

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>Mohammed Jawad</p>	<p>Defense Reply to Government Response to D-008 Motion to Dismiss (Torture of Detainee)</p> <p>June 5, 2008</p>
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1. **Timeliness:** The reply is timely. The Government Response was filed 4 June 08.

2. Reply to Government Paragraphs:

5A. First sentence agreed. Second sentence unsupported by proof and irrelevant. Third sentence. Mr. Jawad was under 18. The U.S. Government has officially conceded this fact to the United Nations. (See Attachment 4 to D-004.¹)

5b. Irrelevant to this motion. No source provided.

5c. Irrelevant to this motion.

5d. Irrelevant to this motion. No source provided.

5e. Irrelevant to this motion. No source provided.

Footnote 1: The defense in no way meant to imply that any JTF-GTMO or OMC-P personnel currently assigned have any complicity in the mistreatment of Mr. Jawad in 2004. The defense does not know who was responsible for the mistreatment, but is making all efforts humanly possible to find out.

¹ Supplemental US Report to the U.N. Committee on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, submitted for 22 May 2008 session of the Committee. Also available at <http://www2.ohchr.org/english/bodies/crc/crcs48.htm>

Footnote 3: The word torture may be incendiary, but it is an apt description for the treatment of Mr. Jawad and the defense has a good faith basis to use it. Sleep deprivation has been specifically found to be torture under the Convention Against Torture as outlined in the defense motion.

Footnote 5: The defense contention that Mr. Jawad possessed no critical intelligence is based on the review of over 40 summaries on interrogation prepared by intelligence agents/interrogators and defense counsel's knowledge of the defendant's age, level of education and personal history gleaned from the defendant and from discovery provided by the government. The defense assertion that Mr. Jawad possessed no critical intelligence is also based on the fact that Mr. Jawad was apparently not interviewed for many weeks after his frequent flyer treatment, suggesting there was some reason for his mistreatment other than a desire to pry information out of him by weakening his resistance.

3. Law and argument:

THE GOVERNMENT HAS FAILED TO COMPLY WITH MILITARY COMMISSIONS TRIAL JUDICIARY RULES OF COURT

As is the government's practice in response to all motions thus far filed by the defense, the government refuses to follow the Military Commission Trial Judiciary Rules of Court (Change 2, 2 Nov 2007), Rule 3, Motions Practice Rule 6(b)(2) which directs, the government to follow the format in Form 3-2 for responses.

This rule requires the government to list:

4. Those facts cited in the motion that the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion. The agreed upon facts will correspond to the subparagraph in the motion containing the facts involved.

5. The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), insofar as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered subparagraph. If the facts or identity of the source is protected or classified, that status will be noted. These factual assertions will correspond to the subparagraph in the motion containing the facts involved.

As usual, the government did not respond paragraph by paragraph to the defense motion, admitting or denying the factual assertions made by the defense. Rather, the government provided additional irrelevant facts using a different numbering system. The government does state in its paragraph 7 "Request for Oral Argument" that the "Government concedes the essential facts upon which the defense motion is premised." The defense does not know how to interpret this statement. The government and defense have not entered into any stipulation of facts, nor has the government officially conceded anything or offered to stipulate. However, if this is an offer to stipulate to all the facts contained in the defense motion, the defense accepts.

The Chief Judge of the Military Commissions Trial Judiciary, Col Kohlmann, issued a letter dated 2 November 2007, which is attached to the court rules and includes the following language:

3. Action:

- a. The judges of the Military Commissions Trial Judiciary shall ensure enforcement of these Rules of Court.
- b. All counsel practicing before Military Commissions shall become familiar with these Rules and shall comply with them.

The defense respectfully requests that the government be ordered to comply with this rule and be appropriately sanctioned for its routine and flagrant disregard of commission rules.

DISMISSAL IS AN APPROPRIATE REMEDY FOR OUTRAGEOUS GOVERNMENT CONDUCT WHICH SHOCKS THE CONSCIENCE

The government argues that exclusion of coerced statements pursuant to the MCRE is the only potential remedy for detainee abuse. The government fails to address the possibility that the abuse may have been unrelated to intelligence collection efforts and/or failed to produce any incriminating statements. If the abuse was merely gratuitous, the government would offer no remedy at all. Abuse of a detainee, unrelated to interrogation, is even more outrageous than abusive interrogation practices designed to elicit intelligence which might save lives. There must be a remedy.

The defense acknowledges that there are no military precedents for actually dismissing charges for “post-apprehension government misconduct” involving the mistreatment of a detainee or pretrial confinee. However, CAAF made clear in *U.S. v. Fulton* that dismissal was well within the authority of the trial court in an appropriate case. The fact that no U.S. servicemember has ever been subjected to remotely comparable mistreatment is the reason that no charges have ever before been dismissed on this basis. Undoubtedly, if a servicemember were subjected to a similar program while in pretrial confinement, a military judge would not hesitate to dismiss charges.

The government is incorrect in its assertion that dismissal of charges has never occurred based on “post-apprehension government misconduct.” CAAF has set aside a conviction based on unlawful influence, another form of government misconduct. (See *United States v. Lewis*, 63 M.J. 405 (CAAF 2006). See generally, D-004 Defense Motion to Dismiss for Unlawful Influence). CAAF has also set aside a conviction based on prosecutorial misconduct, *United States v. Fletcher*, 62 M.J. 175 (CAAF 2005). The doctrine of outrageous government conduct also is recognized by military courts as a basis for dismissal: “A violation of general due process can be the basis to overturn a conviction, however it should be applied only in those rare instances where the law enforcement involvement reaches a demonstrable level of outrageousness.” *United States v. Patterson*, 25 M.J. 650 (AFCMR 1987). That level of outrageousness is present here.

The government also showed a distinct lack of research skill (I would not want to accuse the prosecution of intentionally failing to cite adverse precedent) when they asserted that the “defense lacks any precedent, in military or federal law” for the dismissal of charges based on improper government conduct and when they asserted that all “federal cases are in accord” with the government’s view. There are over 50 years worth of federal precedents to support the defense motion.

In *Rochin v. California*, 342 U.S. 165 (1952), the Court reversed a conviction due to government activity that so “shocked the conscience” that it violated due process. In *Rochin*, police officers broke into the defendant’s bedroom and unsuccessfully attempted to prevent the defendant from swallowing contraband drug capsules. The police took the defendant to the hospital where doctors forcibly pumped his stomach to retrieve the capsules. 342 U.S. at 166. The Supreme Court held:

[W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents. As this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

The spontaneous, isolated and temporary physical discomfort experienced by Rochin at the hands of government agents pales in comparison with the intentional, planned and prolonged abuse of Mr. Jawad.

Of course, reversal of a conviction and exclusion of evidence as occurred in *Rochin* is not identical to dismissal of charges (although exclusion of evidence may preclude the government from successfully prosecuting someone). But the Supreme Court has indicated that dismissal of charges would be appropriate in an appropriate case. In 1973, then Associate Justice Rehnquist stated “[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes

to obtain a conviction.” *United States v. Russell*, 411 U.S. 423, 431-32 (1973). The same rationale would apply to the conduct of official government agents, military or civilian at Guantanamo.

There have been several cases where federal indictments have been dismissed because of governmental misconduct. Two infamous examples involve the Pentagon Papers case and the notorious standoff at Wounded Knee involving Dennis Banks and Russell Means of the American Indian Movement and U.S. Government and military forces. These cases illustrate that even very serious indictments have been dismissed due to egregious governmental conduct. The charges at issue in *U.S. v. Banks*, 383 F. Supp. 389 (Dist. So. Dak. 1974) included obstructing a law enforcement officer under 18 U.S.C.S. § 231(a)(3), setting fire to buildings or machinery under 18 U.S.C.S. § 81, and violating the ban on molotov cocktails under 26 U.S.C.S. § 5861. Nevertheless, due to prosecutorial misconduct, the court stated: “The waters of justice have been polluted, and dismissal, I believe, is the appropriate cure for the pollution in this case.” In the Pentagon Papers case, there were eight charges of espionage, six of theft, and one of conspiracy dismissed against Daniel Ellsberg and Anthony J. Russo, Jr. on the basis of a burglary of the office of Mr. Ellsberg's psychiatrist by government agents. *United States v. Russo*, Crim. No. 9373 (C.D. Cal. 1973). (See Attachment 1) In neither of the case were the defendants physically or mentally harmed by the intentional, planned and coordinated acts of the government, as in the case of Mr. Jawad.

The Supreme Court has consistently held that due process is offended when government conduct is so egregious that it “shocks the conscience” and violates the “decencies of civilized conduct.” *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) quoting *Rochin*, 342 U.S. at 172-73. The government’s intentional torture of a suicidal teenager should shock even the most calloused conscience. Numerous courts have held interrogation by torture “shocks the conscience.” *Harbury v. Deutch*, 233 F.3d 596, 602 (D.C. Cir. 2000) (citing *Rochin*, 342 U.S. at 172); see also *Palko v. Connecticut*, 302 U.S. 319, 326 (1937), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969) (noting that the Due Process Clause must at least “give protection against torture,

physical or mental”). See also, *United States v. Havens*, 446 U.S. 620, 633 (1980) (Brennan, J. dissenting) (equating torture with conscience shocking behavior: “I still hope that the Court would not be prepared to acquiesce in torture or other police conduct that ‘shocks the conscience’ even if it demonstrably advanced the factfinding process.”); cf. *United States v. Mitchell*, 957 F.2d 465, 470 n. 6 (7th Cir. 1992) (court’s conscience not shocked because “the conduct of the government. . . clearly. . .not comparable to official acts of torture, brutality or similar outrageous conduct present in cases where conduct was found to shock the conscience”); *United States v. Chin*, 934 F.2d 393, 399 (2d Cir. 1991) (sort of harm present in case can hardly be said to “shock the conscience” as would physical coercion or torture).

According to the Supreme Court, the due process guarantees of the Constitution were intended to prevent government officials “from abusing [their] power, or employing it as an instrument of oppression.” *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992). The Eleventh Circuit recognized in *United States v. Edenfield*, 995 F.2d 197 (11th Cir. 1993), that even in the investigative or pre-indictment stage of a case, government misconduct could violate “that fundamental fairness, shocking to the universal sense of justice mandated by the due process clause of the fifth amendment.” *Id.* at 200 (quoting *United States v. Tobias*, 662 F.2d 381, 386-87 (5th Cir. Unit B 1981) and *Russell*, 411 U.S. at 432). “In order to completely bar prosecution, government misconduct must be outrageous.” *Edenfield*, 995 F.2d at 200. In evaluating the outrageousness of government misconduct, a court must look at the totality of the circumstances, with no single factor controlling. See *Tobias*, 662 F.2d at 387.

Other federal courts, although declining to dismiss charges in specific cases, have confirmed that dismissal is an available remedy: “serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused” *United States v. McCord*, 166 U.S. App. D.C. 1 (DC.Cir 1974)

The extreme sanction of dismissal of an indictment may be proper "to deter a pattern of demonstrated and longstanding or continuous official misconduct." *United States v. Broward*, 594 F.2d 345, 351 (2d Cir.), cert. denied, 442 U.S. 941, 61 L. Ed. 2d 310, 99 S. Ct. 2882 (1979). The defense intends to introduce evidence that the frequent flyer program was a long-standing and continuous practice of officially sanctioned abuse. In fact, the defense has recently acquired evidence that the frequent flyer program, under a new, innocuous sounding name, continued until at least July 2004.²

An example of outrageous government conduct found to potentially merit dismissal is found in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). In *Toscanino*, the defendant was wanted on a narcotics warrant out of the Eastern District of New York. *Id.* at 268. The defendant was an Italian national living in Uruguay. He was abducted and forcibly brought to the United States to face prosecution. *Id.* The defendant maintained, both pretrial and after his conviction, that the entire prosecution against him was void due to the fact that the United States illegally kidnapped him from his home in Uruguay and tortured him during his transport to the United States. *Id.* at 269-70. The defendant's motions to vacate his conviction and dismiss the indictment were denied without a hearing, and those denials were the sole issue on appeal. *Id.* at 271. The court remanded the case for an evidentiary hearing to determine whether the defendant's claims of forcible abduction and torture could be sustained. *Id.* at 281.

The court concluded "due process now requir[es] a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Id.* at 275. See also, *United States v. Orsini*, 402 F. Supp. 1218 (E.D.N.Y. 1975) (holding that defendant had met his burden of offering credible evidence of gross government misconduct in his seizure). In ruling that the defendant's allegations of outrageous government conduct, if sustained on remand, should result in the dismissal of the indictment, the court in *Toscanino* noted that in many cases involving due process violations center on unlawful government acquisition of evidence and that, in those

² As this evidence may be classified, the defense will introduce it through classified means.

instances, the proper remedy would be the exclusion of the tainted evidence. *Id.* However, it noted that where suppression of the evidence would not suffice, the indictment should be dismissed. There is no evidence that the government gained any evidence through their abuse of Mr. Jawad, so exclusion is not a sufficient remedy.

In short, contrary to the government's claim, there is ample authority for the relief requested by the defense. Military and other federal courts have dismissed charges and reversed convictions based on far less egregious government misconduct than grave breaches of the Geneva Convention. Dismissal is the only appropriate remedy in this case.

CONCLUSION

Judge Lee of the Eastern District of Virginia recently summed up the prevailing view of torture in the federal courts in eloquent fashion:

[T]he Court would like to make a very clear statement that torture of any kind is legally and morally unacceptable, and that the judicial system of the United States will not permit the taint of torture in its judiciary proceedings. This Court takes very seriously its solemn duty and unwavering responsibility to ensure that the human rights guarantees of the United States Constitution and of those international documents on human rights to which the United States is a signatory. . . are upheld in word, deed, and spirit.

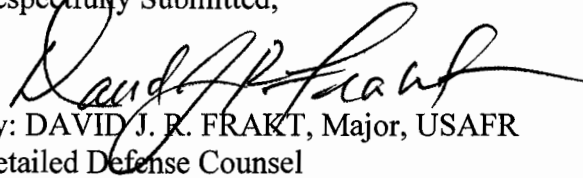
United States v. Abu Ali, 395 F.Supp. 2d 338, 379 (E.D.Va. 2005).

The military commissions should adopt a similar approach and refuse to permit the prosecution of those detainees who have been tortured by the government that was bound to ensure their safety and well-being. The very legitimacy of the military commissions is at stake.

5. Oral Argument: The defense requests oral argument, unless the military judge is prepared to order the requested relief based on the written submissions.

6. Request for Immediate Public Release: The defense requests immediate public release of this and all motions filed by the defense and the government responses thereto.

Respectfully Submitted,



By: DAVID J. R. FRAKT, Major, USAFR
Detailed Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions
1099 14th Street NW, Ste 2000E
Washington, DC 20005
(202) 761-0133, ext. 106

Attachment:

1. Time Magazine Article dated May 21, 1973.



Monday, May. 21, 1973

Pentagon Papers: Case Dismissed

I HAVE decided to declare a mistrial and grant the motion to dismiss." With these 13 terse words, Judge William Matthew Byrne Jr. ended one of the most extraordinary legal—and in many ways, illegal—proceedings in the history of American justice.

By his ruling, the judge cleared Daniel Ellsberg and Anthony J. Russo Jr., both of whom freely admitted that they had secretly copied and leaked the Pentagon papers, of eight charges of espionage, six of theft and one of conspiracy. But since the case had never reached the jury, the two were not declared innocent by acquittal, nor had they been vindicated by their defense based on the assertion of the people's right to know. Even so, the victory was so signal that as Byrne rose to leave the bench in U.S. district court in Los Angeles, the assemblage in the crowded courtroom rose, applauded and cheered him. Patricia Ellsberg rushed over to her stunned husband and asked plaintively: "Haven't you got a kiss for your girl?" (He had.) Defense Counsel Charles Nessen ostentatiously broke out a big cigar and lit it. The prosecution team filed out in tight-lipped silence. Later, a majority of the jurors said that they would have voted for acquittal if they had been given the chance.

Judge Byrne, 42, a blond and sporty bachelor who once directed President Nixon's Commission on Campus Unrest, came to his decision after 4½ long months of trial. Not until its final weeks were the murky beginnings of the case disclosed. Perhaps as early as 1969, and certainly by early 1970, the FBI knew that Ellsberg, then a consultant with the Rand Corp. "think tank" in Santa Monica, Calif., was copying parts of the Pentagon papers at night on a Xerox machine in an advertising-agency office.

At about the same time, President Nixon became incensed by various news leaks and ordered the FBI to stop them. As the bureau's just-appointed director, William D. Ruckelshaus, now admits, the FBI failed in that mission; it did, however, set up a number of wiretaps without any court authorization. One of them was on the home phone of Morton Halperin, then a consultant for the National Security Council, and on that tap, the FBI heard some conversations by Ellsberg. Fully a year ago, Judge Byrne had demanded an account of all Government eavesdropping on Ellsberg, but Ruckelshaus disclosed the tap on Halperin only last week—and added the incredible news that all the tapes and logs of the overheard conversations had mysteriously disappeared from the files of both the FBI and the Department of Justice.

Valid Changes? All of these sensations—following the disclosures that the CIA had helped the Watergate raiders to break in to the offices of Ellsberg's former psychiatrist—took the trial far from its original purpose. The Government had been determined to prosecute Ellsberg and Russo as criminals. The defense was equally determined to raise the broadest legal and constitutional issues. Was a charge of espionage valid when the defendants had given no information to a foreign power? (Ellsberg had returned the actual papers to the Rand Corp. files.) Could theft be alleged when the culprits had stolen nothing but information? Could conspiracy be proved if, as many lawyers believe, the statute defining it is so loosely drawn as to be unconstitutional?

All these matters weighed heavily on Judge Byrne. Then, three weeks ago, the prospect that the case would end in a dismissal surfaced with Byrne's own disclosure that he had visited John D. Ehrlichman, who had offered him the directorship of the FBI, and that he had met President Nixon at the Western White House. The defense immediately demanded dismissal of the case. The judge refused, saying that he had declined to discuss the FBI offer with Ehrlichman and had done nothing improper.

As disclosure followed disclosure, the courtroom air became filled with defense cries of "taint" and motions for mistrial and dismissal, but Byrne hesitated. He was troubled because there were no very direct precedents to guide him. Indeed there could hardly be any, since both the charges and the revelations of the Government's interference and misconduct were unprecedented. Defense Counsel Leonard Boudin tried to cajole Byrne with the coy suggestion: "I'm hopeful that in future when I'm asked to cite a precedent, I'll be able to cite one made by Your Honor in this case."

Byrne had three basic alternatives: 1) declare a mistrial, which would expose the defendants to retrial before a new jury; 2) dismiss the indictments in such a way that the government could never again prosecute these defendants for the same alleged offenses (these two might be combined); or 3) send the case to the jury and decide later whether to throw out a possible guilty verdict if further investigation incriminated the Government still more deeply.

Only a Glimpse. When Byrne mounted the bench to announce his ruling, the courtroom was packed. The corridors were filled with pass holders who had been unable to squeeze in. With the jurors absent during procedural arguments, the jury box was crammed with newsmen. Byrne began briskly: "I am prepared to rule on the motion for dismissal."

First Byrne offered the defense a choice: Did it want to press for dismissal or take the risk of letting the case go to the jury for a final verdict? It took Boudin & Co. only a one-minute huddle to answer: "Dismissal." Byrne had obviously anticipated this and had the appropriate ruling prepared. He read it quickly but clearly. The Government, he noted dryly, had made an "extraordinary series of disclosures" regarding the activities of several agencies. He had tried to

develop "all relevant information" about these activities, but "new information has produced new questions, and there remain more questions than answers."

Of the special investigative unit that White House officials had set up, and which burglarized Psychiatrist Lewis Fielding's office, Byrne said: "We may have been given only a glimpse of what this special unit did, but what we know is more than disquieting." As for the CIA's assistance, he said that the agency was "presumably acting beyond its statutory authority and at the request of the White House."

"No investigation is likely to provide satisfactory answers," he said, "where improper Government conduct has been shielded so long from public view"—and where the files are missing or have been destroyed. "It is the defendants' rights and the effects on this case that are paramount," Byrne declared, "and each passing day indicates that the investigation is further from completion as the jury waits."

The charges against Ellsberg and Russo raised "serious factual and legal issues," and Byrne said he would have liked these to go the full course—meaning a jury verdict and possibly appeals to higher courts. But, he concluded, "the conduct of the Government precludes the fair, dispassionate resolution of these issues by a jury. The totality of the circumstances of this case offends a 'sense of justice.' " Hence he ordered a mistrial and dismissed the indictments.

One of the few precedent cases that Byrne could cite was one that reached the Supreme Court in 1952, in which Justice Felix Frankfurter established the doctrine of dismissal if Government action "shocks the conscience of civilized men." Byrne, a civilized man, was plainly shocked.

When the courtroom applause died, there remained the unresolved questions about the legality of the Government's charges—and of Ellsberg's actions in taking and releasing the documents. In the corridors, an ugly suspicion was voiced by defense counsel: perhaps the Administration had deliberately flunked its last assignment from Byrne, about the Halperin wiretap, because it was being increasingly embarrassed by the disclosures that Byrne was forcing. By failing to meet Byrne's demands, the Administration had given him good reason for dismissing the case and had thus forestalled any further investigation that he might order. It had thereby plugged the leaks of Watergate West.

Ellsberg and Russo plan to sue Government officials for \$2,000,000 in damages and expenses (their legal costs already total \$900,000). For this process, they threaten to subpoena the President himself. In that, they are not likely to succeed, but the Pentagon papers trial, in another guise, may be in the courts and the headlines for months or years to come.