn over the perpetrators of the attacks for questioning, that the Accused had confessed.

2. Armed U.S. government personnel took control of the Accused around 2200 hours on December 17, 2002. He was [redacted] transported to Forward Operating Base (FOB) 195 at the Kabul Military Training Center. Upon arrival at FOB 195, 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 FOB 195 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.

3. On October 28, 2008, the Military Commission granted a defense motion to suppress the Accused's statements to the Afghan government authorities

because they were obtained by use of torture, as that term is defined in the Military Commission Rules of Evidence (MCRE).[3] The Accused now moves this Military Commission to suppress any statements he made to U.S. government authorities on December 17 and 18, 2002, because (1) they were tainted by his prior statements to Afghan government personnel; and (2) even if not tainted, they were coerced and unreliable.[4]

4. Where a confession is obtained after an earlier interrogation in which a confession was acquired due to actual coercion or duress, the subsequent confession is presumptively tainted as a product of the earlier one.[5] To overcome this presumption, the Government must demonstrate by a preponderance of the evidence intervening circumstances which indicate the coercion surrounding the first confession had sufficiently dissipated "to insulate the [subsequent] statement from the effect of all that went before."[6]

5. The Military Commission concludes that the Accused's statements to the U.S. authorities were tainted by his earlier confession to the Afghan police, which

[3] "Torture" is defined as "an act specifically intended to inflict severe physical or mental pain or suffering ... upon another person within the actor's custody or physical control. MCRE 304(b)(3). "Severe mental pain or suffering" includes mental harm caused by or resulting from the threat of imminent death. MCRE 304(b)(3)(C).

[4] A statement alleged to be the product of coercion may only be admitted if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would be served by admission of the statement into evidence. MCRE 304(a)(2) and (c)(1).

[5] *See Oregon v. Elstad*, 470 U.S. 298 (1985) (distinguishing between two classes of involuntary statements for guidance on evaluating the admissibility of a confession obtained after one deemed to have been illegally obtained). The Supreme Court's opinion in *Elstad* was based, in part, on the Fifth Amendment self-incrimination and warning requirements that were put in place in *Miranda v. Arizona*, 451 U.S. 471 (1966) as a practical reinforcement of those rights. While, in the case at bar, the Accused's self-incrimination protections are set forth in MCRE 301 and MCRE 304, a reasonably similar *Elstad* analysis is appropriate with regard to the admissibility of confessions allegedly the product of coercion.

[6] *Clewis v. Texas*, 386 U.S. 707, 710 (1967).

had been achieved under threats of death to the Accused and his family. Therefore, the Government must demonstrate that the second confession was not itself directly produced by the existence of the earlier unlawful confession. In determining whether the coercion actually carried over to the second confession, the Military Commission considered the following non-exclusive factors: (1) the Accused'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 the Accused remained in custody the entire time and was hooded and handcuffed while transferred to FOB 195 - in other words, there was no break in the stream of events from the Accused's initial apprehension and interrogation by the Afghan police to the second confession;[7] (6) that, after arriving at FOB 195, the U.S. interrogator used techniques [redacted] (7) the absence of a cleansing statement; (8) that, while the actual U.S. interrogator may have been unaware of the Accused's exact statements to the Afghan police, agents of the U.S. government were aware that the Accused had confessed to throwing the grenade before arriving at FOB 195; and (9) the change in locations of the interrogations and the identities of the interrogators.[8]

[7] *United States v. Lopez*, 437 F.3d 1059 (10th Cir. 2006).
[8] *See, e.g., United States v. Cuento*, 60 M.J. 106 (2004); *United States v. Brisbane*, 63 M.J. 106 (2006).

6. Under the totality of the circumstances, the Military Commission concludes the effect of the death threats which produced the Accused's first confession to the Afghan police had not dissipated by the second confession to the U.S. government interrogator. In other words, the subsequent confession was itself the product of the preceding death threats. Consequently, as the Government has failed to carry its burden, it cannot use any statements made by the Accused to U.S authorities on or about December 17, 2002 to secure a conviction.

7. As the Military Commission finds the Accused's confession to the U.S. interrogator is tainted by the first confession to the Afghan police, it need not decide now whether, even assuming the second confession is not tainted, it should still be excluded because the totality of the circumstances does not render the statement reliable and the interests of justice would not be served by admission of the statement into evidence. *See* MCRE 304(c)(1).

8. The defense motion to suppress all oral statements of the Accused made while in custody of U.S. forces on December 17 and 18, 2002 is GRANTED.

So ordered at 1300 hours this 19th day of November 2008:

/s/
Stephen R. Henley
Colonel, US Army
Military Judge

EXHIBIT B

UNITED STATES OF AMERICA v. MOHAMMED JAWAD	**D-021** **RULING ON DEFENSE MOTION TO SUPPRESS OUT-OF-COURT STATEMENTS BY THE ACCUSED MADE WHILE IN U.S. CUSTODY**

1. On or about December 17, 2002, in Kabul, Afghanistan, the Accused allegedly threw a hand grenade into a vehicle in which two American service members and their Afghan interpreter were riding. All suffered serious injuries. The Accused, at the time under the age of 18 years,[1] was subsequently apprehended by Afghan police and transported to the [redacted] Police Station for interrogation around 1530 hours. At this point, the Accused presented no threat to the public and appeared to be under the influence of drugs. Present at the police station were several high-ranking Afghan government officials. Most, if not all, present were carrying firearms, which were visible to the Accused. The Accused initially denied throwing the grenade. The Afghan interrogators did not believe him. Someone then 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.[2] The speaker meant what he said; it was a credible threat. The Accused then admitted to throwing a grenade into

[1] The government has implicitly conceded that, at the time of the charged offenses, the Accused was less than 18 years old. Specifically, the United States has stated: "At Guantanamo, the United States is detaining Omar Khadr and Mohammed Jawad, the only two individuals captured when they were under the age of 18, whom the United States Government has chosen to prosecute under the Military Commissions Act of 2006." *See* United States Written Response to Questions Asked by the Committee on the Rights of the Child, 13 May 2008, available at: http://www.state.gov/g/drl/rls/105437.htm (last visited 16 September 2008). The results of a bone scan analysis submitted by the trial counsel are consistent with this statement, as the analysis indicated that the Accused was approximately 18 years old as of October 26, 2003. This would mean the Accused was approximately 17 years old as of the date of the charged offenses.

[2] These findings of fact come primarily from the Accused's September 26, 2008 declaration which the Military Commission admitted into evidence as a remedy for the Government's inability to provide timely discovery to the Defense.

the vehicle, and stated that he was happy if it caused the Americans to die and he would do it again. The Accused was not released. Afghan government officials then informed U.S. military authorities, who had previously requested the Afghans turn over the perpetrators of the attacks for questioning, that the Accused had confessed.

2. Armed U.S. government personnel took control of the Accused around 2200 hours on December 17, 2002. He was [redacted] transported to Forward Operating Base (FOB) 195 at the Kabul Military Training Center. Upon arrival at FOB 195, 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 FOB 195 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.

3. On October 28, 2008, the Military Commission granted a defense motion to suppress the Accused's statements to the Afghan government authorities

because they were obtained by use of torture, as that term is defined in the Military Commission Rules of Evidence (MCRE).[3] The Accused now moves this Military Commission to suppress any statements he made to U.S. government authorities on December 17 and 18, 2002, because (1) they were tainted by his prior statements to Afghan government personnel; and (2) even if not tainted, they were coerced and unreliable.[4]

4. Where a confession is obtained after an earlier interrogation in which a confession was acquired due to actual coercion or duress, the subsequent confession is presumptively tainted as a product of the earlier one.[5] To overcome this presumption, the Government must demonstrate by a preponderance of the evidence intervening circumstances which indicate the coercion surrounding the first confession had sufficiently dissipated "to insulate the [subsequent] statement from the effect of all that went before."[6]

5. The Military Commission concludes that the Accused's statements to the U.S. authorities were tainted by his earlier confession to the Afghan police, which had been achieved under threats of death to the Accused and his family.

---

[3] "Torture" is defined as "an act specifically intended to inflict severe physical or mental pain or suffering ... upon another person within the actor's custody or physical control. MCRE 304(b)(3). "Severe mental pain or suffering" includes mental harm caused by or resulting from the threat of imminent death. MCRE 304(b)(3)(C).

[4] A statement alleged to be the product of coercion may only be admitted if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would be served by admission of the statement into evidence. MCRE 304(a)(2) and (c)(1).

[5] *See Oregon v. Elstad*, 470 U.S. 298 (1985) (distinguishing between two classes of involuntary statements for guidance on evaluating the admissibility of a confession obtained after one deemed to have been illegally obtained).

[6] *Clewis v. Texas*, 386 U.S. 707, 710 (1967).

Therefore, the Government must demonstrate that the second confession was not itself directly produced by the existence of the earlier unlawful confession. In determining whether the coercion actually carried over to the second confession, the Military Commission considered the following non-exclusive factors: (1) the Accused'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 the Accused remained in custody the entire time and was hooded and handcuffed while transferred to FOB 195 - in other words, there was no break in the stream of events from the Accused's initial apprehension and interrogation by the Afghan police to the second confession;[7] (6) that, after arriving at FOB 195, the U.S. interrogator used techniques [redacted] (7) the absence of a cleansing statement; (8) that, while the actual U.S. interrogator may have been unaware of the Accused's exact statements to the Afghan police, agents of the U.S. government were aware that the Accused had confessed to throwing the grenade before arriving at FOB 195; and (9) the change in locations of the interrogations and the identities of the interrogators.[8]

6. Under the totality of the circumstances, the Military Commission concludes the effect of the death threats which produced the Accused's first confession to

[7] *United States v. Lopez*, 437 F.3d 1059 (10th Cir. 2006).
[8] *See, e.g., United States v. Cuento*, 60 M.J. 106 (2004); *United States v. Brisbane*, 63 M.J. 106 (2006).

the Afghan police had not dissipated by the second confession to the U.S. government interrogator. In other words, the subsequent confession was itself the product of the preceding death threats. Consequently, as the Government has failed to carry its burden, it cannot use any statements made by the Accused to U.S authorities on or about December 17, 2002 to secure a conviction.

7. As the Military Commission finds the Accused's confession to the U.S. interrogator is tainted by the first confession to the Afghan police, it need not decide now whether, even assuming the second confession is not tainted, it should still be excluded because the totality of the circumstances does not render the statement reliable and the interests of justice would not be served by admission of the statement into evidence. *See* MCRE 304(c)(1).

8. The defense motion to suppress all oral statements of the Accused made while in custody of U.S. forces on December 17 and 18, 2002 is GRANTED.

So ordered at 1300 hours this 19th day of November 2008:

/s/
Stephen R. Henley
Colonel, US Army
Military Judge

EXHIBIT C

UNITED STATES OF AMERICA v. MOHAMMED JAWAD	**D-022** **RULING ON DEFENSE MOTION TO SUPPRESS OUT-OF-COURT STATEMENTS OF THE ACCUSED TO AFGHAN AUTHORITIES**

1. On or about December 17, 2002, in Kabul, Afghanistan, the Accused allegedly threw a hand grenade into a vehicle in which two American service members and their Afghan interpreter were riding. All suffered serious injuries. The Accused, at the time under the age of 18 years,[1] was subsequently apprehended by Afghan police and transported to an Afghan police station for interrogation. The Accused appeared to be under the influence of drugs. Present at the police station were several high-ranking Afghan government officials, including th[redacted] the [redacted] and the [redacted] 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.[2] The speaker meant what he said; it was a credible threat. The

[1] The government has implicitly conceded that, at the time of the charged offenses, the Accused was less than 18 years old. Specifically, the United States has stated: "At Guantanamo, the United States is detaining Omar Khadr and Mohammed Jawad, the only two individuals captured when they were under the age of 18, whom the United States Government has chosen to prosecute under the Military Commissions Act of 2006." *See* United States Written Response to Questions Asked by the Committee on the Rights of the Child, 13 May 2008, available at: http://www.state.gov/g/drl/rls/105437.htm (last visited 16 September 2008). The results of a bone scan analysis submitted by the trial counsel are consistent with this statement, as the analysis indicated that the Accused was approximately 18 years old as of October 26, 2003. This would mean the Accused was approximately 17 years old as of the date of the charged offenses.

[2] These findings of fact come primarily from the Accused's September 26, 2008 declaration which the Military Commission admitted into evidence as a remedy for the Government's inability to provide timely discovery to the Defense.

Accused subsequently admitted to throwing a grenade into the vehicle, he was happy if it caused the Americans to die and he would do it again. Several hours later, the Accused was turned over to U.S. military custody[3] and eventually transferred to Guantanamo Bay, Cuba, on or about February 6, 2003.

2. The Accused now moves this Military Commission to suppress all statements he made to Afghan government authorities on December 17, 2002 because they were obtained by the use of torture, as that term is defined in the Military Commission Rules of Evidence (MCRE).

3. A statement obtained by the use of torture[4] shall not be admitted into evidence. *See* MCRE 304(3). "Torture" includes statements obtained by use of death threats to the speaker or his family; the actual infliction of physical or mental injury is not required. Instead, the relevant inquiry is whether the threat was specifically intended to inflict severe physical or mental pain or suffering upon another person within the interrogator's custody or control. In this case, the Afghan government and police authorities told the Accused he and his family would be killed if he did not confess to throwing the grenade. The interrogators were armed. There is no evidence the threats were made in jest or intended as a joke. Given the Accused's age and the then reputation of the Afghan police as corrupt and violent, the Commission specifically finds these threats credible.

[3] The Accused also made several incriminating statements to U.S. interrogators, which are the subject of an additional defense motion to suppress, *See* D-023, Defense Motion to Suppress Out-of-Court Statements by the Accused Made While in U.S. Custody.

[4] "Torture" is defined as "an act specifically intended to inflict severe physical or mental pain or suffering ... upon another person within the actor's custody or physical control. MCRE 304(3). "Severe mental pain or suffering" includes mental harm caused by or resulting from the threat of imminent death. MCRE 304(3)(C).

Evidence that someone died or suffered severe injury is not required for the Commission to determine that the threat to kill the Accused and his family was intended to inflict severe physical or mental pain or suffering. On this point, the Commission can not envision a situation where a credible threat to kill someone unless they confess would not satisfy the "act specifically intended to inflict severe physical or mental pain or suffering" requirement in the MCRE definition of torture.

4. While the torture threshold is admittedly high, it is met in this case. The Military Commission concludes that the Accused's statements to the Afghan authorities were obtained by physical intimidation and threats of death which, under the circumstances, constitute torture within the meaning of MCRE 304. Consequently, the government cannot use any statements made by the Accused to Afghan authorities on or about December 17, 2002 to secure a conviction.

5. The defense motion to suppress all oral and written statements of the Accused made to any Afghan police and government authority on December 17, 2002 is GRANTED.

So ordered at 1000 hours this 28th day of October 2008:

/s/
Stephen R. Henley
Colonel, US Army
Military Judge

EXHIBIT D

BEFORE THE MILITARY COMMISSION

UNITED STATES OF AMERICA **v.** **MOHAMMED JAWAD**	**D-021, D-022** **Government Response** to the Defense Brief on the Issue of Torture Under M.C.R.E. 304 **10 October 2008**

1. **Timeliness.** This response is timely under the Military Commission's scheduling order of 26 September 2008.

2. **Relief Requested.** The motions to suppress should be denied with respect to the accused's statements to both the Afghan authorities in Kabul and the U.S. military authorities at Forward Operating Base (FOB) 195.

3. **Discussion.** The arguments in the defense brief of 3 October 2008 do not support finding that the accused was "tortured" as defined under M.C.R.E. 304.[1] Not only do several of the defense's assertions rest on mischaracterizations of key facts, but their legal arguments are unsupported by the text of the rule and draw from inapplicable Constitutional precedents, which, even if employed as persuasive authority, do not support their conclusions.

a. The Defense Brief Mischaracterizes Several Keys Facts, Which Should Be Placed in Context in Evaluating Whether "Torture" Is Established.

As an initial matter, correcting several glaring factual mischaracterizations is in order. First, the defense brief states misleadingly that the alleged threats by Afghan Police "occurred after, one of the arresting officers, Mr. S., had put a gun to [the accused]'s head." Defense Brief

[1] Regardless of the defense's assertions as to whether M.C.R.E. 304(b)(3)'s definition of torture is consistent with international law, since it is reasonably derived from section 948r(b) of the Military Commissions Act and virtually identical to the definition Congress used to implement the Convention Against Torture in 1994, codified at 18 U.S.C. § 2340, it is the only definition applicable in this case. *See, e.g., TMR Energy Limited v. State Property Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) ("Never does customary international law prevail over a contrary federal statute.") (citations omitted); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) (explaining that customary international law is relevant to U.S. courts "where there is no treaty, and no controlling executive or legislative act or judicial decision").

at 2. Based on the prosecution's recollection of Mr. E's testimony (derived from his documented, in-person interviews with Afghan witnesses) as well as a perusal of Mr. S's deposition, it was not Mr. S but an Afghan soldier who pointed a gun at the accused. This occurred at the scene of the crime—well before his interrogation at the police station—immediately after the accused was witnessed throwing a hand grenade, which had exploded into the three victims in their vehicle. Also, the defense fails to mention that the reason the Afghan soldier pointed a gun at the accused under those circumstances was that, even as the victims were stumbling from their vehicle, riddled with shrapnel, bleeding profusely, and yelling for help, the accused actually had a second grenade in his hand and was readying to throw it at them. In other words, the reason why the Afghan soldier pointed a gun at the accused was not only to disarm and apprehend him, but also *to prevent him from killing the already wounded victims at the scene of the crime.*

Preventing an attacker from using a dangerous weapon (a hand grenade, no less) is certainly a legitimate basis for a soldier to point a gun at someone in a combat zone, or even to shoot him for that matter. Hence, whatever mental discomfort the accused may have experienced as a result of the soldier's actions was entirely "incident to lawful sanctions" under M.C.R.E. 304(b)(3) and forms no basis to argue that any "prolonged mental harm" stemming therefrom constitutes torture. The accused's own violent actions placed him in the position of having a gun pointed at him at the time of his arrest. Thus, the argument that this soldier's legitimate, almost certainly life-saving actions should be somehow factored into whether the accused was allegedly "tortured" when he confessed his crime elsewhere, a substantial time later, is specious to the point of disingenuousness. The defense's apparent reliance on this incident is therefore not only misplaced, but actually undermines their argument that any "prolonged mental harm" resulted from alleged threats or mistreatment, as opposed to the legitimate and lawful action of the Afghan authorities.

In addition, a second glaring mischaracterization is the defense's continued assertion that a "blatantly abusive aspect[] of the interrogation" stemmed from the actions of U.S. military personnel at FOB 195 in medically examining the accused and photographing the findings. *See* Defense Brief at 5. This allegation could not be further from the truth. Not only was this

medical exam unrelated to the accused's subsequent interrogation by different personnel at FOB 195, but there was absolutely no aspect in which it was abusive. The officer who conducted the examination, Capt D, a licensed physician's assistant, testified that he had conducted over 1500 of these same kinds of examinations while working for the department of corrections in his home state. His intent was to check for and potentially to treat any injuries, not to harm the accused in any way. Capt D was not involved in any questioning of the accused other than to ascertain whether he had any medical complaints. And the photographs taken at the time clearly show none other than Capt D conducting a physical examination of the accused, with very few other bystanders in the room.

Capt D's reasonable, conscientious actions in this regard were in no way abusive, nor were they in any way "intended to inflict severe physical or mental pain or suffering" on the accused, which is what M.C.R.E. 304(b)(3) requires to establish torture. If the examination caused the accused any embarrassment or mental discomfort, it was entirely incident to lawful actions, not even rising even to the level of "sanctions," which are specifically excluded from consideration in establishing "torture" under M.C.R.E. 304(b)(3). As with the events surrounding the accused's apprehension earlier that day, the defense's deliberate mischaracterization of this medical exam as something sinister, which is controverted by every piece of actual evidence on this issue, in the end only further undermines their argument that any "prolonged mental harm" was caused by or resulted from anything amounting to unlawful threats or mistreatment.

b. Under the Totality of the Circumstances, None of the Statements the Accused Made Either to Afghan Authorities at the Kabul Police Station or Later to U.S. Authorities at FOB 195 Was "Obtained By Use of Torture."

In analyzing whether a statement was "obtained by use of torture," the starting point is to ascertain whether there was an "act specifically intended to inflict severe physical or mental pain or suffering." M.C.R.E. 304(b)(3). While it is clear that "prolonged mental harm" caused by or resulting from threats of imminent death meets this definition, it is equally clear that "pain or suffering [i.e., mental harm] incident to lawful sanctions" does not. *Id.* Hence, it is vital, in weighing the totality of the circumstances, to determine first, whether the alleged mental harm

complained of was the result of unlawful threats as opposed to lawful sanctions, and second, if there is sufficient evidence of threats amounting to torture, to then determine whether the statements at issue were "obtained by" those threats. There is thus a double nexus requirement to establish whether any statement was "obtained by use of torture" under M.C.R.E. 304, and neither nexus is satisfied on the evidence of this case.

(1) If Demonstrated at All, Any "Prolonged Mental Harm" Is the Result of Lawful Sanctions, Not Unlawful Threats.

Regarding the first nexus, there is virtually zero evidence in this case to establish that any "prolonged mental harm" was caused by or resulted from alleged threats by Afghan authorities, as opposed to lawful sanctions surrounding the accused's legitimate capture, detention, and questioning. To compensate for this dearth of evidence, the defense seeks in their brief to prove "prolonged mental harm" by pointing to actions that are unrelated, in time or location, to the alleged threats, such as, for example: "[T]he actions of U.S. interrogators served only to exacerbate the 'severe mental pain and suffering' resulting from the initial threats." Defense Brief at 3. However, since there is no evidence or even any allegation of treatment amounting to "torture" by U.S. personnel, any mental harm allegedly stemming from the U.S. interrogators' actions is entirely "incident to lawful sanctions," which is specifically excluded from consideration under M.C.R.E. 304.

In fact, the entire course of events on 17-18 December 2002 is a case study of lawful actions and sanctions surrounding the legitimate arrest and detention of a belligerent caught in the act of a grenade attack in a crowded marketplace. First, he is stopped mid-attack by local authorities through the legitimate use of force and threat of force. After being disarmed and apprehended at the scene, he is taken to a local police station for questioning by various police officials, none of whom maintains he was mistreated or threatened in any way. He is then turned over to the U.S. military authorities, who immediately assign a human rights observer to ensure he is well treated, while medical personnel examine him for any signs of injury. After being cleared by medical, he is questioned by a trained military interrogator who uses legitimate, textbook interrogation techniques to obtain reliable, actionable intelligence. He is given food

and water during this time and later given linens and allowed to sleep. The following morning, he is re-interviewed briefly before being transferred on to a central detention facility.

It is quite understandable that any one of the above events may have caused the accused some physical or mental discomfort, and judging from their arguments, the defense maintains that was indeed the case. Nevertheless, based on the evidence, the fact remains that any discomfort the accused might have experienced during these events was entirely "incident to lawful sanctions," which M.C.R.E. 304(b)(3) excludes from use as a basis of showing "prolonged mental harm" to establish "torture." In essence, the defense argument would have the Commission blend together all the mental discomfort the accused may have derived during the entire 17-18 December 2002 period and then label it collectively as "prolonged mental harm caused by or stemming from threats of imminent death." But even if the Commission were inclined to believe the accused's vague, unsworn allegations over the weight of the other evidence, the nexus between the alleged threats and the alleged mental harm is still not established. Indeed, it is exactly this type of "blending," argued for by the defense, that M.C.R.E. 304(b)(3)'s lawful-sanction exclusion is specifically designed to disallow.

(2) The Evidence Does Not Connect Any Alleged Unlawful Threats to Any Particular Statements Sought to Be Excluded.

Regarding the second nexus, only those statements "*obtained by* use of torture" are rendered inadmissible. M.C.R.E. 304 (a) (emphasis added). Hence, just as prolonged mental harm must be connected to unlawful threats (as opposed to lawful sanctions), the alleged unlawful threats must also be linked to the particular statements sought to be excluded. Based on inapplicable[2] and misplaced Constitutional precedents, the defense seeks to avoid this nexus requirement by arguing that the events on 17-18 December 2002 should be treated as one long, unlawfully threatening interrogation. This is simply absurd. Not only do the text and structure of M.C.R.E. 304 not support this type of overbroad argument, but even if its reasoning is

[2] As argued in the government's original Response to the Defense Motions to Suppress, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), together stand for the proposition that protections under the Bill of Rights do not extend to nonresident aliens in a foreign country whose only connection to the United States is being witnessed conducting a belligerent attack against U.S. military personnel. *See* Government Response at 4-6.

pursued, as a purely factual matter no characterization of these events could be further from the truth.

Similar to their attempt to prove "prolonged mental harm" by pointing to mental discomfort derived from lawful sanctions, the defense's "continuous stream of events" argument seeks to blend one vague allegation of threats in with dozens of specific statements—obtained at different times, by different interrogators, from different countries, speaking different languages, in different locations—and then label every single statement as "obtained by torture." The text of M.C.R.E. 304 simply does not support this type of overbroad argument. First, this very precise rule commences with the words, "*[a] statement* obtained by use of torture shall not be admitted," which, particularly given the strict remedy imposed, implies that each statement should be analyzed and assessed independently to determine whether it is a product of torture. M.C.R.E. 304(a)(1) (emphasis added). Whether unintentionally or by design, the accused's vague allegation of threats "[w]hile [he] was at the police station" fails to indicate at what point any of the alleged threats were made—before he was questioned? after he was questioned but before he put a thumbprint on the written statement? somewhere in the middle, or between questioning by different officials?—nor does it indicate what if any specific statements the accused made in response to any alleged threats.[3] *See* Accused's Decl. at 1. Even taking the unsworn declaration at face value (against the weight of the other evidence), it is quite plausible that the accused verbally made some or all of his incriminating statements at issue *before* any of the alleged threats were made.

Second, M.C.R.E. 304(b)(3)'s definition of "torture" is based on acts of specifically intended consequences done by a specific actor to a person within that actor's custody, which implies a narrow focus on each individual interrogator or interrogation. Again, the accused's vague declaration provides zero details from which to make this type of assessment. And it would make little sense under the precise wording of the rule to hold that "torture" by a specific interrogator in one location, renders inadmissible statements made to an entirely different

[3] And because this statement was unsworn, and therefore not subject to cross examination, the government has no ability to develop any of these details in responding to the allegations, since the Afghan authorities all deny that any such threats took place.

interrogator, at a different time, in a different location. Such a broad interpretation of the words "obtained by" would essentially swallow any precision contained in the rest of the rule.

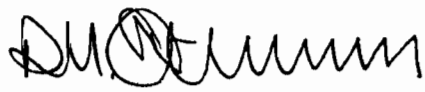
Finally, even pursuing the defense's own line of reasoning in this case, the facts more than adequately support finding a "break in the stream of events" between the interrogations at issue. Separate and apart from the question of whether there were multiple, independent interrogations conducted at each location (which the evidence suggests there were), there is a profound, factual line of demarcation between the afternoon interrogation at the Kabul police station and the interrogation at FOB 195 later that evening. First, the accused was physically transferred from the police station in the city center to a military outpost on the outskirts of town, during which time no questioning occurred. Second, throughout the duration of this transfer, it was quite obvious to the accused that he was being delivered into the custody of an entirely different government, and when he arrived at FOB 195, there were profound differences in context and language. Third, even before any questioning at FOB 195 began, the accused received a full medical examination during which no questioning occurred. And finally, there is zero evidence that any U.S. interrogator was aware of or made reference to any previous alleged threat by Afghan authorities. To the contrary, the U.S. interrogator testified that he was not even informed that the accused had confessed to the Afghan authorities. Thus, even when analyzed under the rubric of domestic custodial interrogations, which is not required under M.C.R.E. 304, the argument that these circumstances do not establish a break in the stream of events is wholly unfounded.

d. Conclusion

In light of the above arguments, in addition to those previously submitted, the government respectfully submits that "torture" by any Afghan authorities is not established on the evidence presented in this case. The government further submits that "torture" has not been established or even alleged against any individual at FOB 195. Finally, the government submits that no statement given by the accused at either the Kabul police station or FOB 195 was "obtained by use of torture" as these terms are defined under M.C.R.E. 304.

For these reasons, the defense motions to suppress based on alleged torture should be denied.

Respectfully submitted,



Douglas M. Stevenson
Lt Col, U.S. Air Force
Prosecutor

John Ellington
LCDR, JAGC, U.S. Navy
Prosecutor

Arthur L. Gaston III
LCDR, JAGC, U.S. Navy
Prosecutor

Office of the Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301-1610
(703) 602-4173

EXHIBIT E

UNITED STATES OF AMERICA v. MOHAMMED JAWAD	D-021, D-022 **Defense Response** to Government Brief on the Issue of Torture Under M.C.R.E. 304 October 10, 2008

1. **Timeliness:** On 26 September 08, the military commission ordered this response brief to be filed by 1200 on 10 October 2008 (seven calendar days after receipt of the original government filing). This brief is timely.

2. **Relief Requested:** The motions to suppress all statements allegedly made by Mr. Jawad on 17-18 December 2002 in both Afghan and U.S. custody should be granted. (D-021 and D-022)

3. **Overview:** MCRE 304(a)(1) requires suppression of all alleged statements of Mr. Jawad made in Afghan police custody on 17 December 2002 as such statements were the result of torture. The government has misstated the facts and the relevant legal standard to be applied. The government has failed to meet their burden to prove by a preponderance of the evidence that the statements were not obtained by use of torture. The government's assertion that the threats described by Mr. Jawad are not sufficient to establish torture is without merit.

4. **Burden of Proof:** The burden is on the prosecution to establish admissibility by preponderance of the evidence.

5. **Response to Government Facts:**

a. Admitted, except the defense disputes that Mr. Jawad was actually witnessed throwing a hand grenade. The only evidence before the commission of an eyewitness to Mr. Jawad throwing the grenade is the deposition testimony of Mr. M. In December 2007, M does he say he saw the grenade being thrown (M Depo p. 6) but his story had changed markedly

from what he told Agent E in June 2003 and is utterly incredible. According to the far more credible deposition testimony of Mr. S, neither he nor Mr. M actually saw the grenade thrown into the jeep. Rather, they heard the explosion while they were eating lunch and then went to investigate. (Mr. S. deposition at p. 4, and pp.18-19)

b. Mr. Jawad was taken to a Kabul police station. It is unclear if Mr. Jawad was taken directly there. He was later taken to the Interior Ministry. It is conceded that according to Afghan witnesses, Mr. Jawad made incriminating statements. However, if such statements were made, they were the product of torture and coercion.

c. The depositions did occur. The military commission has the deposition videos and transcripts. The testimony that no abuse occurred is directly contrary to the physical evidence and testimony introduced at the suppression hearing. Mr. Jawad clearly had a recent injury to his nose when he was received by U.S. Forces. The prosecution's statement that Mr. M accompanied Mr. Jawad "essentially from start to finish" is inaccurate. Mr. M was not present throughout the entire interrogation, and therefore cannot attest with certainty that Mr. Jawad was never threatened. Mr. M left the interrogation repeatedly to do television interviews with CNN, BBC, and Afghan news. (M. depo p. 34) Mr. M was not one of the person's identified as being present or conducting the interrogation by Mr. Z. (Z depo p. 4) The prosecution's paraphrasing of the testimony of Mr. M is also inaccurate. Mr. W did say that he did not observe Mr. Jawad to have been mistreated, but was referring to physical abuse only. He also did not say that he had not been mistreated, only that he had not observed any mistreatment. Mr. W was only present for a limited portion of the time that Mr. Jawad was in Afghan custody. Mr. W indicated that the reason he chose to get personally involved was because of his concern about police corruption. (W depo p. 12)

d. First sentence – admitted. Second sentence -- the prosecutor is attempting to improperly invent evidence through personal testimony by asserting "facts" based on "the prosecutor's knowledge". The government decided, for whatever reason, that they would not introduce any statements made by Mr. Jawad at Bagram or at Guantanamo for any reason. Therefore, there is no evidence before the commission of what Mr. Jawad said in any subsequent

interrogation and the commission may not consider the prosecutor's implication as evidence. The prosecution appears to be attempting to impeach the credibility of Mr. Jawad by suggesting a recent fabrication or prior inconsistent statements. While this is a legitimate method of impeachment under the Military Commission Rules of Evidence 613(b), there is no evidence before you of any prior inconsistent statements by Mr. Jawad.

e. Irrelevant. D-008 was based on torture, illegal pretrial punishment and outrageous government conduct by the United States, not by Afghan authorities.

f. Irrelevant.

g. MCRE 803(b) is inapplicable and irrelevant. The defense informed the government during the RMC 802 conference on 25 September of the intent to submit a declaration of the accused based on the fact that certain facts about the interrogations of Mr. Jawad had been deemed to be classified by the court security officer and could not be testified to in open session before the commission. A draft statement was prepared that evening and refined on the morning of 26 September after Mr. Jawad reviewed the draft declaration. The declaration was then provided to the court security officer for potential redaction. The defense provided a copy of Mr. Jawad's declaration the same morning that the statement was completed and signed, concurrent with the statement being published in open session of the commission.

h. MCRE 803(b) is inapplicable and irrelevant. Attachment A is inadmissible and must be disregarded by the commission.

i. The first sentence is admitted. The second sentence is misleading. The defense has been denied the opportunity for an independent psychological consultation or evaluation until the commission ordered a psychologist appointed to the defense on 26 Sept 08. The confidential report of the psychiatrists who conducted the mental health evaluation, which was provided *in camera* to the military judge, does indicate further potential areas of harm which need to be explored now that an independent defense expert consultant has been appointed. It is

not necessary for the defense to allege or prove harm in order to demonstrate that torture has occurred under MCRE 304.

j. True, but misleading, and irrelevant. The full confidential report indicates a number of mental health issues, which the defense intends to develop more fully now that our expert has been appointed. Prolonged mental harm need not be proved under MCRE 304.

6. Law and Argument:

a. New hearsay statements, improperly presented by the government after the completion of the suppression hearing, should be disregarded by the commission.

The only evidence properly before the commission is the evidence introduced at the suppression hearing (and evidence introduced at earlier hearings, to the extent that it may be relevant to this suppression motion). The commission may not consider the government's improperly introduced supplement. The government feigns surprise at the assertion by Mr. Jawad that the statement allegedly obtained by Afghan authorities on 17 Dec 2002 was obtained by threats, and attempts to belittle his declaration by repeatedly referring to his statement as "unsworn"[1] and "last minute". The commission must not be fooled by the government's attempt to create the impression that Mr. Jawad's declaration caught them off guard, or their implication that this was a recent fabrication by the accused. The government is disingenuously suggesting not only that it came as a complete shock to them to learn of Mr. Jawad's assertions that he was threatened by the Afghan police, but also that they were somehow put at a disadvantage by unfair defense tactics and therefore should have the opportunity to supplement the record in a completely unauthorized manner. Nothing could be further from the truth. The pertinent facts are as follows:

(1) On 12 Sep 2008, the defense notified the commission and the prosecution that the defense intended to seek to have incriminating statements allegedly made to Afghan authorities on 17 Dec 2002 suppressed. The only bases for suppression under MCRE 304 are

[1] Mr. Jawad stated at the June 19 hearing that it is not permitted under Islam to swear, and was permitted to testify simply by promising to tell the truth. (Jawad ROT p. 205). The Declaration contained an affirmation that the statement was truthful, which should be considered to be the equivalent of a sworn statement.

torture and coercion. Thus, the government was placed on notice that the defense intended to allege torture and/or coercion by the Afghan authorities.[2]

(2) In D-022, filed September 18, 2002, the following factual allegation was made in support of the defense motion to suppress statements allegedly made by Mr. Jawad while in Afghan custody:

> Mr. Jawad was subjected to intimidating abusive and coercive treatment, both mentally and physically, while in the custody of the Afghan authorities, including being struck, **threats to himself and threats to his family.** (paragraph e)

Comment: The government was given fair notice, over a week in advance, that the defense intended to raise the issues of threats to Jawad and to his family. The declaration of Mr. Jawad offered at the suppression hearing was completely consistent with the facts asserted in the defense motion.

(3) The government's combined response to D-021 and D-022 contained the following statement:

> All the Afghan authorities involved in the accused's questioning, from the highest ranking ministry official down to the lowest ranking police interrogator, consistently maintained that the accused was well treated at the police station. (Paragraph 5e)

Comment: The government was clearly aware that the "treatment" of the accused by the Afghan authorities was a matter in dispute at the suppression hearing. However, despite being aware that the burden was on them to prove the admissibility of any statements they wished to introduce into evidence, they chose not to offer any live testimony to substantiate the absence of abuse.

[2] As early as the 7 May 08 hearing, the defense asserted that the "confession" obtained by the Afghan authorities was obtained through coercion.

(4) On the 15 Sept 08 witness list provided by the government, the government identified five Afghan witnesses who purportedly witnessed and participated in all or some of the interrogation of the accused on 17 December 2002. Based on the deposition transcript of Mr. Z, this witness list was incomplete. Mr. Z identified four other individuals who were present at the interrogation, at least one of whom was an active participant in the interrogation. (Mr. Z depo. at p. 4)

(5) For reasons unknown to the defense, the government chose not to call any of the Afghan witnesses on their witness list to testify at the suppression motion hearing, nor did they have them available on telephone or VTC standby. Instead, the government brought only Mr. E, the CITF agent who interviewed these five witnesses over five years ago through an interpreter who the government also failed to produce. In addition, the government introduced depositions of four of these witnesses, only two of which even touch upon the treatment of Mr. Jawad, and neither of which specifically addresses the issue of whether Mr. Jawad was threatened.

(6) Mr. Jawad's declaration was read into the record on Friday morning, 26 September. A written copy of Mr. Jawad's declaration was provided to the government at the time the statement was published to the commission. The government had several hours, including a lunch break, to review and digest the contents of the declaration and consider whether rebuttal should be offered.

(7) At the close of the defense case on the suppression motion, the government was given the opportunity to submit rebuttal evidence. Mr. E was still present and available to testify, if he had any relevant testimony to offer. The prosecutors did not call Mr. E. The prosecution did not identify any other witnesses that they would like to call, nor did they request the opportunity to provide supplemental rebuttal evidence at a later time.[3] The

[3] After the 19 June hearing, the defense specifically requested permission to supplement the record with rebuttal evidence after the close of the hearing based on testimony adduced at the hearing which the defense was unprepared to rebut at the time and which required further investigation, specifically, certain misleading statements made by Brig Gen Hartmann. The defense then sought and received an order to depose Capt McCarthy specifically for this purpose. This is the proper way to supplement the record with rebuttal information post-hearing.

prosecutors did not attempt to call Mr. S. or Mr. M. as rebuttal witnesses to respond to Mr. Jawad's declaration.

(8) During argument on D-021 and D-022, lead defense counsel repeatedly referred to Mr. Jawad's "unrebutted" declaration. Assistant trial counsel clearly heard this comment, because he attempted to respond to the claim that the statement was unrebutted in his argument. The government perhaps could have requested to have the hearing reopened to offer rebuttal testimony at that time, but chose not to do so. It apparently dawned on trial counsel sometime shortly after the hearing that they should have not have allowed Mr. Jawad's declaration to go unrebutted, and that their failure to put on any rebuttal evidence would very likely result in the suppression of the accused's alleged statements to the Afghan police. Without seeking permission of the commission to supplement the record, and without notice to the defense or the commission, the government then used their investigative resources to track down Mr. S and Mr. M in an effort to obtain a rebuttal statement.[4]

(9) Attachment A indicates that CITF made a request for investigative assistance which was received in Afghanistan on Monday, 29 Sept 08. Mr. S and Mr. M were allegedly contacted on 30 Sept 08 on their cellular phones. The CITF report was prepared on 30 Sept 08. The prosecution then withheld the report from the defense until 3 Oct 08, at which time it was filed as an attachment to the government's court-ordered brief.

Comment: This is the latest example of the government's outrageous and unfair discovery practices. The commission should consider appropriate sanctions.

[4] It must be noted that the government opposed providing any investigative resources to the defense. It must also be noted that in the 15 Sept 2008 "updated and improved" witness list, no direct contact information was provided to the defense for either of these witnesses. Rather, in direct contravention of the commission's order, the defense was instructed to contact these witnesses through two other witnesses. Amazingly, when the government needed to reach these witnesses in a hurry, they were able to reach them on their cell phones. The government has repeatedly promised, both in writing and on the record, that they would update contact information for these witnesses as soon as the information was available. The defense was not provided with the new cell phone contact information in a timely manner. The most appropriate remedy would be for the military commission to bar these witnesses from testifying and suppression of their Form 40s and depositions.

b. The totality of circumstances supports a finding that the alleged statements made by Mr. Jawad on 17-18 December 2002 were obtained by use of torture.

The government states that the military judge should "consider the totality of the circumstances under which the contested statement was produced or obtained." M.C.R.E. 304(a), Discussion. The defense agrees that the commission must consider all the evidence properly before it to determine if the statements in question were obtained through torture. If so, the statements are *per se* inadmissible. An analysis of the evidence presented to the court supports a finding by the preponderance of the evidence that all the statements allegedly obtained on 17 – 18 December 2002 were "obtained by use of torture."

With respect to the inculpatory statements allegedly made by Mr. Jawad to the Afghan authorities, the only evidence properly before the commission is the declaration of Mr. Jawad, the testimony of Mr. E, and the "Form 40s" and deposition transcripts offered by the government concerning the interrogation. Mr. E's testimony did not specifically address the issue of whether Mr. Jawad was threatened or otherwise abused, nor do the Form 40s address this issue. The only evidence identified by the government that could be considered to remotely address the declaration of Mr. Jawad are the depositions of Mr. M, and Mr. W cited by the government in their brief in paragraph 5c. (The government submitted the depositions of Mr. S and Mr. Z as well, but they contain no testimony relevant to this issue.) The entirety of these transcripts should be examined closely by the commission in making a credibility determination with respect to these two witnesses and in assessing the significance of the limited testimony concerning Mr. Jawad's treatment. A close reading of these depositions reveals that the testimony of these witnesses is of little value in resolving the issue. Whatever marginal relevance the depositions may have, it is beyond peradventure that this *de minimis* offering is insufficient to meet the government's burden of proof.

Neither Mr. M nor Mr. W were asked during their depositions the specific question as to whether Mr. Jawad or his family was threatened at any time during the interrogation. The government is asking the commission to infer from other questions and answers that no such threats were made. For example, Mr. M states: "I'm a police officer. I know the human rights,

so we treated him well at the time." (Mr. M. deposition at 14) One would hardly expect a police officer to admit that he had been abusive towards a juvenile suspect in his charge, or that he would have allowed another official to threaten or abuse him, but Mr. M's testimony is so self-serving as to strain credulity. Consider, for example, the following exchange:.

Q. But his physical condition was good?

A. Yes, absolutely. He was very happy and nothing was wrong with him.

Clearly, whatever Mr. Jawad's emotional state was when he was in custody, he was not "very happy". It is hard to say what Mr. M. meant by "nothing was wrong with him" but this does not seem to account for the clear evidence that Mr. Jawad was injured in Afghan custody by being hit on the nose. The question itself refers only to physical abuse and not threats or "psychological abuse". Mr. M was asked another question which appears at first glance to squarely address the issue of mental or psychological abuse. Unfortunately, no direct answer to this question was provided, possibly because the interpretation being provided was so poor.[5] Consider the question and answer provided in the transcript:

Q. Did anyone mentally or psychologically abuse Mr. Jawad?

A. He said he testified everything that he said he did it. If you guys allow me right now I will do the same thing to every other ones too. He was speaking in English and he did explain everything to the Coalition Forces.

(Mr. M Deposition at 14) A close reading of the transcript in conjunction with viewing the deposition reveals that the interpreter is actually summarizing the witness' testimony and referring to the witness in the third person rather than simply translating the comments of the witness verbatim. Thus, the word "he" sometimes refers to Mr. M and sometimes to Mr. Jawad. In any event, the answer is clearly non-responsive to the question. According to the prosecution, "Mr. M. testified.specifically, that no one has

[5] The obvious inadequacy of the interpretation is one of the reasons that the defense requested the military commission view the videotape of the deposition in conjunction with the review of the written transcript. The video also reveals the unusual demeanor of Mr. M, which should aid the commission in assessing his credibility.

physically, mentally or psychologically abused or harmed him." Mr. M made no such statement. Once again, the prosecution has intentionally misled the commission.

As for Mr. W, the interior minister of Afghanistan, the prosecution states that he "did not observe the accused to have been mistreated by Afghan authorities in any way." This statement by the prosecution appears to be derived from the following question and answer:

> Q. Sir, was the suspect in this case mistreated in any way that you could see?
>
> A. No. We're police and we don't beat people.

The answer to this question indicates that Mr. W considered the word "mistreated" to be related to physical abuse only. It is unclear whether Mr. W would consider threats to be abuse or whether he observed any threats, as this specific question was not asked. Even taking the broadest possible interpretation of this question, the answer is largely irrelevant because Mr. W was only present for a portion of the interrogations session. In fact, Mr.W said he didn't even know Mr. M, the person who, according to the prosecution, was "essentially" present the entire time that Mr. Jawad was in Afghan custody.

Q. Okay. Did you witness the suspect -- I know him as Mohammed Jawad -- give a statement to Majaz, Majaz did he witness that?

A. He [sic] does not know Majaz. (Mr. W deposition p.13)

More importantly, when asked why such a high level official as the Interior Minister got involved, Mr. W made the following comment:

> Our interrogation methods and your interrogation methods are different. You know, basically, there's a lot of corruption in Afghanistan, you know. If an individual is -- if he spends money then it might change police mind. So an individual with -- a high-ranking individual should get involved in this so we know that nothing will be changed. (Mr W depo p. 12)

This candid admission of rampant corruption and "different" interrogation methods provides strong corroboration of Mr. Jawad's assertions that unlawful police interrogation methods were used.

In order for the government to meet their burden to prove that Mr. Jawad was not threatened, the government would have to offer all of the Afghan witnesses who were in contact with Mr. Jawad, who would have to specifically deny the allegation that Mr. Jawad was threatened while he was in custody. The commission would then have to make credibility determinations concerning those witnesses and weigh their testimony against the highly credible testimony of Mr. Jawad. The government realized after the fact that they had utterly failed to meet their evidentiary burden and improperly attempted to supplement the record, but their efforts are too little and too late. The government has apparently not even identified many of the Afghan police who took part in the interrogation. According to the deposition of Mr. Z there were several people present during the interrogation who have never been identified, despite the defense's repeated requests to identify all of the individuals involved in interrogating Mr. Jawad. This is a clear violation of the government's discovery obligations. According to Mr. Z, there were five people present during the interrogation that he observed [redacted] and [redacted]" It should be noted that Mr. M, whom the government alleges was present throughout the period Mr. Jawad was in Afghan custody, was not identified by Mr. Z as being present. According to Mr. Z., Mr.W and [redacted] were doing most of the questioning.

Q. You were quiet and they were asking. So of these six individuals, which one of them were also asking questions of Amir Khan?

A. [redacted]

No contact information has been provided to the defense for [redacted] If the government has interviewed Mr. Halal, the defense has not been provided any information about such an interview.

c. Proof of prolonged mental harm is not required by MCRE 304.

The government opines that the threats against Mr. Jawad and his family did not rise to the level of torture because the threats were neither sufficiently imminent nor did they "cause or result in prolonged mental harm." The government misreads the requirement of M.C.R.E. 304. It is not necessary to prove that an accused actually suffered "prolonged mental harm." The relevant inquiry is whether the act or torture was "specifically intended to inflict severe physical or mental pain of suffering upon another person within the actor's custody or physical control." Severe mental pain or suffering is defined as the prolonged mental harm caused by or resulting from, among other things, "threats of imminent death" or "threats that another person will imminently be subjected to death." In other words, the law recognizes that threats of this nature cause prolonged mental harm. If the threat is made in a way that is designed to convince the recipient that the threat is real, and the recipient of the threat perceives the threat to be real, then the intent to inflict severe mental pain or suffering may be presumed. Under the natural and probable consequences doctrine, it can be presumed that a reasonable person intends the natural and probable consequences of his actions. Few things are likely to cause greater mental pain than a threat of immediate death or death of a loved one. The government has not offered any evidence on the intent of the actor making the threat, choosing to rely on the blanket denial that such a threat was made.

As for the government's assertion that the threats, if made, were not "imminent", the evidence before you suggests otherwise. The police clearly had the present ability to carry out the threat to kill him, and Mr. Jawad quite reasonably presumed that the numerous high-ranking police and security officials involved in his interrogation would be capable of locating and arresting his family members. The brutality and corruption of the Afghan police are notorious and Mr. Jawad, like all citizens of the region, would have been well aware that they could follow through on any threats. The precise reason the threats were effective in extracting the desired self-incriminating statements was because Mr. Jawad believed they were real and imminent.

Although not required under the rule, the defense did introduce evidence of continuing psychological trauma, but was unable to provide more comprehensive evidence of prolonged mental harm because of the government's refusal to appoint an independent psychologist to the

defense to assist in evaluating this issue. The commission has now overruled the Convening Authority's repeated denials of expert assistance and appointed [redacted] a clinical psychologist, in part to assist the defense with determining the extent of suffering caused to Mr. Jawad at the moment of his apprehension and immediately following. Mr. Jawad testified that he suffered from recurrent nightmares following the events of 17-18 December 2002. Recurrent nightmares are a symptom of Posttraumatic Stress Disorder.[6] The defense has also previously introduced evidence that Mr. Jawad was very concerned about the well-being of his family in the months after he arrived at Guantanamo, and that his erratic behavior, such as speaking to posters on the wall, caused sufficient consternation that the interrogator summoned the BSCT psychologist for an assessment. If the military commission believes that further evidence of prolonged mental harm would assist the commission in its ruling, the defense requests the opportunity to supplement the record when such evidence becomes available. However, MCRE 304 is quite clear that no such evidence is required.

CONCLUSION

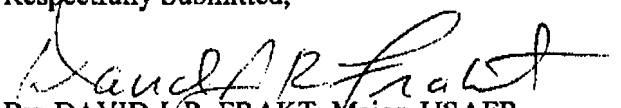
The government's brief attempts to mislead the court on the facts and the law, mischaracterizing the evidence and misstating the legal standard to be applied. There is no reason to doubt Mr. Jawad's declaration, and every reason to believe it. Mr. Jawad's testimony and statements to the court, both planned and spontaneous, have been repeatedly demonstrated to be truthful and accurate. On 7 May, before anyone knew about the frequent flyer program, Mr. Jawad spoke of a time when he was repeatedly awakened and moved from cell to cell so that he couldn't sleep.[7] This assertion was later fully substantiated by the government's detention records and proven at the 19 June hearing to be the infamous frequent flyer program, as found in the commission's ruling on D-008. On 19 June, before there was any evidence available to the defense that he had been abused at Bagram prison, Mr. Jawad stated that he had been subjected to abuse there as well (ROT p. 207). This claim was later substantiated at the August 13-14 hearing. Mr. Jawad's claim that he had been subjected to excessive force by guards on June 2, 2008, was also

[6] Diagnostic and Statistical Manual of Mental Disorders, 4th Edition.

[7] Jawad ROT p. 75 "After that they punished me again, they moved me from one room to another room. Every night and day, I was sleeping the guard would come and push me awake, wake up and he told me that I'd be moved to another room, when I went over there, I spent some time over there and then another guard tapped the floor and put me into another room."

fully substantiated by an independent investigation. Mr. Jawad, in stark contrast to the government witnesses, has a proven track record of reliability and candor to the tribunal that gives him an added measure of credibility. The government has failed to meet their burden of proving that Mr. Jawad's alleged confessions were the product of anything other than torture and coercion. The statements must be suppressed.

Respectfully Submitted,



By: DAVID J. R. FRAKT, Major, USAFR
Defense Counsel

And: KATHARINE DOXAKIS, LCDR, JAGC, USN

And: ERIC MONTALVO, MAJ, JAGC, USMC
Assistant Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions
1099 14th Street NW, Ste 2000E
Washington, DC 20005
(202) 761-0133, ext. 106

EXHIBIT F

BEFORE THE MILITARY COMMISSION

UNITED STATES OF AMERICA	**D-021, D-022**
v.	**Government Brief** on the Issue of Torture Under M.C.R.E. 304
MOHAMMED JAWAD	**3 October 2008**

1. Timeliness. This brief is timely under the Military Commission's scheduling order of 26 September 2008.

2. Relief Requested. The motion to suppress should be denied, insofar as it is based on any allegations of threats from Afghan police which, even if believed, do not amount to "torture" under M.C.R.E. 304.

3. Overview. The accused's recent allegations of threats by Afghan police are not sufficient to establish "torture" under the Military Commissions Act (MCA) and the Manual for Military Commissions (MMC). Unlike the infliction of severe physical pain or suffering (of which there is zero evidence in this case), establishing torture as infliction of severe *mental* pain or suffering requires that a person be threatened with "severe physical pain or suffering" or "imminent death," and further, that such a threat cause or result in "prolonged mental harm." *See* M.C.R.E. 304(b)(3). None of these factors is satisfied on the evidence presented in this case. The accused's unsworn allegations are not only factually controverted by sworn testimony and other evidence, but even if accepted at face value (which they should not be), they do not meet the MMC's high threshold definition of what "torture" is.

4. Burden of Proof. Once the issue of coercion is raised, the burden is on the prosecution to establish admissibility by a preponderance of the evidence. *See* M.C.R.E. 304(e); R.M.C. 905(c)(1).

5. Facts

a. On 17 December 2002, Afghan police apprehended the accused in Kabul immediately after he was witnessed throwing a hand grenade into a vehicle containing U.S. soldiers, which exploded and caused serious injuries all three occupants of the vehicle.

b. The Afghan authorities took the accused directly to a local Kabul police station, where during their interrogation he confessed that he threw the grenade and made other incriminating statements. The Afghan police described the accused as being proud of his actions and willing to discuss how and why he did what he did.

c. Later, during formal depositions in Afghanistan in December 2007, several of these Afghan authorities provided sworn testimony, subject to cross examination by defense counsel, about their interrogation of the accused on 17 December 2002. Mr. M, who was

involved in both apprehending the accused and interrogating him from essentially start to finish, testified that the accused was well treated while in Afghan custody and, specifically, that no one had physically, mentally, or psychologically harmed or abused him. *See* Deposition of Mr. M at 14. Similarly, Mr. W testified that he did not observe the accused to have been mistreated by the Afghan authorities in any way. *See* Deposition of Mr. W at 9.

d. After the accused was turned over to U.S. military custody on the evening of 17 December 2002, he was interviewed by U.S. personnel regarding his involvement in the attack. To the prosecution's knowledge, not once during these interrogations (or any subsequent U.S. interrogations for that matter) did the accused ever allege that the Afghan police had made threats of imminent death against him or his family during the interrogation at the Kabul police station.

e. On 28 May 2008, the defense filed a "Motion to Dismiss Based on Torture of Detainee" (D-008). Although this motion was focused specifically on the issue of alleged torture, and even refers to his arrest by Afghan police, *see* D-008 Motion at 2, neither this pleading nor its various supplements and attachments appears to contain a single allegation that the Afghan authorities ever threatened the accused or his family.

f. During a pretrial hearing on 25 September 2008, the accused made several spontaneous statements in open court regarding his treatment by the Afghan police on 17 December 2002. To the prosecution's recollection, the accused did not once allege, among his various complaints, that the Afghan authorities had ever threatened him or his family.

g. On 26 September 2008, the defense introduced an unsworn declaration, not previously provided to the government per M.C.R.E. 803(b), in which the accused alleged, for the first time to the prosecution's knowledge, in pertinent part:

> While I was at the [Kabul] police station the police threatened me several times. They told me that they were going to "kill me" if I didn't confess to the grenade attack, or words to that effect. They told me they would "arrest my family and kill them" too, or words to that effect. There were many police officers, I don't remember how many. They all had guns.

h. Not having been provided the accused's unsworn declaration in advance of its *introduction per the fair opportunity provisions of M.C.R.E. 803(b), U.S. authorities* subsequently followed up with two of the Afghan authorities, Mr. M and Mr. S, specifically on this issue: whether, during the accused's interrogation on 17 December 2002 or at any other time, they had made or witnessed any threats against the accused or his family. Both denied that they had made or witnessed any such threats, to include threats of death, bodily harm, or torture. *See* Attachment A.

i. In his unsworn declaration of 26 September 2008, the accused stated that he "had nightmares for several days" as a result of his experiences at both the Afghan police station and in U.S. military custody at Forward Operating Base (FOB) 195. No other claim of harm is alleged.

j. During an inquiry into the accused's mental status under R.M.C. 706, conducted 28-31 July 2008, two forensic psychiatrists concluded that the accused is not suffering from any mental disease or defect and is not in need of any immediate psychological or medical treatment.

6. Discussion

The accused's recent, unsworn allegations of threats in this case, which are controverted by the sworn testimony and follow-up responses of the Afghan authorities, are insufficient to establish "torture" as defined under the MCA and MMC, such that his statements to the Afghan police should be suppressed. Although M.C.R.E. 304 renders inadmissible any statement obtained by use of torture, in determining whether a statement was indeed "obtained by use of torture," the military judge should "consider the totality of the circumstances under which the contested statement was produced or obtained." M.C.R.E. 304(a), Discussion. To that end, the rule goes on to set out a very precise definition of what constitutes "torture," based largely on 18 U.S.C. § 2340, and in light of the remedy imposed, that definition should be strictly interpreted. The vague allegations at issue here, even if taken at face value (which they should not be, given the weight of the other evidence), do not establish "torture" under this definition.

For a threat to constitute "torture" under the rule, it must be "specifically intended to inflict '*severe* physical or *mental pain or suffering.*'" M.C.R.E. 304(b)(3) (emphasis added). "Severe mental pain or suffering" is further defined as "*prolonged mental harm* caused by or resulting from:

(A) the intentional infliction or threatened infliction of *severe physical pain or suffering*;
(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
(C) the threat of *imminent death*; or
(D) the threat that another person will *imminently* be subjected to *death, severe physical pain or suffering*, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Id. (emphasis added). Even taking the accused's unsworn allegations at face value, the vague threats he alleges, taken in context, do not constitute torture, since they did not (a) amount to threats of "severe physical pain or suffering" or "imminent death," or (b) cause or result in "prolonged mental harm." Under the totality of the circumstances, his statements to the Afghan police were therefore not obtained by use of torture, such that their exclusion would be warranted under the rule.

a. The Evidence Does Not Support Finding That the Accused or His Family Were Threatened with Severe Physical Pain or Suffering or Imminent Death.

For a threat to meet the threshold definition of torture, it must be of "severe physical pain or suffering" or "imminent death," neither of which is shown by the evidence here. First, the accused does not allege any threats of severe physical pain or suffering. Nor is there any evidence that he was in fact subjected to severe physical pain or mistreatment, particularly in light of the medical exam performed at FOB 195 within hours of the Afghan police's interrogation.

Second, to the extent that the accused's unsworn statement alleges that the Afghan police threatened to "kill me" and "arrest my family and kill them," these statements do not amount to a threat of *imminent* death as required under the MMC. Under a standard dictionary definition, "imminent" means "ready to take place; *especially*: hanging threateningly over one's head (was in *imminent* danger of being run over)." Merriam-Webster's Online Dictionary, *available at* http://www.merriam-webster.com/dictionary/imminent. That definition is not satisfied on the vague allegations at issue here.

Regarding any threats allegedly made against himself, even if believed over the sworn testimony and follow-up statements of the Afghan officers themselves (which it should not be), the accused's bare, unsworn allegation that the Afghan police threatened to "kill me" does not establish a threat of *imminent* death against him. Although he states vaguely that the police "had guns," he does not allege that the police at any point un-holstered a gun, let alone brandished or pointed one at him. Nor does he indicate that any other weapon was brandished to convey it would be used against him, or that the police made any physical gesture or indication as to how they might otherwise do him immediate, irreparable harm. In short, under the definition above, the accused's allegations, even if taken at face value, do not establish that death was "hanging threateningly over his head" in any literal or even metaphorical way. And in light of the police officials' adamant denials that any such threats were made, it is difficult to accept the accused's vague claims that the officers conveyed to him in any real sense that he would face *imminent* death if he did not talk.

To the contrary, given the totality of the circumstances, it is much more believable that, flushed with the "success" of his attack earlier that day, the accused was gloating in his victory during his interrogation by the Afghan police. Indeed, according to Mr. M, not only was the accused "very happy and very proud" during his interrogation, but the accused actually *threatened the police*, telling them at one point that "we will punish you." Deposition of Mr. M at 19. Given the accused's actions, and particularly the way in which he told how and why he did what he did, it beggars belief that the Afghan police would have even felt the need to resort to threats as a means of getting him to talk. In every respect, judging from their statements to Mr. E, their sworn deposition testimony, and their follow-up statements, the Afghan authorities paint a much more credible picture of these events than the self-serving statement of the accused.

The accused's allegations of threats made against his family are even less probative in establishing that they were of *imminent* death or suffering, as required under the rule. As the

defense itself has pointed out, the accused's family was not at the police station during his interrogation. Upon information and belief, no member of the accused's family was even living in Afghanistan at that time, a fact of which the accused himself was well aware. Indeed, the accused's allegations on their face claim that the police threatened they would go "arrest" his family first. There is no evidence the police knew who his family members were, where they lived, or had any ability to track them down as they allegedly threatened to do. In short, even if the accused's unsworn allegations are to be believed (and, again, they should not be, given the totality of the circumstances), the alleged threat against his family is so indefinite and so removed from any ability to immediately act on it that it could not possibly amount to a threat of *imminent* death under M.C.R.E. 304(b)(3).

In sum, the totality of the circumstances strongly suggests that not only should the accused's last-minute allegations not be believed, but that, even if believed, they do not amount to the kind of threats required to potentially establish "torture" under M.C.R.E. 304(b)(3).

b. The Evidence Does Not Support That the Accused Suffered "Prolonged Mental Harm" Caused By or Resulting From Any Threats Allegedly Made Against Himself or His Family.

In addition, regardless of what if any weight is given to the accused's unsworn allegations, threats alone are not enough to establish torture under M.C.R.E. 304(b)(3), absent a showing of "prolonged mental harm" caused by or resulting therefrom. Even taking the accused's declaration at face value (which it should not be), at most the only harm the accused complains of is several days of bad dreams, allegedly stemming from his experiences with both the Afghan police and the U.S. military authorities at FOB 195. This assertion does not present sufficient evidence of "prolonged mental harm" to establish the "torture" under the rule.

The term "prolonged mental harm" implies at least two distinct elements: (1) greater than short-term duration, and (2) damage to the mental or psychological functioning in some respect. The accused's claim of several days of bad dreams does not satisfy either element. First, "several days" is a short-term, rather than a "prolonged," duration. Under a standard dictionary definition, "prolong" means "1 : to lengthen in time : continue; 2 : to lengthen in extent, scope, or range." Merriam-Webster's Online Dictionary, *available at* http://www.merriam-webster.com/dictionary/prolonged. The word thus connotes continuous or lengthy effects over time. By any reasonable estimation, "prolonged" in the context of the mental or psychological damage to an individual cannot possibly be established by a timeframe of several days of bad dreams.

Second, bad dreams do not themselves indicate any damage or impact on mental or psychological *functioning*. To the contrary, at least judging from the conclusions of the accused's 706 evaluation, the accused is not suffering from any mental disease or defect and is not in need of any immediate psychological or medical treatment. Without putting too fine a point on this, to allow a claim of several days of bad dreams to suffice in establishing "prolonged mental harm" would open the door to an endless stream of alleged subjective complaints that would obliterate any ability to say what "prolonged mental harm" is in any objective way.

Third, according to his declaration, the accused claims he suffered these dreams as a result of his treatment at *both* the Afghan police station and FOB 195. That claim suggests several things that are very relevant here. For one thing, it suggests that any threats allegedly made by the Afghan police must have been responsible for producing *less* than the full "several" days of bad dreams. Hence, there is even less substance to the "prolonged" element with respect to any "mental harm" caused by alleged threats at the Kabul police station.

From a different angle, the statement also implies that the accused's alleged bad dreams stemmed, at least in part, from the treatment the accused received at FOB 195, where the evidence credibly established the accused was neither threatened nor mistreated. In other words, the statement suggests that his dreams, even if they occurred, may well have been entirely "incident to lawful sanctions" under C.M.R.E. 304(b)(3), such as his capture, detention, and lawful interrogation at FOB 195, where the accused himself does not even claim anything amounting to threats or "torture." And that conclusion is quite reasonable under the circumstances. One can imagine any number of non-"torture" events, particularly relating to being captured and lawfully interrogated following commission of a violent crime, that might give rise to bad dreams (even several days' worth).

The bottom line is, regardless of whether the accused's vague, last-minute, unsworn, controverted-by-sworn-testimony declaration merits any credence at all, even the claims it makes on its face deserve careful weighing before determining whether they establish "torture" under M.C.R.E. 304. However commonplace "torture" may be in the exaggerated expressions of everyday life, "torture" as a legal term is very precise and not to be taken lightly, as its very moniker casts a cloud over virtually everyone and everything it touches. For that reason M.C.R.E. 304, like 18 U.S.C. § 2340, is extremely careful in defining its elements and further requires that the totality of the circumstances be taken into account before concluding that particular actions by particular individuals amounted to "torture." One can well imagine extreme acts or circumstances under which torture might be so established, and the remedy in such cases is clear under M.C.R.E. 304(a). But under the totality of the circumstances regarding the interrogations of *this* case, the accused's unsworn allegations find purchase in neither the evidence in the record nor the text of the rule.

7. **Oral argument.** The government waives oral argument.

8. **Witnesses and Evidence.** Already in the record, as supplemented by the attachment.

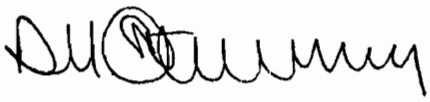
9. **Certificate of Conference.** The defense opposes.

10. **Additional information.** None.

11. **Attachments.**

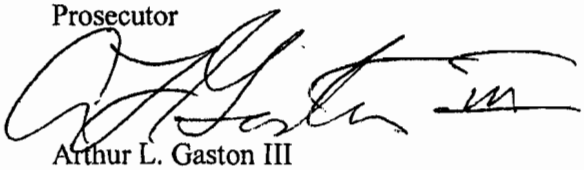
    A. CITF FM40 20080930

Respectfully submitted,



Douglas M. Stevenson
Lt Col, U.S. Air Force
Prosecutor

John Ellington
LCDR, JAGC, U.S. Navy
Prosecutor



Arthur L. Gaston III
LCDR, JAGC, U.S. Navy
Prosecutor

Office of the Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301-1610
(703) 602-4173

CRIMINAL INVESTIGATION TASK FORCE

REPORT OF INVESTIGATIVE ACTIVITY

INTERVIEW: FM40 20080930 - INTERVIEW OF SAMSOUR AND MANDOZAI

1. DATE OF INVESTIGATIVE ACTIVITY	2. PLACE	3. ACTIVITY NUMBER
30 SEP 08	Afghanistan	08100106285729

4. REMARKS

FM40 20080930 - Interview of [redacted]

Date/Place: 30 Sep 08

On 29 September 2008, DOD Criminal Investigation Task Force - Afghanistan (CITF-A) [redacted] received a request from CITF [redacted] contact two witnesses in the case regarding Mohammad JAWAD (ISN: US9AF-00900DP) and ask them two follow-up questions.

[redacted] assisted by CITF-A Interpreter [redacted] reviewed the two lengthy questions and determined the questions were much to complex for an Afghan to comprehend and answer. The questions were simplified and broken down for the witnesses as well as for SAYAM to be able to ask the questions.

On 30 September 2008, [redacted], assisted by [redacted] contacted [redacted] on his cellular phone [redacted] [redacted] was asked the following questions in Pashtu and provided the following answers in Pashtu:

Question # 1: Have you ever threatened JAWAD with death if he did not confess to throwing the grenade?

Answer: No

Question # 2: Have you ever threatened JAWAD with bodily harm if he did not confess to throwing the grenade?

Answer: No

Question # 3: Have you ever threatened JAWAD with any form of torture if he did not confess to throwing the grenade?

Answer: No

Question # 4: Have you ever seen anyone threaten JAWAD with death if he did not confess to throwing the grenade?

Answer: No

Question # 5: Have you ever seen anyone threaten JAWAD with bodily harm if he did not confess to throwing the grenade?

Answer: No

Question # 6: Have you ever seen anyone threaten JAWAD with any form of torture if he did not confess to throwing the grenade?

Answer: No

Question # 7: Have you ever told JAWAD that his family and friends would be killed or hurt if he did not confess to throwing the grenade?
Answer: No

Question # 8: Have you ever heard anyone else tell JAWAD that his family and friends would be killed or hurt if he did not confess to throwing the grenade?

THIS DOCUMENT CONTAINS NEITHER RECOMMENDATIONS NOR CONCLUSIONS OF CITF. IT IS THE PROPERTY OF THE CITF AND IS LOANED TO YOUR AGENCY; THIS DOCUMENT IS NOT TO BE RELEASED OUTSIDE YOUR AGENCY.

UNCLASSIFIED//FOUO

Attachment "A"

Answer: No

On 30 September 2008, [redacted], assisted by [redacted] contacted [redacted] on his cellular phone [redacted] was asked the following questions in Farsi and provided the following answers in Farsi:

Question # 1: Have you ever threatened JAWAD with death if he did not confess to throwing the grenade?

Answer: No

Question # 2: Have you ever threatened JAWAD with bodily harm if he did not confess to throwing the grenade?

Answer: No

Question # 3: Have you ever threatened JAWAD with any form of torture if he did not confess to throwing the grenade?

Answer: No

Question # 4: Have you ever seen anyone threaten JAWAD with death if he did not confess to throwing the grenade?

Answer: No

Question # 5: Have you ever seen anyone threaten JAWAD with bodily harm if he did not confess to throwing the grenade?

Answer: No

Question # 6: Have you ever seen anyone threaten JAWAD with any form of torture if he did not confess to throwing the grenade?

Answer: No

Question # 7: Have you ever told JAWAD that his family and friends would be killed or hurt if he did not confess to throwing the grenade?
Answer: No

Question # 8: Have you ever heard anyone else tell JAWAD that his family and friends would be killed or hurt if he did not confess to throwing the grenade?

Answer: No

----------END of REPORT----------

THIS DOCUMENT CONTAINS NEITHER RECOMMENDATIONS NOR CONCLUSIONS OF CITF. IT IS THE PROPERTY OF THE CITF AND IS LOANED TO YOUR AGENCY; THIS DOCUMENT IS NOT TO BE RELEASED OUTSIDE YOUR AGENCY.

UNCLASSIFIED//FOUO

EXHIBIT G

UNITED STATES OF AMERICA v. MOHAMMED JAWAD	Court Ordered Brief Regarding D-021 and D-022 October 3, 2008

1. **Timeliness:** On 26 September 08, the Military commission ordered this brief to be filed by 1200 on 3 October 2008. This brief is timely.

2. Issues Presented and Overview: The commission ordered the following question to be briefed:

(1) Does Military Commission Rule of Evidence (MCRE) 304(a)(1) require suppression of any statements made by Mr. Jawad?

Answer: MCRE 304(a)(1) requires suppression of all alleged statements of Mr. Jawad made in Afghan police custody on 17 December 2002 as such statements were the result of torture. Furthermore, the alleged statements of Mr. Jawad made in U.S. custody on 17-18 December 2002 at the Forward Operating Base (FOB) in Kabul, Afghanistan must be suppressed as Mr. Jawad continued to be suffering from "severe mental pain or suffering" as defined in MCRE 304 (b)(3).

3. Law and Argument:

a. Statements of Mr. Jawad obtained through the use of torture must be suppressed.

During the suppression hearing on 25-26 September 2008 the commission correctly noted that the issue of torture under MCRE 304 had arisen. Consistent with 10 U.S.C. § 948r, MCRE 304(a)(1) requires that any "statement obtained by use of torture shall not be admitted into evidence against any party or witness, except against a person accused of torture as evidence that the statement was made." "A statement produced by torture or otherwise not admissible under section (c) [of rule 304] may not be received in evidence against an accused who made the

statement if the accused makes a timely motion to suppress or an objection to the evidence..." MCRE 304(a)(3). "'Torture' is defined as an act specifically intended to inflict severe physical or mental pain or suffering upon another person within the actor's custody or physical control." MCRE 304(b)(3). "'Severe mental pain or suffering' is defined as the prolonged mental harm caused by or resulting from: (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death..." MCRE 304(b)(3). [1]

(1) Statements made by Mr. Jawad while in Afghan police custody were obtained through the use of torture as defined in MCRE 304 and must be suppressed.

The government has introduced evidence of statements made by Mr. Jawad while in the custody of Afghan police on 17 December 2002. The statements are inadmissible because they were obtained through torture. Specifically, Mr. Jawad's statement indicates that he was told that he would be killed if he did not confess. He was also threatened that his family members would be arrested and killed if he did not confess to the grenade attack. Mr. Jawad observed that the police and other high level officials were armed, thus capable of immediately carrying out the threat. Although this was Mr. Jawad's first arrest (which would have increased his fear and anxiety), the reputation of Afghan police for violence and corruption were well known in the region. According to a statement submitted by the government, the specific threats occurred after, one of the arresting officers, Mr. S., had put a gun to Mr. Jawad's head, undoubtedly a terrifying experience in itself, and one which would make increase the credibility and immediacy of any subsequent threats.[2] Any reasonable person in Mr. Jawad's situation would have

[1] The defense does not concede that this is the correct definition of torture under international law. The correct definition is more expansive and can be found in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT). Article 1 of the CAT sets out the definition of acts that constitute torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third party, . . ." The definition of torture contained in the CAT has been cited in international tribunals as reflecting the definition of torture for purposes of customary international law. According to Article 15, statements made as a result of torture may not be introduced into evidence, except against the torturer.

[2] It should be noted that the statement of Mr. S. is inconsistent with the statement of Mr. M, a self proclaimed judo master who indicated that he had to use force to wrestle the suspect to the ground and physically subdue him and that the suspect's clothes were torn off during the frenzied altercation. It appears that either Mr. M simply fabricated this entire event, or, if such a brawl occurred, that it occurred between Mr. M and one of the other suspects that was arrested. There is no evidence that Mr. Jawad's clothes were torn and there are no injuries to Mr. Jawad consistent with such a violent fracas.

perceived the words and actions of the Afghan police as threats of "imminent death" to himself or his family.

(2) Statements made by Mr. Jawad while in U.S. custody at FOB 195 in Kabul, Afghanistan were obtained while Mr. Jawad was suffering "severe mental pain or suffering" and must be suppressed under MCRE 304.

The evidence elicited at the 25-26 September 2008 session demonstrates that the effects of the torture which occurred while Mr. Jawad was in Afghan custody, continued on into the evening and early morning hours of the next day. American Forces at the FOB admittedly used techniques designed to "shock" Mr. Jawad into the fearful state associated with his initial apprehension. As they quickly realized, Mr. Jawad was still suffering the impact of torture imposed earlier in the day and this approach was not necessary to elicit the desired responses from him, although it must be emphasized that he did begin the interrogation session, as he had with the Afghan authorities, by denying throwing the hand grenade. Mr. Jawad was already suffering from the "prolonged mental harm" caused by threats of death to himself and his family; the actions of U.S. interrogators served only to exacerbate the "severe mental pain and suffering" resulting from the initial threats. The lasting impact of the threats is evident in Mr. Jawad's statement of events. He was so scared, and believed his death so imminent, that he believed he had been handed over to the Americans so that they could carry out the threat. In this regard, it should be noted that Mr. Jawad observed that the Americans and Afghan authorities were fighting over who would get custody of him. Mr. Jawad's fear of imminent death is amply demonstrated by his statement that he believed the water bottle placed in his hand, while he was blindfolded and hooded, was actually a bomb which would explode at any moment.

Psychological threats like the type used in this case "have extremely devastating consequences for individuals subjected to them and can be just as harmful and are often more long-lasting than physical torture."[3] Death threats "create a sense of complete unpredictability, and induce chronic fear and helplessness. Victims who were threatened with death speak of feeling a sense that one is already dead. They often relive these near-death experiences in their nightmares, flashbacks, and intrusive memories."[4] Mr. Jawad recounted that he had nightmares for several days upon arriving at Bagram after his harrowing experiences in Kabul. Mr. Jawad's

[3] Gretchen Borchelt, JD and Christian Pross, MD, Physicians for Human Rights, *Break them Down, Systematic use of psychological torture by US Forces*, 2005.
[4] Id at 12.

visible agitation upon hearing the testimony of various government witnesses at the most recent hearing demonstrates that he continues to suffer from these experiences.

b. The statements made in U.S. custody at the FOB are inadmissible as there was no "break in the stream of events" between Afghan custody and U.S. custody in Kabul.

The United States Supreme Court has stated that where there is "no break in the stream of events," subsequent statements are not sufficiently "insuate[d]...from the effects of all that went before." *Clewis v. Texas*, 87 S.Ct. 1338, 1340 (1967). As a result, the Court held that a third confession obtained nine days before the first was involuntary. The Court, in this particular case, found of "substantial concern . . . the extent to which petitioner's faculties were impaired by inadequate sleep and food, sickness, and long subjection to police custody with little or no contact with anyone other than police." The Court was referring to an adult defendant, but noted that all these factors took on "additional weight" because the defendant had "only a fifth-grade education" and had "never been in trouble with the law before." *Id* at 1341.

Similarly, the tenth circuit has held that the "'appropriate inquiry in determining the admissibility' of . . . [a] second confession is whether the coercion surrounding the first [confession] had been sufficiently dissipated so as to make the second statement voluntary." *United States v. Lopez*, 437 F.3d 1059, 1065 (10th Cir. 2006), citing *United States v. Perdue*, 8 F.3d 1455, 1467 (10th Cir. 1993). The Lopez court went on to explain that the "government must show intervening circumstances which indicate that the second confession was insulated from the effect of all that went before." *Id.* The court found that the "coercion producing the first confession had not been dissipated" even though the "second confession came after a night's sleep and a meal, and almost twelve hours elapsed between confessions." *Id.* Another important fact identified by the court was that there was no indication that the interrogator or other police officers made statements to the defendant to "dissipate the coercive effect" of the earlier interrogation tactics used to illicit the first confession. *Id.* It is significant that both *Lopez* and *Clewis* are cases about coercive interrogation practices...not torture. It can presumably be implied that torture would have a longer lasting impact on the mental state of the accused.

The interrogation session at the FOB in Kabul was essentially a continuation of the earlier interrogation session by the Afghan police. There was no sleep or meal break between

the two sessions, just a harrowing ride across town in the hands of the enemy while handcuffed and hooded. The fear continued unabated from one session to the next. If anything, the fear was increased by being handed over to the enemy. There is no indication that anyone ever made any attempt to assure Mr. Jawad that no harm would befall him or his family. He was under armed guard at all times and surrounded by several large, strong adult men.

The government's efforts to portray Mr. Jawad as being relaxed and unafraid at the time he ultimately confessed should not blind the commission to the blatantly abusive aspects of the interrogation. Stripping the accused of his clothes and photographing him nude left him vulnerable and exposed and reinforced his feelings of utter helplessness. Placing a hood and blindfold over the accused's head and eyes ensured that he remained in a state of extreme fear and anxiety. The interrogation began by reinforcing the shock of captivity with techniques calculated to induce extreme fear. When the hood and blindfold were removed and the interrogation ultimately moved into a less overtly hostile phase, the comments of the interrogators were nevertheless extremely frightening to Mr. Jawad and quite effectively capitalized upon the prolonged mental harm caused by the earlier threats. Noteworthy is the fact that the same interrogators were in the room (aside from short breaks to brief leadership) throughout the entire U.S. interrogation period.[5]

In essence, Mr. Jawad was told "if you want to see your family again, you will cooperate and confess to the grenade attack." Under the circumstances, this could easily have been interpreted by Mr. Jawad as a repeat of the earlier threat that he would be killed, or that his family would be killed, if he did not confess.[6] While this may not have been the specific intent of the interrogators, due to the government's failure to produce the videotape or the interpreters who translated the questions, the evidence must be viewed in the light most favorable to the defense.

CONCLUSION

[5] In *Lopez*, the court noted as a factor that the interrogator in the third interview was the same as in the first interview nine days earlier.

[6] Apart from his treatment by the Afghans, it is clear that the conduct of the American agents independently amounted to "torture" within the meaning of the CAT. The Commission need not reach that conclusion, however, since the entire sequence of events was continuous and the effects of the Afghans' abuse of Mr. Jawad plainly had not "sufficiently dissipated," *Lopez*, 437 F.3d at 1065, at the time of his alleged statements to the Americans.

All statements allegedly made by Mr. Jawad on 17-18 December 2002 must be suppressed because they were obtained by use of torture.[7] It is clear that threats of imminent death, either to Mr. Jawad or to his family, are defined as torture. Although the torture was perpetrated by the Afghan authorities, the U.S. interrogators clearly capitalized on the torture by using their own coercive techniques to extract the information they wanted. There was no "break in the stream of events" between the first statements in Afghan custody and that statements made in U.S. custody. Thus, the statements obtained at the FOB were also obtained by use of torture and are covered by the *per se* suppression rule of MCRE 304(a)(1).

Respectfully Submitted,

By: DAVID J. R. FRAKT, Major, USAFR
Defense Counsel

And: KATHARINE DOXAKIS, LCDR, JAGC, USN

And: ERIC MONTALVO, MAJ, JAGC, USMC
Assistant Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions
1099 14th Street NW, Ste 2000E
Washington, DC 20005
(202) 761-0133, ext. 106

[7] In the unlikely event that the commission finds the statements were obtained through mere coercion, the statements must still be suppressed under the coercion standard set forth in MCRE 304(c), as detailed in the defense's original briefs D-021 and 022.

EXHIBIT H

BEFORE THE MILITARY COMMISSION

UNITED STATES OF AMERICA	**D-021, D-022**
v.	**Government Response** to Defense Motions to Suppress
MOHAMMED JAWAD	**22 September 2008**

1. Timeliness. This response is filed within the timeline set by the Commission's scheduling order of 28 August 2008 and responds to both defense motions to suppress.

2. Relief Requested. The motions to suppress should be denied.

3. Overview. This is a case in which the accused was caught "red-handed" at the scene of his grenade attack, proudly admitted what he did, and willingly explained why he did it. None of his statements was obtained through unlawful coercion, let alone torture, by either the Afghan authorities who apprehended him or the U.S. authorities who subsequently detained him. Nor is the voluntary nature of these statements in any way undermined by the fact that later in the course of his detention, the accused began to re-think the wisdom of his original confessions and started downplaying his role in the attack. Under the controlling legal standards, the statements made by the accused are both reliable and probative, and the interests of justice are best served by their admission.

4. Burden of Proof. Once the issue of coercion is raised, the burden is on the prosecution to establish admissibility by a preponderance of the evidence. *See* M.C.R.E. 304(e); R.M.C. 905(c)(1).

5. Facts

a. On the afternoon of 17 December 2002, mere moments after his first grenade exploded into the victims in a crowded Kabul marketplace, Afghan military and police personnel caught the accused at the scene, with a second grenade in his hands, as he was preparing to launch a second attack. The Afghan authorities immediately grabbed the accused, subdued and disarmed him, and then took him to the district police station for questioning. There, the accused proudly claimed responsibility for his actions and explained precisely how and why he did them. All the Afghan authorities involved in the accused's questioning, from the highest ranking ministry official down to the lowest ranking police interrogator, consistently maintained that the accused was well treated at the police station and provided the information of his own accord. During this questioning, the accused made statements to the effect of:

(1) Prior to the attack, I bought grenades in Pakistan.
(2) I targeted the victims because they were American soldiers. I saw other foreigners, but I did not bother them; I was waiting specifically for Americans.

(3) I do not like the Americans and want them out of Afghanistan.
(4) I saw the Americans in the market and followed them to their vehicle.
(5) Once they were in their vehicle, I threw the grenade into it.
(6) I am proud of what I did.
(7) I am happy if it caused the Americans to die, but I am sorry their local interpreter was hurt.
(8) I would do it again.
(9) Prior to this attack, I received weapons training on grenades at a terrorist training camp in Pakistan, where I was trained to target Americans.

b. Later that same evening, the accused was turned over to U.S. military custody at Forward Operating Base ("FOB") 195, near Kabul, where a physical examination revealed no medical findings more significant than a scratch on the top of his nose. After photographically documenting the lack of any mistreatment by the Afghan authorities, U.S. military personnel at FOB 195 proceeded to interview the accused. A chaplain was assigned to act as human rights observer to insure the accused was well treated during this period; he was given food to eat and linens to sleep on; and after his initial questioning, the accused was allowed to sleep for a while before a second round of questioning was conducted the following morning. During his questioning at FOB 195, the accused made statements to the effect of:

(1) Several weeks prior to the attack, I was approached by a man who offered a way to make money by attacking Americans.
(2) This man and other individuals took me to a training camp where over a period of weeks I received weapons training and also drugs.
(3) I also received drugs during this training.
(4) After the training, I went home to my village, then on to Kabul.
(5) In Kabul, I received hand grenades and was told to look for U.S. targets.
(6) Once I found Americans, I was to roll a grenade under their vehicle and then casually walk away from the scene as it exploded.
(7) When I attacked the Americans, I threw a grenade into their vehicle, but was apprehended by Afghan authorities.

c. The following day, on 18 December 2002, the accused was transferred to a detention facility at Bagram Airfield, where he remained for a number of weeks before being transferred on to the detention facility at Joint Task Force, Guantanamo ("GTMO"). During questioning sessions at Bagram and GTMO, the accused provided further details regarding his training and other activities, but denied throwing the grenade at the victims in this case.

6. Discussion

Under the controlling legal standards, the statements made by the accused are both reliable and probative, and the interests of justice are best served by their admission. Given the circumstances surrounding the accused's conduct, apprehension, and interrogations, none of the statements he gave to the Afghan police in Kabul or the U.S. military at FOB 195 was obtained through unlawful coercion or torture. To the contrary, throughout this period, not only was he well treated, but he appears to have been quite proud of his actions and more than willing to

relate what he did and why he did it. There is admittedly less evidence to draw from regarding his later interrogations at Bagram and GTMO, due in large part to the fact that the interrogations were designed to serve military as opposed to law enforcement purposes; however, even at these locations, the very fact that the accused saw fit to start denying or downplaying his role in the grenade attack suggests, at the very least, a measure of reliability due to the self-serving nature of the statements themselves.

a. Controlling Law

The only controlling law on this issue is derived from the Military Commissions Act ("MCA"), which specifically outlines the rules regarding admissibility of statements of the accused that were allegedly obtained by torture or coercion. Those rules do not require any *Miranda*-type rights advisements to precede questioning of an accused, nor do they prohibit admission of statements obtained when such rights advisements are not given. Defense arguments to the contrary notwithstanding, neither U.S. Constitutional precedents nor any rules that might apply under Afghani law alter the soundness of the MCA's framework in this area, which alone provides the legal structure for the admissibility analysis.

(1) Statutory Framework Under the MCA

The controlling statutory law on this issue is very concise and very clear. Under the MCA, statements obtained by the use of torture are not admissible. *See* 18 U.S.C. § 948r(b). "Torture" is defined as "an act specifically intended to inflict 'severe physical or mental pain or suffering' (other than pain or suffering incident to lawful sanctions) upon another person within the actor's custody or physical control." M.C.R.E. 304(b)(3). "Severe mental pain or suffering" is further defined as "prolonged mental harm caused by or resulting from

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;
(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
(C) the threat of imminent death; or
(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Id. In addition to statements obtained through torture, the MCA also prohibits admission of statements that were allegedly produced by coercion unless, if obtained before 30 December 2005 (which is the case for all statements at issue here), 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.

18 U.S.C. § 948r(c); M.C.R.E. 304 (c). Finally, in addition to spelling out these affirmative rules, the MCA also makes specifically inapplicable various other statutory rules relating to self-incrimination, including, specifically, the rights advisement rules under Article 31(b) of the Uniform Code of Military Justice. *See* 10 U.S.C. § 948b(d)(1)(C). In light of this comprehensive statutory framework, there is no additional requirement that the accused be "read his rights" prior to questioning, whether by U.S. or foreign authorities, in order to gain admissibility for a statement.[1]

(2) U.S. Constitutional Precedents Do Not Alter the Statutory Framework Set Up Under the MCA.

Contrary to the defense's arguments, *Miranda* and its progeny do not apply to the overseas capture, detention, and interrogation of alien enemy combatants. Statements gained under circumstances indicating their reliability and probative value are admissible whenever it is in the interests of justice, regardless of whether the accused was "read his rights" prior to questioning, by either U.S. authorities or foreign authorities.

The Supreme Court has squarely held that due process rights under the Fifth Amendment, which include the right to remain silent and the right to counsel during interrogations, do not extend to aliens captured and detained at an overseas U.S. military base. *See Johnson v. Eisentrager*, 339 U.S. 763, 782-85 (1950) (noting that to invest nonresident alien enemy combatants with broad due process rights would potentially put them in "a more protected position than our own soldiers"). The Court has further clarified that the individual rights provisions of the Constitution generally run only to aliens with a "significant voluntary connection with the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (holding that Fourth Amendment rights do not apply to search and seizure by U.S. agents of property owned by a nonresident alien and located in a foreign country). Whatever sort of "significant voluntary connection" to the United States might possibly be envisioned under *Verdugo-Urquidez* as invoking Bill of Rights protections for aliens, an enemy combatant's belligerent attack against the U. S. military abroad most certainly does not fit the bill.

While the Court has more recently applied the structural limitations of the Suspension Clause to cases involving detainees (like the accused) held at GTMO, *see Boumediene v. Bush*, 128 S. Ct. 2229 (2008), this narrow holding by no means purported to extend the broad panoply

[1] Indeed, the legislative history of the MCA indicates that rights advisement requirements were specifically considered and intentionally excluded from the statutory framework. As Representative Duncan Hunter, the Chairman of the House Armed Services Committee, explained in the debates leading up to the MCA's enactment,

> [I]n this new war, where intelligence is more vital than ever, we want to interrogate the enemy . . . to save the lives of American troops, American civilians, and our allies. But it is not practical on the battlefield to read the enemy their Miranda warnings.

152 Cong. Rec. H7925-02, H7937 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter); *see also* Statement of Daniel Dell'Orto, Principal Deputy General Counsel, U.S. Department of Defense, Before the Senate Judiciary Committee, *Re: Military Commissions to Try Enemy Combatants* (July 11, 2006) ("It would greatly impede intelligence collection essential to the war effort to tell detainees before interrogation that they are entitled to legal counsel, that they need not answer questions, and that their answers may be used against them in a criminal trial.")

of Bill of Rights protections to alien enemy combatants facing trial at military commission for violation of the law of war. To the contrary, in stressing that the extraterritorial application of the Constitution turned on "objective factors and practical concerns," *Boumediene*, 128 S. Ct. at 2258, the Court reinforced the continued viability of the *Eisentrager-Verdugo-Urquidez* line of cases regarding Fifth Amendment rights in several ways.

First, extending habeas rights to combatants already in detention is entirely different than extending *Miranda* rights to enemies captured in a war zone, particularly when enemy combatant interrogations are designed to gain material intelligence for military, not law enforcement, purposes. Impeding or slowing access to such intelligence, which is often an integral aspect to effective military strategy and action (both offensive and defensive), is a "practical concern" of a vastly greater order of magnitude than simply allowing a detained combatant at some point to petition a habeas court to make the government show cause why he should not be released.

In this same vein, a second line of cases has firmly established a "public safety" exception to *Miranda*, for situations where, for example, a police officer may need to ask a suspect where a weapon is located prior to providing *Miranda* warnings. *See New York v. Quarles*, 467 U.S. 649, 651 (1984). The rationale behind *Quarles* is particularly applicable to the military environment, where, again, rather than being directed toward law enforcement objectives, the interrogation of enemy combatants is typically designed to gain actionable, time-sensitive intelligence to determine how best to attack or defend against other enemy combatants. As the Court in *Quarles* wisely reasoned, since time is of the essence in public safety scenarios, *Miranda* warnings are not appropriate, as they might impede or slow access to vital, actionable information. *See Quarles*, 467 U.S. at 657 ("In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding."). Similarly, given the concerns and dangers inherent in a military combat environment—very much like public safety concerns for police, but of a vastly higher order of magnitude—essentially *every* military scenario presents the "practical concerns" of a *Quarles* scenario.

Finally, as the Supreme Court explained in *Ex Parte Quirin*, violations of the law of war, such as those charged, do not constitute "crimes" or "criminal prosecutions" within the meaning of the Fifth and Sixth Amendments:

> In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

317 U.S. 1, 40 (1942). If such basic Fifth Amendment rights are inapplicable to military commissions, it is difficult to see why the same reasoning would not lead directly to the conclusion that the *Miranda* protections and other due process rights under the Fifth Amendment are similarly inapplicable.

In sum, contrary to the defense's assertions, *Boumediene* does not generally extend *Miranda*, due process, or any other protections under the Fifth Amendment to the accused. Nor does the accused have sufficient voluntary connections with the United States to derive such rights otherwise, under *Verdugo-Urquidez*. Hence, only the statutory framework set up under the MCA provides the legal structure for analyzing the admissibility of the accused's statements.

(3) Afghan law

Finally, while interesting perhaps from a comparative legal perspective, any Afghan law cited by the defense is not applicable to the Commission (to whatever extent the Afghan authorities may be said to have violated it, which is itself a dubious proposition). Pursuant to the Supremacy Clause of the Constitution, international law is the only source of non-U.S. law with controlling legal authority over U.S. courts or other tribunals. A foreign state's law, at best, only provides a context in which to view the actions of the local authorities operating under that law. It does not provide a source of additional rights to the accused regarding the admissibility of his statements, whether taken by the U.S. or Afghan authorities.

b. The Accused's Statements in This Case Are Fully Admissible Under the MCA.

Based on the controlling law outlined above, the accused's statements are fully admissible in this case. There is no evidence whatsoever that any statement was derived from torture. The allegations of coercion, particularly as it concerns the statements he made to the Afghan authorities in Kabul and U.S. military personnel at FOB 195, are similarly baseless. The accused made these statements of his own accord, under circumstances that demonstrate them to be reliable and probative, and justice is well served through their admission.

(1) The accused's statements to the Afghan authorities in Kabul on 17 December 2002 are admissible under the MCA.

There is no evidence in this case that the accused's treatment by Afghan authorities was anything other than lawful and reasonable. Based on the U.S. military's medical examination of the accused when he was turned over to FOB 195, which revealed little more than a scratch on the accused's nose, there is no reason to suspect he was mistreated by the Afghanis at all. Any physical pain derived from the scratch on his nose, which probably resulted from being subdued and disarmed by the Afghan police officers as he was about to throw another hand grenade, was incident to lawful action by the Afghan authorities. Hence, there is zero evidence of "torture," which under the MCA is a very high threshold of mistreatment that only exists in the most egregious cases of "severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions)." M.C.R.E. 304(b)(3). This sentiment is certainly echoed by the statements of the half-dozen or so Afghan officials involved in the accused's interrogation, who all consistently maintained that he was well treated in their custody.

Nor is there any reason to suspect the accused's statements to the Afghanis are in any way unreliable. Given that the accused was apprehended seconds after his attack, even as he was about to throw a second grenade, it makes perfect sense that he would be forthcoming in his

statements. Why not "fess up" when he had been caught "red-handed"? While one of the Afghan officials did comment that the accused appeared to be under the influence of "something," he might just as easily have been "stunned" or "intoxicated" from the events of the day. This is quite understandable, given he had started his day with the adrenaline rush of committing a violent crime, had been apprehended by the police at the scene, and then spent the rest of the day in custody being questioned about what he had done and why he had done it. It should also be noted that a drug screen conducted the very next day by medical personnel at Bagram produced negative results.

It is also not particularly unusual for those who commit terrorist-type attacks, as in the current conflict, to claim responsibility for their actions. Indeed, true to form, the evidence indicates that the accused in this case, not content with merely owning up to his actions, was quite *proud* of them. He told the Afghan police he was, in fact, happy that the Americans might die as a result of his actions, though he lamented the fact that their Afghan interpreter had been hurt. None of these statements suggests in any way that they were obtained through mistreatment or other physically or mentally coercive methods. To the contrary, if anything, they suggest the accused was more than happy to tell the world of his deeds, and the Afghan police merely assisted in writing down what he said.

In short, there is no basis on which to find that the accused's statements to the Afghan authorities are not reliable and probative, or that the interests of justice would not be served by their admission into evidence.

(2) The accused's statements to U.S. military authorities at FOB 195 on 17-18 December 2002 are admissible under the MCA.

Similar to his treatment by the Afghan authorities, there is no basis to conclude the accused's treatment at FOB 195 was anything other than lawful and reasonable. The fact that a military chaplain was assigned to act as a human rights observer, specifically to ensure the accused was well treated, is significant. In addition, several military personnel were present during each of the interrogation sessions. While the videotape of those sessions has not been located, none of the personnel who were actually present indicated any circumstances that suggest the accused was not making statements of his own accord, based on his own recollections of his own actions.

In analyzing the reliability of his statements, while the accused's purported age and education level may be relevant considerations, they are not the only relevant considerations in this area. The seriousness of the crime he was witnessed to commit, for example, should also be taken into account. Indeed, every indication in this case is that the accused, regardless of whether he was slightly under 18 or not, made a conscious decision to "put away childish things" and act as an adult. His actions of obtaining grenades, lying in wait, and then throwing the grenade in a surprise attack against uniformed soldiers, intending to kill them, reveals a maturity level far beyond whatever his true age might be ascertained to have been. Such action as an adult warrants treatment as an adult. The law of war, for example, would certainly have allowed the victims to target and kill the accused at the scene of his attack had he not been apprehended by the Afghan authorities. Nor is the prosecution is aware of any jurisdiction in the United

States that does not allow minors under age 18 to be tried as adults depending on the severity and the circumstances of the crime at issue, murder being perhaps the most typical example. It would be truly anomalous for this not to hold true for violent war crimes of the sort at issue here.

Would it not be even more anomalous still, if, being capable of being tried as an adult, the accused could not be captured, detained, and questioned as one? Just as there is no *Miranda* requirement under the MCA, there is also no general requirement that, prior to interviewing an enemy combatant under age 18, a parent or guardian must be located, notified, and give consent (or be present) for the questioning. Indeed, it is difficult to imagine a more ludicrous application of the parental-consent rule than the scenario presented here: delaying the gathering of actionable military intelligence so that an unlawful combatant's Mom can be located and notified about her son's grenade attack against uniformed soldiers on the battlefield of an international armed conflict.

As with his statements to the Afghan authorities in Kabul, under the controlling law of the MCA, there is no basis on which to find that the accused's statements at FOB 195 are not both reliable and probative, or that the interests of justice would not be served by their admission into evidence.

(3) The accused's various statements to U.S. military authorities at Bagram and GTMO are admissible.

Finally, while there is admittedly less evidence to draw from regarding the circumstances of the various statements the accused made at Bagram and GTMO, the self-serving nature of these statements themselves lends some weight to their reliability. By the time he reached these facilities, the accused had changed his story and started downplaying his role in the grenade attack. This shift to a less culpable version of the events is imminently reasonable and often the case for captured criminals who begin to have second thoughts about their original decision to confess their crimes. It also suggests that whatever difficulties the defense claims he faced at Bagram and GTMO, he had no difficulty denying he threw the grenade at the accused. The self-serving nature of that portion of the statements lends weight to the argument that the other areas the statements cover might be similarly reliable. As these statements are probative in these other areas, and presumably the defense will seek to introduce his denials of wrongdoing anyway, justice is served by their admission.

7. Oral argument. Requested.

8. Witnesses and Evidence. The United States anticipates presenting testimony from the following witnesses:

a. [redacted]
Criminal Investigative Task Force
[redacted] investigated the grenade attack and interviewed the Afghanistan Military Force (AMF) and Afghani police involved in initially apprehending or interrogating the accused, including:

(1) [redacted] AMF, Kabul
(2) [redacted] AMF, Kabul
(3) [redacted] Director of Criminal Investigations, Police District 2, Kabul
(4) [redacted] Director, Police District 2, Kabul
(5) [redacted] National Director, Police and Security, Afghanistan
(6) [redacted] Police Interrogator, Police District 2, Kabul
(7) [redacted] former Afghan Interior Minister

[redacted] will testify regarding his interviews of one or more of the above individuals, concerning their treatment of the accused, his demeanor and condition, and statements the accused made during their interrogation.

b. [redacted]
Forward Operating Base 195, near Kabul
[redacted] conducted a physical examination of the accused when handed into U.S. custody by Afghan authorities. He will testify that the accused's condition was unremarkably other than a small abrasion on the top of his nose, that there was no evidence of mistreatment by the Afghan authorities, and that the accused exhibited no obvious signs of intoxication.

c. [redacted]
Forward Operating Base 195, near Kabul
[redacted] was present at and participated in both interrogations of the accused at FOB 195 on 17-18 December 2002. He will testify to the physical appearance and demeanor of the accused during this time, his responsiveness to questions, and his treatment during these sessions.

d. [redacted]
Forward Operating Base 195, near Kabul
[redacted] was present at and videotaped the first interrogation of the accused at FOB 195 on 17-18 December 2002. He will testify to the accused's physical appearance, demeanor, and treatment during this period.

e. [redacted]
Forward Operating Base 195, near Kabul
[redacted] observed the accused's interrogation at FOB 195. He will testify that the accused was treated humanely throughout this period.

f. **Deposition transcripts**
i. [redacted] Director of Criminal Investigations, Police District 2, Kabul
ii. [redacted] Police Interrogator, Police District 2, Kabul

9. **Certificate of Conference.** The defense opposes.

10. **Additional information.** None

11. **Attachments.** None

Respectfully submitted,

Douglas M. Stevenson
Lt Col, U.S. Air Force
Prosecutor

John Ellington
LCDR, JAGC, U.S. Navy
Prosecutor

Arthur L. Gaston III
LCDR, JAGC, U.S. Navy
Prosecutor

Office of the Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301-1610
(703) 602-4173