UNITED STATES OF AMERICA v. OMAR KHADR	**Defense Motion** To Suppress Statements Procured Using Torture, Coercion and Cruel, Inhumane, and Degrading Treatment 7 November 2008

1. Timeliness: This motion is filed within the timeframe established by Rule for Military Commissions (R.M.C.) 905 and the Military Judge's 23 October 2008 scheduling order.

2. Relief Sought: The accused, Omar Khadr (Mr. Khadr), seeks an order declaring inadmissible into evidence all statements pursuant to § 948r(b) & (c) of the Military Commissions Act of 2006 (MCA or Act) and Military Commissions Rules of Evidence (M.C.R. Evid.) 304(a)(1) & (2).[1]

3. Overview:

a. Mr. Khadr was captured by U.S. Forces in 2002, when he was just fifteen years old. Since then, he has been forced into various "stress positions" and left there for many hours on end. He has been suffocated until he passed out, revived, and then suffocated again. He has been terrorized by barking dogs while his head was covered by a plastic bag tied tightly around his neck, making it hard for him to breathe. He was told he was going to be sent to a country where he would be horribly tortured and raped. He has been doused with freezing water and left cold and shivering. He has been interrogated for long stretches of time without being allowed to go to the bathroom, forcing him to urinate on himself. He was subjected to "light pushing," bright lights left in front of his eyes until he could not see. He has spent long periods in solitary confinement, sometimes in very cold temperatures. He has been beaten by interrogators who shackled his hands and feet together, lifting him off the ground and then dropping him many times over. He has been abused until he could not stand, and then used by military police as a human mop to wipe his own urine and pine oil off the floor of an interrogation chamber.

b. The Military Commissions Act (MCA) categorically prohibits the admission of any statement procured using torture. *See* MCA § 948r(b) and M.C.R. Evid. 304(a)(1). Consequently, because Mr. Khadr was repeatedly subject to acts "specifically intended to inflict severe physical or mental pain or suffering," M.C.R. Evid. 304(b)(3), Mr. Khadr's incriminating statements are inadmissible.

[1] The instant motion extends specifically to those statements identified by the prosecution as statements of the accused on which the prosecution intends to rely at trial. (*See* MAJ Groharing e-mail of 29 August 2008 (Attachment A).) The Military Judge has scheduled an evidentiary hearing on this matter, which is currently scheduled to commence on 19 January 2009. The purpose of this motion is to present an overview of the defense case on suppression and provide the Military Judge with a discussion of the pertinent legal authorities, with the understanding that the parties will introduce evidence on and argue the motion in connection with the scheduled suppression hearing.

c. Even assuming *arguendo* that the abuses suffered by Mr. Khadr do not rise to the level of torture, Mr. Khadr's coerced statements are nonetheless inadmissible because they are unreliable and their introduction would not be in the interest of justice. MCA § 948r(c). The unreliability of Mr. Khadr's incriminating statements is demonstrated by their sporadic timing, their numerous inaccuracies, and their inconsistency with the accounts of other witnesses

d. In addition to the requirements of the MCA, barring Mr. Khadr's statements would also be consistent with the requirements of the Fifth Amendment to the Constitution and Common Article 3 of the Geneva Conventions, both of which prohibit the use of cruel, inhumane, and degrading punishment.

e. The above analysis is even more compelling due to Mr. Khadr's youth, which rendered him more susceptible to coercion and significantly more vulnerable to torture.

f. Finally, any evidence derived from statements made by Mr. Khadr in response to torture or ill-treatment must also be excluded as fruit of the poisonous tree. After interrogators coerced statements from Mr. Khadr, all subsequent statements were made in the shadow of the original confession, rendering them equally involuntary and unreliable.

4. Burden of Persuasion: Because this motion challenges the admissibility of Mr. Khadr's statements on the basis that they were obtained by use of torture and coercion, the prosecution bears the burden of establishing the admissibility of these statements. R.M.C. 304(e).

5. Facts:

a. Mr. Khadr was captured and detained by U.S. forces following a firefight at or near Khost, Afghanistan on Jul [redacted] 2002. At the time, he was fifteen years old. *See* Sworn Charge Sheet (2 Feb 2007) ¶ 12, 4 (Attachment A to Def. Mot. to Dismiss, D-008).

b. In the course of the firefight, Mr. Khadr had been injured and blinded by several shrapnel wounds and was shot twice in the back by American forces, leaving two gaping wounds through his chest.[2] He was airlifted while unconscious to Bagram Air Base. Affidavit of Omar Ahmed Khadr (hereinafter "Khadr Aff.") ¶ 4 (Attachment E to Def. Mot. for App. Relief, D-064).

[2] These injuries were very serious and caused Mr. Khadr severe, chronic pain. Mr. Khadr's chest wounds were infected, swollen, and still seeping blood nearly seven months after the firefight, and Mr. Khadr was in the hospital receiving treatment for the gunshot wounds ten months after the firefight. *See* Report of Investigative Activity of 3 June 03 at 1, 00766-000154 (Attachment B) (Khadr was interrogated during a June 2003 hospitalization due to infections to his gunshot wounds and hospitalization was expected to last six more weeks); Report of Investigative Activity of 12 Mar 2003 at 1, 00766-000151 (Attachment C) (Khadr was scheduled to have surgery on his chest wounds on 13 Mar 2003); Report of Investigative Activity of 20 Feb 03 at 1, 00766-000146 (Attachment D) (Khadr's wounds swelled to the point of bursting); Report of Investigative Activity of 17 Feb 03 at 2, 00766-000145 (Attachment E) (blood was seeping from Khadr's wounds); Report of Investigative Activity of 6 Jan 2003 at 2, 00766-000140 (Attachment F) (Khadr complained to interrogators of pain from his chest and shoulder injuries).

c. Interrogations at Bagram.

(1) Upon regaining consciousness one week later in the tent hospital at Bagram, Mr. Khadr was immediately interrogated by military officials. The interrogators noted that he was very weak and disoriented from pain, fatigue, and sedation. *See* [2] [redacted] (Aug. 12, 2002) (Attachment G).

(2) Over the next three days, Mr. Khadr was questioned several times by an American soldier. When the soldier did not like Mr. Khadr's answers, the soldier would shackle Mr. Khadr's hands and feet to his side. Because of Mr. Khadr's injuries, this caused him great pain. No doctors or nurses were present during these interrogations. Khadr Aff. ¶¶ 7, 9.

(3) Despite his extensive injuries, Mr. Khadr was given only limited pain medication. *Id.* at ¶ 9.

(4) After two weeks in the tent hospital, Mr. Khadr was taken in a stretcher to an interrogation room at the military camp at Bagram. He waited alone for an hour and was then interrogated for three hours. The interrogator was a skinny blonde man who screamed at Mr. Khadr when he did not like his answers. Several times, the interrogator made him sit up in the stretcher because the interrogator knew it would hurt him. Mr. Khadr cried several times during the course of the interrogation. Although he resisted at first, Mr. Khadr eventually gave the interrogator the answers he wanted to hear so that the interrogator would stop hurting him. *Id.* at ¶¶ 10-12.

(5) After that initial interrogation, Mr. Khadr was taken to the holding pen where all the detainees were kept. The building resembled an airplane hangar. The prisoner area was divided using chicken wire and wooden planks to create shared cells for the detainees. Sawed-off crates were used for toilets. A dozen or so men shared Mr. Khadr's cell. *Id.* at ¶ 10. In the detention area, he heard people screaming, both day and night. Sometimes it was interrogators screaming at prisoners to stand up or sit down or not to sleep. Sometimes it was the prisoners screaming from their treatment. *Id.* at ¶ 29.

(6) Mr. Khadr was confined to a stretcher for two weeks to a month. During this time, he was brought into the interrogation room on the stretcher. Once, an interrogator grabbed him and pulled him off his stretcher, causing him to fall and cut his left knee. *Id.* at ¶¶ 14, 17.

(7) On some occasions, interrogators brought barking dogs into the interrogation room while Mr. Khadr's head was covered with a bag. The bag was wrapped tightly around his neck, almost choking him and making it hard to breathe. *Id.* at ¶ 18.

(8) On other occasions, interrogators threw cold water on him. *Id.*

(9) Several times interrogators tied Mr. Khadr's hands to the top of the door frame or to the ceiling and made him stand for hours at a time. Because of his injuries, Mr. Khadr could not raise his hands all the way above his head, but the interrogators would pull them as high as they could go and tied them there. *Id.* at ¶ 19.

(10) During many interrogations he was not allowed to use the bathroom, and was forced to urinate on himself. The interrogators told him that he deserved it. *Id.* at ¶ 24.

(11) On several occasions, interrogators threatened to have Mr. Khadr raped, or sent to other countries like Israel, Syria, Jordan, or Egypt to be raped. *Id.* at ¶ 23.

(12) Sometimes the interrogators would shine bright lights into Mr. Khadr's eyes, which would make them tear up and was very painful because his eyes had been injured by shrapnel. *Id.* at ¶ 25.

(13) Sometimes the interrogators told Mr. Khadr they would let him go if he told them something that allowed American forces to capture "someone big." *Id.* at ¶ 26.

(14) Mr. Khadr saw injuries and bandages on the legs of another man held at Bagram, presumably the result of torture. Later, one of the interrogators told Mr. Khadr the man had died. *Id.* at ¶ 30.

(15) Even outside the interrogation chamber, Mr. Khadr was subjected to constant humiliation and abuse. While his wounds were still healing, U.S. personnel made him clean the floors on his hands and knees. Once, they woke him up sometime after midnight and made him clean the floors with a brush and dry it with towels until dawn. *Id.* at ¶ 21.

(16) U.S. personnel also forced him to perform repetitive, pointless, and painful labor. They forced him to carry five gallon buckets of water, which hurt his left shoulder, where he had been shot. They also made him lift and stack crates of bottled water. When Mr. Khadr was able to walk again, interrogators made him pick up trash, then emptied the trash bag and made him pick it up again. *Id.* at ¶¶ 22, 24.

(17) Mr. Khadr stayed at Bagram for about three months. During the two nights and one day before boarding the plane for Guantanamo Bay, the detainees were not given any food so they would not have to use the bathroom on the plane. Military personnel shaved the detainees' heads and beards, and placed masks over their mouths and noses. They also put goggles and earphones on the detainees so they could not see or hear anything. On the plane, Mr. Khadr was shackled to the floor for the entire trip. *Id.* at ¶ 32, 33.

(18) Mr. Khadr was held at Bagram for roughly 90 days, during which he can recall being interrogated at least 42 times.

d. Interrogations at Guantanamo Bay, Cuba.

(1) Upon arrival at GTMO in October 2002, a military official told Mr. Khadr "Welcome to Israel." The detainees were half dragged, half carried off the plane, causing cuts on their ankles from the shackles. *Id.* at ¶ 33.

(2) While he was waiting to be processed, two U.S. soldiers pinned Mr. Khadr against the wall. One pushed his back hard against the wall with his elbow, the other pushed Mr. Khadr's face into the wall. Although the goggles and earphones had been removed, Mr. Khadr still had on a mask which made it hard to breath. When Mr. Khadr passed out from lack of oxygen, the two soldiers would relax their grip until he woke up again, and then pinned him back against the wall until he passed out again. They repeated this treatment three or four times. The other prisoners were not treated similarly. *Id.* at ¶ 36.

(3) Mr. Khadr was taken to the Fleet Hospital, where he stayed for two days. While in the hospital, two interrogators came and interrogated him for six hours each day. Because he did not want to expose himself to more harm, Mr. Khadr tailored his answers according to what he thought the interrogators wanted to hear. *Id.* at ¶¶ 38, 39.

(4) After these first interrogations, Mr. Khadr was placed in a small cell with walls and a small window that he could not look out. He had no human contact. He was moved in and out of isolation depending on how he answered questions during successive interrogations. *Id.* at ¶¶ 40, 41. Often, the cells in which Mr. Khadr served his isolation would be extremely cold, "like a refrigerator." *Id.* at ¶ 53;

(5) When not in solitary confinement, Mr. Khadr was held with adult detainees. All of the detainees that lived in the same cellblock as Mr. Khadr were much older than he was and Arab. Because of the age and cultural differences, these detainees were very hostile toward Mr. Khadr and would often yell at him. *See* 00766 302 20030203 (Attachment H), 00766 302 20030217 (Attachment I), 00766 FM40 20030217 (Attachment J).

(6) Because of these detention conditions and interrogation methods, Mr. Khadr succumbed to bouts of depression and collapsed crying during interrogations. *See*, *e.g.*, 00766 FM40 20030116 (Jan. 16, 2003) (Attachment K) ("KHADR appeared suicidal and depressed."); 00766 FM40 20030224 (Attachment L) (summarizing interrogations on Feb. 14, 15 and 16 where Mr. Khadr was extremely despondent and cried heavily).

(7) Mr. Khadr has been visited on numerous occasions[2] [2] These included four visits over four days starting on February 13, 2003. 00766 FM40 20030224 (Attachment L) (summarizing interrogations[2] [2] from February 13 through 16). During these visits[2] asked him several questions but did not offer assistance. When Mr. Khadr told his visitors that he had lied and told[2] whatever they wanted to hear because he had been tortured, they yelled at him and called him a liar. Khadr Aff. ¶¶ 43-49.

(8) Sometime in March 2003, Mr. Khadr was taken to an interrogation room between midnight and 1:00 AM. The interrogator there told him that his brother was at Guantanamo and that he should "get ready for a miserable life." When Mr. Khadr asked to see his brother, the interrogator became angry and called in the military police. The police cuffed Mr. Khadr to the floor with his arms in front of his legs for a half hour, behind his legs for another half hour, and then forced him onto his knees and cuffed his hands behind his legs. Later still, the police forced him onto his stomach, bent his knees, and cuffed his hands and feet

together. At some point, Mr. Khadr urinated on himself and the floor. The police poured pine oil on him and the floor, and then dragged Mr. Khadr through the mixture of oil and urine while he was lying on his stomach with his hands and feet cuffed together. Essentially, Mr. Khadr was used as human mop to clean up his own urine. Mr. Khadr was later returned to his cell and not given a change of clothes for two days. *Id.* at ¶ 59;

(9) In the early spring of 2003, Khadr was told "Your life is in my hands" by a military interrogator, who spat on him, tore out some of his hair, and threatened to send him to a country like Jordon, Syria, or Egypt, where he would be tortured more thoroughly. The interrogator said the Egyptians would send in *Askri raqm tisa* ("Soldier Number Nine"), who was known to enjoy raping prisoners. The interrogator then shackled Mr. Khadr's hands and ankles together and made him sit on the floor. The interrogator ordered him to stand up, which was difficult to do because of the shackles. After Mr. Khadr managed to stand, the interrogator ordered him to sit down again and then get back to his feet. When Mr. Khadr could not stand, the interrogator called in two military police officers who lifted him up and then dropped him to the floor. They did this five times at the instruction of the interrogator. At the end of the meeting, the interrogator told Mr. Khadr that the Americans would throw his case in a safe and that he would never leave Guantanamo. Khadr Aff. ¶¶ 56, 57;

(10) Approximately one month before Ramadan in 2003 (which occurred on October 24, 2003), Mr. Khadr was visited by two men claiming to be representatives of the [3] government. He told them about his injuries, that what he had told the American interrogators was not true, and that he said whatever the Americans wanted him to say because they would torture him. The [3] screamed at Mr. Khadr and called him a liar, causing him to cry. Khadr Aff. ¶ 51.

(11) Just before Ramadan in 2003, following another interrogation by [3] officials, Mr. Khadr's security level was increased from Level 1 to Level 4 minus. Everything was taken away from him except for a mattress. He spent a month in isolation. The room in which he was confined was kept very cold. Mr. Khadr said that it was "like a refrigerator." *Id.* at ¶ 53;

(12) Around the time of Ramadan in 2003, [2] wearing an American flag on his trousers, interrogated Mr. Khadr at Guantanamo. [2] The [2] man was unhappy with the answers Mr. Khadr gave him. He left the room and then another military official removed Mr. Khadr's chair and sort-shackled him by his hands and feet to a bolt in the floor. Military officials then moved his hands behind his knees. They left him in the room in this condition for approximately five to six hours. Occasionally, a military officer would come in and laugh at Mr. Khadr. Khadr Aff. ¶ 54;

(13) During the course of that interrogation, the [2] man told Mr. Khadr that a new detention facility was being built [2] or non-cooperative detainees at Guantanamo. Mr. Khadr was told he would be sent there and raped, and that they liked small boys [2] a comment he took as a threat of sexual violence. Before leaving the room,

the[2] man wrote on a piece of pape[2] "This detainee must be transferred[2]. Khadr Aff. ¶ 55.

e. Authorized Interrogation Methods and Reported Detainee Abuses in Bagram and Guantanamo.

(1) Beginning in mid-2002, which is also when Mr. Khadr was captured by U.S. Forces, senior Department of Justice, Department of Defense, and CIA officials authorized a number of unprecedented interrogation techniques for use on detainees. Several of these techniques have since been repudiated by the Department of Defense, including the use of stress positions, hooding, dogs, and exposure to cold.

(2) The "Torture Memos."

(A) In mid-2002, White House Counsel Alberto Gonzalez asked the Office of Legal Counsel (OLC) of the Department of Justice to determine what interrogation methods were permitted by the U.N. Convention Against Torture (CAT). Then-Assistant Attorney General Jay S. Bybee authored one of the OLC opinions, which became known as the "Bybee memorandum." The memo stated that very harsh interrogation techniques were permissible so long as they did not cause "excruciating and agonizing" pain or suffering like that which accompanies organ failure or death. Moreover, if the interrogator's objective was to obtain information rather than inflict pain, no legal liability would attach, even if severe pain and suffering were "reasonably likely to result." Memorandum from Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, "Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A," August 1, 2002.[3]

(B) The Bybee Memorandum was leaked in 2004, causing enormous public outcry. In December 2004, the Bybee Memorandum was officially repudiated and replaced by another memorandum that included a new analysis of the torture prohibition. The new memorandum specifically rejected the Bybee memorandum's narrow construction of the Convention Against Torture as prohibiting only conduct causing "excruciating and agonizing" pain like that accompanying organ failure or death, finding instead that the CAT definition of torture was more broad and included conduct causing "violent or intense" pain that was "[h]ard to sustain or endure." Furthermore, the new memorandum concluded that, to commit torture, an interrogator must "consciously desire" to cause severe pain or suffering, but pain or suffering need not be his ultimate objective. Memorandum from Daniel Levin, Acting Assistant Attorney General to James B. Comey, Deputy Attorney General, "Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A," December 30, 2004.[4]

(3) Authorized Military Interrogation Techniques.

(A) In October 2002, under pressure to obtain intelligence, Joint Task Force 170 (JTF-170), the military interrogation unit stationed at Guantanamo, sought to use

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[3] *Available in* The Torture Papers: The Road to Abu Ghraib, 172-217 (Karen J. Greenberg and Joshua L. Dratel eds., 2005).

[4] *Available at* http://www.usdoj.gov/olc/18usc23402340a2.htm.

"more aggressive interrogation techniques" on detainees. Memorandum from Diane E. Beaver, Staff Judge Advocate, Department of Defense, Joint Task Force 170, to General James T. Hill, Commander, Joint Task Force 170, "Re: Legal Brief on Proposed Counter-Resistance Strategies," October 11, 2002; Memorandum by Jerald Phifer, Director J2, Department of Defense, Joint Task Force 170, to General James T. Hill, Commander, Joint Task Force 170, "Re: Request for Approval of Counter-Resistance Strategies," October 11, 2002.[5] The request came just two months after the Bybee memorandum was written, which opened the door for abusive tactics. On December 2, 2002, then-Secretary of Defense Donald Rumsfeld approved various harsh techniques, including:

a. "interrogator identity" (interrogator impersonates a citizen or interrogator from a country known for harsh treatment of prisoners);
b. stress positions, such as standing, for up to four hours;
c. isolation for up to 30 days, with extensions beyond 30 days upon Commanding General approval;
d. deprivation of all light and auditory stimuli;
e. hooding during transportation and questioning;
f. 20-hour interrogations;
g. The use of a prisoner's individual phobias, such as fear of dogs, to induce stress; and
h. light pushing.

Memorandum from William J. Haynes II, General Counsel, Department of Defense, to Donald Rumsfeld, Secretary of Defense, "Counter-Resistance Techniques," November 27, 2002; Memorandum from Jerald Phifer, to General James T. Hill, "Re: Request for Approval of Counter-Resistance Strategies," October 11, 2002.[6]

(B) Numerous military personnel and lawyers objected to the use of these techniques, including the Commander of the Criminal Investigation Task Force, [redacted], and Navy General Counsel Alberto Mora. On December 2nd, 2002, [redacted] prohibited CITF agents from "participat[ing] in the use of any questionable techniques" and ordered them to report "all discussions of interrogation strategies" to CITF leadership.[7] On December 20th, Mora described the interrogation methods that Rumsfeld had authorized in the December 2002 directive described the techniques as "at a minimum, cruel and unusual treatment and, at worst, torture, and "expressed surprise that the Secretary had been allowed to sign it." Memorandum from Alberto J. Mora, Navy General Counsel, to Navy Inspector General, "Re: Statement for the Record: Office of General Counsel Involvement in Interrogation Issues," July 7, 2004, at14.[8]

(C) In response to the criticism, in January 2003, Secretary Rumsfeld rescinded his approval of the techniques and convened a working group within the Defense

[5] *Available in* The Torture Papers: The Road to Abu Ghraib, 229-235, 227-28 (Karen J. Greenberg and Joshua L. Dratel eds., 2005).
[6] *Id.*
[7] *Available at* http://www.aclu.org/projects/foiasearch/pdf/DOD045185.pdf.
[8] *Available at* http://www.aclu.org/pdfs/safefree/mora_memo_july_2004.pdf

Department to reconsider the interrogation techniques authorized by the December 2002 directive and, if necessary, to authorize a new set of techniques.[9] The Department of Justice's Office of Legal Counsel prepared a legal memorandum that the working group was required to accept as "definitive guidance." *Id.* at 16. The OLC draft, written by Deputy Assistant Attorney General John Yoo, was "nearly identical" to the earlier Bybee Memorandum, which took the position that abuse does not rise to the level of torture under U.S. law unless it inflicts pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[10] Memorandum from John Yoo, Deputy Assistant Attorney General, to William J. Haynes II, General Counsel, Department of Defense, "Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States," March 14, 2003. The working group adopted, almost verbatim, the legal analysis of the Bybee Memorandum. *See* Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations, at 8-16, 20-31, April 4, 2003.[11] The group's final report recommended that the Defense Department endorse a set of 35 interrogation techniques. *See id.* at 70. On April 16, 2003, Rumsfeld approved 24 of those 35 techniques, including:

a. dietary manipulation;
b. hooding and other sensory deprivation techniques;
c. environmental manipulation;
d. "false flag" (leading prisoners to believe that they have been transferred to a country that permits torture); and
e. isolation.

Memorandum from Donald Rumsfeld, Secretary of Defense, to the Commander, US Southern Command, "Counter-Resistance Techniques in the War on Terrorism (S)," April 16, 2003. These techniques appear to have been part of the Guantanamo interrogation policy until March 2005, when the Pentagon declared the Working Group report a "non-operational 'historical' document." Jane Mayer, "The Memo," *New Yorker*, February 27, 2006.[12]

(D) September 6, 2006, the Department of Defense published the new Army Field Manual, which set out the minimum standards of treatment for all detainees. Department of the Army, Field Manual No. 2-22.3: Human Intelligence Collector Operations §§ 5.73-76 (2006). The Manual states that all detainees within the control of the Department of

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[9] http://www.washingtonpost.com/wp-srv/nation/documents/011503rumsfelda.pdf.

[10] In a hearing convened by the Senate Armed Services Committee, Senator Carl Levin observed that Vice Admiral Albert Church, who had conducted an investigation into prisoner abuse, had specifically "noted that [the] conclusions of that [March 14, 2003] memo are nearly identical to those of the August 1, 2002, Office of Legal Counsel memo, which is known as the torture memo, which the administration disavowed in the middle of last year, which, among other things, concluded that for physical pain to amount to torture it had to be equivalent to the pain accompanying, quote, 'organ failure, impairment of bodily functions or even death.'" Transcript of Senate Armed Services Committee hearing on Department of Defense Detention and Detainee Interrogation techniques, March 10, 2005, available at 2005 WL 555674

[11] *Available at* http://www.washingtonpost.com/wp-srv/nation/documents/040403dod.pdf

[12] *Available at* http://www.newyorker.com/archive/2006/02/27/060227fa_fact.

Defense shall be treated humanely, and identifies several techniques that fail to meet that standard:

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

(4) Authorized CIA Interrogation Techniques.

(A) In mid-March 2002, the Central Intelligence Agency (CIA) also authorized a new set of harsh methods for use in its own interrogation program. Interrogation techniques authorized by the Department of Justice and used by the CIA reportedly included:

a. grabbing and shaking prisoners;
b. slapping prisoners to cause pain and fear;
c. forcing prisoners to stand for upwards of 40 hours;
d. exposing prisoners to extremely cold temperatures for prolonged periods and dousing them in cold water;
e. waterboarding prisoners either by binding them to a board, wrapping their faces in plastic and pouring water over them, or strapping them down, putting a washcloth over their faces and pouring water into their noses;
f. confining prisoners in coffin-style boxes;
g. keeping prisoners in darkness without access to light; and
h. blaring continuous loud music at prisoners.

Brian Ross and Richard Esposito, "CIA's Harsh Interrogation Techniques Described," ABCNews.com, November 18, 2005[13]; James Risen, *State of War: The Secret History of the CIA and the Bush Administration* 32 (2006).

(B) CIA Inspector General John Helgerson found that the agency's interrogation techniques constituted cruel, inhuman, and degrading treatment. Douglas Jehl, "Report Warned C.I.A. on Tactics In Interrogation," New York Times, November 9, 2005.

(C) The Supreme Court decided in *Hamdan v. Rumsfeld*,126 S. Ct. 2749 (2006), that Common Article 3 applies to detainees held at Guantanamo and that Mr. Hamdan's military commission failed to meet Common Article 3's requirement of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," and was illegal. *Id.* at 2796. As a result of the Court's decision, the CIA suspended its

[13] *Available at* http://abcnews.go.com/WNT/Investigation/story?id=1322866.

"enhanced interrogation program," David Ignatius, "A Way Out of Guantánamo Bay," *Washington Post,* July 7, 2006,[14] and the President issued Executive Order No. 13440 requiring the CIA to comply with international strictures against harsh treatment of detainees, Executive Order no. 13440, "Interpretation of the Geneva Conventions Common Article 3 as Applies to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, July 20, 2007," *Federal Register*, 72, no 141, 40705-09 (July 24, 2007).[15]

(5) Reports of Abuse at Bagram and Guantanamo.

(A) FBI records document eye-witness accounts of FBI agents who saw the abuse of prisoners at Guantanamo Bay. For example, one FBI agent describes interrogations in which military personnel apparently employed "environmental manipulation" in combination with other techniques:

> On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position on the floor, with no chair, food, or water. Most times they had urinated and defecated on themselves, and had been left there for 18-24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP's what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night.

Email from Unknown FBI Agent to Unknown FBI Agent (Aug. 2, 2004, 10:46 AM).[16]

(B) In another document recently made public, a military interrogator described an interrogation that took place in Guantanamo in April 2003.

> [The interrogator] was repeating the [same] question over and over, in rapid fire fashion, so quickly that the interpreter was not keeping up with the questioning and the detainee would not have been able to answer without interrupting. . . . [The interrogator] then shouted "down" and the two detainee escorts pushed the detainee to the floor. When I say pushed to the floor I mean they pushed in the back of the detainee's knees with their knees, taking the detainee to his knees. Then holding the detainee by his upper arms they slammed his upper body to the floor. This series of motions was all done in one swift movement, so that the detainee went from a standing position to a prone position all at once. . . . The detainee was slammed to the floor in this manner seven or eight times. . . . The

[14] *Available at* http://www.washingtonpost.com/wpdyn/content/article/2006/07/06/AR2006070601548.html.
[15] *Available at* http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-3656.pdf.
[16] *Available at* http://www.aclu.org/projects/foiasearch/pdf/DOJFBI002345.pdf.

> detainee was being slammed to the floor so hard that I was concerned for his safety. The force with which the detainee hit the floor was, in my estimation, adequate to cause severe internal injury.

Memorandum from Unknown Interrogator, ACS Defense to Unknown Individual, "Incident on 22APR2003," April 26, 2003.[17] These reports are just a small sample of the accounts of detainee abuse released pursuant to a Freedom of Information Act request. *See generally* American Civil Liberties Union, *Torture Documents Released Under FOIA*, http://www.aclu.org/safefree/torture/torture foia.html.

(C) Reports from Bagram suggest detainee abuse was rampant there as well. In December 2002, interrogators at Bagram Collection Point killed two Afghan prisoners, Mullah Habibullah and Dilawar. News reports based on government documents relating to these deaths indicate the prisoners who were killed at Bagram were hooded, "shackled by the wrists to the wire ceiling," subjected to repeated "peroneal strikes," (potentially disabling blows to the side of the leg, just above the knee), beaten repeatedly, and pushed, shoved, and kicked during interrogations. *See* Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005. One of the prisoners was found dead in an "isolation cell," "tethered to the ceiling by two sets of handcuffs and a chain around his waist. His body was slumped forward, held up by the chains." *Id.* Notably, interrogators themselves believed the other prisoner to be an innocent man "who simply drove his taxi past the American base at the wrong time." *Id.*

(D) The International Committee of the Red Cross in a report leaked in 2004 deemed the psychological and physical coercion techniques used at Guantanamo to be "tantamount to torture." Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 30, 2004. *See also See, e.g.*, Neil A. Lewis, *F.B.I. Memos Criticized Practices at Guantanamo*, N.Y. TIMES, Dec. 7, 2004 (describing confidential FBI reports which stated that the bureau had repeatedly criticized "aggressive interrogation practices" that its agents observed being used by military personnel at Guantánamo Bay, Cuba); Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. TIMES, Jan. 1, 2005 (describing FBI and International Red Cross reports of abusive interrogation tactics, including physical abuse and use of isolation, deception, and other psychological methods); DETAINEE ABUSE AND ACCOUNTABILITY PROJECT, BY THE NUMBERS (2006) (documented over 330 cases in which U.S. military and civilian personnel are credibly alleged to have abused or killed detainees)[18]; Neil A. Lewis & Eric Schmitt, *Inquiry Finds Abuses at Guantanamo Bay*, N.Y. TIMES, May 1, 2005 (detailing pervasive abuse of detainees as part of effort "to devise innovative methods to gain information").

[17] *Available at* http://www.aclu.org/projects/foiasearch/pdf/DOD023885.pdf (see pages 16-17).
[18] *Available at* http://hrw.org/reports/2006/ct0406/.

6. Law and Argument:

a. Introduction

(1) The Military Commissions Act of 2006 prohibits the introduction of statements obtained using torture, MCA § 948r(b), 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. Evid. 304(b)(3). Particularly in light of Mr. Khadr's young age and extensive injuries, the cruel treatment he endured rises to the level of torture and, therefore, any statements made during his time at Bagram and Guantanamo are inadmissible.

(2) The MCA also mandates the suppression of Mr. Khadr's past statements because they were obtained through coercive interrogation. Such statements may only be introduced if the prosecution demonstrates they are reliable and that introducing the statements would be in the interest of justice. *See* MCA § 948r(c). Neither requirement is met here. First, Mr. Khadr had every reason to lie. He believed that providing a false confession was the only way to avoid what he understood was his future--indefinite detention at Guantanamo Bay or transfer to a country that routinely practices torture. Furthermore, Mr. Khadr's coerced claims that he threw the grenade that killed Sergeant First Class Speer conflict both with Government witness accounts of the firefight near Khost and with each other. The statements made during these interrogations are unreliable and uncorroborated. Second, admitting Mr. Khadr's coerced statements would be contrary to the interests of justice. Statements obtained through coercion are not only inadmissible because they are unreliable, but also because they are uncorroborated and therefore inconsistent with basic tenets of our adversarial system of justice. Therefore, because Mr. Khadr's coerced statements are not reliable and admitting them would be contrary to the interests of justice, these statements are inadmissible under MCA § 948r(c).

(3) The admission of Mr. Khadr's incriminating statements would also be in consistent with the requirements of the Fifth Amendment to the Constitution and Common Article 3 of the Geneva Conventions. Both require that detainees not be subjected to cruel, inhumane, and degrading treatment. The Military Commissions Act of 2006 and Detainee Treatment Act of 2005 define cruel, inhumane, and degrading treatment as conduct violating the Fifth, Eighth, and/or Fourteenth Amendments of the Constitution. *See* MCA § 948r(d)(3); Detainee Treatment Act of 2005, § 1003(d), Pub. L. No. 109-48, 119 Stat. 2680 (codified at 42 U.S.C. § 2000dd (2006).[19] Federal case law makes clear that the harsh interrogation tactics endured by Mr. Khadr rise far above that threshold and his incriminating statements are thus barred.

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[19] *See also* U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17486 (1990) (U.S. Senate reservations declaring "[t]hat the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.")

(4) In determining whether the prosecution has met its burden for proving Mr. Khadr's statements are admissible, the commission must take special notice of the fact that he was a juvenile at the time those statements were made. The Supreme Court has repeatedly made clear, and scientific evidence confirms, that children are uniquely vulnerable to harsh interrogation practices and are more likely to suffer lasting physical and psychological harm from those practices. *See e.g.*, *Haley*, 332 U.S. at 599-600 (suppressing the confession of a 15 year-old outside the presence of his parents because "a lad of tender years is no match for the police").

(5) Finally, any evidence derived from statements made by Mr. Khadr in response to torture or ill-treatment must also be excluded as fruit of the poisonous tree. After interrogators coerced statements from Mr. Khadr, all subsequent statements were made in the shadow of the original confession, rendering them equally involuntary and unreliable.

b. Mr. Khadr's Statements Were Obtained Using Torture and Are Therefore Inadmissible.

(1) Considering the Totality of the Circumstances, Mr. Khadr's Treatment Amounts to Torture.

(A) Since the Founding, the Fifth Amendment has prohibited the introduction of evidence obtained by torture. *See, e.g.*, *Brown v. Mississippi*, 297 U.S. 278, 286-87 (1935) ("The rack and torture chamber may not be substituted for the witness stand."); *Lisenba v. California,* 314 U.S. 219, 237 (1941) ("To extort testimony from a defendant by physical torture . . . is not due process . . ."). The universal rule against admitting tortured statements applies equally in civilian and military courts. *See, e.g.*, *United States v. Monge*, 2 C.M.R. 1, 4 (C.M.A. 1952) (noting that a confession "following inducements calculated to arouse either hope or fear is just as untrustworthy in a court-martial as it is in a civilian criminal court").

(B) The Fifth Amendment reflects a universal rule prohibiting the use of torture, exemplified by the United Nations Convention Against Torture,[20] customary international law,[21] and centuries of Anglo-American jurisprudence.[22] *See* Memorandum from

[20] G.A. Res. 39/46, U.N. GAOR, 39th Sess. Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984). Torture is also prohibited by many other international agreements. *See, e.g.,* U.N. CHARTER art. 55 (calling upon U.N. member countries to promote "universal respect for, and observance of, human rights and fundamental freedoms for all."); Universal Declaration on Human Rights, UN GAOR, Supp. No. 16, at 52, UN Doc. A/6316, at art. 5 (1948) ("[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 3rd Comm., 21st Sess., 1496th plen. mtg. at 49, U.N. Doc. A/RES/ 2200A (XXI), at art. 7 (1966) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

[21] The prohibition against torture has achieved the status of *jus cogens* (*i.e.*, a peremptory norm) under international law. *See, e.g.*, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147, 198; *see also* Restatement (Third) of Foreign Relations Law of the United States § 702 reporters' note 5.

Daniel Levin, Acting Assistant Attorney General to James B. Comey, Deputy Attorney General, "Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A," December 30, 2004, at 1.

(C) In keeping with this fundamental principle of American law, **the MCA provides that "[a] statement obtained by use of torture shall not be admissible in a military commission." MCA § 948r(b); *see also* M.C.R. Evid. 304(a)(1).** 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. Evid. 304(b)(3).

(D) To determine whether Mr. Khadr's statements were "obtained by torture," this court must "consider the totality of the circumstances under which the contested statement was produced or obtained." *See* M.C.R. Evid. 304(a) note. Courts also use a totality of the circumstances test to determine whether a defendant's statements were given involuntarily and therefore inadmissible under the Due Process Clause of the Fifth or Fourteenth Amendments. *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 693 (1993) ("Under the due process approach, as we have already seen, courts look to the totality of circumstances to determine whether a confession was voluntary."); *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Clewis v. Texas*, 386 U.S. 707, 708 (1967); *Files v. Alabama*, 352 U.S. 191, 197 (1957). This court should consider, as it would in a due process analysis, both the severity of the interrogation techniques used, *see Davis v. North Carolina*, 384 U.S. 737, 752 (1966) (confession involuntary because police repeatedly interrogated jailed suspect held incommunicado over 16-day period), and the defendant's capacity to withstand the pressure created by those techniques, *see Mincey v. Arizona*, 437 U.S. 385, 399-401 (1978) (confession involuntary because continued police interrogation of hospitalized suspect overwhelmed suspect's free will).

(E) In evaluating interrogation methods, federal courts commonly consider not only the methods themselves, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), but also the length and location of the interrogation, *Ashcraft v. Tennessee*, 322 U.S. 143, 153-154 (1944), *Reck v. Pate*, 367 U.S. 433, 441 (1961); its continuity, *Leyra v. Denno*, 347 U.S. 556, 561 (1954); and whether the accused was allowed to consult with relatives, friends or an attorney, *Haley v. Ohio*, 332 U.S. 596, 600 (1948). In regard to the defendant's capacity to resist coercion, federal courts often take into account the defendant's maturity, *Haley*, 332 U.S. at 599-601 ; education, *Clewis v. Texas*, 386 U.S. 707, 712 (1967); physical condition, *Greenwald v. Wisconsin*, 390 U.S. 519, 520-521 (1968) (per curiam); and mental health, *Fikes v. Alabama*, 352 U.S. 191 (1957).[23]

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[22] *See A(FC) v. Secretary of State of the Home Department*, [2005] UKHL 71 (H.L Dec. 8, 2005) (tracing the common law's prohibition on torture to the mid 1600's).

[23] International courts have also considered many of the same factors when confronted with claims of torture. *See, e.g.*, *Ireland v. United Kingdom,* Judgment, European Court of Human Rights (1978) at ¶ 167 ("All the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim."); *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) para. 30 (1978); Scott N. Carlson & Gregory Gisvold, Practical Guide to the International Covenant on Civil and Political Rights 74 (2003) ("The [Human Rights] Committee has indicated that assessing what constitutes torture is a subjective endeavor that depends on all of the circumstances of the case.")

(2) Mr. Khadr's Youth weighs heavily in the totality of circumstances analysis.

(A) While many factors weigh in favor of a finding of conduct rising to the level of torture or coercion in Mr. Khadr's case, his age and developmental stage is critical. A defendant's youth is weighed heavily in the totality of the circumstances analysis. *See* 87 A.L.R.2d 624 § 1. Mr. Khadr was fifteen-years-old when he was captured in Afghanistan and has spent subsequent developmental years incarcerated with an adult population and subjected to interrogation techniques that shock the conscience.

(B) Mr. Khadr's treatment flies in the face of the Supreme Court's repeated holdings that juveniles are particularly vulnerable to coercion:

> [W]hen, as here, a mere child--an easy victim of the law--is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a. m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.

Haley, 332 U.S. at 599-600; *see also In re Gault*, 387 U.S. 1, 55 (1967) ("[T]he greatest care must be taken to assure that [a minor's] confession was voluntary in the sense that it was not coerced or suggested, but also that it was not the product of ignorance of rights, or adolescent fantasy, fright, or despair."); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (holding that a 14-year-old's statement was involuntary and noting that the defendant's five day detention, during which his mother tried unsuccessfully to see him and he had no contact with a lawyer or any other friendly adult, "gives the case an ominous cast").[24]

(C) Scientific research supports the strong judicial determination that children are less able to withstand and more likely to lie under police pressure. The Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005) pointed to three psychological differences

[24] In several other cases, the Supreme Court has found the confession of a minor involuntary but did not focus on the age of the defendant. *See, e.g.*, *Chambers v Florida*, 309 US 227 (1940) (young defendants arrested without warrant, held in jail without formal charges, threatened with mob violence, and questioned 5 days; confession held coerced); *McNabb v United Sta*tes 318 US 332 (1943) (decided primarily on the delay in arraignment of defendants, but the court noting that they were ignorant and inexperienced young men); *Lee v Mississippi*, 332 US 742 (1948) (17-year-old defendant; confession obtained as the result of duress, threats, and physical violence by police officers, held coerced); *Payne v Arkansas* 356 US 560 (1958) (19-year-old defendant, mentally dull, arrested without warrant and held incommunicado for 3 days; confession held coerced).

between juveniles and adults that make it unconstitutional to apply the death penalty to minors. These same differences also explain why courts are reluctant to endorse or encourage the use of harsh interrogation techniques against minors.

(D) First, juveniles do not have the same capacity for mature reasoning, risk assessment and impulse control as adults. Therefore, "impetuous and ill-considered actions and decisions" are "more understandable among the young." *Id.* at 569.[25] In a study of more than 1,000 adolescents and adults, researchers investigated the relationship among the factors of age, maturity, and decision making. Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741 (2000). Adolescents, on average, were "less responsible, more myopic, and less temperate than the average adult." *Id.* at 757. Psychologists attribute the impulsive behavior of juveniles to an inability to weigh costs and benefits accurately. Minors tend to focus on opportunities for gain and ignore the potential for loss, and tend to focus on short-term consequences and discount long-term effects more than adults. *See* Elizabeth S. Scott *et al.*, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 231 (1995). The diminished capacity of a juvenile to properly assess the consequences of his or her own behavior is a function of both a lack of experience and brain development. The human brain does not settle into its mature, adult form until after the adolescent years have passed and a person has entered young adulthood. *See, e.g.,* Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861 (1999) (study of 145 children and adolescents scanned up to five times over approximately 10 years); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004). These differences in cognitive capabilities mean young people are less able to make sound legal decisions and to protect their own interests. *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L & HUM. BEHAV. 333 (2003) (studying more than 1,300 adolescents and young adults, and finding juveniles' psychosocial immaturity and heightened compliance with authority reflected in decisions to make a confession, consult with counsel, and accept a plea offer). To ensure that the state does not take advantage of these vulnerabilities, courts must be especially protective of juveniles when deciding whether to admit coerced statements.

(E) Second, and most important here, "juveniles are more vulnerable or susceptible to negative influences and outside pressures. . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." *Roper*, 543 U.S. at 569; *see also Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a

[25] *See also Bellotti v. Baird*, 443 U.S. 622, 640 (1979) ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to avoid choices that could be detrimental to them," as well as "the ability to make fully informed choices that take account of both immediate and long-range consequences."); *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) ("The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions. . . .")

person may be most susceptible to influence and to psychological damage."). Empirical research shows that even *adults* often succumb to coercion and lie to please their interrogators and avoid future harm. *See, e.g.*, Gisli H. Gudjonsson, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 235-40, 260-73, 316-20 (1992) (analyzing British and American cases in which defendants were charged or convicted on the basis of coerced confessions later shown to be false); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997) (analyzing cases in which police interrogation techniques elicited false confessions). Studies have found between 14 to 25% of all erroneous convictions in America can be attributed to false confessions. *See* Steven A. Drizin and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. REV. 891, 901-07 (2004) (summarizing studies of wrongful convictions and percentage of false confessions in the studies).

(F) This tendency to lie under pressure is much more pronounced in children. Children are more *compliant* than adults; they tend to go along with instructions without actually accepting the premises. Matthew B. Johnson & Ronald C. Hunt, *The Psycholegal Interface in Juvenile Assessment of Miranda*, 18 AM. J. FORENSIC Psychol. 17, 24 (2000). Their low social status *vis-a-vis* their adult interrogators, societal expectations that they respect authority, and their naiveté in believing that police officers would not deceive them, also may make them more likely to comply with the demands of their interrogators. *See* Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents,* 32 HOFSTRA L. REV. 463 (2004); *see also* Gerald Robin, *Juvenile Interrogation and Confessions,* 10 J. POL. SCI. & ADMIN. 224, 225 (1982). Furthermore, children are more *prone to suggestion* than adults; not only are they more likely to change their story under pressure, but stressful situations may actually change their own perceptions and memories of an event. *See* Johnson & Hunt at 29; Gerald P. Koocher, *Different Lenses: Psycho-legal Perspectives on Children's Rights*, 16 NOVA L. Rev. 711, 716 (1992); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 16 (1997). For example, in a study comparing 15- and 16-year-old adolescents to young adults ages 18 to 26, the adolescents were more likely to take responsibility for a mock crime when presented with false evidence of their guilt. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & HUM. BEHAV. 141, 151 (2003). Given juvenile psychology, it is not surprising that adolescents are vastly overrepresented among the known cases of false confessors. In a recent survey of the total of 113 defendants found guilty on the basis of a false confession and later exonerated, the authors found that fully *one third* were juveniles. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944 (2004).

(G) Finally, the "third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Roper*, 543 U.S. at 570 (*citing* E. Erikson, IDENTITY: YOUTH AND CRISIS (1968)). Not only should coercive interrogations of children be avoided because they are less capable of resisting such coercion, but also because that treatment is more likely to cause them severe and lasting harm. Children who are abused often suffer long-term psychological damage that follows them through their adult lives. Bessel A. van der Kolk et al., *Dissociation, Affect Dysregulation & Somatization: The Complex Nature of Adaptation to Trauma*, 153 AM. J. OF PSYCHIATRY 83

(1995) ("Our study confirms earlier investigations that have shown a relationship between the age of onset of the trauma, the nature of the traumatic experience, and the complexity of the clinical outcome. Subjects who had suffered interpersonal abuse before age 14 developed significantly more dissociative problems, as well as difficulties modulating anger, self-destructive and suicidal behaviors, than either the older victims of interpersonal trauma, or the victims of disaster."). Long term consequences include: aggressive and violent behavior, criminality, substance abuse, self-injurious and suicidal behavior, emotional problems, interpersonal problems, and academic and vocational difficulties. *See* Malinosky-Rummell, R. & Hansen, D.J., *Long Term Consequences of Childhood Physical Abuse*, 114 PSYCHOLOGICAL BULL. 68 (1993). The ill effects of child abuse are serious and well known, therefore the state should be particularly careful when it comes to the treatment of minors in its custody, and courts should be particularly skeptical of claims by the state that harsh treatment is warranted.

(H) As a result, Mr. Khadr's age is one of the most important factors this court should consider in evaluating the harsh interrogation techniques employed against him and the reliability of any resulting statements.

(3) Under Military Commission, American and International Law, the Abuse Inflicted upon Mr. Khadr Rises to the Level of Torture.

(A) The brutal treatment to which Mr. Khadr was subjected would satisfy the definition of "torture" under the Military Commissions Act and Military Commission Rules of Evidence, even if he had been an adult.

(B) Under the Plain Text of the MCA and Rules of Evidence, the Interrogation Methods Used on Mr. Khadr Qualify as Torture.

i. The Military Commissions Act of 2006 prohibits the introduction of statements obtained using torture, MCA § 948r(b), 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. Evid. 304(b)(3). Severe mental pain is further defined as "prolonged mental harm" caused by either (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.*

ii. Because the statute does not define "severe," "we construe [the] term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). Dictionaries define "severe" to mean "[c]ausing great discomfort, damage, or distress: *a severe pain*." *American Heritage Dictionary of the English Language* (4th ed. 2000)[26]; *see also*

[26] Interestingly, the Office of Legal Counsel of the Department of Justice chose to cite the third edition of the American Heritage Dictionary in its most recent analysis of the treaty and statutory prohibition on

see also XV *Oxford English Dictionary* 101 (2d ed. 1989) ("Of pain, suffering, loss, or the like: Grievous, extreme" and "Hard to sustain or endure").

iii. It is clear that Mr. Khadr experienced severe physical suffering in both Bagram and Guantanamo Bay. M.C.R. Evid. 304(b)(3) (emphasis added). In the firefight near Khost, Mr. Khadr was badly injured. He had been shot twice in the back and the bullets left two gaping wounds in his chest. He had also been struck repeatedly with shrapnel, blinding him and leaving him with small pieces of metal embedded in his body. Despite his condition, Mr. Khadr was interrogated immediately upon regaining consciousness. U.S. forces refused his requests for pain medication, repeatedly shackled his hands and feet to his side, made him sit up in his stretcher, forced him to lift five gallon buckets of water and crates of bottled water, and tied his hands to the top of a door frame leaving him there to stand for hours. Because of his severe injuries, this treatment caused Mr. Khadr excruciating pain because raising his arms, carrying heavy objects, and even sitting up pulled at the stitches and unhealed injuries to Mr. Khadr's left arm and chest.

iv. This conduct continued at Both Bagram and Guantanamo, where interrogators pulled Mr. Khadr off his stretcher and threw him to the ground, doused him in freezing water, spat on him, pulled his hair, and repeatedly lifted him off the ground with his hands and feet shackled together and then dropped him.

v. On several occasions, Mr. Khadr was short-shackled into a variety of stress-positions and left for several hours. For example, during one interrogation in March 2003, when he was 17 years old, he was removed from his cell in the middle of the night and brought to an interrogation room. Military police shackled his feet and ankles together with handcuffs, tied the cuffs to a bolt in the floor, and then forced Mr. Khadr into various stress positions, such as lying on his stomach with his hands and feet cuffed together behind his back. He was left in these stress positions for hours at a time and, because he was not allowed to use the toilet, he eventually urinated on himself and on the floor. Military Police subsequently poured a pine oil solvent onto the floor and onto Mr. Khadr. Then, with Mr. Khadr on his stomach with his hands and feet cuffed behind his neck, the Military Policemen used Mr. Khadr as a human mop, dragging him back and forth across the floor through the mixture of urine and pine oil. Mr. Khadr was later returned to his cell and was not allowed a change of clothing for two days. This was one of several times Mr. Khadr was forced to soil himself during an interrogation. Khadr Aff. at ¶ 59.

vi. At other times, Mr. Khadr was placed in isolation for long periods of time in rooms kept at very cold temperatures, "like a refrigerator." *Id.* at ¶ 53;. It is not difficult to imagine the extreme physical suffering that would be associated with such long-time exposure to cold.

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torture, which defines "severe" as "extremely violent or intense." *See* Memorandum from Daniel Levin, Acting Assistant Attorney General to James B. Comey, Deputy Attorney General, "Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A," December 30, 2004 (citing *American Heritage Dictionary of the English Language* 1653 (3d ed. 1992).

vii. Mr. Khadr was also subjected to severe mental suffering. M.C.R. Evid. 304(b)(3) (emphasis added). In Bagram, interrogators tied a bag tightly over Mr. Khadr's head, making it difficult for him to breathe. The interrogators then brought barking dogs into the room to terrify the blinded Mr. Khadr. *Id.* at ¶ 18. Moreover, interrogators often threatened gross physical and mental harm, threats Mr. Khadr had learned from experience to take seriously. *See* M.C.R. Evid. 304(b)(3) (including "threatened infliction of severe physical pain" as an example of conduct that can cause severe mental suffering). For example, Mr. Khadr was threatened with rape on numerous occasions. Around the time of Ramadan 2003 (which occurred on October 24, 2003), an man claiming to be from the Afghani government but wearing an American flag on his pants threatened to sent Mr. Khadr to Afghanistan where "they like young boys." Another time in 2003 an interrogator threatened to send Mr. Khadr to Egypt where he would see "Askri raqm tisa"--Arabic for "Soldier Number Nine"--a man known for raping young boys. *Id.* ¶¶ 10-12. Interrogators also repeatedly told Mr. Khadr that they would send him to a third country where he would be even more severely tortured if he failed to cooperate--that is, provide them the answers they wanted to hear. *Id.* at ¶ 12.[27]

viii. Mr. Khadr's own interrogators have worried for his mental health. *See* 00766 FM40 20030116 (Jan. 16, 2003) (Attachment K) ("KHADR appeared suicidal and depressed."); 00766 FM40 20031008 (Oct. 8, 2003) (Attachment M) ("The investigators asked KHADER if he had nightmares about the attack and if he felt he needed someone to talk to, from a psychological aspect.").

ix. Mr. Khadr could hear other detainees screaming in pain, and heard that other detainees had died from injuries sustained during interrogations. Khadr Aff. ¶ 29. Mr. Khadr was at the mercy of all his interrogators, and never knew when they would punish him for failing to give the answers they wanted to hear. He quickly learned to "cooperate"--that is, invent lies when necessary to please his interrogators so they would not have an excuse to further hurt and humiliate him. *Id.* at ¶¶ 43-49.

(C) The Executive Branch Itself Has Concluded the Interrogation Methods Used on Mr. Khadr Constitute Torture.

i. At the time they were employed upon Mr. Khadr, many of the extreme interrogation techniques to which he was subjected (stress positions, barking military dogs, hooding, lengthy interrogations, cold water, light pushing, freezing conditions, and beatings) were deemed not to constitute torture by the now-infamous "Torture Memos." When these memos were leaked to the media, however, they came under attack both internally[28] and publicly. In response, these memos were disavowed by the Department of Defense and

[27] CAT/C/20/D/83/1997 (1998) (finding of torture by the CAT Committee supported by medical evidence presented by the applicant demonstrating that she suffered "severely from post-traumatic stress disorder, most probably as the consequence of the abuse" she had earlier suffered at the hands of military forces in her home State).

[28] *See, e.g.*, Memorandum from Alberto J. Mora, Navy General Counsel, to Navy Inspector General, "Re: Statement for the Record: Office of General Counsel Involvement in Interrogation Issues," July 7, 2004, p.14 (describing the authorized techniques as "at a minimum, cruel and unusual treatment and, at worst, torture").

Department of Justice. Specifically, the Justice Department issued a new memorandum concluding that torture is not limited to conduct causing "excruciating or agonizing pain" like that accompanying organ failure or death (as suggested by the "Torture Memos"), but also includes conduct causing "violent or intense" pain that is "[h]ard to sustain or endure."[29] *See* Memorandum from Daniel Levin, Acting Assistant Attorney General to James B. Comey, Deputy Attorney General, "Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A," December 30, 2004. Similarly, the Department of Defense issued a new list of authorized interrogation methods, which conspicuously did not include many of the harsh techniques that had been used on Mr. Khadr. *See* Memorandum from Donald Rumsfeld, Secretary of Defense, to the Commander, US Southern Command, "Counter-Resistance Techniques in the War on Terrorism (S)," April 16, 2003 (failing to authorize the use of stress positions, light pushing, military dogs, and very lengthy interrogations, all of which had been previously authorized and used on Mr. Khadr); *see also* Department of the Army, Field Manual No. 2-22.3: Human Intelligence Collector Operations §§ 5.73-76 (2006) (prohibiting the use of hooding, military dogs, very cold conditions, and beatings, all of which have been applied to Mr. Khadr). This change in policy is extremely significant in that it demonstrates the barbaric interrogation techniques inflicted upon Mr. Khadr amounted to torture and have since been recognized as inappropriate.

ii. In fact, in other contexts, the Executive Branch has clearly interpreted the term "torture" as including many of the techniques used upon Mr. Khadr. *See, e.g.*, State Department Reports on Human Rights Practices[30] – Iran (2007) ("[C]ommon [torture] methods included **prolonged solitary confinement with sensory deprivation, beatings, long confinement in contorted positions, [and] sleep deprivation."**); Egypt (2007) ("Principal methods of torture and abuse reportedly employed by the police and the SSIS included stripping and blindfolding victims; **suspending victims by the wrists and ankles in contorted positions or from a ceiling or doorframe** with feet just touching the floor; . . . **dousing victims with cold water; and sexual abuse, including sodomy**."); Lebanon, 2007 ("Torture methods [Ministry of Defense between 1992 and 2005] included **physical abuse, sleep deprivation, and prolonged isolation**."); Libya, 2007 ("The reported methods of torture and abuse included **chaining prisoners to a wall for hours**; . . . **suffocating with plastic bags;** depriving detainees of sleep, food, and water**; hanging by the wrists; … threatening with dog attacks**; and beatings on the soles of the feet."); Nepal (2007) (Torture techniques used "included beatings with plastic pipes, submersion in water, sexual humiliation, **restricted movement**, and prolonged sensory deprivation. . . . Prisoners were also **threatened with sexual abuse, rape, death, or indefinite detention**."); Syria (2007) (Torture techniques included **"dousing victims with freezing water** and beating them in extremely cold rooms"); Syria (2007) ("Reported abuses included … sexual assault and **threats of sexual assault**."); Syria (2005) ("[F]our young men … were subjected to various forms of torture and ill-treatment, including . . . **dousing with cold water, standing for long periods of time during the night, subjected to loud screams and beatings of other detainees.**"); Turkey (2007) ("[S]ecurity officials mainly used methods that did not leave

[29] As mentioned above, the more recent edition of the dictionary cited by Acting Assistant Attorney general Levin defines "severe" as mean "[c]ausing great discomfort, damage, or distress: *a severe pain*." *American Heritage Dictionary of the English Language* (4th ed. 2000). It is unclear why the Department of Justice chose to cite the older edition.

[30] All available at http://www.state.gov/g/drl/rls/hrrpt/.

physical signs, including repeated slapping, **exposing detainees to cold**, stripping and blindfolding detainees, food and sleep deprivation, threatening detainees or their family members, dripping water on detainees' heads, isolation, and mock executions."). In fact, even before 2001, the State Department's section-by-section analysis of the Convention Against Torture, included in President Reagan's transmittal to the Senate, observed that the term "torture" should be "reserved for extreme, deliberate, and unusually cruel practices [such as] . . . ***tying up or hanging in positions that cause extreme pain***." President's Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, May 23, 1988, S. Treaty. Doc. No. 100-20, *reprinted in* 13857 U.S. Cong. Serial Set at 3 (1990) (emphasis added), *see supra* note 7, and the Senate's accompanying reservations, S. Exec. Rep. No. 101-30, at 36 (1990). **Given these unequivocal findings, the Government cannot reasonably claim now that the physical abuse, stress positions, hanging by chains, sensory deprivation, barking dogs, cold water, threats of rape, sleep deprivation, long periods of isolation, exposure to cold, and more suffered by Mr. Khadr do *not* amount to "torture."**

(D) International Tribunals Have Held that the Abuses Suffered by Mr. Khadr are Torture and Violate International Law.

i. American federal courts have not had occasion to pass judgment on the type of brutal interrogation methods used at Bagram and Guantanamo Bay, but a number of international tribunals have, including the military courts established by American government following World War II to try Japanese POWs for war crimes, the CAT Commission, and the European Court of Human Rights. All three have found that the interrogation techniques used on Mr. Khadr violate international law.

ii. The U.S. government successfully prosecuted many Japanese soldiers following WWII for abusing American POWs in violation of the laws and customs of war. Such actionable abuse included forcing POWs into stress positions, throwing them to the ground, and hanging them by their wrists--all techniques employed against Mr. Khadr. For example, Yoshio Kameoka, a civilian translator for the Japanese military, was sentenced to 25 years of confinement and hard labor for forcing American POWs to stand at attention for many hours.[31] Similarly, Masato Hada, a medical orderly,[32] and Shohei Ikeda, a civilian guard at a POW camp,[33] were sentenced to life imprisonment and 15 years of confinement and hard labor respectively for, among other things, forcing American POWs to hold heavy objects over their heads for long periods of time (i.e., a stress position). Not only has Mr. Khadr been subjected to various stress positions, he has also been hung from his wrists for long periods of time and tied by his wrists and ankles and thrown to the floor repeatedly. For inflicting these same abuses

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[31] *Available at* http://socrates.berkeley.edu/~warcrime/Japan/Yokohama/Reviews/Yokohama_Review_Kameoka.htm.
[32] *Available at* http://socrates.berkeley.edu/~warcrime/Japan/Yokohama/Reviews/Yokohama_Review_Hada.htm.
[33] *Available at* http://socrates.berkeley.edu/~warcrime/Japan/Yokohama/Reviews/Yokohama_Review_Ikeda.htm.

upon American POWs under his control, Yagoheiji Iwata, a Sergeant in the Japanese Army, was found guilty of torture and sentenced to 12 years hard labor.[34]

iii. More recently, in 1997, the CAT Committee reviewed common interrogation techniques used by Israeli security forces against Palestinian detainees between the late 1980s and late 1990s. These interrogation techniques included: (1) **restraining in very painful positions**, (2) **hooding under special conditions**, (3) sounding of loud music for prolonged periods, (4) **sleep deprivation for prolonged periods**, (5) **threats**, including death threats, (6) **violent shaking**, and (6) **using cold air to chill**. After examining a special report by Israel, the Committee concluded these methods **constituted torture** as defined by CAT Article 1. Concluding Observations of the Committee against Torture: Israel, 18th Sess., U.N. Doc. A/52/44 (1997) at ¶ 257, 260. Moreover, the Committee suggested **such techniques rose to the level of torture even when applied singly**, although they were more often applied in conjunction.[35] *Id.* at ¶ 257. For its part, the U.S. State Department reported in 2000 that Israeli security forces "abused, and in some cases, tortured Palestinians suspected of security offenses." U.S. Dept. of State, Bureau Of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices - 1999 (Feb. 23, 2000).[36]

(E) Considering the "totality of the circumstances" and particularly in light of his youth, the abuse suffered by Mr. Khadr clearly rises to the level of torture and his statements must be excluded under MCA § 948r(b)and M.C.R. Evid. 304(a)(1).

c. In the Alternative, Mr. Khadr's Coerced Statements Are Inadmissible Because They Are Unreliable and Admission Would Be Contrary to the Interests of Justice.

(1) Completely aside from the blanket prohibition against statement obtained by torture, Mr. Khadr's statements are also inadmissible because they were coerced, are unreliable, and their admission would be contrary to the interests of justice. MCA § 948r(c) and M.C.R. Evid. 304(c). To admit a statement that the defendant contends was coerced, the military commission must find both that "the totality of the circumstances renders the statement reliable and possessing sufficient probative value" and that "the interests of justice would best be served by admission of the statement into evidence." *Id.* Neither requirement is met here.

(2) Centuries of judicial wisdom and the experience of military officers on the ground and tell us that statements wrung from a suspect by force cannot be trusted. *See infra* page 28-29. This basic intuition is well supported by psychological research, which also demonstrates that children are particularly vulnerable to coercion and more likely to falsely

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[34] *Available at* http://socrates.berkeley.edu/~warcrime/Japan/Yokohama/Reviews/Yokohama_Review_Iwata.htm.

[35] The Israeli Supreme Court later found these interrogation techniques illegal except in cases when "special permission" was granted permitting their usage against detainees "believed to possess information about an imminent attack." *See Pub. Comm. Against Torture in Israel v. State of Israel*, Judgment, H.C. 5100/94 Israeli High Court of Justice (1999), *available at* http://62.90.71.124/eng/verdict/framesetSrch.html.

[36] *Available at available at* http://www.state.gov/g/drl/rls/hrrpt/1999/416.htm.

confess under pressure. *See supra* at pages 19-20. Moreover, Mr. Khadr's incriminating statements are themselves implausible and contradicted by the available evidence. *See infra* at pages 30-36.

(3) Second, the Supreme Court has made very clear that coerced statements are not only inadmissible because they are unreliable, but also because they are inconsistent with a basic respect for human dignity and an adversarial system of justice. Foreign and international law underscores this point. Because Mr. Khadr's coerced statements are not probative and admitting them would be contrary to the interests of justice, these statements are inadmissible under MCA § 948r(c).

(4) Coerced Statements Are Notoriously Unreliable

(A) The tendency of a person to lie under pressure is magnified when that person is a minor. *See* Matthew B. Johnson & Ronald C. Hunt, The Psycholegal Interface in Juvenile Assessment of Miranda, 18 Am. J. Forensic Psychol. 17, 24 (2000); Gerald P. Koocher, *Different Lenses: Psycho-legal Perspectives on Children's Rights*, 16 Nova L. Rev. 711, 716 (1992); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 16 (1997); Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 151 (2003); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 944 (2004).

(B) It is axiomatic that coerced statements are untrustworthy. *See, e.g.*, *Stein v. New York*, 346 U.S. 156, 182 (1953) ("The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt."); *United States ex rel. Caminito v. Murphy*, 222 F.2d 698, 703 (2d Cir. 1955) ("Aristotle … wrote of torture 'that people under its compulsion tell lies quite as often as they tell the truth, … sometimes recklessly making a false charge in order to be left off sooner … so that no trust can be placed in evidence under torture.'"); *King v. Warickshall*, 168 Eng. Rep. 234, 235 (K.B. 1783) ("[A] confession forced from the mind by the flattery of hope, or torture of fear … comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it."); *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964) (courts cannot tolerate "the probable unreliability of confessions that are obtained in a manner deemed coercive"); *United States v. Monge*, 2 C.M.R. 1, 4 (C.M.A. 1952) (noting that a confession "following inducements calculated to arouse either hope or fear is just as untrustworthy in a court-martial as it is in a civilian criminal court"); *United States v. Lewis*, 12 M.J. 205, 208 (C.M.A. 1982) ("The prohibitions of . . . the Fifth Amendment against coerced confessions are based on the concept that involuntary statements must be excluded because of their inherent potential for unreliability.").

(C) Experienced FBI interrogators who witnessed the use of "enhanced interrogation techniques" used at Guantanamo Bay repeatedly objected to their use on the basis that they do not produce reliable information. "In late 2002 and continuing into mid-2003, the

[FBI's] Behavioral Analysis Unit raised concerns over interrogation tactics being used by the U.S. military."[37] The FBI believed that the military's methods "were not effective or producing intel that was reliable," and raised these concerns in weekly meetings with senior officials at the Criminal Division of the Justice Department. E-mail from Unknown FBI Agent to FBI Agent [redacted] (May 10, 2004, 12:26 PM).[38] An FBI memorandum states that, between late October and mid-December 2002, FBI personnel stationed at Guantánamo Bay concluded that military interrogators "were being encouraged at times to use aggressive interrogation tactics in [Guantánamo] which are of questionable effectiveness and subject to uncertain interpretation based on law and regulation." Memorandum from CIRG Behavioral Analysis Unit to Counterterrorism General Council in Miami, "265A-MM-C99102May 30, 2003.[39] The memorandum also states that "[n]ot only are these tactics at odds with legally permissible interviewing techniques used by U.S. law enforcement agencies in the United States, but they are being employed by personnel in GTMO who have little, if any, experience eliciting information for judicial purposes. *Id.*

(D) The FBI also objected to the interrogation techniques authorized by the Department of Homeland Security in a Nov. 22, 2002 email addressed to Major General Geoffrey Miller, Commander of JTF-GTMO. The document states that "reports from those knowledgeable about the use of these coercive techniques are highly skeptical as to their effectiveness and reliability."[40] Another 2003 FBI email describes FBI objections to military interrogators impersonating FBI agents while employing what the FBI described as "torture techniques." According to the FBI agent, "[t]hese tactics have produced no intelligence of a threat neutralization nature to date and CITF believes that techniques have destroyed any chance of prosecuting this detainee." The FBI was concerned that DOD's impersonation would lead to the FBI being "left holding the bag before the public." E-mail from Unknown FBI Agent to [redacted], et al. (Dec. 5, 2003, 9:53 AM).[41]

(E) The observations of the FBI are reflected in the Army Field Manual, updated in September 2006, which states that "[u]se of force is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the [human intelligence] collector wants to hear." Both high-ranking military officers and on-the-ground interrogators have spoken out against the use of coercive methods, arguing that they simply don't work.[42]

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[37] http://www.aclu.org/projects/foiasearch/pdf/DOJFBI003178.pdf
[38] *Available at* http://www.aclu.org/projects/foiasearch/pdf/DOJFBI003085.pdf
[39] http://www.aclu.org/projects/foiasearch/pdf/DOJFBI003524.pdf
[40] DOJFBI-1290, reprocessed, DETAINEES-1232, available on file
[41] *Available at* http://www.aclu.org/projects/foiasearch/pdf/DOJFBI002442.pdf.
[42] Not only do coercive methods not work, but they put American soldiers at risk. *See* Letter, 12/12/07, from General Joseph Hoar, (Ret.); Maj. General Fred E. Haynes, (Ret.); General David M. Maddox, (Ret.); Maj. General Gerald T. Sajer, (Ret.); Vice Admiral Lee F. Gunn, (Ret.); Brig. General James P. Cullen, (Ret.); Vice Admiral Albert Konetzni Jr.(Ret.); Brig. General John H. Johns, (Ret.); Maj. General Paul Eaton, (Ret.); Brig. General Anthony Verrengia, (Ret.); Rear Admiral Don Guter, (Ret.); General Charles Krulak, (Ret.); Maj. General Melvyn Montano, (Ret.); Admiral Stansfield Turner, (Ret.); Brig. General David Brahms, (Ret.); Lt. General Donald L. Kerrick, (Ret.); Brig. General David Irvine, (Ret.); Lt. General Harry E. Soyster, (Ret.); Brig. General Murray Sagsveen, (Ret.); Maj. General John L. Fugh, (Ret.); General Paul J. Kern, (Ret.); Rear Admiral John D. Hutson, (Ret.); General Merrill A. McPeak,

i. General David Petraeus, the Commanding General of Iraq: "Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. That would be wrong. Beyond the basic fact that such actions are illegal, history shows that they also are frequently neither useful nor necessary. Certainly, extreme physical action can make someone 'talk;' however, what the individual says may be of questionable value. In fact, our experience in applying the interrogations laid out in the Army Field Manual that was published last year shows that the techniques in the manual work effectively and humanely in eliciting information from detainees." [Open Letter, 5/10/07]

ii. Lieutenant General Harry E. Soyster, USA (Ret.), the Director of the Defense Intelligence Agency from 1988 to 1991: "Experienced military and intelligence professionals know that torture, in addition to being illegal and immoral, is an unreliable means of extracting information from prisoners. … The overwhelming consensus of intelligence professionals is that torture produces unreliable information. And the overwhelming consensus of senior military leaders is that resort to torture is dishonorable. Use of such primitive methods actually puts our own troops and our nation at risk."

iii. Lt. General Harry Soyster, (Ret.) Former Director of Defense Intelligence Agency: "Experience shows that the field manual's approaches to interrogation work. The Army Field Manual is comprehensive and sophisticated. It contains all the techniques any good interrogator needs to get accurate, reliable information, including out of the toughest customers." [2/29/08]

iv. Rear Admiral Donald J. Guter, (Ret.) Judge Advocate General, Navy: "As far as we're concerned, this shouldn't be a point the United States should have to debate. There's no disconnect between human rights and national security. They're synergistic. One doesn't work without the other for very long." [Pittsburgh Post Gazette, 12/10/07]

v. Army Colonel Stewart Herrington, a military intelligence specialist who conducted interrogations in Vietnam, Panama and during the first Gulf War, has said that "torture is simply not a good way to get information. Many will talk without being subjected to torture, and those who are tortured will say anything to make it stop."[43]

(F) As explained previously, the belief shared by the courts, military officers, and FBI interrogators that coerced confessions are unreliable is born out by

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(Ret.); Maj. General Antonio M. Taguba, (Ret.); Lt. General Claudia J. Kennedy, (Ret.); Brig. General Evelyn P. Foote, (Ret.); Lt. General Charles Otstott, (Ret.); Brig. General Richard O'Meara, (Ret.); Maj. General Eugene Fox, (Ret.); Brig. General Stephen Xenakis, (Ret.): "We believe it is vital to the safety of our men and women in uniform that the United States not sanction the use of interrogation methods it would find unacceptable if inflicted by the enemy against captured Americans. The current situation, in which the military operates under one set of interrogation rules that are public and the CIA operates under a separate, secret set of rules, is unwise and impractical. What sets us apart from our enemies in this fight is how we behave. In everything we do, we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect."

[43] http://www.washingtonpost.com/wpdyn/articles/A2302-2005Jan11.html.

psychological studies. *See, e.g.*, Gisli H. Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* 235-40, 260-73, 316-20 (1992) (analyzing British and American cases in which defendants were charged or convicted on the basis of coerced confessions later shown to be false); Richard J. Ofshe, *Coerced Confessions: The Logic of Seemingly Irrational Action*, 6 Cultic Stud. J. 1 (1989) (analyzing cases in which police interrogation techniques elicited false confessions); Saul M. Kassin & Lawrence S. Wrightsman, Confession Evidence, in The Psychology of Evidence and Trial Procedure 67 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985).

(5) Mr. Khadr's "Admissions" that He Threw the Grenade Are Inconsistent with One Another and with Other Witness Accounts.[44]

(A) In determining whether statements are reliable, this commission "may consider all relevant circumstances, including the facts and circumstances surrounding the alleged coercion, as well as whether other evidence tends to corroborate or bring into question the reliability of the proffered statement."[45] *See* MCA § 948r(c) note. In this regard, Mr. Khadr's admissions to throwing the grenade that killed Sergeant First Class Speer are clearly unreliable due to their inconsistency, both with other statement by Mr. Khadr and with the accounts of other witnesses. Mr. Khadr's alleged admissions statements were very sporadic; he was interrogated hundreds of times but allegedly took responsibility for the death of Sergeant Speer in only a handful of interrogations. **Mr. Khadr "confessed" in two sets of interrogations at Bagram**, in mid-August and in mid-September, Bates Nos. [redacted] (Aug. 13, 2002) (Attachment N); 00766 AIR 20020916 (Sept. 16, 2002) (Attachment O); 00766 AIR 20020917 (Sept. 17, 2002) (Attachment P), **and then in another two sets of interrogations in Guantanamo**, in November 2002 and December 2004, 00766 MFR 20021107-JTF (Nov. 7, 2002) (Attachment Q); 00766 MFR 20021111-JTF (Nov. 11, 2002) (Attachment R); 00766 MFR 20021126-JTF (Nov. 26, 2002) (Attachment S); 00766 FM40 20021130 (Nov. 30, 2002) (Attachment T); 00766 FM40 20041208 (Dec. 8, 2004) (Attachment U).

(B) More recently, after first confiding [redacted] on February 14, 2003 that he confessed only because [redacted] had tortured him, Mr. Khadr has consistently maintained that claim. *See* 00766 FM40 20030224 (Feb. 14-16, 2003) (Attachment

[44] The Military Commission Rules of Evidence, provide that a military commission, when evaluating whether a statement is coerced and inadmissible under MCA § 948r(c), may consider "whether other evidence tends to corroborate or bring into question the reliability of the proffered statement." *See* M.C.R. Evid. 304(c) note. In contrast, the Fifth Amendment prohibits a court from considering the accuracy of a statement when determining whether it is involuntary and thus inadmissible. *See Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). Because Mr. Khadr has a right to due process under the Fifth Amendment, *see infra* at 39-40, this court must consider only Mr. Khadr's treatment at the hands of military interrogators and the circumstances surrounding his interrogations, not the accuracy of the statements elicited by the Government's abuse. In demonstrating that the Government has no evidence corroborating Mr. Khadr's incriminating statements--indeed, that the evidence raises serious doubts as to the reliability of those statements--the Defense does not waive any objection to the constitutionality of Rule 304(c) of the Military Commission Rules of Evidence.

[45] In federal court, the truthfulness of a confession may *not* be considered by the court when deciding whether the confession is admissible. *See Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

L); 00766 FM40 20030217 (Feb. 17, 2003) (Attachment J); 00766 FM40 20030327 (March 27, 2003) (Attachment V); 00766 FM40 20030603 (June 3, 2003) (Attachment W); 00766 FM40 20030714 (July 14, 2003) (Attachment X); 00766 FM40 20030721 (July 21, 2003) (Attachment Y); 00766 302 20030804 (Aug. 4, 2003) (Attachment Z); 00766 302 20030814 (Aug. 14, 2003) (Attachment AA); 00766 302 20040419 (Apr. 19, 2004) (Attachment BB); 00766 FM40 20040519 (May 19, 2004) (Attachment CC). The only exception is a single interrogation on December 8, 2004. This story and Mr. Khadr's previous "confessions" are not only implausible based on Government witness accounts, but are inconsistent with one another and plagued with mistakes. Moreover, the 8 December 2004 statement shows, on its face, that Mr. Khadr feared retribution from his "other interrogator" for failing to cooperate with law enforcement agents who had come to extract a confession. Mr. Khadr's incriminating statements are more consistent with what his interrogators believed occurred than what actually occurred--suggesting, once again, that Mr. Khadr simply told his interrogators what the wanted to hear.

(6) Admitting Mr. Khadr's Coerced Statements Would be Contrary to the Interests of Justice.

(A) This court must also suppress Mr. Khadr's coerced confessions because admitting them would be contrary to the interests of justice. MCA § 948r(c). While evidence procured by coercion is notoriously unreliable, *see Jackson*, 278 U.S. at 386, reliance on such evidence is "constitutionally obnoxious" even if the statements obtained by such methods are probative, or can be "independently established as true." *Rochin v. California*, 342 U.S. 165, 173 (1952). The rationale for the constitutional prohibition on coerced but accurate statements is that reliance on such evidence is abhorrent to our system of justice:

> [O]urs is an accusatorial and not an inquisitorial system – a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Rogers v. Richmond, 365 U.S. 534, 540-41 (1961); *see also Rochin*, 342 U.S. at 173 (use of evidence obtained by coercive methods offends basic notions of "decency" and would "afford the brutality the cloak of law"). For that reason, federal courts may not consider the accuracy of a statement when determining whether it is involuntary and therefore inadmissible under the Fifth or Fourteenth Amendment. *See Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961).

(B) With respect to the key allegations in the case, there is no independent corroboration of Mr. Khadr's statements. Admitting those statements would create an unacceptable risk of wrongful conviction.

(C) Mr. Khadr's coerced statements are not probative and admitting them would be contrary to the interests of justice, these statements are inadmissible under MCA § 948r(c).

d. Mr. Khadr was Subjected to Cruel, Inhumane, and Degrading Treatment, and Therefore his Statements are Inadmissible.

(1) The use of Mr. Khadr's incriminating statements is barred not only by the MCA, but also by the Fifth Amendment and Common Article 3 of the Geneva Conventions. Both prevent the use of statements procured using cruel, inhumane, and degrading treatment (similar to the post-2005 MCA standard), and the abuses suffered by Mr. Khadr far surpass that threshold. The MCA provides that statements procured using "cruel, inhuman, or degrading treatment" (defined as conduct violating the Fifth, Eighth, or Fourteenth Amendments of the Constitution[46]) are automatically inadmissible if they were "obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005)." MCA § 948r(d). However, even before the enactment of the DTA, such treatment was prohibited by Common Article 3 of the Geneva Conventions and the Fifth Amendment of the Constitution. Therefore, regardless of when he was subjected to cruel, inhumane and degrading treatment, Mr. Khadr's coerced statements should not be admitted into evidence.

(2) Admission of Statements Procured Through Cruel, Inhumane, and Degrading Treatment is Prohibited by Common Article 3

(A) The admission into evidence of statements obtained as a result of cruel, inhuman, and degrading treatment violates Common Article 3 of the Geneva Conventions.[47] It was Congress's intention that military commissions established pursuant to the MCA would comply with Common Article 3. *See United States v. Khadr*, No. 07-001, at 14-15 (C.M.C.R. Sept. 24, 2007) ("Congress, clearly aware of the *Hamdan* decision when it drafted the MCA, appears to have embraced the minimal safeguards guaranteed by Common Article 3 requiring that even 'unlawful enemy combatants' be tried by a 'regularly constituted court

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[46] Detainee Treatment Act of 2005, § 1003(d), Pub. L. No. 109-48, 119 Stat. 2680 (codified at 42 U.S.C. § 2000dd (2006); *see also* U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17486 (1990) (U.S. Senate reservations declaring "[t]hat the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.")

[47] Accordingly, the Defense believes that recent testimony before a Senate Committee concerning the standards established by the MCA presented an erroneous view of the law. *See The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and Is an End in Sight?: Hearing of the Terrorism, Technology and Homeland Security Subcomm. of the S. Judiciary Comm.*, 110th Cong. (2007) (statement of Brig. Gen. Thomas Hartmann, Legal Adviser to the Convening Authority for Military Commissions) ("SEN. FEINSTEIN: So in other words, if you believe you can prove something from evidence derived from waterboarding, it will be used? GEN. HARTMANN: If the evidence is reliable and probative, and the judge concludes that it is in the best interest of justice to introduce that evidence, ma'am, those are the rules we will follow.") Indeed, the credibility of American military justice requires that such a position be repudiated at the first opportunity, as (1) the use of such coercive techniques is repugnant to American conceptions of decency and must not receive even indirect judicial sanction, and (2) evidence obtained through such methods can never be deemed reliable.

affording all the judicial guarantees which are recognized as indispensable by civilized peoples."") (citing MCA § 948b(f) and quoting Common Article 3).

(B) The Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), concluded that Mr. Hamdan's military commission failed to meet Common Article 3's requirement of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," and was, for that reason, among others, illegal. *See id.* at 2796. The Court in *Hamdan* invited the President to seek legislation authorizing the military commissions from Congress, *Hamdan*, 126 S.Ct. at 2799 (Breyer, J., concurring), which he did. In response, Congress *could have* chosen to repeal or abrogate the Geneva Conventions and expressly authorize military commissions that failed to comply therewith. It did not. As a result, the Geneva Conventions, as treaties to which the United States is a party, remain the "supreme Law of the Land." U.S. Const. art. VI; *United States v. Khadr*, CMCR 07-001, n.4 (U.S.C.M.C.R. Sep. 24, 2007) (citations omitted).[48]

(C) Common Article 3, and also Article 75 of Protocol I, prohibits torture, both physical and mental, and "[o]utrages upon personal dignity, in particular humiliating and degrading treatment." Common Article 3, ¶ 1(c); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), art. 75, ¶ 2(b), *opened for signature* 8 June 1977, 1125 U.N.T.S. 3; *see also* International Covenant on Civil and Political Rights ("ICCPR"), art. 14(3)(g), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (no one shall "be compelled . . . to confess guilt"). In addition, the admission of evidence obtained as a result of cruel, inhumane, and degrading treatment unquestionably is not allowed by "the judicial guarantees which are recognized as indispensable by civilized peoples." Common Article 3, ¶ 1(d); *see* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 15, U.N. Doc. A/RES/39/46 (Dec. 10, 1948); U.N. Human Rights Comm. general cmt. no. 7: Torture or cruel, inhuman or degrading treatment or punishment (1982).

(D) In 1978, the European Court of Human Rights (ECHR) heard a case brought by Ireland against the United Kingdom challenging British interrogation tactics used against members of secessionist movements in Northern Ireland in the early 1970s. *Ireland v. United Kingdom*, Judgment, European Court of Human Rights (1978). The question before the court was whether five interrogation techniques commonly employed by British authorities constituted "inhuman or degrading treatment or punishment." The five techniques were: (1) stress positions, (2) hooding, (3) subjection to loud and continuous noises, (4) sleep deprivation, and (5) deprivation of food and drink. The ECHR concluded these techniques, many of which are identical to those inflicted upon Mr. Khadr, constituted inhuman and degrading treatment. *Id.* at ¶ 167. In fact, in comparison, Mr. Khadr's treatment was far more severe and degrading than the treatment considered by the ECHR. Mr. Khadr was also physically assaulted, thrown to the ground repeatedly, doused in freezing water, spat upon, forced to urinate on himself, used as

[48] Congress arguably purported to declare those commissions to comply with Common Article 3, *see* MCA § 948b(f), which, of course, it has no power to do. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Its statement can only be interpreted, consistent with constraints on the legislative power, as a manifestation of intent that rules promulgated by the Secretary *comply* with Common Article 3, except where Congress has specifically mandated a contrary result.

a human mop to wipe up urine and pine oil, terrorized by barking dogs, and threatened with transport to a country where he would be more thoroughly tortured and raped. International law mandates the Government not be permitted to benefit from such gross and intolerable abuse.

(3) Admission of Statements Procured Through Cruel, Inhumane, and Degrading Treatment is Also Prohibited by the Fifth Amendment

(A) Detainees held at the United States Naval Station at Guantanamo enjoy fundamental constitutional rights:

> Petitioners' allegations--that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years . . . without access to counsel and without being charged with any wrongdoing— unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'

Rasul v. Bush, 542 U.S. 466, 484 n.15 (2004) (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278 (1990) (Kennedy, J., concurring) (stating that individuals held outside the sovereign territory of the United States but who are nonetheless in the power of the American government are entitled to "fundamental' constitutional rights")).[49] These rights include the right to "personal liberty," "access to courts of justice," and "due process of law," *Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901).

(B) Allowing Mr. Khadr to be convicted on the basis of coerced testimony violates not only his right to due process, but also his right to equal protection under the laws. The MCA affords greater rights to detainees interrogated after December 30, 2005 than those, like Mr. Khadr, who were captured and questioned long before that date. The Supreme Court has held several times that classifying individuals for different treatment based on some arbitrary date does not satisfy rational basis review under the Equal Protection Clause. *See Zobel v. Williams*, 457 U.S. 55 (1982) (striking down on equal protection grounds an Alaska statute that gave a greater share of the state's oil revenues to residents who had lived in the state for a longer time because there was no rational reason to discriminate against newer residents); *Williams v. Vermont*, 472 U.S. 14 (1985) (striking down on equal protection grounds a statute which required Vermont residents to pay an additional tax to register their cars in the state if they had not been residents of the state when the car was purchased because there was no rational reason

[49] Unlike the Petitioner in *Verdugo-Urquidez*, who challenged a search and seizure by American agents that occurred in Mexico, Mr. Khadr is challenging the constitutionality of actions taken by the Government in territory under the United States' "exclusive jurisdiction and control." *Rasul*, 542 U.S. at 476. Furthermore, rather than claiming a right to exclude credible evidence under the Fourth Amendment, he is asserting his fundamental right to not to be convicted on the basis of coerced testimony. *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 689 (1993); *Arizona* v. *Fulminante*, 499 U.S. 279 (1991); *Miller v. Fenton*, 474 U.S. 104, 109-110 (1985). Unlike the prophylactic exclusionary rule that was at issue in *Verdugo-Urquidez*, which extends further than the Fourth Amendment strictly requires, the right to be free from state abuse is at the very core the Fifth Amendment's guarantee of due process. Accordingly, on the theory articulated in by Justice Kennedy in *Verdugo-Urquidez*, and adopted by the Court in *Rasul*, the Fifth Amendment applies to Guantanamo with full force

to discriminate against newer residents); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (striking down on equal protection grounds a New Mexico statute that created a property tax exemption for Vietnam-era veterans who had been residents of the state before May 8, 1976 because there was no legitimate reason to treat veterans who had moved to the state after that date less favorably). There is no rational reason to treat detainees who were interrogated before December 30, 2005 any differently than those who were interrogated afterwards. This court should interpret the MCA as consistent with equal protection of the laws and refuse to admit Mr. Khadr's statements if they were obtained using cruel, inhumane or degrading treatment.

(4) The Abuses Suffered by Mr. Khadr Amount to Cruel, Inhumane and Degrading Treatment under the Fifth Amendment.

(A) As already mentioned, the MCA defines cruel, inhumane, and degrading treatment as conduct violating the Fifth, Eighth, or Fourteenth Amendments of the Constitution. A defendant's statement is coerced for the purposes of the Fifth Amendment if his "will was overborne" at the time of confession. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *Haynes v. Washington*, 373 U.S. 503, 513 (1963). In determining whether a statement is involuntary—a question of law left to judges to resolve, *see, e.g.*, *Miller v. Fenton*, 474 U.S. 104, 110 (1985)--a court must consider the "totality of the circumstances." *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 693 (1993); *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Clewis v. Texas*, 386 U.S. 707, 708 (1967); *Files v. Alabama*, 352 U.S. 191, 197 (1957). The inquiry should take into account both the conduct of law enforcement officials in pressuring the defendant[50] and the defendant's capacity to resist that pressure.[51]

(B) A defendant's youth is weighed heavily in the totality of the circumstances analysis, although it is not dispositive. *See* 87 A.L.R.2d 624 § 1(c). In three separate cases, the Supreme Court has found a confession involuntary and inadmissible primarily because of the defendant's age.[52] The interrogations in those cases, all quite ruthless, pale in

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[50] In evaluating interrogation methods, federal courts commonly consider not only the methods themselves, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), but also the length and location of the interrogation, *Ashcraft v. Tennessee*, 322 U.S. 143, 153-154 (1944), *Reck v. Pate*, 367 U.S. 433, 441 (1961); its continuity, *Leyra v. Denno*, 347 U.S. 556, 561 (1954); and whether the accused was allowed to consult with relatives, friends or an attorney, *Haley v. Ohio*, 332 U.S. 596, 600 (1948).

[51] In regard to the defendant's capacity to resist coercion, federal courts often take into account the defendant's maturity, *Haley v. Ohio*, 332 U.S. 596, 599-601 (1948) (plurality); education, *Clewis v. Texas*, 386 U.S. 707, 712 (1967); physical condition, *Greenwald v. Wisconsin*, 390 U.S. 519, 520-521 (1968) (per curiam); and mental health, *Fikes v. Alabama*, 352 U.S. 191 (1957).

[52] In several other cases, the Supreme Court has found the confession of a minor involuntary but did not focus on the age of the defendant. *See, e.g.*, *Chambers v Florida*, 309 US 227 (1940) (young defendants arrested without warrant, held in jail without formal charges, threatened with mob violence, and questioned 5 days; confession held coerced); *McNabb v United Sta*tes 318 US 332 (1943) (decided primarily on the delay in arraignment of defendants, but the court noting that they were ignorant and inexperienced young men); *Lee v Mississippi*, 332 US 742 (1948) (17-year-old defendant; confession obtained as the result of duress, threats, and physical violence by police officers, held coerced); *Payne v Arkansas* 356 US 560 (1958) (19-year-old defendant, mentally dull, arrested without warrant and held incommunicado for 3 days; confession held coerced).

comparison to those suffered by Mr. Khadr. *A fortiori*, admitting Mr. Khadr's coerced statements would be a clear violation of the Fifth Amendment.

(C) In *Haley v. Ohio*, 332 U.S. 596 (1948), the Court held that the admission of a 15 year-old boy's confession was a violation of due process. The defendant had been arrested on suspicion of robbing a confectionary store. Beginning shortly after midnight, the boy was questioned by the police for about five hours. He was alone, without the support of counsel or his parents. Around 5 a. m., after being shown the alleged confessions of his two suspected accomplices, he confessed. He was held incommunicado for the next three days, while his lawyer and mother tried to see him but were refused by police. The Court held the confession inadmissible, stating that "[a] 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a. m. But we cannot believe that a lad of tender years is a match for the police in such a contest." *Id.* at 599-600.

(D) In *Reck v. Pate*, 367 U.S. 433 (1961), the petitioner brought a habeas action challenging his conviction for murder. Reck was 19 at the time of the crime, but had the intelligence of a child between 10 and 11 years old and had only a sixth grade education. The defendant was arrested on suspicion of murder and held at a police station for three days, during which he was interrogated for about six to seven hours a day. After falling ill, he was taken to a hospital, where he spent the night. The following day, he met with police officers and his co-defendants, who confessed and implicated Reck in the murder. By the time he signed his confession, Reck had been in custody almost 80 hours without counsel, contact with his family, or a court appearance. Although there was no physical brutality, the Court found the confession involuntary on account of the defendant's youth, his lack of the assistance of counsel, family or friends, and his physically weakened condition. *Id.* at 444.

(E) Finally, in *Gallegos v. Colorado*, 370 U.S. 49 (1962), the petitioner had been found guilty of murder. The conviction rested primarily on a confession he signed after being detained for five days, during which time he saw no lawyer, parent, or other friendly adult. Although the boy was not subject to prolonged questioning, the Court found the fact that he was held incommunicado for five days, during which his mother tried to see him and he was not allowed the assistance of counsel, gave "the case an ominous cast." *Gallegos*, 370 U.S. at 54. As in *Haley*, the Court emphasized that, without the protection of an adult, the boy could not have resisted the pressure from the police. "[T]he youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend" together required the Court to find that the confession had been coerced. *Id.* at 55.

(F) Mr. Khadr's interrogations share all of the qualities that made the interrogations in these three Supreme Court cases constitutionally intolerable, only more so. He has suffered through many more interrogations, using much harsher methods, and gone for much longer without the benefit of a lawyer, parent, or friendly adult. But more important, unlike the

defendants in *Haley*, *Reck*, and *Gallegos*, Mr. Khadr has been physically abused.[53, 54] On many occasions he was physically abused by interrogators. He has been forced into various "stress positions" and left there for many hours on end. He has been suffocated until he passed out, revived, and then suffocated again. He has been terrorized by barking dogs while his head was covered by a plastic bag tied tightly around his neck, making it hard for him to breathe. He has been doused with freezing water and left cold and shivering. He was subjected to "light pushing," bright lights left in front of his eyes until he could not see. He has been beaten by interrogators who shackled his hands and feet together, lifting him off the ground and then dropping him many times over. He has been abused until he could not stand, and then used by military police as a human mop to wipe his own urine and pine oil off the floor of an interrogation chamber

(G) In *Stein v. New York*, the Supreme Court held that confessions obtained using physical violence or the threat of physical violence are *per se* involuntary, meaning that there is no need for a court to consider the totality of the circumstances and "weigh or measure [the] effects on the will of the individual victim" before excluding such confessions. 346 U.S. 156, 182 (1953). The Court explained:

> Physical violence or threat of it by the custodian of a prisoner during detention serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. When present, there is no need to weigh or measure its effects on the will of the individual victim. The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.

Id. at 180. [55]

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[53] The defendants in *Haley* and *Reck* alleged police brutality, but there was conflicting evidence. The Supreme Court set the allegations to the side and, nevertheless, found the confessions inadmissible. *See Haley v. Ohio*, 332 U.S. 596, 597-598 (1948); *Reck v. Pate*, 367 U.S. 433, 440 (1961).

[54] For examples of confessions held inadmissible because of physical brutality, *see Brown v. Mississippi*, 297 U.S. 278, 286-87 (1936) (confession extracted through coercion and brutality violated Due Process Clause of 14th Amendment); *Cooper v. Scroggy*, 845 F.2d 1385, 1390-91 (6th Cir. 1988) (confession involuntary because officer struck defendant, failed to take steps to change coercive environment, and state failed to rebut evidence of multiple blows and threats to defendant); *Smith v. Duckworth*, 910 F.2d 1492, 1496-97 (7th Cir. 1990) (confession involuntary because officers threatened to return defendant to cell containing people defendant implicated).

[55] The Department of Defense has acknowledged as much in its 2006 revision of the Army Field Manual. The Manual states that all detainees within the control of the Department of Defense shall be treated humanely. Several of the techniques that the Manual identifies as failing to meet that standard were used on Mr. Khadr, including: hooding, beatings and physical pain, military dogs, freezing conditions, and deprivation of medical care. Department of the Army, *Field Manual No. 2-22.3: Human Intelligence Collector Operations* §§ 5.73-76 (2006). Therefore, these techniques must, at least, constitute cruel, inhumane and degrading treatment. As explained previously, however, when the totality of the

e. Khadr's Subsequent Statements Must be Suppressed as Fruit of the Poisonous Tree.

(1) All statements made by Mr. Khadr subsequent to any statement he made in response to coercive interrogation must also be suppressed as fruit of the poisonous tree. Once Mr. Khadr had made a coerced statement, any future statement would have been made in the shadow of that coercion. He was forced to repeat his original statement, bowing to the pressure of past coercion, to avoid changing his story and risking even more ill-treatment. Therefore, in addition to suppressing the original coerced statements, this Military Commission must suppress subsequent statements as well.

(A) Statements made subsequent to illegally obtained statements are the fruit of the poisonous tree.

i. In *United States v. Bayer*, 331 U.S. 532 (1947), the Supreme Court determined that if a statement is held inadmissible, later statements are inadmissible as well. *Id.* at 540. Justice Jackson characterized the potential conflicts that may arise from inadmissible confessions as letting "the cat out of the bag":

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. *Bayer,* 331 U.S. at 540.

ii. In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Supreme Court analyzed a police officer's strategy of deliberately withholding *Miranda* warnings until after a suspect confessed, and then had the suspect repeat the confession after a *Miranda* warning. The Court held that prior illegally obtained statements tainted future statements notwithstanding the *Miranda* warning. *Id.* at 604. The issue was whether the new warnings could provide the suspect with a real choice about giving a new statement:

> For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment. *Id.* at 612.

iii. In order for the second statement to be admissible, the prosecution must show facts "sufficient to insulate the [subsequent] statement from the effect of all that went before." *Clewis v. Texas*, 386 U.S. 707, 710 (1967). If the later confessions are part of "one continuous process" of interrogation or if it merely fills in and perfects the early

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circumstances are taken into account—including, for example, Mr. Khadr's age, his extensive injuries, his isolation for many years--the abuses he suffered actually amount to torture.

confession, then the later confessions are inadmissible. *Leyra v. Denno*, 347 U.S. 556, 561 (1954).

iv. Justice Brennan recognized that it may be impossible to insulate the later confessions from the first: "One of the factors that can vitiate the voluntariness of a subsequent confession is the hopeless feeling of an accused that he has nothing to lose by repeating his confession, even where the circumstances that rendered his first confession illegal have been removed." *Oregon v. Elstad*, 470 U.S. 298, 325 (1985) (dissenting opinion). Justice Harlan reasoned similarly, stating that the prosecution had "the burden of proving not only that the later confession was not itself the product of improper threats or promises or coercive conditions, but also that it was not directly produced by the existence of the earlier confession." *Darwin v. Connecticut*, 391 U.S. 346, 350-51 (1968) (concurring in part and dissenting in part).

v. When deciding whether a statement is the fruit of the poisonous tree, this Commission should consider all the factual circumstances surrounding the confession. "The question whether a confession is the product of a free will . . . must be answered on the facts of each case. No single fact is dispositive." *Brown v. Illinois*, 422 U.S. 590, 603 (1975). The Court listed several factors to be considered when determining admissibility of a statement subsequent to coercion, including: "the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and particularly, the purpose and flagrancy of the official misconduct." *Id.*at 604. Military courts have relied upon these factors when deciding whether confessions should be admitted. *See United States v. Khamsouk*, 57 M.J. 282 (C.A.A.F. 2002); *United States v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006).

(B) Khadr's statements should be suppressed because they are the fruit of the poisonous tree.

i. Following the line of analysis used in *Brown v. Illinois*, *supra*, not only the original, but also subsequent, statements made by Mr. Khadr must be suppressed. Mr. Khadr experienced ill-treatment that made his statements involuntary. Mr. Khadr had a legitimate fear of the results if he was interrogated again or changed his statement, as demonstrated by the fact that an interrogator pulled his hair and spat in his face after he told the Canadians that his prior statements had been coerced and untrue. Khadr Affidavit, ¶ 50. Moreover, this juvenile was in the hopeless circumstance of having already told the interrogators "what they wanted to hear." How could a person in such a continuous and coercive environment of interrogations, lasting years, without the benefit of counsel, make a voluntary and knowing decision to withdraw the original statements(s)?

ii. Even if this Commission determines that his later confessions were voluntary in their immediate circumstances, they should not be admitted under the remaining three *Brown* factors demonstrating the continuing effects of earlier ill-treatment.

iii. First, the temporal proximity of the arrest and confessions is inevitably very close, since Mr. Khadr is still detained. Mr. Khadr's interrogations began immediately after he regained consciousness in Bagram following his capture. Khadr Affidavit, ¶ 7. They continued thereafter in a constant, coordinated system of interrogation and detention

designed to break down his will to resist and obtain the statements interrogators wanted. Because of this continuous system of interrogation, no confession can be separated from the arrest and interrogation which began his detention.

iv. Second, intervening circumstances between Mr. Khadr's arrest and statements all support suppressing the statements. Mr. Khadr was ill-treated from the time of his capture until at least March of 2003. Khadr Affidavit, ¶¶ 7, 59. As a captured child, Mr. Khadr was short shackled, threatened with rape, confined in a very cold cell, had needed medical treatment withheld, and was held by pressure points thus causing extreme pain, among a number of other forms of ill-treatment. Such treatment destroys any semblance of voluntariness. Even had Mr. Khadr not been subject to ill-treatment, he was held as a child in high-security conditions that were harsh even for adults. Further, Mr. Khadr was consistently denied access to any form of help or reassurance, such as consular visits or an attorney, apparently in order to increase the psychological pressure on him. In short, Mr. Khadr was never freed from the effects of the coercion he suffered after his capture, thereby rendering all future statements involuntary.

v. Third, there was official misconduct sufficient to destroy voluntariness because of its flagrancy and impermissible purpose. As a child only fifteen years old, Mr. Khadr endured many types of flagrant ill-treatment, including being treated roughly, being threatened with a dog, carrying heavy buckets of water despite his painful gunshot wounds, threats of rape, short shackling, being forced to urinate on himself and then dragged through the urine, being picked up and dropped onto the floor, and a number of other types of ill-treatment. In *Brooks v. Florida*, 389 U.S. 413, 415 (1967), the court condemned confining a prisoner naked, for two weeks, with only twelve ounces of soup and eight ounces of water for daily sustenance, a hole in the corner for sanitation, and no friendly human contact as a "shocking display of barbarism."

vi. This official misconduct is all the more serious because its victim, Mr. Khadr, was a child at the time of his ill-treatment. The Supreme Court has said:

> [W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. . . . That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. . . . He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.

Haley v. Ohio, 332 U.S. 596, 599-600 (1948). The Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 569 (2005), noted that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." The ill-treatment Mr. Khadr endured would thus have a more powerful, and longer-lasting, effect on Mr. Khadr than it might have on an adult detainee.

vii. Moreover, all of these types of ill-treatment were inflicted for a purpose that was impermissible, namely eliciting incriminating statements from Mr. Khadr. *See, e.g.*, U.S. Const. amend. V (prohibiting treatment whereby a defendant would "be compelled in

any criminal case to be a witness against himself"); *Blackburn v. State of Alabama*, 361 U.S. 199, 205 ("[T]he Fourteenth Amendment is grievously breached when an involuntary confession is obtained by state officers and introduced into evidence in a criminal prosecution which culminates in a conviction."); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, entered into force June 26, 1987 (expressly identifying "obtaining from [a torture victim] or a third person information or a confession" as an impermissible purpose for ill-treatment). Extracting confessions by these means must be considered an impermissible purpose "because declarations procured by torture are not premises from which a civilized forum will infer guilt." *Lyons v. State of Oklahoma*, 322 U.S. 596, 605 (1944).

(C) Mr. Khadr has been ill-treated almost from the moment of his capture. Many factors contributed to the coercive nature of his interrogation: Mr. Khadr was a juvenile; he suffered degrading and painful ill-treatment; he was held in prolonged isolation; his Fifth Amendment rights were not explained or vindicated; the interrogations were intense, continuous, and unrelenting; he was painfully shackled; his environment was cruelly manipulated; he was denied access to any outside support or advice; he was denied access to counsel for over 2 years after his detention; his detention was contrary to the law of war and applicable treaties. In such a situation, Mr. Khadr's confessions were not voluntarily given, and once the "cat was out of the bag," Mr. Khadr could not have made a truly voluntary confession in the shadow of the original coercion and the other ominous and egregious legal deprivations outlined above. Therefore, all statements and evidence derived from Khadr's original coerced statements must be suppressed.

f. **Conclusion:** For all the foregoing reasons, the defense respectfully requests that this court exclude from evidence any incriminating statement made by Mr. Khadr.

7. Witnesses and Evidence: The defense requests an oral argument and an evidentiary hearing pursuant to R.M.C. 905(h). The defense reserves the right (and intends) to offer additional matters (in addition to Attachments A through CC) in support of this motion at a hearing currently scheduled to commence on 19 January 2009. The defense has separately requested the production of (and reserves the right to call) the following witnesses relating to this matter, including:

a. [redacted]

b. [redacted]

c. [redacted]

d. [redacted]

e. [redacted]

f. [redacted]

g. [redacted]

h. [redacted]

i. [redacted]

j. [redacted]

k. [redacted][56]

8. Certificate of Conference: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

/s/
William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

[56] The defense notes that it has not been afforded access to intelligence interrogators under the terms of the Military Commission's ruling on D-092 and reserves the right to call any of these individuals (or witnesses identified by these individuals) in connection with this matter.