

**APPENDIX
TO APPELLANT'S BRIEF**

***UNITED STATES v. KHADR*
C.M.C.R. Case No. 08-003**

Exhibit A: *United States v. Khadr*, Ruling on Government Motion for Reconsideration D019 and D047 Ruling on Defense Motion to Strike Surplus Language from Charge III (Mil. Comm'n 14 Aug. 2008) (Parrish, J.).

Exhibit B: *United States v. Khadr*, Government Motion for Reconsideration of D019 Ruling on Defense Motion to Strike Surplus Language from Charge III (Conspiracy) and D047 Ruling on Defense Special Request for Relief in Light of the Commission's Ruling on D019 to Strike Surplus Language from Charge III (11 Jul. 2008).

Exhibit C: *United States v. Khadr*, Ruling on D-047 Defense Special Request for Relief in Light of the Commission's Ruling on D-019 to Strike Surplus Language from Charge III (Mil. Comm'n 9 May 2008) (Brownback, J.).

Exhibit D: *United States v. Khadr*, D-010 Ruling on Defense Motion to Dismiss Charge III for Lack of Subject Matter Jurisdiction (Mil. Comm'n 21 Apr. 2008) (Brownback, J.).

Exhibit E: E-mail from William Kuebler, LCDR, to Peter E. Brownback, COL, et al., *Re: Defense Special Request for Relief* (9 Apr. 2008).

Exhibit F: *United States v. Khadr*, Ruling on Defense Motion to Strike Surplus Language from Charge III (D-019) (Mil. Comm'n 4 Apr. 2008) (Brownback, J.).

Exhibit G: *United States v. Khadr*, D-19 Government's Response to the Defense Motion to Strike Surplus Language from Charge III (18 Jan. 2008).

Exhibit H: *United States v. Khadr*, Defense Motion to Strike Surplus Language from Charge III (11 Jan. 2008).

Exhibit I: *United States v. Khadr*, Government's Response to the Defense's Motion to Dismiss Charge III (Conspiracy) (14 Dec. 2007).

Exhibit J: *United States v. Khadr*, Referred Charges (24 Apr. 2007).

Exhibit K: *United States v. Khadr*, Sworn Charges (2 Feb. 2007).

UNITED STATES v. KHADR

C.M.C.R. Case No. 08-003

**APPENDIX
TO APPELLANT'S BRIEF**

EXHIBIT A

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khali"

)
) **Government Motion for Reconsideration**
)
) **D019 and D047**
) **Ruling on Defense Motion to Strike**
) **Surplus Language from Charge III**
)
)
)
)
)

1. The Government requests the Commission to reconsider its rulings in D019 and D047 concerning the striking of certain language from Charge III (Conspiracy). The Defense did not file a response brief and did not request oral argument. The Commission is willing to reconsider its prior ruling and adheres to its prior ruling, in part.
2. The Government's position is that the Commission erred when it deleted language relating the enterprise theory of liability. The Commission analyzed and rejected that position in its prior ruling. The Commission sees no need to revise its prior ruling concerning the enterprise theory of liability. That part of the motion to reconsider is denied.
3. The Government raises a valid issue on the inadvertent deletion of the language concerning the knowledge element of the offense. The allegation that the accused knew the unlawful purpose of the agreement is an element of the offense of conspiracy. It was language which was properly alleged and its deletion was an inadvertent error. That part of the motion to reconsider and restore the allegation that the accused knew the unlawful purpose of the conspiracy is granted.

So Ordered this 14th day of August 2008.


Patrick J. Parrish
COL, JA
Military Judge

UNITED STATES v. KHADR

C.M.C.R. Case No. 08-003

**APPENDIX
TO APPELLANT'S BRIEF**

EXHIBIT B

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khali"

Government Motion for Reconsideration of

D019

Ruling on Defense Motion to Strike Surplus
Language from Charge III (Conspiracy)

and

D047

Ruling on Defense Special Request for Relief
in Light of the Commission's Ruling on D019
to Strike Surplus Language from Charge III

11 July 2008

1. **Timeliness:** Because the Military Judge may, prior to authentication of the record of trial, reconsider any ruling, this Motion is timely filed. *See* Rule for Military Commissions ("RMC") 905(f).
2. **Relief Requested:** The Government respectfully requests that the Military Judge reconsider the above-referenced rulings of 4 April 2008 and 9 May 2008, which were made by the prior Military Judge detailed to this case, and deny the 11 January 2008 Defense Motion to Strike Surplus Language from Charge III ("11 Jan. 2008 Def. Mot.") and the related 9 April 2008 Defense Special Request for Relief.
3. **Overview:**
 - a. The enterprise theory of liability for Conspiracy set forth in the Manual for Military Commissions ("MMC") is authorized by 10 U.S.C. § 950v(b)(28) (codifying the Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a), 120 Stat. 2600, 2630 (2006) ("MCA")). The Secretary of Defense ("Secretary") has reasonably construed the MCA's use of the word "conspires" to include both entering into an agreement for an unlawful purpose, as well as joining an enterprise of persons sharing a common criminal purpose. That reasonable interpretation of a term that can reasonably be understood in at least two different ways, was made pursuant to an express statutory delegation from Congress, and is entitled to deference under the Supreme Court's well-settled decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). Moreover, even if the enterprise theory of the Conspiracy offense were not authorized by section 950v(b)(28) of the MCA, the accused is properly charged with such an offense because it is a violation of the law of war, and this court's jurisdiction includes law of war offenses codified by the MCA *in addition to* any other violations of the law of war. *See* 10 U.S.C. § 948d(a).
 - b. The MMC enumerates three elements for the agreement theory of the Conspiracy offense: (1) That the accused entered into an agreement to commit one or

more substantive offenses triable by military commission; (2) that the accused knew the unlawful purpose of the agreement; and (3) that the accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement. The prior Military Judge's rulings of 4 April 2008 and 9 May 2008, however, struck from the charge sheet the allegation relating to the second element of the offense—that the accused *knew* the unlawful purpose of the agreement. Since the Military Judge and Defense apparently conceded that the elements of the Conspiracy offense set forth in the MMC with respect to the *agreement theory* accurately describe at least one part of the offense enacted by Congress in the MCA, the Military Judge's decision to strike the *mens rea* element of the offense from the charge sheet was clear error and should be reconsidered by this Commission and corrected.

4. **Burden of Persuasion:** With respect to the instant Motion for Reconsideration, the Government, as the moving party, bears the burden of persuasion. *See* RMC 905(c)(2)(A). As to the underlying motions to strike so-called surplus language, however, the burden rests with the Defense. In those motions, the Defense is not challenging the subject matter jurisdiction with respect to the offense of Conspiracy, but rather is merely attempting to litigate the proper elements of the offense and the propriety of certain language contained within a specification in the charge sheet. Such claims are not properly considered in a motion to dismiss for lack of jurisdiction. Accordingly, the burden of persuasion with respect to the underlying motions rests with the Defense, as the moving party. *See id.*

5. **Facts:**

a. The Manual for Military Commissions codifies two forms of Conspiracy, each of which are reasonable articulations of the word “conspires” in the MCA. These two theories have generally been referred to as the “agreement theory” and the “enterprise theory.” Under the agreement theory, the accused is guilty of Conspiracy if he enters into an agreement with one or more persons to commit one or more substantive offenses triable by military commission. In addition, the accused must know the unlawful purpose of the agreement. Finally, the accused must knowingly commit at least one overt act in order to accomplish some objective or purpose of the agreement.

b. Under the enterprise theory, the accused is guilty of Conspiracy if he joins an enterprise of persons sharing a common criminal purpose that involves, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission. As with the agreement theory, the accused must also know the common criminal purpose of the enterprise, and join it willfully, that is, with the intent to further the unlawful purpose. Finally, the accused must knowingly commit at least one overt act in order to accomplish some objective or purpose of the enterprise.

c. On 11 January 2008, the Defense moved to have the bolded language in the below paragraph deleted from the specification for Conspiracy:¹

¹ As explained below, the Defense in its 11 January 2008 motion did not reference the underlined or double-underlined language from the charge sheet. The underlined language was, however, the subject

In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002 to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a/ Abu Al-Rahman Al-Kanadi), and various other members and associates for the al Qaeda organization, known and unknown, **and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS Cole in October 2000, the attacks on the United States on September 11, 2001, and further attacks continuing to date against the United States;** said agreement **and enterprise sharing a common criminal purpose known to the accused** to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism.

In furtherance of this agreement or enterprise, Omar Khadr knowingly committed overt acts, including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one private al Qaeda basic training from an al Qaeda member named "Abu Haddi." [sic], consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
3. In or about July 2002, Khadr attended one month of land mine training.
4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

of the Defense's 9 April 2008 D047 motion, the ruling on which is also the subject of the instant Motion for Reconsideration.

5. On or about July 27, 2002, Khadr engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.
6. Khadr threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.
7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

United States v. Khadr, Referred Charges, at 1-2 (24 Apr. 2007); *see also* 11 Jan. 2008 Def. Mot. at 1. In its 11 January 2008 motion, the Defense claimed that the bolded language was “surplusage,” since it related to conduct that, according to the Defense, had not been criminalized by Congress in the MCA— notwithstanding that it clearly *was* described in the substantive offenses section of the Manual for Military Commissions, promulgated by the Secretary of Defense (“Secretary”). *See* MMC IV-6(28). On 9 April 2008, the Defense moved to strike the underlined language as well.

- d. The MCA codifies the offense of Conspiracy as follows:

Any person subject to this chapter who *conspires* to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

10 U.S.C. § 950v(b)(28) (emphasis added). The MCA did not, however, expressly define the word “conspires,” but rather delegated to the Secretary the authority to elaborate the specific elements of the offense:

Pretrial, trial, and post-trial procedures, *including elements and modes of proof*, for cases triable by military commission under this chapter *may be prescribed by the Secretary of Defense*, in consultation with the Attorney General. Such procedures shall, *so far as the Secretary considers practicable or consistent with military or intelligence activities*, apply the principles of law and the rules of evidence in trial by general courts-martial. Such procedures and rules of evidence may not be contrary to or inconsistent with this chapter.

Id. § 949a(a) (emphasis added); *see also* MCA § 3(b).

e. In the Manual for Military Commissions, the Secretary reasonably interpreted the word “conspires” in the MCA as follows:

(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and

(3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

MMC IV-6(28).

f. Although the Military Judge determined that the accused could be prosecuted for Conspiracy with respect to his pre-MCA conduct, *see United States v. Khadr*, Ruling on Defense Motion to Strike Surplus Language from Charge III (D-019), at 5 (4 Apr. 2008) (“4 Apr. 2008 Ruling”), the Military Judge determined that the word “conspires” in the MCA *must* have the same meaning as that word in the court-martial context. Based on the fact that the Manual for Courts-Martial (“MCM”) does not elaborate the Conspiracy offense in the Uniform Code of Military Justice (“UCMJ”) to include an enterprise theory of Conspiracy, *see* UCMJ, art. 81; MCM, Part IV-5(b), the Military Judge determined that the elements in the Manual for Military Commissions of the enterprise theory of Conspiracy were “contrary to” the MCA and therefore ultra vires. *See* 4 Apr. 2008 Ruling at 6.

g. In his 4 April 2008 ruling, the Military Judge granted the Defense’s 11 January 2008 motion to strike the bolded language from the charge sheet. In his 9 May 2008 ruling, the Military Judge granted the Defense’s 9 April 2008 request to strike the underlined language as well. Neither the Defense nor the Military Judge referenced the double-underlined phrase in the overt acts portion of the specification.

6. Discussion:

a. **THE MILITARY JUDGE ERRED BY FAILING TO ACCORD THE SECRETARY OF DEFENSE’S ELABORATION IN THE MCA OF THE CONSPIRACY OFFENSE SUFFICIENT (OR ANY) DEFERENCE**

i. Section 950v(b)(28) of the MCA codifies as a violation of the law of war the offense of Conspiracy, and provides that “[a]ny person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object

of the conspiracy” is guilty of Conspiracy. The Secretary of Defense promulgated the elements of Conspiracy set forth in the MMC pursuant to an express delegation of authority from Congress. This delegation to the Secretary in the MCA is *broader* than the putatively analogous delegation to the President in the UCMJ.

ii. Under section 949a(a) of the MCA, the Secretary is authorized to prescribe “[p]retorial, trial, and post-trial procedures, including *elements* and modes of proof, for cases triable by military commission.” 10 U.S.C. § 949a(a) (emphasis added); *see also* MCA § 3(b) (“[T]he Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the procedures for military commissions [i.e., the MMC] . . .”). This delegation is *broader* than the delegation to the President under Article 36(a) of the UCMJ, which authorizes the President to prescribe only “[p]retorial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry.” Absent from this list is the authority to prescribe *elements* of substantive offenses.

iii. This limitation on the President’s authority to prescribe elements of offenses has been recognized by the courts. For example, in *United States v. Davis*, 47 M.J. 484 (C.A.A.F. 1998), Judge Crawford recognized that “Article 36(a), UCMJ, 10 USC § 836(a), gives the President express authority to promulgate rules under Parts II and III of the Manual. Part IV of the Manual is not expressly governed by Article 36(a).” *Id.* at 486; *accord United States v. Czeschin*, 56 M.J. 346, 348 (C.A.A.F. 2002). By contrast, where Congress has expressly delegated to the President the authority under Article 56 of the UCMJ to determine the maximum punishment for each offense within the UCMJ, “courts must defer to the President’s determination.” *United States v. Zachary*, 61 M.J. 813, 819 (A. Ct. Crim. App. 2005), *aff’d*, 63 M.J. 438 (C.A.A.F. 2006). (Moreover, even in light of the above limitation, the C.A.A.F. has recognized that “[a]lthough the President’s interpretation of the elements of an offense is not binding on this Court, absent a contrary intention in the Constitution or a statute, *this Court should adhere to the Manual’s elements of proof.*” *United States v. Guess*, 48 M.J. 69, 71 (C.A.A.F. 1998) (Crawford, J.) (emphasis added).) In any event, whatever limitations may exist on the President’s authority to prescribe elements of offenses under the UCMJ stems from the specific limits of the delegation to him under that Act.

iv. By contrast, the Secretary of Defense under the MCA is charged with prescribing, among other things, “*elements . . . for cases triable by military commission*” under the MCA. 10 U.S.C. § 949a(a) (emphasis added). Under the Supreme Court’s opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), and settled principles of administrative law, the Secretary’s reasonable interpretation of ambiguous provisions of the MCA is entitled to deference by this Commission. *See also United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“A very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed.”); *cf.* MCA § 3(b) (“[T]he Secretary of Defense shall submit to the Committees on Armed Services of the

Senate and the House of Representatives a report setting forth the procedures for military commissions [i.e., the MMC] . . .”).

v. In *Chevron*, the Supreme Court articulated a rule, to which it has adhered ever since, that “[i]f . . . the court determines Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” 467 U.S. at 843; *see also id.* at 844 (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer . . .”). As the D.C. Circuit recently explained,

Under step one [of *Chevron*], the court asks “whether Congress has directly spoken to the . . . issue;” if Congress’ intent is clear, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. However, if the court determines that “Congress has not directly addressed the precise question at issue,” *id.* at 843, then, under step two, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.*

Env’tl. Def., Inc. v. EPA, 509 F.3d 553, 559 (D.C. Cir. 2007) (alteration in original).

vi. The MCA does not define the word “conspires.” That definition has been supplied by the Secretary of Defense, acting pursuant to an express delegation of authority to promulgate elements of the offenses in the Manual for Military Commissions. *See* MCA § 3(b); 10 U.S.C. § 949a(a). The MMC reasonably interprets the word “conspires” as including at least two meanings: First, the MMC interprets “conspires” as including “enter[ing] into an agreement with one or more persons.” MMC, Part IV-6(a)(28)(b)(1). Second, the MMC interprets the word “conspires,” as used in the MCA, to include “join[ing] an enterprise of persons who shared a common criminal purpose.” *Id.*

vii. A word that is capable of being understood in two or more possible senses is, by definition, “ambiguous.” The word “conspires” is ambiguous and is susceptible of multiple definitions. For example, the American Heritage Dictionary lists two definitions for the word “conspire”: (1) “[t]o plan together secretly to commit an illegal or wrongful act or accomplish a legal purpose through illegal action”; and (2) “[t]o join or act together; combine.” Similarly, the Oxford English Dictionary defines “conspire” both as “agree[ing] together to do something criminal, illegal, or reprehensible,” and “combin[ing] privily for an evil or unlawful purpose.”

viii. “In determining the scope of a statute, we look first to its language, giving the words used their ordinary meaning.” *Ingalls Shipbuilding, Inc. v. Director, Office of Workers’ Compensation Programs*, 519 U.S. 248, 255 (1997) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981), and *Richards v. United States*, 369 U.S. 1, 9 (1962)). The word

“conspires” in section 950v(b)(28) of the MCA may reasonably be interpreted as (1) agreeing to do something illegal, (2) joining an enterprise for an illegal purpose, or (3) both. The Secretary of Defense has reasonably interpreted the word “conspires” to cover both forms of conspiring, and that interpretation of an ambiguous provision is entitled to deference by this Court. *See Chevron*, 467 U.S. 842-45.

ix. That the President has interpreted similar language in Article 81 of the UCMJ differently is not dispositive with respect to whether the Secretary’s interpretation of the MCA is reasonable and entitled to deference. *See* MCM, Part IV-5(b). As the Supreme Court recently explained, “Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). In *Brand X*, the Federal Communications Commission (“FCC”) interpreted an ambiguous statutory term contrary to the Court of Appeals’ prior construction of that term. Notwithstanding that the FCC in effect “reversed” a prior judgment, the Court held that the FCC’s recent interpretation of the ambiguous statutory text was entitled to deference under *Chevron*. *See id.* at 982-83. Similarly, the Court noted that an agency’s *changed* interpretation of an ambiguous statute it is charged with administering is as entitled to deference as its initial interpretation of that statute. *See id.* at 981-82 (“That is no doubt why in *Chevron* itself, this Court deferred to an agency interpretation that was a recent reversal of agency policy.”) (citing *Chevron*, 467 U.S. at 857-58).

x. So, too, here, the meaning of the word “conspires” in UCMJ Article 81 and MCA § 950v(b)(28) is ambiguous. The President has reasonably interpreted it, in the context of courts-martial, to mean “[t]hat the accused entered into an agreement with one or more persons to commit an offense under the code.” MCM, Part IV-5(b)(1). The Secretary of Defense has *also* reasonably interpreted the word “conspires,” in accordance with its ordinary meaning, to include both “enter[ing] into an agreement with one or more persons,” as well as “join[ing] an enterprise of persons who shared a common criminal purpose.” MMC, Part IV-6(a)(28)(b)(1). Both the President’s and the Secretary of Defense’s interpretations of the word “conspires” are reasonable, and both are entitled to deference under *Chevron*.²

xi. We note that the issue here is not whether the Secretary of Defense receives *Chevron*-deference in *enforcing* a statute, but rather whether the Secretary receives *Chevron*-deference in *interpreting and implementing* a statute. The Secretary

² Thus in contrast to the Government’s decision to prosecute (which is not entitled to *Chevron*-deference *vis-à-vis* a defendant’s guilt, *see, e.g., Gonzales v. Oregon*, 546 U.S. 243, 264 (2006); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment)), Congress can impose criminal punishments upon those who violate rules promulgated by Executive Branch officials, *see, e.g., United States v. Grimaud*, 220 U.S. 506 (1911), and those punitive rules are entitled to deference. The *Grimaud* Court emphasized that “when Congress [has] legislated and indicated its will, it [can] give to those who were to act under such general provisions ‘power to fill up the details’ by the establishment of administrative rules and regulations, the violation of which [can] be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done.” *Id.* at 511. Here, Congress expressly delegated to the Secretary the power to promulgate the elements of the MCA’s substantive offenses, and the Secretary has reasonably done so.

has been entrusted not merely with enforcing the MCA, but with interpreting it. MCA § 3(b) and 10 U.S.C. § 949a(a) authorized the Secretary of Defense to promulgate the MMC, which sets forth the elements of the Conspiracy offense. Whatever level of deference may be appropriate with respect to, for example, the Prosecution's interpretation of the MCA and MMC in a particular case, where the Secretary has promulgated *regulations* implementing the MCA, he has acted in a rule-making, rather than in an enforcement or adjudicatory, capacity, and he therefore must receive *Chevron*-deference, just as the head of the EPA would when *he* promulgates environmental regulations pursuant to a statute. *See Sash v. Zenk*, 439 F.3d 61, 67 (2d Cir. 2006) ("The Supreme Court has rejected the idea that the rule of lenity should trump the deference we traditionally afford to reasonable administrative regulations.") (citing *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 704 (1995)); *see also Sweet Home Chapter*, 515 U.S. at 704 & n.18 (holding that EPA's interpretation of a statute was reasonable and deserving of deference even though the statute was criminally enforced).³ Accordingly, *Chevron* is fully applicable to the Secretary's articulation in the MMC of the elements of the MCA's Conspiracy offense.

xii. The Military Judge's rulings on D019 and D047 also ignore that many offenses triable by military commission have unique international law aspects not implicated by offenses listed in the MCM, which emphatically does not purport to list or codify all offenses traditionally triable by military commission or the law of war. In addition, whatever may be said of the meaning of Conspiracy in the domestic sphere, there is ample historical precedent for criminalizing the enterprise theory of Conspiracy as a violation of the law of war. *See, e.g., United States v. Göring, et al.* (1 Oct. 1946), in *Trial of The Major War Criminals Before the International Military Tribunal, Judgment*, Vol. I, at 256 (1947) ("A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose."); *Trial of Martin Gottfried Weiss and Thirty-Nine Others (The Dachau Concentration Camp Trial)*, United Nations War Crimes Commission, Case No. 60 (15 Nov. - 13 Dec. 1945), in *Law Reports of Trials of War Criminals*, Vol. XI, at 5, 12-15 (1949) (accused were convicted of "act[ing] in pursuance of a common design to commit" unlawful acts against prisoners); *Military Commissions*, 11 Op. Atty. Gen. 297, 298, 312 (1865) (endorsing the prosecution by military commission of the Lincoln assassination conspirators, who were charged with "combining, confederating and conspiring" to kill President Lincoln, and explaining that "to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; *the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war.*") (emphasis added). As these precedents demonstrate, joining a band or enterprise that violates the law of war is itself a violation of the law of war, punishable by

³ To the extent courts-martial have interpreted the UCMJ in a contrary fashion, such decisions are inapposite—since they rely on a more limited delegation to the President in the UCMJ—and, in any event, are not binding on this Commission. *See* 10 U.S.C. § 948b(c) ("The judicial construction and application of [the UCMJ] are not binding on military commissions established under this chapter.").

military commission. *See generally United States v. Khadr*, Government's Response to the Defense's Motion to Dismiss Charge III (Conspiracy) at 5-13 (14 Dec. 2007).

xiii. Furthermore, within the specific context of the war crime at issue in the present motion, the President in 2003 defined "Conspiracy" as including both "enter[ing] into an agreement with one or more persons to commit one or more substantive offenses triable by military commission," as well as "join[ing] an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission." 32 C.F.R. § 11.6(c)(6)(i)(A) (2003). Given that Congress legislated in the MCA against the backdrop of the President's prior military order governing the conflict with al Qaeda, it was certainly reasonable for the Secretary to maintain such an interpretation of the Conspiracy offense, insofar as permitted by the MCA.

h. EVEN IF THE ENTEPRISE THEORY OF CONSPIRACY IS NOT AUTHORIZED BY 10 U.S.C. § 950v(b)(28), IT IS ITSELF A VIOLATION OF THE LAW OF WAR, AND THEREFORE MAY BE TRIED BEFORE THIS COMMISSION

i. This military commission has "jurisdiction to try any offense made punishable by [the MCA] or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001." 10 U.S.C. § 948d(a) (emphasis added). That is, this commission's jurisdiction is not limited to those offenses specifically enumerated in section 950v(b) of the MCA, nor is it limited to those offenses codified in Part IV of the MMC (which codifies the offenses enumerated in section 950v(b) of the MCA). Rather, this military commission may try violations of the law of war, even with respect to offenses not codified in the MCA.

ii. Not only does such a conclusion follow from the clear language of section 948d(a) of the MCA, but it also follows from historical practice. For example, the German nationals who were tried before U.S.-convened military commissions in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), were not tried for violating domestic U.S. law, but rather for violating the un-codified "laws and customs of war." *Johnson v. Eisentrager*, Joint Appendix of Exhibits in the D.C. Cir., Ex. C, in Trans. of Record, S. Ct., No. 306, *Johnson v. Eisentrager*, at 25-26 (1949). Similarly, in *Ex parte Quirin*, 317 U.S. 1 (1942), the Nazi conspirators there were tried for the offense of conspiracy under the un-codified law of war. *See id.* at 23, 27-28.

iii. Although not binding on this Commission, the International Criminal Tribunal for the Former Yugoslavia (ICTY) in several decisions has found that joining an enterprise of persons who share a common criminal purpose is and has been punishable under customary international law. *See, e.g., Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgment, ¶¶ 28-32 (ICTY Appeals Chamber 17 Sept. 2003); *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶¶ 189-224 (ICTY Appeals Chamber 15 July 1999). In that regard, we note that Khadr is accused of joining an enterprise of persons who shared a common criminal purpose that involved the

commission of one or more substantive offenses triable by military commission, *viz.*, attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, and terrorism. The ICTY prosecutions themselves involved offenses dating to the early 1990s, before the accused joined al Qaeda. In other words, the accused is charged with conduct that has traditionally been prosecuted, not only by military commission convened by the United States, but also by international tribunals.⁴

iv. Because the elements of the Conspiracy offense set forth in the MMC are reasonable interpretations of the word “conspires” in the MCA, those elements—including the enterprise theory of the Conspiracy offense—are entitled to deference and have the force of law in this military commission. In addition, the existence of a common criminal enterprise theory of liability made punishable by the law of war further authorizes a charge of conspiracy in this case.⁵ The Commission should reject the accused’s claim that the enterprise theory of Conspiracy is not supported by the MCA or international law.

**c. THE REMEDY ORDERED BY THE MILITARY JUDGE
RENDERS THE CHARGE SHEET DEFECTIVE AS TO THE
AGREEMENT THEORY OF CONSPIRACY**

i. Per the Military Judge’s 4 April 2008 and 9 May 2008 rulings, the Conspiracy specification against the accused now reads as follows:

In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002, to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa’id Khadr (a/k/a/ Abu Al-Rahman

⁴ To the extent that Justice Stevens in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), reached a contrary conclusion, *see id.* at 2784-85 (plurality op.), such a conclusion is unpersuasive for the reasons already stated and, in any event, is not binding on this commission. *See, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987) (“[W]e are not bound by [a plurality opinion’s] reasoning.”); *see also Horton v. California*, 496 U.S. 128, 136 (1990) (reaffirming that a plurality view that does not command a majority is not binding precedent). As explained above, whether or not a theory of joint enterprise liability has been prosecuted as a separate substantive offense or a species of accomplice liability is a distinction without a difference, at least insofar as we are considering whether the accused’s conduct was prohibited under international law at the time of the offense. *Cf. Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (Chase, J.) (the Ex Post Facto Clause prohibits “[e]very law that makes an action, done before the passing of the law, and which was *innocent when done*, criminal”) (emphasis added); *cf. also* Francis Lieber, *Guerilla Parties Considered with Reference to the Laws and Usages of War* 1, 7-8 (1862) (noting that, in spite of the “particularly confused” definition of the term “guerilla” under the law of war, those who carried on “an irregular war” during the Civil War (i.e., guerillas) were nonetheless punished for violating the law of war).

⁵ Were this Court to determine that the enterprise theory could *only* be tried under the law of war and section 948d(a) of the MCA, and not under section 950v(b)(28), the Government may seek leave to amend the charge sheet and refer the charge of Conspiracy on that basis.

Al-Kanadi), and various other members and associates for the al Qaeda organization, known and unknown; said agreement to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism.

In furtherance of this agreement or enterprise, Omar Khadr knowingly committed overt acts, including, but not limited to, the following

ii. Thus, as amended by the Military Judge's rulings, Khadr now stands accused of: (1) entering into an agreement with Usama bin Laden and others to commit certain violations of the law of war; and (2) knowingly committing several overt acts in furtherance of that agreement. However, as already described, the MMC sets forth the following *three* elements for the Conspiracy offense:

(1) *The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;*

(2) *The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and*

(3) *The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.*

MMC IV-6(28) (emphasis added).

iii. The charge sheet, as amended by the Military Judge, thus alleges conduct sufficient to meet the first and third elements of the agreement theory of the Conspiracy offense, *but completely omits the second element of the offense.*

iv. Assuming that the Military Judge intended to permit the Government to pursue a Conspiracy charge against the accused under the agreement theory, *cf.* 4 Apr. 2008 Ruling at 5 (“There was a reasonable basis for Congress, in 2006, to determine that the offense of conspiracy to commit violations of the law of war was punishable by military commissions, before, on, and after 11 September 2001.”), it is difficult to see how that will be possible if the Government cannot charge the accused with having entered into an agreement that the accused *knew* involved law of war violations.

v. As revised by the Military Judge, the charge sheet with respect to the Conspiracy offense is now defective since it alleges only two of the necessary three elements of that offense. Since the Military Judge, *see id.* at 5-6, and even the Defense,

see 11 Jan. 2008 Def. Mot. at 2-3, apparently concede that the elements of the Conspiracy offense set forth in the MMC with respect to the *agreement theory* accurately describe at least part of the offense enacted by Congress in the MCA, the Military Judge's decision to strike the mens rea element from the charge sheet was clear error and should be reconsidered and corrected.⁶

d. CONCLUSION

i. The enterprise theory of liability for the Conspiracy offense under the MMC is statutorily authorized by the MCA, and the Secretary's interpretation of that offense is entitled to deference under *Chevron*. Moreover, even if the enterprise theory of the Conspiracy offense were not authorized by section 950v(b)(28) of the MCA, the accused is properly charged with such an offense because it is a violation of the law of war, and this court's jurisdiction includes both offenses made punishable under the MCA *in addition to* violations of the law of war. See 10 U.S.C. § 948d(a). In addition, the Military Judge's "remedy" rendered the charge sheet defective with respect to the agreement theory of the Conspiracy offense, since it deleted the Government's allegation that the accused *knew* the unlawful purpose of the agreement, which knowledge is an element of the offense.

ii. This Motion for Reconsideration should be granted, and the deleted language from the charge sheet restored.

7. Oral Argument: The Government does not request oral argument.

⁶ As explained in Part 6.a., *supra*, the Military Judge must defer to the Secretary's reasonable interpretation in the MMC of the MCA's Conspiracy offense. In the event that the Military Judge disagrees, however, with the Government's position, the Government assumes that the Military Judge will, at minimum, want to correct the now-defective charge sheet. Thus, if the Military Judge still intends, over the Government's strong objection, to strike the enterprise theory of Conspiracy from the charge sheet, the revised specification should read as follows:

In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002 to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (*a/k/a/* Abu Al-Rahman Al-Kanadi), and various other members and associates for the al Qaeda organization, known and unknown, ~~and willfully join an enterprise of persons, to-wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS Cole in October 2000, the attacks on the United States on September 11, 2001, and further attacks continuing to date against the United States; said agreement and enterprise sharing a common criminal concerning an unlawful purpose known to the accused to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war, destruction of property in violation of the law of war; and terrorism.~~

In furtherance of this ~~agreement or enterprise~~, Omar Khadr knowingly committed overt acts, including, but not limited to, the following

8. **Witnesses and Evidence:** The evidence and testimony necessary to grant this Motion for Reconsideration are already in the record.

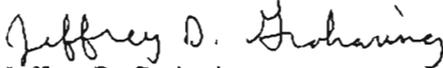
9. **Certificate of Conference:** The Defense opposes this Motion.

10. **Additional Information:**

a. *United States v. Khadr*, Ruling on Defense Special Request for Relief in Light of the Commission's Ruling on D019 to Strike Surplus Language from Charge III (D047), 9 May 2008.

b. *United States v. Khadr*, Ruling on Defense Motion to Strike Surplus Language from Charge III (D019), 4 Apr. 2008.

11. **Submitted by:**


Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney

UNITED STATES v. KHADR

C.M.C.R. Case No. 08-003

**APPENDIX
TO APPELLANT'S BRIEF**

EXHIBIT C

UNITED STATES
OF
AMERICA

D-047
Defense Special Request for Relief in light of the
commission's ruling on D-019 to Strike Surplus
Language from Charge III

v

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khahi"

Ruling

1. The defense filed this special request for relief by email on 9 April 2008. The government responded on 22 April 2008. Neither party chose to argue the motion on the record on 8 May 2007.
2. The commission adheres to its ruling in D-019 and the matters and analysis contained therein. The language requested to be stricken is hereby deleted.
3. The Specification of Charge III shall now read as follows:

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002, to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown; said agreement to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism.

In furtherance of this agreement or enterprise, Omar Khadr knowingly committed overt acts, including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi," consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
3. In or about July 2002, Khadr attended one month of land mine training.

4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where; based on previous surveillance, U.S. troops were expected to be traveling.
5. On or about July 27,2002, Khadr engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.
6. Khadr threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.
7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

4. The defense special request for relief is granted.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES v. KHADR

C.M.C.R. Case No. 08-003

**APPENDIX
TO APPELLANT'S BRIEF**

EXHIBIT D

UNITED STATES
OF
AMERICA

}
}
} **D-010**
} **Ruling on Defense Motion to Dismiss Charge III**
} **for Lack of Subject Matter Jurisdiction**

21 April 2008

v

}
}
} **OMAR AHMED KHADR**
} a/k/a "Akhbar Farhad"
} a/k/a "Akhbar Farnad"
} a/k/a "Ahmed Muhammed Khahi"
}

1. The commission has considered the defense motion, the government response, and the defense reply. In this ruling, the commission does not address those aspects of the Specification of Charge III upon which it ruled in D-019.
2. Charge III and its Specification read as follows (as alleged prior to the commission ruling in D-019):

CHARGE III: VIOLATION OF 10 U.S.C. §950v(b)(28), CONSPIRACY

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002, to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks, continuing to date against the United States; said agreement and enterprise sharing a common criminal purpose known to the accused to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism.

In furtherance of this agreement or enterprise, Omar Khadr knowingly committed overt acts, including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi.", consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
3. In or about July 2002, Khadr attended one month of land mine training.
4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where; based on previous surveillance, U.S. troops were expected to be traveling.
5. On or about July 27,2002, Khadr engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.
6. Khadr threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.
7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

3. Paragraph 6(28), Part IV, Manual for Military Commissions, which contains both the text of Sec 950v(b)(28) and the Secretary's implementation of the statute, reads as follows:

6(28) CONSPIRACY.

a. *Text.* "Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct."

b. *Elements.*

- (1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and

(3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

c. Comment.

(1) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(2) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact "triable by military commission." Although the accused must be subject to the MCA, other co-conspirators need not be.

(3) The overt act must be done by the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(4) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. It is not essential that any substantive offense, including the object offense, be committed.

(5) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(6) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the

conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

d. *Maximum Punishment.* Death, if the death of any person occurs as a result of the conspiracy.

4. Congress possesses express enumerated authority under Article I, Section 8, Clause 10, of the Constitution to enact the Military Commissions Act of 2006. The plenary power given to Congress "to define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations" establishes the *prima facie* validity of the statute in question.

5. The Supreme Court has recognized that Congress could define offenses against the Law of Nations:

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns....Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course. *Ex Parte Quirin*, 317 U.S. 1, 12, 63 S.Ct. 2 (1942).

6. The commission has considered the cases and authorities cited by the defense and prosecution and finds:

1) There was a reasonable basis for Congress, in 2006, to determine that the offense of conspiracy to commit violations of the law of war was part of the common law of war, before, on, and after 11 September 2001; and,

2) There was a reasonable basis for Congress, in 2006, to determine that the offense of conspiracy to commit violations of the law of war was punishable by military commissions, before, on, and after 11 September 2001.

7. The defense asserts that the specific statutory provision in question, 10 U.S.C. Sec. 950v(b)(28), did not exist at the time of the offenses charged. Since the offenses charged allegedly occurred in 2002 and the statute in question was enacted in 2006, that assertion is beyond dispute. Assuming for the purposes of this paragraph of this motion that Mr. Khadr is entitled to specific, partial or limited protections of the Constitution, the commission will evaluate the provision in light of *ex post facto* standards:

a. On its face, the provision applies to Mr. Khadr. The jurisdictional provisions of the MCA (Section 948d) set forth that any person who may be tried by a military commission may be tried for any offense listed in the MCA – whether committed before, on, or after 11 September 2001.

b. The Supreme Court has recognized Congress' authority in this area (See, eg., *Ex Parte Quirin*, 317 U.S. 1, 63 S.Ct. 2 (1942). It has stated that “An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.” *Ex Parte Quirin, Id.*, at 10.

c. The Congressional decision to enact the murder in violation of the law of war provision was not a decision to create a new crime and Congress did not create a new crime. The Supreme Court recognized that Congress has and has had the choice of allowing military commissions to determine for themselves what are violations of the law of war or of setting out specifically certain violations of the law of war. “Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts....” *Ex Parte Quirin, Id.*, at 12.

d. The commission concludes that prosecution of Mr. Khadr for the offense of conspiracy to commit violations of the law of war, as defined by the provision in question, does not violate *ex post facto* standards – whether under the Constitution or international law.

8. The commission has reviewed Charge III and its Specification. The Specification alleges a violation of the statute. The offense alleged in the Specification, conspiracy to commit various violations of the law of war, is a violation of the law of war.

9. The defense motion to dismiss Charge III and its Specification is denied.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES v. KHADR

C.M.C.R. Case No. 08-003

**APPENDIX
TO APPELLANT'S BRIEF**

EXHIBIT E

Goldstein, Jordan A

From: William.Kuebler [REDACTED]
Sent: Wednesday, April 09, 2008 2:32 PM
To: Peter.E.Brownback [REDACTED]

Cc: [REDACTED]

Subject: Defense Special Request for Relief

Sir,

1. In light of the Commission's ruling on D-019, the defense respectfully requests that the Military Judge strike the following additional language from Charge III as surplussage:

"on September 11, 2001, and further attacks, continuing to date against the United States".

2. The same rationale asserted in the defense motion applies with respect to the language above and the arguments made in D-019 are incorporated herein by reference.

V/R

LCDR Kuebler

UNITED STATES v. KHADR

C.M.C.R. Case No. 08-003

**APPENDIX
TO APPELLANT'S BRIEF**

EXHIBIT F

UNITED STATES
OF
AMERICA

D-019
Ruling on Defense Motion to Strike Surplus
Language from Charge III

4 April 2008

v

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khahi"

1. The commission has considered the defense motion and the government response. There was no oral argument on the motion.
2. Charge III and its Specification read as follows:

CHARGE III: VIOLATION OF 10 U.S.C. §950v(b)(28), CONSPIRACY

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002, to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks, continuing to date against the United States; said agreement and enterprise sharing a common criminal purpose known to the accused to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism.

In furtherance of this agreement or enterprise, Omar Khadr knowingly committed overt acts, including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu

Haddi," consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

3. In or about July 2002, Khadr attended one month of land mine training.

4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where; based on previous surveillance, U.S. troops were expected to be traveling.

5. On or about July 27, 2002, Khadr engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.

6. Khadr threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

3. Paragraph 6(28), Part IV, Manual for Military Commissions, which contains both the text of Sec 950v(b)(28) and the Secretary's implementation of the statute, reads as follows:

6(28) CONSPIRACY.

a. *Text.* "Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct."

b. *Elements.*

(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and

(3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

c. Comment.

(1) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(2) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact "triable by military commission." Although the accused must be subject to the MCA, other co-conspirators need not be.

(3) The overt act must be done by the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(4) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. It is not essential that any substantive offense, including the object offense, be committed.

(5) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(6) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the

conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

d. *Maximum Punishment.* Death, if the death of any person occurs as a result of the conspiracy.

4. Congress possesses express enumerated authority under Article I, Section 8, Clause 10, of the Constitution to enact the Military Commissions Act of 2006. The plenary power given to Congress "to define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations" establishes the *prima facie* validity of the statute in question.

5. The Supreme Court has recognized that Congress could define offenses against the Law of Nations:

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns....Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course. *Ex Parte Quirin*, 317 U.S. 1, 12, 63 S.Ct. 2 (1942).

6. In Section 949a of the Military Commissions Act of 2006, Congress authorized the Secretary of Defense to establish certain rules and procedures in connection with military commissions:

“§ 949a. Rules

“(a) PROCEDURES AND RULES OF EVIDENCE.—Pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense, in consultation with the Attorney General. Such procedures shall, so far as the Secretary

considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial. Such procedures and rules of evidence may not be contrary to or inconsistent with this chapter.

The Secretary used this authority to publish the Manual for Military Commissions. Specifically, the Secretary established the elements for the offense of conspiracy in violation of Section 950v(b)(28) of the Act.

7. The defense moves to have the language of Specification of Charge III shown in bold below struck from the Specification:

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002, to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahrnan Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, **and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks, continuing to date against the United States;** said agreement **and enterprise sharing a common criminal purpose known to the accused** to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism.

The commission makes no finding or ruling concerning the underlined wording shown above, since those words were not addressed by the defense motion.

8. The commission has considered the cases and authorities cited by the defense and prosecution and finds:

1) There was a reasonable basis for Congress, in 2006, to determine that the offense of conspiracy to commit violations of the law of war was part of the common law of war, before, on, and after 11 September 2001; and,

2) There was a reasonable basis for Congress, in 2006, to determine that the offense of conspiracy to commit violations of the law of war was punishable by military commissions, before, on, and after 11 September 2001.

3) "(T)he principles of law ... in trial by general courts-martial..." establish a clear and consistent meaning to the term and offense of conspiracy.

4) The elements propounded by the Secretary in Paragraph 6(28), Part IV, of Manual for Military Commissions go beyond the elements for conspiracy under the principles of law in general courts-martial.

5) Since the elements propounded by the Secretary in Paragraph 6(28), Part IV, of Manual for Military Commissions go beyond the elements for conspiracy under the principles of law in general courts-martial, those elements, insofar as they refer to an enterprise of persons with a common criminal purpose, are "contrary to or inconsistent with" the statutory offense of conspiracy - as set forth in Sec 950v(b)(28).

9. The defense motion to strike the language in the Specification of Charge III, as shown in bold in paragraph 7 above, is granted. The commission will further allow the defense to supplement its motion to address the language underlined in paragraph 7 above.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES v. KHADR

C.M.C.R. Case No. 08-003

**APPENDIX
TO APPELLANT'S BRIEF**

EXHIBIT G

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khali"

D 19

GOVERNMENT'S RESPONSE

To the Defense Motion to Strike Surplus
Language from Charge III

January 18, 2008

1. **Timeliness:** This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 28 November 2007.

2. **Relief Requested:** The Government respectfully submits that the Defense Motion to Strike Surplus Language from Charge III should be denied.

3. **Overview:** The language in the Prosecution's charge sheet in the instant case, specifically in regard to the "enterprise of persons" language, is per se relevant as the language represents valid elements of the Conspiracy charge. The language citing "al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, that attack against the U.S.S Cole in October 2000, and attacks on the United States..." are all facts pertinent to the criminal conduct alleged in the charges and are properly plead. As the Manual for Military Commissions (MCM) states that the specification may be in any format,¹ and the language in Charge III is properly plead, the Defense motion should be denied.

4. **Burden and Persuasion:** The government does not agree with the Defense assertion that this is a challenge to the subject matter jurisdiction of the military commission. As the accused is charged with Conspiracy, and the defense is not challenging the subject matter jurisdiction of the crime of Conspiracy *in this motion*, this motion is simply an attempt to litigate the proper elements of an offense and the propriety of certain language contained within a specification. Such a motion is not considered to be a motion to dismiss for lack of jurisdiction, therefore the burden of persuasion resides with the Defense as the moving party. See MCM 905(c)2(B).

¹ See MCM Rule 307(c)(3).

5. Discussion:

The “enterprise of persons” is a valid theory of liability under the Military Commissions Act and conspiracy law

a. A criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group' bound together and organized for a common purpose.”

-The International Military Tribunal at Nuremberg, Judgment, pg 499 (30 Sept 1946).

b. The defense moves this Military Commission to strike the following language from Charge III: “and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania, the attack against the USS Cole in October 2000, the attacks on the United States;” and “an enterprise sharing a common criminal purpose known to the accused.” The defense motion should be denied.

c. The Military Commissions Act of 2006 (“MCA”) states that a person subject to trial by military commission may be charged with Conspiracy if he “conspires to commit one or more substantive offenses triable by military commission, and if he knowingly does any overt act to effect the object of the conspiracy.” See 10 U.S.C. §950v(b)(28). The Military Commissions Act does not define the elements of Conspiracy, leaving that task instead to the Secretary of Defense (The “pretrial, trial, and post-trial procedures, *including elements* and modes of proof, for cases triable by military commissions may be prescribed by the Secretary of Defense, in consultation with the Attorney General). See id. §949a(a) (*Emphasis added*).

d. The Military Commissions Act further states that such procedures shall, so far as practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial at general courts-martial. Such procedures and rules of evidence may not be contrary to or inconsistent with the Military Commissions Act. Id. Despite the assertions of the Defense, the elements of Conspiracy, specifically in regard to the elements “or otherwise joined an enterprise of persons who shared a common criminal purpose and that the accused knew the common criminal purpose of the enterprise, and joined willfully, that is, with the intent to further the unlawful purpose,” as listed by the Manual for Military Commissions, are neither contrary to, nor inconsistent with, the Military Commissions Act. The above-described conduct fits well within established principles of conspiracy law, and, furthermore, is a well-recognized theory of liability under international law for crimes committed during wartime.

e. The Manual for Military Commissions lists the following elements for the Offense of Conspiracy:

- i. The accused entered into an agreement with one or more persons to commit one or more substantive offense triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;
- ii. The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and
- iii. The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

10 U.S.C. §950v(28).

f. If one were to join an enterprise of persons who shared a common criminal purpose that involved the commission or intended commission of one or more substantive offenses, knowing the common criminal purpose of the enterprise, and joined willfully with the intent to further the unlawful purpose of the enterprise, he could be found guilty of conspiracy under the standard definition reflected in Manual for Court Martial and 18 U.S.C. 371, both of which were cited by the defense as properly defining Conspiracy. This would be the case even if the accused committed no overt acts in furtherance of the objective of the enterprise.² A simple comparison of the relevant principles contained in the explanation section in Article 81 Conspiracy charge of the UCMJ, when juxtaposed with how the “enterprise of persons” language comports with the explanation section of Conspiracy under Article 81 of the UCMJ, requires this conclusion:

- i. Explanation for Conspiracy in UCMJ for Article 81: Two or more persons are required to have a conspiracy.

The MCA requires the accused join an enterprise of persons.³ (plural).

² This presumes that one of the other co-conspirators did at least one overt act in furtherance of the Conspiracy.

³ Of import, the government is not alleging that he joined a legal entity, such as a corporation or a government, but rather an enterprise of *persons*.

ii. Explanation in Conspiracy in UCMJ for Article 81: Knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established.

Members of an enterprise of persons, such as al Qaeda in the instant case, often do not know every other member of the enterprise, or their particular connection to the group, but this is clearly not required under conspiracy law.

iii. Explanation in UCMJ: The agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.

The MCA requires the enterprise of persons to *share a common criminal purpose, and also requires that the accused know the purpose of the enterprise and join willfully, with the intent to further the unlawful purpose. To the extent the enterprise of persons shares a common criminal purpose, and the accused knows the purpose and joins with the intent to further the unlawful purpose, this constitutes evidence of an “agreement.”*

g. Of course, as with any conspiracy, the accused’s conduct, as manifested in his overt act(s), can serve as proof of his knowledge of the common criminal purpose of the enterprise, the accused’s agreement with the purpose of the enterprise, and the fact that the accused willfully joined the enterprise (i.e., the conspiracy). Conspiracy law does not require that the accused walk up to Usama bin Laden and the other named co-conspirators, shake their hands, and tell him that he is in agreement with his desire to attack Americans to constitute the “agreement.”

h. The Defense concedes in its filing that Congress, in the Military Commissions Act, altered the traditional notion of Conspiracy, at least inasmuch as it is defined under Article 81 of the Manual for Courts-Martial, when it required the accused himself, and not just any of his co-conspirators, to commit an overt act.⁴ While the defense contends that, in doing so, Congress simply intended to “narrow the definition” of Conspiracy, the defense ignores any notion that this additional requirement of an overt act done by the accused was done to reflect international law principles in regard to criminal enterprise liability.

i. While it is true, as the defense contends, that Congress set out to create a system “based upon” court-martial practice, the defense assertion that this intention leads, *ipso*

⁴ See Def. Motion at 3.

facto, to the conclusion that Conspiracy under the Manual for Military Commissions must have the exact same elements as Conspiracy in the Manual for Courts-Martial ignores the fact that many of the offenses triable by military commissions have unique international law aspects not contemplated by offenses listed in the Manual for Courts-Martial. The Manual for Courts-Martial does not purport to list or codify all of the offenses traditionally triable by military commission or the law of war.

j. One example of how the MCA differs from principles of law in trial by general court-martial, despite being “based upon” court-martial practice, is 10 U.S.C. §950q. Section 950q, like the MCM, states that any person is punishable as a principal if he commits the offense, or by aiding, abetting, counseling, commanding or procuring its commission, or by causing an act to be done which if directly performed by him would be punishable under this chapter. See 10 U.S.C. §§950q(1) & 950q(2)). However, the MCA also adds the principle of liability for a superior commander who, with regard to acts punishable under the MCA, “knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or the punish the perpetrators thereof.” No such theory of liability exists under the Manual for Courts-Martial, despite the fact that Congress “intended” for the MCA to be “based upon” Court Martial practice. Instead, there exists a clear recognition in both the MCA and the MCM of principles of law recognized specifically within a law of war context, based on both contemporary international law in recent international criminal tribunals, as well as common law of war decisions after World War II (to be discussed below). The same may be said for Conspiracy as a violation of the law of war and the “enterprise of persons” liability under the MCM, even if not explicitly spelled out by Congress in the MCA.

k. The defense’s claim that the Secretary of Defense inaccurately stated the elements of Conspiracy, and that Congress could have only meant what it meant in using the same term in the UCMJ and the Federal Criminal Code, misapprehends both international law and the Federal Code. While the defense cites to 18 U.S.C. §371 as an example of a Conspiracy charge under Federal Law with the same elements as Conspiracy under the UCMJ, it fails to mention that there are at least four⁵ other Conspiracy charges under the Federal Code that have different elements based on the fact that they have no overt act requirement at all, for any of the co-conspirators.⁶ For the defense to suggest that Conspiracy has *only* one definition that has been “accurately” described “for years” in the MCM is just flat wrong. Such a statement fails to recognize that conspiracy charges are, at times, specifically tailored to combat the specific ill it is intended to address (i.e. by removing an element such as the overt act when the meeting of the minds should be punished regardless of whether any overt act in furtherance of the agreement takes place). The same can be said for combating conspiracies in a war-time setting.

⁵ See 18 U.S.C §372 Conspiracy to impede or injure any Federal officer in the discharge of his duties; 18 U.S.C. §241 Conspiracy against Civil Rights 1956(h); and drug conspiracies under 21 U.S.C. §846 and 21 U.S.C. §963 for examples of conspiracies with no overt act requirement. *See also* UCMJ Article 81c (9) mandating that these crimes require charging under Article 134 (The Federal Assimilative Crimes Act) as they differ in the elements in comparison to UCMJ Article 81 Conspiracy.

l. In a wartime context, when a nation is engaged in armed conflict with an unlawful international terrorist organization that functions more like an army than a small, readily ascertainable group of individuals, the Secretary of Defense should be given great deference in his choice of elements, providing those elements fit squarely within the principles of Conspiracy law, which they do. The elements the Secretary of Defense set forth in the Manual for Military Commissions are consistent with the Military Commissions Act, consistent with military activities the Secretary is charged with overseeing⁷ (which includes prosecuting a war against an international terrorist organization), and consistent with theories of liability under international law.

m. Examining the applicable principles of law and the inherent characteristics of many crimes perpetrated during wartime led the International Criminal Tribunal for the Former Yugoslavia (ICTY) to take the exact approach the Secretary of Defense did in finding that common criminal enterprise liability was *implicit*, even if not *explicit*, in its charter statute:

i....[t]he Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design.”

See The Prosecutor v. Dusko Tadic, Opinion and Judgment, Case No.: IT-94-1-T, Appeals Chamber, 15 July 1999, ¶189 International Criminal Tribunal for the Former Yugoslavia.

n. In determining that the charter statute for the ICTY contained *implicit* theories of liability, the *Tadic Court*, much like the Secretary of Defense did in the MCM, considered the very nature of international crimes committed during wartime:

i. ...it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet⁸ in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur *where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons.*

ii. The above interpretation is not only dictated by the object and purpose of the Statute but is *also warranted by the very nature of many*

⁷ The Secretary of Defense has discretion to establish procedures are consistent with military activities. See 10 U.S.C. §949a(a).

⁸ Although the two theories are similar, acting in pursuance to a common plan or design liability is not tantamount to aiding and abetting liability. For a full discussion on the difference between the two theories of liability, please see Tadic at ¶229.

international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: *the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design.* Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question.

iii...However, the Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (*actus reus* and *mens rea*) of this category of collective criminality. *To identify these elements one must turn to customary international law.* Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation⁹.

Id. at ¶193-194 (emphasis added).

o. There is admittedly a distinction between the Tadic decision and Conspiracy section in the Military Commissions Act. The Tadic court found liability for the ultimate substantive offenses because of sharing a common criminal purpose with others in the enterprise, whereas in the Military Commissions Act, the Conspiracy is the ultimate substantive act. Id. However, based on the arguments presented above, it is clear that the theory of prosecution is directly akin to conspiracy and joint enterprise liability as defined under the MCA and the MCM. Tadic at ¶206-213 citing The Essen Lynching Case The Trial of Erich Heyer and Six Others, British Military Court for the Trial of War Criminals Volume I, 88 (United Nations War Crimes Commission, 1947).

p. From a practical perspective this is a matter of little import. It appears that Conspiracy, as listed in the MCM merely reflects the more traditional approach which practitioners before Military Commissions are accustomed to (as well as others in common law jurisdictions). While there may be some differences, the underlying goal that is common to these offenses is the punishment of conspiring with others to effect a criminal objective when coupled with some action by the accused that advances that objective. ICTY's required proof of a "common plan" for criminal enterprise convictions is strikingly similar to the proof required for the "agreement" element in establishing a conspiracy. See Richard P. Barrett and Laura E. Little, Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. at 42.

⁹ For a full examination of the cases and international legislation considered by the Tadic Court in determining that criminal liability for joining an enterprise of persons was implicit in its charter statute, despite not being explicit in its terms, see Tadic, Opinion and Judgment, ¶189-228.

q. Because of the realities of waging war against these common criminal enterprises, their leaders may be killed, detained, go into hiding or blend back into the civilian population. As time goes on, people may start to fight only for the group itself, with little or no knowledge of the individuals who originally set in motion the common criminal purpose of the enterprise, or even the individuals who are now in command of the enterprise. There may be scenarios where an individual never even personally meets other members of the group, yet still joins the enterprise and furthers its purpose. To prove what specific people an accused “agreed” with may be difficult despite overwhelming proof of the accused’s involvement in the common criminal enterprise.

r. Here, the accused is charged with conspiring with Usama bin Laden, Ayman al Zawahiri, and various other members and associates of the al Qaeda organization, known and unknown. The evidence at trial will show that these are two of the individuals who are the leaders and policymakers for the international terrorist enterprise known as al Qaeda, and who set forth al Qaeda’s purpose to attack American civilians and service members worldwide in violation of several of the offenses authorized for trial by military commissions. The facts in the instant case will support, equally, that the accused conspired with the named co-conspirators as well as joined an enterprise of persons with a common criminal purpose due to his familiarity with the stated intentions of Usama bin Laden and other al Qaeda leaders, as well as al Qaeda’s criminal purposes as an enterprise. However, the issue of whether the enterprise theory of liability is a valid theory under conspiracy law, in a law of war context, must also consider the future scenarios where establishing proof of an agreement between a relatively small group of readily identifiable individuals may be difficult, despite strong proof that an individual joined an enterprise of persons who shared a common criminal purpose.

s. In a wartime setting, whether it is the threat the United States faces from al Qaeda now, or other criminal enterprises in the future, it is groups of individuals acting together and sharing a common criminal purpose to commit acts in violation of the laws of war that can exact the most damage, and who most threaten the underlying principles of the laws of war. These groups as a whole are more dangerous than the sum of their individual participants, and to believe that knowing and willful participation in such a group falls outside of the realm of what any conspiracy law seeks to punish is to misunderstand conspiracy law in its entirety.

t. The defense’s claim that the accused could be convicted of conspiracy based exclusively on the past conduct of others, without the government demonstrating that the accused participated in any agreement whatsoever to commit any actual offense after June/July 2002 is simply a misstatement of the law. While the fact that an enterprise had committed certain offenses in the past may help establish the common criminal purpose of the enterprise, and may also help establish the accused’s knowledge¹⁰ of the common criminal purpose of the enterprise, the government must still further prove, beyond a reasonable doubt, that the accused knew of the common criminal purpose of the enterprise, and that he joined the enterprise willfully, with the intention to further the goals of the common criminal enterprise, and that he also committed an overt act in order

¹⁰ To the extent the accused was aware that this enterprise of persons had committed the attacks.

to accomplish some objective or purpose of the enterprise. While such proof logically leads to the legal and factual conclusion that he “agreed” with the enterprise of persons under either theory of liability, the burden the Prosecution has in the Conspiracy charge under the enterprise theory of liability is a far cry from “convicting the accused based exclusively on the past conduct of others, without the government demonstrating that the accused participated in any agreement whatsoever to commit any actual offense.”

t. It is important to note that the prosecution is **not** alleging that the MCA authorizes trial for a separate offense of joining a common criminal enterprise, but rather asserts only that knowingly and willfully joining a common criminal enterprise is a valid theory of liability which one could be found under the express terms of the MCA, as well as under the traditional offense of Conspiracy. Membership in such a group is **not** sufficient, on its own, to establish guilt under the Conspiracy charge. The common criminal enterprise is, of course, **not** a status crime. The common criminal enterprise elements of the Conspiracy charge clearly require that the accused know of the common criminal purpose of the enterprise of persons, that he join it with the intent to further the unlawful purpose of the enterprise, and that he knowingly commit an overt act in order to accomplish some objective or purpose of the enterprise. All of these requirements square with traditional conspiracy doctrine, as well as the pervading desire of international law to assign individual responsibility for crimes committed of the most serious magnitude.

The Language cited by the Defense in Charge III is not Surplusage

u. The defense asks that allegedly surplus language relating to an “enterprise” be stricken because it creates a risk that Mr. Khadr will be convicted of conspiracy without the government having actually proven the offense. While the Prosecution has shown these concerns to be unfounded, the challenged language in the charge sheet is simply not surplusage. Surplusage is defined, at least in part, by the discussion under R.M.C. 906(b)(3), in that it includes irrelevant or redundant details or aggravating circumstances which are not necessary to enhance the maximum authorized punishment or to explain the essential facts of the case.

v. The Defense has moved this Military Commission to strike the following allegedly surplus language from Charge III: “and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania, the attack against the USS Cole in October 2000, the attacks on the United States”; and “enterprise sharing a common criminal purpose known to the accused.”

w. All of the details cited in the Prosecution’s charge are relevant, in that they either describe valid elements of Conspiracy as set forth by the Secretary of Defense, or explain the essential facts of the case. The language in the Prosecution’s charges in the instant case, specifically in regard to the enterprise language, is per se relevant as the language represents valid elements of the Conspiracy charge. The language “Al Qaeda, founded by Usama bin Laden in or about 1989” serves to allege the enterprise of persons the government is alleging the accused joined, which also happens to have been founded by

the Usama bin Laden who is also the first named co-conspirator. The three attacks cited by the Prosecution within the Conspiracy charge serve to show the existence of a Conspiracy¹¹ to Attack Civilians and Civilian Objects (for the attacks on the embassies and the attacks on the World Trade Center); Conspiracy to Commit Murder in Violation of the Law of War and Conspiracy to Destroy Property in Violation of the Law of War (all three attacks listed) and Conspiracy to Commit Terrorism (all three attacks listed). The three attacks cited in the charge also help explain the essential facts of the case in that the facts also establish the existence of an armed conflict between the United States and the international terrorist organization al Qaeda; a conflict which the laws of armed conflict govern. All of the aforementioned reasons are directly relevant to the underlying offenses and are all facts pertinent to the criminal conduct alleged in the charges. Therefore, the language does not constitute surplusage. Accordingly, the Defense motion should be denied.

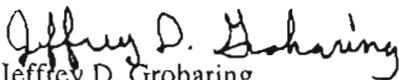
6. Oral Argument: In view of the authorities cited above, which directly, and conclusively, address the issues presented, the Prosecution believes that the motion to dismiss should be readily denied. Should the Military Judge orders the parties to present oral argument, the Government is prepared to do so.

7. Witnesses and Evidence: None.

8. Certificate of Conference: The Defense conferred with the Prosecution regarding the requested relief and the Prosecution objected.

9. Additional Information: None.

10. Submitted by:


Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

Clayton Trivett, Jr.
Assistant Prosecutor
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John F. Murphy
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Assistant U.S. Attorney

¹¹ The existence of a Conspiracy under both theories of liability "an agreement between one or more persons...and an enterprise of persons who shared a common criminal purpose."

UNITED STATES v. KHADR

C.M.C.R. Case No. 08-003

**APPENDIX
TO APPELLANT'S BRIEF**

EXHIBIT H

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Motion

to Strike Surplus Language
from Charge III

11 January 2008

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge's 28 November 2007 scheduling order.

2. **Relief Requested:** The Defense respectfully requests that this Military Commission strike the following surplus language from Charge III, alleging conspiracy in violation of Section 950v(b)(28) of the Military Commissions Act of 2006 ("MCA"):

and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States;

and

and enterprise sharing a common criminal purpose known to the accused

3. **Overview:**

a. The MCA proscribes the offense of "conspiracy." MCA § 950v(b)(28). The term conspiracy has a well-established meaning and the terms of the offense are clearly set forth in the statute. In short, under the MCA, "conspiracy" consists of an agreement to commit an offense or offenses and an overt act done by the accused in furtherance thereof. *See id.* Nonetheless, in the Manual for Military Commissions (MMC), the Secretary of Defense has purported to define "conspiracy" to include "joining an enterprise of persons sharing a common criminal purpose." Whatever else it is, this is not conspiracy.

b. Based on this expanded and erroneous definition of the term conspiracy, the government has alleged, in support of Charge III, not only that Mr. Khadr "did conspire and agree" with various persons to commit a number of offenses triable by military commission, but that he "joined an enterprise of persons . . . sharing a common criminal purpose" as well. Though lacking in the requisite degree of particularity regarding the object offenses, language concerning an "agreement" appears to state an offense.¹ The additional language (relating to an

¹ This matter is the subject of a separate motion for a bill of particulars relating to the object offenses, filed concurrently herewith.

“enterprise of persons” and the “common criminal purpose” thereof) is based on the Secretary’s *ultra vires* attempt to expand the definition of the term “conspiracy” to include conduct not punishable as such. Accordingly, this language should be stricken under RMC 906(b)(3).

4. **Burdens of Proof and Persuasion:** This motion presents a question of law. As it pertains to the Military Commission’s subject matter jurisdiction over the conduct alleged in Charge III, the burden of persuasion is on the government.

5. **Facts:** The following facts relating to the procedural history of the case are germane:

a. The President signed the MCA into law on October 17, 2006. P.L. 109-366, 120 Stat. 2600.

b. The Secretary of Defense issued the MMC on or about 18 January 2007.

c. Charges were initially sworn against Mr. Khadr on 2 February 2007 and referred for trial by this Military Commission on 24 April 2007. (*See* AE 001.)

6. **Argument: The Military Commission should strike language from Charge III alleging that Mr. Khadr joined an “enterprise of persons sharing a common criminal purpose” as surplusage**

a. **Conspiracy does not mean an “enterprise of persons sharing a common criminal purpose” and the Secretary’s statement to the contrary is of no effect**

(1) The MCA proscribes the offense of “conspiracy.” MCA § 950v(b)(28) provides:

Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished . . . as a military commission under this chapter may direct.

(2) Aside from narrowing the scope of the offense (as discussed below), the MCA definition of conspiracy tracks the analogous provision of the Uniform Code of Military Justice (UCMJ). Article 81 thereof provides:

Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

10 U.S.C.S. § 881(a) (2007).

(3) The term “conspiracy” is not new, either to military law or the criminal law generally. It is well understood as “agreement to violate the law.” *United States v.*

Blankenship, 970 F.2d 283, 285 (7th Cir. 1992). As stated by the Supreme Court, “[t]he gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *United States v. Falcone*, 311 U.S. 205, 207 (1940). “The essential element of the offense of conspiracy is that there is an agreement with one or more persons to commit a criminal act.” *United States v. Jones*, 36 M.J. 778, 779 (A.C.M.R. 1993); *see also United States v. Pretlow*, 13 M.J. 85, 88 (C.M.A. 1982) (“Conspiracy is an offense requiring an agreement between two or more persons to commit *another* offense recognized by the Uniform Code of Military Justice and the doing of an act to effect the agreement.”).

(4) There is no reason to believe that in using the term “conspiracy” in MCA § 950v(b)(28), Congress meant something other than what it meant in using the same term in the UCMJ (or the federal criminal code). *Cf.* 18 U.S.C.S § 371 (2007). That conclusion is reinforced here by three specific considerations: First, aside from mandating that the overt act be performed by the accused, Congress defined the offense the same way it defined it in the UCMJ: an “agreement” and an over act done in furtherance of the agreement. Second, Congress set out to create a system “based upon” court-martial practice. *See* MCA § 948b(c). Third, in enacting the MCA, Congress amended the provision of the UCMJ punishing conspiracy to make it an offense for any person subject to the code to conspire with any other person (presumably, given the context of the amendment, an unlawful enemy combatant) to commit an offense under the law of war. *See* MCA § 4 (amending 10 U.S.C. § 881 to include new subsection (b)). There is no reason to think that Congress would have intended the anomalous result of a situation in which two individuals could be found guilty of different substantive conduct as part of the same conspiracy.

(5) The elements of the offense of conspiracy are (and have been for years) accurately described in the Manual for Courts-Martial (MCM):

(1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

See ¶ 5b, Part IV, MCM (2005).

(6) Notwithstanding the plain and unambiguous meaning of the word “conspiracy,” and the language of the statute, in setting forth the elements of the offense in the MMC, the Secretary of Defense describes conspiracy as follows:

(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission *or otherwise joined an enterprise of persons who shared a common criminal purpose that*

involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(2) The accused knew the unlawful purpose of the agreement *or the common criminal purpose of the enterprise* and joined willfully, that is, with the intent to further the unlawful purpose; and

(3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement *or enterprise*.

See ¶ 5(28), Part IV, MMC (2007) (emphasis added).

(7) The highlighted language is not an accurate statement of the elements of the offense of conspiracy. Whatever else joining an “enterprise of persons who shared a common criminal purpose” may be, it is not the offense of conspiracy.²

(8) The Secretary may not make it so by fiat. In issuing the MMC, the Secretary cannot contradict the MCA anymore than the President can contradict the UCMJ in issuing the MCM. *Compare* MCA § 949a(a) with 10 U.S.C. § 836(a). Military courts have long held that the President cannot, through regulation, trump the provisions of the UCMJ. *See generally* *United States v. Gonzalez*, 42 M.J. 469, 474 (1995); *United States v. Mance*, 26 M.J. 244, 252 (1988); *United States v. Pritt*, 54 M.J. 47, 50 (C.A.A.F. 2000); *United States v. McFadden*, 19 U.S.C.M.A. 412, 42 C.M.R. 14 (1970); *United States v. Johnpier*, 12 U.S.C.M.A. 90, 30 C.M.R. 90 (1961); *United States v. Ware*, 1 M.J. 282, 285 n.11 (C.M.A. 1976).

(9) As with the MCM in the court-martial setting, the MMC cannot be “contrary to or inconsistent with” the MCA. *See* MCA § 949a(a). To the extent the MMC articulates a definition of “conspiracy” inconsistent with the plain and unambiguous meaning of the language of the statute, the statute must prevail. The “elements” of conspiracy are what they are as stated by Congress in MCA § 950v(b)(28): “agreement” to commit an offense or offenses and an “overt act” in furtherance thereof. The Secretary’s attempt to enlarge the plain meaning of the word “conspiracy” by regulation must therefore fail.

(10) The government can be expected to defend the MMC provision based on MCA § 949a(a)’s general delegation of rule-making authority because Congress included the term “elements” in that section. Such reliance would be misplaced. It goes without saying that the Constitution vests “all legislative Powers” in Congress. *See* U.S. Const. art. I, § 1. This is a power Congress may not delegate. *See* *Loving v. United States*, 517 U.S. 748, 772 (1996) (“Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.”). And Congress could not, consistent with the Constitution, provide the Secretary with power to criminalize conduct as “conspiracy” that is simply not embraced by that term.

² *See Agency Holding v. Malley-Duff*, 483 U.S. 143 (1987) (stating that the legislative history reveals that RICO imported concepts of liability into the criminal law from anti-trust law). “RICO is designed to remedy injury caused by a pattern of racketeering, and “[c]oncepts such as RICO “enterprise” and “pattern of racketeering activity” were simply unknown to common law.” *Id.* At 150.

(11) This, however, is a Constitutional issue that is easily avoided and should be avoided by this Commission. *See Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (“an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.”). In view of the accepted practice whereby the President issues a manual describing the elements of offenses under the UCMJ (subject to the ultimate authority of the code), there is no reason to presume that Congress intended anything other than to allow for a similar practice in military commissions, i.e., Congress anticipated that the Secretary would issue a manual that *accurately* stated the elements of the offenses prescribed by Congress. That the Secretary inaccurately described those elements does not mean that his error becomes law.

(12) There is no reason to believe that Congress intended to widen the scope of conspiracy to include “enterprise” crimes. Indeed, the evidence is to quite the contrary. In proscribing conspiracy under the MCA, Congress actually *narrowed* the scope of liability under the statute. MCA § 950v(b)(28) mandates that in order to be guilty of conspiracy, the *accused* must commit an overt act in furtherance of the agreement. In contrast, Article 81 of the UCMJ allows an accused to be convicted based on the overt act of a co-conspirator. *See* 10 U.S.C.S § 881(a). Congress’ *narrowing* of the definition of conspiracy to focus on the conduct of the accused significantly undermines any suggestion that Congress intended to widen the scope of liability under the statute based on the acts of others.

b. Surplus language relating to an “enterprise” should be stricken because it creates a risk that Mr. Khadr will be convicted of conspiracy without the government having actually proven the offense

(1) Based on the Secretary’s *ultra vires* definition of “conspiracy,” in the sole specification of Charge III, the government has alleged that in addition to conspiring with named individuals to commit a number of object offenses, Mr. Khadr did the following:

willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States; said . . . enterprise sharing a common criminal purpose known to the accused[.]

(2) This language is surplusage and should be stricken under R.M.C. 906(b)(3). The Discussion accompanying that provision states that “[s]urplusage may include irrelevant or redundant details or aggravating circumstances which are not necessary to enhance the maximum authorized punishment or to explain the essential facts of the offense.” This accurately describes the “enterprise” language in Charge III. But it is not merely irrelevant. Its presence increases the likelihood that Mr. Khadr will be erroneously convicted of “conspiracy” without the government having actually established the elements of the offense.

(3) While Mr. Khadr’s joining of an “enterprise” with a “common criminal purpose” may in some way describe the government’s *evidence* in support of the specification of

Charge III, it does not mean that these are the “elements” of the offense of conspiracy. And proof thereof cannot relieve the government of its burden to prove that the accused entered into an agreement to commit some particular offense or offenses. Yet this is the likely effect of this language.

(4) It is not difficult to see how this might happen. Mr. Khadr is alleged to have conspired with certain named individuals and joined the “enterprise” in June and July of 2002. It is alleged that the “enterprise” engaged in certain conduct before Mr. Khadr joined. As an initial matter, Mr. Khadr obviously could not have conspired with the named individuals in 2002 to commit offenses in 1998, 2000, and 2001 (i.e., in the past). However, based on nothing more than evidence that the “enterprise” was responsible for those offenses (which generally constitute, according to the MCA, the object offenses of “attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism”), the members could infer that the “enterprise” had a “criminal purpose” to do similar things in the future. In the view of the MMC, this would be sufficient, even if the government failed to offer a shred of evidence to show that Mr. Khadr conspired to commit any particular offense or offenses following his “joining” of the “enterprise.” Thus, Mr. Khadr could be convicted of “conspiracy” based exclusively on the past conduct of others, without the government demonstrating that Mr. Khadr participated in any agreement whatsoever to commit any actual offense after June/July of 2002. In such circumstances, he would not be guilty of conspiracy, only associating with an “enterprise” that had committed certain offenses in the past. Whatever this conduct may be described as, it is most certainly not the offense of “conspiracy” to commit a particular offense or offenses under the MCA, and there is no reason to believe that Congress intended to proscribe such conduct in MCA § 950v(b)(28).

c. Conclusion

(1) In the sole specification of Charge III, the government alleges that Mr. Khadr conspired with certain named individuals to commit various object offenses. Either the government’s evidence will support the charge or it will not. The government cannot relieve itself of the obligation to establish the elements of the offense of “conspiracy” by redefining the term to embrace a distinct offense of “joining a criminal enterprise” and proving that offense instead. The surplus language identified herein should therefore be stricken from Charge III’s specification.

7. Oral Argument: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h). Oral argument will assist the Court in understanding and resolving the complex legal issues presented by this motion.

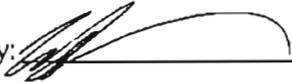
8. Witnesses and Evidence:

A. Charge Sheet.

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

10. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

11. **Attachment:** None.

By:  _____

William Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

UNITED STATES v. KHADR

C.M.C.R. Case No. 08-003

**APPENDIX
TO APPELLANT'S BRIEF**

EXHIBIT I

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khali"

GOVERNMENT'S RESPONSE

To the Defense's Motion to
Dismiss Charge III
(Conspiracy)

14 December 2007

1. **Timeliness:** This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 28 November 2007.

2. **Relief Requested:** The Government respectfully submits that the Defense's motion to dismiss charge III, conspiracy in violation of 10 U.S.C. § 950v(b)(28) ("Mot. to Dismiss III"), should be denied.

3. **Overview:**

a. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court divided over whether the President could, by executive order, establish a military commission to try the offense of conspiracy. Four justices would have held that conspiracy was not so triable. *See id.* at 2780-81 (plurality op.). Three justices would have said it was. *See id.* at 2834 (Thomas, J., dissenting, joined by Scalia and Alito, JJ.). Even Justice Stevens's plurality opinion, however, emphasized that it was for Congress to define such offenses. *See id.* at 2779 (plurality op.) (emphasizing that "there is no suggestion that Congress, in exercise of its constitutional authority to 'define and punish . . . Offences against the Law of Nations,' U.S. Const., Art. I, § 8, cl. 10, positively identified 'conspiracy' as a war crime."). Justice Kennedy, who did not join the plurality, agreed on that point as well. *See id.* at 2809 (Kennedy, J., concurring) ("Congress, not the Court, is the branch in the better position to undertake the sensitive task" of determining whether conspiracy is a war crime) (internal quotation marks omitted).

b. In the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA"), Congress responded to *Hamdan* by exercising its constitutional power to "define and punish . . . Offences against the Law of Nations," U.S. Const., art. I, § 8, cl. 10, and making conspiracy triable under the MCA. *See* 10 U.S.C. § 950v(b)(28). In enacting the MCA, Congress exercised its constitutional authority to clarify that conspiracy does violate the law of war is in fact a violation of international law. *See* 10 U.S.C. § 950p(a) ("The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission."). That determination conclusively settles any question over the

viability of the conspiracy charge against Khadr. Neither the Supreme Court's decision in *Hamdan* nor international law can alter Congress's determination that conspiracy is, and was at the time of the incidents charged against Khadr, a violation of the law of war.

c. Neither the Constitution nor international law imposes any ex post facto bar to the application of the MCA to offenses Khadr committed prior to its enactment. The constitutional prohibition on ex post facto laws does not apply *vis-à-vis* alien enemy combatants detained at Guantanamo Bay, Cuba. Even if Khadr could claim the protection of the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, the MCA merely codifies then-existing international law that was already applicable to Khadr at the time of his offenses. *See* 10 U.S.C. § 950p(a). Accordingly, no new criminal liability has been retroactively imposed on the accused. In addition, because Congress has unambiguously made clear its intent that the MCA is to have retroactive effect, any principles of international law to the contrary are of no force. Accordingly, neither the Constitution nor international law imposes any ex post facto bar to the application of the MCA to offenses Khadr committed prior to its enactment, and this court therefore has jurisdiction to try Khadr for the offense of conspiracy in violation of 10 U.S.C. § 950v(b)(28). The motion to dismiss should therefore be denied.

4. Burden and Persuasion: The Prosecution bears the burden of demonstrating the factual basis for jurisdiction by a preponderance of the evidence. *See* Rule for Military Commissions ("RMC") 905(c)(2)(B).

5. Facts:

a. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan. During this period, he paid numerous visits to and at times lived at Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and personally met many senior al Qaeda leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and Saif al Adel. The accused also visited various al Qaeda training camps and guest houses. *See* AE 17, attachment 2.

b. On 11 September 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy. *See The 9/11 Commission Report, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004).*

c. After al Qaeda's terrorist attacks on 11 September 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. *See* AE 17, attachment 3.

- d. Following this training the accused received an additional month of training on landmines. Soon thereafter, he joined a group of al Qaeda operatives and converted landmines into improvised explosive devices (“IEDs”) capable of remote detonation.
- e. In or about June 2002, the accused conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
- f. In or about July 2002, the accused planted improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
- g. On or about 27 July 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan. *See* AE 17, attachment 4.
- h. Before the firefight had begun, U.S. forces approached the compound and asked the accused and the other occupants to surrender. *See id.*, attachment 5.
- i. The accused and three other individuals decided not to surrender and instead “vowed to die fighting.” *Id.*
- j. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. *Id.*
- k. Near the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer. *See id.*, attachment 6. American forces subsequently shot and wounded the accused. After his capture, American medics administered life-saving medical treatment to the accused.
- l. Approximately one month later, U.S. forces discovered a videotape at the compound where the accused was captured. The videotape shows the accused and other al Qaeda operatives constructing and planting improvised explosive devices while wearing civilian attire. *See id.*, attachment 4.
- m. During an interview on 5 November 2002, the accused described what he and the other al Qaeda operatives were doing in the video. *Id.*, attachment 1.
- n. When asked on 17 September 2002 why he helped the men construct the explosives, the accused responded “to kill U.S. forces.” *Id.*, attachment 6.
- o. The accused related during the same interview that he had been told the U.S. wanted to go to war against Islam. And for that reason he assisted in building and deploying the explosives, and later he threw a grenade at an American. *Id.*
- p. During an interrogation on 4 December 2002, the accused agreed that his use of land mines as roadside bombs against American forces was also of a terrorist nature and that he is a terrorist trained by al Qaeda. *Id.*, attachment 3.

q. The accused further related that he had been told about a \$1,500 reward being placed on the head of each American killed, and when asked how he felt about the reward system, he replied: "I wanted to kill a lot of American[s] to get lots of money." *Id.*, attachment 8. During a 16 December 2002 interview, the accused stated that a "jihad" is occurring in Afghanistan, and if non-believers enter a Muslim country, then every Muslim in the world should fight the non-believers. *Id.*, attachment 9.

r. The accused was designated as an enemy combatant as a result of a Combatant Status Review Tribunal ("CSRT") conducted on 7 September 2004. *See* AE 11. The CSRT also found that the accused was a member of, or affiliated with, al Qaeda. *Id.*

s. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. After receiving the Legal Adviser's formal "Pretrial Advice" that Khadr is an "unlawful enemy combatant" and thus that the military commission had jurisdiction to try the accused, those charges were referred for trial by military commission on 24 April 2007.

6. Discussion:

a. Congress has unambiguously exercised its authority under Art. I, § 8, cl. 10 of the Constitution to "define and punish" conspiracy as an "Offense[] against the Law of Nations."

i. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court divided over whether the President could, by executive order, establish a military commission to try the offense of conspiracy. Four justices would have held that conspiracy was not so triable. *See id.* at 2780-81 (plurality op.). Three justices would have said it was. *See id.* at 2834 (Thomas, J., dissenting, joined by Scalia and Alito, JJ.). Even Justice Stevens's plurality opinion, however, emphasized that it was for Congress to define such offenses. *See id.* at 2779 (plurality op.) (emphasizing that "there is no suggestion that Congress, in exercise of its constitutional authority to 'define and punish . . . Offences against the Law of Nations,' U.S. Const., Art. I, § 8, cl. 10, positively identified 'conspiracy' as a war crime."). Justice Kennedy, who did not join the plurality, agreed on that point as well. *See id.* at 2809 (Kennedy, J., concurring) ("Congress, not the Court, is the branch in the better position to undertake the sensitive task" of determining whether conspiracy is a war crime) (internal quotation marks omitted).

ii. In direct response to *Hamdan's* holding that congressionally authorized military commissions may be used to punish violations of the law of war, Congress enacted the MCA. The MCA specifically authorized military commissions to try alien unlawful enemy combatants for violations of the law of war. *See* 10 U.S.C. § 948b(a) ("This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.").

iii. In the MCA, Congress codified numerous violations of the law of war, including the offense of conspiring to violate other substantive offenses codified by the MCA. *See id.* § 950v(b)(28). Congress’s intent to codify only those offenses already triable by military commission was clear: “The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.” *Id.* § 950p(a).

iv. The Constitution expressly authorizes Congress to define and punish violations of the law of war. *See* U.S. Const. art. I, § 8, cl. 10 (“The Congress shall have Power . . . [t]o define and punish . . . ‘Offense[] against the Law of Nations . . .’”). This authority was recognized by the plurality opinion in *Hamdan*. There, a plurality of the justices would have held that *Hamdan* could not be tried for conspiracy before a military commission created by military order because conspiracy was not a recognized violation of the law of war. *See* 126 S. Ct. at 2785 (plurality op.). In so holding, the plurality emphasized Congress’s at-that-time unexercised authority to define conspiracy as a violation of the law of war: “There is no suggestion that Congress has, in exercise of its constitutional authority to ‘define and punish . . . Offences against the Law of Nations,’ U.S. Const., Art. I, § 8, cl. 10, positively identified ‘conspiracy’ as a war crime.” *Id.* at 2779 (plurality op.) (alteration in original). The plurality further noted that numerous provisions of U.S. law support the proposition that Congress is authorized by the Constitution to define violations of the law of war, including 10 U.S.C. § 904 (authorizing the crime of “aiding the enemy” to be triable by military commission), 10 U.S.C. § 906 (same for spying) and 18 U.S.C. § 2441 (defining various war crimes and grave breaches of Common Article 3 of the Geneva Conventions). *See Hamdan*, 126 S. Ct. at 2779 n.33 (plurality op.); *see also id.* at 2780 (plurality op.) (violations of the law of war may be defined by statute).

v. In the MCA, Congress exercised its clear constitutional authority to define and punish violations of the law of war. Specifically, in a section of the MCA entitled “Crimes triable by military commissions,” Congress defined those offenses triable by military commission, which, per *Hamdan*, are those offenses that are violations of the law of war. *See Hamdan*, 126 S. Ct. at 2777. Further, Congress made clear in section 950p(a) that the MCA codified only offenses already triable by military commission under the common law of war. Accordingly, conspiracy, which is among the offenses codified by the MCA, is, and was at the time of *Khadr*’s offense, a violation of the law of war.

b. Even before enactment of the MCA, conspiracy was a violation of the law of war.

i. The Defense relies heavily upon the plurality’s analysis in *Hamdan* as to whether conspiracy was a violation of the common law of war. As discussed above, the plurality’s view depended upon the premise that the Court was proceeding in the absence of congressional action. In any event, Justice Kennedy pointedly declined to join the plurality’s reasoning, and it is not binding on this commission. *See Texas v. Brown*, 460 U.S. 730, 737 (1983) (stating that a plurality view that does not command a majority is

not binding precedent). Moreover, the plurality's view should not be followed because it is not an accurate description of the law of war. Individuals have been tried before military commissions for conspiracy to commit war crimes throughout this Nation's history. The Nazi saboteurs in *Ex parte Quirin*, 317 U.S. 1 (1942), for example, were charged with conspiracy, *see id.* at 23, as was another Nazi saboteur whose convictions were subsequently upheld, *see Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957). Learned treatises on the law of war further emphasize that conspiracy has long been established as a violation of the law of war. *See generally* Winthrop, *Military Law and Precedents* 839 & n.5 (1895, 2d ed. 1920) (listing conspiracy offenses prosecuted by military commissions); Charles Roscoe Howland, *Digest of Opinions of the Judge Advocates General of the Army* 1071 (1912) (noting that conspiracy "to violate the laws of war by destroying life or property in aid of the enemy" was an offense against the law of war that was "punished by military commissions" throughout the Civil War).

ii. The United States has long recognized that

to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war.

Military Commissions, 11 Op. Atty. Gen. 297, 312 (1865). That is, unlawful enemy combatants, such as Khadr, violate the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the "killing [and] disabling . . . of peaceable citizens or soldiers." Winthrop, *Military Law and Precedents* 784; *see also* 11 Op. Atty. Gen., at 314 ("A bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war").

iii. Similarly, the Department of the Army formally recognized the offense of conspiracy to commit war crimes in 1956. U.S. Army's Field Manual 27-10, The Law of Land Warfare, Chapter 8, para. 500 (18 July 1956). It clearly and succinctly states that "Conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable." *Id.* Based on this language alone, the *ex post facto* argument alluded to at times by the Defense is nullified.

These long-standing practices suffice to defeat the Defense's claim that conspiracy is not triable by military commissions.

c. **After enactment of the MCA, there can be no doubt but that conspiracy is a violation of the law of war.**

i. The *Hamdan* plurality's determination that conspiracy is not a violation of the law of war was expressly predicated on the absence of congressional action to the contrary. Now that Congress has acted, *see* 10 U.S.C. § 950v(b)(28) (making conspiracy a crime triable by military commission, which, per *Hamdan*, tries violations of the law of war), there is no doubt that conspiracy is in fact, and was at the time of the underlying events in this case, *see id.* § 950p(a) (stating that the MCA codifies only existing offenses), a violation of the law of war.

ii. As an initial proposition, we note that Congress is not bound by international law. *See, e.g., TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) ("Never does customary international law prevail over a contrary federal statute."); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) (explaining that international law is relevant to U.S. courts "where there is no treaty and no controlling executive or legislative act or judicial decision"). That the Supreme Court decided *Hamdan* prior to Congress clarifying conspiracy's status in international law is irrelevant. As the Supreme Court acknowledged in that case, it is for Congress to define "Offenses against the Law of Nations." In *Hamdan*, the Supreme Court did not have the benefit of express congressional legislation on the status of the offense of conspiracy as a matter of international law and whether it in fact was an "Offense[] against the Law of Nations." However, the Supreme Court clearly acknowledged that violations of the law of war may be defined by statute. *See Hamdan*, 126 S. Ct. at 2779 (plurality op.) ("There is no suggestion that Congress has, in exercise of its constitutional authority to 'define and punish . . . Offences against the Law of Nations,' U.S. Const., Art. I, § 8, cl. 10, positively identified 'conspiracy' as a war crime.") (alteration in original). Now that Congress has codified several violations of the law of war, including conspiracy, the Supreme Court's determination to the contrary in *Hamdan* is no longer authoritative.

iii. Nor does the canon of construction articulated by *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), stand to the contrary. There, the Supreme Court held that an ambiguous statute should be construed, to the extent possible, not to conflict with international law. *See id.* at 118. As the Second Circuit recently explained, however, "[t]his canon of statutory interpretation . . . does not apply where the statute at issue admits no relevant ambiguity." *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 235 (2d Cir. 2005). Accordingly, because Congress has defined conspiracy as a violation of the law of war, its status under international law more generally is not relevant.

iv. Here, Congress enacted the MCA in direct response to the Supreme Court's decision in *Hamdan*. Following the invitation of the Court in *Hamdan*, Congress expressly provided under the MCA that conspiracy be triable by military commission. Accordingly, Congress has clearly legislated on the status of conspiracy as a violation of international law and, pursuant to its Article I authority to "define and punish . . . Offences against the Law of Nations," determined that conspiracy is a violation of the

law of war, *Hamdan* notwithstanding. That determination must stand, without regard to any analysis of customary international law. See *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) (“Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency.”); see also *Oliva*, 433 F.3d at 233 (“[W]hile courts are ‘bound by the law of nations which is a part of the law of the land,’ Congress may apply a different rule ‘by passing an act for the purpose.’”) (quoting *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815)). Accordingly, this court has jurisdiction to try Khadr on the charge of conspiracy, as codified by the MCA.

d. Neither the Constitution nor international law imposes any ex post facto bar on the application of the MCA to offenses Khadr committed prior to its enactment.

i. Although the Constitution provides that “[n]o . . . ex post facto Law shall be passed,” U.S. Const. art. I, § 9, cl. 3, it does not ensure the legal rights of alien enemy combatants detained in foreign territory. See *Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950). Pursuant to this principle, the U.S. Court of Appeals for the D.C. Circuit has unambiguously held that the Constitution does not apply to alien enemy combatants held outside United States territory, including those held at Guantanamo Bay, such as Khadr. See *Boumediene v. Bush*, 476 F.3d 981, 992 (D.C. Cir.), cert. granted, 127 S. Ct. 3078 (2007); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). The D.C. Circuit has direct review over this court, see 10 U.S.C. § 950g, and its decisions are binding. Cf. *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). This court need proceed no further to reject Khadr’s claim that trying him on charges of conspiracy violates the Ex Post Facto Clause.

ii. *Eisentrager*’s holding that alien enemy combatants detained outside the United States do not enjoy constitutional protections is not confined to particular clauses of the Constitution, such as the Fifth Amendment. See 339 U.S. at 783-85. Rather, as the Court of Appeals recognized in *Boumediene*, *Eisentrager* stands for the broader proposition that limitations on Congress set forth elsewhere in the Constitution do not apply *vis-à-vis* alien enemy combatants detained outside the United States.

iii. Accordingly, the Court of Appeals in *Boumediene* rejected the argument that an alien enemy combatant like Khadr could invoke purported “limitation[s] on congressional power,” even if he could not assert individual “constitutional right[s].” 476 F.3d at 993. As the *Boumediene* court correctly explained, “this is no distinction at all. Constitutional rights are rights against the government and, as such, *are* restrictions on governmental power.” *Id.* The court added that, “[o]n [a contrary] theory . . . aliens outside the United States [would be] entitled to the protection of the Separation of Powers because they have no individual rights under the Separation of Powers.” *Id.* at 994

iv. The court in *Boumediene* correctly rejected any distinction between restrictions on congressional power and individual rights. *Id.* at 993-94. It held instead that the Ex Post Facto and Suspension Clauses, like other constitutional provisions such

as the Fifth Amendment, do not apply to detainees such as Khadr, notwithstanding that the former clauses do not expressly reference “individuals” or “rights.” *Id.* Accordingly, under the binding precedent of *Eisentrager* and *Boumediene*, Khadr cannot claim the protection of the Ex Post Facto Clause.¹

v. In any event, raising such claims must take account of the fact that Congress passed and the President signed the MCA *precisely because* the Supreme Court invited the politically accountable branches to do so. *See Hamdan*, 126 S. Ct. at 2774-75; *see also id.* at 2799 (Breyer, J., concurring) (“*Nothing* prevents the President from returning to Congress to seek the authority he believes necessary [to try members of al Qaeda before military commissions.]”) (emphasis added). Were the Defense to prevail in its argument that Khadr’s prosecution is barred by the Ex Post Facto Clause, the Supreme Court’s invitation would be transformed into a fool’s errand.

vi. Even if the Ex Post Facto Clause did somehow apply to Khadr as a general proposition, prosecution of Khadr in a military commission for conspiracy does not violate the Ex Post Clause. First, it is well established that changes to judicial tribunals and provisions governing venue or jurisdiction do not violate the Ex Post Facto Clause. Thus, courts have long held that the Clause does not apply to the abolition of old courts and the creation of new ones, *see, e.g., Duncan v. State*, 152 U.S. 377 (1894), the creation or alteration of appellate jurisdiction, *see, e.g., Mallett v. North Carolina*, 181 U.S. 589 (1901), the transfer of jurisdiction from one court or tribunal to another, *see, e.g., People ex rel. Foote v. Clark*, 119 N.E. 329 (Ill. 1918), or the modification of a trial panel, *see, e.g., Commonwealth v. Phelps*, 96 N.E. 349 (Mass. 1911). The rationale for these decisions is clear: The Ex Post Facto Clause applies only to laws that retroactively alter the definition or consequences of a criminal offense—not to *jurisdictional* provisions that affect where or how criminal liability is adjudicated.²

¹ In *Downes v. Bidwell*, 182 U.S. 244 (1901), which predates both *Eisentrager* and *Boumediene*, the Supreme Court held that “when the Constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed,’ and that ‘no title of nobility shall be granted by the United States,’ it goes to the competency of Congress to pass a bill of *that description.*” *Id.* at 277. However, *Downes* concerned only the applicability of “the revenue clauses of the Constitution . . . to our newly acquired territories.” *Id.* at 249. *Downes* has no relevance with respect to the constitutional rights enjoyed by alien enemy combatants held outside the territorial sovereignty of the United States in Guantanamo Bay, Cuba. The controlling cases on that point are *Boumediene* and *Eisentrager*, which held that alien enemy combatants detained outside the United States do not enjoy the structural or other protections of the Constitution.

² We note that the Defense repeatedly cites the procedures Khadr would have received had his case been tried in an Article III court in order to demonstrate that he has been prejudiced by having his case adjudicated under the MCA. *See* Mot. to Dismiss III at 9-11. However, even if Khadr did somehow possess a right to be tried in a forum other than under the MCA, we do not understand why trial before an Article III court is the appropriate benchmark, rather than trial in a court-martial. Given that *lawful* enemy combatants (i.e., those enemies who fight according to the law of war) would be tried before a court-martial, *see Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135 (“GPW”), art. 102 (“A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.”), it seems utterly perverse that an *unlawful* enemy combatant, such as Khadr, would receive all

vii. Second, with respect to the 28 offenses codified in section 950v(b) as crimes triable by military commission, Congress specifically determined that those offenses “have traditionally been triable by military commissions.” 10 U.S.C. 950p(a). Congress went on to explain that the MCA “does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.” *Id.* Because conspiracy was a violation of the law of war at the time of the charged conduct in this case, the later codification of such proscribed conduct in the MCA does not violate the Ex Post Facto Clause. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994) (“A statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.”) (citation and footnote omitted).

viii. Congress made pellucidly clear that the MCA applies to offenses committed both before and after its enactment: “Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.” *Id.* § 950p(b). Accordingly, there is no doubt that Congress intended for the MCA to apply to conduct “that occurred before the date of the enactment of this chapter.” In fact, Congress expressly stated that military commissions authorized under the MCA “have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant *before, on, or after September 11, 2001.*” 10 U.S.C. § 948d(a). Obviously, any offense committed “before” or “on” 11 September 2001 occurred prior to enactment of the MCA in 2006. Congress’s extension of military commission jurisdiction over such offenses makes unambiguously clear that it intended the Act to have retroactive effect.³

the benefits of a U.S. citizen in an Article III court. Although we do not believe that Khadr is entitled to be tried in either an Article III court or a court-martial, we note that the Defense’s illogical claim that Khadr is entitled to be tried in a civilian Article III court further underscores the weakness of his argument.

³ The Defense appears to agree with us. In its Motion to Dismiss Charge III (filed 7 Dec. 2007, 4:27 AM, *see* e-mail from Rebecca Snyder to Danny Chappell, LTC, et al.), the defense vociferously argues that the MCA is best read prospectively, *see, e.g.*, Mot. to Dismiss III at 6 (“The MCA Should Not Be Interpreted to Apply Retroactively”); *id.* (“Congress did not provide that the provisions of the MCA under which Khadr is charged should be applied retroactively.”); *id.* at 7 (“Section 950p provides additional evidence that Congress did not intend the MCA to apply retroactively”); *id.* (“Section 948d(a) of the MCA is not to the contrary.”). However, in its final motion to dismiss, *see* Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder) (“Mot. to Dismiss (Bill of Attainder)”), which was subsequently filed on 7 December 2007 at 3:30 PM, *see* e-mail from William Kuebler, LCDR, to Danny Chappell, LTC, et al., the Defense appears to concede the force of the Government’s argument and agrees with the Prosecution that the MCA, in fact, applies retroactively. *See, e.g.*, Mot. to Dismiss (Bill of Attainder) at 6 (“This definition [in 10 U.S.C. § 948a(1)(A)(i)] encompasses those who were already in custody when the MCA was enacted and targets such individuals for their past conduct, that is, for having allegedly engaged in or supported hostilities against the United States before the date of the MCA’s enactment.”); *id.* (“That the definition above is intended to be retrospective is made clear by surrounding provisions of the Act.”); *id.* (“Most tellingly of all, the MCA states that ‘[a] military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an

ix. As discussed above, all of the justices in *Hamdan* agree that the question whether conspiracy is a violation of the law of war was one to be made by Congress. See, e.g., *Hamdan*, 126 S. Ct. at 2779 (“There is no suggestion that Congress has, in exercise of its constitutional authority to ‘define and punish . . . Offences against the Law of Nations,’ U.S. Const., Art. I, § 8, cl. 10, positively identified ‘conspiracy’ as a war crime.”) (alteration in original). In direct response to *Hamdan*, Congress passed the MCA to make clear that, in fact, conspiracy is, and always has been, see 10 U.S.C. 950p, a violation of the law of war. Accordingly, the Ex Post Facto Clause poses no impediment to trying Khadr for conspiracy to violate the law of war, since that offense was already a violation of the law of war at the time Khadr committed the offenses.

x. The Supreme Court’s statement in *Schooner Charming Betsy* that “an act of congress ought never to be construed to violate the law of nations if any other possible construction remains,” 6 U.S. (2 Cranch) at 118, is wholly inapplicable to the present case. Contrary to the Defense’s position that there is ambiguity as to whether the MCA applies to offenses committed prior to its enactment, there is in fact *no* ambiguity on this point.⁴ Congress expressly stated that the criminal offenses codified by the MCA are not “new crimes that did not exist before its enactment,” but rather are “offenses that have traditionally been triable by military commissions.” 10 U.S.C. § 950p(a). In the immediately subsequent subsection, Congress explained that “[b]ecause the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.” *Id.* § 950p(b). The foregoing sentence cannot mean anything other than that Congress expressly contemplated and authorized trial by military commissions for crimes committed prior to enactment of the MCA. By providing that conspiracy is triable under the MCA, even with respect to offenses committed prior to its enactment, Congress clearly rejected any rule of international law that would have otherwise precluded the imposition of criminal liability under the MCA for such acts.

xi. *Schooner Charming Betsy* is not to the contrary. There, the Supreme Court held that an ambiguous statute should be construed, to the extent possible, not to conflict

alien unlawful enemy combatant *before, on, or after September 11, 2001.* § 948d(a) (emphasis added). These provisions make it unmistakably clear that the definition of an unlawful enemy combatant—the only class of individuals subject to trial by military commission, see § 948c—is intended to target individuals for conduct occurring well before the act’s passage.”) (emphasis and alteration in original); *id.* at 7 (“In any case, the context of the MCA’s passage make it unmistakably clear that it was intended to create a Commission system that would apply retroactively to individuals like Mr. Khadr.”). We assume that the arguments in the Defense’s later-filed Motion to Dismiss (Bill of Attainder) represent the Defense’s final view on this matter. In any event, the Government agrees with the Defense that Congress left no doubt that the MCA was intended to apply to offenses committed prior to its enactment.

⁴ The only ambiguity of which we are aware is in the Defense’s own briefs before this court. Compare Mot. to Dismiss III at 6 (“The MCA Should Not Be Interpreted to Apply Retroactively”), with Mot. to Dismiss (Bill of Attainder) at 7 (“[T]he context of the MCA’s passage make it unmistakably clear that it was intended to create a Commission system that would apply retroactively to individuals like Mr. Khadr.”). See also *supra* note 3.

with international law. See 6 U.S. (2 Cranch) at 118. *Schooner Charming Betsy* clearly did *not* hold that Congress is powerless to legislate in violation of international law, so long as it does so unambiguously. See, e.g., *The Paquete Habana*, 175 U.S. at 700 (explaining that international law is relevant to U.S. courts “where there is no treaty and no controlling executive or legislative act or judicial decision”); *Oliva*, 433 F.3d at 233 (“[W]hile courts are ‘bound by the law of nations which is a part of the law of the land,’ Congress may apply a different rule ‘by passing an act for the purpose.’”) (quoting *The Nereide*, 13 U.S. (9 Cranch) at 423); *Guaylupo-Moya*, 423 F.3d at 136 (“[C]lear congressional action trumps customary international law and previously enacted treaties.”); *TMR Energy Ltd.*, 411 F.3d at 302 (“Never does customary international law prevail over a contrary federal statute.”); *Comm. of U.S. Citizens Living in Nicaragua*, 859 F.2d at 938 (“Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency.”). In any event, Congress has authority under Article I of the Constitution to define and punish violations of international law. Congress has clearly exercised that authority here, with respect to conspiracies to violate the law of war, whether committed before, on or after enactment of the MCA.

xii. Similarly, Congress has determined, as its passage of the MCA makes clear, see, e.g., 10 U.S.C. § 950p, that applying the conspiracy provisions of the MCA to Khadr for acts committed prior to its enactment does not violate any international law prohibition against ex post facto legislation. As stated above, where Congress has legislated unambiguously on a subject, such legislation “trumps customary international law and previously enacted treaties.” *Guaylupo-Moya*, 423 F.3d at 136. Congress expressly provided in the MCA that it could be used to prosecute offenses, including conspiracy, that predate its enactment. Accordingly, international law poses no bar to the Executive Branch enforcing the MCA to do precisely that.

xiii. Moreover, for the MCA to have violated the Ex Post Facto Clause as applied to Khadr, the Act must have “retroactively alter[ed] the definition of crimes or increase[d] the punishment for criminal acts.” *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). However, as discussed above, a 142-year-old opinion by the Attorney General, which remains binding on the Executive Branch, makes clear that

to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war.

11 Op. Atty. Gen. at 312. Colonel Winthrop notes that during the Civil War, numerous individuals were charged—and were “liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by a military commission”—based upon their material support for groups of unlawful combatants. Winthrop, *Military Law and Precedents* 784. See also 11 Op. Atty. Gen. at 314 (“A

bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war”).

xiv. Khadr is certainly no worse off as a result of being given the right to an adversarial proceeding, the right to both civilian and military defense counsel, *see* 10 U.S.C. §§ 948k, 949a(b)(1)(C), the right “to present evidence in his defense, to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing,” *id.* § 949a(b)(1)(A), the right to be present at all sessions of the military commission, *see id.* § 949a(b)(1)(B), the presumption of innocence, *id.* § 949l(c), and, if he is convicted, the right to appellate counsel, *id.* § 950h, and the right to review of his sentence by the convening authority, *id.* § 950(b), the Court of Military Commission Review, *id.* § 950c(a), 950f, the D.C. Circuit, *id.* § 950g(a), and the Supreme Court of the United States through writ of *certiorari*, *id.* § 950g(d). He is being humanely detained and will be tried before a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” GPW, art. 3. Nothing more is required.

e. Conclusion

i. Consistent with its authority under Article I of the Constitution, Congress has clarified that conspiracy is, and was at the time of the incidents charged against Khadr, a violation of the law of war. In addition, neither the Constitution nor international law imposes any *ex post facto* bar to the application of the MCA to offenses Khadr committed prior to its enactment. Accordingly, this court has jurisdiction to try Khadr for the offense of conspiracy in violation of 10 U.S.C. § 950v(b)(28).

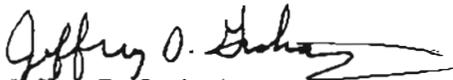
7. **Oral Argument:** The Prosecution disagrees that the issues presented by the Defense’s motion are “complex.” Mot. to Dismiss III at 12. In view of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motion should be readily denied. To the extent, however, that the Military Judge orders the parties to present oral argument, the Government will be prepared to do so.

8. **Witnesses and Evidence:** All of the evidence and testimony necessary to deny this motion is already in the record.

9. **Certificate of Conference:** Not applicable.

10. **Additional Information:** None.

11. **Submitted by:**


Jeffrey D. Groharing
Major, U.S. Marine Corps.
Prosecutor

Clayton Trivett, Jr
Lieutenant, U.S. Navy
Assistant Prosecutor

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant Prosecutor
Assistant United States Attorney

UNITED STATES v. KHADR

C.M.C.R. Case No. 08-003

**APPENDIX
TO APPELLANT'S BRIEF**

EXHIBIT J

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:

Omar Ahmed Khadr

2. ALIASES OF ACCUSED:

Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):

0766

II. CHARGES AND SPECIFICATIONS

4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (LAST, FIRST, MI):

Tubbs II, Marvin W

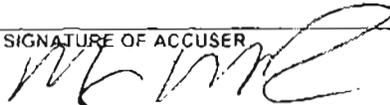
5b. GRADE

O-4

5c. ORGANIZATION OF ACCUSER

Office of the Chief Prosecutor, OMC

5d. SIGNATURE OF ACCUSER



5e. DATE (YYYYMMDD)

20070405

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 5th day of April, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief

Jeffrey D. Groharing

Typed Name of Officer

Office of the Chief Prosecutor, OMC

Organization of Officer

O-4

Grade

Commissioned Officer, U.S. Marine Corps

Official Capacity to Administer Oath

(See R.M.C. 307(b) must be commissioned officer)


Signature



IV. NOTICE TO THE ACCUSED

6. On April 5th, 2007 the accused was notified of the charges against him/her (See R M C 308)

Jeffrey D. Groharing, Major, U.S Marine Corps
*Typed Name and Grade of Person Who Caused
 Accused to Be Notified of Charges*

Office of the Chief Prosecutor, OMC
*Organization of the Person Who Caused
 Accused to Be Notified of Charges*


Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at 1411 hours, on 6 April 2007 at Arlington, Virginia

Location

For the Convening Authority, Jennifer D. Young
Typed Name of Officer

CW3
Grade


Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY Convening Authority 10USC §948h Appointed on 6 Feb 2007	8b. PLACE Arlington, Va	8c. DATE (YYYYMMDD) 20070424
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Referred for trial to the (non)capital military commission convened by military commission convening order 07-02
dated 8 March 2007

subject to the following instructions' this case is referred
non-capital; see continuation sheet

Command, Order, or Direction

Susan J. Crawford
Typed Name and Grade of Officer

Convening Authority 10USC §948h
Official Capacity of Officer Signing


Signature

VII. SERVICE OF CHARGES

9. On _____ I (caused to be) served a copy these charges on the above named accused

Jeffrey D. Groharing
Typed Name of Trial Counsel

0-4
Grade of Trial Counsel

Signature of Trial Counsel

FOOTNOTES

See R.M.C. 601 concerning instructions. If none, so state

W

CONTINUATION SHEET – MC FORM 458 JAN 2007, Block VI Referral

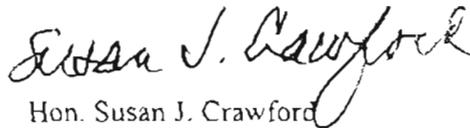
In the case of UNITED STATES OF AMERICA v OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khali”

The following charges and specifications are referred to trial by military commission:

The Specification of Charge I and Charge I
The Specification of Charge II and Charge II
The Specification of Charge III, as amended, and Charge III
Specifications 1 and 2 of Charge IV, as amended, and Charge IV
The Specification of Charge V and Charge V

This case is referred non-capital.

Date: 4-24-07



Hon. Susan J. Crawford
Convening Authority
for Military Commission

UNITED STATES OF AMERICA)	<u>CHARGES</u>
)	
)	Murder in Violation of the Law of War
)	
v.)	Attempted Murder in Violation of the Law of War
)	
)	Conspiracy
)	
OMAR AHMED KHADR)	Providing Material Support for Terrorism
a/k/a "Akhbar Farhad")	
a/k/a "Akhbar Farnad")	Spying
a/k/a "Ahmed Muhammed Khali")	

CHARGE I: VIOLATION OF 10 U.S.C. §950v(b)(15), MURDER IN VIOLATION OF THE LAW OF WAR

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, unlawfully and intentionally murder U.S. Army Sergeant First Class Christopher Speer, in violation of the law of war, by throwing a hand grenade at U.S. forces resulting in the death of Sergeant First Class Speer.

CHARGE II: VIOLATION OF 10 U.S.C. §950t, ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, between, on or about June 1, 2002, and on or about July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, attempt to commit murder in violation of the law of war, by converting land mines into improvised explosive devices and planting said improvised explosive devices in the ground with the intent to kill U.S. or coalition forces.

CHARGE III: VIOLATION OF 10 U.S.C. §950v(b)(28), CONSPIRACY

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002 to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks, continuing to date against the United States; said agreement and enterprise sharing a common

criminal purpose known to the accused to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; ~~hijacking or hazarding a vessel or aircraft~~; and terrorism. SFC 4-24-07

In furtherance of this agreement or enterprise, Omar Khadr knowingly committed overt acts, including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi," consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
3. In or about July 2002, Khadr attended one month of land mine training.
4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
5. On or about July 27, 2002, Khadr ~~and/or other suspected al Qaeda members~~ engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members. SFC 4-24-07
6. Khadr ~~and/or the other suspected al Qaeda members~~ threw and/or fired grenades at nearby coalition forces resulting in numerous injuries. SFC 4-24-07
7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

CHARGE IV: VIOLATION 10 U.S.C. §950v(b)(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM

Specification 1: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from at least June 2002 through on or about July 27, 2002, intentionally provide material support or resources to wit: personnel, himself, to al Qaeda, an international terrorist organization founded by Usama bin Laden, in or about 1989, and known by the accused to be an organization that engages in terrorism, said al Qaeda having engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks, continuing to date against the United States; said conduct taking place in the context of and associated with armed conflict.

NS

The accused provided material support or resources to al Qaeda including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi," consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
3. In or about July 2002, Khadr attended one month of land mine training.
4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
5. On or about July 27, 2002, Khadr ~~and/or other suspected al Qaeda members~~ engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members. *SLC 4.24.07*
6. Khadr ~~and/or the other suspected al Qaeda members~~ threw and/or fired grenades at nearby coalition forces resulting in numerous injuries. *SLC 4.24.07*
7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

Specification 2: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, from at least June 2002 through on or about July 27, 2002, intentionally provide material support or resources to wit: personnel, himself, to be used in preparation for, or carrying out an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, and that the conduct of the accused took place in the context of and was associated with an armed conflict.

The accused provided material support or resources in support of acts of terrorism including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi," consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
 2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
- W*

3. In or about July 2002, Khadr attended one month of land mine training.
4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
5. On or about July 27, 2002, Khadr ~~and/or other suspected al Qaeda members~~ ^{S/C 4-24-07} engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.
6. Khadr ~~and/or the other suspected al Qaeda members~~ ^{S/C 4-24-07} threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.
7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

CHARGE V: VIOLATION OF 10 U.S.C. §950v(b)(27), SPYING

Specification: In that Omar Ahmed Khadr, a person subject to military commission as an alien unlawful enemy combatant, did in Afghanistan, in or about June 2002, collect certain information by clandestine means or while acting under false pretenses, information that he intended or had reason to believe would be used to injure the United States or provide an advantage to a foreign power; that the accused intended to convey such information to an enemy of the United States, namely al Qaeda or its associated forces; that the conduct of the accused took place in the context of and was associated with an armed conflict; and that the accused committed any or all of the following acts: on at least one occasion, at the direction of a known al Qaeda member or associate, and in preparation for operations targeting U.S. forces, the accused conducted surveillance of U.S. forces and made notations as to the number and types of vehicles, distances between the vehicles, approximate speed of the convoy, time, and direction of the convoys.

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UNITED STATES v. KHADR

C.M.C.R. Case No. 08-003

**APPENDIX
TO APPELLANT'S BRIEF**

EXHIBIT K



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

(day) (month) (year)

MEMORANDUM FOR Detainee Omar Ahmed Khadr 0766, Guantanamo Bay, Cuba

SUBJECT: Notification of the Swearing of Charges

1. You are hereby notified that criminal charges were sworn against you on the ____ day of _____, 2007, pursuant to the Military Commissions Act of 2006 (MCA) and the Manual for Military Commissions (MMC). A copy of this notice is being provided to you and to your detailed defense counsel.

2. Specifically, you are charged with the following offenses:

MURDER IN VIOLATION OF THE LAW OF WAR

ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

CONSPIRACY

PROVIDING MATERIAL SUPPORT FOR TERRORISM

SPYING

(Read the charges and specifications to the accused. If necessary, an interpreter may read the charges in a language, other than English, that the accused understands.)

AFFIDAVIT OF NOTIFICATION

I hereby certify that a copy of this document was provided to the named detainee this ____ day of _____, 2007.

Signature

Organization

Typed or Printed Name and Grade

Address of Organization

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:

Omar Ahmed Khadr

2. ALIASES OF ACCUSED:

Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):

0766

II. CHARGES AND SPECIFICATIONS

4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (LAST, FIRST, MI)

Tubbs II, Marvin W.

5b. GRADE

0-4

5c. ORGANIZATION OF ACCUSER

Office of the Chief Prosecutor, OMC

5d. SIGNATURE OF ACCUSER



5e. DATE (YYYYMMDD)

20070202

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 2nd day of February, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

Commissioned Officer, U.S. Marine Corps
Official Capacity to Administer Oath
(See R.M.C. 307(b) must be commissioned officer)

Jeffrey D. Groharing
Signature

IV. NOTICE TO THE ACCUSED

6 On February 2, 2007 the accused was notified of the charges against him/her (See R.M.C. 308).

Jeff Groharing, Major, U.S. Marine Corps
*Typed Name and Grade of Person Who Caused
 Accused to Be Notified of Charges*

Office of the Chief Prosecutor, OMC
*Organization of the Person Who Caused
 Accused to Be Notified of Charges*

Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at _____ hours, on _____, at _____

 Location

For the Convening Authority: _____

Typed Name of Officer

 Grade

 Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY

8b. PLACE

8c. DATE (YYYYMMDD)

Referred for trial to the (non)capital military commission convened by military commission convening order _____

_____ subject to the following instructions¹: _____

By _____ of _____
Command, Order, or Direction

Typed Name and Grade of Officer

Official Capacity of Officer Signing

 Signature

VII. SERVICE OF CHARGES

9 On _____, _____ I (caused to be) served a copy these charges on the above named accused.

Typed Name of Trial Counsel

Grade of Trial Counsel

Signature of Trial Counsel

FOOTNOTES

¹See R.M.C. 601 concerning instructions. If none, so state.

UNITED STATES OF AMERICA	<u>CHARGES</u>
v.	Murder in Violation of the Law of War
	Attempted Murder in Violation of the Law of War
	Conspiracy
OMAR AHMED KHADR	Providing Material Support for Terrorism
a/k/a "Akhbar Farhad"	
a/k/a "Akhbar Farnad"	Spying
a/k/a "Ahmed Muhammed Khali"	

INTRODUCTION

1. The accused, Omar Ahmed Khadr (a/k/a Akhbar Farhad, a/k/a Akhbar Farnad, a/k/a Ahmed Muhammed Khali, hereinafter "Khadr"), is a person subject to trial by military commission for violations of the law of war and other offenses triable by military commission, as an alien unlawful enemy combatant. At all times material to the charges:

JURISDICTION

2. Jurisdiction for this Military Commission is based on Title 10 U.S.C. Sec. 948d, the Military Commissions Act of 2006, hereinafter "MCA," its implementation by the Manual for Military Commissions (MMC), Chapter II, Rules for Military Commissions (RMC) 202 and 203; and the final determination of the Combatant Status Review Tribunal of September 7, 2004, that Khadr is an unlawful enemy combatant as a member of, or affiliated with, al Qaeda.

3. The accused's charged conduct is triable by a military commission.

BACKGROUND

4. Khadr was born on September 19, 1986, in Toronto, Canada. In 1990, Khadr and his family moved from Canada to Peshawar, Pakistan.

5. Khadr's father, Ahmad Sa'id Khadr (a/k/a Ahmad Khadr a/k/a Abu Al-Rahman Al-Kanadi, hereinafter Ahmad Khadr), co-founded and worked for Health and Education Project International-Canada (HEPIC), an organization that, despite stated goals of providing humanitarian relief to Afghani orphans, provided funding to al Qaeda to support terrorist training camps in Afghanistan. Ahmad Khadr was a senior al Qaeda member and close associate of Usama bin Laden and numerous other senior members of al Qaeda.

6. In late 1994, Ahmad Khadr was arrested by Pakistani authorities for providing money to support the bombing of the Egyptian Embassy in Pakistan. While Ahmad Khadr was incarcerated, Omar Khadr returned with his siblings to Canada to stay with their grandparents.

Khadr attended school in Canada for one year while his father was imprisoned in Pakistan before returning to Pakistan in 1995.

7. In 1996, Khadr moved with his family from Pakistan to Jalalabad, Afghanistan.
8. From 1996 to 2001, the Khadr family traveled throughout Afghanistan and Pakistan, including yearly trips to Usama bin Laden's compound in Jalalabad for the Eid celebration at the end of Ramadan. While traveling with his father, Omar Khadr saw or personally met senior al Qaeda leaders, including Usama bin Laden, Doctor Ayman Al-Zawahiri, Muhammad Atef (a/k/a Abu Hafs al Masri), and Saif al Adel. Khadr also visited various al Qaeda training camps and guest houses.
9. After al Qaeda's terrorist attacks against the United States on September 11, 2001, the Khadr family moved repeatedly throughout Afghanistan.
10. In the summer of 2002, Khadr received one-on-one, private al Qaeda basic training, consisting of training in the use of rocket propelled grenades, rifles, pistols, grenades, and explosives.
11. After completing his training, Khadr joined a team of other al Qaeda operatives and converted landmines into remotely-detonated improvised explosive devices, ultimately planting these explosive devices to target U.S. and coalition forces at a point where they were known to travel.
12. U.S. Forces captured Khadr on July 27, 2002, after a firefight resulting in the death of three members of the U.S. led coalition and injuries to several other U.S. service members.

GENERAL ALLEGATIONS

13. Al Qaeda ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
14. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.
15. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.
16. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
17. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and

supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

18. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.

19. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

20. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

21. In or about 2001, al Qaeda's media committee created As Sahab ("The Clouds") Media Foundation, which has orchestrated and distributed multi-media propaganda detailing al-Qaeda's training efforts and its reasons for its declared war against the United States.

22. Since 1989 members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

23. Following al Qaeda's attacks on September 11, 2001, and in furtherance of its goals, members and associates of al Qaeda have violently opposed and attacked the United States or its Coalition forces, United States Government and civilian employees, and citizens of various countries in locations throughout the world, including, but not limited to Afghanistan.

24. On or about October 8, 1999, the United States designated al Qaeda a foreign terrorist organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

CHARGE 1: VIOLATION OF PART IV, M.M.C. SECTION 950v(15), MURDER IN VIOLATION OF THE LAW OF WAR

25. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, unlawfully and intentionally murder U.S. Army Sergeant First Class Christopher Speer, in violation of the law of war, by throwing a hand grenade at U.S. forces resulting in the death of Sergeant First Class Speer.

**CHARGE II: VIOLATION OF PART IV, M.M.C., SECTION 950t, ATTEMPTED
MURDER IN VIOLATION OF THE LAW OF WAR**

26. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, between, on, or about June 1, 2002, and July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, attempt to commit murder in violation of the law of war, by converting land mines into improvised explosive devices and planting said improvised explosive devices in the ground with the intent to kill U.S. or coalition forces.

CHARGE III: VIOLATION OF PART IV, M.M.C., SECTION 950v(28), CONSPIRACY

27. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from on or about June 1, 2002 to on or about July 27, 2002, willfully join an enterprise of persons who shared a common criminal purpose, said purpose known to the accused, and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al adel, Ahmad Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, to commit the following offenses triable by military commission to include: attacking protected property; attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; hijacking or hazarding a vessel or aircraft; and terrorism.

28. In addition to paragraph 27, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet.

29. Additionally, in furtherance of this enterprise and conspiracy, Khadr and other members of al Qaeda performed overt acts, including, but not limited to the following:

- a. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmad Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
- b. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
- c. In or about July 2002, Khadr attended one month of land mine training.
- d. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

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- e. On or about July 27, 2002, near the village of Ayub Kheil, Afghanistan, U.S. forces surrounded a compound housing suspected al Qaeda members. Khadr and/or other suspected al Qaeda members engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members. Khadr and/or the other suspected al Qaeda members also threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.
- f. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

CHARGE IV: VIOLATION OF PART IV, M.M.C., SECTION 950v(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM

30. Specification I: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such organization that engaged, or engages, in terrorism, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

31. In addition to paragraph 30, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

32. Specification II: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to be used in preparation for, or carrying out an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, and that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

33. In addition to paragraph 32, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

CHARGE V: VIOLATION OF PART IV, M.M.C., SECTION 950v(27), SPYING

34. Specification. In that Omar Ahmed Khadr, a person subject to military commission as an alien unlawful enemy combatant, did in Afghanistan, in or about June 2002, collect certain information by clandestine means or while acting under false pretenses, information that he intended or had reason to believe would be used to injure the United States or provide an advantage to a foreign power; that the accused intended to convey such information to an enemy of the United States, namely al Qaeda or its associated forces; that the conduct of the accused took place in the context of and was associated with an armed conflict; and that the accused committed any or all of the following acts: on at least one occasion, at the direction of a known al Qaeda member or associate, and in preparation for operations targeting U.S. forces, the accused conducted surveillance of U.S. forces and made notations as to the number and types of vehicles, distances between the vehicles, approximate speed of the convoy, time, and direction of the convoys.

