UNITED STATES OF AMERICA	}	**D-008** **Ruling on Defense Motion to Dismiss Charge One for Failure to State an Offense and 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. Both parties presented oral argument on the matter.

2. Charge I and its Specification read as follows:

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.

3. Paragraph 6(15), Part IV, Manual for Military Commissions, which contains both the text of § 950v(b)(15) and the Secretary's implementation of the statute, reads as follows:

Paragraph 6(15) MURDER IN VIOLATION OF THE LAW OF WAR.

a. *Text.* "Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct."

b. *Elements.*

(1) One or more persons are dead;
(2) The death of the persons resulted from the act or omission of the accused;
(3) The killing was unlawful;
(4) The accused intended to kill the person or persons;
(5) The killing was in violation of the law of war; and
(6) The killing took place in the context of and was associated with an armed conflict.

c. *Comment.* See comment to "Intentionally Causing Serious Bodily Injury."

> [The comment to Paragraph 6(13), "Intentionally Causing Serious Bodily Injury", reads as follows:
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> d. *Comment.* For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy. It is generally accepted international practice that unlawful enemy combatants may be prosecuted for offenses associated with armed conflicts, such as murder; such unlawful enemy combatants do not enjoy combatant immunity because they have failed to meet the requirements of lawful combatancy under the law of war.]

d. *Maximum punishment*. Death.

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. As if anticipating the defense motion in this case, the Supreme Court actually defined those who are protected by the Law of Nations and those who are not:

> By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or **an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.** (*Ex Parte Quirin, Id.,* at 12, emphasis added)

7. 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 murder in violation 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 murder in violation of the law of war was punishable by military commissions, before, on, and after 11 September 2001.

8. The defense asserts that the specific statutory provision in question, 10 U.S.C. Sec. 950v(b)(15), 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 murder in violation 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.

9. The commission has reviewed Charge I and its Specification. The Specification alleges a violation of the statute. The act alleged in the Specification, the killing of a lawful combatant by an unlawful combatant, is a violation of the law of war.

10. The defense motion to dismiss Charge I and its Specification is denied.

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

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**D-008** **Defense Reply to Prosecution Response to Defense Motion to Dismiss Charge I (Murder In Violation of the Law of War)** 20 December 2007

1. **Timeliness**: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge.

2. **Overview:**

a. This Commission has no jurisdiction to try Mr. Khadr for "murder in violation of the law of war" for a simple reason: he has not been charged with any conduct that violates either a U.S. statute or the law of war. Nothing in the Government's response alters this straightforward conclusion. In its brief, the Government misstates Mr. Khadr's position as claiming that terrorists may kill American soldiers with impunity. (*See* Gov't Resp. at 1, ¶ 3.) Mr. Khadr makes no such claim. Rather, he argues only that he may not be tried *by military commission* for this alleged offense because his alleged conduct does not constitute a violation of the law of war. If the allegations set forth in the charge sheet were proven to be true, and if Mr. Khadr were found not to be entitled to combatant immunity, he might well be liable under domestic law for murder or a similar offense. *Cf.* 18 U.S.C. § 1114 (proscribing the killing of U.S. employees, including members of "uniformed services"). But it does not follow that Mr. Khadr committed a law of war violation triable by military commission under the MCA.

b. In response to Mr. Khadr's motion, the prosecution makes three basic arguments. All fail. First, the prosecution argues that international law draws a distinction between unlawful and lawful combatants, and that the act of killing a soldier as an unlawful combatant constitutes a violation of the law of war. That is incorrect. As Mr. Khadr explained in his opening brief, the accused's status is relevant only to whether the accused enjoys combatant immunity from domestic prosecution. It does not bear on whether any murder he commits is a violation of the law of war. The law of war prohibits only certain modes of warfare and attacks on certain protected persons, and the charges against Mr. Khadr do not allege any of this prohibited conduct. Because Mr. Khadr has not been accused of killing using a prohibited means, or of killing a protected individual, his alleged conduct does not violate the law of war. The sources the Government cites for the proposition that the law of war prohibits *any* killing committed by an "unlawful" combatant do not in fact establish that proposition.

c. Second, the prosecution argues that Mr. Khadr can be tried for murder in violation of the law of war because that law prohibits murder committed in a secret or treacherous manner. It is true that perfidy constitutes a war crime. But the charges against Mr. Khadr do not allege that he engaged in murder or attempted murder in a treacherous way. Rather, Mr. Khadr is accused of killing an American soldier with a hand grenade "while in the context of and

associated with armed conflict." *See* 2007 Charge Sheet, Charge I. The prosecution's motion makes clear that the soldiers involved were armed and engaged in a "firefight" at the time of this occurrence. *See* Gov't Resp. at 2. This alleged behavior is completely consistent with acts that are common in war. The prosecution's own recitation of the facts demonstrates that the U.S. soldiers involved in this fight were fully aware of Mr. Khadr's intent to engage in combat.[1]

d. Finally, the prosecution argues that the MCA "conclusively establishes jurisdiction" over Mr. Khadr's murder charge. That too is flatly incorrect. As Mr. Khadr explained in his opening brief, and as the prosecution cannot dispute, the MCA does not purport to prohibit "murder" as such, but rather murder "in violation of the law of war." And as discussed, the conduct with which Mr. Khadr has been accused does not violate the law of war.

e. The government never takes the position that the MCA (or MMC) purports to create a new offense of acting as a combatant without having met the requirements for lawful combatancy. (*Cf.* Def. Motion at 7.) The government's discussion of *ex post facto* issues is thus largely beside the point. (It would have been relevant only if the Government had claimed that the MCA somehow created a new offense.) In any event, to the extent that the Government may attempt to make such an argument, it is foreclosed by the *Ex Post Facto* Clause of the United States Constitution.

f. Accordingly, because Mr. Khadr has not been charged with a violation triable by military commission, this commission lacks jurisdiction to hear this charge against him. Charge I should be dismissed.

3. **Reply:**

a. MR. KHADR'S ALLEGED CONDUCT DOES NOT VIOLATE THE LAW OF WAR

(1) As Mr. Khadr's opening brief explained, the prohibitions on killing in the law of war take two forms: they ban certain means of warfare, and prohibit certain objects of attack. (*See* Def. Motion at 3-5.) As that brief further made clear, Mr. Khadr has neither been accused of killing using a prohibited means, nor of attacking a protected person. Accordingly, his conduct does not violate the law of war, and therefore falls outside the scope of the MCA.

[1] Mr. Khadr is accused of killing an American soldier with a hand grenade and attempting to kill others "while in the context of and associated with armed conflict and without enjoying combatant immunity." *See* 2007 Charge Sheet, Charge I. The prosecution labels this conduct "terrorism," Gov't Resp. at 9, ¶ 4(c), but that conclusion is not obvious. Mr. Khadr's alleged conduct was not directed at a civilian population located far from a site of battle. To the contrary, the offenses in question occurred on a battlefield, while both soldiers were armed, and at the end of a "firefight." Gov't Resp. at 2. Whatever the prosecution may call it, this behavior is consistent with a soldier battling another soldier in armed conflict. Moreover, "terrorism" is a separate offense under the MCA, 10 U.S.C. §950v(b)(24), and one with which Mr. Khadr has *not* been charged.

(a) The Law of War Does Not Prohibit Murder Based on the Assailant's Status

(i) Resisting this straightforward conclusion, the prosecution argues that because Mr. Khadr was allegedly an "unlawful" combatant at the time of his alleged offenses, any killing he committed necessarily violates the law of war. That is incorrect. As discussed in Mr. Khadr's initial motion, the distinction between "lawful" and "unlawful" combatant status is relevant only for determining whether a particular combatant enjoys combat immunity, *i.e.*, immunity from prosecution in the capturing nation's domestic courts. It matters, in other words, for purposes of determining whether Mr. Khadr would be liable for murder under U.S. law, or whether (on the other hand) he would be immune from such prosecution as a privileged lawful combatant. The distinction is *not* relevant to the entirely different international law question of whether a particular killing violates the law of war. As one scholar aptly put it, "[a] war crime inherently requires an overt infraction of the law of war, not just committing a domestic crime without combatant immunity."[2]

(ii) The CMCR's decision in this case reflects this well-established distinction in international law. In holding that "[u]nlawful combatants remain civilians and may properly be captured, detained by opposing military forces, and treated as criminals under the *domestic law* of the capturing nation for any and all unlawful combat actions," *Khadr*, CMCR 07-001, at 6 (emphasis added), the CMCR made clear that Mr. Khadr's status as a lawful or unlawful combatant was relevant to his ability to claim combatant immunity if tried under *domestic* law. Indeed, immediately following the above passage, the CMCR cites *United States v. Lindh*, 212 F. Supp. 2d 541, 554 (E.D. Va. 2002), a case in which the accused was tried in federal district court for violations of U.S. law, *id.* at 547—not war crimes—and the question at issue was whether Lindh was immune from prosecution by virtue of the combatant immunity privilege. *Id.* at 544.

(iii) The prosecution attempts to distort the CMCR's decision by arguing that Mr. Khadr, assuming he is an unlawful combatant, can be tried under the MCA because it is "domestic law." But the MCA, by its plain terms, makes clear that it is not a "domestic law" in the relevant sense—*i.e.*, it does not purport to govern the relations between civilians within the sovereign's territory. Rather, it expressly incorporates the "law of war" and proscribes only "murder *in violation of the law of war*." 10 U.S.C. § 950v(15) (emphasis added). It does not purport to reach murders conducted by individuals outside the context of armed conflict, as do our domestic laws.

(iv) Notably, in its brief, the prosecution cites *no* international law sources to support its assertion that the "law of war" proscribes all murder committed by an unlawful combatant. Yet as the Supreme Court has recently confirmed, it is international law that defines law of war offenses. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality) (holding

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[2] Norman A. Goheer, *The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent is not a War Crime*, Bepress Legal Series Working Paper 1871, at 12 (Nov. 8, 2006), *available at* http://law.bespress.com/expresso/eps/1871. The above quotation and source were included in the Defense Motion to Dismiss, but—as the Government notes in its brief (*see* Gov't Resp. at 7)—were erroneously attributed to the CMCR. *See* Def. Motion at 3 n.2. The mistake occurred because of an editing error that shifted the position of the relevant footnote. The defense apologizes for the error.

that for an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally") (quoting *Ex Parte Quirin*, 317 U.S. at 30); *see also, e.g., The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct."). This dearth of relevant authority is fatal to the prosecution's claim that the law of war prohibits all murder by an unlawful combatant. The prosecution offers *no* rebuttal to the fact that unqualified "murder" is not listed as an offense in the Geneva Conventions or the Hague Conventions—two treaties the Supreme Court has called "the major treaties on the law of war." *Hamdan*, 126 S. Ct. at 2781.[3] And it cannot account for the fact that "[n]o treaty (including the statutes governing international courts such as the International Criminal Court, International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda) suggests that targeting a combatant is unlawful. Rather combatants are only protected from attack when they are *hors de combat* because they have surrendered, are sick or wounded and not carrying the fight, are shipwrecked, or have parachuted from a disabled aircraft."[4]

(v) Apparently unable to find any relevant international law sources to support its position, the Government turns to centuries-old U.S. sources. For at least two reasons, however, these sources are irrelevant to the question before this Commission; namely, whether an individual's "unlawful" status could give rise to a law of war violation in 2002. First, international law sources—not domestic sources—provide the appropriate source for determining whether conduct violates the law of war. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality) (holding that for an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally" (quoting *Ex Parte Quirin*, 317 U.S. at 30)).[5] Second, even if unlawful status could give rise to a violation of the law of war two hundred years ago, that says nothing about whether it can do so now. Unsurprisingly, the law of war has evolved significantly since the early 20th-century, as norms of civilized conduct and modes of warfare

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[3] *See* Jack Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 Am. J. Int'l L. 56, 61 (2007) ("[A]bsent some other violation, a war crime based solely on the killing of a combatant who is engaged in hostilities is problematic under the Geneva Convention."). Further, murder is not listed as an offense triable by the International Criminal Court in the Rome Statute, a statute with more than 120 signatory nations that "provides the most comprehensive, definitive, and authoritative list of war crimes." Robert Cryer, I*nternational Criminal Law v. State Sovereignty: Another Round?* 16 Eur. J. Int'l L. 979, 990 (2005).

[4] Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi J. Int'l L. 511, 520 n.44 (citing, *inter alia*, Convention between the United States and other Powers respecting the Laws and Customs of War on Land, art 23(c), 36 Stat 2277 (1907); Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), art. 12, 6 UST 3217 (1956)).

[5] For this reason, the 1865 Attorney General opinion, 11 Op. Atty Gen. 297, 1865 U.S. AG LEXIS 36, and the 1956 Army Manual are of little, if any, relevance.

have changed.[6] In enacting Article 21 of the UCMJ, and its predecessor, Article 15 of the Articles of War, Congress intended only to preserve what jurisdiction existed under the law of war as it had then evolved. *Hamdan*, 126 S.Ct. at 2774; *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (noting that a claim under the Alien Tort Claims Act "must be gauged against the *current state of international law*") (emphasis added). Many of the international community's most prominent treaties were adopted in the latter half of the twentieth-century, and it defies both law and common sense to suggest that conduct violates the law of war as evidenced by those instruments today simply because that conduct may have violated the law of war as it was understood two hundred years ago.

(vi) Moreover, even if the Government's sources were probative—and they are not—they would not support the prosecution's efforts to expand the "law of war" to cover the status crimes with which Mr. Khadr has been charged.[7] That is because these sources do not support the proposition that a person's status as an unlawful combatant can transform conduct that would otherwise not be a violation of the law of war into a war crime. Some of the Government's sources merely reflect the fact that the "law of war" prohibits crimes such as perfidy, in which the accused engages in active deception intended to trick his adversaries into believing that he is not engaged in hostilities. Thus, for example, Lieber's Code simply provides that those who "divest[] themselves of the character or appearance of soldiers" may be dealt with "summarily as highway robbers or pirates." *See* Lieber's Code, General Order No. 100, War Department, Apr. 24, 1863. The prosecution's other sources merely reflect the fact that unlawful combatants—like lawful combatants—can violate the law of war by committing an act that is prohibited by the law of war, irrespective of their status at the time of the offense. *See United States v. List* ("Hostage Case"), 11 Trials of War Criminals 1223 (GPO 1950) (killing of civilians); *Talbot v. Janson*, 3 U.S. 133 (1795) (piracy); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (describing piracy as a violation of the law of nations).[8] They thus say nothing

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[6] For example, according to Winthrop's treatise, summary execution is permitted under the law of war. Winthrop, *Military Law and Precedents* 783 (1895, 2d ed. 1920). But the modern day law of war clearly prohibits such inhumane treatment. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3 (entered into force Oct. 21, 1950). Thus, to the extent Winthrop suggests that an unlawful belligerent may be summarily executed based on their status alone, it does not reflect the current state of the law of war.

[7] The prosecution maintains that Mr. Khadr is not being charged on the basis of his "status" because he is "charged with *committing murder* while maintaining the status of an unlawful enemy combatant." Gov't Resp. at 5 n.2. But this assertion misses the point that under the prosecution's view, the conduct with which Mr. Khadr is charged would not constitute a violation of the law of war were it not for Mr. Khadr's alleged status as an unlawful enemy combatant.

[8] Winthrop, too, is principally concerned with those who "engage[] in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the sacking of towns, from motives of mostly personal profit or revenge." Winthrop, *Military Law and Precedents* 784 (1795, 2d ed. 1820). The U.S. Army Field Manual No. 27-10, which the Government also cites, is even less relevant. That manual specifically provides that it "should not be considered binding upon courts and tribunals applying the law of war." *Id.* art. 1. And it provides only that unlawful belligerents may be tried and sentenced, saying nothing about whether they may be tried in domestic courts or by military commission. *See id.* art. 81. Similarly, the 1865 Attorney General opinion, 11 Op. Atty Gen. 297, 1865 U.S. AG LEXIS 36, is not only significantly outdated but, like the Army Manual, is a *domestic* guidance document that should have

about whether conduct that would not otherwise violate the law of war, such as killing a soldier on the battlefield, may be turned into a law of war violation based solely on the accused's status.

(b) Mr. Khadr Has Not Been Charged With Committing Murder In A Treacherous Manner

(i) Implicitly recognizing that international law provides the appropriate source for determining the law of war, the prosecution next argues that Mr. Khadr can be tried for murder because the "'treacherous[]' killing of 'individuals belonging to the hostile nation or army'" is a violation of the law of war. Gov't Resp. at 7 (citing to, *inter alia*, the Geneva Conventions and the Rome Statute). It is true that international law prohibits "killing through perfidy, including the murder of an adversary by an individual feigning . . . civilian non-combatant status" (*id.*)—indeed, Mr. Khadr's initial motion cites perfidy (or treacherous killing) as an example of a means of killing prohibited by the law of war. *See* Def. Motion at 3. But the prohibition on perfidy is wholly irrelevant to this case, because Mr. Khadr is not alleged to have committed it.

(ii) Initially, perfidy is specifically listed as a violation of the law of war made triable in military commissions by the MCA, *see* 10 U.S.C. §950(v)(b)(17), but such a charge has *not* been brought against Mr. Khadr. That in itself disposes of the Government's argument.

(iii) In any event, Mr. Khadr could not be charged with perfidy based on the acts he is alleged to have committed. Mr. Khadr is charged with intentionally killing a U.S. soldier "by throwing a hand grenade at U.S. forces . . . *in the context of and associated with armed conflict*." *See* 2007 Charge Sheet, Charge I (emphasis added). This accusation does not allege that Mr. Khadr "feign[ed]" civilian non-combatant status or committed a treacherous killing. Indeed, the facts as recited by the prosecution state that "before the firefight [in which Mr. Khadr was captured] had begun, U.S. forces approached the compound [where Mr. Khadr was located] and asked the accused and the other occupants to surrender." *See* Gov't Resp. at 2, ¶ 5(h). The accused "decided not to surrender," and the firefight ensued. *Id*. This request for surrender is wholly inconsistent with the theory that the U.S. soldiers were fooled into thinking that Mr. Khadr was a civilian who did not intend to fight. There are thus no affirmative allegations to support the theory that Mr. Khadr committed a treacherous killing while feigning civilian status, and this theory in fact *conflicts* with the facts as alleged by the prosecution.

(iv) The prosecution's last-minute switch in theory to preserve this Court's jurisdiction is improper. It is black-letter law that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States*, 361 U.S. 212, 217 (1960); *United States v. Lawton*, 995 F.2d 290, 292 (D.C. Cir. 1993) (forbidding "constructive amendments" to indictments where the theory of illegal conduct tried at trial does not match the conduct charged). Otherwise, the charging document "cannot serve its critical function of giving defendants fair notice of the charges they must defend." *Lawton*, 995 F.2d at 292; *see also United States v. Sayan*, 968 F.2d 55, 59 (D.C. Cir. 1992). There is thus no basis for

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no bearing on the contours of the law of war, which are to be determined by reference to *international* legal sources.

this Commission to assume jurisdiction over Mr. Khadr on the prosecution's "treacherous killing" theory. The offense Mr. Khadr is alleged to have committed in the charge sheet does not constitute "treacherous killing."

b. THE MCA DOES NOT ESTABLISH JURISDICTION IN THIS CASE BECAUSE IT ONLY CONFERS JURISDICTION OVER MURDER "IN VIOLATION OF THE LAW OF WAR"

(1) The fact that charges have been brought under the MCA does not somehow resolve these jurisdictional problems and confer jurisdiction on this court. The government argues that the MCA "conclusively establishes jurisdiction" in this case (Gov't Resp. at 3), but that argument is simply wrong. As the Government repeatedly concedes, the MCA purports to confer jurisdiction on this commission to try claims for "murder *in violation of the law of war*." (*See, e.g.*, Gov't Resp. at 4, ¶ 6(A)(i), *id.* at 4, ¶ 6(A)(ii)(b) (emphasis added).) It does not purport to make triable by military commission *any* killing, whether or not it would constitute a violation of the law of war. But as discussed above and in Mr. Khadr's opening brief, Mr. Khadr's alleged conduct in fact does *not* constitute a violation of the law of war. *See supra* at 3-6; Def. Motion at 3-6. Accordingly, the MCA, by its plain terms, does not confer jurisdiction over this commission to try Mr. Khadr for the murder charge alleged, and the charge must be dismissed.

(2) The prosecution never claims that the MCA itself purports to expand the scope of conduct prohibited by the law of war.[9] The prosecution's discussion of *ex post facto* issues (*see* Gov't Resp. at 10-12) is therefore irrelevant. However, in an abundance of caution, it bears mention that the prosecution's *ex post facto* analysis is incorrect: even if Congress had purported to define a new offense of murder that encompassed the charges against Mr. Khadr, such an offense could only be applied prospectively because both U.S. and international law proscribe *ex post facto* legislation. *See* U.S. Const. art. I, § 9, cl. 3.

(3) Arguing against the restriction on *ex post facto* legislation in both U.S. and international law, the prosecution argues that the Constitution "does not ensure the legal rights of alien enemy combatants detained in foreign territory." Gov't Resp. at 8. This argument fails. As a preliminary matter, the *Ex Post Facto* Clause is a structural limitation on congressional

[9] As discussed in Mr. Khadr's initial motion, the Secretary of Defense, to the extent he attempted to expand the scope of the law of war through the promulgation of the Manual of Military Commissions ("MMC"), exceeded his authority under the MCA, and the MMC rules purporting to affect such an expansion can be given no effect. *See* Def. Motion at 6-7. The prosecution does not even attempt to dispute this argument, or invoke or rely on the MMC. The prosecution does reference Congress's power to "*define* and *punish* . . . Offenses against the Law of Nations" (*see* Gov't Resp. at 3 (quoting U.S. Const. art. I, § 8, cl. 10) (emphasis in Gov't Resp.)), but it never suggests that Congress "defined" the offense of murder beyond simply referring to "murder in violation of the law of war." In any event, Congress could not have used that power to expand the scope of offenses under the law of war. *See, e.g.*, 11 Op. Atty Gen. 297, 1865 U.S. AG LEXIS 36, *4 ("To *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations."); *see also, e.g.*, Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L.J. 121, 141 (2007).

power, *Weaver v. Graham*, 450 U.S. 24, 29, 29 n.10 (1981), which governs Congress's conduct regardless of whether the individuals adversely affected have independent legal rights under the Constitution, *see id.* at 29-30 ("The presence or absence of an affirmative, enforceable right is not relevant . . . to the *ex post facto* prohibition."); *see also Downes v. Bidwell*, 182 U.S. 244, 277 (1901).

(4) Even assuming, *arguendo*, that the *Ex Post Facto* Clause only applies to those persons detained within the territorial jurisdiction of the United States, it would still apply in this case because the Supreme Court has previously recognized that Guantanamo Bay comes within the "territorial jurisdiction" of the United States. *See Rasul v. Bush*, 542 U.S. 466, 480 (2004) (interpreting habeas statutute); *see also id.* ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base." (citing the terms of the 1903 lease agreement)); *id.* at 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . ."); *id.* ("From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)).

(5) In an effort to limit the reach of the Constitution's prohibition on *ex post facto* legislation, the prosecution relies heavily on the D.C. Circuit's opinion in *Boumediene v. Bush*, 476 F.3d 981 (2007), currently on review at the Supreme Court. While the prosecution argues that *Boumediene* "unambiguously held that the Constitution does not apply to alien enemy combatants held" at Guantanamo, (Gov't Resp. at 8), *Boumediene* did no such thing. *Boumediene* was concerned solely with the Suspension Clause and did *not* address the applicability of the *Ex Post Facto* Clause to Guantanamo detainees. To the extent *Boumediene* may have suggested that other constitutional provisions do not apply at Guantanamo, it did so only by dismissing the significance of the Supreme Court's recent precedent in *Rasul*. *See Boumediene*, 476 F.3d at 991 n.10 (concluding that *Rasul*, "resting as it did on statutory interpretation, . . . could not possibly have affected the constitutional holding of" *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950), which held that constitutional protections extend to aliens "within [the courts'] territorial jurisdiction"). In rejecting the Supreme Court's conclusion that aliens at Guantanamo are within the "territorial jurisdiction" of the United States, the D.C. Circuit unnecessarily manufactured a tension between *Eisentrager* and *Rasul*. It is far more natural to read *Eisentrager* as setting out the standard for the extraterritorial application of constitutional rights and *Rasul* as recognizing that Guantanamo satisfies that standard.

(6) Moreover, the holding of *Boumediene* has already been called into question—first by the Supreme Court's grant of certiorari and second by the D.C. Circuit's own decision to recall the mandate it had previously issued. Under the Federal Rules of Appellate Procedure, an appellate decision "is not final until issuance of the mandate." Advisory Committee Notes, subdivision (c), Fed. R. App. P. 41. Numerous judges have recognized that "the Court of Appeals' withdrawal of the mandate in *Boumediene*," when considered along with "the Supreme Court's highly unusual grant of certiorari on rehearing," casts "a deep shadow of uncertainty over the jurisdictional ruling of that decision." *Alhami v. Bush*, No. 05-359, at 6 (GK) (D.D.C. Oct. 2, 2007); *see also Al-Oshan v. Bush*, No. 05-0520, at 6 n.2 (RMU) (D.D.C. Oct. 5, 3007)

(noting that "the extraordinary procedural dispositions in *Boumediene* 'cast a deep shadow of uncertainty'" over the D.C. Circuit's jurisdictional ruling).

(7) Given the considerable uncertainty surrounding *Boumediene*, if this Commission were to find that the D.C. Circuit's opinion necessary to the resolution of this case, it should stay these proceedings until the Supreme Court reaches a decision. Several D.C. district court judges have stayed their proceedings and refused to rule on Government motions to dismiss detainee habeas petitions in light of the considerable uncertainty surrounding *Boumediene*. *See Maqaleh v. Gates*, No. 06-1669 (JDB) (D.D.C. July 18, 2007); *Al-Oshan v. Bush*, No. 05-0520 (RMU) (D.D.C. Oct. 5, 3007); *cf. Alhami v. Bush*, No. 05-359 (GK) (D.D.C. Oct. 2, 2007).

(8) Alternatively, if this Court should decide that it can now reach the merits of the *Ex Post Facto* issue, it should determine that applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause. As discussed in Mr. Khadr's initial motion, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it retroactively changes the "criminal quality attributable to an act," *Beazell v. Ohio*, 269 U.S. 167, 170 (1925), and it impermissibly alters the "nature or amount of the punishment imposed for its commission," *id.* *See* Def. Motion at 7-8. The Government's throwaway claim that summary execution is the proper baseline for determining the extent to which application of the MCA disadvantages Mr. Khadr implicitly reflects a recognition that the MCA, when compared against the proper baseline, violates the prohibitions of the *Ex Post Facto* Clause. (Gov't Resp. at 12-13.)[10] The proper baseline is in fact not summary execution, but trial in federal district court under 18 U.S.C. § 1117, which criminalizes conspiracy to murder an officer of the United States, including members of the armed services. *Id.*; *see also id.* § 1114. Numerous courts have held that these statutes can be applied extraterritorially to reach conduct that occurred outside the United States. *See, e.g.*, *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984); *U.S. v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 202 (S.D.N.Y. 2000); *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981). As discussed in Mr. Khadr's initial motion, in light of this baseline, applying the MCA to Mr. Khadr would represent a clear violation of the *Ex Post Facto* Clause. *See* Def. Motion at 7-9.

(9) Even assuming, *arguendo*, that courts-martial provide the appropriate benchmark, *see* Gov't Resp. at 9-10, applying the MCA to Mr. Khadr nonetheless violates the *Ex Post Facto* Clause. This Commission need look no further than the text of the MCA itself, which *explicitly* breaks from *court-martial* procedures. In Section 948b(d) ("Inapplicability of Certain Provisions"), the MCA identifies three crucial UCMJ protections that do *not* apply, including "any rule of courts-martial relating to speedy trial," 10 U.S.C. § 948b(d)(1)(A), the rules "relating to compulsory self-incrimination," *id.* § 948b(d)(1)(B), and those relating to pretrial investigation, *id.* § 948b(d)(1)(C). The other rules "shall apply to trial by military commission *only to the extent provided by this chapter*." *Id.* § 948b(d)(2) (emphasis added). This is little comfort, since the MCA provides, among other things, that *court-martial* principles of law and

[10] The prosecution's assertion that the proper baseline is summary execution is particularly absurd in light of the fact that summary executions have long been prohibited as violations of the law of war. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3 (entered into force Oct. 21, 1950).

rules of evidence shall apply only insofar "as the Secretary [of Defense] considers practicable or consistent with military or intelligence activities." *Id.* § 949a(a). The very same section of the MCA notes that the Secretary may prescribe that under certain circumstances the "hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission." *Id.* § 949a(b)(2)(E). This includes, notably, the admission in certain circumstances of coerced testimony. *Id.* § 948r. While the Government lists in its response a number of purported rights available to Mr. Khadr under the military commission system,[11] the relevant question is not what rights the MCA provides, but what rights it takes away. As discussed above and in detail in Mr. Khadr's motion to dismiss, the retroactive application of the MCA to Mr. Khadr's case deprives him of many rights which are routinely provided in U.S. courts and courts-martial. Def. Motion at 8-12.

(10) Thus, regardless of whether the appropriate benchmark is trial in an Article III court or by court-martial, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it "aggravate[s]" the consequences for the conduct Mr. Khadr is alleged to have committed. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). The Government cannot diminish the significance of these changes simply by labeling them as "jurisdiction[al]." Gov't Resp. at 9. As the Supreme Court has specifically recognized, legislative changes cannot be insulated from *ex post facto* analysis simply by labeling them "procedural" or "jurisdictional"—what matters is the degree to which they effectively "aggravate an offense." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925); *see also id.* at 171 ("Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree.").[12] As explained above and in detail in Mr. Khadr's motion to dismiss, the MCA changes the nature of the offense with which Mr. Khadr is charged and the consequences for that conduct. Def. Motion at 8-12. Accordingly, applying it to Mr. Khadr would violate the *Ex Post Facto* Clause of the U.S. Constitution.

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[11] It is worth noting that some of the "rights" the Government identifies exist more in theory than they do in practice. For example, the Government states the accused has the right to cross-examine witnesses who testify against him, but because the Government can base its case exclusively on documentary and hearsay evidence, the accused may have no witnesses and/or no witnesses with personal knowledge to cross-examine. *See* 10 U.S.C. § 949a(b)(2). The Government also claims that the accused has the right to present evidence in his defense, but the accused cannot compel the attendance of witnesses at a commission in Guantanamo Bay.

[12] Indeed, in the two Supreme Court cases on which the Government relies, the Supreme Court made clear that to survive an *ex post facto* challenge legislation must "leav[e] untouched all the substantial protections with which the existing law surrounds the person accused of crime." *Duncan v. State*, 152 U.S. 377, 382-83 (1894); *see also Mallett v. North Carolina*, 181 U.S. 589, 597 (1901) ("[The legislature] cannot lawfully . . . dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."). That is assuredly not the case with respect to the MCA. For example, the Government does not even dispute that applying the MCA to Mr. Khadr's case deprives him of the protections provided by the Juvenile Delinquency Act, 18 U.S.C. §§ 5031 *et seq.*; *see also* Def. Motion at 8.

c. Conclusion:

(1) The MCA only confers jurisdiction on this Commission to try murders that violate the law of war. Mr. Khadr has not been charged with facts that would constitute a violation of the law of war. Charge I should therefore be dismissed.

/s/
William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Detailed Assistant Defense Counsel

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 I & II (Murder & Attempted Murder)** December 14, 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 I, murder in violation of the laws of war under 10 U.S.C. § 950v(b)(15) ("Mot. to Dismiss I"), should be denied. The Government similarly and respectfully submits that the Defense's motion to dismiss charge II, attempted murder in violation of the laws of war under 10 U.S.C. § 950t ("Mot. to Dismiss II"), should be denied.

3. Overview: The Defense argues that, under the law of war, terrorists may kill or attempt to kill American soldiers with impunity. To state that argument is to demonstrate its absurdity. While it is certainly true that the law of war evolved to handle armed conflicts involving *lawful* combatants—unlike the accused—who mutually respect the rules, conventions, and customs of warfare, it does not follow that terrorists who flout those rules—like the accused—may take advantage of them. Moreover, the law of war has long prohibited "treacherous" killing, and nothing could be more treacherous than an individual who lies in wait, dressed as a civilian, before attacking and killing a law-abiding American. Murder and its attempt have been cognizable violations of the law of war for centuries, so Khadr's Ex Post Facto claims are baseless. The motion to dismiss therefore should be denied.

4. Burden and Persuasion: To the extent the Defense attempts to equate Khadr's murderous actions with those of a lawful combatant, the Defense bears the burden of proving that he is entitled to lawful combatant immunity. *See United States v. Khadr*, CMCR 07-001, at 7 (Sept. 24, 2007). Otherwise, 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. THE MCA CONCLUSIVELY ESTABLISHES JURISDICTION

i. The Defense asserts that Congress cannot create military commission jurisdiction for murder and attempted murder in violation of the law of war because, in the Defense's view, Congress does not have the power to do so. That assertion is patently incorrect.

ii. The Constitution vests Congress with the exclusive authority "[t]o *define* and *punish* . . . Offenses against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10 (emphasis added). Exercising that authority in the Military Commissions Act of 2006 ("MCA"),

Congress unequivocally declared murder in violation of the law of war, and its attempt, to be crimes triable and punishable by military commissions.

a. MCA codifies "offenses that have traditionally been triable by military commissions." 10 U.S.C. § 950p(a).[1] Two such offenses, triable by a military commission, are murder and attempted murder committed in violation of the law of war. *See id.* §§ 950v(b)(15), 950t.

b. Even if Congress were incorrect in its assessment of those crimes that "have traditionally been triable by military commissions," that would not prevent Congress from directing that those crimes be tried by military commissions going forward. Congress has the constitutional authority to define, by statute, the jurisdiction of military commissions. *See, e.g.*, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774-75; *see also id.* at 2780 (plurality op.). Congress has done so here with respect to both murder in violation of the law of war and its attempt.

iii. As the Defense concedes, Khadr has been properly charged (and jurisdiction therefore exists) under Part IV of the Manual for Military Commissions ("MMC"). *See* Mot. to Dismiss I at 7; Mot. to Dismiss II at 8. The MMC is entirely consistent with the MCA, and the Defense's motions therefore should be denied.

B. MURDER IN VIOLATION OF THE LAW OF WAR IS A WAR CRIME, TRIABLE BY MILITARY COMMISSION

i. The MCA reflects Congress's exercise of its authority to "define and punish" murder and its attempt as "Offenses against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10. Congress's judgment is firmly rooted in U.S. law and international law and custom, both of which recognize that a combatant commits murder when he kills another person in a manner that is not sanctioned by the laws of war.

Murder in Violation of the Law of War

ii. The Defense concedes, *see* Mot. to Dismiss I at 3-5; Mot. to Dismiss II at 3-5, that killing through "prohibited means" constitutes a violation of the law of war. One of those "prohibited means"—which is as old as the law of war itself—is murder committed by a

[1] The Defense appears to concede this point. *See* Mot. to Dismiss I at 6; Mot. to Dismiss II at 7. Confusingly, however, the Defense also appears to contradict its own concession in a footnote, *see* Mot. to Dismiss I at 6 n.15; Mot. to Dismiss II at 7 n.19, which suggests that 10 U.S.C. § 950p(a) should not be read "as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to the adoption of the M.C.A." As support for that conclusion, the Defense invokes "separation of powers" concerns, and it cites cases such as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), for the proposition that Article III courts have the power to declare unconstitutional an act of Congress. Whatever "separation of powers" considerations may arise in this case, it utterly defies common sense to invoke them here, where the present proceedings are conducted wholly within a single Branch, and where the Military Judge is *not* an officer of the "*judicial department*," Mot. to Dismiss I at 6 n.15; Mot. to Dismiss II at 7 n.19 (emphasis in original).

combatant who fails to fight as a lawful belligerent.[2] As Justice Iredell noted in 1795, "hostility committed without public authority" is "not merely an offence against the nation of the individual committing the injury, *but also against the law of nations* . . . ." *Talbot v. Janson*, 3 U.S. 133 (1795) (Iredell, J., concurring) (emphasis added).

a. Individuals "who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment." U.S. Army Field Manual No. 27-10, Article 80, 18 July 1956 (citation omitted). *See also id.*, Articles 81, 82. Historically, summary execution of those caught committing acts of unlawful belligerency, sometimes termed "unlawful combatants" or "unprivileged belligerents," has not been uncommon. *See, e.g.*, *United States v. List* ("Hostage Case"), 11 Trials of War Criminals 1223 (GPO 1950).

b. Colonel Winthrop, in a treatise that the Supreme Court has called the "the Blackstone of Military Law," *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777 (2006), noted:

> Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death.

Winthrop, *Military Law and Precedents*, 783 (1895, 2d ed. 1920). During the Civil War, military commissions were used frequently to try and punish unlawful combatants "who engaged in the killing . . . of peaceable citizens *or soldiers*." *Id.* at 784 (emphasis added). Critically for purposes of this motion, many were sentenced to death "for homicide." *Id.* at 784 n.57. *See also id.* at 839 (emphasizing that murder was one of the crimes "most frequently brought to trial before military commissions" during the Civil War).

c. Similarly, in a 142-year-old opinion, which remains binding on the Executive Branch, the Attorney General emphasized that "[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." 11 Op. Atty. Gen. 297, 314 (1865).

d. Lieber's Code, General Order No. 100 War Department, April 24, 1863, recognized the distinction between lawful and unlawful combatants as well. Under Article 57, "[s]o soon as a man is armed by a sovereign government, and takes the

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[2] The Defense argues—notably, without citation—that the law of war does not recognize "status crimes." Mot. to Dismiss I at 5. The Supreme Court, however, has held that the distinction between "lawful" and "unlawful" combatant status is founded in the "universal agreement of law and practice" under the law of war. *Ex parte Quirin*, 317 U.S. 1, 30 (1942). And unlawful combatants can be forced to stand trial before military commissions for *precisely* those "acts which render their belligerency unlawful." *Id.* Moreover, the Government did not criminally charge Khadr simply on the basis of his "status"; rather, he is charged with *committing murder* while maintaining the status of an unlawful enemy combatant.

soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses." By contrast, hose who "commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army . . . shall be treated summarily as highway robbers or pirates." Article 82.

e. Given that unlawful belligerents historically could be summarily punished—and even executed—under the law of war, it follows *a fortiori* that they may be tried by military commissions. Thus, the Supreme Court has held:

> By universal agreement and practice the law of war draws a distinction between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. *Unlawful combatants* are likewise subject to capture and detention, but in addition they are *subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.*

Ex parte Quirin, 317 U.S. 1, 30 (1942) (emphasis added).

f. Here, Khadr has been charged for committing murder without combatant immunity and in violation of the law of war. Specifically, Khadr unlawfully engaged in combat by fighting outside of responsible command, by fighting without wearing a distinctive emblem, by failing to carry his arms openly, and by flaunting the laws and customs of war by feigning to be a non-combatant. *Compare* Hague Regulations, Annex, Art. 1.

1. Under the law of armed conflict, only a lawful combatant enjoys "combatant immunity" or "belligerent privilege" for the lawful conduct of hostilities during armed conflict. *See, e.g., Padilla v. Bush*, 233 F.Supp.2d 564, 592 (S.D.N.Y 2002), *rev'd on other grounds*, 542 U.S. 426 (2004). Those considered "lawful combatants" under the law cannot be prosecuted for belligerent acts—including the killing of an enemy soldier—if they abide by the law of armed conflict. *See id.* at 592 (*citing United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002)).

2. Khadr bears the burden of proving that he is entitled to combatant immunity. *See United States v. Khadr*, CMCR 07-001, at 7 (Sept. 24, 2007) ("The burden of raising the special defense that one is entitled to lawful combatant immunity rests upon the individual asserting the claim.").

3. Here, Khadr has not challenged the *prima facie* evidence that he is an unlawful combatant, *see* Mot. to Dismiss I at 5 n.11; Mot. to Dismiss II at 6 n.15, much less has he proven that he is entitled to combatant immunity.

g. Unlawful or unprivileged combatants—such as Khadr—violate the laws of war when they commit war-like acts, such as murder. The CMCR emphasized that

proposition by noting that unlawful combatants may be "treated as criminals under the domestic law of the capturing nation," ***including the Military Commissions Act***, "for any and all unlawful combat actions." *Khadr*, CMCR 07-001, at 6. The CMCR reiterated the permissibility of Khadr's trial before military commission by citing passages from *Lindh* and *Quirin*, both of which emphasize that "'*[u]nlawful combatants are . . . subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.*'" *Khadr*, CMCR 07-001, at 6 (quoting *Quirin*, 317 U.S. at 30, and citing *Lindh*, 212 F. Supp. 2d at 554, the latter of which block-quoted the same language from *Quirin*).

h. In utter disregard for the law governing this case, the Defense *twice* purports to quote the CMCR's opinion to hold "[a] war crime inherently requires an overt infraction of the law of war, not just committing a domestic crime without combatant immunity." Mot. to Dismiss I at 6 & n.14; Mot. to Dismiss II at 6 & n.18. Wherever the source of that quotation may be,[3] this much is absolutely certain: It did ***not*** come from the CMCR. Rather, as noted, the CMCR's decision—and its reliance on both *Lindh* and *Quirin*—emphatically countenanced the use of military commissions to try crimes committed by unlawful combatants, such as Khadr.

Treacherous Killing

iii. Even for otherwise lawful combatants (which Khadr is not), one example of murder in violation of the law of war is the "treacherous[]" killing of "individuals belonging to the hostile nation or army." Annex to Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907, Art. 23, ¶ 3 ("Hague Regulations"). Such killings have long been held to violate the laws of war, including under the Fourth Hague Convention, and they have violated the War Crimes Act since 1997, *see* Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. 105-118, § 583, 111 Stat. 2386, 2436 (Nov. 26, 1997), long before Khadr treacherously killed Sergeant First Class Speer.

a. For example, Article 37(1)(c) of Additional Protocol I to the Geneva Conventions prohibits killing through "perfidy," including the murder of an adversary by an individual "feigning . . . civilian, non-combatant status." Although the United States has not ratified Protocol I, it views the perfidy provisions of Article 37 as reflecting customary international law. *See U.S. Army Operational Law Handbook* 15, 25 (J. Rawcliffe & J. Smith eds., 2006).

b. The Army's *Operational Law Handbook* similarly defines unlawful combatants to include "civilians who are participating in the hostilities or who otherwise engage in unauthorized attacks or other combatant acts." *Id.* at 17.

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[3] The words "inherently," "overt," and "infraction" do not appear anywhere in the CMCR's decision, much less do they appear together in a sentence even remotely resembling the one quoted by the Defense. Given that much of the Defense's argument relies on law review articles, the Government also performed a search for ("inherently requires" /s "overt infraction" /s "law of war") in Westlaw's JLR database, which produced zero hits. The same search in Westlaw's ALLFEDS database similarly came up empty.

c. The Judge Advocate General's *Law of War Handbook* also emphasizes that attacking a soldier while feigning non-combatant status constitutes a war crime. *See* Int'l & Operational Law Department, *Law of War Handbook*, § 5(A)(2)(f), at 192 (Keith E. Puls et al. eds., 2005) ("Attacking enemy forces while posing as a [non-combatant] civilian puts all civilians at hazard.") (internal quotation marks and citations omitted).

d. Similarly, U.S. Air Force Pamphlet 110-31 prohibits "[p]erfidy or treachery," which includes murder by a combatant who "feign[s] . . . civilian, noncombatant status." U.S. Air Force Pamphlet 110-31, at 5-12.

e. Building on these and other materials, Article 8(2)(b)(xi) of the Rome Statute of the International Criminal Court similarly prohibits "killing or wounding treacherously individuals belonging to the hostile nation or enemy." *See also* Knut Dörmann, *Elements of War Crimes* 240-45 (2002).

f. These sources establish an irrefutable consensus, as a matter of United States and international law, that murder committed by an individual—like Khadr—who takes up arms without satisfying the conditions for lawful combat is a violation of the law of war. He was therefore appropriately charged, especially in light of the well-settled principle that "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Application of Yamashita*, 327 U.S. 1, 17 (1946).

Conclusion

iv. The Defense is correct that "[t]he law of war plainly does not prohibit killing enemy soldiers," Mot. to Dismiss I at 4, but that is only true when the killing is done by a soldier who fights under responsible command, wears a distinctive emblem, carries his arms openly, and obeys the laws and customs of war.[4] *See* Hague Regulations, Annex, Art. 1. To receive the protections afforded by the law of war for killing in combat, a person must conform to the requirements for lawful combatants that the laws of war prescribe.

a. The Defense argues that these essential requirements for lawful combat do nothing to alter the permissibility of a combatant's hostile actions. Rather, in the Defense's view, anyone can kill an American serviceman under any battlefield circumstances, so long as he does not use certain narrowly proscribed methods, which (conveniently enough for Khadr) do not include terrorism.

b. That contention does violence to both the law of war and common sense. The law of war does not condone, much less immunize, killing undertaken in a manner that flouts its requirements for lawful combat—which is why it clearly recognizes the crime of unlawful killing, even where the target is a soldier. *See* pp. 4-7, *supra*. The

[4] Khadr, of course, has not invoked this—or any other—basis for combatant immunity.

Defense's argument to the contrary relies upon egregious misunderstandings and misinterpretations, under which the law of war somehow protects killing by terrorists, like Khadr, who openly flaunt every convention, norm, custom, and rule that has ever governed the conduct of warfare in the history of the civilized world.

c. Because Khadr was an unlawful combatant under any conceivable interpretation of the law of war, his killing is not even arguably immunized as lawful combat by those same laws. Hence, the charge of murder as alleged against Khadr is a cognizable war crime, which is properly heard before this Court.

C. ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR IS ALSO A COGNIZABLE WAR CRIME AND IS THEREFORE ALSO TRIABLE BY MILITARY COMMISSION

i. The Defense does not—indeed, could not—contest that the MCA plainly prohibits attempted murder. *See* 10 U.S.C. § 950t(a) ("Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct."). Instead, the Defense argues that the MCA is somehow invalid because "many international law treaties do not explicitly criminalize attempts." Mot. to Dismiss II at 5.

ii. As an initial matter, Congress's authority to define crimes triable by military commission is not limited to the crimes that treaties or customary international law may or may not criminalize.

a. As noted above, *Congress* has explicitly criminalized attempt. Even assuming *arguendo* that international law expressly precluded the criminalization of attempt (as explained below, it does not), the MCA would trump it by "defin[ing] and punish[ing]" attempt as an "Offense[] against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10. *See, e.g.*, *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 233 (2d Cir. 2005) ("[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)); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *MR 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.); *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.").

b. Moreover, even assuming that the crime of attempt is not covered by the treaties cited by the Defense, that fact says nothing about whether such an offense is a cognizable war crime under international law. Were it otherwise, only those offenses that appear in *every* treaty in the world could constitute war crimes—thus precluding, for

example, the war crime of genocide, *see, e.g.*, Statute for the International Criminal Tribunal for Rwanda, Art. 2, simply because that offense is not prohibited in other treaties, such as the Geneva Conventions or the Hague Conventions. *See* Mot. to Dismiss I at 4 (quoting *Hamdan*, 126 S. Ct. at 2781, for the proposition that offenses not listed in the Geneva Conventions or the Hague Conventions, which are "the major treaties on the law of war," are not cognizable war crimes); Mot. to Dismiss II at 4 (same). That is patently not the law.

iii. The Defense's argument fails even on its own terms, for it is well established that attempted murder in violation of the law of war is, in fact, a war crime. Among other authorities:

a. Colonel Winthrop noted that attempted murder was one of the crimes "most frequently brought to trial before military commissions" during the Civil War. *See* Winthrop, *Military Law and Precedents*, at 839.

b. Army Field Manual 27-10, ¶ 82, emphasizes that unlawful belligerents who attempt to commit hostile acts against the enemy are guilty of a war crime and "are subject to the extreme penalty of death because of the danger inherent in their conduct."

c. And the Judge Advocate General's Law of War Handbook lists "attempts" as an independent war crime. *See Law of War Handbook*, § III(K), at 215.

iv. Thus, notwithstanding the opinion of the Defense (and the law review authors it relies upon) that "attempts should [not] be criminalized at all," Mot. to Dismiss II at 5, the fact of the matter is that the law of war has long recognized such an offense, and both Congress and the President—through the MCA—have agreed to make it triable by military commission. This Court should give effect to that determination.

D. THE DEFENSE'S EX POST FACTO ARGUMENTS ARE BASELESS

i. In its motions to dismiss both charges I and II, the Defense claims that the United States Constitution's Ex Post Facto Clause somehow precludes Khadr's trial before a military commission. That argument must be rejected as frivolous.

ii. As an initial matter, controlling D.C. Circuit precedent unambiguously holds that the Constitution does not apply to aliens held outside the United States, 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); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).[5] The D.C. Circuit has direct review over this court, *see* 10 U.S.C. § 950g, and its decisions are

[5] In his principal brief before the Court of Military Commission Review, Khadr suggested that these longstanding doctrines may not govern here because, in his view, the Ex Post Facto Clause imposes structural limitations on Congress. *See* Br. for Appellee at 20-21. That precise argument was rejected by the D.C. Circuit. *See Boumediene*, 476 F.3d at 993.

binding. *Cf. Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). This Court need proceed no further to reject Khadr's constitutional claims.

a. Additionally, any evaluation of Khadr's constitutional challenge to the MCA 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 v. Rumsfeld*, 126 S. Ct. 2749, 2774-75 (2006); *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).

b. Were the Defense to prevail in its argument that Khadr's prosecution is barred by the Ex Post Facto Clause, the action the Supreme Court invited would be transformed into a fool's errand.

iii. Moreover, even on its own terms, Khadr's ex post facto claim is meritless. The Supreme Court has emphasized that the Ex Post Facto Clause is implicated only where (1) Congress "retroactively alter[s] the *definition* of crimes or increase[s] the punishment for criminal acts," *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), or (2) the statute "disadvantage[s] the offender affected by [it]," *id.* at 41. Neither condition is met here.

a. First, the MCA does not "retroactively alter the definition of" murder and its attempt in violation of the law of war.

1. As explained above, both offenses have been well-established war crimes for centuries. And under the law of war, unlawful combatants like Khadr faced military commissions (at best) and summary execution (at worst) for openly flaunting the rules and customs that govern armed conflict. Thus, the MCA does not "retroactively alter the definition of" or "increase the punishment for" murder and its attempt in violation of the law of war, within the meaning of the Ex Post Facto Clause.

2. Thus, it is well established that changes to judicial tribunals and provisions governing venue or jurisdiction do not implicate the Ex Post Facto Clause, much less violate it. Courts have therefore 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). Indeed, the Supreme Court has emphasized that it has "upheld intervening procedural changes [under the Ex Post Facto Clause] *even if application of the new rule operated to a defendant's disadvantage in the particular case*." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.28 (1994) (emphasis added).[6] The rationale for these

[6] Thus, the MCA's evidentiary rules—including, for example, the broad admissibility of hearsay—do not violate the Ex Post Facto Clause. The accused, like the Government, can rely upon those rules to introduce evidence, and in that sense, the MCA's rules are closely akin to retroactive procedural changes

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.

b. Second, Khadr cannot conceivably claim that he has been "disadvantaged" by the MCA's passage.

1. As explained above, banditti, jayhawkers, guerillas and their modern-day equivalents are traditionally liable to be shot immediately upon their capture. Where such individuals have instead been tried, the United States has prosecuted them based upon offenses under the common law of war. Indeed, the MCA represents one of the first attempts of the United States to set out clearly, in its domestic law, the law of war offenses triable by military commissions. The fact that Congress chose expressly to define these law of war offenses does not amount to the creation of "new" offenses for purposes of the Ex Post Facto Clause. To the contrary, Khadr is certainly better off based upon the clarity provide by Congress and the extensive array of procedural protections provided by the MCA, the likes of which no unlawful combatant has ever enjoyed in the history of warfare.

2. For example, unlike his historical predecessors, Khadr enjoys the statutory 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.* § 949*l*(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).

3. Instead of summary execution, and far from "fundamental unfairness," Mot. to Dismiss I at 8, Khadr enjoys more legal process than any unlawful combatant ever detained or tried in any prior conflict anywhere in the world. Whatever an Ex Post Facto violation may entail, this is certainly not it.[7]

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that the Court has approved in the past. *See, e.g.*, *Carmell v. Texas*, 529 U.S. 513, 546 (2000) (noting that the legislature may retroactively alter rules governing the admissibility of evidence where doing so does not uniformly prejudice the defendant).

[7] It also bears emphasizing that Khadr's baseline for claiming a "disadvantage" under the MCA is surpassing strange. Khadr claims that the MCA has unconstitutionally abrogated rights that he would have enjoyed if tried in federal court. *See* Mot. to Dismiss I at 8-9; Mot. to Dismiss II at 9-10. But Khadr can point to *nothing*—not even a law review article—that suggests unlawful enemy combatants are entitled to federal court trials for their war crimes. Even *Hamdan*, which was obviously decided before Congress created the military commissions at issue here, chose the court-martial system as the relevant baseline. And under the court-martial rules, among other things, Khadr could be convicted by two-thirds of the members present, he would have no right to a grand jury indictment, and he would not be entitled to use the

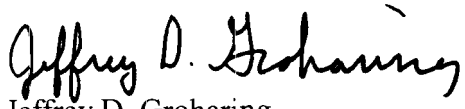
7. Oral Argument: The Government disagrees that the issues presented by these motions are "complex." Mot. to Dismiss I at 9; Mot. to Dismiss II at 10. In light of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motions should be readily 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 these motions is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

11. Submitted by:



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Federal Rules of Evidence. The Defense's invocation of those and other rights, *see* Mot. to Dismiss I at 8; Mot. to Dismiss II at 9, is specious.

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** to Dismiss Charge One for Failure to State an Offense and for Lack of Subject Matter Jurisdiction 7 December 2007

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 requests that this Court dismiss Charge I against Mr. Khadr, murder in violation of the law of war, *see* 10 U.S.C. §950v(b)(15).

3. **Overview:**

a. The charge of murder in violation of the law of war must be dismissed because the specification fails to state an offense; it does not allege a killing that violates the law of war. Accordingly, the military commission has no jurisdiction to try Mr. Khadr for the alleged conduct. A military commission has jurisdiction to hear an offense only if a U.S. statute explicitly provided it with jurisdiction or if the conduct violated the law of war when the offense was committed. At the time the alleged offense occurred in this case, neither U.S. law nor the international law of war proscribed murder as such as an offense triable by military commission. The Uniform Code of Military Justice (U.C.M.J.) set forth the applicable U.S. law at the time, and under the U.C.M.J., the only offenses triable by military commission were aiding the enemy and spying—not murder. Likewise, treaties and international practice confirm that murder does not violate the law of war and thus cannot be tried by military commission.

b. The enactment of the 2006 Military Commissions Act ("MCA") does not alter this conclusion. The relevant provision of the MCA prohibits intentional killing "in violation of the law of war." 10 U.S.C. §950v(15). The law of war prohibits certain modes of warfare and attacks on certain protected persons, but the allegations against Mr. Khadr do not include any of this prohibited conduct. Put simply, because killing a soldier in combat is not a violation of the law of war, it is also not an offense made triable by military commission under the MCA. It is irrelevant that the Manual for Military Commissions ("MMC") states otherwise. *See* MMC, Part IV, para. 6(a)(15)(c). The MCA does not give the Executive Branch the authority to exercise its rulemaking power in a manner that would expand the class of conduct triable by military commission. Indeed, Congress expressly states that the statute is merely "declarative of existing law." Further, even if the Executive Branch did have such authority, the MMC's newly expanded definition of "murder in violation of the law of war" could not be applied to Mr. Khadr, because doing so would violate the U.S. and international law prohibitions on *ex post facto* legislation.

c. Accordingly, because Mr. Khadr has not been charged with a violation triable by military commission, this commission lacks jurisdiction to hear this charge against him. Charge I should be dismissed. *See* R.M.C. 907(b)(1).

4. **Burdens of Proof and Persuasion:** Because this motion is jurisdictional in nature, the Government bears the burden of proving jurisdiction by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

5. **Facts:** This motion presents a question of law.

a. The Government alleges that, at the age of 15, Mr. Khadr murdered a U.S. soldier "in violation of the law of war by throwing a hand grenade at U.S. Forces" resulting in the soldier's death. *See* Charge Sheet (24 Apr 2007) [hereinafter 2007 Charge Sheet]; Sworn Charge Sheet (2 Feb 2007).

b. The President signed the Military Commissions Act into law on October 17, 2006. P.L. 109-366, 120 Stat. 2600.

6. **Argument: The Charge of Murder Must Be Dismissed Because the Military Commission Lacks Jurisdiction To Hear It.**

a. As the Supreme Court made clear in *Ex Parte Quirin*, the first question in a military commission case is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal." 317 U.S. 1, 29 (1942).[1] At the time of the alleged conduct, military commissions could also try an accused for a statutory violation expressly made triable by military commission. 10 U.S.C. § 821 (1998).

b. Mr. Khadr has not been charged with violating any statue in effect at the time of his alleged offenses. Nor could he have been so charged: as noted above, the Uniform Code of Military Justice (U.C.M.J.) set forth the applicable U.S. law at the time of Mr. Khadr's alleged offense, and there is no dispute that under the U.C.M.J. only aiding the enemy and spying—and not murder—are triable by military commission. Accordingly, this Commission has authority to try Mr. Khadr for murder only if murder is a violation of the law of war. However, as discussed below, it is not. This Commission therefore has no jurisdiction to consider Charge I, and the charge must be dismissed.

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[1] *See also Hamdan*, 126 S. Ct. at 2777 ("[A] law-of-war commission has jurisdiction to try only two kinds of offense: 'Violations of the laws and usages of war cognizable by military tribunals only,' and '[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.'") (citing W. Winthrop, Military Law and Precedents 839 (rev. 2d ed. 1920)); *id.* (noting that it "is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge 'properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction.*'" (citing Winthrop at 842 (emphasis in original)); *In re Yamashita*, 327 U.S. 1, 13 (1946) ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is a violation of the law of war.").

(1) Murder Is Not A Violation Of The Law Of War

(a) Mr. Khadr is charged with murdering an American soldier in violation of the "law of war." 2007 Charge Sheet.

(b) For an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally." *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.) (quoting *Ex Parte Quirin*, 317 U.S. at 30); *see also*, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.").

(c) A review of the relevant sources reveals that killing an enemy in combat, without more, does not meet this high standard and thus does not amount to a violation of the law of war.

(i) <u>The Alleged Conduct Does Not Violate the Law of War Because it Does Not Involve A Prohibited Mode or Object of Killing</u>

(A) The prohibitions on killing embodied in the law of war take two forms: certain means of warfare are banned, and certain objects of attack are forbidden.[2] Neither of these proscriptions applies to Mr. Khadr's alleged conduct: the charge against Mr. Khadr does not allege that he murdered a protected person or killed using prohibited means.

(B) First, the law of war prohibits only certain methods of killing, none of which have been alleged here. Attacks with certain weapons, such as blinding lasers or poisonous gas, are not permitted.[3] Soldiers are likewise not allowed to employ "human shields" by using the presence of civilians to deter an enemy from attacking.[4] Similarly, soldiers may not engage in "perfidy," defined as "inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law

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[2] *See* Major Richard Baxter, *So-Called Unprivileged and Belligerency: Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 326 (1951); Norman A. Goheer, The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent is not a War Crime, Bepress Legal Series Working Paper 1871, at 12 (Nov. 8, 2006), *available at* http://law.bespress.com/expresso/eps/1871; *see also* 1 International Committee of the Red Cross, Customary International Humanitarian Law 569 (Jean Marie Henckaerts & Louise Doswald-Beck eds., 2005) (listing war crimes compiled from a variety of international legal sources).

[3] *See* Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), International Red Cross Conference, 13 October 1995; Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, Feb. 8. 1928, 94 L.N.T.S. 65.

[4] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 28, 6 U.S.T. 3516, 75 U.N.T.S. 287.

applicable in armed conflict, with an intent to betray that confidence."[5] But Mr. Khadr has not been charged with any of these illegal forms of combat. Rather, he is charged with killing another soldier with a hand grenade—a common weapon used in warfare. That does not constitute killing using prohibited means.

(C) Mr. Khadr has also not been charged with killing a protected individual. The law of war condemns attacks against vulnerable individuals, such as wounded soldiers, sick soldiers, civilians, prisoners of war, medical personnel not engaged in fighting, and soldiers who have laid down their arms—all "protected persons" under the fourth Geneva Convention.[6] The killing of these individuals, even in a time of war, is prohibited and constitutes a violation of the law of war.[7]

(D) Mr. Khadr, however, has been charged only with killing an enemy soldier. The law of war plainly does not prohibit killing enemy soldiers, as doing so is, almost by definition, a fundamental element of armed conflict.[8] For this reason, unqualified "murder" and "attempted murder" are not listed as offenses in the Geneva Conventions or the Hague Conventions—two treaties the Supreme Court has called "the major treaties on the law of war." *Hamdan*, 126 S. Ct. at 2781.[9] In fact, "[n]o treaty (including the statutes governing international courts such as the International Criminal Court, International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda) suggests that targeting a combatant is unlawful. Rather combatants are only protected from attack when they are *hors de combat* because they have surrendered, are sick or wounded and not carrying the fight, are shipwrecked, or have parachuted from a disabled aircraft."[10]

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[5] Perfidy is listed as a war crime in military manuals throughout the world, including in the U.S. Army Field Manual. See Goheer, supra . 9, at 14.

[6] Common Article 3, Geneva Conventions of 1949; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), art. 4, 12-14, 6 U.S.T. 3217, 75 U.N.T.S. 31; Geneva Convention IV art. 4.

[7] *Id.*

[8] Peter Rowe, *Murder and the Law of War*, 42 N. Ir. Legal Q. 216 (1991) ("[A] fundamental effect of war is the killing of enemy soldiers.").

[9] *See also* Jack Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 Am. J. Int'l L. 56, 61 (2007) ("[A]bsent some other violation, a war crime based solely on the killing of a combatant who is engaged in hostilities is problematic under the Geneva Convention."). Further, murder is not listed as an offense triable by the International Criminal Court in the Rome Statute, a statute with more than 120 signatory nations that "provides the most comprehensive, definitive, and authoritative list of war crimes." Robert Cryer, I*nternational Criminal Law v. State Sovereignty: Another Round?* 16 Eur. J. Int'l L. 979, 990 (2005).

[10] Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi J. Int'l L. 511, 520 n.44 (citing, *inter alia*, Convention between the United States and other Powers respecting the Laws and Customs of War on Land, art 23(c), 36 Stat 2277 (1907); Geneva Convention I, art. 12.

(E) In sum, Mr. Khadr has not been charged with using a prohibited means of killing, or of killing a protected person. Rather, he has been charged with killing a solider using a commonly employed weapon, a hand grenade. Such conduct does not violate the law of war.

(ii) Mr. Khadr's Status As An "Enemy Combatant" Does Not Alter The Conclusion that His Alleged Conduct Does Not Violate the Law of War

(A) The government will likely contend that Mr. Khadr was not participating in the armed conflict in Afghanistan as a traditional soldier, but rather as an "unlawful enemy combatant," and that this unprivileged status alone makes any killing he committed a violation of the law of war. *See* Manual for Military Commissions (MMC), Part IV, para. 6(a)(15)(c) (explaining that "[f]or the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy."). That argument fails.

(B) Merely holding the status of an "unlawful" combatant[11] does *not* mean that by causing a soldier's death the combatant has violated the law of war. The law of war does not recognize "status crimes:" the mere fact that a person is an "unlawful" combatant does not automatically subject him to liability under the law of war if he kills a lawful combatant. Rather, an "unlawful" combatant who kills another person will violate the law of war *only* if he does so using a prohibited means, or if the victim is a protected person. As discussed above, Mr. Khadr is not alleged to have used either a prohibited means of killing, or to have killed a protected person. He therefore did not violate the law of war, and his alleged status as an "unlawful" combatant cannot, by itself, alter this conclusion.

(C) The position set forth in the MMC relies on a fundamental misunderstanding of the significance of "lawful" combatant status. The primary significance of that status is to render a person immune from domestic liability for acts that would ordinarily be punishable under domestic law. Thus, "lawful" or privileged combatants are not liable under domestic law for killing other human beings in combat because causing another's death is an inevitable part of war. *See United States. v. Lindh*, 212 F.Supp.2d 541, 554 (E.D. Va 2002). Unprivileged, unlawful combatants do not share in this privilege; when they kill another, they must face the normal consequences of doing so, including possible prosecution for murder under domestic law.[12] These consequences, though, are not a result of violating the law of war. If an unprivileged person kills a combatant, he may—unlike a lawful combatant—be subject to a

[11] Mr. Kahdr does not admit that he is an unlawful enemy combatant. He reserves the right to challenge this Commission's prima facie jurisdiction in the future. *United States v. Khadr*, No. 07-001 at 21 (C.M.C.R. Sept. 24, 2007).

[12] *See* Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi J. Int'l L. 511, 520 ("civilians who directly participate [in war] may be punished for their actions because they lack the 'combatant privilege' to use force against lawful targets").

murder charge under domestic law,[13] but he will not, without more, be subject to liability for committing a war crime. Rather, as discussed, "[a] war crime inherently requires an overt infraction of the law of war, not just committing a domestic crime without combatant immunity."[14]

(D) As a result, even if it is ultimately determined that Mr. Khadr is an unprivileged combatant, that determination would mean only that he could be tried for murder under U.S. law. It does not mean that he could be tried by military commission for violating the "law of war."

(E) In sum, Mr. Khadr did not commit an attack against a protected person or through a prohibited means, and his potential status as an "unprivileged" enemy combatant has no relevance to the international law question of whether he violated the laws of war. This Commission therefore has no subject matter jurisdiction to try Mr. Khadr for murder against the law of war, and Charge I must be dismissed.

(2) Mr. Khadr's Alleged Conduct Does Not Violate the MCA, and Even if it Did, He Could Not Be Held Liable For Newly-Minted War Crimes Defined By That Statute

(a) The fact that Mr. Khadr has been charged under the MCA does not alter this analysis. *See* 2007 Charge Sheet (charging Mr. Khadr with a violation of the MCA, 10 U.S.C. §950v(b)(15)). Simply put, the MCA cannot provide a basis for jurisdiction in this case because Mr. Khadr's alleged conduct is not prohibited by the plain text of the act.

(b) Congress did not list "murder" as an offense to be tried by a military commission under the MCA; rather, it prohibited the more specific "murder in violation of the law of war." 10 U.S.C. §950v(15). This modifying clause confirms what is stated explicitly elsewhere in the statute: that in enacting the MCA, Congress intended only to codify "offenses that have traditionally been triable by military commissions." 10 U.S.C. § 950p(a). Indeed, Congress was careful to point out that the MCA "does not establish new crimes that did not exist before its enactment." *Id.*[15] The MCA thus provides this Commission with jurisdiction over a murder charge only when the alleged conduct constitutes a violation of the "law of war."

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[13] *See United States v. Khadr*, No. 07-001 at 4 (C.M.C.R. Sept. 24, 2007).("Unlawful combatants remain civilians and may properly be captured, detained by opposing military forces, and *treated as criminals under the domestic law* of the capturing nation for any and all unlawful combat actions. *Lindh*, 212 F. Supp. 2d at 554 (citing *Ex parte Quirin*, 317 U.S. at 30-31); *see* Army Op. Law Handbook 17.") (emphasis added).

[14] *Id*. *See also Mohammed Ali v. Public Prosecutor*, 1968 All ER 488 (1968) (Malaysia Privy Council holding that a member of the Indonesian army who attacked an enemy while wearing civilian clothes in Singapore could be tried under Malaysian domestic law because he did not comply with the requirements of the Third Geneva Convention and was not operating as a member of the Indonesian forces at the time).

[15] To read § 950p as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to adoption of the M.C.A. violates bedrock separation of powers principle. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") This interpretation should be avoided because it would raise serious constitutional

(c) However, as previously discussed, Mr. Khadr's charged conduct does not violate the law of war. *See supra* at 3-8. Accordingly, it falls outside the scope of the MCA, which only prohibits conduct traditionally proscribed by the "law of war." This commission therefore lacks jurisdiction to hear this charge.

(d) It is true that the rules in the MMC, promulgated by the Secretary of the Defense, state that "for the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy," implying that an "unlawful" combatant violates the law of war any time he kills a combatant. *See* MMC, Part IV, para. 6(a)(15)(c) (cross-referencing para. 6(a)(13)(d)). But, as discussed above, that assertion is simply false: one's status as a privileged or unprivileged combatant is irrelevant to determining whether one violated the law of war. *See* supra at 5-6. The MMC's "interpretation" of the MCA is thus flatly inconsistent with the statute's plain language, which specifically limits murder offenses to those that violate the law of war.

(e) Because of this, the MMC's interpretation of the MCA exceeds the Executive's authority and should be given no effect. Congress gave the Executive Branch the authority to define the elements of the offenses listed in the MCA. 10 U.S.C. § 949a(a). But in exercising this authority, it is settled that the Executive may not define the elements in such a way as to *expand* the scope of a crime. *See Loving v. United States*, 517 U.S. 748, 768 (1996) ("We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, *and the regulations "confin[e] themselves within the field covered by the statute.*") (emphasis added); *see also Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 21 (D.C. 2000) (holding that an agency has no "authority to promulgate [a] rule . . . [when it] exceed[s] the scope of the authority delegated by Congress"). The Executive certainly may not define these elements in such a way as to *violate* a clear congressional command. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("If the intent of Congress 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."). Here, Congress plainly stated that it did not intend for the MCA to create new crimes, but only to codify existing violations of the law of war. 10 U.S.C. § 950p(a). The MMC rules passed by the Secretary of the Defense purport to expand the scope of the law of war. The Secretary therefore exceeded his authority under the MCA, and this rule in the MMC should be given no effect.

(f) Moreover, even if the Executive did have the authority to expand the scope of the MCA in direct contravention of Congress's express limitations, and the MMC's interpretation of the MCA somehow rendered the act of killing an enemy soldier without having met the requirements for lawful combatancy triable by military commission, that newly-defined

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concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

provision could not be applied in this case because the MCA was not enacted until four years *after* Mr. Khadr allegedly committed the offenses with which he is charged. As discussed above, at the time of the charged conduct, Mr. Khadr could not have been tried by military commission for his alleged offense. *See supra* at 2-6. Thus, applying the MCA (as interpreted by the MMC) to his case would violate the U.S. and international law prohibition on *ex post facto* legislation. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990); U.S. Const. art. I, § 9, cl.3 ("No . . . ex post facto Law shall be passed."); *Kring v. Missouri*, 107 U.S. 221, 227 (1882) (noting that the Convention attached "[s]o much importance" to the ex post facto prohibition "that it is found twice in the Constitution"); *see, e.g.*, Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, art. 22, 2187 U.N.T.S. 3 (entered into force July 1, 2002) (providing that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, *a crime within the jurisdiction of the Court*." (emphasis added)); Protocol I, art. 75(4)(c) ("No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.") (recognized as customary international law by the U.S. in W. Hays Parks et al., Unclassified Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD (May 8, 1986) (entitled 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications).

(g) This prohibition on *ex post facto* legislation recognizes the fundamental unfairness in holding individuals accountable for consequences that they could not have foreseen at the time of their alleged offense. Assuming Mr. Khadr could be tried in a U.S. federal court for murder, he could not have foreseen in 2002 that the offenses with which he is accused would be triable by military commission in 2006, or foreseen the significantly different consequences that would result from that fact. Trying Mr. Khadr in a military commission for "murder in violation of the laws of war" as defined by the MMC, rather than in a U.S. court for murder (*see* 18 U.S.C. § 1114), violates the *Ex Post Facto* Clause in two respects. First, it retroactively changes the "criminal quality attributable to an act," *Beazell v. Ohio*, 269 U.S. 167, 170 (1925), and, second, it impermissibly alters the "nature or amount of the punishment imposed for its commission." *Id.*

(h) First, Mr. Khadr faces prosecution before an entirely different adjudicative body with entirely different rules than would have been the case had he been tried in federal court. In particular, because he faces trial before a commission rather than a court, Mr. Khadr will be (1) unable to receive the protections of the Juvenile Delinquency Act (the "JDA"), 18 U.S.C. §§ 5031 *et seq.*; and (2) subject to adjudication absent procedural protections such as the right to a grand jury indictment, the right to the protections of the Federal Rules of Evidence, and the right to trial before a jury of his peers who, before conviction, would have to agree unanimously that the evidence proved his guilt beyond reasonable doubt.

(i) Second, this retroactive change alters the "nature or amount of the punishment imposed for its commission." *Beazell*, 269 U.S. at 170. It deprives Mr. Khadr of the protections against arbitrary sentencing provided by federal sentencing law, and deprives him of the certain right to appeal his sentence. Under federal law, courts are required to consider a number of different factors, including the "nature and circumstances of the offense and the history and

characteristics of the defendant," to ensure that the sentence imposed is "no greater than necessary." 18 U.S.C. § 3553. Under the MCA, by contrast, any person convicted of murder shall be punished by death or such other punishment as a military commission under this chapter may direct." 10 U.S.C. § 950v(b)(1). The MCA thus vests nearly unbridled discretion in the military commission to make the determination as to what sentence is appropriate in any given case, and the military commission is under no obligation analogous to that of federal courts to consider possible grounds, unique to Mr. Khadr's case, which might warrant a reduced sentence.

(j) By purporting to change retroactively the "criminal quality attributable to an act" and the "nature or amount of the punishment imposed for its commission," *Beazell v. Ohio*, 269 U.S. 167, 170 (1925), the MCA—if applied as interpreted by the MMC to Mr. Khadr's alleged conduct—would violate the U.S. Constitution's *Ex Post Facto* Clause, and would therefore be without legal effect. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description.").

(3) Conclusion

(a) Military commissions have long been defined, in large part, by their limited jurisdiction. The international law of war does not recognize murdering an enemy as a violation of the law of war. And the MCA only confers jurisdiction to this Commission for murders that violate the law of war. Accordingly, the murder charge against Mr. Khadr should be dismissed.

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. Mr. Khadr intends to offer the testimony of [redacted] to testify on issues relating to the international law of war consistent with R.M.C. 201A(b).

b. Sworn Charge Sheet (2 Feb 2007).

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:**

A. Sworn Charge Sheet (2 Feb 2007)

By: Rebecca Snyder

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Detailed Assistant Defense Counsel

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):
[redacted]

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*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
[redacted]	[redacted]	Office of the Chief Prosecutor, OMC

5d. SIGNATURE OF ACCUSER	5e. DATE (YYYYMMDD)
[redacted]	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.

[redacted]
Typed Name of Office

Office of the Chief Prosecutor, OMC
Organization of Officer

[redacted]
Grade

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

[redacted]

MC FORM 458 JAN 2007

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).

[redacted], 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 instructions[1]: _____

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

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

MC FORM 458 JAN 2007

UNITED STATES OF AMERICA	)	**CHARGES**
	)	
	)	**Murder in Violation of the Law of War**
	)	
	)	**Attempted Murder in Violation of the Law of War**
v.	)	
	)	
	)	**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.

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.

[redacted]

[redacted]

Subject: US v Khadr - Ruling - D-008

Attachments: Ruling - D-008 US v Khadr.pdf

COL Brownback has directed that I send the attached ruling to counsel and other interested persons.

v/r,

[redacted]
Military Commissions Trial Judiciary
Department of Defense

From: [redacted]
Sent: Saturday, April 19, 2008 13:03
To: [redacted]
Subject: Ruling - D-008

LTC [redacted]

Please forward the attached ruling to the parties in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

[redacted]

[redacted]

Subject: US v. Khadr - Defense Reply to D-008 (MTD Charge I)

Attachments: D-008 Defense Reply re MTD Charge I of 12-20-07.pdf

D-008 Defense Reply re MTD Cha...

Sir,

1. The defense reply to the government's response to the defense motion to dismiss Charge I (murder) is attached. It has been numbered D-008.

V/r
Ms. Snyder

[redacted]

[redacted]C

Subject: FW: Prosecution Responses - D - 008 thru D - 013 US v Khadr

Follow Up Flag: Follow up
Flag Status: Red

Attachments: FI - Khadr - 14 Dec 07.pdf; Prosecution Response to Defense Motion to Dismiss Charge II.pdf; Prosecution Response to Defense Motion to Dismiss Charge I.pdf

FI - Khadr - 14 Dec 07.pdf (45... Prosecution Response to Defens. Prosecution Response to Defens.

COL Brownback has directed that I forward the attachments and the email below to counsel and other interested persons.

v/r,

[redacted] Judiciary

[redacted]D - 008 thru D - 013

LTC [redacted]

1. Please forward the email below to the counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

2. Please copy the file labelled Prosecution Response to Defense Mot to Dismiss Chg I and II.pdf. Name one of the versions, Prosecution Response to Defense Motion to Dismiss Charge I. Name the other version Prosecution Response to Defense Motion to Dismiss Charge II. Forward those two new files to all parties.

3. Please also forward a copy of the latest Filings Inventory.

COL Brownback

Counsel in the case of United States v. Khadr,

1. All counsel are once again urged to read the Rules of Court. Counsel, in this instance, are specifically urged to read and reread RC 2.2d.

2. The Rules of Court are not designed to aggravate counsel - they are designed to assist the commission. Compliance with the Rules helps the commission insure that matters are attended to as required.

3. The government was responding to six (6) separate defense motions. Each of those defense motions was assigned a filings designation. The government should have responded by six (6) separate emails. The subject line on the emails should have included the filings designation. For instance:

Prosecution Response to D - 013, Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder), US v. Khadr or, more simply, Khadr - Prosecution Response to D - 013.

If the defense chooses to reply to the response, the subject line should read:

Defense Reply to Prosecution Response to D - 013, Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder), US v. Khadr or, more simply, Khadr - Defense Reply to D - 013.

4. As may be inferred from the directions to LTC [redacted] above, the government request to file a combined response is not granted. [redacted]ission will consider the response as to each motion separately. No further government action is required.

5. Counsel are directed to Schedule for Trial, 28 November 2007, paragraph 1a, Note 2.

6. Defense replies, if any, are due NLT 20 December 2007.

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

[redacted]

Subject: RE: US v. Khadr - Defense Motions to Dismiss Each of the Charges

> Sir,
>
>
> 1. The Government respectfully submits the following responses to the
> Defense's motions to dismiss.
>
> 2. The Government also respectfully requests leave from the Court to
> file its responses to the Defense's motions to dismiss charges I (murder)
> and II (attempted murder) as a single pleading. As explained in our
> response, the motions to dismiss charges I and II raise virtually
> identical
> issues, so for the convenience of both the Military Judge and the Defense,
> the Government has responded in the most efficient manner possible. Of
> course, the Government can file two separate briefs, if the Military Judge
> so directs.
>
> 3. I apologize for the late filing. We had difficulties getting the
> documents scanned and saved appropriately.
>
> V/R,
>
>
>
> Jeff Groharing
> Major, U.S. Marine Corps
>
>
>
s to Dismiss Each of the Charges
>
> LtCol
>
> Please find attached five motions, one to dismiss each charge.
>
> V/r
> Ms. Snyder
>
>
>
>

UNITED STATES OF AMERICA	}	**D-009** **Ruling on Defense Motion to Dismiss Charge II for Failure to State an Offense and 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. Both sides presented oral argument on the matter.

2. Charge II and its Specification read as follows:

> **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.

3. Paragraph 4, Part IV, Manual for Military Commissions, which contains both the text of § 950t and the Secretary's implementation of the statute, reads as follows:

> **4. (Section 950t) – Attempts**
>
> a. *Text.* "(a) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.
> (b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated."

b. *Elements.*

(1) That the accused did a certain overt act;
(2) That the act was done with the specific intent to commit a certain offense under the M.C.A.;
(3) That the act amounted to more than mere preparation; and
(4) That the act apparently tended to effect the commission of the intended offense.

c. *Maximum punishment.* Any person subject to this chapter who is found guilty of an attempt under Section 950t to commit any offense punishable by this chapter shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be adjudged, nor shall any mandatory minimum punishment provisions apply; and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged.

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 previously considered the defense argument with respect to the offense of murder in violation of the law of war. The commission ruled on that issue in its ruling on D-008 on 21 April 2008. That ruling is incorporated herein and adopted in its entirety for all purposes.

7. In connection with the defense argument concerning the offense of attempt, 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 attempting to commit a violation of the law of war was punishable as 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 attempting to commit a violation of the law of war was punishable by military commissions, before, on, and after 11 September 2001.

8. The defense asserts that the specific statutory provision in question, 10 U.S.C. Sec. 950t, 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 attempt 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 attempt to commit murder in violation 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.

9. The commission has reviewed Charge II and its Specification. The Specification alleges a violation of the statute. The act alleged in the Specification, the attempt to commit murder in violation of the law of war, is a violation of the law of war.

10. The defense motion to dismiss Charge II and its Specification is denied.

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

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**D-009** **Defense Reply to Prosecution Response to Defense Motion to Dismiss Charge II (Attempted Murder In Violation of the Law of War)** 20 December 2007

1. **Timeliness**: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge.

2. **Overview:**

a. This Commission has no jurisdiction to try Mr. Khadr for "attempted murder in violation of the law of war" for a simple reason: he has not been charged with any conduct that violates either a U.S. statute or the law of war. In its brief, the Government misstates Mr. Khadr's position as claiming that terrorists may attempt to kill American soldiers with impunity. (*See* Gov't Resp. at 1, ¶ 3.) Mr. Khadr makes no such claim. Rather, he argues only that he may not be tried *by military commission* for this alleged offense because his alleged conduct does not constitute attempted murder in violation of the law of war. If the allegations set forth in the charge sheet were proven to be true, and if Mr. Khadr were found not to be entitled to combatant immunity, he might well be liable under domestic law for attempted murder or a similar offense. *Cf.* 18 U.S.C. § 1114 (proscribing the killing of U.S. employees, including members of "uniformed services"). But it does not follow that Mr. Khadr committed a law of war violation triable by military commission under the MCA.

b. In response to Mr. Khadr's motion, the prosecution makes four basic arguments. Three of them purport to establish that Mr. Khadr's alleged conduct violated the laws of war; the fourth purports to establish that Mr. Khadr's alleged conduct violated the MCA. All four arguments fail. The prosecution first argues that Mr. Khadr can be tried for attempted murder in violation of the law of war because international law draws a distinction between unlawful and lawful combatants, and the act of killing a soldier (or, presumably, attempting to kill a soldier) as an unlawful combatant constitutes a violation of the law of war. That is incorrect. As Mr. Khadr explained in his opening brief, the accused's status is relevant only to whether the accused enjoys combatant immunity from domestic prosecution. It does not bear on whether any murder he commits is a violation of the law of war. The law of war prohibits only certain modes of warfare and attacks on certain protected persons, and the charges against Mr. Khadr do not allege any of this prohibited conduct. Because Mr. Khadr has not been accused of attempting to kill using a prohibited means, or of attempting to kill a protected individual, his alleged conduct does not violate the law of war. The sources the Government cites for the proposition that the law of war prohibits *any* killing committed by an "unlawful" combatant do not in fact establish that proposition.

c. Second, the prosecution argues that Mr. Khadr can be tried for attempted murder in violation of the law of war because that law prohibits murder committed in a secret or treacherous manner. It is true that perfidy constitutes a war crime. But the charges against Mr. Khadr do not allege that he attempted to commit murder in a treacherous way. Rather, Mr. Khadr is accused of attempting to kill American soldiers "while in the context of and associated with armed conflict." *See* 2007 Charge Sheet, Charge II. This alleged behavior is wholly consistent with acts that are common in war. The prosecution's own recitation of the facts demonstrates that the U.S. soldiers involved in this fight were fully aware of Mr. Khadr's intent to engage in combat.[1]

d. Third, the prosecution argues that Mr. Khadr can be tried for attempted murder in violation of the law of war because "it is well established that attempted murder in violation of the law of war is, in fact, a war crime." (*See* Gov't Resp. at 10.) This argument is largely irrelevant. As discussed in Mr. Khadr's opening brief (*see* Def. Motion at 5), the extent to which international law penalizes attempt is unclear, and the Government's dated, domestic sources do not significantly alter this conclusion. But even assuming that international law *does* recognize attempted crimes, that fact would be immaterial here, because the underlying conduct with which Mr. Khadr has been charged would not have violated the laws of war even if it had resulted in the death of U.S. soldiers. The Government's sources certainly do not suggest that attempted murder in violation of the law of war is a *broader* crime than murder in violation of the law of war, or that an accused could be held liable for "attempting" to commit murder "in violation of the law of war" if the underlying conduct, if successful, would not have violated the law of war. Because Mr. Khadr's alleged attempted murder would not have constituted a war crime even if it had been "successful," he cannot be held liable for attempted murder in violation of the law of war.

e. Finally, the prosecution argues that the MCA "conclusively establishes jurisdiction" over Mr. Khadr's attempted murder charge by "explicitly criminalize[ing] attempt." (Gov't Resp. at 3, 9). But as Mr. Khadr explained in his opening brief, and as the prosecution cannot dispute, the MCA does not purport to prohibit "attempted murder" as such, but rather attempted murder "in violation of the law of war." And as discussed, the conduct with which Mr. Khadr has been accused does not violate the law of war.

f. The government does not squarely allege that the MCA purports to create a new offense of attempted murder that covers even murders that would *not* violate the law of war. The government's discussion of *ex post facto* issues is thus largely beside the point. But to the extent that the Government intended to make such an argument, it is squarely foreclosed by the *Ex Post Facto* Clause of the United States Constitution.

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[1] Mr. Khadr is accused of attempting to kill American soldiers "while in the context of and associated with armed conflict and without enjoying combatant immunity." *See* 2007 Charge Sheet, Charge II. The prosecution labels this conduct "terrorism," Gov't Resp. at 9, ¶ 4(b), but that conclusion is not obvious. Mr. Khadr's alleged conduct was not directed at a civilian population located far from a site of battle. To the contrary, the offenses in question were directed toward soldiers. Gov't Resp. at 2. Whatever the prosecution may call it, this behavior is consistent with a soldier battling another soldier in armed conflict. Moreover, "terrorism" is a separate offense under the MCA, 10 U.S.C. §950v(b)(24), and one with which Mr. Khadr has *not* been charged.

g. Accordingly, because Mr. Khadr has not been charged with a violation triable by military commission, this commission lacks jurisdiction to hear this charge against him. Charge I should be dismissed.

3. **Reply:**

a. MR. KHADR'S ALLEGED CONDUCT DOES NOT VIOLATE THE LAW OF WAR

(1) As Mr. Khadr's opening brief explained, the prohibitions on killing in the law of war take two forms: they ban certain means of warfare, and prohibit certain objects of attack. (*See* Def. Motion at 3-5.) As that brief further made clear, Mr. Khadr has neither been accused of attempting to kill using a prohibited means, nor of attempting to attack a protected person. Accordingly, his conduct does not violate the law of war, and therefore falls outside the scope of the MCA.

(a) The Law of War Does Not Prohibit Attempted Murder Based on the Accused's Status

(i) The prosecution argues that because Mr. Khadr was allegedly an "unlawful" combatant at the time of his alleged offenses, any killing (or, presumably, any attempted killing) in which he engaged necessarily violates the law of war. That is wrong. As discussed in Mr. Khadr's initial motion, the distinction between "lawful" and "unlawful" combatant status is relevant only for determining whether a particular combatant enjoys combat immunity, *i.e.*, immunity from prosecution in the capturing nation's domestic courts. It matters, in other words, for purposes of determining whether Mr. Khadr would be liable for attempted murder under U.S. law, or whether (on the other hand) he would be immune from such prosecution as a privileged lawful combatant. The distinction is *not* relevant to the entirely different international law question of whether a particular killing violates the law of war. As one scholar aptly put it, "[a] war crime inherently requires an overt infraction of the law of war, not just committing a domestic crime without combatant immunity."[2]

(ii) The CMCR's decision in this case reflects this well-established distinction in international law. In holding that "[u]nlawful combatants remain civilians and may properly be captured, detained by opposing military forces, and treated as criminals under the *domestic law* of the capturing nation for any and all unlawful combat actions," *Khadr*, CMCR 07-001, at 6 (emphasis added), the CMCR made clear that Mr. Khadr's status as a lawful or unlawful

[2] Norman A. Goheer, *The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent is not a War Crime*, Bepress Legal Series Working Paper 1871, at 12 (Nov. 8, 2006), *available at* http://law.bespress.com/expresso/eps/1871. The above quotation and source were included in the Defense Motion to Dismiss, but—as the Government notes in its brief (*see* Gov't Resp. at 7)—were erroneously attributed to the CMCR. *See* Def. Motion at 3 n.2. The mistake occurred because of an editing error that shifted the position of the relevant footnote. The defense apologizes for the error.

combatant was relevant to his ability to claim combatant immunity if tried under *domestic* law. Indeed, immediately following the above passage, the CMCR cites *United States v. Lindh*, 212 F. Supp. 2d 541, 554 (E.D. Va. 2002), a case in which the accused was tried in federal district court for violations of U.S. law, *id.* at 547—not war crimes—and the question at issue was whether Lindh was immune from prosecution by virtue of the combatant immunity privilege. *Id.* at 544.

(iii) The prosecution attempts to distort the CMCR's decision by arguing that Mr. Khadr, assuming he is an unlawful combatant, can be tried under the MCA because it is "domestic law." But the MCA, by its plain terms, makes clear that it is not a "domestic law" in the relevant sense—*i.e*., it does not purport to govern the relations between civilians within the sovereign's territory. Rather, it expressly incorporates the "law of war" and proscribes only attempted "murder *in violation of the law of war*." 10 U.S.C. § 950t (emphasis added). It does not purport to reach murders conducted by individuals outside the context of armed conflict, as do our domestic laws.

(iv) Notably, in its brief, the prosecution cites *no* international law sources to support its assertion that the "law of war" proscribes all murder (or attempted murder) committed by an unlawful combatant. Yet as the Supreme Court has recently confirmed, it is international law that defines law of war offenses. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality) (holding that for an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally") (quoting *Ex Parte Quirin*, 317 U.S. at 30); *see also*, *e.g*., *The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct."). This dearth of relevant authority is fatal to the prosecution's claim that the law of war prohibits all murder (or attempted murder) by an unlawful combatant. The prosecution offers *no* rebuttal to the fact that unqualified "murder" is not listed as an offense in the Geneva Conventions or the Hague Conventions—two treaties the Supreme Court has called "the major treaties on the law of war." *Hamdan*, 126 S. Ct. at 2781.[3] And it cannot account for the fact that "[n]o treaty (including the statutes governing international courts such as the International Criminal Court, International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda) suggests that targeting a combatant is unlawful. Rather combatants are only protected from attack when they are *hors de combat* because they have surrendered, are sick or wounded and not carrying the fight, are shipwrecked, or have parachuted from a disabled aircraft."[4]

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[3] *See* Jack Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 Am. J. Int'l L. 56, 61 (2007) ("[A]bsent some other violation, a war crime based solely on the killing of a combatant who is engaged in hostilities is problematic under the Geneva Convention."). Further, murder is not listed as an offense triable by the International Criminal Court in the Rome Statute, a statute with more than 120 signatory nations that "provides the most comprehensive, definitive, and authoritative list of war crimes." Robert Cryer, I*nternational Criminal Law v. State Sovereignty: Another Round?* 16 Eur. J. Int'l L. 979, 990 (2005).

[4] Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi J. Int'l L. 511, 520 n.44 (citing, *inter alia*, Convention between the United States and other Powers respecting the Laws and Customs of War on Land, art 23(c), 36 Stat 2277

(v) Apparently unable to find any relevant international law sources to support its position, the Government turns to centuries-old U.S. sources. For at least two reasons, however, these sources are irrelevant to the question before this Commission; namely, whether an individual's "unlawful" status could give rise to a law of war violation in 2002. First, international law sources—not domestic sources—provide the appropriate source for determining whether conduct violates the law of war. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality) (holding that for an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally" (quoting *Ex Parte Quirin*, 317 U.S. at 30)).[6] Second, even if unlawful status could give rise to a violation of the law of war two hundred years ago, that says nothing about whether it can do so now. Unsurprisingly, the law of war has evolved significantly since the early 20th-century, as norms of civilized conduct and modes of warfare have changed.[7] In enacting Article 21 of the UCMJ, and its predecessor, Article 15 of the Articles of War, Congress intended only to preserve what jurisdiction existed under the law of war as it had then evolved. *Hamdan*, 126 S.Ct. at 2774; *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (noting that a claim under the Alien Tort Claims Act "must be gauged against the *current state of international law*") (emphasis added). Many of the international community's most prominent treaties were adopted in the latter half of the twentieth-century, and it defies both law and common sense to suggest that conduct violates the law of war as evidenced by those instruments today simply because that conduct may have violated the law of war as it was understood two hundred years ago.

(vi) Moreover, even if the Government's sources were probative—and they are not—they would not support the prosecution's efforts to expand the "law of war" to cover the status crimes with which Mr. Khadr has been charged.[8] That is because these sources do not support the proposition that a person's status as an unlawful combatant can transform conduct that would otherwise not be a violation of the law of war into a war crime. Some of the Government's sources merely reflect the fact that the "law of war" prohibits crimes such as perfidy, in which the accused engages in active deception intended to trick his adversaries into

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(1907); Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), art. 12, 6 UST 3217 (1956)).

[6] For this reason, the 1865 Attorney General opinion, 11 Op. Atty Gen. 297, 1865 U.S. AG LEXIS 36, and the 1956 Army Manual are of little, if any, relevance.

[7] For example, according to Winthrop's treatise, summary execution is permitted under the law of war. Winthrop, *Military Law and Precedents* 783 (1895, 2d ed. 1920). But the modern day law of war clearly prohibits such inhumane treatment. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3 (entered into force Oct. 21, 1950). Thus, to the extent Winthrop suggests that unlawful belligerent may be summarily executed based on their status alone, it does not reflect the current state of the law of war.

[8] The prosecution maintains that Mr. Khadr is not being charged on the basis of his "status" because he is "charged with *committing murder* while maintaining the status of an unlawful enemy combatant." Gov't Resp. at 5 n.2. But this assertion misses the point that under the prosecution's view, the conduct with which Mr. Khadr is charged would not constitute a violation of the law of war were it not for Mr. Khadr's alleged status as an unlawful enemy combatant.

believing that he is not engaged in hostilities. Thus, for example, Lieber's Code simply provides that those who "divest[] themselves of the character or appearance of soldiers" may be dealt with "summarily as highway robbers or pirates." *See* Lieber's Code, General Order No. 100, War Department, Apr. 24, 1863 The prosecution's other sources merely reflect the fact that unlawful combatants—like lawful combatants—can violate the law of war by committing an act that is prohibited by the law of war, irrespective of their status at the time of the offense. *See United States v. List* ("Hostage Case"), 11 Trials of War Criminals 1223 (GPO 1950) (killing of civilians); *Talbot v. Janson*, 3 U.S. 133 (1795) (piracy); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (describing piracy as a violation of the law of nations).[9] They thus say nothing about whether conduct that would not otherwise violate the law of war, such as killing a soldier on the battlefield, may be turned into a law of war violation based solely on the accused's status.

(b) Mr. Khadr Has Not Been Charged With Attempting To Commit Murder In A Treacherous Manner

(i) Implicitly recognizing that international law provides the appropriate source for determining the law of war, the prosecution next argues that Mr. Khadr can be tried for attempted murder because the "'treacherous[]' killing of 'individuals belonging to the hostile nation or army'" is a violation of the law of war. Gov't Resp. at 7 (citing to, *inter alia*, the Geneva Conventions and the Rome Statute). It is true that international law prohibits "killing through perfidy, including the murder of an adversary by an individual feigning . . . civilian non-combatant status" (*id.*)—indeed, Mr. Khadr's initial motion cites perfidy (or treacherous killing) as an example of a means of killing prohibited by the law of war. *See* Def. Motion at 3. But the prohibition on perfidy is wholly irrelevant to this case, because Mr. Khadr is not alleged to have committed it.

(ii) Initially, perfidy is specifically listed as a violation of the law of war made triable in military commissions by the MCA, *see* 10 U.S.C. §950(v)(b)(17), but a charge of attempted perfidy has *not* been brought against Mr. Khadr. That in itself disposes of the Government's argument.

(iii) In any event, Mr. Khadr could not be charged with perfidy based on the acts he is alleged to have committed. Mr. Khadr is charged with attempting to kill U.S. soldiers "while *in the context of and associated with armed conflict*." *See* 2007 Charge Sheet, Charge II (emphasis added). This accusation does not allege that Mr. Khadr "feign[ed]" civilian non-

[9] Winthrop, too, is principally concerned with those who "engage[] in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the sacking of towns, from motives of mostly personal profit or revenge." Winthrop, *Military Law and Precedents* 784 (1795, 2d ed. 1820). The U.S. Army Field Manual No. 27-10, which the Government also cites, is even less relevant. That manual specifically provides that it "should not be considered binding upon courts and tribunals applying the law of war." *Id.* art. 1. And it provides only that unlawful belligerents may be tried and sentenced, saying nothing about whether they may be tried in domestic courts or by military commission. *See id.* art. 81. Similarly, the 1865 Attorney General opinion, 11 Op. Atty Gen. 297, 1865 U.S. AG LEXIS 36, is not only significantly outdated but, like the Army Manual, is a *domestic* guidance document that should have no bearing on the contours of the law of war, which are to be determined by reference to *international* legal sources.

combatant status or attempted to commit a treacherous killing. Indeed, the facts as recited by the prosecution state that "before the firefight [in which Mr. Khadr was captured] had begun, U.S. forces approached the compound [where Mr. Khadr was located] and asked the accused and the other occupants to surrender." *See* Gov't Resp. at 2, ¶ 5(h). The accused "decided not to surrender," and the firefight ensued. *Id*. Mr. Khadr's actions at that time are wholly inconsistent with the suggestion that he was attempting to fool U.S. soldiers into thinking that he was a civilian who did not intend to fight. There are thus no allegations to support the theory that Mr. Khadr attempted to commit a treacherous killing while feigning civilian status, and this theory conflicts with other facts alleged by the prosecution.

(iv) Moreover, the prosecution's last-minute switch in theory to preserve this Court's jurisdiction is improper. It is black-letter law that "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone v. United States,* 361 U.S. 212, 217 (1960); *United States v. Lawton*, 995 F.2d 290, 292 (D.C. Cir. 1993) (forbidding "constructive amendments" to indictments where the theory of illegal conduct tried at trial does not match the conduct charged). Otherwise, the charging document "cannot serve its critical function of giving defendants fair notice of the charges they must defend." *Lawton,* 995 F.2d at 292; *see also United States v. Sayan,* 968 F.2d 55, 59 (D.C. Cir. 1992). There is thus no basis for this Commission to assume jurisdiction over Mr. Khadr on the prosecution's "treacherous killing" theory. The offense Mr. Khadr is alleged to have committed in the charge sheet does not constitute "treacherous killing."

(c) The Law of War Does Not Otherwise Apply to the Conduct Here

(i) The prosecution also devotes a significant section of its brief to attacking Mr. Khadr's argument that it is not clear "whether, or to what extent, international law prohibits attempted crimes at all." (Def. Motion at 5; *see* Gov't Resp. at 9-10.) In response to this argument, the Government insists that "it is well established that attempted murder in violation of the law of war is, in fact, a war crime," citing in support three domestic sources. (*See* Gov't Resp. at 10.)

(ii) Initially, the Government's response is beside the point. Even assuming that international law recognizes attempted crimes, the Government itself concedes that it only recognizes attempts to commit "murder *in violation of the law of war*." (Gov't Resp. at 10) (emphasis added). For the reasons set forth above, Mr. Khadr's alleged attempted murder, even if it had been successful, would not have constituted a violation of the law of war: he is not alleged either to have attempted to kill either a protected person, or to have attempted murder using a prohibited means; and the Government's alternative theories for classifying Mr. Khadr's alleged conduct as a war crime fail. Accordingly, even if the Government were correct that attempt crimes are "well established" under the law of war, that would be irrelevant here, where the murder Mr. Khadr allegedly attempted to commit would not itself have violated the law of war.[5]

[5] As noted in the Overview, the Government's sources do not suggest that attempted murder in violation of the law of war is somehow a *broader* crime than murder in violation of the law of war, or that an accused can be held liable for "attempting" to commit murder "in violation of the law of war" if the underlying conduct, even if successful, would not have violated the law of war. *Cf*. Winthrop, *Military*

(iii) Furthermore, the Government's sources do not alter the conclusion that there is significant uncertainty over the extent to which international law penalizes attempt. In support of the proposition that it is "well established that attempted murder in violation of the law of war is, in fact, a war crime" (Gov't Resp. at 10), the prosecution cites no international law at all, relying instead on a treatise from the civil war, an army field manual, and the judge advocate general's law of war handbook. The excerpt from the treatise fails to answer the relevant question: the fact that attempted murder charges were tried in military commissions during the Civil War does not establish that attempts are violations of the law of war today. Indeed, it does not even necessarily establish that they were violations of the law of war *then*, because U.S. law can make offenses triable by military commission even if they do not violate the law of war. Likewise, the army field manual merely provides that unlawful belligerents who attempt to commit hostile acts may be tried and sentenced, saying nothing about whether they are international war crimes or may be tried in domestic courts or by military commission. Army Field Manual 27-10, arts. 80-82 (1956). And while the JAG handbook does state that international law allows for punishment of attempts, neither of the two international law citations it contains—the GPW, art. 129 and Allied Control Council Law No. 10, art. II, para. 2, Dec. 20, 1945—actually proscribe attempts. Importantly, neither the Army Field Manual nor the JAG handbook can *create* law of war violations that do not otherwise exist in international law. If Congress cannot create war crimes, *see* note 7 *infra*, the executive branch certainly cannot, and the prosecution does not argue otherwise. Indeed, the army field manual explicitly provides that it "should not be considered binding upon courts and tribunals applying the law of war." *Id.* art. 1.

(iv) In sum, the attempted murder with which Mr. Khadr has been charged does not violate the law of war, even assuming that that law penalizes attempts. The attempted murder charge therefore falls outside the scope of this commission's jurisdiction, and must be dismissed.

b. THE MCA DOES NOT ESTABLISH JURISDICTION IN THIS CASE BECAUSE IT ONLY CONFERS JURISDICTION OVER ATTEMPTED MURDER "IN VIOLATION OF THE LAW OF WAR"

(1) The fact that charges have been brought under the MCA does not somehow resolve these jurisdictional problems and confer jurisdiction on this court. The government argues that the MCA "conclusively establishes jurisdiction" over Mr. Khadr's attempted murder charge by "explicitly criminalize[ing] attempt." (Gov't Resp. at 3, 9). But that argument is simply wrong. As the Government repeatedly concedes, the MCA purports to confer jurisdiction on this commission to try claims for attempted "murder *in violation of the law of war*." (*See, e.g.*, Gov't Resp. at 3, ¶ 6(A)(i), *id.* at 4, ¶ 6(A)(ii)(b) (emphasis added).) It does not purport to make triable by military commission *any* attempted killing, whether or not it would constitute a violation of the law of war. And as discussed above and in Mr. Khadr's opening brief, Mr. Khadr's alleged conduct in fact does *not* constitute a violation of the law of war. *See supra* at 3-

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Law and Precedents (1895, 2d ed. 1920); Army Field Manual 27-10 (1956); Judge Advocate General, *Law of War Handbook* (2005).

6; Def. Motion at 3-6. Accordingly, the MCA, by its plain terms, does not confer jurisdiction over this commission to try Mr. Khadr for the attempted murder charge alleged.[6]

(2) The Government never squarely argues that in the MCA, Congress purported to define a new offense of attempted murder that encompasses murders that would *not* violate the "law of war," and any such interpretation of the MCA would squarely contradict the statute's plain text. Nonetheless, it bears mention that, even if Congress had purported to do so, such an offense could not be charged retroactively against Mr. Khadr, because doing so would violate the prohibitions on ex post facto legislation under both U.S. and international law.

(3) Arguing against the restriction on *ex post facto* legislation in both U.S. and international law, the prosecution argues that the Constitution "does not ensure the legal rights of alien enemy combatants detained in foreign territory." Gov't Resp. at 8. This argument fails. As a preliminary matter, the *Ex Post Facto* Clause is a structural limitation on congressional power, *Weaver v. Graham*, 450 U.S. 24, 29, 29 n.10 (1981), which governs Congress's conduct regardless of whether the individuals adversely affected have independent legal rights under the Constitution, *see id.* at 29-30 ("The presence or absence of an affirmative, enforceable right is not relevant . . . to the *ex post facto* prohibition."); *see also Downes v. Bidwell*, 182 U.S. 244, 277 (1901).

(4) Even assuming, *arguendo*, that the *Ex Post Facto* Clause only applies to those persons detained within the territorial jurisdiction of the United States, it would still apply in this case because the Supreme Court has previously recognized that Guantanamo Bay comes within the "territorial jurisdiction" of the United States. *See Rasul v. Bush*, 542 U.S. 466, 480 (2004) (interpreting habeas statutute); *see also id.* ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base." (citing the terms of the 1903 lease agreement)); *id.* at 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . ."); *id.* ("From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950)).

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[6] As discussed in Mr. Khadr's initial motion, the Secretary of Defense, to the extent he attempted to expand the scope of the law of war through the promulgation of the Manual of Military Commissions ("MMC"), exceeded his authority under the MCA, and the MMC rules purporting to affect such an expansion can be given no effect. *See* Def. Motion at 6-7. The prosecution does not even attempt to dispute this argument, or invoke or rely on the MMC. The prosecution does reference Congress's power to "define and punish . . . Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10 (*see* Gov't Resp. at 9), but it never suggests that Congress "defined" the offense of attempted murder beyond simply referring to attempted "murder in violation of the law of war." In any event, Congress could not have used that power to expand the scope of offenses under the law of war. *See, e.g.*, 11 Op. Atty Gen. 297, 1865 U.S. AG LEXIS 36, *4 ("To *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations."); *see also, e.g.*, Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L.J. 121, 141 (2007).

(5) In an effort to limit the reach of the Constitution's prohibition on *ex post facto* legislation, the prosecution relies heavily on the D.C. Circuit's opinion in *Boumediene v. Bush*, 476 F.3d 981 (2007), currently on review at the Supreme Court. While the prosecution argues that *Boumediene* "unambiguously held that the Constitution does not apply to alien enemy combatants held" at Guantanamo, (Gov't Resp. at 8), *Boumediene* did no such thing. *Boumediene* was concerned solely with the Suspension Clause and did not address the applicability of the *Ex Post Facto* Clause to Guantanamo detainees. To the extent *Boumediene* may have suggested that other constitutional provisions do not apply at Guantanamo, it did so only by dismissing the significance of the Supreme Court's recent precedent in *Rasul*. *See Boumediene*, 476 F.3d at 991 n.10 (concluding that *Rasul*, "resting as it did on statutory interpretation, . . . could not possibly have affected the constitutional holding of" *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950), which held that constitutional protections extend to aliens "within [the courts'] territorial jurisdiction"). In rejecting the Supreme Court's conclusion that aliens at Guantanamo are within the "territorial jurisdiction" of the United States, the D.C. Circuit unnecessarily manufactured a tension between *Eisentrager* and *Rasul*. It is far more natural to read *Eisentrager* as setting out the standard for the extraterritorial application of constitutional rights and *Rasul* as recognizing that Guantanamo satisfies that standard.

(6) Moreover, the holding of *Boumediene* has already been called into question—first by the Supreme Court's grant of certiorari and second by the D.C. Circuit's own decision to recall the mandate it had previously issued. Under the Federal Rules of Appellate Procedure, an appellate decision "is not final until issuance of the mandate." Advisory Committee Notes, subdivision (c), Fed. R. App. P. 41. Numerous judges have recognized that "the Court of Appeals' withdrawal of the mandate in *Boumediene*," when considered along with "the Supreme Court's highly unusual grant of certiorari on rehearing," casts "a deep shadow of uncertainty over the jurisdictional ruling of that decision." *Alhami v. Bush*, No. 05-359, at 6 (GK) (D.D.C. Oct. 2, 2007); *see also Al-Oshan v. Bush*, No. 05-0520, at 6 n.2 (RMU) (D.D.C. Oct. 5, 3007) (noting that "the extraordinary procedural dispositions in *Boumediene* 'cast a deep shadow of uncertainty'" over the D.C. Circuit's jurisdictional ruling).

(7) Given the considerable uncertainty surrounding *Boumediene*, if this Commission were to find that the D.C. Circuit's opinion necessary to the resolution of this case, it should stay these proceedings until the Supreme Court reaches a decision. Several D.C. district court judges have stayed their proceedings and refused to rule on Government motions to dismiss detainee habeas petitions in light of the considerable uncertainty surrounding *Boumediene*. *See Maqaleh v. Gates*, No. 06-1669 (JDB) (D.D.C. July 18, 2007); *Al-Oshan v. Bush*, No. 05-0520 (RMU) (D.D.C. Oct. 5, 3007); *cf. Alhami v. Bush*, No. 05-359 (GK) (D.D.C. Oct. 2, 2007).

(8) Alternatively, if this Court should decide that it can now reach the merits of the *Ex Post Facto* issue, it should determine that applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause. As discussed in Mr. Khadr's initial motion, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it retroactively changes the "criminal quality attributable to an act," *Beazell v. Ohio*, 269 U.S. 167, 170 (1925), and it impermissibly alters the "nature or amount of the punishment imposed for its commission," *id.* *See* Def. Motion at 7-8. The Government's throwaway claim that summary execution is the proper baseline for determining the extent to which application of the MCA disadvantages Mr. Khadr implicitly

reflects a recognition that the MCA, when compared against the proper baseline, violates the prohibitions of the *Ex Post Facto* Clause. (Gov't Resp. at 12-13.)[7] The proper baseline is in fact not summary execution, but trial in federal district court under 18 U.S.C. § 1117, which criminalizes conspiracy to murder an officer of the United States, including members of the armed services. *Id.*; *see also id.* § 1114. Numerous courts have held that these statutes can be applied extraterritorially to reach conduct which occurred outside the United States. *See, e.g.*, *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984); *U.S. v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 202 (S.D.N.Y. 2000); *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981). As discussed in Mr. Khadr's initial motion, in light of this baseline, applying the MCA to Mr. Khadr would represent a clear violation of the *Ex Post Facto* Clause. *See* Def. Motion at 7-9.

(9) Even assuming, *arguendo*, that courts-martial provide the appropriate benchmark, *see* Gov't Resp. at 9-10, applying the MCA to Mr. Khadr nonetheless violates the *Ex Post Facto* Clause. This Commission need look no further than the text of the MCA itself, which *explicitly* breaks from *court-martial* procedures. In Section 948b(d) ("Inapplicability of Certain Provisions"), the MCA identifies three crucial UCMJ protections that do *not* apply, including "any rule of courts-martial relating to speedy trial," 10 U.S.C. § 948b(d)(1)(A), the rules "relating to compulsory self-incrimination," *id.* § 948b(d)(1)(B), and those relating to pretrial investigation, *id.* § 948b(d)(1)(C). The other rules "shall apply to trial by military commission *only to the extent provided by this chapter*." *Id.* § 948b(d)(2) (emphasis added). This is little comfort, since the MCA provides, among other things, that *court-martial* principles of law and rules of evidence shall apply only insofar "as the Secretary [of Defense] considers practicable or consistent with military or intelligence activities." *Id.* § 949a(a). The very same section of the MCA notes that the Secretary may prescribe that under certain circumstances the "hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission." *Id.* § 949a(b)(2)(E). This includes, notably, the admission in certain circumstances of coerced testimony. *Id.* § 948r. While the Government lists in its response a number of purported rights available to Mr. Khadr under the military commission system,[8] the relevant question is not what rights the MCA provides, but what rights it takes away. As discussed above and in detail in Mr. Khadr's motion to dismiss, the retroactive application of the MCA to Mr. Khadr's case deprives him of many rights which are routinely provided in U.S. courts and courts-martial. Def. Motion at 8-12.

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[7] The prosecution's assertion that the proper baseline is summary execution is particularly absurd in light of the fact that summary executions have long been prohibited as violations of the law of war. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3 (entered into force Oct. 21, 1950).

[8] It is worth noting that some of the "rights" the Government identifies exist more in theory than they do in practice. For example, the Government states the accused has the right to cross-examine witnesses who testify against him, but because the Government can base its case exclusively on documentary and hearsay evidence, the accused may have no witnesses and/or no witnesses with personal knowledge to cross-examine. *See* 10 U.S.C. § 949a(b)(2). The Government also claims that the accused has the right to present evidence in his defense, but the accused cannot compel the attendance of witnesses at a commission in Guantanamo Bay.

(10) Thus, regardless of whether the appropriate benchmark is trial in an Article III court or by court-martial, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it "aggravate[s]" the consequences for the conduct Mr. Khadr is alleged to have committed. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). The Government cannot diminish the significance of these changes simply by labeling them as "jurisdiction[al]." Gov't Resp. at 9. As the Supreme Court has specifically recognized, legislative changes cannot be insulated from *ex post facto* analysis simply by labeling them "procedural" or "jurisdictional"—what matters is the degree to which they effectively "aggravate an offense." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925); *see also id.* at 171 ("Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree.").[9] As explained above and in detail in Mr. Khadr's motion to dismiss, the MCA changes the nature of the offense with which Mr. Khadr is charged and the consequences for that conduct. Def. Motion at 8-12. Accordingly, applying it to Mr. Khadr would violate the *Ex Post Facto* Clause of the U.S. Constitution.

c. CONCLUSION:

(1) The MCA only confers jurisdiction on this Commission to try attempted murders that violate the law of war. Mr. Khadr has not been charged with facts that would constitute a violation of the law of war. Charge II should therefore be dismissed.

/s/
William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Detailed Assistant Defense Counsel

[9] Indeed, in the two Supreme Court cases on which the Government relies, the Supreme Court made clear that to survive an *ex post facto* challenge legislation must "leav[e] untouched all the substantial protections with which the existing law surrounds the person accused of crime." *Duncan v. State*, 152 U.S. 377, 382-83 (1894); *see also Mallett v. North Carolina*, 181 U.S. 589, 597 (1901) ("[The legislature] cannot lawfully . . . dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."). That is assuredly not the case with respect to the MCA. For example, the Government does not even dispute that applying the MCA to Mr. Khadr's case deprives him of the protections provided by the Juvenile Delinquency Act, 18 U.S.C. §§ 5031 *et seq.*; *see also* Def. Motion at 8.

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 I & II (Murder & Attempted Murder)** December 14, 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 I, murder in violation of the laws of war under 10 U.S.C. § 950v(b)(15) ("Mot. to Dismiss I"), should be denied. The Government similarly and respectfully submits that the Defense's motion to dismiss charge II, attempted murder in violation of the laws of war under 10 U.S.C. § 950t ("Mot. to Dismiss II"), should be denied.

3. Overview: The Defense argues that, under the law of war, terrorists may kill or attempt to kill American soldiers with impunity. To state that argument is to demonstrate its absurdity. While it is certainly true that the law of war evolved to handle armed conflicts involving *lawful* combatants—unlike the accused—who mutually respect the rules, conventions, and customs of warfare, it does not follow that terrorists who flout those rules—like the accused—may take advantage of them. Moreover, the law of war has long prohibited "treacherous" killing, and nothing could be more treacherous than an individual who lies in wait, dressed as a civilian, before attacking and killing a law-abiding American. Murder and its attempt have been cognizable violations of the law of war for centuries, so Khadr's Ex Post Facto claims are baseless. The motion to dismiss therefore should be denied.

4. Burden and Persuasion: To the extent the Defense attempts to equate Khadr's murderous actions with those of a lawful combatant, the Defense bears the burden of proving that he is entitled to lawful combatant immunity. *See United States v. Khadr*, CMCR 07-001, at 7 (Sept. 24, 2007). Otherwise, 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. THE MCA CONCLUSIVELY ESTABLISHES JURISDICTION

i. The Defense asserts that Congress cannot create military commission jurisdiction for murder and attempted murder in violation of the law of war because, in the Defense's view, Congress does not have the power to do so. That assertion is patently incorrect.

ii. The Constitution vests Congress with the exclusive authority "[t]o *define* and *punish* . . . Offenses against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10 (emphasis added). Exercising that authority in the Military Commissions Act of 2006 ("MCA"),

Congress unequivocally declared murder in violation of the law of war, and its attempt, to be crimes triable and punishable by military commissions.

a. MCA codifies "offenses that have traditionally been triable by military commissions." 10 U.S.C. § 950p(a).[1] Two such offenses, triable by a military commission, are murder and attempted murder committed in violation of the law of war. *See id.* §§ 950v(b)(15), 950t.

b. Even if Congress were incorrect in its assessment of those crimes that "have traditionally been triable by military commissions," that would not prevent Congress from directing that those crimes be tried by military commissions going forward. Congress has the constitutional authority to define, by statute, the jurisdiction of military commissions. *See, e.g.*, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774-75; *see also id.* at 2780 (plurality op.). Congress has done so here with respect to both murder in violation of the law of war and its attempt.

iii. As the Defense concedes, Khadr has been properly charged (and jurisdiction therefore exists) under Part IV of the Manual for Military Commissions ("MMC"). *See* Mot. to Dismiss I at 7; Mot. to Dismiss II at 8. The MMC is entirely consistent with the MCA, and the Defense's motions therefore should be denied.

B. MURDER IN VIOLATION OF THE LAW OF WAR IS A WAR CRIME, TRIABLE BY MILITARY COMMISSION

i. The MCA reflects Congress's exercise of its authority to "define and punish" murder and its attempt as "Offenses against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10. Congress's judgment is firmly rooted in U.S. law and international law and custom, both of which recognize that a combatant commits murder when he kills another person in a manner that is not sanctioned by the laws of war.

Murder in Violation of the Law of War

ii. The Defense concedes, *see* Mot. to Dismiss I at 3-5; Mot. to Dismiss II at 3-5, that killing through "prohibited means" constitutes a violation of the law of war. One of those "prohibited means"—which is as old as the law of war itself—is murder committed by a

[1] The Defense appears to concede this point. *See* Mot. to Dismiss I at 6; Mot. to Dismiss II at 7. Confusingly, however, the Defense also appears to contradict its own concession in a footnote, *see* Mot. to Dismiss I at 6 n.15; Mot. to Dismiss II at 7 n.19, which suggests that 10 U.S.C. § 950p(a) should not be read "as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to the adoption of the M.C.A." As support for that conclusion, the Defense invokes "separation of powers" concerns, and it cites cases such as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), for the proposition that Article III courts have the power to declare unconstitutional an act of Congress. Whatever "separation of powers" considerations may arise in this case, it utterly defies common sense to invoke them here, where the present proceedings are conducted wholly within a single Branch, and where the Military Judge is *not* an officer of the "*judicial department*," Mot. to Dismiss I at 6 n.15; Mot. to Dismiss II at 7 n.19 (emphasis in original).

combatant who fails to fight as a lawful belligerent.[2] As Justice Iredell noted in 1795, "hostility committed without public authority" is "not merely an offence against the nation of the individual committing the injury, *but also against the law of nations* . . . ." *Talbot v. Janson*, 3 U.S. 133 (1795) (Iredell, J., concurring) (emphasis added).

a. Individuals "who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment." U.S. Army Field Manual No. 27-10, Article 80, 18 July 1956 (citation omitted). *See also id.*, Articles 81, 82. Historically, summary execution of those caught committing acts of unlawful belligerency, sometimes termed "unlawful combatants" or "unprivileged belligerents," has not been uncommon. *See, e.g.*, *United States v. List* ("Hostage Case"), 11 Trials of War Criminals 1223 (GPO 1950).

b. Colonel Winthrop, in a treatise that the Supreme Court has called the "the Blackstone of Military Law," *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777 (2006), noted:

> Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death.

Winthrop, *Military Law and Precedents*, 783 (1895, 2d ed. 1920). During the Civil War, military commissions were used frequently to try and punish unlawful combatants "who engaged in the killing . . . of peaceable citizens *or soldiers*." *Id.* at 784 (emphasis added). Critically for purposes of this motion, many were sentenced to death "for homicide." *Id.* at 784 n.57. *See also id.* at 839 (emphasizing that murder was one of the crimes "most frequently brought to trial before military commissions" during the Civil War).

c. Similarly, in a 142-year-old opinion, which remains binding on the Executive Branch, the Attorney General emphasized that "[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." 11 Op. Atty. Gen. 297, 314 (1865).

d. Lieber's Code, General Order No. 100 War Department, April 24, 1863, recognized the distinction between lawful and unlawful combatants as well. Under Article 57, "[s]o soon as a man is armed by a sovereign government, and takes the

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[2] The Defense argues—notably, without citation—that the law of war does not recognize "status crimes." Mot. to Dismiss I at 5. The Supreme Court, however, has held that the distinction between "lawful" and "unlawful" combatant status is founded in the "universal agreement of law and practice" under the law of war. *Ex parte Quirin*, 317 U.S. 1, 30 (1942). And unlawful combatants can be forced to stand trial before military commissions for *precisely* those "acts which render their belligerency unlawful." *Id.* Moreover, the Government did not criminally charge Khadr simply on the basis of his "status"; rather, he is charged with *committing murder* while maintaining the status of an unlawful enemy combatant.

soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses." By contrast, hose who "commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army . . . shall be treated summarily as highway robbers or pirates." Article 82.

e. Given that unlawful belligerents historically could be summarily punished—and even executed—under the law of war, it follows *a fortiori* that they may be tried by military commissions. Thus, the Supreme Court has held:

> By universal agreement and practice the law of war draws a distinction between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. *Unlawful combatants* are likewise subject to capture and detention, but in addition they are *subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.*

Ex parte Quirin, 317 U.S. 1, 30 (1942) (emphasis added).

f. Here, Khadr has been charged for committing murder without combatant immunity and in violation of the law of war. Specifically, Khadr unlawfully engaged in combat by fighting outside of responsible command, by fighting without wearing a distinctive emblem, by failing to carry his arms openly, and by flaunting the laws and customs of war by feigning to be a non-combatant. *Compare* Hague Regulations, Annex, Art. 1.

1. Under the law of armed conflict, only a lawful combatant enjoys "combatant immunity" or "belligerent privilege" for the lawful conduct of hostilities during armed conflict. *See, e.g., Padilla v. Bush*, 233 F.Supp.2d 564, 592 (S.D.N.Y 2002), *rev'd on other grounds*, 542 U.S. 426 (2004). Those considered "lawful combatants" under the law cannot be prosecuted for belligerent acts—including the killing of an enemy soldier—if they abide by the law of armed conflict. *See id.* at 592 (*citing United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002)).

2. Khadr bears the burden of proving that he is entitled to combatant immunity. *See United States v. Khadr*, CMCR 07-001, at 7 (Sept. 24, 2007) ("The burden of raising the special defense that one is entitled to lawful combatant immunity rests upon the individual asserting the claim.").

3. Here, Khadr has not challenged the *prima facie* evidence that he is an unlawful combatant, *see* Mot. to Dismiss I at 5 n.11; Mot. to Dismiss II at 6 n.15, much less has he proven that he is entitled to combatant immunity.

g. Unlawful or unprivileged combatants—such as Khadr—violate the laws of war when they commit war-like acts, such as murder. The CMCR emphasized that

proposition by noting that unlawful combatants may be "treated as criminals under the domestic law of the capturing nation," ***including the Military Commissions Act***, "for any and all unlawful combat actions." *Khadr*, CMCR 07-001, at 6. The CMCR reiterated the permissibility of Khadr's trial before military commission by citing passages from *Lindh* and *Quirin*, both of which emphasize that "'*[u]nlawful combatants are . . . subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.*'" *Khadr*, CMCR 07-001, at 6 (quoting *Quirin*, 317 U.S. at 30, and citing *Lindh*, 212 F. Supp. 2d at 554, the latter of which block-quoted the same language from *Quirin*).

h. In utter disregard for the law governing this case, the Defense *twice* purports to quote the CMCR's opinion to hold "[a] war crime inherently requires an overt infraction of the law of war, not just committing a domestic crime without combatant immunity." Mot. to Dismiss I at 6 & n.14; Mot. to Dismiss II at 6 & n.18. Wherever the source of that quotation may be,[3] this much is absolutely certain: It did ***not*** come from the CMCR. Rather, as noted, the CMCR's decision—and its reliance on both *Lindh* and *Quirin*—emphatically countenanced the use of military commissions to try crimes committed by unlawful combatants, such as Khadr.

Treacherous Killing

iii. Even for otherwise lawful combatants (which Khadr is not), one example of murder in violation of the law of war is the "treacherous[]" killing of "individuals belonging to the hostile nation or army." Annex to Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907, Art. 23, ¶ 3 ("Hague Regulations"). Such killings have long been held to violate the laws of war, including under the Fourth Hague Convention, and they have violated the War Crimes Act since 1997, *see* Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. 105-118, § 583, 111 Stat. 2386, 2436 (Nov. 26, 1997), long before Khadr treacherously killed Sergeant First Class Speer.

a. For example, Article 37(1)(c) of Additional Protocol I to the Geneva Conventions prohibits killing through "perfidy," including the murder of an adversary by an individual "feigning . . . civilian, non-combatant status." Although the United States has not ratified Protocol I, it views the perfidy provisions of Article 37 as reflecting customary international law. *See U.S. Army Operational Law Handbook* 15, 25 (J. Rawcliffe & J. Smith eds., 2006).

b. The Army's *Operational Law Handbook* similarly defines unlawful combatants to include "civilians who are participating in the hostilities or who otherwise engage in unauthorized attacks or other combatant acts." *Id.* at 17.

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[3] The words "inherently," "overt," and "infraction" do not appear anywhere in the CMCR's decision, much less do they appear together in a sentence even remotely resembling the one quoted by the Defense. Given that much of the Defense's argument relies on law review articles, the Government also performed a search for ("inherently requires" /s "overt infraction" /s "law of war") in Westlaw's JLR database, which produced zero hits. The same search in Westlaw's ALLFEDS database similarly came up empty.

c. The Judge Advocate General's *Law of War Handbook* also emphasizes that attacking a soldier while feigning non-combatant status constitutes a war crime. *See* Int'l & Operational Law Department, *Law of War Handbook*, § 5(A)(2)(f), at 192 (Keith E. Puls et al. eds., 2005) ("Attacking enemy forces while posing as a [non-combatant] civilian puts all civilians at hazard.") (internal quotation marks and citations omitted).

d. Similarly, U.S. Air Force Pamphlet 110-31 prohibits "[p]erfidy or treachery," which includes murder by a combatant who "feign[s] . . . civilian, noncombatant status." U.S. Air Force Pamphlet 110-31, at 5-12.

e. Building on these and other materials, Article 8(2)(b)(xi) of the Rome Statute of the International Criminal Court similarly prohibits "killing or wounding treacherously individuals belonging to the hostile nation or enemy." *See also* Knut Dörmann, *Elements of War Crimes* 240-45 (2002).

f. These sources establish an irrefutable consensus, as a matter of United States and international law, that murder committed by an individual—like Khadr—who takes up arms without satisfying the conditions for lawful combat is a violation of the law of war. He was therefore appropriately charged, especially in light of the well-settled principle that "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Application of Yamashita*, 327 U.S. 1, 17 (1946).

Conclusion

iv. The Defense is correct that "[t]he law of war plainly does not prohibit killing enemy soldiers," Mot. to Dismiss I at 4, but that is only true when the killing is done by a soldier who fights under responsible command, wears a distinctive emblem, carries his arms openly, and obeys the laws and customs of war.[4] *See* Hague Regulations, Annex, Art. 1. To receive the protections afforded by the law of war for killing in combat, a person must conform to the requirements for lawful combatants that the laws of war prescribe.

a. The Defense argues that these essential requirements for lawful combat do nothing to alter the permissibility of a combatant's hostile actions. Rather, in the Defense's view, anyone can kill an American serviceman under any battlefield circumstances, so long as he does not use certain narrowly proscribed methods, which (conveniently enough for Khadr) do not include terrorism.

b. That contention does violence to both the law of war and common sense. The law of war does not condone, much less immunize, killing undertaken in a manner that flouts its requirements for lawful combat—which is why it clearly recognizes the crime of unlawful killing, even where the target is a soldier. *See* pp. 4-7, *supra*. The

[4] Khadr, of course, has not invoked this—or any other—basis for combatant immunity.

Defense's argument to the contrary relies upon egregious misunderstandings and misinterpretations, under which the law of war somehow protects killing by terrorists, like Khadr, who openly flaunt every convention, norm, custom, and rule that has ever governed the conduct of warfare in the history of the civilized world.

c. Because Khadr was an unlawful combatant under any conceivable interpretation of the law of war, his killing is not even arguably immunized as lawful combat by those same laws. Hence, the charge of murder as alleged against Khadr is a cognizable war crime, which is properly heard before this Court.

C. ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR IS ALSO A COGNIZABLE WAR CRIME AND IS THEREFORE ALSO TRIABLE BY MILITARY COMMISSION

i. The Defense does not—indeed, could not—contest that the MCA plainly prohibits attempted murder. *See* 10 U.S.C. § 950t(a) ("Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct."). Instead, the Defense argues that the MCA is somehow invalid because "many international law treaties do not explicitly criminalize attempts." Mot. to Dismiss II at 5.

ii. As an initial matter, Congress's authority to define crimes triable by military commission is not limited to the crimes that treaties or customary international law may or may not criminalize.

a. As noted above, *Congress* has explicitly criminalized attempt. Even assuming *arguendo* that international law expressly precluded the criminalization of attempt (as explained below, it does not), the MCA would trump it by "defin[ing] and punish[ing]" attempt as an "Offense[] against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10. *See, e.g.*, *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 233 (2d Cir. 2005) ("[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)); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *MR 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.); *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.").

b. Moreover, even assuming that the crime of attempt is not covered by the treaties cited by the Defense, that fact says nothing about whether such an offense is a cognizable war crime under international law. Were it otherwise, only those offenses that appear in *every* treaty in the world could constitute war crimes—thus precluding, for

example, the war crime of genocide, *see, e.g.*, Statute for the International Criminal Tribunal for Rwanda, Art. 2, simply because that offense is not prohibited in other treaties, such as the Geneva Conventions or the Hague Conventions. *See* Mot. to Dismiss I at 4 (quoting *Hamdan*, 126 S. Ct. at 2781, for the proposition that offenses not listed in the Geneva Conventions or the Hague Conventions, which are "the major treaties on the law of war," are not cognizable war crimes); Mot. to Dismiss II at 4 (same). That is patently not the law.

iii. The Defense's argument fails even on its own terms, for it is well established that attempted murder in violation of the law of war is, in fact, a war crime. Among other authorities:

a. Colonel Winthrop noted that attempted murder was one of the crimes "most frequently brought to trial before military commissions" during the Civil War. *See* Winthrop, *Military Law and Precedents*, at 839.

b. Army Field Manual 27-10, ¶ 82, emphasizes that unlawful belligerents who attempt to commit hostile acts against the enemy are guilty of a war crime and "are subject to the extreme penalty of death because of the danger inherent in their conduct."

c. And the Judge Advocate General's Law of War Handbook lists "attempts" as an independent war crime. *See Law of War Handbook*, § III(K), at 215.

iv. Thus, notwithstanding the opinion of the Defense (and the law review authors it relies upon) that "attempts should [not] be criminalized at all," Mot. to Dismiss II at 5, the fact of the matter is that the law of war has long recognized such an offense, and both Congress and the President—through the MCA—have agreed to make it triable by military commission. This Court should give effect to that determination.

D. THE DEFENSE'S EX POST FACTO ARGUMENTS ARE BASELESS

i. In its motions to dismiss both charges I and II, the Defense claims that the United States Constitution's Ex Post Facto Clause somehow precludes Khadr's trial before a military commission. That argument must be rejected as frivolous.

ii. As an initial matter, controlling D.C. Circuit precedent unambiguously holds that the Constitution does not apply to aliens held outside the United States, 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); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).[5] The D.C. Circuit has direct review over this court, *see* 10 U.S.C. § 950g, and its decisions are

[5] In his principal brief before the Court of Military Commission Review, Khadr suggested that these longstanding doctrines may not govern here because, in his view, the Ex Post Facto Clause imposes structural limitations on Congress. *See* Br. for Appellee at 20-21. That precise argument was rejected by the D.C. Circuit. *See Boumediene*, 476 F.3d at 993.

binding. *Cf. Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). This Court need proceed no further to reject Khadr's constitutional claims.

a. Additionally, any evaluation of Khadr's constitutional challenge to the MCA 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 v. Rumsfeld*, 126 S. Ct. 2749, 2774-75 (2006); *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).

b. Were the Defense to prevail in its argument that Khadr's prosecution is barred by the Ex Post Facto Clause, the action the Supreme Court invited would be transformed into a fool's errand.

iii. Moreover, even on its own terms, Khadr's ex post facto claim is meritless. The Supreme Court has emphasized that the Ex Post Facto Clause is implicated only where (1) Congress "retroactively alter[s] the *definition* of crimes or increase[s] the punishment for criminal acts," *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), or (2) the statute "disadvantage[s] the offender affected by [it]," *id.* at 41. Neither condition is met here.

a. First, the MCA does not "retroactively alter the definition of" murder and its attempt in violation of the law of war.

1. As explained above, both offenses have been well-established war crimes for centuries. And under the law of war, unlawful combatants like Khadr faced military commissions (at best) and summary execution (at worst) for openly flaunting the rules and customs that govern armed conflict. Thus, the MCA does not "retroactively alter the definition of" or "increase the punishment for" murder and its attempt in violation of the law of war, within the meaning of the Ex Post Facto Clause.

2. Thus, it is well established that changes to judicial tribunals and provisions governing venue or jurisdiction do not implicate the Ex Post Facto Clause, much less violate it. Courts have therefore 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). Indeed, the Supreme Court has emphasized that it has "upheld intervening procedural changes [under the Ex Post Facto Clause] *even if application of the new rule operated to a defendant's disadvantage in the particular case*." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.28 (1994) (emphasis added).[6] The rationale for these

[6] Thus, the MCA's evidentiary rules—including, for example, the broad admissibility of hearsay—do not violate the Ex Post Facto Clause. The accused, like the Government, can rely upon those rules to introduce evidence, and in that sense, the MCA's rules are closely akin to retroactive procedural changes

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.

b. Second, Khadr cannot conceivably claim that he has been "disadvantaged" by the MCA's passage.

1. As explained above, banditti, jayhawkers, guerillas and their modern-day equivalents are traditionally liable to be shot immediately upon their capture. Where such individuals have instead been tried, the United States has prosecuted them based upon offenses under the common law of war. Indeed, the MCA represents one of the first attempts of the United States to set out clearly, in its domestic law, the law of war offenses triable by military commissions. The fact that Congress chose expressly to define these law of war offenses does not amount to the creation of "new" offenses for purposes of the Ex Post Facto Clause. To the contrary, Khadr is certainly better off based upon the clarity provide by Congress and the extensive array of procedural protections provided by the MCA, the likes of which no unlawful combatant has ever enjoyed in the history of warfare.

2. For example, unlike his historical predecessors, Khadr enjoys the statutory 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.* § 949*l*(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).

3. Instead of summary execution, and far from "fundamental unfairness," Mot. to Dismiss I at 8, Khadr enjoys more legal process than any unlawful combatant ever detained or tried in any prior conflict anywhere in the world. Whatever an Ex Post Facto violation may entail, this is certainly not it.[7]

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that the Court has approved in the past. *See, e.g.*, *Carmell v. Texas*, 529 U.S. 513, 546 (2000) (noting that the legislature may retroactively alter rules governing the admissibility of evidence where doing so does not uniformly prejudice the defendant).

[7] It also bears emphasizing that Khadr's baseline for claiming a "disadvantage" under the MCA is surpassing strange. Khadr claims that the MCA has unconstitutionally abrogated rights that he would have enjoyed if tried in federal court. *See* Mot. to Dismiss I at 8-9; Mot. to Dismiss II at 9-10. But Khadr can point to *nothing*—not even a law review article—that suggests unlawful enemy combatants are entitled to federal court trials for their war crimes. Even *Hamdan*, which was obviously decided before Congress created the military commissions at issue here, chose the court-martial system as the relevant baseline. And under the court-martial rules, among other things, Khadr could be convicted by two-thirds of the members present, he would have no right to a grand jury indictment, and he would not be entitled to use the

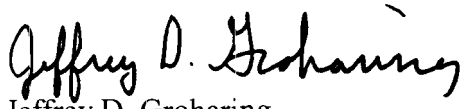
7. **Oral Argument:** The Government disagrees that the issues presented by these motions are "complex." Mot. to Dismiss I at 9; Mot. to Dismiss II at 10. In light of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motions should be readily 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 these motions is already in the record.

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

10. **Additional Information:** None.

11. **Submitted by**:



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Federal Rules of Evidence. The Defense's invocation of those and other rights, *see* Mot. to Dismiss I at 8; Mot. to Dismiss II at 9, is specious.

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** to Dismiss Charge Two for Failure to State an Offense and for Lack of Subject Matter Jurisdiction December 7, 2007

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge.

2. **Relief Requested:** The Defense requests that this Court dismiss Charge II against Mr. Khadr, "attempt to commit murder in violation of the law of war." *See* 2007 Charge Sheet, *citing* 10 U.S.C. §950t.

3. **Overview:**

a. The charge of attempted murder in violation of the law of war must be dismissed because the specification fails to state an offense; it does not allege an attempted killing that violates the law of war. Accordingly, the military commission has no jurisdiction to try Mr. Khadr for the alleged conduct. A military commission has jurisdiction to hear an offense only if a U.S. statute explicitly provided it with jurisdiction or if the conduct violated the law of war when the offense was committed. At the time the alleged offense occurred in this case, neither U.S. law nor the international law of war proscribed attempted murder as such as an offense triable by military commission. The Uniform Code of Military Justice (U.C.M.J.) set forth the applicable U.S. law at the time, and under the U.C.M.J., the only offenses triable by military commission were aiding the enemy and spying—not murder or attempted murder. Likewise, treaties and international practice confirm that murder does not violate the law of war and thus cannot be tried by military commission.

b. The enactment of the 2006 Military Commissions Act ("MCA") does not alter this conclusion. The relevant provisions of the MCA prohibits intentional killing "in violation of the law of war," 10 U.S.C. §950v(15), and any attempt to kill in violation of the law of war, 10 U.S.C. §950t. The law of war prohibits certain modes of warfare and attacks on certain protected persons, but the allegations against Mr. Khadr do not include any of this prohibited conduct. Put simply, because killing or attempting to kill a soldier in combat is not a violation of the law of war, it is also not an offense made triable by military commission under the MCA. It is irrelevant that the Manual for Military Commissions ("MMC") states otherwise. *See* MMC, Part IV, para. 6(a)(15)(c). The MCA does not give the Executive Branch the authority to exercise its rulemaking power in a manner that would expand the class of conduct triable by military commission. Indeed, Congress expressly states that the statute is merely "declarative of existing law." Further, even if the Executive Branch did have such authority, the MMC's newly

expanded definition of attempting to "murder in violation of the law of war" could not be applied to Mr. Khadr, because doing so would violate the U.S. and international law prohibitions on *ex post facto* legislation.

c. Accordingly, because Mr. Khadr has not been charged with a violation triable by military commission, this commission lacks jurisdiction to hear this charge against him. Charge II should be dismissed. *See* R.M.C. 907(b)(1).

4. **Burdens of Proof and Persuasion:** Because this motion is jurisdictional in nature, the Government bears the burden of proving jurisdiction by a preponderance of the evidence.

5. **Facts:** This motion presents a question of law.

a. The Government alleges that Mr. Khadr, "while in the context of and associated with armed conflict and without enjoying combatant immunity," attempted to commit murder in violation of the law of war by converting land mines into explosive devices "with the intent to kill U.S. or coalition forces." *See* 2007 Charge Sheet.

b. The President signed the Military Commissions Act into law on October 17, 2006. P.L. 109-366, 120 Stat. 2600.

6. **Argument: The Charge of Attempted Murder Must Be Dismissed Because the Military Commission Lacks Jurisdiction To Hear It.**

a. As the Supreme Court made clear in *Ex Parte Quirin*, the first question in a military commission case is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal." 317 U.S. 1, 29 (1942).[1] At the time of the alleged conduct, military commissions could also try an accused for a statutory violation expressly made triable by military commission. 10 U.S.C. § 821 (1998).

b. Mr. Khadr has not been charged with violating any statute in effect at the time of his alleged offenses. Nor could he have been so charged: as noted above, the Uniform Code of Military Justice (U.C.M.J.) set forth the applicable U.S. law at the of Mr. Khadr's alleged offense, and there is no dispute that under the U.C.M.J., only aiding the enemy and spying—and not murder or attempted murder—are triable by military commission. Accordingly, this Commission has authority to try Mr. Khadr for attempted murder only if attempted murder is a

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[1] *See also Hamdan*, 126 S. Ct. at 2777 ("[A] law-of-war commission has jurisdiction to try only two kinds of offense: 'Violations of the laws and usages of war cognizable by military tribunals only,' and '[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.'") (citing W. Winthrop, Military Law and Precedents 839 (rev. 2d ed. 1920)); *id.* (noting that it "is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge 'properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction.*'" (citing Winthrop at 842 (emphasis in original)); *In re Yamashita*, 327 U.S. 1, 13 (1946) ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is a violation of the law of war.").

violation of the law of war. However, as discussed below, it is not. This Commission therefore has no jurisdiction to consider Charge II, and the charge must be dismissed.

(1) Attempted Murder Is Not A Violation Of The Law Of War

(a) Mr. Khadr is charged with attempted to murder American soldiers in violation of the "law of war."

(b) For an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally." *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.) (quoting *Ex Parte Quirin*, 317 U.S. at 30); *see also*, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.").

(c) A review of the relevant sources reveals that attempting to kill an enemy in combat, without more, does not meet this high standard and thus does not amount to a violation of the law of war.

(i) <u>The Alleged Conduct Does Not Violate the Law of War Because it Does Not Involve A Prohibited Mode or Object of Killing</u>

(A) The prohibitions on killing embodied in the law of war take two forms: certain means of warfare are banned, and certain objects of attack are forbidden.[2] Neither of these proscriptions applies to Mr. Khadr's alleged conduct: the charge against Mr. Khadr does not allege that he murdered a protected person or killed using prohibited means.[3]

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[2] *See* Major Richard Baxter, *So-Called Unprivileged and Belligerency: Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 326 (1951); Norman A. Goheer, The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent is not a War Crime, Bepress Legal Series Working Paper 1871, at 12 (Nov. 8, 2006), *available at* http://law.bespress.com/expresso/eps/1871; *see also* 1 International Committee of the Red Cross, Customary International Humanitarian Law 569 (Jean Marie Henckaerts & Louise Doswald-Beck eds., 2005) (listing war crimes compiled from a variety of international legal sources).

[3] The charge of attempted murder is based solely on Mr. Khadr's alleged use of landmines. While one international treaty does require its signatories to abandon the use of landmines, *see* Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (18 September 1997), several major powers, including the United States, have refused to sign this treaty. Moreover, other international treaties, which list those weapons which may not be used in warfare, do not identify landmines as among the group of weapons that may not be used in war. *See*, *e.g.*, Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 22, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute]. The existence of one anti-landmine treaty that the U.S. government has not even signed hardly establishes the "'universal agreement and practice' both in this country and internationally" that is necessary to demonstrate that the use of landmines constitutes a violation of the law of war. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.) (quoting *Ex Parte Quirin*, 317 U.S. at 30). In fact, the United States's refusal to sign the landmine treaty reflects its belief that the use of landmines is, in some cases, a permissible means

(B) First, the law of war prohibits only certain methods of killing, none of which have been alleged here. Attacks with certain weapons, such as blinding lasers or poisonous gas, are not permitted.[4] Soldiers are likewise not allowed to employ "human shields" by using the presence of civilians to deter an enemy from attacking.[5] Similarly, soldiers may not engage in "perfidy," defined as "inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with an intent to betray that confidence."[6] But Mr. Khadr has not been charged with any of these illegal forms of combat. Rather, he has simply been charged with attempting to murder other soldiers "in the context of and associated with armed conflict." *See* 2007 Charge Sheet.

(C) Mr. Khadr has also not been charged with attempting to kill a protected individual. The law of war condemns attacks against vulnerable individuals, such as wounded soldiers, sick soldiers, civilians, prisoners of war, medical personnel not engaged in fighting, and soldiers who have laid down their arms—all "protected persons" under the Geneva Convention.[7] The killing of these individuals, even in a time of war, is prohibited and constitutes a violation of the law of war.[8]

(D) Mr. Khadr, however, has been charged only with attempting to kill an enemy soldier. The law of war plainly does not prohibit attempting to kill enemy soldiers, as doing so is, almost by definition, a fundamental element of armed conflict.[9] For this reason, unqualified "murder" and "attempted murder" are not listed as offenses in the Geneva Conventions or the Hague Conventions—two treaties the Supreme Court has called "the major treaties on the law of war." *Hamdan,* 126 S. Ct. at 2781.[10] In fact, "[n]o treaty (including the

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of warfare—a position apparently shared by other nations that have likewise not signed the treaty. For these reasons, the prosecution simply cannot meet the high burden necessary to establish that the use of landmines during warfare is a violation of the law of war.

[4] *See* Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), International Red Cross Conference, 13 October 1995; Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, Feb. 8. 1928, 94 L.N.T.S. 65.

[5] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 28, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[6] Perfidy is listed as a war crime in military manuals throughout the world, including in the U.S. Army Field Manual. See Goheer, supra . 9, at 14.

[7] Common Article 3, Geneva Conventions of 1949; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), art. 4, 12-14, 6 U.S.T. 3217, 75 U.N.T.S. 31; Geneva Convention IV art. 4.

[8] *Id.*

[9] Peter Rowe, *Murder and the Law of War,* 42 N. Ir. Legal Q. 216 (1991) ("[A] fundamental effect of war is the killing of enemy soldiers.").

[10] *See also* Jack Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations,* 101 Am. J. Int'l L. 56, 61 (2007) ("[A]bsent some other violation, a war crime based solely on the killing of a combatant who is engaged in hostilities is problematic under the Geneva

statutes governing international courts such as the International Criminal Court, International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda) suggests that targeting a combatant is unlawful. Rather combatants are only protected from attack when they are *hors de combat* because they have surrendered, are sick or wounded and not carrying the fight, are shipwrecked, or have parachuted from a disabled aircraft."[11]

(E) In any event, it is not at all clear whether, or to what extent, international law prohibits attempted crimes at all. *See* Gerhard Werle, *Principles of International Criminal Law* 169 (2005) ("[I]t remains to be seen to what extent attempt . . . will actually play a significant role in the work of international courts. The concentration on the most serious crimes affecting the international community as a whole makes it likely that the focus will continue to be on prosecution of fully executed crimes."). Just as the MCA separately penalizes attempts and completed offenses, *compare* 10 U.S.C. § 950t *with* 10 U.S.C. § 950v, international law treaties would be expected to make explicit any intention to criminalize attempted, as opposed to completed, crimes. Yet many international law treaties do not explicitly criminalize attempts.[12] And others only criminalize the attempts of certain crimes. The ICTY, for example, explicitly criminalizes the "attempt to commit genocide,"[13] but does not criminalize attempts to violate the law of war or commit grave breaches of the Geneva Conventions.[14] Given this, it is not at all clear that the Government can meet the high burden of demonstrating that there is "'*universal* agreement and practice' both in this country and internationally" that attempts should be criminalized at all. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.) (quoting *Ex Parte Quirin*, 317 U.S. at 30) (emphasis added).

(F) In sum, Mr. Khadr has not been charged with using a prohibited means of killing, or of killing a protected person. Rather, he has been charged with attempting to kill other soldiers in the normal course of combat. Such conduct does not violate the law of war.

(ii) <u>Mr. Khadr's Status As An "Enemy Combatant" Does Not Alter The Conclusion that His Alleged Conduct Does Not Violate the Law of War</u>

(A) The government will likely contend that Mr. Khadr was not participating in the armed conflict in Afghanistan as a traditional soldier, but rather as an "unlawful enemy

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Convention."). Further, attempted murder is not listed as an offense triable by the International Criminal Court in the Rome Statute, a statute with more than 120 signatory nations that "provides the most comprehensive, definitive, and authoritative list of war crimes." Robert Cryer, I*nternational Criminal Law v. State Sovereignty: Another Round?* 16 Eur. J. Int'l L. 979, 990 (2005).

[11] Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi J. Int'l L. 511, 520 n.44 (citing, *inter alia*, Convention between the United States and other Powers respecting the Laws and Customs of War on Land, art 23(c), 36 Stat 2277 (1907); Geneva Convention I, art. 12.

[12] *See, e.g.*, International Convention on the Suppression and Punishment of the Crime of Apartheid, art. III(b), Nov. 30, 1973, 1015 U.N.T.S. 243.no

[13] Statute of the International Tribunal for the former Yugoslavia art. 4(3) (adopted May 25, 1993)

[14] *Id.* arts. 2-3.

combatant," and that this unprivileged status alone makes any attempt to kill on his part a violation of the law of war. *See* Manual for Military Commissions (MMC), Part IV, para. 6(a)(15)(c) (explaining that "[f]or the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy."). That argument fails.

(B) Merely holding the status of "unlawful" combatant[15] does *not* mean that by attempting to cause a soldier's death the combatant has violated the law of war. The law of war does not recognize "status crimes:" the mere fact that a person is an "unlawful" combatant does not automatically subject him to liability under the law of war if he kills a lawful combatant. Rather, an "unlawful" combatant who kills another person will violate the law of war *only* if he does so using a prohibited means, or if the victim is a protected person. As discussed above, Mr. Khadr is not alleged to have used either a prohibited means of killing, or to have killed or attempted to kill a protected person. He therefore did not violate the law of war, and his alleged status as an "unlawful" combatant cannot, by itself, alter this conclusion.

(C) The position set forth in the MMC relies on a fundamental misunderstanding of the significance of "lawful" combatant status. The primary significance of that status is to render a person immune from domestic liability for acts that would ordinarily be punishable under domestic law. Thus, "lawful" or privileged combatants are not liable under domestic law for killing other human beings in combat, because causing another's death is an inevitable part of war. *See United States. v. Lindh*, 212 F.Supp.2d 541, 554 (E.D. Va 2002). Unprivileged, "unlawful" combatants do not share in this privilege; when they kill or attempt to kill another, they must face the normal consequences of doing so, including possible prosecution for murder or attempted murder under domestic law.[16] These consequences, though, are not a result of violating the law of war. If an unprivileged person kills a combatant, he may—unlike a lawful combatant—be subject to a murder charge under domestic law,[17] but he will not, without more, be subject to liability for committing a war crime. Rather, as discussed, "[a] war crime inherently requires an overt infraction of the law of war, not just committing a domestic crime without combatant immunity."[18]

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[15] Mr. Khadr does not admit that he is an unlawful enemy combatant. He reserves the right to challenge this Commission's prima facie jurisdiction in the future. Mr. Kahdr does not admit that he is an unlawful enemy combatant. He reserves the right to challenge this Commission's prima facie jurisdiction in the future. *United States v. Khadr*, No. 07-001 at 21 (C.M.C.R. Sept. 24, 2007).

[16] *See* Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi J. Int'l L. 511, 520 ("civilians who directly participate [in war] may be punished for their actions because they lack the 'combatant privilege' to use force against lawful targets").

[17] *See United States v. Khadr*, No. 07-001 at 4 (C.M.C.R. Sept. 24, 2007).("Unlawful combatants remain civilians and may properly be captured, detained by opposing military forces, and *treated as criminals under the domestic law* of the capturing nation for any and all unlawful combat actions. *Lindh*, 212 F. Supp. 2d at 554 (citing *Ex parte Quirin*, 317 U.S. at 30-31); *see* Army Op. Law Handbook 17.") (emphasis added).

[18] *Id*. *See also Mohammed Ali v. Public Prosecutor*, 1968 All ER 488 (1968) (Malaysia Privy Council holding that a member of the Indonesian army who attacked an enemy while wearing civilian clothes in

(D) As a result, even if it is ultimately determined that Mr. Khadr is an unprivileged combatant, that determination would mean only that he could be tried for attempted murder under U.S. law. It does not mean that he could be tried by military commission for violating the "law of war."

(E) In sum, Mr. Khadr did not commit an attack against a protected person or through a prohibited means, and his potential status as an "unprivileged" enemy combatant has no relevance to the international law question of whether he violated the laws of war. This Commission therefore has no subject matter jurisdiction to try Mr. Khadr for murder against the law of war, and Charge II must be dismissed.

(2) Mr. Khadr's Alleged Conduct Does Not Violate the MCA, and Even if it Did, He Could Not Be Held Liable For Newly-Minted War Crimes Defined By That Statute

(a) The fact that Mr. Khadr has been charged under the MCA does not alter this analysis. *See* 2007 Charge Sheet (charging Mr. Khadr with a violation of the MCA,10 U.S.C. § 950t). Simply put, the MCA cannot provide a basis for jurisdiction in this case because Mr. Khadr's alleged conduct is not prohibited by the plain text of the act.

(b) The attempts provision of the MCA, 10 U.S.C. § 950t, refers back to the substantive offenses listed elsewhere in the chapter. And in listing those substantive offenses, Congress did not list "murder" as an offense to be tried by a military commission under the MCA; rather, it prohibited the more specific "murder in violation of the law of war." 10 U.S.C. § 950v(15). This modifying clause confirms what is stated explicitly elsewhere in the statute: that in enacting the MCA, Congress intended only to codify "offenses that have traditionally been triable by military commissions." 10 U.S.C. § 950p(a). Indeed, Congress was careful to point out that the MCA "does not establish new crimes that did not exist before its enactment." *Id.*[19] The MCA thus provides this Commission with jurisdiction over an attempted murder charge only when the alleged conduct constitutes a violation of the "law of war."

(d) However, as previously discussed, Mr. Khadr's charged conduct does not violate the law of war. *See supra* at 3-8. Accordingly, it falls outside the scope of the MCA, which only

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Singapore could be tried under Malaysian domestic law because he did not comply with the requirements of the Third Geneva Convention and was not operating as a member of the Indonesian forces at the time).

[19] To read this provision as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to adoption of the M.C.A. violates bedrock separation of powers principle. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") This interpretation should be avoided because it would raise serious constitutional concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

prohibits conduct traditionally proscribed by the "law of war." This commission therefore lacks jurisdiction to hear this charge.

(d) It is true that the rules in the MMC, promulgated by the Secretary of the Defense, state that "for the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy," implying that an "unlawful" combatant violates the law of war any time he kills or attempts to kill a combatant. *See* MMC, Part IV, para. 6(a)(15)(c)(cross-referencing para. 6(a)(13)(d)). But, as discussed above, that assertion is simply false: one's status as a privileged or unprivileged combatant is irrelevant to determining whether one violated the law of war. *See* supra at 5-6. The MMC's "interpretation" of the MCA is thus flatly inconsistent with the statute's plain language, which specifically limits murder offenses to those that violate the law of war.

(e) Because of this, the MMC's interpretation of the MCA exceeds the Executive's authority and should be given no effect. Congress gave the Executive Branch the authority to define the elements of the offenses listed in the MCA. 10 U.S.C. § 949a(a). But in exercising this authority, it is settled that the Executive may not define the elements in such a way as to *expand* the scope of a crime. *See Loving v. United States*, 517 U.S. 748, 768 (1996) ("We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, *and the regulations confine themselves within the field covered by the statute*.) (emphasis added) (quotation omitted); *see also Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 21 (D.C. 2000) (holding that an agency has no "authority to promulgate [a] rule . . . [when it] exceed[s] the scope of the authority delegated by Congress"). The Executive certainly may not define these elements in such a way as to *violate* a clear congressional command. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("If the intent of Congress 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."). Here, Congress plainly stated that it did not intend for the MCA to create new crimes, but only to codify existing violations of the law of war. 10 U.S.C. § 950p(a). The MMC rules passed by the Secretary of the Defense purport to expand the scope of the law of war. The Secretary therefore exceeded his authority under the MCA, and this rule in the MMC should be given no effect.

(f) Moreover, even if the Executive did have the authority to expand the scope of the MCA in direct contravention of Congress's express limitations, and the MMC's interpretation of the MCA somehow rendered the act of attempting to kill an enemy soldier without having met the requirements for lawful combatancy triable by military commission, that newly-defined provision could not be applied in this case because the MCA was not enacted until four years *after* Mr. Khadr allegedly committed the offenses with which he is charged. As discussed above, at the time of the charged conduct, Mr. Khadr could not have been tried by military commission for his alleged offense. *See supra* at 2-6. Thus, applying the MCA (as interpreted by the MMC) to his case would violate the U.S. and international law prohibition on *ex post facto* legislation. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990); U.S. Const. art. I, § 9, cl.3 ("No . . . ex post facto Law shall be passed."); *Kring v. Missouri*, 107 U.S. 221, 227 (1882) (noting that the Convention attached "[s]o much importance" to the ex post facto prohibition "that it is found

twice in the Constitution"); *see, e.g.*, Rome Statute, art. 22 (entered into force July 1, 2002) (providing that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, *a crime within the jurisdiction of the Court*." (emphasis added)); Protocol I, art. 75(4)(c) ("No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.") (recognized as customary international law by the U.S. in W. Hays Parks et al., Unclassified Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD (May 8, 1986) (entitled 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications).

(g) This prohibition on *ex post facto* legislation recognizes the fundamental unfairness in holding individuals accountable for consequences that they could not have foreseen at the time of their alleged offense. Assuming Mr. Khadr could be tried in a U.S. federal court for murder, he could not have foreseen in 2002 that the offenses of which he is accused would be triable by military commission in 2006, or foreseen the significantly different consequences that would result from that fact. Trying Mr. Khadr in a military commission, rather than in a U.S. court, violates the *Ex Post Facto* Clause in two respects. First, it retroactively changes the "criminal quality attributable to an act," *Beazell v. Ohio*, 269 U.S. 167, 170 (1925), and, second, it impermissibly alters the "nature or amount of the punishment imposed for its commission." *Id.*

(h) First, Mr. Khadr faces prosecution before an entirely different adjudicative body with entirely different rules than would have been the case had he been tried in federal court. In particular, because he faces trial before a commission rather than a court, Mr. Khadr will be (1) unable to receive the protections of the Juvenile Delinquency Act (the "JDA"), 18 U.S.C. §§ 5031 *et seq.*; and (2) subject to adjudication absent procedural protections such as the right to a grand jury indictment, the right to the protections of the Federal Rules of Evidence, and the right to trial before a jury of his peers who, before conviction, would have to agree unanimously that the evidence proved his guilt beyond reasonable doubt.

(i) Second, this retroactive change alters the "nature or amount of the punishment imposed for its commission." *Beazell*, 269 U.S. at 170. It deprives Mr. Khadr of the protections against arbitrary sentencing provided by federal sentencing law, and deprives him of the certain right to appeal his sentence. Under federal law, courts are required to consider a number of different factors, including the "nature and circumstances of the offense and the history and characteristics of the defendant," to ensure that the sentence imposed is "no greater than necessary." 18 U.S.C. § 3553. Under the MCA, by contrast, any person convicted of attempted murder shall be punished "as a military commission under this chapter may direct." 10 U.S.C. § 950t. The MCA thus vests nearly unbridled discretion in the military commission to make the determination as to what sentence is appropriate in any given case, and the military commission is under no obligation analogous to that of federal courts to consider possible grounds, unique to Mr. Khadr's case, which might warrant a reduced sentence.

(j) By purporting to change retroactively the "criminal quality attributable to an act" and the "nature or amount of the punishment imposed for its commission," *Beazell v. Ohio*, 269

U.S. 167, 170 (1925), the MCA—if applied as interpreted by the MMC to Mr. Khadr's alleged conduct—would violate the U.S. Constitution's *Ex Post Facto* Clause, and would therefore be without legal effect. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description.").

(3) Conclusion

(a) Military commissions have long been defined, in large part, by their limited jurisdiction. The international law of war does not recognize attempting to murder an enemy as a violation of the law of war. And the MCA only confers jurisdiction to this commission for murders or attempted murders that violate the law of war. Accordingly, the attempted murder charge against Mr. Khadr should be dismissed.

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. Mr. Khadr intends to offer the testimony of [redacted] testify on issues relating to the international law of war consistent with R.M.C. 201A(b).

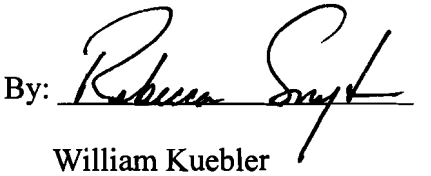
b. Sworn Charge Sheet (2 Feb 2007).

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:**

A. Sworn Charge Sheet (2 Feb 2007)

By: 

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Detailed Assistant Defense Counsel

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):
[redacted]

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*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
[redacted]	[redacted]	Office of the Chief Prosecutor, OMC

5d. SIGNATURE OF ACCUSER	5e. DATE (YYYYMMDD)
[redacted]	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.

[redacted]
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

[redacted]
Grade

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

[redacted]

MC FORM 458 JAN 2007

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).

[redacted] 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 instructions[1]: _____

_____

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

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

MC FORM 458 JAN 2007

UNITED STATES OF AMERICA	)	**CHARGES**
	)	
	)	**Murder in Violation of the Law of War**
	)	
	)	**Attempted Murder in Violation of the Law of War**
v.	)	
	)	
	)	**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.

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.

[redacted]

Subject: US v Khadr - Ruling - D-009

Attachments: Ruling - D-009 US v Khadr.pdf

COL Brownback has directed that I send the attached ruling to counsel and other interested persons.

v/r,

[redacted], USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

[redacted]

Subject: Ruling - D-009

[redacted]

Please forward the attached ruling to the parties in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

[redacted]

From: [redacted]

Subject: US v. Khadr - Defense Reply to D-009 (MTD Charge II)

Attachments: D-009 Defense Reply re MTD Charge II of 12-20-07.pdf

D-009 Defense Reply re MTD Cha...

Sir,

1. The defense reply to the government's response to the defense motion to dismiss Charge I (murder) is attached. It has been numbered D-009.

V/r
Ms. Snyder

[redacted]

From: [redacted]

Subject: FW: Prosecution Responses - D - 008 thru D - 013 US v Khadr

Follow Up Flag: Follow up
Flag Status: Red

Attachments: FI - Khadr - 14 Dec 07.pdf; Prosecution Response to Defense Motion to Dismiss Charge II.pdf; Prosecution Response to Defense Motion to Dismiss Charge I.pdf

FI - Khadr - 14 Dec 07.pdf (45... | Prosecution Response to Defens... | Prosecution Response to Defens...

COL Brownback has directed that I forward the attachments and the email below to counsel and other interested persons.

v/r,

[redacted]

[redacted]D - 008 thru D - 013

[redacted]

1. Please forward the email below to the counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

2. Please copy the file labelled Prosecution Response to Defense Mot to Dismiss Chg I and II.pdf. Name one of the versions, Prosecution Response to Defense Motion to Dismiss Charge I. Name the other version Prosecution Response to Defense Motion to Dismiss Charge II. Forward those two new files to all parties.

3. Please also forward a copy of the latest Filings Inventory.

COL Brownback

Counsel in the case of United States v. Khadr,

1. All counsel are once again urged to read the Rules of Court. Counsel, in this instance, are specifically urged to read and reread RC 2.2d.

2. The Rules of Court are not designed to aggravate counsel - they are designed to assist the commission. Compliance with the Rules helps the commission insure that matters are attended to as required.

3. The government was responding to six (6) separate defense motions. Each of those defense motions was assigned a filings designation. The government should have responded by six (6) separate emails. The subject line on the emails should have included the filings designation. For instance:

Prosecution Response to D - 013, Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder), US v. Khadr or, more simply, Khadr - Prosecution Response to D - 013.

If the defense chooses to reply to the response, the subject line should read:

Defense Reply to Prosecution Response to D - 013, Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder), US v. Khadr or, more simply, Khadr - Defense Reply to D - 013.

4. As may be inferred from the directions to LTC [redacted] above, the government request to file a combined response is not granted. [redacted]ission will consider the response as to each motion separately. No further government action is required.

5. Counsel are directed to Schedule for Trial, 28 November 2007, paragraph 1a, Note 2.

6. Defense replies, if any, are due NLT 20 December 2007.

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

[redacted]

Subject: RE: US v. Khadr - Defense Motions to Dismiss Each of the Charges

> Sir,
>
>
> 1. The Government respectfully submits the following responses to the
> Defense's motions to dismiss.
>
> 2. The Government also respectfully requests leave from the Court to
> file its responses to the Defense's motions to dismiss charges I (murder)
> and II (attempted murder) as a single pleading. As explained in our
> response, the motions to dismiss charges I and II raise virtually
> identical
> issues, so for the convenience of both the Military Judge and the Defense,
> the Government has responded in the most efficient manner possible. Of
> course, the Government can file two separate briefs, if the Military Judge
> so directs.
>
> 3. I apologize for the late filing. We had difficulties getting the
> documents scanned and saved appropriately.
>
> V/R,
>
>
>
> eff Groharing
> jor, U.S. Marine Corps
>
>
>
> -----O
ns to Dismiss Each of the Charges
>
>
>
> Please find attached five motions, one to dismiss each charge.
>
> V/r
> Ms. Snyder
>
>
>
>

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-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.

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 OF AMERICA v. OMAR AHMED KHADR	**D-010** **Defense Reply to Prosecution Response to Defense Motion** to Dismiss Charge Three for Lack of Subject Matter Jurisdiction 20 December 2007

1. **Timeliness:** This reply motion is filed within the timeframe established by Rule for Military Commission (RMC) 905 and the military judge.

2. **Overview:**

a. The central issue regarding Charge III is whether conspiracy was triable by military commission at the time of Mr. Khadr's alleged conduct. Military commissions only have jurisdiction over a charge where Congress has specifically given them such jurisdiction or where the charged conduct violates the law of war. 10 U.S.C. § 821 (1998). At the time of Mr. Khadr's conduct, conspiracy did not fall into either category. The prosecution does not even argue that there was a statutory basis for jurisdiction in 2002, and as Mr. Khadr demonstrated in his motion to dismiss Charge III (Def. Motion. at 2-6), conspiracy did not violate the law of war in 2002.

b. Although the prosecution attempts to argue that conspiracy was a violation of the law of war in 2002, this argument fails for the same reason that a plurality of the Supreme Court recently rejected it: the sources on which the prosecution relies simply do not support its claim. As a result, the prosecution devotes the bulk of its response to a series of red herrings and irrelevant arguments, arguing that the MCA supplies a basis for jurisdiction either by retroactively changing the content of the law of war or by now making conspiracy triable by military commission. The former argument is wrong as a matter of U.S. law. Congress may not retroactively change the content of international law. The latter argument is irrelevant. The question is not what the law is now, but what the law was when the alleged offense occurred.

c. Applying the MCA retroactively to conduct that occurred, according to the government's own allegations, four years *before* the statute was enacted violates both U.S. and international law proscriptions on *ex post facto* legislation. Mr. Khadr's detainment at Guantanamo does not permit the Congress to ignore this structural limitation on its power.

d. Accordingly, because the government has failed to show a statutory or law of war basis for the conspiracy charge, this Commission must dismiss that charge for lack of subject matter jurisdiction.

3. **Reply: The Conspiracy Charge Must Be Dismissed Because This Commission Has No Jurisdiction To Consider It**

a. Conspiracy Was Not Triable by Military Commission at the Time of the Alleged Conduct

(1) The prosecution fundamentally misunderstands the basic issue in this case. That issue is not whether Congress can make conspiracy triable by military commission,[1] but whether it had done so at the time of Mr. Khadr's alleged conduct in 2002.

(2) The prosecution does not even dispute the fact that a U.S. statute did not make conspiracy triable by military commission at the time of the alleged conduct in this case. It is simply uncontestable that, in 2002, when Mr. Khadr's alleged conduct occurred, Congress had only made two offenses triable by military commission: aiding the enemy and spying. 10 U.S.C. § 904, 906. There was thus no statutory basis to try Mr. Khadr by military commission.

(3) Because there was no statutory basis to try Mr. Khadr by military commission, this Commission may only consider charges alleging conduct that plainly and unambiguously violates the law of war. *See* 10 U.S.C. § 821; *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.). And as a plurality of the Supreme Court found just last year, that standard is "far from satisfied" with regard to conspiracy. *Id.* Canvassing the sources of the law of war offered by the Solicitor General in *Hamdan*, a plurality of Justices concluded that "the Government has failed even to offer a 'merely colorable' case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission." *Id.* at 2785.

(4) In an apparent attempt to re-argue *Hamdan*, the prosecution now offers many of the same sources already considered and rejected by a plurality of the Supreme Court. The prosecution suggests, for example, that this Commission should not follow the plurality's conclusion in *Hamdan* "because it is not an accurate description of the law of war." (Gov't Resp. at 6.) As evidence of the plurality's alleged error, the prosecution points to *Ex parte Quirin*, 317 U.S. 1 (1942), in which Nazi saboteurs "were charged with conspiracy." But (of course) the Supreme Court *did* consider that fact, as even a cursory reading of the case reveals. Having done so, it noted: "That the defendants in *Quirin* were charged with conspiracy is not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of war—let alone one triable by military commission." *Hamdan*, 126 S. Ct. at 2781 (plurality op.). The *Hamdan* plurality continued: "If anything, *Quirin* supports Hamdan's argument that conspiracy is not a violation of the law of war," because *Quirin* pointedly omits any mention of conspiracy as a basis of commission jurisdiction. *Id*. at 2782.

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[1] In an apparent attempt to obscure the fact that conspiracy was *not* a violation of the law of war at the time of Mr. Khadr's alleged conduct, the prosecution devotes the majority of its response to the irrelevant argument that Congress has the power to make conspiracy triable by military commission. Whatever the validity of this argument, it is simply irrelevant where, as here, Congress had *not* done so at the time of the alleged conduct. As discussed in Mr. Khadr's initial motion and below, the MCA cannot be applied (and should not be interpreted to apply) retroactively to offenses Mr. Khadr is alleged to have committed four years *before* the MCA's enactment. *See* Def. Motion at 6-12; *infra* at 5-8.

(5) The prosecution's citation to Winthrop is similarly misleading. The prosecution cites Winthrop for the proposition that "conspiracy has long been established as a violation of the law of war." (Gov't Resp. at 6 (citing Winthrop, Military Law and Precedents 839 & n.5 (1895, 2d ed. 1920)).) Citing the same edition—indeed, the same page—of Winthrop's treaty, the plurality in *Hamdan* read Winthrop for precisely the *opposite* proposition: "Winthrop . . . excludes conspiracy of any kind from his own list of offenses against the law of war. *See* Winthrop 839–840." *Hamdan*, 126 S. Ct. at 2783 (plurality op). The Court explained that while

> Winthrop does, unsurprisingly, include "criminal conspiracies" in his list of "[c]rimes and statutory offenses cognizable by State or U. S. courts" and triable by martial law or military government commission. . . . the military commissions convened during the Civil War functioned at once as martial law or military government tribunals and as law-of-war commissions. Accordingly, they regularly tried war crimes and ordinary crimes together. . . . Winthrop's conspiracy "of the first and second classes combined" is . . . best understood as a species of compound offense of the type tried by the hybrid military commissions of the Civil War. It is not a stand-alone offense against the law of war.

Id.

(6) The prosecution's reliance on Charles Roscoe Howland's *Digest of Opinions of the Judge Advocates General of the Army* (1912) (cited in Gov't Resp. at 6) is also unavailing. As the *Hamdan* plurality specifically noted, "the records of cases that Howland cites . . . provide no support for the inclusion of conspiracy as a violation of the law of war." *Hamdan*, 126 S. Ct. at 2783 (plurality) (citations omitted).[2]

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[2] Indeed, even if—contrary to the Supreme Court's conclusion—any of the scattered U.S. sources on which the prosecution relies could be read to suggest that conspiracy was once a violation of the law of war, that reading would say (1) little about whether it was *actually* a violation at the time those sources were published, and (2) absolutely *nothing* about whether it remains one today. The prosecution's sources say little about whether conspiracy was once a law of war violation because international law sources, not domestic sources, provide the appropriate source for determining whether conduct violates the law of war. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality) (holding that for an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally" (quoting *Ex Parte Quirin*, 317 U.S. at 30)). And the prosecution's dated sources say nothing about whether conspiracy remains a law of war violation today because the law of war has undergone significant evolution since the early 20th-century. For example, according to Winthrop's treatise, summary execution was once routinely permitted under the laws of war. *See* Winthrop, *Military Law and Precedents* 783 (1895, 2d ed. 1920). But the modern day law of war *clearly* prohibits such inhumane treatment. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3 (entered into force Oct. 21, 1950). In enacting Article 21 of the UCMJ, and its predecessor, Article 15 of the Articles of War, Congress intended only to preserve what jurisdiction existed under the law of war as it had evolved. *Hamdan*, 126 S.Ct. at 2774; *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (noting that a claim under the Alien Tort Claims Act "must be gauged against the *current state of international law*" (emphasis added)). Many of the international community's most prominent treaties were adopted in the latter half of the

(7) Thus, as Mr. Khadr argued in his motion to dismiss charge III, at the time of the charged conduct neither U.S. law nor the "law of war" recognized conspiracy as one of the narrow category of crimes triable by military commission. (Def. Motion at 2-6). The prosecution's response does nothing to counter those dispositive facts.

b. The MCA Cannot Conclusively and Retroactively Determine the Content of the Law of War

(1) After ignoring the *Hamdan* plurality's analysis of the state of international law in 2002 and arguing that it should not be followed (Gov't Resp. at 5-6), the prosecution reverses course and cites *Hamdan* for the dubious proposition that the Court "invited the politically accountable branches" to pass an *ex post facto* law making conspiracy retroactively triable by military commission. *Id.* at 9. In support of this notion, the prosecution selectively cites Justice Breyer's statement that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary," *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring), emphasizing the word "[n]othing." (Gov't Resp. at 9.) But, of course, Justice Breyer did not give Congress or the Executive authority to disregard the Constitution. The prosecution omits Justice Breyer's complete statement of his views: "If Congress, after due consideration, deems it appropriate to change the controlling statutes, *in conformance with the Constitution and other laws*, it has the power and prerogative to do so." *Hamdan*, 126 S. Ct. at 2800 (Breyer, J., concurring) (emphasis added). The President is free to "seek"—and Congress is free to grant—the authority the President believes is necessary, but only within the bounds of the Constitution. While Congress may be able to give the President the authority to make conspiracy triable by military commission as to future offenses, that does not mean it can give him the authority to make triable by military commission alleged conspiracies that occurred long before the MCA was enacted. *See infra* at 6-9.

(2) Just as the Congress cannot give the President the authority to retroactively make conspiracy triable by military commissions, it also cannot retroactively change the content of international law. Perhaps recognizing that international law does not support its position, the prosecution ignores the international law sources cited in *Hamdan* and throughout Mr. Khadr's motion to dismiss. Instead, the prosecution bases its argument that "conspiracy is, and always has been, a violation of the law of war," *see, e.g.*, Gov't Resp. at 11, almost entirely on the MCA's declaration that it "*does not establish new crimes that did not exist before its enactment*," 10 U.S.C. § 950p(a) (emphasis added), and on the (incorrect) idea that Congress can conclusively determine the content of international law, *see, e.g.*, Gov't Resp. at 7 ("Congress is not bound by international law."); *id.* at 8 (arguing that Congress's declaration of the content of international law "must stand, without regard to any analysis of customary international law").

(3) This argument is wholly without merit. Initially, as Mr. Khadr explained in his opening brief, the best interpretation of the MCA is that it is not intended to apply retroactively

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twentieth-century, and it defies both law and common sense to suggest that the conduct prohibited in these treaties does not violate the law of war simply because such conduct was not considered to be a violation two hundred years ago.

to newly minted crimes. (*See* Def. Motion at 6-8.) The MCA's declaration that it "does not establish new crimes" simply confirms this intent that the MCA not apply retroactively. (*See* Def. Motion at 7.) To the extent that Congress erroneously believed that conspiracy was an offense triable by military commission prior to the MCA's enactment, the appropriate response is not to read the MCA as purporting (absurdly) to retroactively change the content of the law of war *as of four years ago* by Congressional fiat, but rather to read the inadvertently new offense as applying only to conduct that occurred after the enactment of the MCA.[3]

(4) In any event, even if the MCA purported to retroactively declare the content of international law, its is clear that Congress cannot do so. The law of war is—and always has been—based on international law, and Congress has no power to conclusively determine what is and is not a violation of international law. *See Hamdan*, 126 S. Ct. at 2780 (plurality op.) (for an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally" (quoting *Ex Parte Quirin*, 317 U.S. at 30)); *see also The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct."). The prosecution cannot claim that conspiracy has always been a violation of the law of war while simultaneously claiming that the sources needed to prove that proposition—particularly international law and practice—are irrelevant.

(5) To the extent that the Government is suggesting that the Congress can conclusively determine the content of the law of war as part of its authority "[t]o *define* and *punish* . . . Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10 (emphasis added), that is simply not the case. Congress only has the power to clarify the exact scope and elements of offenses which have been previously recognized as violations of the law of war by

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[3] In a series of footnotes (*see* Gov't Resp. at 10-11, n.3&4), the prosecution suggests that the Defense has wavered in its view of the MCA's retroactivity. At the risk of repetition: the Defense's view is that the MCA is, at best, ambiguous as to whether Congress intended any changes in substantive law it creates apply retroactively. Because the retroactive application of such changes would be unconstitutional, the defense, in its motion to dismiss Charge III, offered a constitutional construction of the MCA—one that avoids creating an *Ex Post Facto* violation. (*See* Def. Motion at 6-7.) The defense suggested that the Commission could—and should, in accordance with the fundamental canon of constitutional avoidance—interpret the statute *prospectively* as to any substantive changes in the law. *Zadyvas v. Davis*, 533 U.S. 678, 689 (2001) (internal citation omitted); *see also Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (an act of Congress should never be construed to violated the law of nations if any other possible construction remains). In its motion to dismiss for lack of jurisdiction (the bill of attainder motion), the defense was addressing an issue wholly irrelevant to this motion; namely, whether Congress intended the MCA to apply retroactively to the extent that it merely codified preexisting violations of the law of war. Def. Motion at 6. That question has no relevance to this motion because conspiracy was not, as a plurality of the Supreme Court has already held, a violation of the law of war at the time Mr. Khadr is alleged to have committed it. To the extent that Congress attempted to retroactively make conspiracy a law of war violation or an offense triable by military commission, it intended something it has no power to do, as the Defense has made clear in its motions to dismiss each of the charges. (*See, e.g.*, Mot. to Dismiss Charge III at 6-12.) If the prosecution is correct that Congress "unambiguously" intended to retroactively apply the new crimes created by the MCA (Gov't Resp. at 10), then the MCA unambiguously violates the *Ex Post Facto* Clause. (*See infra* at 6-9.)

international sources. It has no authority to *create* violations of law which the international sources do not recognize. Indeed, the Government's argument is belied by one of the principal sources on which the Government itself relies. As explained in the 1865 Attorney General opinion to which the Government cites, "[t]o *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations." 11 Op. Atty Gen. 297, 1865 U.S. AG LEXIS 36, *4 (*cited in* Gov't Resp. at 6, 8 (describing the opinion as "binding on the Executive Branch")). In other words, Congress is not itself empowered to *create* war crimes, but rather has only the "second-order authority to assign more definitional certainty to *those offenses already existing under the law of nations* at the time it legislated." Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 141 (2007) (emphasis added).[4]

(6) Similarly, Congress cannot use its "define and punish" power to simply label any existing crime an offense against the law of nations: "Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by Congress." *United States v. Arjona*, 120 U.S. 479, 488 (1887). In *United States v. Furlong*, 18 U.S. (5 Wheat) 184 (1820), the Supreme Court rejected Congress's attempt to assert jurisdiction over certain acts of murder simply by describing them as violations of the law of nations. Whether there is sufficient evidence to establish an offense as a violation of the law of nations is ultimately a judicial question that must be answered in relation to recognized sources of international law; the "define and punish" power does not confer upon Congress the unilateral authority to make such a determination. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") (emphasis added). Congress's attempt in the MCA to "say what the law is" violates the

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[4] The executive branch likewise lacks the authority to create war crimes, and the prosecution does not claim otherwise. It is thus immaterial that scattered and dated executive branch pronouncements, such as the 1865 Attorney General's Opinion and the 1956 Army Field Manual cited by the prosecution (Gov't Resp. 6), may have suggested that conspiracy is a violation of the law of war. The proper sources to consider in determining whether conduct violates the law of war are international law sources, and the fact that the prosecution can cite to none is simply further evidence of the fundamental weakness of its position. Regardless of whether the Army Field Manual might be binding on some executive branch officials, it is not binding on this Commission, which has an independent obligation to determine the content of the law of war.

Moreover, the government's reliance on the Field Manual is otherwise misplaced. Consistent with the Manual, it is recognized that conspiracy and other inchoate offenses can be punished under very limited circumstances under international law. The Manual should be read to do nothing more than acknowledge this bare fact and leave room for such prosecutions where otherwise permitted under international law. Art. III(b) of the Genocide Convention, Dec. 9, 1948, 78 U.N.T.S. 227, criminalizes conspiracy to commit genocide. Likewise, the Nuremberg Principles adopted by the General Assembly in 1950 U.N. GAOR, 5th Sess. Supp. No. 12, Principle VI, U.N. Doc. A/1316 (1950), provide liability for conspiracy to commit crimes against peace. However, no international treaty or judicial decision accepts that conspiracy to commit any international crime is itself a crime against the laws of war. Obviously, neither instrument is implicated here. The Field Manual provision cannot be reasonably interpreted to suggest that conspiracy and direct incitement would constitute a basis for liability in relation to every war crime.

bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").[5]

(7) Accordingly, the fact that Congress may have—four years after the fact—declared conspiracy to be a violation of the law of war at the time of the charged conduct is irrelevant, because the judiciary has an independent obligation to determine the content of the law of war based on international law sources. As a plurality of the Supreme Court determined just last year following an exhaustive search of those sources, conspiracy was not a violation of the law of war in 2002.

c. The MCA Cannot Be Retroactively Applied to Mr. Khadr's Case.

(1) Because Congress cannot conclusively determine the state of international law at the time of Mr. Khadr's alleged offenses, and because a plurality of the Supreme Court has already determined that international law did not proscribe conspiracy at that time, this commission has jurisdiction only if the MCA—which was not passed until four years *after* Mr. Khadr's alleged offenses—can be applied in this case. But retroactively applying the MCA to Mr. Khadr would violate both U.S. and international law prohibitions on *ex post facto* legislation. (Def. Motion at 8-12).

(2) Initially, as noted above, and as explained in detail in Mr. Khadr's opening brief, the best interpretation of the MCA is that it is not intended to apply retroactively. Accordingly, applying standard principles of statutory interpretation and constitutional avoidance, this commission should read the MCA's conspiracy offense as applying only to conduct that occurred after the enactment of the MCA. (*See* Def. Motion at 6-8.)

(3) In any event, the MCA could not be applied retroactively because doing so would violate the Ex Post Facto clause of the U.S. Constitution and international law. In an effort to evade the constitutional prohibition on *ex post facto* legislation, the prosecution argues that the

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[5] In a footnote of its Response to the Motion to Dismiss Charges I and II, the prosecution makes the startling argument that there can be no separation of powers problem where "proceedings are conducted wholly within a single Branch." Gov't Resp. at 4 n.1. It is hornbook constitutional law that the *purpose* of separation of powers doctrine is to prevent one branch from performing the functions of another. *See, e.g., Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) ("[Congress] may not invest itself or its Members with either executive power or judicial power.") (quotations omitted); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (striking down Congress's attempt to grant itself a legislative veto).

Contrary to the prosecution's suggestion, no branch can flout the Constitution's separation of powers by effectively claiming all three branches' powers for itself. As Justice Kennedy noted in his *Hamdan* concurrence, which the prosecution cites on the first page of its response, "[t]rial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review." *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring) (citing *Loving v. United States*, 517 U.S. 748, 756-58 (1996)).

Constitution "does not ensure the legal rights of alien enemy combatants detained in foreign territory." Gov't Resp. at 8. But the *Ex Post Facto* Clause is a structural limitation on congressional power. *Weaver v. Graham*, 450 U.S. 24, 29, 29 n.10 (1981) (the *Ex Post Facto* Clause acts as a restriction on congressional power "by restraining arbitrary and potentially vindictive legislation," and "confin[es] the legislature to penal decisions with prospective effect"). It governs Congress's conduct regardless of whether the individuals adversely affected have independent legal rights under the Constitution. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description."); *see also Weaver*, 450 U.S. at 29-30 ("The presence or absence of an affirmative, enforceable right is not relevant . . . to the *ex post facto* prohibition."). Even the previous military commission system recognized that individuals could not be tried with offenses that did not exist when they were allegedly committed. MCI No. 2 ¶ 3(A) ("No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question."). Accordingly, the *Ex Post Facto* Clause prohibits the retroactive application of the MCA regardless of where the individuals affected by it are detained.

(4) But even assuming, *arguendo*, that the *Ex Post Facto* Clause only applies to those persons detained within the territorial jurisdiction of the United States, it would still apply in this case because the Supreme Court has recognized that Guantanamo Bay is within the "territorial jurisdiction" of the United States. *See Rasul v. Bush*, 542 U.S. 466, 480 (2004) (interpreting habeas statutute); *see also id.* ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base." (citing the terms of the 1903 lease agreement)); *id.* at 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . ."); *id.* ("From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it.") (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950).

(5) In an effort to limit the reach of the Constitution's prohibition on *ex post facto* legislation, the prosecution relies heavily on the D.C. Circuit's opinion in *Boumediene v. Bush*, 476 F.3d 981 (2007), currently on review at the Supreme Court. While the prosecution argues that *Boumediene* "unambiguously held that the Constitution does not apply to alien enemy combatants held" at Guantanamo, (Gov't Resp. at 8), *Boumediene* did no such thing. *Boumediene* was concerned solely with the Suspension Clause of the Constitution, and did *not* address the applicability of the *Ex Post Facto* Clause to Guantanamo detainees. To the extent *Boumediene* may have suggested that other constitutional provisions do not apply at Guantanamo, it did so only by dismissing the significance of the Supreme Court's recent precedent in *Rasul*. *See Boumediene*, 476 F.3d at 991 n.10 (concluding that *Rasul*, "resting as it did on statutory interpretation, . . . could not possibly have affected the constitutional holding of" *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950), which held that constitutional protections extend to aliens "within [the courts'] territorial jurisdiction"). In rejecting the Supreme Court's conclusion that aliens at Guantanamo are within the "territorial jurisdiction" of the United States, the D.C. Circuit unnecessarily manufactured a tension between *Eisentrager* and *Rasul*. It is far more natural to read *Eisentrager* as setting out the standard for the extraterritorial application of constitutional rights and *Rasul* as recognizing that Guantanamo satisfies that standard.

(6) Moreover, the holding of *Boumediene* has already been called into question—first by the Supreme Court's grant of certiorari and second by the D.C. Circuit's own decision to recall the mandate it had previously issued. Under the Federal Rules of Appellate Procedure, an appellate decision "is not final until issuance of the mandate." Advisory Committee Notes, subdivision (c), Fed. R. App. P. 41. Numerous judges have recognized that "the Court of Appeals' withdrawal of the mandate in *Boumediene*," when considered along with "the Supreme Court's highly unusual grant of certiorari on rehearing," casts "a deep shadow of uncertainty over the jurisdictional ruling of that decision." *Alhami v. Bush*, No. 05-359, at 6 (GK) (D.D.C. Oct. 2, 2007); *see also Al-Oshan v. Bush*, No. 05-0520, at 6 n.2 (RMU) (D.D.C. Oct. 5, 3007) (noting that "the extraordinary procedural dispositions in *Boumediene* 'cast a deep shadow of uncertainty'" over the D.C. Circuit's jurisdictional ruling).

(7) Given the considerable uncertainty surrounding *Boumediene*, if this Commission were to find that the D.C. Circuit's opinion necessary to the resolution of this case, it should stay these proceedings until the Supreme Court reaches a decision. Several D.C. district court judges have stayed their proceedings and refused to rule on Government motions to dismiss detainee habeas petitions in light of the considerable uncertainty surrounding *Boumediene*. *See Maqaleh v. Gates*, No. 06-1669 (JDB) (D.D.C. July 18, 2007); *Al-Oshan v. Bush*, No. 05-0520 (RMU) (D.D.C. Oct. 5, 3007); *cf. Alhami v. Bush*, No. 05-359 (GK) (D.D.C. Oct. 2, 2007).

(8) Alternatively, if this Court should decide that it can now reach the merits of the *Ex Post Facto* issue, it should determine that applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause. Indeed, the Government's throwaway claim that summary execution is the proper baseline for determining the extent to which application of the MCA disadvantages Mr. Khadr implicitly reflects a recognition that the MCA, when compared against the proper baseline, violates the prohibitions of the *Ex Post Facto* Clause. (Gov't Resp. at 12-13). Indeed, only such an absurd baseline would make the MCA look good in comparison.[6]

(9) The proper baseline is in fact not summary execution, but trial in federal district court under 18 U.S.C. § 1117, which criminalizes conspiracy to murder an officer of the United States, including members of the armed services. *Id.*; *see also id.* § 1114. Numerous courts have held that these statutes can be applied extraterritorially to reach conduct which occurred outside the United States. *See, e.g.*, *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984); *U.S. v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 202 (S.D.N.Y. 2000); *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981). Nor does the nature of the charges or their relationship to national security make resolution in an Article III court impossible. Article III courts have successfully handled a broad array of terrorism cases, including those involving jihadists trained abroad, *see, e.g.*, *U.S. v. Khan*, 461 F.3d 477 (4th Cir. 2006); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998), U.S. citizens involved with al-Qaeda in the United States and abroad, *see, e.g.*, *United States v. Nettles*, 476 F.3d 508 (7th Cir. 2007); *United States v. Reid*, 369 F.3d 619 (1st Cir. 2004), *see, e.g.*, *United States v. El-*

[6] As discussed above, *see supra* at 3 n.2, the law of war has evolved considerably since Winthrop suggested that summary executions were permissible, and it is testament to the fundamental weakness of the prosecution's position that it feels the need to set as the baseline a punishment which is now *prohibited* by the law of war.

Hage, 213 F.3d 74 (2d Cir. 2000); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002), and *non*-citizens charged with conduct occurring both inside and outside the United States, *United States v. Ressam*, 474 F.3d 597 (9th Cir. 2007) (Algerian citizen who had trained with al Qaeda abroad and was detained while attempting to bring bomb parts into the United States); *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *see also United States v. Bin Laden*, 93 F. Supp. 2d 484 (S.D.N.Y. 2000) ("[S]o long as a count alleges acts committed outside the United States in furtherance of a conspiracy to kill United States nationals, it alleges a violation of [18 U.S.C.] § 2332(b)."). There is no reason to believe that federal courts would be any less suited to handle Mr. Khadr's trial.

(10) Even assuming, *arguendo*, that courts-martial provide the appropriate benchmark, *see* Gov't Resp. at 9-10, applying the MCA to Mr. Khadr nonetheless violates the *Ex Post Facto* Clause. This Commission need look no further than the text of the MCA itself, which *explicitly* breaks from *court-martial* procedures. In Section 948b(d) ("Inapplicability of Certain Provisions"), the MCA identifies three crucial UCMJ protections that do *not* apply, including "any rule of courts-martial relating to speedy trial," 10 U.S.C. § 948b(d)(1)(A), the rules "relating to compulsory self-incrimination," *id.* § 948b(d)(1)(B), and those relating to pretrial investigation, *id.* § 948b(d)(1)(C). The other rules "shall apply to trial by military commission *only to the extent provided by this chapter*." *Id.* § 948b(d)(2) (emphasis added). This is little comfort, since the MCA provides, among other things, that *court-martial* principles of law and rules of evidence shall apply only insofar "as the Secretary [of Defense] considers practicable or consistent with military or intelligence activities." *Id.* § 949a(a). The very same section of the MCA notes that the Secretary may prescribe that under certain circumstances the "hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission." *Id.* § 949a(b)(2)(E). This includes, notably, the admission in certain circumstances of coerced testimony. *Id.* § 948r. While the Government lists in its response a number of purported rights available to Mr. Khadr under the military commission system,[7] the relevant question is not what rights the MCA provides, but what rights it takes away. As discussed above and in detail in Mr. Khadr's motion to dismiss, the retroactive application of the MCA to Mr. Khadr's case deprives him of many rights which are routinely provided in U.S. courts and courts-martial. Def. Motion at 8-12.

(11) Thus, regardless of whether the appropriate benchmark is trial in an Article III court or by court-martial, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it "aggravate[s]" the consequences for the conduct Mr. Khadr is alleged to have committed. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). The Government cannot diminish the significance of these changes simply by labeling them as "jurisdiction[al]." Gov't Resp. at 9. As the Supreme Court has specifically recognized, legislative changes cannot be insulated from *ex post facto* analysis simply by labeling them "procedural" or "jurisdictional"—what matters is the

[7] It is worth noting that some of the "rights" the Government identifies exist more in theory than they do in practice. For example, the Government states the accused has the right to cross-examine witnesses who testify against him, but because the Government can base its case exclusively on documentary and hearsay evidence, the accused may have no witnesses and/or no witnesses with personal knowledge to cross-examine. *See* 10 U.S.C. § 949a(b)(2). The Government also claims that the accused has the right to present evidence in his defense, but the accused cannot compel the attendance of witnesses at a commission in Guantanamo Bay.

degree to which they effectively "aggravate an offense." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925); *see also id.* at 171 ("Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree.").[8] As explained above and in detail in Mr. Khadr's motion to dismiss, the MCA changes the nature of the offense with which Mr. Khadr is charged and the consequences for that conduct. Def. Motion at 8-12. Accordingly, applying it to Mr. Khadr would violate the *Ex Post Facto* Clause of the U.S. Constitution.

d. Conclusion

(1) Military commissions have long been defined, in large part, by their limited jurisdiction. Neither U.S. nor international law recognized conspiracy as one of the narrow category of crimes triable by military commission at the time the charged conduct in this case is alleged to have occurred.

(2) Unable to meaningfully contest that point, the prosecution attempts to base this Commission's jurisdiction on the MCA, arguing in the alternative that the MCA can conclusively establish that international law did proscribe conspiracy at the time of the charged conduct or that its determination that conspiracy is triable by military commission as a matter of U.S. law can be retroactively applied to Mr. Khadr. Both arguments are without merit. The Congress cannot dictate the content of international law, and it certainly cannot do so retroactively. Nor can it retroactively make conspiracy triable by military commission as a matter of U.S. law because to do so would violate the structural limitations on Congress's power imposed by the *Ex Post Facto* Clause.

(3) Accordingly, military commissions do not have jurisdiction to consider a charge of conspiracy, and this charge against Mr. Khadr should be dismissed.

/s/
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LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Detailed Assistant Defense Counsel

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[8] Indeed, in the two Supreme Court cases on which the Government relies, the Supreme Court made clear that to survive an *ex post facto* challenge legislation must "leav[e] untouched all the substantial protections with which the existing law surrounds the person accused of crime." *Duncan v. State*, 152 U.S. 377, 382-83 (1894); *see also Mallett v. North Carolina*, 181 U.S. 589, 597 (1901) ("[The legislature] cannot lawfully . . . dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."). That is assuredly not the case with respect to the MCA. For example, the Government does not even dispute that applying the MCA to Mr. Khadr's case deprives him of the protections provided by the Juvenile Delinquency Act, 18 U.S.C. §§ 5031 *et seq.*; *see also* Def. Motion at 8.

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]

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[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]

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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 [redacted] 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 [redacted] 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

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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.* § 949*l*(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).

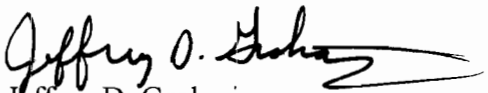
7. Oral Argument: The Prosecution disagrees that the issues presented by the Defense's motion are "complex." Mot. to Dismiss III at 12. In view of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motion should be readily denied. To the 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:



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UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** to Dismiss Charge Three for Lack of Subject Matter Jurisdiction 7 December 2007

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 requests that this Commission dismiss Charge III, conspiracy in violation of Section 950v(b)(28) of the Military Commissions Act of 2006 ("MCA").

3. **Overview:**

a. The charge of conspiracy must be dismissed because the military commission has no jurisdiction to consider it. Military commissions may only be used to try violations established by statute or by the law of war. At the time of the alleged offense, neither U.S. law nor the law of war proscribed conspiracy as an offense triable by military commission: the Uniform Code of Military Justice (UCMJ) set forth the applicable U.S. law at the time, and it does not identify conspiracy as a crime triable by military commission. Likewise, the law of war does not proscribe conspiracy, as the controlling plurality opinion of the Supreme Court held just last year in *Hamdan v. Rumsfeld*. 126 S.Ct. 2740, 2777-85 (2006). Treaties and international practice confirm that conspiracy does not violate the law of war and thus cannot be tried by military commission.

b. Although the MCA identifies conspiracy as an offense triable by military commission, that fact is wholly irrelevant to this case because both U.S. and international law provide that individuals must be tried under the law as it existed at the time of their alleged offense. This constitutional prohibition on *ex post facto* legislation recognizes that there is a fundamental unfairness in holding individuals accountable for consequences that they could not have foreseen at the time of their alleged offense. Mr. Khadr could not have foreseen in 2002 that the offense of conspiracy would be triable by military commission four years later, nor foreseen the significantly different consequences that would result from that fact. To avoid this constitutional problem, MCA § 950v(b)(28) should be interpreted to apply prospectively only.

c. Accordingly, because Mr. Khadr must be tried based upon the law at the time the alleged offense occurred, and because at that time, conspiracy was not one of the narrow category of crimes triable by military commission, this commission lacks jurisdiction to hear this charge against Khadr. *See* R.M.C. 907(b)(1).

4. **Burdens of Proof and Persuasion:** Because this motion is jurisdictional in nature, the prosecution bears the burden of proving jurisdiction by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

5. **Facts:** This motion presents a question of law.

a. The Government alleges that Mr. Khadr conspired to commit various offenses triable by military commission: attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism. *See* Charge Sheet (24 Apr 2007) [hereinafter 2007 Charge Sheet].

b. In June 2006, the Supreme Court held in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that the President's military commissions violated Common Article 3 of the Geneva Conventions and that the President's creation of military commissions failing to meet international law standards exceeded his statutory authority.

c. The President signed the Military Commissions Act into law on October 17, 2006. P.L. 109-366, 120 Stat. 2600.

6. **Argument: The Charge of Conspiracy Must Be Dismissed Because the Military Commission Lacks Jurisdiction To Hear It**

a. At The Time Of The Charged Conduct Military Commissions Lacked Jurisdiction Over Charges Of Conspiracy In Both U.S. And International Law

(1) As the Supreme Court made clear in *Ex Parte Quirin*, the first question in a military commission case is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal." 317 U.S. 1, 29 (1942).[1] At the time of Mr. Khadr's alleged conduct, military commissions could only be used to try violations if expressly made triable by military commission, or if proscribed by the international law of war. 10 U.S.C. § 821 (1998). Because the conspiracy charge does not fall into either category, this commission has no jurisdiction to consider it. And while the MCA purports to make conspiracy an offense triable by military commission, the MCA cannot be applied in this case because it was not enacted until four years *after* the charged conduct. Thus, its application in this case would violate the prohibition on *ex post facto* legislation under both U.S. and international law.

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[1] *See also Hamdan*, 126 S. Ct. at 2777 ("[A] law-of-war commission has jurisdiction to try only two kinds of offense: 'Violations of the laws and usages of war cognizable by military tribunals only,' and '[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.'") (citing W. Winthrop, Military Law and Precedents 839 (rev. 2d ed. 1920)); *id.* (noting that it "is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge 'properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction.*'" (citing Winthrop at 842 (emphasis in original)); *In re Yamashita*, 327 U.S. 1, 13 (1946) ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is a violation of the law of war.").

(2) Neither U.S. nor international law proscribed conspiracy as an offense triable by military commission at the time the offense in this case was allegedly committed. The statute applicable at that time—the Uniform Code of Military Justice (UCMJ)—made only two offenses triable by military commission, and conspiracy was not one of them.[2]

(3) Because there is no statutory basis to try Mr. Khadr before a military commission, the only possible basis for this Commission's jurisdiction is if the conspiracy with which Mr. Khadr has been charged plainly and unambiguously violates the law of war. *Hamdan*, 126 S. Ct. at 2780 (plurality) ("When . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous.") (*citing Quirin* 317 U.S. at 30). In order to justify a trial on that basis, however, the Government must "make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Id.* at 2780. And, as in *Hamdan*, "[t]hat burden is far from satisfied here." *Id.*

(4) In *Hamdan*, after reviewing the voluminous historical evidence produced by the parties and amici, the Supreme Court found that:

> [t]he sources that the Government . . . rel[ies] upon to show that conspiracy to violate the law of war is itself a violation of the law of war in fact demonstrate quite the opposite. Far from making the requisite substantial showing, the Government has failed even to offer a 'merely colorable' case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission. Because the charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan.

Id. at 2785. The prosecution in this case is limited to the same sources the government relied on in *Hamdan* and thus can make no greater a showing than the government could then. The available sources show that "[t]he crime of 'conspiracy' has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war." *Id.* at 2780-81 (internal citations omitted).[3] Indeed, more than simply failing to mention conspiracy, "international sources confirm that [conspiracy] is *not* a recognized violation of the law of war." *Id.* at 2784 (emphasis added).

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[2] The only UCMJ offenses triable by military commission are aiding the enemy and spying. *See* Art. 104, UCMJ, 10 U.S.C. § 904; Art. 106, UCMJ, 10 U.S.C.§ 906. The latter offense possesses more elements than the spying offense with which Mr. Khadr was charged—including at least three elements that cannot be satisfied in Mr. Khadr's case. *See* Art. 104, UCMJ, 10 U.S.C. § 904; Art. 106, UCMJ, 10 U.S.C. § 906.

[3] *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (relying on the Geneva and Hague Conventions when construing "longstanding law-of-war principles").

(5) The statutes and treaties establishing the tribunals punishing war crimes in Rwanda[4] and Yugoslavia,[5] for example, do not give those tribunals jurisdiction over conspiracy, with the limited and irrelevant exception of conspiracy to commit genocide.[6] Similarly, the final draft of the Rome Statute for the International Criminal Court (I.C.C.),[7] which has 139 signatory nations[8] and "provides the most comprehensive, definitive and authoritative list of war crimes,"[9] pointedly omits conspiracy. This omission is particularly noteworthy because the statute does include other inchoate crimes such as attempt and solicitation.[10] Colonel William Winthrop, whom the Supreme Court has called "the 'Blackstone of Military Law,'" *Reid v. Covert*, 354 U.S. 1, 19, n. 38 (1957) (plurality), likewise omits conspiracy from his own long list of offenses against the law of war. *See* Winthrop at 839-840.

(6) Lacking any evidence from treaties or international practice, the prosecution in this case cannot hope to carry its "minimum" burden of making "a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Hamdan*, 126 S. Ct. at 2780 (plurality). The prosecution's burden is all the more weighty given the nature of the charge. As noted above, when "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent

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[4] Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, art. 1, 33 I.L.M. 1598.

[5] Statute of the International Criminal Tribunal for the former Yugoslavia, May 25, 1993, art. 1, 32 I.L.M. 1192.

[6] 1 Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* 96 (1995). As the Supreme Court specifically noted in *Hamdan*, "the only 'conspiracy' crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a 'concrete plan to wage war.'" *Hamdan*, 126 S. Ct. at 2784 (plurality). Genocide and the waging of aggressive war are *inherently* conspiratorial actions—No one can commit genocide or wage war by himself. *Amicus Br. of Specialists in Conspiracy and Int'l Law*, *Hamdan v. Rumsfeld*, at 14, *available at* http://www.hamdanvrumsfeld.com/15053HuntonBRFcomplete.pdf. They thus present narrow exceptions to the general rule that conspiracy is not a violation of the law of war, but they are not even remotely relevant in this case, as the charges against Mr. Khadr do not fall anywhere near either of these exceptions.

[7] Rome Statute of the International Criminal Court, July17, 1998, art. 8, 37 I.L.M. 999 [*hereinafter* ICC statute]. The Crimes and Elements portion of which was drafted largely by the United States. David J. Scheffer, "The Global Challenge of Establishing Accountability for Crimes Against Humanity" Remarks, Centre for Human Rights, University of Pretoria, Pretoria, South Africa, Aug. 22, 2000 *available at* http://www.state.gov/documents/organization/6551.doc ("T]he United States led the UN negotiations for Elements of Crimes of the International Criminal Court. We drafted the primary document and for nearly 2 years we were in the trenches with South Africa and other governments to finish this work-engine document of the Court.")

[8] World Signatures and Ratifications, http://www.iccnow.org/?mod=romesignatures.

[9] Robert Cryer, *International Criminal Law v. State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979, 990 (2005).

[10] ICC Statute art. 25.

[establishing the alleged offense] must be plain and unambiguous." *Id.* at 2780 (*citing Quirin* 317 U.S. at 30). Yet, as Justice Jackson—who was the chief U.S. prosecutor at Nuremberg—recognized, "[t]he modern crime of conspiracy is so vague that it almost defies definition." *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring). Indeed, few countries even recognize it as a crime.[11] It is certainly not generally "acknowledged to be an offense against the law of war."

(7) In keeping with this international practice, the Supreme Court has repeatedly declined to recognize conspiracy as a violation of the law of war. As noted above, the controlling opinion in *Hamdan* noted that "the Government has failed even to offer a 'merely colorable' case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission." 126 S. Ct. 2785 (plurality). *Hamdan* also noted that the Court in *Quirin* declined to recognize conspiracy as a violation of the law of war despite the fact that the defendants in that case had been charged with conspiracy: "That the defendants in *Quirin* were charged with conspiracy is not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of war—let alone one triable by military commission." *Hamdan*, 126 S. Ct. at 2781 (plurality op.). The *Hamdan* Court continued: "If anything, *Quirin* supports Hamdan's argument that conspiracy is not a violation of the law of war," because *Quirin* pointedly omits any mention of conspiracy as a basis of commission jurisdiction. *Id.* at 2782.

(8) Nor does the historic example of the International Military Tribunal at Nuremberg support the notion that the conspiracy with which Mr. Khadr has been charged is a violation of the law of war. To the contrary, the failed attempt to convict the Nuremberg defendants of conspiracy confirms that conspiracy is *not* a violation of the law of war. Article 6 of the Nuremberg Charter established three crimes within the jurisdiction of the International Military Tribunal: crimes against peace; crimes against humanity; and war crimes.[12] Conspiracy appears only twice in the Charter. It is listed in the definition of crimes against peace, which include "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of the foregoing."[13] It appears again in the final sentence of the Article: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all the acts performed by any persons in execution of such plan."[14]

(9) Neither of these references to conspiracy creates a free-standing offense. Recognizing that conspiracy only violates the law of war if it involves an agreement to wage aggressive war, the Tribunal noted in its judgment that "the charter does not define as a separate

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[11] *Amicus Br. of Specialists in Conspiracy and Int'l Law*, *Hamdan v. Rumsfeld*, at 7-9 (demonstrating that the common law practice of punishing conspiratorial agreements differs from the rest of the world).

[12] Charter of the International Military Tribunal, Art. 6, *available at* http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm#art6.

[13] *Id.* art 6(a).

[14] *Id.* art 6(c).

crime any conspiracy except the one to commit acts of aggressive war."[15] Thus, the Tribunal disregarded "the offences of conspiracy to commit war crimes and crimes against humanity" and considered "only the common plan to prepare, initiate, and wage aggressive war."[16] As the Supreme Court recognized in *Hamdan*, "[t]he International Military Tribunal at Nuremberg, over the prosecution's objections, pointedly refused to recognize as a violation of the law of war conspiracy to commit war crimes, and convicted only Hitler's most senior associates of conspiracy to wage aggressive war." *Hamdan*, 126 S. Ct. at 2784 (plurality) (citing, inter alia, S. Pomorski, Conspiracy and Criminal Organization, in the Nuremberg Trial and International Law 213, 233-235 (G. Ginsburgs & V. Kudriavtsev eds. 1990)).

(10) It is the prosecution's burden in this case to make "the requisite substantial showing" that conspiracy was a violation of the law of war at the time of Mr. Khadr's conduct.[17] Such a showing is simply not possible. The evidence marshaled and presented by the Solicitor General and amici in *Hamdan* "fail[ed] to satisfy the high standard of clarity required to justify the use of a military commission."[18] Because the prosecution cannot carry its burden of showing that conspiracy violates the law of war, this commission has no jurisdiction to consider that charge. It must be dismissed.

b. The MCA Cannot Provide Jurisdiction Over Mr. Khadr Because It Was Not Enacted Until Four Years After the Charged Conduct

(1) <u>The MCA Should Not Be Interpreted To Apply Retroactively</u>

(a) As previously discussed, neither U.S. law nor the international "law of war" recognized conspiracy as one of the narrow category of crimes triable by military commission at the time of Mr. Khadr's alleged offenses. *See supra* at 3-8. Indeed, the Government has implicitly conceded this point by charging Mr. Khadr with conspiracy under the MCA, rather than under any statute in effect at the time of the alleged offense. But the MCA's conferral of jurisdiction on the military commission to try conspiracy charges in 2006 is irrelevant to this case because the MCA was not enacted until four years *after* Khadr allegedly committed the offenses with which he is charged.

(b) It is well-established that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Here, Congress did not provide that the provisions of the MCA under which Mr. Khadr is charged should be applied retroactively. To the contrary, Congress made explicit that only one specific section of the MCA—its implementation of treaty obligations—should be applied

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[15] International Military Tribunal, Judgment, in I Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945 - 1 October 1946, p. 226.

[16] *Id.*

[17] *Id*

[18] *Hamdan*, 126 S. Ct. 2781.

retroactively. *See* Military Commissions Act, Pub. L. No. 109-366,§ 6(b)(2), 120 Stat. 2600, 2633 (2006) (amending 18 U.S.C. § 2441).

(c) Section 950p provides additional evidence that Congress did not intend the MCA to apply retroactively because it makes clear that Congress believed that the MCA "does not establish new crimes that did not exist before its enactment." 10 U.S.C. § 950p(a). While Congress's belief in this regard was erroneous—conspiracy was not an offense triable in a military commission before the MCA's enactment—this erroneous belief nonetheless suggests that Congress did not intend to change existing law when it enacted the MCA.[19] It follows *a fortiori* that it would not have intended any inadvertent change in the law to apply retroactively—particularly in light of the general presumption against retroactive legislation, *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and the fact that retroactive application of such a change would raise serious constitutional questions under the *Ex Post Facto* Clause, as is discussed below.

(d) Section 948d(a) of the MCA is not to the contrary. That provision states that the commission has jurisdiction over "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). The best reading of this provision—and one that renders it consistent with section 950p—is that it simply clarifies that the commission's jurisdiction extends even to offenses that occurred prior to the commission's establishment by the MCA. To the extent that the MCA (contrary to its stated purpose) sets forth new offenses that are not also violations of the law of war, such offenses are not "made punishable by this chapter" if they occurred before enactment of the MCA, because under section 950p and the presumption against retroactivity, the MCA's substantive criminal provisions do not apply retroactively.

(e) Even if Section 948d(a) is read—in conflict with section 950p and the presumption against retroactivity—to suggest that the MCA was intended to apply retroactively, it would at best render the statute ambiguous. And any doubts about whether the MCA applies to conduct prior to the law's passage should be resolved in favor of non-retroactivity, because a contrary holding would raise serious constitutional concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades*

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[19] To read § 950p as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to adoption of the M.C.A. violates bedrock separation of powers principle. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") This interpretation should be avoided because it would raise serious constitutional concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

Council, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

(f) In this case, applying the MCA retroactively would violate the *Ex Post Facto* Clause of the U.S. Constitution. This rule of statutory construction is especially weighty in this case because, as discussed below, international law also prohibits the application of *ex post facto* laws, and the *Charming Betsy* doctrine compels U.S. courts to interpret statutes in accordance with international law whenever possible. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Interpreting the MCA in accordance with its own plain text, which identifies the statute as "declarative" rather that retroactive, § 950p, avoids these problems of constitutionality and comity, and is the better reading of the statute.

(2) Applying The MCA Retroactively Would Violate Constitutional And International Prohibitions On Ex Post Facto Laws

(a) Even assuming, *arguendo*, that Congress intended the MCA to apply retroactively, the MCA nonetheless cannot be so applied in this case because doing so would violate the *Ex Post Facto* Clause of the U.S. Constitution. The U.S. Constitution's prohibition on legislation that retroactively "alter[s] the definition of crimes or increase[s] the punishment for criminal acts" is clear and unequivocal. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990); *see* also U.S. Const. art. I, § 9, cl.3 ("No . . . ex post facto Law shall be passed."); *Kring v. Missouri*, 107 U.S. 221, 227 (1882) (noting that the Convention attached "[s]o much importance" to the ex post facto prohibition "that it is found twice in the Constitution").[20] It is well-established that this "constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to . . . aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925); *see also Collins*, 497 U.S. at 43. The *Ex Post Facto* Clause thus ensures that an individual can know the consequences of his actions when he commits them. *See Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) ("Through [the *Ex Post Facto*] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."). Here, Mr. Khadr could not have anticipated that the conduct he is alleged to have committed in 2002 would subject him to prosecution by a military commission in 2006.

(b) Applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause for two simple reasons. First, it retroactively changes the "criminal quality attributable to an act." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). Second, it alters the "nature or amount of the punishment imposed for its commission." *Id.*

(c) First, applying the MCA to Mr. Khadr would violate the *Ex Post Facto* Clause because it changed the "criminal quality attributable to" Mr. Khadr's alleged conduct by

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[20] The prohibition also appears as a limitation on the power of state legislatures. U.S. Const. art. I, § 10, cl.1 ("No State shall . . . pass any . . . ex post facto Law.").

making conspiracy an offense triable by a military commission. It is immaterial that U.S. law previously recognized the crime of conspiracy. What is material is that it did not recognize it as one of the few crimes *triable by a military commission*. As a result of that change, Mr. Khadr faces prosecution before an entirely different adjudicative body with entirely different rules than would have been the case had he been tried in federal court. While "statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited," *Beazell*, 269 U.S. at 170, conferring jurisdiction on an entirely different body with entirely different rules of procedure is another matter altogether. In particular, because he faces trial before a commission rather than a court, Mr. Khadr will be (1) unable to receive the protections of the Juvenile Delinquency Act (the "JDA"), 18 U.S.C. §§ 5031 *et seq.*; (2) subject to adjudication absent procedural protections such as the right to a grand jury indictment, the right to the protections of the Federal Rules of Evidence, and the right to trial before a jury of his peers who, before conviction, would have to agree unanimously that the evidence proved his guilt beyond reasonable doubt.

(d) As a preliminary matter, if Mr. Khadr were tried in federal court, he would have the right to invoke the protections of the JDA because he was just 15 years old when his alleged offenses occurred. Under the JDA, Mr. Khadr could be tried as an adult only if a court, after making factual findings about several factors such as his age, social background, and psychological maturity, determined that such a trial was appropriate. *Id.* § 5032. If the MCA is applied to Mr. Khadr, he will be deprived of the JDA's protections because the MCA simply assumes, that all persons, even those who have not yet attained legal or psychological maturity under U.S. law, should be subject to the same procedures and consequences. *Cf. Roper v. Simmons*, 543 U.S. 551, 569 (2005) (noting that juveniles' "lack of maturity and an underdeveloped sense of responsibility," combined with their greater "susceptib[ility] to negative influences and outside pressures . . . render suspect any conclusion that a juvenile falls among the worst offenders").

(e) Further, applying the MCA to Mr. Khadr would subject him to a method of adjudication qualitatively different from a criminal trial in a domestic court. *Cf. Beazell*, 269 U.S. at 171 ("Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation . . . ."). Perhaps most significantly, if Mr. Khadr had been tried for conspiracy in federal court, he could be convicted only if a jury of his peers unanimously found him guilty of the offense. *See* Fed. R. Crim. P. 31(a); *see also* U.S. Const. amend. VI. Under the MCA, by contrast, all that is required to convict the accused of "conspiracy" is "concurrence of two-thirds of the [military commission] members present at the time the vote is taken." *See id.* § 949m(a). In addition, under the MCA, the accused has no right to grand jury indictment, *see* 10 U.S.C. § 948q(a), and the protections against the admission of unreliable evidence afforded by the Federal Rules of Evidence are significantly limited, *see id.* § 949a. Thus, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it "changes the criminal quality attributable to an act" by making it one subject to trial by military commission.

(f) Second, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it alters the "nature or amount of the punishment imposed for its commission," *Beazell v. Ohio*, 269 U.S. 167, 170 (1925), deprives him of the protections against arbitrary sentencing provided by federal sentencing law, and deprives him of the certain right to appeal his sentence. Under federal law, the maximum punishment for conspiracy is life imprisonment. *See* 18 U.S.C. § 1117. By contrast, the MCA provides for death if the conspiracy results in death and life imprisonment if it does not. Although Mr. Khadr's charge is a non-capital referral, "the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed." *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). The MCA prescribes a higher standard of punishment than does federal conspiracy law, and a retroactive "increase [in] the punishment for criminal acts" is a paradigmatic example of the type of legislation prohibited by the *Ex Post Facto* Clause. *See, e.g.*, *Collins v. Youngblood*, 497 U.S. 37, 43 (1990).

(g) Applying the MCA to Mr. Khadr also violates the *Ex Post Facto* Clause because it deprives him of the protections against arbitrary sentencing provided by federal sentencing law. *See Rita v. United States*, 127 S. Ct. 2456, 2463 (2007). Under federal law, courts are required to consider a number of different factors, including the "nature and circumstances of the offense and the history and characteristics of the defendant," to ensure that the sentence imposed is "no greater than necessary." 18 U.S.C. § 3553; *see, e.g.*, *United States v. Fonseca*, 473 F.3d 1109, 1112 (10th Cir. 2007) (requiring courts to consider the recommendations of the Federal Sentencing Guidelines, including consideration of any applicable grounds for reductions in the otherwise recommended range). Under the MCA, by contrast, any person convicted of 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(d)(28). The MCA thus vests nearly unbridled discretion in the military commission to make the determination as to what sentence is appropriate in any given case, and the military commission is under no obligation analogous to that of federal courts to consider possible grounds, unique to Mr. Khadr's case, which might warrant a reduced sentence.

(h) In addition, and perhaps most significantly, in the federal system, Mr. Khadr would be unquestionably entitled to appellate review of both the procedural and substantive reasonableness of any sentence imposed by the district court. *See, e.g.*, *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006). By contrast, the Government will likely argue that Mr. Khadr does not have the right to appeal whatever sentence is ultimately imposed by the military commission.[21] Thus, applying the MCA to Mr. Khadr deprives him of the certain right to appellate review of his sentence he would have enjoyed under the preexisting law.

(i) These changes in the applicable sentencing regime are a clear violation of the *Ex Post Facto* Clause. In *Miller v. Florida*, the Supreme Court held that a change in sentencing

[21] The MCA limits the jurisdiction of the Court of Appeals is "limited to the consideration of . . . (1) whether the final decision was consistent with the standards and procedures specified in [the MCA]; and . . . to the extent applicable, the Constitution and the laws of the United States." 10 U.S.C. § 950g.

laws could violate the *Ex Post Facto* Clause, and it was immaterial that the new law did not "'technically . . . increase . . . the punishment annexed to [the defendant's] crime.'" *Miller v. Florida*, 482 U.S. 423, 432-33 (1987) (quoting *Lindsey v. Washington*, 301 U.S. 397, 401 (1937)). The Court explained that the new law violated the *Ex Post Facto* Clause because under the new law "the trial judge did not have to provide any reasons, convincing or otherwise, for imposing the sentence, and his decision was unreviewable." *Id.* at 432-33. And while the Supreme Court has approved new statutes that "altered the methods employed in determining whether the death penalty was to be imposed" in a way that was "ameliorative" and provided "significantly more safeguards to the defendant than did the old," *Dobbert v. Florida*, 432 U.S. 282, 293, 294, 295 (1977), it has reached the opposite conclusion when—as in the case of the MCA—the new legislation does not heighten the protections available to the defendant. *See Miller*, 482 U.S. at 431-32 ("Unlike *Dobbert*, where we found that the 'totality of the procedural changes wrought by the new statute . . . did not work an onerous application of an *ex post facto* change,' here [defendant] has not been able to identify any feature of the revised guidelines law that could be considered ameliorative.") (internal citation omitted). Moreover, the changes wrought by the MCA are not simply procedural; they deprive Mr. Khadr of the right to have his sentencing body consider mitigating factors that might warrant a reduction in his sentence and, even more fundamentally, they may deprive him of the uncontestable right to have that sentence reviewed by a higher court. Applying the MCA to Mr. Khadr thus changes the "nature and amount" of his punishment within the meaning of the *Ex Post Facto* Clause's prohibition, and the MCA therefore cannot serve as the basis for military commission jurisdiction over Mr. Khadr.

(j) In addition to violating the express terms of the U.S. Constitution, interpreting the MCA to apply retroactively would conflict with international law. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Like U.S. law, international law – including the law of war,[22] international criminal law,[23] and human rights law,[24] – also prohibits

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[22] Protocol I, art. 75(4)(c) ("No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.") (recognized as customary international law by the U.S. in W. Hays Parks et al., Unclassified Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD (May 8, 1986) (entitled 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications); Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, art. 99(1), 75 U.N.T.S. 135; Geneva Convention IV, art. 67.

[23] *See* Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, art. 22, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

[24] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Article 9 (entered into force July 18, 1978; International Covenant on Civil and Political Rights (1966), art. 15(1), 999 U.N.T.S. 171 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."); Universal Declaration of Human Rights, art. 11(2), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) ("No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."); *see also* Executive Order 13107, "Implementation of Human Rights Treaties," Dec. 10, 1998 ("It shall be the policy and practice of the Government of the United States, being committed to the

the application of *ex post facto* laws. For example, Article 22 of the Rome Statute of the International Criminal Court provides that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, *a crime within the jurisdiction of the Court*."[25] The MCA, however, purports to do exactly what the Rome Statute prohibits: allow the military commission to hold individuals criminally responsible for conduct which, at the time it took place, was not a "crime within the jurisdiction of the Court." International law also clearly prohibits the imposition of heavier sentences than were applicable when the offense was committed.[26] Thus, international law, too, prohibits the *ex post facto* application of the MCA to this case.

(k) Because applying the MCA to Mr. Khadr would violate the *Ex Post Facto* Clause, he cannot be tried for any charges brought under it. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description.").

c. Conclusion

(1) Military commissions have long been defined, in large part, by their limited jurisdiction. Neither U.S. nor international law recognized conspiracy as one of the narrow category of crimes triable by military commission at the time the charged conduct in this case is alleged to have occurred. Because both U.S. and international law recognize that an individual must be tried according to the law in effect at the time of his alleged offense, the MCA, which was not enacted until four years *after* the charged conduct in this case, cannot serve as a basis for jurisdiction over Mr. Khadr. Accordingly, the military commission does not have jurisdiction to consider a charge of conspiracy, and this charge against Mr. Khadr should be dismissed.

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:** Mr. Khadr intends to offer the testimony of [redacted] to testify on issues relating to the international law of war consistent with R.M.C. 201A(b).

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

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protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.").

[25] Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, art. 22, 2187 U.N.T.S. 3 (entered into force July 1, 2002) (emphasis added).

[26] *See, e.g.*, International Covenant on Civil and Political Rights art. 15(1) (entered into force Mar. 23, 1976); Protocol I of the Geneva Conventions art. 75(4)(c) (entered into force Dec. 7, 1979).

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:**

A. Sworn Charge Sheet (2 Feb 2007)

By: Rebecca Snyder
William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

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):
[redacted]

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*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
[redacted]	[redacted]	Office of the Chief Prosecutor, OMC

5d. SIGNATURE OF ACCUSER	5e. DATE (YYYYMMDD)
[redacted]	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.

[redacted]
Typed Name of Office

Office of the Chief Prosecutor, OMC
Organization of Officer

[redacted]
Grade

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

[redacted]

MC FORM 458 JAN 2007

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).

[redacted], 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 instructions[1]: _____

_____

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

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

MC FORM 458 JAN 2007

UNITED STATES OF AMERICA	)	**CHARGES**
	)	
	)	**Murder in Violation of the Law of War**
	)	
	)	**Attempted Murder in Violation of the Law of War**
v.	)	
	)	
	)	**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.

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.

[redacted]

From: [redacted]
Sent: Monday, April 21, 2008 9:17 AM
To: [redacted]
[redacted]
Subject: US v Khadr - Ruling - D-010
Attachments: Ruling - D-010 US v Khadr.pdf

COL Brownback has directed that I send the attached ruling to counsel and other interested persons.

v/r,

[redacted]
Military Commissions Trial Judiciary
Department of Defense

From: Pete Brownback [redacted]
Sent: Saturday, April 19, 2008 13:05
To: [redacted]
Subject: Ruling - D-010

[redacted]

Please forward the attached ruling to the parties in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

[redacted]

From: [redacted]
Wednesday, December 19, 2007 8:35 PM
To: [redacted]

Subject: US v. Khadr - Defense Reply to D-010 (MTD Charge III)

Attachments: D-010 Defense Reply re MTD Charge III - 12-20-07.pdf

D-010 Defense Reply re MTD Cha...

Sir,

1. The defense reply to the government's response to the defense motion to dismiss Charge I (murder) is attached. It has been numbered D-010.

V/r
Ms. Snyder

[redacted]

From: [redacted]
Sent: Friday, December 14, 2007 5:39 PM
To: [redacted]

Subject: FW: Prosecution Responses - D - 008 thru D - 013 US v Khadr

Follow Up Flag: Follow up
Flag Status: Red

Attachments: FI - Khadr - 14 Dec 07.pdf; Prosecution Response to Defense Motion to Dismiss Charge II.pdf; Prosecution Response to Defense Motion to Dismiss Charge I.pdf

FI - Khadr - 14 Dec 07.pdf (45... | Prosecution Response to Defens. | Prosecution Response to Defens.

COL Brownback has directed that I forward the attachments and the email below to counsel and other interested persons.

v/r,

[redacted]ial Judiciary
Department of Defense

[redacted]D - 008 thru D - 013

[redacted]

1. Please forward the email below to the counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

2. Please copy the file labelled Prosecution Response to Defense Mot to Dismiss Chg I and II.pdf. Name one of the versions, Prosecution Response to Defense Motion to Dismiss Charge I. Name the other version Prosecution Response to Defense Motion to Dismiss Charge II. Forward those two new files to all parties.

3. Please also forward a copy of the latest Filings Inventory.

COL Brownback

Counsel in the case of United States v. Khadr,

1. All counsel are once again urged to read the Rules of Court. Counsel, in this instance, are specifically urged to read and reread RC 2.2d.

2. The Rules of Court are not designed to aggravate counsel - they are designed to assist the commission. Compliance with the Rules helps the commission insure that matters are attended to as required.

3. The government was responding to six (6) separate defense motions. Each of those defense motions was assigned a filings designation. The government should have responded by six (6) separate emails. The subject line on the emails should have included the filings designation. For instance:

Prosecution Response to D - 013, Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder), US v. Khadr or, more simply, Khadr - Prosecution Response to D - 013.

If the defense chooses to reply to the response, the subject line should read:

Defense Reply to Prosecution Response to D - 013, Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder), US v. Khadr or, more simply, Khadr - Defense Reply to D - 013.

[redacted]he
[redacted]vernment action is required.

5. Counsel are directed to Schedule for Trial, 28 November 2007, paragraph 1a, Note 2.

6. Defense replies, if any, are due NLT 20 December 2007.

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

[redacted]

Subject: RE: US v. Khadr - Defense Motions to Dismiss Each of the Charges

> Sir,
>
>
> 1. The Government respectfully submits the following responses to the
> Defense's motions to dismiss.
>
> 2. The Government also respectfully requests leave from the Court to
> file its responses to the Defense's motions to dismiss charges I (murder)
> and II (attempted murder) as a single pleading. As explained in our
> response, the motions to dismiss charges I and II raise virtually
> identical
> issues, so for the convenience of both the Military Judge and the Defense,
> the Government has responded in the most efficient manner possible. Of
> course, the Government can file two separate briefs, if the Military Judge
> so directs.
>
> 3. I apologize for the late filing. We had difficulties getting the
> documents scanned and saved appropriately.
>
> V/R,
>
>
>
> Jeff Groharing
> Major, U.S. Marine Corps
>
>
>
> -----Original Message-----
> From: Snyder, Rebecca, Ms, DoD OGC
> Sent
s to Dismiss Each of the Charges
>
>
>
> Please find attached five motions, one to dismiss each charge.
>
> V/r
> Ms. Snyder
>
>
>
>

UNITED STATES OF AMERICA	}	**D-011** **Ruling on Defense Motion to Dismiss Charge IV 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. Both parties presented oral argument on the matter.

2. Charge IV and its Specifications read as follows:

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.

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 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.

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.

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(25), Part IV, Manual for Military Commissions, which contains both the text of § 950v(b)(25) and the Secretary's implementation of the statute, reads as follows:

(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.

a. *Text*. "Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct."

b. *Elements*. The elements of this offense can be met either by meeting (i) all of the elements in A, or (ii) all of the elements in B, or (iii) all of the elements in both A and B:

A. (1) The accused provided material support or resources to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24));
(2) The accused knew or intended that the material support or resources were to be used for those purposes; and
(3) The conduct took place in the context of and was associated with an armed conflict.

Or

B. (1) The accused provided material support or resources to an international terrorist organization engaged in hostilities against the United States;
(2) The accused intended to provide such material support or resources to such an international terrorist organization;
(3) The accused knew that such organization has engaged or engages in terrorism; and
(4) The conduct took place in the context of and was associated with an armed conflict.

c. *Definition*. "Material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons,

lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

d. *Maximum Punishment.* Confinement for life.

4. Paragraph 6(24), Part IV, Manual for Military Commissions, which contains both the text of § 950v(b)(24) and the Secretary's implementation of the statute, reads as follows:

(24) TERRORISM.

a. *Text.* "Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, 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 intentionally killed or inflicted great bodily harm on one or more protected persons or engaged in an act that evinced a wanton disregard for human life;
(2) The accused did so in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct; and
(3) The killing, harm or wanton disregard for human life took place in the context of and was associated with armed conflict.

c. *Comment.*

(1) This offense includes the concept of causing death or bodily harm, even if indirectly.
(2) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

d. *Maximum Punishment.* Death, if the death of any person occurs as a result of the terrorist act. Otherwise, confinement for life.

5. 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.

6. 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).

7. 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 providing material support for terrorism 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 providing material support for terrorism was punishable by military commissions, before, on, and after 11 September 2001.

8. The defense asserts that the specific statutory provision in question, 10 U.S.C. Sec. 950v(b)25), 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 (§ 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 providing material support for terrorism 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 providing material support for terrorism, as defined by the provision in question, does not violate *ex post facto* standards – whether under the Constitution or international law.

9. The commission has reviewed Charge IV and its Specifications. Each Specification alleges a violation of the statute.

10. The defense motion to dismiss Charge IV and its Specifications is denied.

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

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**D-011** **Defense Reply to Government Response to Defense Motion** to Dismiss Charge Four for Lack of Subject Matter Jurisdiction 4 January 2007

1. **Timeliness:** This reply is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge's 19 December e-mail order.

2. **Overview:**

a. The central issue regarding Charge IV is whether providing material support for terrorism was triable by military commission at the time of Mr. Khadr's alleged conduct. Military commissions, in 2002, only had jurisdiction over a charge where Congress had specifically given them such jurisdiction or where the charged conduct violated the law of war. 10 U.S.C. § 821 (1998). At the time of Mr. Khadr's alleged conduct, providing material support for terrorism did not fall into either category.

b. Although the prosecution attempts to argue that providing material support for terrorism was a violation of the law of war in 2002, this argument fails for two reasons: first, neither terrorism nor material support thereof were violations of the law of war in 2002; second, a plurality of the Supreme Court recently rejected the argument that a similar offense, conspiracy, was an offense under the law of war. In addition, the federal statute prohibiting the provision of material support to terrorists did not reach Mr. Khadr's alleged conduct in 2002. The prosecution relies primarily on a series of red herrings and irrelevant arguments, arguing that the MCA supplies a basis for jurisdiction either by retroactively changing the content of the law of war or by now making material support triable by military commission. The former argument is wrong as a matter of U.S. law. Congress may not retroactively change the content of international law. The latter argument is irrelevant. The question is not what the law is now, but what the law was when the alleged offense occurred.

c. Applying the MCA retroactively to conduct that occurred, according to the government's own allegations, four years *before* the statute was enacted violates both U.S. and international law proscriptions on *ex post facto* legislation. Mr. Khadr's detainment at Guantanamo does not permit the Congress to ignore this structural limitation on its power.

d. Accordingly, because the government has failed to show a statutory or law of war basis for the providing material support for terrorism charge, this Commission must dismiss that charge for lack of subject matter jurisdiction.

3. **Reply: Charge IV Must Be Dismissed Because This Commission Has No Jurisdiction To Consider It**

a. Providing Material Support for Terrorism Was Not Triable by Military Commission at the Time of the Alleged Conduct

(1) The prosecution fundamentally misunderstands the basic issue in this case. That issue is not whether Congress can make providing material support for terrorism triable by military commission,[1] but whether it had done so at the time of Mr. Khadr's alleged conduct in 2002.

(2) The prosecution does not even dispute the fact that no U.S. statute made providing material support for terrorism triable by military commission at the time of the alleged conduct in this case. It is simply uncontestable that, in 2002, when Mr. Khadr's alleged conduct occurred, Congress had only made two offenses triable by military commission: aiding the enemy and spying. 10 U.S.C. § 904, 906. There was thus no statutory basis to try Mr. Khadr by military commission.

(3) Because there was no statutory basis to try Mr. Khadr by military commission, this Commission may only consider charges alleging conduct that plainly and unambiguously violates the law of war. *See* 10 U.S.C. § 821; *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.). Neither terrorism nor material support thereof meets this exacting standard. Indeed, they do not even come close.

(4) The government contends that terrorism and material support thereof are "well-established war crimes." (Govt. Resp. at 4.) This is nonsense. The government cannot point to a single precedent or authority establishing that the offenses of "terrorism" or "material support of terrorism" were, prior to passage of the MCA, punishable, as such, as offenses against the law of war. In the absence of *any* precedent, it is hard to see how the government can conceivably be deemed to have met its burden of demonstrating a "plain and unambiguous" basis for the prosecution of terrorism or material support thereof as war crimes based on conduct alleged to have occurred in 2002.

(5) Picking up on the defense's observation that some acts that might be labeled "terrorism" (if committed in the course of an armed conflict) could be punishable as war crimes (e.g., attacking civilians) the government proceeds to argue that *all* acts of terrorism must therefore be war crimes. (Govt. Resp. at 5-6.) This argument is ridiculous and is based on an

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[1] In an apparent attempt to obscure the fact that providing material support for terrorism was *not* a violation of the law of war at the time of Mr. Khadr's alleged conduct, the prosecution devotes much of its response to the irrelevant argument that Congress has the power to make providing material support for terrorism triable by military commission. Whatever the validity of this argument, it is simply irrelevant where, as here, Congress had *not* done so at the time of the alleged conduct. As discussed in Mr. Khadr's initial motion and below, the MCA cannot be applied (and should not be interpreted to apply) retroactively to offenses Mr. Khadr is alleged to have committed four years *before* the MCA's enactment.

elementary logical fallacy. The fact that some acts of terrorism may violate the law of war does not make all acts of terrorism war crimes anymore than the fact that some trees are oaks, means that all trees are oaks.

(6) Mistakenly equating all acts of terrorism with attacks on civilians or other protected persons, the government goes on to state the obvious, i.e., that grave breaches of the Geneva and Hague Conventions and violations of Common Article 3 of the Geneva Conventions are war crimes. This is almost certainly true and entirely beside the point. Mr. Khadr is not charged with committing a grave breach of any of the four Geneva Conventions of 1949, attacking civilians or other protected persons, or with violating Common Article 3. Attacking civilians or murdering non-combatants were, almost certainly, offenses against the law of war in 2002. Thus, if Mr. Khadr or any other person engaged in such conduct, he could be charged with a war crime. He is not. The law of war as constituted in 2002 was sufficient to reach and punish such conduct. Thus, there is simply no reason to engage in the government's semantic shell game attempting to equate all acts of "terrorism" with actual war crimes.

(7) Moreover, regardless of whether particular acts of "terrorism" could be styled and punished as war crimes, Mr. Khadr is not alleged to have engaged in such acts. The conduct alleged under Charge IV has nothing whatsoever to do with attacks on civilians or other protected persons. Instead, Mr. Khadr is alleged to have received military training and fought combatants in the course of an armed conflict in Afghanistan. Whatever else it may be, such conduct is simply not an offense punishable under the law of war. Thus, the authorities relied upon by the government to show that some acts of terrorism could conceivably constitute war crimes are completely immaterial as applied to Mr. Khadr.

(8) As the defense noted in its opening brief, because terrorism is not a war crime, it follows *a fortiori* that providing material support for terrorism is not a war crime either. The very term "material support for terrorism" is unknown to the law of war. As alleged against Mr. Khadr, i.e., consisting of the allegation that he provided material support in the form of himself, the government appears to be attempting to punish Mr. Khadr for the same type of conduct it attempted to charge as "conspiracy" under Military Commission Instruction No. 2 – an attempt soundly rejected by a plurality of the Supreme Court in *Hamdan*. *See Hamdan*, 126 S.Ct. at 2785. Thus, for the very same reasons that "conspiracy" was not, prior to the MCA, recognized as an offense against the law of war, the offense of providing material support for terrorism by simply providing oneself to (i.e., joining) a criminal or terrorist group or organization was not a war crime (or crime at all) in 2002.[2] The government's reliance on the same outdated authorities to support its position here must fail as it did in *Hamdan*.

(9) The government cites a number of treaties for the proposition that "the prohibitions of terrorism under international law extend beyond the Geneva Conventions and the Hague Conventions." (Govt. Resp. at 6.) First, the argument is completely beside the point – the government does not even claim that these treaties establish that terrorism is a war crime. Indeed, as the government appears to recognize, they establish quite the contrary. Not one of

[2] Review of the Charge Sheet confirms that the offense of material support as alleged against Mr. Khadr reaches, in substance, the same conduct as the offense of conspiracy. Indeed, the overt acts alleged in support of Charge III are identical to the "material support or resources" allegedly provided by Mr. Khadr in both specifications of Charge IV.

these instruments states or suggests that terrorism is a "war crime" or that terrorism-related offenses should be punished by military tribunals. Moreover, these instruments do not, as the government intimates, make terrorism punishable as an offense against "international law." These treaties generally impose obligations on states-parties to make terrorism-related activities offenses punishable under their domestic criminal law. This, the United States has done. *See, e.g.*, Terrorist Bombings Convention Implementation Act of 2002, 107 P.L. 197, 116 Stat. 721 (amending 18 U.S.C.S. § 2332f to comply with U.S. obligations under the International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249). The government's invocation of these instruments actually makes the point the defense made in its opening brief and is consistent with the authorities cited therein, which demonstrate that the U.S. has consistently taken the position that terrorism should not be included amongst crimes against international law or the law of armed conflict, but rather should be punished exclusively under domestic law. (Def. Mot. at 3-4.) Nothing to which the government cites indicates that terrorism is a crime punishable under "international law" as such, let alone an offense against the law of war.

b. Merely Joining or Affiliating with a Terrorist Organization did not Clearly Constitute the Provision of "Material Support" for Terrorism Under Federal Statutes in Effect in 2002.

(1) The government contends that providing "personnel" in the form of oneself to a terrorist organization violated the then-existing version of 18 U.S.C. 2339B. The government relies principally on *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002), in which the district court denied a defense motion to dismiss a charge of providing material support against a adult U.S. citizen who left the U.S. to join a foreign terrorist organization in Afghanistan. While *Lindh* supports the government's view, one can hardly call an isolated district court opinion an overwhelming body of evidence for § 2339B's clarity. Less compelling is the government's citation to the opinion of the district court in *United States v. Goba*, 220 F. Supp. 2d 182 (W.D.N.Y. 2002). There, the trial judge, at a preliminary stage of the proceedings and for the sole purpose of resolving a question of pretrial confinement, rejected a constitutional challenge to § 2339B and found a sufficient basis for holding the defendant without bail. In so doing, the court expressly limited the effect of its ruling to that particular "stage of the proceeding." *Id.* at 194.

(2) As noted by the defense in its opening brief, and as acknowledged by the government, the only federal appellate court to address the issue concluded that the term "personnel" as used in the statute was not sufficiently precise as to place potential defendants on clear notice of what conduct would violate the statute. *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000). In light of the then-existing statutory language, the defense respectfully submits that reasoning of *Humanitarian Law Project* is the more persuasive.

(3) The most that can be said for the government's response is that it shows that whether simply joining a terrorist organization constituted a violation of § 2339B before the 2004 amendments was an open question. In this regard, it bears remembering that the ultimate point of the analysis is to determine whether the defendant had "fair notice" of the illegality of his actions. *See Lynce v. Mathis*, 519 U.S. 433, 441 (1997). Thus, the fact that one or two

isolated district courts reached conclusions favoring the government's view here is largely beside the point. To the extent relevant, they actually support the defense position. That different courts, analyzing the same statutory language, came to different conclusions as to whether joining a terrorist organization constituted the offense of providing "material support" is itself evidence of ambiguity that would undercut any suggestion that a potential defendant, particularly a 15 year-old foreign national, whose conduct takes place entirely outside the jurisdiction of the United States, would be on "fair notice" that his conduct violated § 2339B. Indeed, the best evidence of the ambiguity is the fact that Congress saw the need to amend the statute (and enact § 2339D) to bring such conduct within its scope in 2004.

c. The MCA Cannot Conclusively and Retroactively Determine the Content of the Law of War

(1) The prosecution cites *Hamdan* for the dubious proposition that the Court "invited the politically accountable branches" to pass an *ex post facto* law making material support for terrorism retroactively triable by military commission. In support of this notion, the prosecution selectively cites Justice Breyer's statement that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary," *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring), emphasizing the word "[n]othing." (Govt. Resp. at 10.) But, of course, Justice Breyer did not give Congress or the Executive authority to disregard the Constitution. The prosecution omits Justice Breyer's complete statement of his views: "If Congress, after due consideration, deems it appropriate to change the controlling statutes, *in conformance with the Constitution and other laws*, it has the power and prerogative to do so." *Hamdan*, 126 S. Ct. at 2800 (Breyer, J., concurring) (emphasis added). The President is free to "seek"—and Congress is free to grant— the authority the President believes is necessary, but only within the bounds of the Constitution. While Congress may be able to give the President the authority to make providing material support for terrorism triable by military commission as to future offenses, that does not mean it can give him the authority to make triable by military commission alleged conduct that occurred long before the MCA was enacted.

(2) Just as the Congress cannot give the President the authority to retroactively make providing material support for terrorism triable by military commission, it also cannot retroactively change the content of international law. Nonetheless, the prosecution relies primarily on the argument that providing material support for terrorism was an offense punishable under the law of war prior to the date of the MCA's enactment because Congress has said so. (Govt. Resp. at 3-4.)

(3) This argument is wholly without merit. Initially, as Mr. Khadr explained in his opening brief, the best interpretation of the MCA is that it is not intended to apply retroactively to newly minted crimes. (*See* Def. Motion at 5-7.) The MCA's declaration that it "does not establish new crimes" simply confirms this intent that the MCA not apply retroactively. To the extent that Congress erroneously believed that providing material support for terrorism was an offense triable by military commission prior to the MCA's enactment, the appropriate response is not to read the MCA as purporting (absurdly) to retroactively change the content of the law of war *as of four years ago* by Congressional fiat, but rather to read the

inadvertently new offense as applying only to conduct that occurred after the enactment of the MCA.[3]

(4) In any event, even if the MCA purported to retroactively declare the content of international law, it is clear that Congress cannot do so. The law of war is—and always has been—based on international law, and Congress has no power to conclusively determine what is and is not a violation of international law. *See Hamdan*, 126 S. Ct. at 2780 (plurality op.) (for an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally" (quoting *Ex Parte Quirin*, 317 U.S. at 30)); *see also The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.").

(5) To the extent that the Government is suggesting that the Congress can conclusively determine the content of the law of war as part of its authority "[t]o *define* and *punish* . . . Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10 (emphasis added), that is simply not the case. Congress only has the power to clarify the exact scope and elements of offenses which have been previously recognized as violations of the law of war by international sources. It has no authority to *create* violations of law which the international sources do not recognize. Indeed, the Government's argument is belied by one of the principal sources on which the Government itself relies. As explained in the 1865 Attorney General opinion to which the Government cites, "[t]o *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations." 11 Op. Atty Gen. 297, 1865 U.S. AG LEXIS 36, *4 (*cited in* Govt. Resp. at 7 (describing the opinion as "binding on the Executive Branch")). In other words, Congress is not itself empowered to *create* war crimes, but rather has only the "second-order authority to

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[3] The prosecution suggests that the Defense has wavered in its view of the MCA's retroactivity. At the risk of repetition: the Defense's view is that the MCA is, at best, ambiguous as to whether Congress intended any changes in substantive law it creates apply retroactively. Because the retroactive application of such changes would be unconstitutional, the defense, in its motion to dismiss Charge IV, offered a constitutional construction of the MCA—one that avoids creating an *Ex Post Facto* violation. (*See* Def. Motion at 5-7.) The defense suggested that the Commission could—and should, in accordance with the fundamental canon of constitutional avoidance—interpret the statute *prospectively* as to any substantive changes in the law. *Zadyvas v. Davis*, 533 U.S. 678, 689 (2001) (internal citation omitted); *see also Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (an act of Congress should never be construed to violated the law of nations if any other possible construction remains). In its motion to dismiss for lack of jurisdiction (the bill of attainder motion), the defense was addressing an issue wholly irrelevant to this motion; namely, whether Congress intended the MCA to apply retroactively to the extent that it merely codified preexisting violations of the law of war. Def. Motion at 6. That question has no relevance to this motion because providing material support for terrorism was not a violation of the law of war at the time Mr. Khadr is alleged to have committed it. To the extent that Congress attempted to retroactively make this a law of war violation or an offense triable by military commission, it intended something it has no power to do, as the Defense has made clear in its motions to dismiss each of the charges. (*See, e.g.*, Mot. to Dismiss Charge III at 6-12.) If the prosecution is correct that Congress "unmistakably" intended to retroactively apply the new crimes created by the MCA (Govt. Resp. at 11), then the MCA unmistakably violates the *Ex Post Facto* Clause. (*See infra* at 7-10.)

assign more definitional certainty to *those offenses already existing under the law of nations* at the time it legislated." Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 141 (2007) (emphasis added).

(6) Similarly, Congress cannot use its "define and punish" power to simply label any existing crime an offense against the law of nations: "Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by Congress." *United States v. Arjona*, 120 U.S. 479, 488 (1887). In *United States v. Furlong*, 18 U.S. (5 Wheat) 184 (1820), the Supreme Court rejected Congress's attempt to assert jurisdiction over certain acts of murder simply by describing them as violations of the law of nations. Whether there is sufficient evidence to establish an offense as a violation of the law of nations is ultimately a judicial question that must be answered in relation to recognized sources of international law; the "define and punish" power does not confer upon Congress the unilateral authority to make such a determination. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") (emphasis added). Congress's attempt in the MCA to "say what the law is" violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

(7) Accordingly, the fact that Congress may have—four years after the fact—declared providing material support for terrorism to be a violation of the law of war at the time of the charged conduct is irrelevant, because the judiciary has an independent obligation to determine the content of the law of war based on international law sources. Those sources simply do not support the government's claim that terrorism and material support thereof are offenses against the law of war.

d. The MCA Cannot Be Retroactively Applied to Mr. Khadr's Case

(1) Because Congress cannot conclusively determine the state of international law at the time of Mr. Khadr's alleged offenses, and because a plurality of the Supreme Court has already determined that international law did not proscribe the analogous offense of conspiracy at that time, this commission has jurisdiction only if the MCA—which was not passed until four years *after* Mr. Khadr's alleged offenses—can be applied in this case. But retroactively applying the MCA to Mr. Khadr would violate both U.S. and international law prohibitions on *ex post facto* legislation.

(2) Initially, as noted above, and as explained in detail in Mr. Khadr's opening brief, the best interpretation of the MCA is that it is not intended to apply retroactively. Accordingly, applying standard principles of statutory interpretation and constitutional avoidance, this commission should read the MCA's material support offense as applying only to conduct that occurred after the enactment of the MCA.

(3) In any event, the MCA could not be applied retroactively because doing so would violate the *Ex Post Facto* Clause of the U.S. Constitution and international law. In an

effort to evade the constitutional prohibition on *ex post facto* legislation, the prosecution argues that the Constitution "does not ensure the legal rights of alien enemy combatants detained in foreign territory." (Govt. Resp. at 4.) But the *Ex Post Facto* Clause is a structural limitation on congressional power. *Weaver v. Graham*, 450 U.S. 24, 29, 29 n.10 (1981) (the *Ex Post Facto* Clause acts as a restriction on congressional power "by restraining arbitrary and potentially vindictive legislation," and "confin[es] the legislature to penal decisions with prospective effect"). It governs Congress's conduct regardless of whether the individuals adversely affected have independent legal rights under the Constitution. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description."); *see also Weaver*, 450 U.S. at 29-30 ("The presence or absence of an affirmative, enforceable right is not relevant . . . to the *ex post facto* prohibition."). Even the previous military commission system recognized that individuals could not be tried with offenses that did not exist when they were allegedly committed. MCI No. 2 ¶ 3(A) ("No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question."). Accordingly, the *Ex Post Facto* Clause prohibits the retroactive application of the MCA regardless of where the individuals affected by it are detained.

(4) But even assuming, *arguendo*, that the *Ex Post Facto* Clause only applies to those persons detained within the territorial jurisdiction of the United States, it would still apply in this case because the Supreme Court has recognized that Guantanamo Bay is within the "territorial jurisdiction" of the United States. *See Rasul v. Bush*, 542 U.S. 466, 480 (2004) (interpreting habeas statute); *see also id.* ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base." (citing the terms of the 1903 lease agreement)); *id.* at 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . ."); *id.* ("From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it.") (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950).

(5) In an effort to limit the reach of the Constitution's prohibition on *ex post facto* legislation, the prosecution relies heavily on the D.C. Circuit's opinion in *Boumediene v. Bush*, 476 F.3d 981 (2007), currently on review at the Supreme Court. While the prosecution argues that *Boumediene* "unambiguously held that the Constitution does not apply to alien enemy combatants held" at Guantanamo, (Govt. Resp. at 8), *Boumediene* did no such thing. *Boumediene* was concerned solely with the Suspension Clause of the Constitution, and did *not* address the applicability of the *Ex Post Facto* Clause to Guantanamo detainees. To the extent *Boumediene* may have suggested that other constitutional provisions do not apply at Guantanamo, it did so only by dismissing the significance of the Supreme Court's recent precedent in *Rasul*. *See Boumediene*, 476 F.3d at 991 n.10 (concluding that *Rasul*, "resting as it did on statutory interpretation, . . . could not possibly have affected the constitutional holding of" *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950), which held that constitutional protections extend to aliens "within [the courts'] territorial jurisdiction"). In rejecting the Supreme Court's conclusion that aliens at Guantanamo are within the "territorial jurisdiction" of the United States, the D.C. Circuit unnecessarily manufactured a tension between *Eisentrager* and *Rasul*. It is far

more natural to read *Eisentrager* as setting out the standard for the extraterritorial application of constitutional rights and *Rasul* as recognizing that Guantanamo satisfies that standard.

(6) Moreover, the holding of *Boumediene* has already been called into question—first by the Supreme Court's grant of certiorari and second by the D.C. Circuit's own decision to recall the mandate it had previously issued. Under the Federal Rules of Appellate Procedure, an appellate decision "is not final until issuance of the mandate." Advisory Committee Notes, subdivision (c), Fed. R. App. P. 41. Numerous judges have recognized that "the Court of Appeals' withdrawal of the mandate in *Boumediene*," when considered along with "the Supreme Court's highly unusual grant of certiorari on rehearing," casts "a deep shadow of uncertainty over the jurisdictional ruling of that decision." *Alhami v. Bush*, No. 05-359, at 6 (GK) (D.D.C. Oct. 2, 2007); *see also Al-Oshan v. Bush*, No. 05-0520, at 6 n.2 (RMU) (D.D.C. Oct. 5, 3007) (noting that "the extraordinary procedural dispositions in *Boumediene* 'cast a deep shadow of uncertainty'" over the D.C. Circuit's jurisdictional ruling).

(7) Given the considerable uncertainty surrounding *Boumediene*, if this Commission were to find that the D.C. Circuit's opinion necessary to the resolution of this case, it should stay these proceedings until the Supreme Court reaches a decision. Several D.C. district court judges have stayed their proceedings and refused to rule on Government motions to dismiss detainee habeas petitions in light of the considerable uncertainty surrounding *Boumediene*. *See Maqaleh v. Gates*, No. 06-1669 (JDB) (D.D.C. July 18, 2007); *Al-Oshan v. Bush*, No. 05-0520 (RMU) (D.D.C. Oct. 5, 3007); *cf. Alhami v. Bush*, No. 05-359 (GK) (D.D.C. Oct. 2, 2007).

(8) Alternatively, if this Court should decide that it can now reach the merits of the *Ex Post Facto* issue, it should determine that applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause. Indeed, the Government's throwaway claim that summary execution is the proper baseline for determining the extent to which application of the MCA disadvantages Mr. Khadr implicitly reflects a recognition that the MCA, when compared against the proper baseline, violates the prohibitions of the *Ex Post Facto* Clause. (Govt. Resp. at 11). Indeed, only such an absurd baseline would make the MCA look good in comparison.

(9) The proper baseline is in fact not summary execution, but as the government implicitly acknowledges in arguing that Mr. Khadr's conduct is punishable under the 2002 version of the material support statute, trial in federal district court under 18 U.S.C. § 2339B. Nonetheless, the government chides the defense for employing federal criminal prosecution as a baseline. For reasons discussed above, it is difficult to see how Mr. Khadr's alleged conduct, i.e., providing material support for terrorism could conceivably be punished under any other provision of law. Indeed, the defense does not believe it can,[4] but assuming, *arguendo*, that the government's view of the statute is correct, the *only* place Mr. Khadr could have been prosecuted prior to the passage of the MCA was a federal district court. It goes without saying that that Mr. Khadr would enjoy a far greater range of procedural and evidentiary protections in a federal criminal proceeding, including, perhaps most importantly, the protections

[4] Punishment for providing material support for terrorism as alleged in Charge IV would violate the *Ex Post Facto* Clause, first and foremost, because it would make an act criminal that was innocent when done. A comparison with procedures for trial in a federal district court is only necessary if the Commission agrees with the government that Mr. Khadr's alleged conduct violated the then-existing version of § 2339B.

of the Juvenile Delinquency Act, 18 U.S.C. §§ 5031 *et seq*. The transfer of jurisdiction over this offense to a military commission under the MCA is far more than just a change in courts.

(10) Even assuming, *arguendo*, that courts-martial provide the appropriate benchmark, *see* Govt. Resp. at 13, applying the MCA to Mr. Khadr nonetheless violates the *Ex Post Facto* Clause. This Commission need look no further than the text of the MCA itself, which *explicitly* breaks from *court-martial* procedures. In Section 948b(d) ("Inapplicability of Certain Provisions"), the MCA identifies three crucial UCMJ protections that do *not* apply, including "any rule of courts-martial relating to speedy trial," 10 U.S.C. § 948b(d)(1)(A), the rules "relating to compulsory self-incrimination," *id.* § 948b(d)(1)(B), and those relating to pretrial investigation, *id.* § 948b(d)(1)(C). The other rules "shall apply to trial by military commission *only to the extent provided by this chapter*." *Id.* § 948b(d)(2) (emphasis added). This is little comfort, since the MCA provides, among other things, that *court-martial* principles of law and rules of evidence shall apply only insofar "as the Secretary [of Defense] considers practicable or consistent with military or intelligence activities." *Id.* § 949a(a). The very same section of the MCA notes that the Secretary may prescribe that under certain circumstances the "hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission." *Id.* § 949a(b)(2)(E). This includes, notably, the admission in certain circumstances of coerced testimony. *Id.* § 948r. While the Government lists in its response a number of purported rights available to Mr. Khadr under the military commission system,[5] the relevant question is not what rights the MCA provides, but what rights it takes away. As discussed above and in detail in Mr. Khadr's motion to dismiss, the retroactive application of the MCA to Mr. Khadr's case deprives him of many rights which are routinely provided in U.S. courts and courts-martial. (Def. Motion at 10-13.)

(11) Thus, regardless of whether the appropriate benchmark is trial in an Article III court or by court-martial, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it "aggravate[s]" the consequences for the conduct Mr. Khadr is alleged to have committed. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). The Government cannot diminish the significance of these changes simply by labeling them as "jurisdiction[al]." (Govt. Resp. at 12.) As the Supreme Court has specifically recognized, legislative changes cannot be insulated from *ex post facto* analysis simply by labeling them "procedural" or "jurisdictional"—what matters is the degree to which they effectively "aggravate an offense." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925); *see also id.* at 171 ("Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree.").[6] As explained above and in

[5] It is worth noting that some of the "rights" the Government identifies exist more in theory than they do in practice. For example, the Government states the accused has the right to cross-examine witnesses who testify against him, but because the Government can base its case exclusively on documentary and hearsay evidence, the accused may have no witnesses and/or no witnesses with personal knowledge to cross-examine. *See* 10 U.S.C. § 949a(b)(2). The Government also claims that the accused has the right to present evidence in his defense, but the accused cannot compel the attendance of witnesses at a commission in Guantanamo Bay.

[6] Indeed, in the two Supreme Court cases on which the Government relies, the Supreme Court made clear

detail in Mr. Khadr's motion to dismiss, the MCA changes the nature of the offense with which Mr. Khadr is charged and the consequences for that conduct. Accordingly, applying it to Mr. Khadr would violate the *Ex Post Facto* Clause of the U.S. Constitution.

e. Conclusion

(1) Military commissions have long been defined, in large part, by their limited jurisdiction. Neither U.S. nor international law recognized providing material support for terrorism as one of the narrow category of crimes triable by military commission at the time the charged conduct in this case is alleged to have occurred.

(2) Unable to meaningfully contest that point, the prosecution attempts to base this Commission's jurisdiction on the MCA, arguing that the MCA can conclusively establish that international law did proscribe providing material support for terrorism at the time of the charged conduct or that its determination that providing material support for terrorism is triable by military commission as a matter of U.S. law can be retroactively applied to Mr. Khadr. Both arguments are without merit. The Congress cannot dictate the content of international law, and it certainly cannot do so retroactively. Nor can it retroactively make providing material support for terrorism triable by military commission as a matter of U.S. law because to do so would violate the structural limitations on Congress's power imposed by the *Ex Post Facto* Clause.

(3) Accordingly, military commissions do not have jurisdiction to consider a charge of providing material support for terrorism, and this charge against Mr. Khadr should be dismissed.

By: _____

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that to survive an *ex post facto* challenge legislation must "leav[e] untouched all the substantial protections with which the existing law surrounds the person accused of crime." *Duncan v. State*, 152 U.S. 377, 382-83 (1894); *see also Mallett v. North Carolina*, 181 U.S. 589, 597 (1901) ("[The legislature] cannot lawfully . . . dispense with any of those substantial protections with which the existing law surrounds the person accused of crime."). That is assuredly not the case with respect to the MCA. For example, the Government does not even dispute that applying the MCA to Mr. Khadr's case deprives him of the protections provided by the Juvenile Delinquency Act, 18 U.S.C. §§ 5031 *et seq*.

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 IV (Material Support for Terrorism)** December 14, 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 IV, providing material support for terrorism under 10 U.S.C. § 950v(b)(25) ("Mot. to Dismiss IV"), should be denied.

3. Overview: Congress has defined material support of terrorism as an offense under the law of war and has plainly given this Court jurisdiction to try that offense. The Ex Post Facto Clause is irrelevant here because (i) binding precedent renders the Constitution inapplicable, (ii) the underlying conduct for which Khadr is charged was illegal—under both domestic and international law—prior to the passage of the Military Commissions Act of 2006 ("MCA"), and (iii) Khadr cannot conceivably argue that he is in a worse position on account of being forced to stand trial before a military commission. The motion to dismiss therefore should 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 DEFINED MATERIAL SUPPORT AS A WAR CRIME, TRIABLE BY MILITARY COMMISSION

i. The Constitution vests Congress with the exclusive authority "[t]o *define* and *punish* . . . Offenses against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10 (emphasis added). Exercising that authority in the MCA, Congress unequivocally defined material support of terrorism to be an offense triable and punishable by military commission.

a. As the Defense points out three separate times, *see* Mot. to Dismiss IV at 3, 4, and 5, "[w]hen . . . neither the elements of the offense nor the range of permissible punishments is **defined by statute** or treaty, the precedent must be plain and unambiguous." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.) (emphasis added). As the Defense thrice ignores, however, the offense of material support for terrorism is unequivocally defined by statute. *See* 10 U.S.C. § 950v(b)(25). Congress has statutorily "define[d] and punish[ed]" material support for terrorism as an "Offense[] against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10. *Hamdan*'s "plain and unambiguous" dictum—along with the Defense's attempts to rely upon it—is unavailing.

b. The MCA creates military commission jurisdiction for "any offense made punishable by this chapter [i.e., 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). Material support for terrorism is undeniably an "offense made punishable by" the MCA,[1] and the facts allegedly occurred "before, on, or after September 11, 2001." That alone is sufficient to deny the motion to dismiss.

ii. All of the Defense's hand-wringing as to the scope of international law is therefore irrelevant. *See* Mot. to Dismiss IV at 3-5, 13-15. The "Law of Nations," as governing this proceeding, includes the war crime of providing material support for terrorism, as defined in the MCA.

a. In accordance with the offense defined in the MCA, the Secretary of Defense promulgated the elements for "material support for terrorism." *See* Manual for Military Commissions ("MMC"), at IV-18 to -19 (Jan. 18, 2007).

b. Khadr does not claim that his charge sheet conflicts with the elements set forth in the MMC. Nor does he claim that the MMC conflicts with the MCA.

c. Instead, Khadr inexplicably claims that trying him for "material support" before a military commission is impermissible because it would violate *non-binding* principles of U.S. and international law—notwithstanding the fact that Congress expressly legislated that result. That argument is ridiculous, and it must be rejected.

B. TERRORISM AND MATERIAL SUPPORT THEREOF ARE WELL-ESTABLISHED WAR CRIMES

i. Congress has expressly defined terrorism and the material support thereof to constitute war crimes, cognizable before military commissions, and that determination renders the Defense's motion to dismiss irrelevant in its entirety. But even taking that motion on its own terms, it beggars belief to argue that "[t]errorism is not an offense against the law of war," Mot. to Dismiss IV at 3, as the Defense itself appears to recognize, *see id.* at 5 n.13.[2]

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[1] As explained below, it is also an offense made punishable under the law of war. *See* pp. 7-9, *infra*.

[2] The Defense concedes that "[t]errorism could, in theory, include acts that would be punishable as 'war crimes' under established law of war principles," including the mass slaughter of innocent civilians. Mot. to Dismiss IV at 5 n.13. Whatever "theor[etical]" problems the Defense may be able to hypothesize, it is irrefutable—as a matter of fact, law, and common sense—that the attacks orchestrated by al Qaeda on September 11th were war crimes, and Khadr's provision of support to that terrorist organization likewise violated the law of war.

ii. First, terrorism plainly constitutes a violation of the law of war.[3]

a. It is difficult to imagine a crime more offensive to the law of war than, for example, the hijacking of civilian aircraft and the use of those aircraft as weapons to slaughter almost 3,000 innocent civilians. Such an attack plainly violates the text and the principles of both the Geneva Conventions and the Hague Conventions—two treaties the Supreme Court has called "the major treaties on the law of war." *Hamdan*, 126 S. Ct. at 2781.[4]

1. For example, targeting and murdering thousands of innocent civilians clearly constitutes a "grave breach" (A) under the Geneva Conventions by killing "protecting persons," *see, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, (B) under the Hague Regulations by inflicting unnecessary death and suffering on the target population, *see* Regulations Respecting the Laws and Customs of War on Land, Art. 23, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, and (C) under Common Article 3 by purposely killing non-combatants, *see, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

2. As the authoritative treatise on the Geneva Conventions points out, it is a "cardinal principle of the law of war . . . that the civilian population must enjoy complete immunity." 4 International Committee of Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 3 (J. Pictet ed. 1958). Al Qaeda's terrorist attacks—carried out in complete contempt for that "cardinal principle" of the laws of war—constitute war crimes.

b. Given that al Qaeda is not a State, and given the Supreme Court's decision that our war with al Qaeda is a conflict "not of an international character" that is governed by Common Article 3, *see Hamdan*, 126 S. Ct. at 2795, that provision is of particular relevance here.

1. As an initial matter, there can be no doubt that violations of Common Article 3 are war crimes. The federal War Crimes Act was amended in 1997 to cover expressly all violations of Common Article 3. *See* 18 U.S.C. § 2441 (2000). Every federal court to consider the issue has concluded that violations of Common Article 3 are "serious violations of international law" and "war crimes." *See Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998).

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[3] All violations of the laws of war are, as a matter of U.S. military policy, war crimes. *See, e.g.*, Department of the Army, The Law of Land Warfare, Field Manual 27-10, ¶ 499 (1956).

[4] Of course, these instruments do not apply directly to al Qaeda. *See* Memorandum from the President, *Re: Humane Treatment of Taliban and al Qaeda Detainees*, The White House (Feb. 7, 2002). The President's determination turned, in part, on the Department of Justice's legal conclusion that al Qaeda systematically scorns the law of war, and it is therefore not entitled to its protections.

2. Although they are not binding on the United States, several other instruments of international law demonstrate a global consensus that violations of Common Article 3 are war crimes. For example, Article 8 of the Rome Statute specifically criminalizes violations of Common Article 3. Article 4 of the statute authorizing the International Criminal Tribunal for Rwanda also imposes individual criminal liability for serious violations of the provision. And although the statute authorizing the International Criminal Tribunal for the former Yugoslavia ("ICTY") does not expressly cover violations of Common Article 3, the ICTY held that the statute's provision concerning "other serious violations of the laws and customs of war" necessarily includes violations of Common Article 3. *See, e.g.*, *Prosecutor v. Tadic*, No. IT-94-1-AR72, ¶¶ 87-91 (ICTY Appeals Chamber 1995), *reprinted in* 35 I.L.M. 32 (1996). Finally, the criminal law and military manuals of many other states recognize violations of Common Article 3 as war crimes. *See, e.g.*, Tom Graditzky, *Individual Criminal Responsibility for Violations of International Humanitarian Law in Non-International Armed Conflicts*, 322 Int'l Rev. Red Cross 29 (1998) (collecting sources).

c. Moreover, the prohibitions of terrorism under international law extend beyond the Geneva Conventions and the Hague Conventions.

1. To apprehend and prosecute international terrorists, the United States relies upon no fewer than twelve antiterrorism treaties, some of which expressly condemn terrorist bombings (in general) and plane bombings (in particular), in addition to the killing of innocent civilians. *See* International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 726; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627; Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, 18 I.L.M. 1419, 1456 U.N.T.S. 1987; International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. Doc A/34/46 (Dec. 17, 1979), 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

2. In the wake of September 11th, the United Nations Security Council—with the support of the United States—reaffirmed its condemnation of international terrorism as a crime and as a threat to international security. *See* S.C. Res.

1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). Furthermore, it called on all member states to criminalize the material support of terrorism. *See id.* §§ 1-2, 4-5.

d. Thus, under any reasonable interpretation of the law of war, terrorism is a war crime. *See* Ingrid Detter, *The Law of War* 21-25 (2d ed. 2000); Christopher Greenwood, *War, Terrorism, and International Law*, 56 Current L. Probs. 505, 515 (2003); Derek Jinks, *September 11th and the Laws of War*, 28 Yale J. Int'l L. 1, 2 (2003).

iii. Just as terrorism is a well-established war crime, so too is the material support thereof.

a. Long before Khadr began supporting al Qaeda, material support for terrorism violated both U.S. and international law. Thus, the MCA codifies "offenses that have traditionally been triable by military commissions." 10 U.S.C. § 950p(a).[5]

b. The law of war has long prohibited the provision of material support—including in the form of personnel—to groups of unlawful combatants. For example, in a 142-year-old opinion by the Attorney General, which remains binding on the Executive Branch, "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. 297, 312 (1865) (emphasis added).

c. In other words, an unlawful combatant, such as Khadr, violates the law of war merely by providing personnel—including himself—to 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 (1895, 2d ed. 1920).

d. 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. *Id.* (emphasis added). *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").

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[5] The Defense suggests in a footnote, *see* Mot. to Dismiss IV at 6 n.16, that 10 U.S.C. § 950p(a) should not be read "as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to the adoption of the M.C.A." As support for that conclusion, the Defense invokes "separation of powers" concerns, and it cites cases such as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), for the proposition that Article III courts have the power to declare unconstitutional an act of Congress. Whatever "separation of powers" considerations may arise in this case, it utterly defies common sense to invoke them here, where the present proceedings are conducted wholly within a single Branch, and where the Military Judge is *not* an officer of the "*judicial department*," Mot. to Dismiss IV at 6 n.16 (emphasis in original).

1. For example, there were "numerous rebels . . . that . . . furnish[ed] the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents [we]re banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste to the country. All such persons are by the laws of war in every civilized country liable to capital punishment." H.R. Doc. No. 65, 55th Cong., 3d Sess., 234 (1894).

2. One well-recognized form of material support—triable by military commission, if the offender was not summarily executed—was the provision of personnel, including oneself, to the banditti, jayhawkers, or guerillas. *See, e.g.*, U.S. War Dept., General Court-Martial Order No. 51, p. 1 (1866) ("G.C.M.O.") (indictment in the military commission trial of James Harvey Wells charged "[b]eing a guerrilla"); G.C.M.O. No. 108, Head-Quarters Dept. of Kentucky, p. 1 (1865) (indictment in the military commission trial of Henry C. Magruder charged "[b]eing a guerrilla" and "join[ing]" "a band of guerrillas"); G.C.M.O. No. 41, p. 1 (1864) (indictment in the military commission trial of John West Wilson charged that Wilson "did join and co-operate with an armed band of insurgents and guerrillas who were engaged in plundering the property of peaceable citizens . . . in violation of the laws and customs of war"); G.C.M.O. No. 93, p. 9(1864) (indictment in the military commission trial of James A. Powell charged "[t]ransgression of the laws and customs of war" and specified that he "did join himself to and, in arms, consort with . . . a rebel enemy of the United States, and the leader of a band of insurgents and armed rebels"); *id.* at 10-11 (indictment in the military commission trial of Joseph Overstreet charged "[b]eing a guerrilla" and specified that he "did join, belong to, consort and co-operate with a band of guerrillas, insurgents, outlaws, and public robbers").

e. When Khadr provided material support to al Qaeda in June and July of 2002, the then-existing federal material support statute, 18 U.S.C. § 2339B, reflected the long-established law of war principle described above. It criminalized the provision of various resources—including "personnel"—to international terrorist organizations, such as al Qaeda.[6]

f. Under the version of section 2339B in effect during the summer of 2002, the district court in *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002), held that the provision of "personnel"—namely, the defendant's provision of himself—qualifies as material support for terrorism. The court emphasized that the plain meaning of "personnel" connotes "employees or employee-like operatives who serve the designated group and work at its command or, in Lindh's case, who provide themselves to serve the organization." *Id.* at 572. Thus, the court held:

> under any reasonable construction of Section 2339B's statutory language, a person who joins the armed force of a foreign terrorist organization, receives

[6] The material support statute, of course, went beyond the law of war context and prohibited material support to terrorism without regard to whether the terrorist group in question, or the material support provided, was associated with an armed conflict.

> combat training from that organization, and serves in a combat unit to protect the organization and advance its goals has provided material support and resources—including, specifically, "personnel"—to that group. By any measure, Lindh provided personnel, *i.e.*, himself, to al Qaeda and [Harakat ul-Mujahideen] when he allegedly joined these organizations and engaged in a variety of conduct, including combat, to further the goals of these organizations. Thus, to provide personnel is to provide people who become affiliated with the organization and work under its direction: the individual or individuals provided could be the provider himself, or others, or both.

Id. at 577. *See also United States v. Goba*, 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002) ("[O]ne can be found to have 'provided material support or resources to a foreign terrorist organization' by offering one's services to said organization and allowing one's self to be indoctrinated and trained as a 'resource' in that organization's beliefs and activities.").

g. In so holding, *Lindh* rejected the Ninth Circuit's holding in *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000), which had held that the term "personnel" was unconstitutionally vague. As a threshold matter, under the precedent binding this Court, **the MCA, and not the Constitution, provides the governing law in this proceeding**. *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); *Johnson v. Eisentrager*, 339 U.S. 763 (1950). 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). It also bears noting that in addition to the court in *Lindh*, the United States District Court for the Southern District of New York has rejected *Humanitarian Law Project* as unpersuasive. *See United States v. Shah*, 474 F. Supp. 2d 492 (S.D.N.Y. 2007).

1. As enumerated in the MMC, the offense has two independent sets of elements, the second of which mirror the requirements of 18 U.S.C. § 2339B, as it existed at the time Lindh was decided.

2. Thus, when Khadr provided material support to al Qaeda, an international terrorist organization, in June and July of 2002, his offense plainly violated both the well-established law of war and the law of the United States. It is simply untenable to suggest that "Khadr could not have foreseen in 2002" the consequences of his material support for terrorism. Mot. to Dismiss IV at 1.

C. KHADR'S EX POST FACTO ARGUMENTS ARE BASELESS

i. Because the Defense cannot plausibly deny that Khadr's material support for al Qaeda was illegal in 2002, it focuses the vast majority of its argument on the so-called "presumption against retroactivity" and the U.S. Constitution's Ex Post Facto Clause.[7]

[7] Citing avowed sources of customary international law (including the Rome Statute, which obviously does not directly bind the United States) and the Supreme Court's opinion in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), the Defense also claims that that jurisdiction is lacking here

See Mot. to Dismiss IV at 5-14. While those arguments are long on words, they are short on law and logic.

ii. As noted above, controlling D.C. Circuit precedent unambiguously holds that the Constitution does not apply to aliens held outside the United States, including those held at Guantanamo Bay, such as Khadr. *See Boumediene*, 476 F.3d at 992. The D.C. Circuit specifically rejected the argument—which Khadr also made unsuccessfully before the Court of Military Commission Review, *see* Br. for Appellee at 20-21—that the Ex Post Facto Clause imposes structural limitations on Congress. *See Boumediene*, 476 F.3d at 993. This Court need proceed no further to reject Khadr's constitutional claims.

a. 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 v. Rumsfeld*, 126 S. Ct. 2749, 2774-75 (2006); *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.

b. The ambitiousness of Khadr's assertion that *all three* branches of the U.S. Government misunderstood the constitutional boundaries of military commissions, is matched only by its erroneousness.

iii. Moreover, even on its own terms, Khadr's constitutional claim is meritless. The Supreme Court has emphasized that the Ex Post Facto Clause is implicated only where (1) Congress "retroactively alter[s] the definition of crimes or increase[s] the punishment for criminal acts," *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), or (2) the statute "disadvantage[s] the offender affected by [it]," *id.* at 41. Neither condition is met here.

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because "international law . . . prohibits the *ex post facto* application of the MCA to this case." Mot. to Dismiss IV at 13-14. For reasons explained below, the Defense's *ex post facto* argument is specious. Moreover, *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. 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"); *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 233 (2d Cir. 2005) ("[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)); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *MR 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.); *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."). In any event, Congress has authority under Article I of the Constitution to define and punish violations of international law. Congress has clearly done so here, with respect to material support for terrorism, whether committed before, on or after enactment of the MCA.

a. First, the MCA does not "retroactively alter the definition of" material support for terrorism.

1. As explained above, the provision of material support, including personnel, to groups of unlawful combatants has been a well-established war crime since at least the Civil War. And under the law of war, unlawful combatants like Khadr faced military commissions (at best) and summary execution (at worst) for openly flaunting the rules and customs that govern armed conflict. Thus, the MCA does not "retroactively alter the definition of" or "increase the punishment for" material support of terrorism, within the meaning of the Ex Post Facto Clause.[8]

2. To be sure, the MCA expressly applies to conduct that occurred in the past. *See* 10 U.S.C. § 950p(b) ("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.*") (emphasis added). And the Defense concedes that the MCA expressly applies retroactively.[9] As a result, Khadr's so-called "presumption against retroactivity" is irrelevant. *See, e.g.*, *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the [statutory] language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful

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[8] Nor does the MCA "apply retroactively" in the sense described by the Supreme Court in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). That case held only that the Secretary of Health and Human Services was not statutorily authorized to require the retroactive recoupment of funds previously paid to private hospitals. As explained above, the MCA provides precisely the kind of statutory authority that was lacking in *Bowen*. Moreover, the MCA does not regulate "primary conduct," *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994); rather, it regulates the *procedure* for trying offenses that were already illegal under the preexisting law of war, *see* 10 U.S.C. § 950p(a).

[9] The Defense suggests that the retroactive effect of the MCA is "at best . . . ambiguous." Mot. to Dismiss IV at 6. With all due respect, the only ambiguity on this point comes from the Defense's own briefs. Eleven hours after it filed its motion to dismiss charge V (spying), the Defense filed its final motion to dismiss, *see* Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder) ("Mot. to Dismiss (Bill of Attainder)"), which concedes the force of the Government's argument and agrees that the MCA 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 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 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.

meanings need no discussion."). But simply regulating past conduct—under the same substantive standards that have always applied to it—does not necessarily implicate the Ex Post Facto Clause.

3. Thus, it is well established that changes to judicial tribunals and provisions governing venue or jurisdiction do not implicate the Ex Post Facto Clause, much less violate it. 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). Indeed, the Supreme Court has emphasized that it has "upheld intervening procedural changes [under the Ex Post Facto Clause] *even if application of the new rule operated to a defendant's disadvantage in the particular case*." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.28 (1994) (emphasis added).[10] 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.

b. Second, Khadr cannot conceivably claim that he has been "disadvantaged" by the MCA's passage.

1. As explained above, banditti, jayhawkers, guerillas and their modern-day equivalents are traditionally liable to be shot immediately upon their capture. Where such individuals have instead been tried, the United States has prosecuted them based upon offenses under the common law of war. Indeed, the MCA represents one of the first attempts of the United States to set out clearly, in its domestic law, the law of war offenses triable by military commissions. The fact that Congress chose expressly to define these law of war offenses does not amount to the creation of "new" offenses for purposes of the Ex Post Facto Clause. To the contrary, Khadr is certainly better off based upon the clarity provide by Congress and the extensive array of procedural protections provided by the MCA, the likes of which no unlawful combatant has ever enjoyed in the history of warfare.

2. For example, unlike his historical predecessors, Khadr enjoys the statutory 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

[10] Thus, the MCA's evidentiary rules—including, for example, the broad admissibility of hearsay—do not violate the Ex Post Facto Clause. The accused, like the Government, can rely upon those rules to introduce evidence, and in that sense, the MCA's rules are closely akin to retroactive procedural changes that the Court has approved in the past. *See, e.g.*, *Carmell v. Texas*, 529 U.S. 513, 546 (2000) (noting that the legislature may retroactively alter rules governing the admissibility of evidence where doing so does not uniformly prejudice the defendant).

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.* § 949*l*(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).

3. Instead of summary execution, Khadr enjoys more legal process than any unlawful combatant ever detained or tried in any prior conflict anywhere in the world. Whatever an Ex Post Facto violation may entail, this is certainly not it.[11]

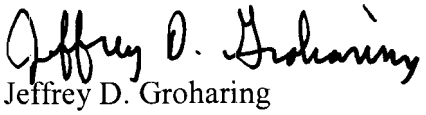
7. Oral Argument: The Government disagrees that the issues presented by this motion are "complex." Mot. to Dismiss IV at 14. In light of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motion should be readily denied. To the extent, however, 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:



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[11] It also bears emphasizing that Khadr's baseline for claiming a "disadvantage" under the MCA is surpassing strange. Khadr claims that the MCA has unconstitutionally abrogated rights that he would have enjoyed if tried in federal court. *See* Mot. to Dismiss IV at 10-13. But Khadr can point to *nothing*—not even a law review article—that suggests unlawful enemy combatants are entitled to federal court trials for their war crimes. Even *Hamdan*, which was obviously decided before Congress created the military commissions at issue here, chose the court-martial system as the relevant baseline. And under the court-martial rules, Khadr could be convicted by two-thirds of the members present, he would have no right to a grand jury indictment, and he would not be entitled to use the Federal Rules of Evidence. The Defense's invocation of those rights, *see* Mot. to Dismiss IV at 11, is specious.

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** to Dismiss Charge Four for Lack of Subject Matter Jurisdiction 7 December 2007

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 Commission dismiss Charge IV, "providing material support for terrorism" in violation of Section 950v(b)(25) of the Military Commissions Act of 2006 ("MCA").

3. **Overview:**

a. The charge of providing material support for terrorism must be dismissed because the Military Commission has no jurisdiction to consider it. At the time of Mr. Khadr's alleged conduct, military commissions could only be used to try violations established by statute or by the law of war. *See* 10 U.S.C. § 821 (1998). At the time of the alleged offense, neither U.S. law nor the law of war proscribed material support for terrorism as an offense triable by military commission: the Uniform Code of Military Justice (UCMJ) set forth the applicable U.S. law at the time, and it does not identify providing material support for terrorism as a crime triable by military commission. Likewise, the law of war does not proscribe providing material support for terrorism. Treaties and international practice confirm that material support for terrorism does not violate the law of war and thus cannot be tried by military commission.

b. Although the MCA identifies material support for terrorism as an offense triable by military commission, that fact is wholly irrelevant to this case, because both U.S. and international law provide that individuals must be tried under the law as it existed at the time of their alleged offense. This constitutional prohibition on *ex post facto* legislation recognizes that there is a fundamental unfairness in holding individuals accountable for consequences that they could not have foreseen at the time of their alleged conduct. Mr. Khadr could not have foreseen in 2002 that the offense of providing material support for terrorism would be triable by military commission four years later, nor foreseen the significantly different consequences that would result from that fact. To avoid this constitutional problem, MCA § 950v(b)(25) should be interpreted to apply prospectively only.

c. Accordingly, because Mr. Khadr must be tried based upon the law at the time the alleged offense occurred, and because at that time, providing material support for terrorism was not one of the narrow category of crimes triable by military commission, this Military

Commission lacks jurisdiction to hear Charge IV against Mr. Khadr. Charge IV should be dismissed. *See* R.M.C. 907(b)(1).

4. **Burdens of Proof and Persuasion:** Because this motion is jurisdictional in nature, the prosecution bears the burden of proving jurisdiction by a preponderance of the evidence.

5. **Facts:** This motion presents a question of law. However, the following facts, which are a matter of record in these proceedings, are germane to the Commission's disposition of the instant motion.

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

b. The government preferred charges against Mr. Khadr under the MCA on 2 February 2007. *See* Sworn Charge Sheet (2 Feb 2007) [hereinafter Sworn Charges]. Charges were re-preferred, with amendments, on 5 April 2007. These amended charges were referred to this Military Commission on 24 April 2007. *See* Charge Sheet (24 Apr 2007) [hereinafter Charge Sheet].

c. The Government alleges that Mr. Khadr committed material support for terrorism triable by military commission in June and July of 2002. *See* Charge Sheet. The government has alleged that Mr. Khadr committed these offenses at the age of 15. *See* Sworn Charges.

d. Mr. Khadr is not alleged to have committed any acts forming the basis for the instant prosecution occurring after the date of the MCA's enactment. *See* Charge Sheet.

6. **Argument: The Charge of Material Support for Terrorism Must Be Dismissed Because the Military Commission Lacks Jurisdiction To Hear It.**

a. At The Time Of The Charged Conduct Military Commissions Lacked Jurisdiction Over Charges Of Material Support For Terrorism In Both U.S. And International Law

(1) As the Supreme Court made clear in *Ex Parte Quirin*, the first question in a military commission case is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal." 317 U.S. 1, 29 (1942).[1] At the time of Mr. Khadr's

[1] *See also Hamdan*, 126 S. Ct. at 2777 ("[A] law-of-war commission has jurisdiction to try only two kinds of offense: 'Violations of the laws and usages of war cognizable by military tribunals only,' and '[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.'") (citing W. Winthrop, Military Law and Precedents 839 (rev. 2d ed. 1920)); *id.* (noting that it "is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge 'properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction.*'" (citing Winthrop at 842 (emphasis in original)); *In re Yamashita*, 327 U.S. 1, 13 (1946) ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is a violation of the law of war.").

alleged conduct, military commissions could only be used to try violations if expressly made triable by military commission, or if proscribed by the international law of war. 10 U.S.C. § 821 (1998). Because the material support for terrorism charge does not fall into either category, this Commission has no jurisdiction to consider it. And while the MCA purports to make providing material support for terrorism an offense triable by military commission, the MCA cannot be applied in this case because it was not enacted until four years *after* the charged conduct. Thus, its application in this case would violate the prohibition on *ex post facto* legislation under both U.S. and international law.

(2) Neither U.S. nor international law proscribed material support for terrorism as an offense triable by military commission at the time the charged offense in this case was allegedly committed. The statute applicable at that time—the Uniform Code of Military Justice (UCMJ)—made only two offenses triable by military commission, and providing material support for terrorism was not one of them.[2]

(3) Because there is no statutory basis to try Mr. Khadr before a military commission, the only possible basis for this Commission's jurisdiction is if the material support for terrorism offense with which Mr. Khadr has been charged plainly and unambiguously violates the law of war. *Hamdan*, 126 S. Ct. at 2780 (plurality) ("When . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous.") (*citing Quirin* 317 U.S. at 30). In order to justify a trial on that basis, however, the Government must "make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Id.* at 2780. As with the conspiracy offense at issue in *Hamdan*, "[t]hat burden is far from satisfied here." *Id.*

(4) Terrorism is not an offense against the law of war, and it follows, *a fortiori*, that "providing material support for terrorism" is not an offense against the law of war either. Neither the Geneva nor the Hague Conventions proscribe "terrorism." State practice (and in particular, U.S. practice) confirms that the broad offense of "terrorism" does not constitute an offense under the law of war, to which individual criminal responsibility will attach. In 1991, when the United Nations Secretary-General sought Member States' views on the possibility of convening an international conference to define terrorism, the U.S. did not support such a conference on the basis that it would not be useful as it would seek to "address a question on which there is little possibility of achieving consensus."[3] It noted that since "the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism, the international community has repeatedly failed in its efforts to reach consensus on a generic definition of

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[2] The only UCMJ offenses triable by military commission are aiding the enemy and spying. *See* Art. 104, UCMJ, 10 U.S.C. § 904; Art. 106, UCMJ, 10 U.S.C.§ 906. The latter offense possesses more elements than the spying offense with which Mr. Khadr was charged—including at least two elements that cannot be satisfied in Mr. Khadr's case. *See* Art. 104, UCMJ, 10 U.S.C. § 904; Art. 106, UCMJ, 10 U.S.C. § 906.

[3] *See* "Submission, U.S. Permanent Representative to the United Nations, to UN Secretary General Regarding International Terrorism," April 15, 1991 *available at* http://www.state.gov/s/l/65586.htm.

terrorism."[4] Then in 1996, the U.S. Mission to the United Nations supported the decision of the International Law Commission to exclude "international terrorism" from the list of crimes contained in the Draft Code of Crimes Against the Peace and Security of Mankind.[5] Finally, at the drafting of the Rome Statute for the International Criminal Court,[6] the U.S. was strongly opposed to the inclusion of "terrorism" amongst the list of international crimes over which the Court would have jurisdiction. The final draft of the Statute, which has 139 signatory nations,[7] "provides the most comprehensive, definitive and authoritative list of war crimes,"[8] yet it does not list "terrorism" as a violation of the law of war.

(5) Therefore, while there may exist a "handful of crimes to which the law of nations attributes individual responsibility,"[9] terrorism is not one of them.[10] The "handful" is reserved for those crimes that are particularly egregious in nature and for conduct that violates "well-established, universally recognized norms of international law".[11] When "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous."[12] Given that terrorism itself was not recognized as an offense under the law of war, the lesser offense of providing material support clearly would not have satisfied the "high standard" either.

(6) United States practice is consistent with the proposition that "terrorism" is not a law of war offense. Prior to the enactment of the MCA in 2006, the crime of "terrorism" and related offenses were punishable, exclusively, as civilian criminal offenses under Title 18 of the

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[4] *Id.*

[5] *See* United States Mission to the United Nations, *Report of the International Law Commission: The Draft Code of Crimes: Statement by John R. Crook, Office of the Legal Advisor, Department of State*, Nov. 5, 1996 at 2.

[6] S*ee generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. The Crimes and Elements portion of which was drafted largely by the United States. David J. Scheffer, "The Global Challenge of Establishing Accountability for Crimes Against Humanity" Remarks, Centre for Human Rights, University of Pretoria, Pretoria, South Africa, Aug. 22, 2000 *available at* http://www.state.gov/documents/organization/6551.doc ("T]he United States led the UN negotiations for Elements of Crimes of the International Criminal Court. We drafted the primary document and for nearly 2 years we were in the trenches with South Africa and other governments to finish this work-engine document of the Court.").

[7] World Signatures and Ratifications, http://www.iccnow.org/?mod=romesignatures.

[8] Robert Cryer, *International Criminal Law v. State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979, 990 (2005).

[9] *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. 1984) (Edwards, Circuit Judge, concurring). These offenses include war crimes, crimes against humanity, and genocide.

[10] *Id*. (Edwards, Circuit Judge, concurring) (finding that torture, absent state action, and terrorism generally are not violations of the law of nations).

[11] *See Kadic v. Karadzic*, 70 F.3d 232, 243 (C.A.2 (N.Y.), 1995).

[12] *See Hamdan*, 126 S.Ct. at 2780 (plurality).

U.S. Code. *See, e.g.*, 18 U.S.C.S. § 2332b (2000). Similarly, the federal criminal statute punishing "war crimes" omitted (and continues to omit) "terrorism" as an offense punishable under that section. *See* 18 U.S.C.S. § 2441 (2007).[13]

(7) Neither terrorism nor "providing material support for terrorism" have been recognized as offenses that attribute individual responsibility under the law of war.[14] Lacking any evidence from treaties or international practice, the prosecution in this case cannot hope to carry its "minimum" burden of making "a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Hamdan*, 126 S. Ct. at 2780 (plurality). The prosecution's burden is all the more weighty given the nature of the charge. As noted above, when "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent [establishing the alleged offense] must be plain and unambiguous." *Id.* at 2780 (*citing Quirin* 317 U.S. at 30).

(8) It is the prosecution's burden in this case to make "the requisite substantial showing" that material support for terrorism was a violation of the law of war at the time of Mr. Khadr's conduct.[15] Such a showing is simply not possible. Because the prosecution cannot carry its burden of showing that providing material support for terrorism violates the law of war, this commission has no jurisdiction to consider that charge. It must be dismissed.

b. The MCA Cannot Provide Jurisdiction Over Mr. Khadr Because It Was Not Enacted Until Four Years After the Charged Conduct

(1) <u>The MCA Should Not Be Interpreted To Apply Retroactively</u>

(a) As previously discussed, neither U.S. law nor the international "law of war" recognized material support for terrorism as one of the narrow category of crimes triable by military commission at the time of Mr. Khadr's alleged offenses. *See supra* at 3-5. Indeed, the Government has implicitly conceded this point by charging Mr. Khadr with material support for terrorism under the MCA, rather than under any statute in effect at the time of the alleged offense. But the MCA's conferral of jurisdiction on the military commission to try material support for terrorism charges in 2006 is irrelevant to this case because the MCA was not enacted until four years *after* Khadr allegedly committed the offenses with which he is charged.

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[13] Terrorism could, in theory, include acts that would be punishable as "war crimes" under established law of war principles. For example, attacking civilians in armed conflict could constitute both a recognized war crime and fall within the statutory definition of "terrorism." However, providing "material support" to such acts would encompass a variety of acts not themselves constituting violations of the law of war. Thus, the same considerations underlying the rejection of conspiracy as a basis for imposition of criminal liability under the law of war (as discussed in *Hamdan*) militate against finding "material support" of terrorism to violate the law of war.

[14] *Tel-Oren*, 726 F.2d. at 795-96 (stating that while the Restatement (Third) if Foreign Relations Law of the United States § 404 (1987) says that certain acts of terrorism may "perhaps" be of universal concern, it does not mention providing material support for terrorism as of the same concern).

[15] *Id.*

(b) It is well-established that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Here, Congress did not provide that the provisions of the MCA under which Mr. Khadr is charged should be applied retroactively. To the contrary, Congress made explicit that only one specific section of the MCA—its implementation of treaty obligations—should be applied retroactively. *See* Military Commissions Act, Pub. L. No. 109-366,§ 6(b)(2), 120 Stat. 2600, 2633 (2006) (amending 18 U.S.C. § 2441).

(c) Section 950p provides additional evidence that Congress did not intend the MCA to apply retroactively because it makes clear that Congress believed that the MCA "does not establish new crimes that did not exist before its enactment." 10 U.S.C. § 950p. While Congress's belief in this regard was erroneous—material support for terrorism was not an offense triable in a military commission before the MCA's enactment—this erroneous belief nonetheless suggests that Congress did not intend to change existing law when it enacted the MCA.[16] It follows *a fortiori* that it would not have intended any inadvertent change in the law to apply retroactively—particularly in light of the general presumption against retroactive legislation, *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and the fact that retroactive application of such a change would raise serious constitutional questions under the *Ex Post Facto* Clause, as is discussed below.

(d) Section 948d(a) of the MCA is not to the contrary. That provision states that the commission has jurisdiction over "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). The best reading of this provision—and one which renders it consistent with section 950p—is that it simply clarifies that the commission's jurisdiction extends even to offenses that occurred prior to the commission's establishment by the MCA. To the extent that the MCA (contrary to its stated purpose) sets forth new offenses that are not also violations of the law of war, such offenses are not "made punishable by this chapter" if they occurred before enactment of the MCA, because under section 950p and the presumption against retroactivity, the MCA's substantive criminal provisions do not apply retroactively.

(e) Even if Section 948d(a) is read—in conflict with section 950p and the presumption against retroactivity—to suggest that the MCA was intended to apply retroactively, it would at best render the statute ambiguous. And any doubts about whether the MCA applies

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[16] To read § 950p as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to adoption of the M.C.A. violates bedrock separation of powers principle. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") This interpretation should be avoided because it would raise serious constitutional concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

to conduct prior to the law's passage should be resolved in favor of non-retroactivity, because a contrary holding would raise serious constitutional concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

(f) In this case, applying the MCA retroactively would violate the *Ex Post Facto* Clause of the U.S. Constitution. This rule of statutory construction is especially weighty in this case because, as discussed below, international law also prohibits the application of *ex post facto* laws, and the *Charming Betsy* doctrine compels U.S. courts to interpret statutes in accordance with international law whenever possible. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Interpreting the MCA in accordance with its own plain text, which identifies the statute as "declarative" rather that retroactive, § 950p, avoids these problems of constitutionality and comity, and is the better reading of the statute.

(2) <u>Applying The MCA Retroactively Would Violate Constitutional And International Prohibitions On Ex Post Facto Laws</u>

(a) Even assuming, *arguendo*, that Congress intended the MCA to apply retroactively, the MCA nonetheless cannot be so applied in this case because doing so would violate the *Ex Post Facto* Clause of the U.S. Constitution. The U.S. Constitution's prohibition on legislation that retroactively "alter[s] the definition of crimes or increase[s] the punishment for criminal acts" is clear and unequivocal. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990); *see* also U.S. Const. art. I, § 9, cl.3 ("No . . . ex post facto Law shall be passed."); *Kring v. Missouri*, 107 U.S. 221, 227 (1882) (noting that the Convention attached "[s]o much importance" to the ex post facto prohibition "that it is found twice in the Constitution").[17] It is well-established that this "constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to . . . aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925); *see also Collins*, 497 U.S. at 43. The *Ex Post Facto* Clause thus ensures that an individual can know the consequences of his actions when he commits them. *See Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) ("Through [the *Ex Post Facto*] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."). Here, Mr. Khadr could not have anticipated that the conduct he is alleged to have committed in 2002 would subject him to prosecution by a military commission in 2006.

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[17] The prohibition also appears as a limitation on the power of state legislatures. U.S. Const. art. I, § 10, cl.1 ("No State shall . . . pass any . . . ex post facto Law.").

(b) Applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause for two simple reasons. First, it retroactively changes the "criminal quality attributable to an act." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). Second, it alters the "nature or amount of the punishment imposed for its commission." *Id.*

(3) Material Support For Terrorism, As Defined By The MCA, Was Not A Crime Under Federal Law At The Time Of The Alleged Offenses

(a) First, applying the MCA to Mr. Khadr would violate the *Ex Post Facto* Clause because it changed the "criminal quality attributable to" Mr. Khadr's alleged conduct by making material support for terrorism an offense triable by a military commission. It is well-established that Congress is without power to make an action that "was innocent when done before the passing of the law . . . , criminal, and punish[ ] such action." *Calder v. Bull*, 3 U.S. 386, 390-91 (1798); *see also Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (Congress cannot retroactively change the "criminal quality attributable to an act"); *see also Collins*, 497 U.S. at 43. The *Ex Post Facto* Clause of the Constitution restricts congressional power by "confining the legislature to penal decisions with prospective effect." *Weaver v. Graham*, 450 U.S. 24, 29, 29 n.10 (1981). Because the Constitution expressly withholds from Congress the power to enact *ex post facto* legislation, MCA § 950v(b)(27) is without effect. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description."). Thus, this Commission should dismiss Charge IV.

(b) As shown above, "providing material support for terrorism" was not an offense under the law of war at the time of Mr. Khadr's alleged conduct. The government may, however, argue that application of § 950v(b)(25) to Mr. Khadr does not violate the Ex Post Facto Clause or the principle of legality because a similar offense existed under the federal criminal code prior to the MCA's enactment. *Cf.* 18 U.S.C. §§ 2339A and 2339B. This argument must fail.

(c) The offense of "material support for terrorism" as defined in the MCA appears to conflate two distinct offenses under Title 18 of the U.S. Code relating to "material support" of terrorist activities – "material support to terrorists" in violation of 18 U.S.C. § 2339A and material support to "terrorist organizations" in violation of 18 U.S.C. § 2339B. While both statutory provisions were extant at the time of Mr. Khadr's alleged conduct, both have undergone substantial amendment and alteration since June and July of 2002. In their current form, they look nothing like they did then, and plainly did not criminalize Mr. Khadr's alleged conduct as a matter of federal law in June and July of 2002.

(d) The "material support" offenses entered U.S. law in 1994. Section 2339A (prohibiting material support to terrorists) became law as part of the Violent Crime Control and Law Enforcement Act of 1994, 103 P.L. 322, 108 Stat. 1796. Two years later, Congress enacted § 2339B (material support of designated terrorist organizations). Both statutory provisions then, as now, employed § 2339A's definition of "material support or resources." Before 2004, the definition included a narrow set of categories of support or resources: "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or

assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." *See* 18 U.S.C.S. § 2339A (2002).

(e) The material support statutes underwent a significant evolution after 9/11. In 2001, as part of the so-called "USA Patriot Act," § 2339A was amended to reach conduct occurring outside the United States.[18] A similar amendment took place with respect to § 2339B in 2004 (as discussed below). However, the most significant change for the purposes of this case came in 2004. Apparently recognizing the inability of the federal statutory scheme to clearly reach and punish mere membership in or affiliation with a terrorists or a terrorist organization, the definition of "material support or resources" was dramatically expanded in 2004, as part of the Intelligence Reform and Prevention of Terrorism Act, 108 P.L. 458, 118 Stat. 3638 (2004), to encompass the provision of "any . . . service" to terrorists or terrorist organizations and to punish providing "oneself" as "personnel" to terrorists or a terrorist organization.[19] As part of the same bill, Congress made it a crime to receive "military-type training" from a terrorist organization. However, as with the expansion of material support under § 2339A to encompass membership-type offenses, this did not become an offense until 18 U.S.C. § 2339D became part of the code on December 17, 2004 – again, long after the alleged conduct forming the basis for the charges in this case.[20]

(f) Both specifications under Charge IV state that the basis for the material support allegation is that Mr. Khadr did "intentionally provide material support or resources to wit: personnel, himself, to al Qaeda[.]" As shown above, providing personnel in the form of "oneself" (i.e., joining or affiliating) with terrorists or a terrorist organization, did not become a clear basis for liability under the material support statutes until 2004. Both specifications go on to allege a number of additional facts in support of the allegation that Mr. Khadr provided material support or resources. These fall into two categories: allegations that Mr. Khadr *received* training from al Qaeda (*see* ¶¶ 1 and 3 under specifications 1 and 2 of Charge IV) and allegations that Mr. Khadr arguably provided certain *services* to al Qaeda (i.e., that he fought or engaged in other acts on behalf of al Qaeda) (*see* ¶¶ 2, 4-7 under specifications 1 and 2 of Charge IV). As with the above-mentioned provision dealing with "personnel," these acts simply do not fall within the definition of "material support or resources" operative in June and July of 2002.[21]

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[18] 107 P.L. 56; 115 Stat. 272.

[19] *See Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000); *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003). *But see United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

[20] *See* State Dept Briefing, Sept. 7, 2006, available at: http://www.state.gov/s/l/rls/71939.htm (State Department recognizing that training in al Qaeda training camps in Afghanistan did not violate "U.S. criminal laws because those were not crimes that were on our books at the time in September 11, 2001").

[21] Moreover, whether or not Mr. Khadr's alleged acts fall within the statutory definition of "material support," it is clear that he could not have been prosecuted for a violation of § 2339B for alleged acts in Afghanistan. Even if the section would, by its terms, apply to Mr. Khadr's conduct, the statute did not then reach conduct by a non-national outside the United States. The current version of § 2339B (relating to material support of terrorist organizations) provides for extraterritorial application of the statute in a number of circumstances, which may or may not be implicated by the facts here. *See* § 2339B(d). However, at the time of Mr. Khadr's alleged conduct in Afghanistan (2002), the statute's reach was

(g) The Court has consistently stressed the "'lack of fair notice'" of the illegality of one's action as one of the "'central concerns of the Ex Post Facto Clause.'" *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (quoting *Weaver v. Graham*, 450 U.S. 24, 30); *see also Strogner v. California*, 539 U.S. 607, 611 (2003). The *Ex Post Facto* Clause thus ensures that an individual can know the consequences of his actions when he commits them. *See Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) ("Through [the *Ex Post Facto*] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."). At the time that Mr. Khadr is alleged to have committed the offense of providing material support for terrorism as defined by the MCA, that conduct was not illegal. Consequently, he could not have anticipated that the conduct he is alleged to have committed in 2002 would subject him to prosecution by a military commission in 2006 or a United States court of any variety. Applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause because it makes an act that was innocent when done, criminal, and punishes that act.

(4) Even If Mr. Khadr's Alleged Acts Did Violate Existing Federal Law, Punishment By Military Commission Would Violate The *Ex Post Facto* Clause

(a) Moreover, even if U.S. law previously criminalized Mr. Khadr's actions as providing material support for terrorism, punishment by this Military Commission under the MCA would nonetheless violate the Ex Post Facto Clause. What is material is that the law before the MCA did not recognize providing material support for terrorism as one of the few crimes *triable by a military commission.* As a result of that change, Mr. Khadr faces prosecution before an entirely different adjudicative body with entirely different rules than would have been the case had he been tried in federal court. While "statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited," *Beazell*, 269 U.S. at 170, conferring jurisdiction on an entirely different body with entirely different rules of procedure is another matter altogether. In particular, because he faces trial before a commission rather than a court, Mr. Khadr will be (1) unable to receive the protections of the Juvenile Delinquency Act (the "JDA"), 18 U.S.C. §§ 5031 *et seq.*; (2) subject to adjudication absent procedural protections such as the right to a grand jury indictment, the right to the protections of the Federal Rules of Evidence, and the right to trial before a jury of his peers who, before

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expressly limited to persons "within the United States or subject to the jurisdiction of the United States[.]" This language was deleted, and the scope of the statute expanded to encompass extraterritorial conduct, as the result of a December 17, 2004 amendment to § 2339B contained in the Intelligence Reform and Prevention of Terrorism Act, 108 P.L. 458, 118 Stat. 3638 (2004). However, at the time Mr. Khadr allegedly provided material support to a terrorist organization, the statute simply did not reach to and did not criminalize his conduct in Afghanistan. As a result, punishing Mr. Khadr for material support to a terrorist organization would violate the Ex Post Facto Clause and the Military Commission lacks subject matter jurisdiction over the offense.

conviction, would have to agree unanimously that the evidence proved his guilt beyond reasonable doubt.

(b) As a preliminary matter, if Mr. Khadr were tried in federal court, he would have the right to invoke the protections of the JDA because he was just 15 years old when his alleged offenses occurred. Under the JDA, Mr. Khadr could be tried as an adult only if a court, after making factual findings about several factors such as his age, social background, and psychological maturity, determined that such a trial was appropriate. *Id.* § 5032. If the MCA is applied to Mr. Khadr, he will be deprived of the JDA's protections because the MCA simply assumes, that all persons, even those who have not yet attained legal or psychological maturity under U.S. law, should be subject to the same procedures and consequences. *Cf. Roper v. Simmons*, 543 U.S. 551, 569 (2005) (noting that juveniles' "lack of maturity and an underdeveloped sense of responsibility," combined with their greater "susceptib[ility] to negative influences and outside pressures . . . render suspect any conclusion that a juvenile falls among the worst offenders").

(c) Further, applying the MCA to Mr. Khadr would subject him to a method of adjudication qualitatively different from a criminal trial in a domestic court. *Cf. Beazell*, 269 U.S. at 171 ("Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation . . . ."). Perhaps most significantly, if Mr. Khadr had been tried for material support for terrorism in federal court, he could be convicted only if a jury of his peers unanimously found him guilty of the offense. *See* Fed. R. Crim. P. 31(a); *see also* U.S. Const. amend. VI. Under the MCA, by contrast, all that is required to convict the accused of "material support for terrorism" is "concurrence of two-thirds of the [military commission] members present at the time the vote is taken." *See id.* § 949m(a). In addition, under the MCA, the accused has no right to grand jury indictment, *see* 10 U.S.C. § 948q(a), and the protections against the admission of unreliable evidence afforded by the Federal Rules of Evidence are significantly limited, *see id.* § 949a. Thus, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it "changes the criminal quality attributable to an act" by making it one subject to trial by military commission.

(d) Second, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it alters the "nature or amount of the punishment imposed for its commission," *Beazell v. Ohio*, 269 U.S. 167, 170 (1925), deprives him of the protections against arbitrary sentencing provided by federal sentencing law, and deprives him of the certain right to appeal his sentence. Under federal law, the maximum punishment for material support for terrorism is 15 years, or, "if the death of any person results," life imprisonment. *See* 18 U.S.C. §§ 2339A and 2339B. By contrast, the MCA provides for death if the material support for terrorism results in death and life imprisonment if it does not. Although Mr. Khadr's charge is a non-capital referral, "the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed." *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). The MCA prescribes a higher standard of punishment than does federal material support for terrorism law, and a retroactive "increase [in] the punishment for criminal acts" is a paradigmatic example of

the type of legislation prohibited by the *Ex Post Facto* Clause. *See, e.g.*, *Collins v. Youngblood*, 497 U.S. 37, 43 (1990).

(e) Applying the MCA to Mr. Khadr also violates the *Ex Post Facto* Clause because it deprives him of the protections against arbitrary sentencing provided by federal sentencing law. *See Rita v. United States*, 127 S. Ct. 2456, 2463 (2007). Under federal law, courts are required to consider a number of different factors, including the "nature and circumstances of the offense and the history and characteristics of the defendant," to ensure that the sentence imposed is "no greater than necessary." 18 U.S.C. § 3553; *see, e.g.*, *United States v. Fonseca*, 473 F.3d 1109, 1112 (10th Cir. 2007) (requiring courts to consider the recommendations of the Federal Sentencing Guidelines, including consideration of any applicable grounds for reductions in the otherwise recommended range). Under the MCA, by contrast, any person convicted of material support for terrorism "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(d)(28). The MCA thus vests nearly unbridled discretion in the military commission to make the determination as to what sentence is appropriate in any given case, and the military commission is under no obligation analogous to that of federal courts to consider possible grounds, unique to Mr. Khadr's case, which might warrant a reduced sentence.

(f) In addition, and perhaps most significantly, in the federal system, Mr. Khadr would be unquestionably entitled to appellate review of both the procedural and substantive reasonableness of any sentence imposed by the district court. *See, e.g.*, *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006). By contrast, the Government will likely argue that Mr. Khadr does not have the right to appeal whatever sentence is ultimately imposed by the military commission.[22] Thus, applying the MCA to Mr. Khadr deprives him of the certain right to appellate review of his sentence he would have enjoyed under the preexisting law.

(g) These changes in the applicable sentencing regime are a clear violation of the *Ex Post Facto* Clause. In *Miller v. Florida*, the Supreme Court held that a change in sentencing laws could violate the *Ex Post Facto* Clause, and it was immaterial that the new law did not "'technically . . . increase . . . the punishment annexed to [the defendant's] crime.'" *Miller v. Florida*, 482 U.S. 423, 432-33 (1987) (quoting *Lindsey v. Washington*, 301 U.S. 397, 401 (1937)). The Court explained that the new law violated the *Ex Post Facto* Clause because under the new law "the trial judge did not have to provide any reasons, convincing or otherwise, for imposing the sentence, and his decision was unreviewable." *Id.* at 432-33. And while the Supreme Court has approved new statutes that "altered the methods employed in determining whether the death penalty was to be imposed" in a way that was "ameliorative" and provided "significantly more safeguards to the defendant than did the old," *Dobbert v. Florida*, 432 U.S. 282, 293, 294, 295 (1977), it has reached the opposite conclusion when—as in the case of the MCA—the new legislation does not heighten the protections available to the defendant. *See*

[22] The MCA limits the jurisdiction of the Court of Appeals is "limited to the consideration of . . . (1) whether the final decision was consistent with the standards and procedures specified in [the MCA]; and . . . to the extent applicable, the Constitution and the laws of the United States." 10 U.S.C. § 950g.

Miller, 482 U.S. at 431-32 ("Unlike *Dobbert*, where we found that the 'totality of the procedural changes wrought by the new statute . . . did not work an onerous application of an *ex post facto* change,' here [defendant] has not been able to identify any feature of the revised guidelines law that could be considered ameliorative.") (internal citation omitted). Moreover, the changes wrought by the MCA are not simply procedural; they deprive Mr. Khadr of the right to have his sentencing body consider mitigating factors that might warrant a reduction in his sentence and, even more fundamentally, they may deprive him of the uncontestable right to have that sentence reviewed by a higher court. Applying the MCA to Mr. Khadr thus changes the "nature and amount" of his punishment within the meaning of the *Ex Post Facto* Clause's prohibition, and the MCA therefore cannot serve as the basis for military commission jurisdiction over Mr. Khadr.

(h) In addition to violating the express terms of the U.S. Constitution, interpreting the MCA to apply retroactively would conflict with international law. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Like U.S. law, international law – including the law of war,[23] international criminal law,[24] and human rights law,[25] – also prohibits the application of *ex post facto* laws. For example, Article 22 of the Rome Statute of the International Criminal Court provides that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, *a crime within the jurisdiction of the Court*."[26] The MCA, however, purports to do exactly what the Rome Statute prohibits: allow the military commission to hold individuals criminally responsible for conduct which, at the time it took place, was not a "crime within the jurisdiction of the Court."

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[23] Protocol I, art. 75(4)(c) ("No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.") (recognized as customary international law by the U.S. in W. Hays Parks et al., Unclassified Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD (May 8, 1986) (entitled 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications); Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, art. 99(1), 75 U.N.T.S. 135; Geneva Convention IV, art. 67.

[24] *See* Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, art. 22, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

[25] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Article 9 (entered into force July 18, 1978; International Covenant on Civil and Political Rights (1966), art. 15(1), 999 U.N.T.S. 171 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."); Universal Declaration of Human Rights, art. 11(2), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) ("No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."); *see also* Executive Order 13107, "Implementation of Human Rights Treaties," Dec. 10, 1998 ("It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.").

[26] Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, art. 22, 2187 U.N.T.S. 3 (entered into force July 1, 2002) (emphasis added).

International law also clearly prohibits the imposition of heavier sentences than were applicable when the offense was committed.[27] Thus, international law, too, prohibits the *ex post facto* application of the MCA to this case.

(i) Because applying the MCA to Mr. Khadr would violate the *Ex Post Facto* Clause, he cannot be tried for any charges brought under it, including providing material support for terrorism. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description.").

c. Conclusion

(1) Military commissions have long been defined, in large part, by their limited jurisdiction. Neither U.S. nor international law recognized providing material support for terrorism as one of the narrow category of crimes triable by military commission at the time the charged conduct in this case is alleged to have occurred. Because both U.S. and international law recognize that an individual must be tried according to the law in effect at the time of his alleged offense, the MCA, which was not enacted until four years *after* the charged conduct in this case, cannot serve as a basis for jurisdiction over Mr. Khadr. Accordingly, the military commission does not have jurisdiction to consider a charge of providing material support for terrorism, and this charge against Mr. Khadr should be dismissed.

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. Sworn Charge Sheet (2 Feb 2007)

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.

[27] *See, e.g.*, International Covenant on Civil and Political Rights art. 15(1) (entered into force Mar. 23, 1976); Protocol I of the Geneva Conventions art. 75(4)(c) (entered into force Dec. 7, 1979).

11. **Attachment:**

A. Sworn Charge Sheet (2 Feb 2007)

By: Rebecca Snyder

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

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):
[redacted]

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*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
[redacted]	[redacted]	Office of the Chief Prosecutor, OMC

5d. SIGNATURE OF ACCUSER	5e. DATE (YYYYMMDD)
[redacted]	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.

[redacted]
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

[redacted]
Grade

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

[redacted]

MC FORM 458 JAN 2007

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).

[redacted], 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 instructions[1]: _____

_____

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

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

MC FORM 458 JAN 2007

UNITED STATES OF AMERICA	)	**CHARGES**
	)	
	)	**Murder in Violation of the Law of War**
	)	
	)	**Attempted Murder in Violation of the Law of War**
v.	)	
	)	
	)	**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.

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.

[redacted]

From: [redacted]
Sent: Monday, April 21, 2008 9:20 AM
To: [redacted]
Cc: [redacted]
Subject: US v Khadr - Ruling - D-011
Attachments: Ruling - D-011 US v Khadr.pdf

COL Brownback has directed that I send the attached ruling to counsel and other interested persons.

v/r,

[redacted]
Department of Defense

From: Pete Brownback [redacted]
Sent: Saturday, April 19, 2008 13:06
To: [redacted]
Subject: Ruling - D-011

[redacted],

Please forward the attached ruling to the parties in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

[redacted]

From: Kuebler, William, LCDR, DoD OGC
Sent: Friday, January 04, 2008 4:38 PM
To: [redacted]
Cc: [redacted]
Subject: U.S. v. Khadr -- D-011
Attachments: 2008-01-04 Defense Reply re MTD Charge IV - D-011.pdf

Sir,

Please find attached for filing the Defense Reply to the Government Response to the Defense Motion to Dismiss Charge IV.

VR,

LCDR Kuebler

[redacted]

From: [redacted]
[redacted] Wednesday, December 19, 2007 2:06 PM
To: [redacted]
Cc: [redacted]

Subject: Re: FW: Delay in Filing Reply - D - 011 US v Khadr

Follow Up Flag: Follow up
Flag Status: Completed

Sir,

Please forward the following email to Colonel Brownback:

1. Clearly the request by the Defense should have been considered a special request for relief under the Military Commissions Rules of Court, Rule 3.4. Under RC 3.4, special requests for relief must include a certificate of conference indicating that the moving party has conferred with the opposing party and whether the opposing party concurs or objects with the requested relief. RC 3.4 further provides, that if the moving party has made a best effort to confer with the opposing party and has not been able to do so, through no fault of their own, the efforts made shall be listed.

2. In the present case, the Defense did not confer with the Prosecution prior to filing the request, nor did the request note any efforts that were made in attempting to do so.

3. Although the opposing party is not required to respond, the rules of court provide for an opportunity for the opposing party to respond as soon as possible, if it so desires.

4. The Defense sent the subject request after the close of business on Tuesday, 18 December, filing at 1803. Upon reviewing the request this morning, the Government was preparing a response despite the fact that the Military Judge had not yet solicited whether we were going to respond. The Government received the Military Judge's decision before we were able to file our response.

5. Based on the fact that the rules of court were not followed, and the fact that the Military Judge decided the issue prior to receiving, or soliciting, any input from the Government, the Government requests the military judge reconsider his ruling taking into account the following:

a. On 7 December 2007, the Defense served upon the Government and this Court a total of six motions to dismiss. Those six pleadings, not including their attachments, contained 35,520 words over a span of 69 pages. Notwithstanding the breadth of issues raised therein—ranging from statutory to constitutional to international law—the Government responded at 1639 on 14 December with responses to the Defense filings, but for a technical issue getting the motions scanned, within the 7 day timeline set forth in the Military Commission Trial Judiciary Rules of Court.

b. Yesterday's Defense request for delay is the latest in a series of requests for delay since the inception of this case. The Defense has requested delays for every proceeding and virtually every pleading filed in this case, while contemporaneously complaining in the media how the government has failed to bring the accused to trial, despite holding him since July 2002. Granting the Defense request would effectively provide the Defense with 21 days to reply to the Government responses, three times the

amount of time the Government was given to respond to the original Defense motions.

c. The most recent request is premised on two bases: (1) logistical difficulties have prevented the Defense from preparing replies while at Guantanamo Bay; and (2) the Government's response briefs have provided the Defense with a "first look" at some of the more important legal issues involved in this case. Neither basis supports the Defense request for an additional 15 days to file replies.

d. The Defense arranged to travel to Guantanamo Bay this week, having full knowledge that any replies would be required to be filed by Wednesday, 19 December. Furthermore, the technical difficulties the Defense encountered are the same that all parties face upon arrival at GTMO, and should always be anticipated and taken into account. The Defense has already been given an additional day to reply to the Government responses. Their most recent difficulties at Guantanamo certainly do not provide justification for an additional two weeks to reply to the Government responses.

e. The Defense second basis for delay is that the Government briefs provided the Defense with a "first look" at the issues involved in this case, claiming they are unable to adequately research and brief these issues in the time allotted by the court. This argument is completely unsupportable, considering the issues now before the Court were raised by the Defense. The Defense has had months to prepare its arguments on these motions, and, based on the breadth and depth of their treatment in the Defense's opening briefs, the Defense has obviously thought long and hard about the issues it considers relevant here.

f. It is absolutely unfair to the Government for this court to permit a schedule that allows the defense weeks, if not months, to prepare their opening briefs, requires the government to respond in seven days, and then permits the defense an additional 21 days to reply. Any reasonable litigator can see the unfairness in that schedule - and the unfairness is only magnified when one considers the complaints by the defense about the length of the accused's detention, the fact that the defense seeks delay at every juncture, and the fact that the defense's publicly-stated strategy is to drag this process out long enough to avoid a trial while convincing others that the accused should be released from detention.
This modified schedule, and every other defense request for delay that has been granted, plays right into the hands of that defense strategy.

g. The Government therefore respectfully opposes the latest Defense request for a delay. As the Government has previously noted, and as the Defense has repeatedly emphasized in its statements to the press, the Defense wants to litigate this case in the court of public opinion——not before the Military Judge. With each new request for delay, the Defense also requests a delay in the administration of justice.

h. The timelines established in the Military Commission Trial Judiciary Rules of Court are sufficient to allow the Defense to respond, just as the Government did. At most, the Defense should be granted a one (1) day extension in light of their difficulties encountered yesterday. The additional two week delay is not supportable by the record and is inherently unfair to the Government.

6. Additionally, the Government requests the Military Judge make clear that any additional time that he does permit in this instance, cannot and will not be used to support any further delays to the current trial schedule, including the legal motions due 11 January 2008.

V/R,

Major Groharing

[redacted] wrote:

> COL Brownback has directed that I forward the email below to counsel
> and other interested persons.
>
>

> v/r,
>
> [redacted], USAR
>
>>[redacted]
>
> Military Commissions Trial Judiciary
> Department of Defense
>
>
> -----Original Message
> [redacted]
>
> The defense request to delay filing a reply in D - 011 is approved.
> The reply is due no later than 1700 hours, 4 January 2008.
>
> COL Brownback
> -----Original M
> From: Kuebler, [redacted]
> Sent:
> To: '[redacted]e Request for Additional Time to File
> Replies (D:011-013)
>
> Sir,
>
> 1. The defense respectfully requests additional time in which to file
> replies to three of the government response briefs to the defense
> motions to dismiss. The defense expects to be able to file the
> balance within the time currently allotted.
>
> 2. Defense counsel are currently at GTMO. Our flight was delayed
> leaving Virginia yesterday morning. We arrived in GTMO late yesterday
> afternoon to discover that, despite having submitted the request weeks
> ago, we had not received country clearance. We were detained at the
> air terminal, under armed guard, upon arrival until the matter was
> (for the time being) resolved. After finally arriving at the OMC
> offices last night, we discovered a number of computer and other
> logistical problems (in addition to those ordinarily present in GTMO)
> that have hampered our ability to competently respond to the
> government's briefs. These
> include:
>
> a. Our JTF computer accounts were disabled and had to be reactivated;
>
> b. The OSD "dial up" connection for our lap top had been disabled;
>
> c. Our printer connections had been deactivated;
>
> d. We were hampered in efforts to contact J6 for support by the late
> hour and the fact that we were issued cell phones with dead batteries;
>
> e. When we did make contact with J6 and they restored our accounts,
> we learned that 4 computers in our office would not work (the first 4

> we tried to use);
>
> f. Upon activation, the computers were particularly slow to boot up
> due to upgrades or patches installed by J6 staff since our last visit;
>
> g. Ms. Snyder's computer crashed; and
>
> h. For whatever reason, internet access has been unusually slow, it
> is often taking several minutes for web pages to load (particularly on
> LEXIS) and the pages sometimes timeout.
>
> 3. In addition to the technical issues cited above, we simply do not
> have ready access to a number of the sources (e.g., treatises) relied
> upon by the government in their response briefs and sources that we
> need to consult in our office in Washington. Due to weight limits on
> the government flight, we were unable to bring many books with us to GTMO.
> Although some of the sources are available on the internet, for the
> reasons mentioned above, it has proven unduly difficult to access and
> utilize these materials.
>
> 4. The issues raised by the defense motions and the government
> responses thereto are critical legal issues of first impression, which
> may be dispositive for this case. In addition, they bear on the
> legitimacy of the entire military commissions enterprise under the MCA.
> The government's response briefs are the defense's "first look" at
> some of the more important legal issues involved in the case -- for
> example, the government's extraordinary argument (made in all 6
> response briefs) that Congress possesses plenary authority to
> legislate without regard to the Ex Post Facto or Bill of Attainder
> Clauses. Under the circumstances in Gitmo, if required to file all
> replies by Thursday, it will simply be impossible for defense counsel
> to adequately research and brief those issues and competently represent our client.
>
> 5. Two full days this week (Monday and Thursday) will have been spent
> traveling to and from GTMO.
>
> 6. Based on the foregoing, defense counsel respectfully request
> additional time in which to reply to three of the six government briefs.
> Ms. Snyder will be on pre-approved leave from 22 Dec 07 until 31 Dec 07.
> As filing the reply will complete the briefing cycle for each motion,
> no prejudice results to the current trial schedule by granting the
> defense additional time to respond. Accordingly, the defense requests
> permission to file its replies to the government's responses to the
> motions below NLT 4 Jan 08:
>
> a. MTD Charge IV (D:011)
>
> b. MTD Charge V (D:012)
>
> c. MTD (Bill of Attainder) (D:013)
>
> 7. Thank you for your consideration of this request. Please note
> that the military judge is omitted from the cc line -- we do not
> currently have access to his regular e-mail account and because of the
> technical issues cited above are unable to obtain it.
>
> VR,
>
> LCDR Kuebler
>

--
Jeff Groharing

[redacted]

[redacted]

From: [redacted]
Sent: Friday, December 14, 2007 5:39 PM
To: [redacted]

Subject: FW: Prosecution Responses - D - 008 thru D - 013 US v Khadr

Follow Up Flag: Follow up
Flag Status: Red

Attachments: FI - Khadr - 14 Dec 07.pdf; Prosecution Response to Defense Motion to Dismiss Charge II.pdf; Prosecution Response to Defense Motion to Dismiss Charge I.pdf

FI - Khadr - 14 Dec 07.pdf (45... | Prosecution Response to Defens. | Prosecution Response to Defens.

COL Brownback has directed that I forward the attachments and the email below to counsel and other interested persons.

v/r,

[redacted]ial Judiciary
Department of Defense

[redacted]

To: [redacted]
Subj[redacted]D - 008 thru D - 013

[redacted],

1. Please forward the email below to the counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

2. Please copy the file labelled Prosecution Response to Defense Mot to Dismiss Chg I and II.pdf. Name one of the versions, Prosecution Response to Defense Motion to Dismiss Charge I. Name the other version Prosecution Response to Defense Motion to Dismiss Charge II. Forward those two new files to all parties.

3. Please also forward a copy of the latest Filings Inventory.

COL Brownback

Counsel in the case of United States v. Khadr,

1. All counsel are once again urged to read the Rules of Court. Counsel, in this instance, are specifically urged to read and reread RC 2.2d.

2. The Rules of Court are not designed to aggravate counsel - they are designed to assist the commission. Compliance with the Rules helps the commission insure that matters are attended to as required.

3. The government was responding to six (6) separate defense motions. Each of those defense motions was assigned a filings designation. The government should have responded by six (6) separate emails. The subject line on the emails should have included the filings designation. For instance:

Prosecution Response to D - 013, Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder), US v. Khadr or, more simply, Khadr - Prosecution Response to D - 013.

If the defense chooses to reply to the response, the subject line should read:

Defense Reply to Prosecution Response to D - 013, Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder), US v. Khadr or, more simply, Khadr - Defense Reply to D - 013.

4. As may be inferred from the directions to [redacted] above, the government request to file a combined response is not grante[redacted]ission will consider the response as to each motion separately. No further government action is required.

5. Counsel are directed to Schedule for Trial, 28 November 2007, paragraph 1a, Note 2.

6. Defense replies, if any, are due NLT 20 December 2007.

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

[redacted]

Subject: RE: US v. Khadr - Defense Motions to Dismiss Each of the Charges

> Sir,
>
>
> 1. The Government respectfully submits the following responses to the
> Defense's motions to dismiss.
>
> 2. The Government also respectfully requests leave from the Court to
> file its responses to the Defense's motions to dismiss charges I (murder)
> and II (attempted murder) as a single pleading. As explained in our
> response, the motions to dismiss charges I and II raise virtually
> identical
> issues, so for the convenience of both the Military Judge and the Defense,
> the Government has responded in the most efficient manner possible. Of
> course, the Government can file two separate briefs, if the Military Judge
> so directs.
>
> 3. I apologize for the late filing. We had difficulties getting the
> documents scanned and saved appropriately.
>
> V/R,
>
>
>
> Jeff Groharing
> Major, U.S. Marine Corps
>
>
>
s to Dismiss Each of the Charges
>
>
>
> Please find attached five motions, one to dismiss each charge.
>
> V/r
> Ms. Snyder
>
>
>
>

UNITED STATES OF AMERICA	}	**D-018** **Ruling on Defense Motion for Appropriate Relief (Strike Terrorism from Charge III)**
		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 motion, the defense moves to strike "terrorism" as an object of the conspiracy alleged in Charge III.

2. The commission has determined (*See* Ruling - D-010, dated 21 April 2008.) that Congress properly enacted the offense of conspiracy in the Military Commissions Act of 2006.

3. Paragraph 6(24), Part IV, Manual for Military Commissions, which contains both the text of § 950v(b)(24) and the Secretary's implementation of the statute, reads as follows:

> **(24) TERRORISM.**
>
> a. *Text.* "Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, 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 intentionally killed or inflicted great bodily harm on one or more protected persons or engaged in an act that evidenced a wanton disregard for human life;

(2) The accused did so in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct; and
(3) The killing, harm or wanton disregard for human life took place in the context of and was associated with armed conflict.

c. *Comment.*

(1) This offense includes the concept of causing death or bodily harm, even if indirectly.
(2) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

d. *Maximum Punishment.* Death, if the death of any person occurs as a result of the terrorist act. Otherwise, confinement for life.

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 terrorism 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 terrorism 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)(24), 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 (§ 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 terrorism 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 terrorism, and therefore for the offense of conspiracy with terrorism as one of the offenses to which the accused allegedly conspired, 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, insofar as it alleges a conspiracy to commit terrorism, alleges a violation of the statute.

9. The defense motion to strike "terrorism" as an object of the conspiracy alleged by Charge III and its Specification is denied.

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

	D018
UNITED STATES OF AMERICA	**Defense Reply** to Government Response to Defense Motion for Appropriate Relief
v.	
OMAR AHMED KHADR	(Strike Terrorism from Charge III)
	28 January 2008

1. **Timeliness:** This reply is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge.

2. **Overview:**

a. The central issue is whether conspiracy to commit terrorism was triable by military commission at the time of Mr. Khadr's alleged conduct. Military commissions, in 2002, only had jurisdiction over a charge where Congress had specifically given them such jurisdiction or where the charged conduct violated the law of war. 10 U.S.C. § 821 (1998). At the time of Mr. Khadr's alleged conduct, conspiracy to commit terrorism did not fall into either category.

b. Although the prosecution attempts to argue that terrorism, and therefore conspiracy to commit terrorism, was a violation of the law of war in 2002, this argument fails for two reasons. Neither terrorism nor conspiracy to commit terrorism were violations of the law of war in 2002. The prosecution primarily argues that the MCA supplies a basis for jurisdiction either by retroactively changing the content of the law of war or by now making terrorism and conspiracy to commit terrorism triable by military commission. The former argument is wrong as a matter of U.S. law. Congress may not retroactively change the content of international law. The latter argument is irrelevant. The question is not what the law is now, but what the law was when the alleged offense occurred.

c. Applying the MCA retroactively to conduct that occurred, according to the government's own allegations, four years *before* the statute was enacted violates both U.S. and international law proscriptions on *ex post facto* legislation. Mr. Khadr's detainment at Guantanamo does not permit the Congress to ignore this structural limitation on its power.

d. Accordingly, because the government has failed to show a statutory or law of war basis for terrorism, this Commission must strike terrorism as on object of the alleged conspiracy in Charge III.

3. **Burdens of Proof and Persuasion:** The government contends that the burden of proof is on the defense because the defense seeks to strike language from the specification. (Govt. Resp. at 1.) The basis for striking the language, however, is that the commission has no jurisdiction to try Mr. Khadr for conspiracy to commit terrorism. Accordingly, the motion is jurisdictional in nature, and the prosecution bears the burden of proving jurisdiction by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

4. **Argument: Terrorism Must Be Dismissed As An Object Of The Alleged Conspiracy Because Terrorism Is Not An Offense Triable By Military Commission**

a. Terrorism Was Not An Offense Triable By Military Commission At The Time Of The Alleged Conduct

(1) The prosecution fundamentally misunderstands the basic issue in this case. That issue is not whether Congress can make terrorism or conspiracy to commit terrorism triable by military commission,[1] but whether it had done so at the time of Mr. Khadr's alleged conduct in 2002.

(2) The prosecution does not even dispute the fact that no U.S. statute made terrorism or conspiracy to commit terrorism triable by military commission at the time of the alleged conduct in this case. It is simply uncontestable that, in 2002, when Mr. Khadr's alleged conduct occurred, Congress had only made two offenses triable by military commission: aiding the enemy and spying. 10 U.S.C. § 904, 906. There was thus no statutory basis to try Mr. Khadr by military commission.

(3) Because there was no statutory basis to try Mr. Khadr by military commission, this Commission may only consider charges alleging conduct that plainly and unambiguously violates the law of war. *See* 10 U.S.C. § 821; *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.). Neither terrorism nor conspiracy to commit terrorism meet this standard. Indeed, as discussed below, the government has not made a substantial showing that either offense violates the law of war.

(4) The government contends that terrorism is a "well-established war crime." (Govt. Resp. at 5.) Yet, the government cannot point to a single precedent or authority establishing that "terrorism", as such, was punishable as offenses against the law of war before passage of the MCA. Instead, picking up on the defense's observation that some particular types of terrorism are war crimes, the government argues that *all* acts of terrorism must therefore be war crimes. (Govt. Resp. at 8-9.) This argument is based on an elementary logical fallacy. The fact that some acts of terrorism may violate the law of war does not make all acts of terrorism war crimes anymore than the fact that some trees are oaks, means that all trees are oaks. Anticipating this argument, the government contends that it is based on "circular reasoning", suggesting that "the only way to dispute that all acts of terrorism are war crimes is to presuppose . . . that they are not." (Govt. Resp. at 7 n.5.) The government is wrong – nothing must be presupposed. An examination of treaties and other sources of international law demonstrates that only some particular acts of terrorism that are well defined are war crimes.

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[1] In an apparent attempt to obscure the fact that terrorism was *not* a violation of the law of war at the time of Mr. Khadr's alleged conduct, the prosecution devotes much of its response to the irrelevant argument that Congress has the power to make terrorism triable by military commission. Whatever the validity of this argument, it is simply irrelevant where, as here, Congress had *not* done so at the time of the alleged conduct. As discussed in Mr. Khadr's initial motion and below, the MCA cannot be applied (and should not be interpreted to apply) retroactively to offenses Mr. Khadr is alleged to have committed more than four years *before* the MCA's enactment.

(5) In mistakenly equating all acts of terrorism with attacks on civilians or other protected persons, the government states the obvious – that grave breaches of the Geneva and Hague Conventions and violations of Common Article 3 of the Geneva Conventions are war crimes. (Govt. Resp. at 8-9.) This is entirely beside the point. Mr. Khadr is not charged with committing a grave breach of any of the four Geneva Conventions of 1949 or with violating Common Article 3. Thus, the authorities relied upon by the government to show that some acts of terrorism may be war crimes are completely immaterial as applied to Mr. Khadr.

(6) Moreover, the specific acts of terrorism punishable under the law of war consist of conduct intended to inflict terror on the civilian population in the context of an ongoing armed conflict with the hope of preventing hostile acts[2] – not acts of political terrorism against which the MCA offense of terrorism is aimed. As professor Michael Schmitt explains:

> [A]n offense of terrorism, as it is generally understood in common parlance (characterized as having some political purpose or aspect), does not appear in the law of armed conflict. Rather, in the law of armed conflict, the term "terror" refers only to acts that have the specific intent to intimidate the population *in the context of an ongoing armed conflict.* Most significantly, Article 33 of the Fourth Geneva Convention provides that "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited." The Official Commentary indicates that this article refers to "restoring to intimidatory measures to terrorize the population" in the hope of preventing hostile acts by them.[3] Since the Fourth Geneva Convention applies only to situations of occupation, the intent is to preclude acts by the occupying force intended to cow the civilian population into submission. It, in no way, is meant to address acts of political terrorism such as those committed by al Qaeda.
>
> [] The prohibition also appears in both Additional Protocols to the Geneva Conventions. Article 51(2) of Protocol I provides that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." In the context of non-international armed conflict, Articles 4 and 13 set forth essentially the same prohibitions. The United States is a Party to neither of these treaties. But this point aside, the intent is, again, to encompass acts specifically intended to intimidate the population during an ongoing armed conflict, not acts intended to alter government positions or otherwise reflective of a "political" purpose.

Schmitt Aff. ¶¶ 28-29 (Attachment A)[4].

(7) The government cites a number of conventions for the proposition that "the prohibitions of terrorism under international law extend beyond the Geneva Conventions and the

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[2] International Committee of the Red Cross, Commentary on the Geneva Convention Relative to the Protection of Civlian Persons in Time of War 226 (Jean Pictet ed. 1958).

[3] *Id.*

[4] The defense is citing this affidavit for no other proposition than the one mentioned above in the text.

Hague Conventions." (Govt. Resp. at 9.) First, the argument is completely beside the point – the government does not claim that these conventions establish that terrorism is a war crime. Indeed, as the government appears to recognize, they establish quite the contrary. Not one of these instruments states or suggests that terrorism is a "war crime" or that terrorism-related offenses should be punished by military tribunals. Moreover, these instruments do not, as the government intimates, make terrorism punishable as an offense against "international law." These treaties generally impose obligations on states parties to make terrorism-related activities offenses punishable under their domestic criminal law. This, the United States has done. *See, e.g.*, Terrorist Bombings Convention Implementation Act of 2002, 107 P.L. 197, 116 Stat. 721 (amending 18 U.S.C.S. § 2332f to comply with U.S. obligations under the International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249). The government's invocation of these instruments actually makes the point the defense made in its opening brief and is consistent with the authorities cited therein, which demonstrate that the U.S. has consistently taken the position that terrorism should not be included amongst crimes against international law or the law of armed conflict, but rather should be punished exclusively under domestic law. (Def. Mot. at 4-5.) Nothing to which the government cites indicates that terrorism is a crime punishable under "international law" as such, let alone an offense against the law of war.

(8) The government also cites several United Nations Security Council Resolutions, claiming they "condemned al Qaeda's actions as war crimes." (Govt. Resp. at 10 para. 6(B)(v)(b)-(c).) While some of the resolutions refer to al Qaeda's activities as terrorism, none of them concludes that al Qaeda's activities are war crimes. Moreover, whether al Qaeda's activities years before Mr. Khadr is alleged to have conspired with "members and associates" of al Qaeda are war crimes is irrelevant as Mr. Khadr is not charged with committing any of them; the charged 2-month conspiracy is alleged to have existed long after these acts were committed.

(9) The government then embarks on a long discussion of how guerrilla fighters were subject to summary execution in the 1800s for nothing more than joining the group of fighters.[5] (Govt. Resp. at 11-14.). From this discussion, the government reaches the stunning conclusion that summary execution of guerilla fighters supports a finding that terrorism, as such, violates present-day law of war. The sources cited by the government, however, reveal that the combatants were summarily executed due to their status, not anything they might have done.[6] (*See* Govt. Resp. at 11-12.) These sources say nothing about whether terrorism, as such, was once a violation of the law of war nor whether terrorism, as such, violates the law of war today. Indeed, the law of war has evolved significantly since the early 20th-century, as norms of civilized conduct and modes of warfare have changed. For example, although summary execution might once have been routinely permitted under the laws of war, *see* Winthrop, *Military Law and Precedents* 783 (1895, 2d ed. 1920), the modern day law of war *clearly* prohibits such inhumane treatment. *See* Geneva Convention (III) Relative to the Treatment of

[5] The government also contends that these guerilla fighters did not "enjoy the full benefit of the law of war" (Govt. Resp. at 11) – a point that is irrelevant to the issue of whether terrorism, as such, violates the law of war.

[6] Modern day law of war does not recognize status offenses. *See* argument and authorities cited in Mr. Khadr's Motion to Dismiss Charge I at 5-6 and his corresponding Reply Brief at 3-6, D008.

Prisoners of War art. 3 (entered into force Oct. 21, 1950). In enacting Article 21 of the UCMJ, and its predecessor, Article 15 of the Articles of War, Congress intended only to preserve what jurisdiction existed under the law of war as it had evolved. *Hamdan*, 126 S.Ct. at 2774; *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (noting that a claim under the Alien Tort Claims Act "must be gauged against the *current state of international law*" (emphasis added)). Many of the international community's most prominent treaties were adopted in the latter half of the twentieth-century, and it defies both law and common sense to suggest that conduct violates present-day law of war simply because that conduct may have violated the law of war as it was understood two hundred years ago.

(10) Finally, the government contends that it need not establish that terrorism, as such, violates the law of war because the charge of conspiracy to support terrorism is supported by specific allegations. (Govt. Resp. at 14, para. 6(B)(iv)(a).) But none of those specific allegations allege an act of terrorism that violates the law of war. For example, in support of this argument, the government points to the allegation that Mr. Khadr "attended al Qaeda training camps." (*Id*.) Yet the government cites no authority supporting its argument that receiving training amounts to an act of that violates the law of war.[7] (*See* Govt. Resp. at 9, paras. 6(B)(iv)(d), 6(B)(vii)(a).) Indeed, the government has charged this conduct as material support for terrorism – not terrorism. *See* Charge Sheet.

(11) In the absence of *any* precedent that terrorism, as such, violates the law of war, it is hard to see how the government can conceivably be deemed to have met its burden of demonstrating a "plain and unambiguous" basis for the prosecution of conspiracy to commit terrorism as a war crime based on conduct alleged to have occurred in 2002.

b. The MCA Cannot Conclusively and Retroactively Determine the Content of the Law of War

(1) The prosecution cites *Hamdan* for the dubious proposition that the Court "invited the politically accountable branches" to pass an *ex post facto* law making terrorism and conspiracy to commit terrorism retroactively triable by military commission. In support of this notion, the prosecution selectively cites Justice Breyer's statement that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary," *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring), emphasizing the word "[n]othing." (Govt. Resp. at 10.) But, of course, Justice Breyer did not give Congress or the Executive authority to disregard the Constitution. The prosecution omits Justice Breyer's complete statement of his views: "If Congress, after due consideration, deems it appropriate to change the controlling statutes, *in conformance with the Constitution and other laws*, it has the power and prerogative to do so." *Hamdan*, 126 S. Ct. at 2800 (Breyer, J., concurring) (emphasis added). The President is free to

[7] Not only does the alleged training not violate the law of war, but it did not violate U.S. law at the State Department has explained, "[M]any of the people in Guantanamo had never set foot in the United States, had trained in al Qaeda training camps in Afghanistan and were captured there. And while they were training in acts of terrorism, there may have been an Egyptian or a Pakistani who would come to train. They had not committed crimes that were in violation of our U.S. criminal laws because those were not crimes that were on our books at the time in September 11, 2001." Foreign Press Center Briefing With State Department Legal Advisor John Bellinger, Federal News Service, Sept. 7, 2006.

"seek"—and Congress is free to grant— the authority the President believes is necessary, but only within the bounds of the Constitution. While Congress may be able to give the President the authority to make terrorism and conspiracy to commit terrorism triable by military commission as to future offenses, that does not mean it can give him the authority to make triable by military commission alleged conduct that occurred long before the MCA was enacted.

(2) Just as the Congress cannot give the President the authority to retroactively make terrorism and conspiracy to commit terrorism triable by military commission, it also cannot retroactively change the content of international law. Nonetheless, the prosecution relies primarily on the argument that terrorism was an offense punishable under the law of war prior to the date of the MCA's enactment because Congress has said so. (Govt. Resp. at 4-6.)

(3) This argument is wholly without merit. Initially, as Mr. Khadr explained in his opening brief, the best interpretation of the MCA is that it is not intended to apply retroactively to newly minted crimes. (*See* Def. Motion at 5-7.) The MCA's declaration that it "does not establish new crimes" simply confirms this intent that the MCA not apply retroactively. To the extent that Congress erroneously believed that terrorism and conspiracy to commit terrorism were offenses triable by military commission prior to the MCA's enactment, the appropriate response is not to read the MCA as purporting (absurdly) to retroactively change the content of the law of war *as of four years ago* by Congressional fiat, but rather to read the inadvertently new offenses as applying only to conduct that occurred after the enactment of the MCA.

(4) In any event, even if the MCA purported to retroactively declare the content of international law, it is clear that Congress cannot do so. The law of war is—and always has been—based on international law, and Congress has no power to conclusively determine what is and is not a violation of international law. *See Hamdan*, 126 S. Ct. at 2780 (plurality op.) (for an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally" (quoting *Ex Parte Quirin*, 317 U.S. at 30)); *see also The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.").

(5) To the extent that the Government is suggesting that the Congress can conclusively determine the content of the law of war as part of its authority "[t]o *define* and *punish* . . . Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10 (emphasis added), that is simply not the case. Congress only has the power to clarify the exact scope and elements of offenses that have been previously recognized as violations of the law of war by international sources. It has no authority to *create* violations of law that the international sources do not recognize. Indeed, the Government's argument is belied by one of the principal sources on which the Government itself relies. As explained in the 1865 Attorney General opinion to which the Government cites, "[t]o *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations." 11 Op. Atty Gen. 297, 1865 U.S. AG LEXIS 36, *4 (*cited in* Govt. Resp. at 7 (describing the opinion as "binding on the Executive Branch")). In other words, Congress is not itself empowered to *create* war crimes, but rather has only the "second-order authority to assign

more definitional certainty to *those offenses already existing under the law of nations* at the time it legislated." Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 141 (2007) (emphasis added).

(6) Similarly, Congress cannot use its "define and punish" power to simply label any existing crime an offense against the law of nations: "Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by Congress." *United States v. Arjona*, 120 U.S. 479, 488 (1887). In *United States v. Furlong*, 18 U.S. (5 Wheat) 184 (1820), the Supreme Court rejected Congress's attempt to assert jurisdiction over certain acts of murder simply by describing them as violations of the law of nations. Whether there is sufficient evidence to establish an offense as a violation of the law of nations is ultimately a judicial question that must be answered in relation to recognized sources of international law; the "define and punish" power does not confer upon Congress the unilateral authority to make such a determination. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") (emphasis added). Congress's attempt in the MCA to "say what the law is" violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

(7) Accordingly, the fact that Congress may have—four years after the fact—declared terrorism to be a violation of the law of war at the time of the charged conduct is irrelevant, because the judiciary has an independent obligation to determine the content of the law of war based on international law sources. Those sources simply do not support the government's claim that terrorism and conspiracy to commit terrorism are offenses against the law of war.

c. The MCA Cannot Be Retroactively Applied to Mr. Khadr's Case

(1) Because Congress cannot conclusively determine the state of international law at the time of Mr. Khadr's alleged offenses, and because international law did not proscribe terrorism or conspiracy to commit terrorism at that time, this commission has jurisdiction only if the MCA—which was not passed until four years *after* Mr. Khadr's alleged offenses—can be applied in this case. But retroactively applying the MCA to Mr. Khadr would violate both U.S. and international law prohibitions on *ex post facto* legislation.

(2) Initially, as noted above, and as explained in detail in Mr. Khadr's opening brief, the best interpretation of the MCA is that it is not intended to apply retroactively. Accordingly, applying standard principles of statutory interpretation and constitutional avoidance, this commission should read the MCA's terrorism offense as applying only to conduct that occurred after the enactment of the MCA.

(3) In any event, the MCA could not be applied retroactively because doing so would violate the *Ex Post Facto* Clause of the U.S. Constitution and international law. In an effort to evade the constitutional prohibition on *ex post facto* legislation, the prosecution argues that the

Constitution "does not apply to aliens held outside the United States, including those held at Guantanamo Bay, such as Khadr." (Govt. Resp. at 15.) But the *Ex Post Facto* Clause is a structural limitation on congressional power. *Weaver v. Graham*, 450 U.S. 24, 29, 29 n.10 (1981) (the *Ex Post Facto* Clause acts as a restriction on congressional power "by restraining arbitrary and potentially vindictive legislation," and "confin[es] the legislature to penal decisions with prospective effect"). It governs Congress's conduct regardless of whether the individuals adversely affected have independent legal rights under the Constitution. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description."); *see also Weaver*, 450 U.S. at 29-30 ("The presence or absence of an affirmative, enforceable right is not relevant . . . to the *ex post facto* prohibition."). Even the previous military commission system recognized that individuals could not be tried with offenses that did not exist when they were allegedly committed. MCI No. 2 ¶ 3(A) ("No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question."). Accordingly, the *Ex Post Facto* Clause prohibits the retroactive application of the MCA regardless of where the individuals affected by it are detained.

(4) But even assuming, *arguendo*, that the *Ex Post Facto* Clause only applies to those persons detained within the territorial jurisdiction of the United States, it would still apply in this case because the Supreme Court has recognized that Guantanamo Bay is within the "territorial jurisdiction" of the United States. *See Rasul v. Bush*, 542 U.S. 466, 480 (2004) (interpreting habeas statute); *see also id.* ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base.") (citing the terms of the 1903 lease agreement); *id.* at 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . ."); *id.* ("From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it.") (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950).

(5) The government next argues that there is no *ex post facto* violation because Mr. Khadr could have foreseen the consequences of his conduct in 2002 because the President issued Military Commission Order No. 1 on November 13, 2001. (Govt. Resp. at 15-16.) Setting aside the fact that *Hamdan* found the order to be illegal, the President's order did not purport to criminalize any of the alleged conduct. And Military Commission Instruction No. 2, purporting to list offenses triable by military commission, was not issued until April 30, 2003. In any event, while lack of fair notice is a concern of the Ex Post Facto Clause, it is not necessary to find an *ex post facto* violation.

(6) In an effort to limit the reach of the Constitution's prohibition on *ex post facto* legislation, the prosecution relies heavily on the D.C. Circuit's opinion in *Boumediene v. Bush*, 476 F.3d 981 (2007), currently on review at the Supreme Court. While the prosecution argues that *Boumediene* "unambiguously holds that the Constitution does not apply to alien enemy combatants held" at Guantanamo, (Govt. Resp. at 8), *Boumediene* did no such thing. *Boumediene* was concerned solely with the Suspension Clause of the Constitution, and did *not* address the applicability of the *Ex Post Facto* Clause to Guantanamo detainees. To the extent *Boumediene* may have suggested that other constitutional provisions do not apply at Guantanamo, it did so only by dismissing the significance of the Supreme Court's recent

precedent in *Rasul*. *See Boumediene*, 476 F.3d at 991 n.10 (concluding that *Rasul*, "resting as it did on statutory interpretation, . . . could not possibly have affected the constitutional holding of" *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950), which held that constitutional protections extend to aliens "within [the courts'] territorial jurisdiction"). In rejecting the Supreme Court's conclusion that aliens at Guantanamo are within the "territorial jurisdiction" of the United States, the D.C. Circuit unnecessarily manufactured a tension between *Eisentrager* and *Rasul*. It is far more natural to read *Eisentrager* as setting out the standard for the extraterritorial application of constitutional rights and *Rasul* as recognizing that Guantanamo satisfies that standard.

(7) Moreover, the holding of *Boumediene* has already been called into question—first by the Supreme Court's grant of certiorari and second by the D.C. Circuit's own decision to recall the mandate it had previously issued. Under the Federal Rules of Appellate Procedure, an appellate decision "is not final until issuance of the mandate." Advisory Committee Notes, subdivision (c), Fed. R. App. P. 41. Numerous judges have recognized that "the Court of Appeals' withdrawal of the mandate in *Boumediene*," when considered along with "the Supreme Court's highly unusual grant of certiorari on rehearing," casts "a deep shadow of uncertainty over the jurisdictional ruling of that decision." *Alhami v. Bush*, No. 05-359, at 6 (GK) (D.D.C. Oct. 2, 2007); *see also Al-Oshan v. Bush*, No. 05-0520, at 6 n.2 (RMU) (D.D.C. Oct. 5, 3007) (noting that "the extraordinary procedural dispositions in *Boumediene* 'cast a deep shadow of uncertainty'" over the D.C. Circuit's jurisdictional ruling).

(8) Given the considerable uncertainty surrounding *Boumediene*, if this Commission were to find that the D.C. Circuit's opinion is necessary to the resolution of this case, it should stay these proceedings until the Supreme Court reaches a decision. Several D.C. district court judges have stayed their proceedings and refused to rule on Government motions to dismiss detainee habeas petitions in light of the considerable uncertainty surrounding *Boumediene*. *See Maqaleh v. Gates*, No. 06-1669 (JDB) (D.D.C. July 18, 2007); *Al-Oshan v. Bush*, No. 05-0520 (RMU) (D.D.C. Oct. 5, 3007); *cf. Alhami v. Bush*, No. 05-359 (GK) (D.D.C. Oct. 2, 2007).

(9) Alternatively, if this Court should decide that it can now reach the merits of the *Ex Post Facto* issue, it should determine that applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause. Indeed, the Government's throwaway claim that summary execution is the proper baseline for determining the extent to which application of the MCA disadvantages Mr. Khadr implicitly reflects a recognition that the MCA, when compared against the proper baseline, violates the prohibitions of the *Ex Post Facto* Clause. (Govt. Resp. at 16). Only such an absurd baseline would make the MCA look good in comparison.

(10) In short, trying Mr. Khadr for conspiracy to commit terrorism violates the *Ex Post Facto* Clause because it makes criminal an action that "was innocent when done before the passing of the law . . . , criminal, and punishes such action." *Calder v. Bull*, 3 U.S. 386, 390-91 (1798); *see also Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (Congress cannot retroactively change the "criminal quality attributable to an act").

d. Conclusion

(1) Military commissions have long been defined, in large part, by their limited jurisdiction. Neither U.S. nor international law recognized terrorism or conspiracy to commit terrorism as part of the narrow category of crimes triable by military commission at the time the charged conduct in this case is alleged to have occurred.

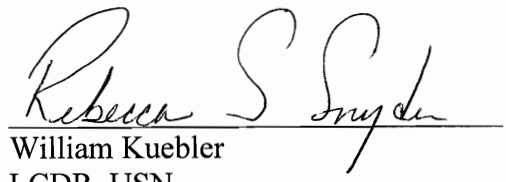
(2) Unable to meaningfully contest that point, the prosecution attempts to base this Commission's jurisdiction on the MCA, arguing that the MCA can conclusively establish that international law did proscribe terrorism at the time of the charged conduct or that its determination terrorism is triable by military commission as a matter of U.S. law can be retroactively applied to Mr. Khadr. Both arguments are without merit. The Congress cannot dictate the content of international law, and it certainly cannot do so retroactively. Nor can it retroactively make terrorism or conspiracy to commit terrorism triable by military commission as a matter of U.S. law because to do so would violate the structural limitations on Congress's power imposed by the *Ex Post Facto* Clause.

(3) Accordingly, military commissions do not have jurisdiction to try Mr. Khadr for conspiracy to commit terrorism. Thus, terrorism should be struck as an object of the conspiracy alleged in Charge III.

5. **Witnesses and Evidence:** Schmitt Affidavit.[8]

6. **Attachment:**

A. Schmitt Affidavit



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[8] The defense is citing this affidavit for no other proposition than the one mentioned in the text on page 3 of this Reply.

AFFIDAVIT

I am **Michael N. Schmitt**, Professor of International Law and Director of the Program in Advanced Security Studies at the George C. Marshall European Center for Security Studies, a US-German educational institution sponsored jointly by the Department of Defense and German Ministry of Defense. A retired USAF Judge Advocate who has served on the faculties of the United States Air Force Academy and the United States Naval War College, my publications include over 60 articles and edited books, the vast majority dealing with international law, in particular the law of armed conflict. Professional affiliations include the Lieber Society of the American Society of International Law (Member, Executive Board), the International Law Association, and the International Society for Military Law and the Law of War. In 2002, I was elected a Member of the International Institute of Humanitarian Law, and I currently serve on the Steering Committee of Harvard's International Humanitarian Law Research Initiative and on the Board of Editors of the International Review of the Red Cross. I have been involved as an "International Expert" in numerous projects seeking to clarify the law of armed conflict. Currently, I am participating in such projects with regard to non-international armed conflict (Institute of Humanitarian Law), aerial warfare (Harvard), and participation by civilians in hostilities (International Committee of the Red Cross). My academic degrees include an LL.M from Yale Law School, a JD from the University of Texas, an MA in National Security and Strategic Studies from the Naval War College, and an MA and BA from Texas State University.

I have been asked to comment on law of armed conflict (a term synonymous with "law of war" and "humanitarian law") issues related to the case of Mr. David Matthews Hicks.

Sources of International Law

1. The accepted sources of international law are set forth in Article 38 of the Statute to the International Court of Justice:

   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law; [and]
   c. the general principles of law recognized by civilized nations.[1]

As the law of armed conflict is a sub-category of international law, it is derived from such sources.

2. Conventions formally bind only parties thereto. However, certain provisions of various law of armed conflict conventions are characterized as also reflecting customary law, and are thereby binding even on non-Parties. For instance, the United States views much of the 1977 Additional Protocol I to the 1949 Geneva Conventions, to which it is

[1] Statute of the International Court of Justice, art. 38.1(a-c) [ICJ Statute].

not a Party, as accurately restating the customary international law of armed conflict. Customary international law of armed conflict emerges from "the practice of military and naval forces" during armed conflict. "When such practice attains a degree of regularity and is accompanied by the general conviction among nations that behavior in conformity with the practice is obligatory, it can be said to have become a rule of customary law binding on all nations."[2]

3. War crimes (in international armed conflict) derive from either treaties or customary law (or both); they consist of "grave breaches of the Geneva Conventions of 12 August 1949" and "other serious violations of the law and customs applicable in international armed conflict, within the established framework of international law."[3] The application of the law of armed conflict is further informed by "general principles of law recognized by civilized nations."[4] For instance, Part 3 of the Statute of the International Criminal Court sets forth such general principles of criminal law as *nullum crimen sine lege*[5] and the accepted grounds for individual criminal responsibility.[6]

4. Article 38 goes on to note that "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are "subsidiary means for the determination of rules of law."[7] Thus, in international law, judicial decisions are persuasive, not binding, authority used in identification and interpretation of law. The written works of publicists (scholars) are also referred to for the same purposes.

Commencement of an Armed Conflict

5. The law of armed conflict only applies during times of "armed conflict." This term has replaced "war" as the legal term of art referring to hostilities. Thus, phrases such as "state of war" are *descriptive* (factual), not *juridical* (legal), in nature.

6. There are two categories of armed conflicts, *international* and *non-international* (internal). Since different parts of the law of armed conflict apply to each, it is essential to distinguish between the two. For instance, the laws regarding detention of combatants during an international armed conflict contained in the Third Geneva Convention do not apply during a non-international armed conflict. On the contrary, human rights law governs detention much more prominently during such conflicts. In any event, as

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[2] United States Navy, The Commander's Handbook on the Law of Naval Operations (NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.1), October 1995, para. 5.41. The Handbook is the "law of war manual" for the United States Navy, Marine Corps, and Coast Guard.

[3] Statute of the International Criminal Court, art. 8.2(a-b).

[4] Statute of the International Court of Justice, art. 38(c). Such principles must be accepted by the community of nations. Thus, a principle of criminal culpability such as conspiracy would not be a general principle of law because it is not used in civil law countries (see discussion below).

[5] No crime without a law authorizing it. In other words, an individual may not be held criminally except for crimes over which the court has jurisdiction.

[6] Statute of the International Criminal Court, art. 25.

[7] ICJ Statute, art. 38.1(d)

explained below, no armed conflict of either sort began in Afghanistan until October 7, 2001. Moreover, none of the specific offenses charged against Mr. Hicks appears, as such, in either the law of international armed conflict or the law of non-international armed conflict.

A. International Armed Conflict

7. International armed conflict requires a conflict between States (non-State actors can be involved, but there must be at least one State on either side). The widely accepted definition of war (which today is called an "international armed conflict" in international law) is that proposed in the classic treatise, *Oppenheim's International Law*: "War is a contention *between two or more States* through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases."[8] In the context of the "global war on terror," the most significant of the constituent elements comprising this definition of international armed conflict is that requiring conflict between two or more sovereign States. This requirement is well established in mainstream international law.[9]

8. The requirement that States be on either side of the battlefield is included in each of the five core instruments setting forth the law of international armed conflict – the four 1949 Geneva Conventions and the 1977 Protocol Additional I to those instruments. Article 2 common to each of the Geneva Conventions provides that they apply, aside from several provisions that specifically pertain in peacetime, "to all cases of declared war or of any other armed conflict *which may arise between two or more of the High Contracting Parties*, even if the state of war is not recognized by one of them." The 1977 Protocol Additional I, which like the Conventions pertains to international armed conflict, adopts the same "armed conflict" standard.[10]

9. The Official Commentaries to these instruments, although not an express source of law themselves, further confirm the prerequisite of State participation in hostilities before they can be characterized as an international armed conflict. Those on the Geneva Conventions define armed conflict as "[a]ny difference arising *between two States* and leading to the intervention of armed forces… even if one of the Parties denies the existence of a state of war."[11] Similarly, the Commentary to Additional Protocol I

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[8] OPPENHEIM, II INTERNATIONAL LAW 202 (Hersch Lauterpacht ed., 7th ed. 1952).

[9] Indeed, as Professor Yoram Dinstein has authoritatively commented, "[o]f the four ingredients in Oppenheim's definition of war, only the first can be accepted with no demur." YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENSE 5 (3d ed. 2001).

[10] Article 1.

[11] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 32-33 (Jean Pictet ed. 1952) [hereinafter GC I Commentary].

specifies that "humanitarian law… covers any dispute *between two States* involving the use of their armed forces."[12]

10. Case law is supportive. For instance, the International Criminal Tribunal for the Former Yugoslavia held in the *Tadic* case that an international armed conflict "exists whenever there is a resort to armed force *between States*."[13] The Appeals Chamber subsequently confirmed this position in its judgment: "It is indisputable that an armed conflict is international if it takes place between two or more States."[14] Finally, there is broad consensus among international law scholars that State involvement on both sides of a conflict is a *sine qua non* of international armed conflict This requirement certainly reflects customary international law.

11. Applying this law to the circumstances of this case, an international armed conflict only began on October 7, 2001, the date Coalition forces commenced military operations against Afghanistan. Those operations were legal as an exercise of the right of self-defense (see discussion below), a right that had existed before October 7th (and in my view well before that date given al Qaeda attacks against US targets stretching back nearly a decade). But it was only on October 7th that the law of armed conflict became operative because it was only then that the armed forces of one State engaged those of another.

12. In my opinion, the international armed conflict in Afghanistan became a *non*-international armed conflict (see below) no later than June 2002, when the Transitional Authority under President Harmid Karzai was created following conclusion of the Emergency Loya Jirga. The Security Council, including the United States, formally recognized the legitimacy of this government in Resolution 1419 of 26 June 2002.[15] Since there are no longer States on either side of the conflict, the continued hostilities in Afghanistan can no longer be characterized as an international armed conflict.

13. Sometimes, the concept of *international armed conflict* is confused with that of *self-defense*, an inherent right of States in international law, recognized in Article 51 of the

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[12] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds. 1987), at para. 62.

[13] ICTY, Appeals Chamber, (decision on the defence motions for interlocutory appeal on jurisdiction), *Tadic*, IT-94-1-AR72, para. 70.

[14] ICTY, Appeals Chamber, Judgment, *Tadic*, IT-94-1-A, para. 84.

[15] Arguably, the conflict became non-international during the period of the Afghan Interim Authority because the conflict had become internalized, with Coalition forces serving to assist the Interim Authority. See, e.g., UNSC Res. 1386 (December 2001) (regarding ISAF operations in Afghanistan and recognizing that "the responsibility for providing security and law and order throughout the country resides with the Afghans themselves"). See also UNSC Res. 1413 (May 2002) which also confirmed that the Afghan people bore responsibility for security in the country. But in any event, by June 2002, the conflict in Iraq had become internal.

United Nations Charter.[16] It is essential that the difference between the two be understood clearly. In the aftermath of the September 11 terrorist attacks, there is no question that the right of self-defense extends to armed attacks committed by non-State actors, such as terrorists.[17] That this is an accepted interpretation of Article 51 is evidenced by the many offers of collective defense (assistance to the United States in defending itself from terrorists) from individual States and from security organizations such as NATO, as well as a string of UN Security Council resolutions either directly citing the right of self-defense with regards to the attacks, or reaffirming earlier resolutions that did so.[18]

14. But one must be careful not to read too much into those acts and documents. They are relevant to the existence of the right to *self-defense*, not an *international armed conflict*. Similarly, the Authorization to use Military Force passed by Congress a week after the attacks was entirely consistent with the exercise by the United States of its right to *self-defense*; it has however, it does not establish the existence of an *international armed conflict* such that the law of armed conflict began to apply.[19] Suggestions to the contrary confuse these two very distinct legal concepts.

15. Of course, at times the concepts of self defense and international armed conflict are related. For instance, an armed attack by State A on State B clearly triggers the right to self-defense and, *because two States are involved*, the law of international armed conflict. Yet if a non-State actor mounts the attack, the law of armed conflict is *not* activated, even though the right to self-defense using military force matures. In such cases, other aspects of domestic and international law become operative (most notably, human rights law and the domestic criminal law of the victim State).

16. Finally, it has been suggested that certain statements by US government officials and other Coalition leaders constitute a "declaration of war" on al Qaeda. In some cases, a

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[16] "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." UN Charter, art. 51.

[17] Michael N. Schmitt, *Bellum Americanum Revisited: U.S. Security Strategy and the Jus ad Bellum*, 176 MILITARY LAW REVIEW 364-421 (2003), 16th Annual Waldemar A. Solf Lecture, U.S. Army Judge Advocate General's School.

[18] Most significantly, Resolution 1368 was issued the very day after the attacks. In preambular language, it specifically reaffirmed the "inherent right of self-defense as recognized by the Charter of the United Nations." Two weeks later, the Council did so again in Resolution 1373. Both resolutions came at a time when no one was pointing to the possibility that the attacks might have been the work of a State. Both were reaffirmed in multiple subsequent resolutions, including resolutions adopted after the Coalition operations began on October 7th.

[19] Authorization to Use Military Force, 115 Stat. 224.

"declaration of war" may indeed create a state of international armed conflict. None of the pronouncements made by President Bush or other Coalition leaders would qualify as such. This is because it is meaningless as a matter of law to "declare war" (technically international armed conflict) on an entity that cannot be the other Party in an international armed conflict. Hostilities with a non-State actor, absent related hostilities with a State, cannot trigger international armed conflict.

B. Non-international Armed Conflict

17. Non-international armed conflict is a legal term of art referring to armed conflicts that are internal in nature. The laws of non-international armed conflict (a component of the "law of armed conflict") are set forth in the Common Article 3 to the 1949 Geneva Conventions, the 1977 Protocol Additional II to the Geneva Conventions (the United States is not a Party to this treaty), and customary international law (the content of customary law in a non-international armed conflict is a matter of some controversy). Even if a non-international armed conflict continues in Afghanistan, it is only this component of international law, not the law of *international* armed conflict that applies. Because the two types of conflict implicate different bodies of law, it is essential to distinguish between them. As noted above, none of the offenses charged against Mr. Hicks, as such, are war crimes under the law of non-international armed conflict. Indeed, the law of non-international armed conflict is much less developed than the law of international armed conflict. For this reason, prosecution for acts committed during a non-international armed conflict generally occurs in domestic courts applying domestic law.

18. At least as important, prior to October 7, 2001, there was not a non-international armed conflict involving the United States in Afghanistan, just as there was no international armed conflict. Suggestion that the attacks of September 11th *began a non-*international armed conflict between the United States and the al Qaeda terrorist organization (and that the law of non-international armed conflict was thereby activated) are simply wrong. The vast majority of legal scholars are in accord on this issue. Common Article 3 to the Geneva Conventions, considered the lowest threshold for non-international armed conflict (Protocol Additional II add criteria), refers to "cases of non-international armed conflict occurring in the territory of one of the High Contracting Parties." The Official Commentary makes clear that non-international armed conflict involves an *intra*-State conflict by suggesting the following criterion when ascertaining whether a conflict is non-international: "That the party in revolt against the *de jure* government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having means of respecting and ensuring respect for the Convention."[20]

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[20] GC I Commentary at 49.

19. Case law supports this interpretation. For instance, the International Criminal Tribunal for Rwanda, a Tribunal dealing exclusively with such conflicts, in the case of *Akayesu* and citing with approval the decision of the Appeals Chamber in the ICTY case of *Tadic*, stated that "an armed conflict exists whenever there is [...] *protracted violence* between *governmental authorities and organized armed groups* or between such groups within a State."[21] In *Rutaganda*, the same tribunal noted that "[C]onflicts referred to in Common Article 3 are armed conflicts with *armed forces* on either side engaged in hostilities: conflicts, in short, which are in many respects similar to an international conflict, but takes place *within the confines of a single country*."[22] And in *Musema*, it stated that "The expression 'armed conflicts' introduces a material criterion: the existence of *open hostilities between armed forces which are organized* to a greater or lesser degree. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a *single* State."[23] The International Criminal Court Statute, in a provision to which the United States does not object, takes the same approach.[24]

20. It is clear that a transnational terrorist organization operating from scores of countries, with a membership of many nationalities, loosely organized, having lawlessness as it purpose, and attacking States, organizations, and individuals scattered across the globe is not the type of armed group meant in the law of non-international armed conflict.

21. In sum, terms such as "the war on terror" are effective and useful rhetorical devices to mobilize the American people and the nation's resources, and to strengthen our resolve in the face of transnational terrorism. But the term "war" is being used in a lay, not legal, sense, in the same manner as "War on Poverty," "War on Drugs," and so forth. War is an issue of fact and law, not pronouncements. No armed conflict began until October 7, 2001, and the international armed conflict between the United States and Afghanistan had ended by June 2002. Al Qaeda attacks proceeding October 7, 2001, and any post-

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[21] See ICTR, *Akayesu*, (Trial Chamber), September 2, 1998, paras. 619-621, 625.

[22] ICTR, *Rutaganda*, (Trial Chamber), December 6, 1999, para. 170.

[23] ICTR, *Musema* (Trial Chamber), January 27, 2000, paras. 247-248.

[24] Statute of the International Criminal Court, art. 8.2(f).

[25] Michael N. Schmitt, *Bellum Americanum Revisited: U.S. Security Strategy and the Jus ad Bellum*, 176 MILITARY LAW REVIEW 364-421 (2003), 16th Annual Waldemar A. Solf Lecture, U.S. Army Judge Advocate General's School.

[26] Most significantly, Resolution 1368 was issued the very day after the attacks. In preambular language, it specifically reaffirmed the "inherent right of self-defense as recognized by the Charter of the United Nations." Two weeks later, the Council did so again in Resolution 1373.67 Both resolutions came at a time when no one was pointing to the possibility that the attacks might have been the work of a State. Both were reaffirmed in multiple subsequent resolutions, including resolutions adopted after the Coalition operations began on October 7th.

[27] Authorization to Use Military Force, 115 Stat. 224.

October 7 actions without a clear direct link to the armed conflict in Afghanistan, constituted neither an international, nor non-international, armed conflict.

The Charges

A. Conspiracy

22. Charge 1 against the accused is the inchoate offense of conspiracy. In international criminal law, however, conspiracy is neither an inchoate offense, nor the basis for individual criminal responsibility for a separate war crime. There are but two exceptions: crimes against peace (aggression) and genocide, neither of which constitutes a war crime per se. The limited acceptance of conspiracy derives from the fact that most civil law countries (e.g., continental European in contrast to common law jurisdictions such as the United States and United Kingdom) do not recognize the offense in their domestic criminal law systems.[28] Instead, they focus on complicity, or participation, in an actual crime or attempt.[29] Thus, any attempt to support the existence of a crime of conspiracy through reference to common law cases is misleading. On the contrary, the very fact that the offence is recognized in common law jurisdictions, but not in civil law systems, supports its non-inclusion in international criminal law. Note that I am describing the law of armed conflict as it exists in contemporary practice; to the extent such an offence existed historically, it has long since faded away.

23. Application of conspiracy to international crimes occurred most prominently in the war crimes trials following the Second World War. Inclusion of the notion of conspiracy in the Charters of the various tribunals resulted from US influence during the drafting processes.[30] Article 6 of the Nuremberg Charter (1945) set forth the three crimes within the jurisdiction of the International Military Tribunal (IMT): crimes against peace, crimes against humanity, and war crimes.[31] The term "conspiracy" appeared only in the definition of the first: "…planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or *conspiracy* for the accomplishment of the foregoing." Although a non-specific reference to conspiracy was also contained in the article ("*conspiracy* to commit *any* of the foregoing crimes"), the Tribunal limited application to crimes against peace. Of the 22 defendants, each was charged with conspiracy to commit crimes of peace; eight were convicted of the offence.[32]

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[28] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 191 (2003).

[29] WILLIAM A. SHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 103 (2nd ed. 2004).

[30] CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 8 (2003).

[31] The principles set out in the Nuremberg Charter were confirmed as principles of international law by the U.N. General Assembly on December 11, 1946. Resolution Affirming the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), U.N. Doc. A/236 (1946).

[32] None were convicted on the conspiracy charge alone.

24. Although the IMT captured the greater attention, most of the war crimes trials held after the war were conducted by the individual allies pursuant to Allied Control Council Law No. 10 (1945). That instrument, in Article II (d), only mentioned conspiracy *per se* with regard to crimes against peace.

25. By contrast, the Charter of the International Military Tribunal for the Far East (1946), in Article 5, followed the Nuremberg precedent in citing conspiracy vis-à-vis crimes against peace (Article 5a), but also included conspiracy in the definition of crimes against humanity (Article 5c). It contained no offense of conspiring to commit war crimes.[33]

26. Despite the explicit references to conspiracy in the three aforementioned instruments, and resulting convictions, subsequent international criminal law conventions have not included conspiracy to commit such crimes.[34] A sole exception in the context of armed conflict is conspiracy to commit genocide. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article III (b), renders "conspiracy to commit genocide" punishable. Other international instruments addressing criminal conduct during armed conflict incorporate the notion of conspiracy only with regard to genocide. The Statutes of the International Tribunal for the Former Yugoslavia (1993) (Article 4.3) and the International Tribunal for Rwanda (1994) (Article 2.3), for instance, both criminalize conspiracy to commit genocide as an inchoate offense, using precisely the same verbiage as the Genocide Convention. Indeed, the ICTR has issued numerous judgments dealing with the offense.[35] It should be noted that the Statute of the International Criminal Court (1998) does not follow the lead of its *ad hoc* counterparts, as it makes no reference to conspiracy at all. On the contrary, initial efforts to address conspiracy in the Statute were rejected on the basis that it does not represent a generally accepted principle of law. Thus, it is clear that modern international criminal law practice restricts the offense of conspiracy to cases of genocide, the most egregious international crime.

27. I would further note that of the underlying crimes that Mr. Hicks is alleged to have conspired to commit, only attacking civilians and civilian objects are war crimes *per se*. Murder by an unprivileged belligerent (see below), destruction of property by an

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[33] Of the 25 defendants convicted by the IMTFE, 23 were found guilty of conspiracy to wage a war of aggression. Again, this offense is a "crime against peace," not a war crime, and does not bear on this case.

[34] On the contrary, disagreement over the scope of even the *underlying* crime of aggression has precluded its inclusion in relevant instruments, with the exception of the Statute of the International Criminal Court, Art. 5.1(d). However, jurisdiction will only exist once the crime has been defined for the purposes of the Statute, something that is highly unlikely in the foreseeable future. *Id.*, art. 5.2.

[35] See, e.g., ICTR, *Musema,* (Trial Chamber), January 27, 2000; *Ntakirutimana and Ntakirutimana,* (Trial Chamber), February 21, 2003; *Niyitegeka,* (Trial Chamber), May 16, 2003; *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003; *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003.

unprivileged belligerent, and terrorism are *not* war crimes *as such* under the law of armed conflict.[36]

28. Since terrorism forms such an integral part of the case against Mr. Hicks, it is important to emphasize that an offense of terrorism, as it is generally understood in common parlance (characterized as having some political purpose or aspect), does not appear in the law of armed conflict. Rather, in the law of armed conflict, the term "terror" refers only to acts that have the specific intent to intimidate the population *in the context of an ongoing armed conflict*. Most significantly, Article 33 of the Fourth Geneva Convention provides that "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited." The Official Commentary indicates that this article refers to "resorting to intimidatory measures to terrorize the population" in the hope of preventing hostile acts by them.[38] Since the Fourth Geneva Convention applies only to situations of occupation, the intent is to preclude acts by the occupying force intended to cow the civilian population into submission. It, in no way, is meant to address acts of political terrorism such as those committed by al Qaeda.

29. The prohibition also appears in both Additional Protocols to the Geneva Conventions. Article 51(2) of Protocol I provides that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." In the context of non-international armed conflict, Articles 4 and 13 set forth essentially the same prohibitions. The United States is a Party to neither of these treaties. But this point aside, the intent is, again, to encompass acts specifically intended to intimidate the population during an ongoing armed conflict, not acts intended to alter government positions or otherwise reflective of a "political" purpose.

30. Case law, albeit limited, is in accord with this position. Most significant in this regard is the judgment of the International Criminal Tribunal for the Former Yugoslavia in the *Galic* case, which has been *wrongly cited* as support for the existence of a war crime of terrorism in the law of armed conflict.[39] On the contrary, the Tribunal specifically *declined* to consider "political" terrorism, that is, the type of terrorism engaged in by al Qaeda.[40]

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[36] The labeled "crimes" potentially could encompass conduct that is in fact criminal. For instance, intentional destruction of civilian property is a war crime if it does not have a valid military objective, but whether the act was done by a lawful or unlawful combatant would be irrelevant.

[37] Military Commission Order No. 2, para. 6B(2).

[38] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION FOR THE RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 226 (Jean Pictet ed. 1958).

[39] ICTY, *Galic*, Judgment, Case No. IT-98-29-T (Dec. 5, 2003).

[40] The charge against General Galic was "unlawfully inflicting terror upon civilians" by commanding troops that indiscriminately shelled and sniped the civilian population of Sarejevo. In its judgment, the Tribunal expressly refused to consider what is commonly understood as terrorism (in, e.g., the September 11th sense). In a footnote, it specifically stated that: As stated in an earlier [sic], the Majority has not

31. To summarize, there is no offense of "terrorism" in the law of armed conflict with regard to acts with a political purpose. Although such acts may in fact frighten the civilian population, political terrorism as such (e.g., the 1998 attacks against the two US embassies in East Africa, the 2000 attack on the USS Cole, the attacks of September 11th) is absent from the law of armed conflict.

32. In any event, regardless of the status of the underlying offenses that Mr. Hicks is alleged to have conspired to commit, there can be no doubt that conspiracy itself is not a crime under the law of armed conflict.

B. Attempted Murder by an Unprivileged Belligerent

33. The offense of murder by an unprivileged belligerent alleged in Charge 2 is likewise absent from the law of armed conflict, although the underlying conduct thereto could constitute an offense if the victim was either a civilian who had not lost his or her immunity from attack (through direct participation in hostilities)[43] or a combatant protected under the law of armed conflict, such as those who have surrendered or are otherwise *hors de combat*. However, in such cases, the status of the individual committing the act (assuming a nexus to the armed conflict) would be irrelevant; both military and civilian personnel can commit war crimes. Rather, it is the status of the *victim* as protected by the law of armed conflict that matters.

34. The specific conduct alleged is that Mr. Hicks attempted to murder combatants, i.e., "American, British, Canadian, Australian, Afghan, and other Coalition forces." Under the law of armed conflict, *combatants* enjoy no general protection from attack.[44] Rather, they are only protected from attack when they are *hors de combat* because they have surrendered,[45] are sick or wounded and not carrying on the fight,[46] are shipwrecked,[47] or

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considered it necessary to enter into discussion of "political" terrorist violence and of attempts to regulate it through international conventions." Id at fn. 222.

[42] *Id.* at fn 222.

[43] *See* Additional Protocol I, art. 51, which is accepted as customary law by the United States [hereinafter PI].

[44] No treaty (including the Statutes governing international courts such as the International Criminal Court, International Criminal Tribunal for the Former Yugoslavia, and International Criminal Tribunal for Rwanda) suggests that targeting a combatant is unlawful absent the special circumstances set forth.

[45] Regulations Annexed to the 1907 Hague Convention IV Respecting the laws and Customs of War on Land, art. 23 [HIVR]; PI, art. 41.

[46] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 12 [GCI]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949 [GCII], art. 12; PI, arts. 10, 42.

have parachuted from a disabled aircraft.[48] They are also immune from attack when serving as *parlementaires* conducting negotiations with the enemy,[49] or as medical or religious personnel.[50] It should be noted that certain types of attacks on a combatant are wrongful not because of the victim's status, but rather because an unlawful method or means of warfare was employed. For instance, a general prohibition on using methods or means of warfare resulting in unnecessary suffering or superfluous injury exists,[51] as do restrictions on specific weapons (such as poison or blinding lasers[52]) and perfidious attacks.[53] If Mr. Hicks engaged in such activities, and they resulted in the death of a member of the Coalition forces, he would be guilty of a war crime. However, Charge II fails to allege any circumstances that, under the law of armed conflict, would render attack on combatants wrongful.

35. This being so, perhaps the reference to "unprivileged belligerent" in Charge 2 (it does not appear as such on its face) was meant to suggest that merely participating in an armed conflict without enjoying combatant status is a violation of the law of armed conflict. If so, such a position is incorrect as a matter of law.

36. There is but one law of armed conflict consequences of direct participation in an armed conflict. Civilians who "take a direct part in hostilities" lose the protection from attack they would otherwise enjoy pursuant to the law of armed conflict.[54] Thus, it is not a violation of the law of armed conflict for combatants to use force against civilians for such time as those civilians engage in hostile action.

37. However, because the unprivileged belligerent does not have combatant status (he remains a civilian), he or she does not enjoy the law of armed conflict immunity from prosecution for murder that a combatant has when killing either an enemy combatant or a civilian directly participating in the hostilities. This immunity from prosecution (together with prisoner of war entitlement) is the seminal benefit of lawful combatancy.

38. Absent such immunity, the unprivileged belligerent who kills a combatant is subject to prosecution for murder pursuant to the domestic law of States with subject matter jurisdiction over the offense and personal jurisdiction over the accused. There being no such crime under the law of armed conflict, domestic law offers the sole basis for

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[47] GC II, art . 12, PI, art. 10.

[48] PI, art. 42.

[49] HIVR, art. 32.

[50] GCI, art. 24, 25; PI, art. 15. Note that by Protocol Additional I, art. 43, these individuals are not combatants.

[51] St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 1868; HIVR art 23; PI, art. 35.

[52] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 1980.

[53] HIVR, art. 23; PI, art. 37.

[54] PI, art 51.3.

prosecution. Although the distinction between the war criminal and the unprivileged belligerent (who may also be a war criminal if he violates the law of armed conflict) has at times proven confusing,[55] such a distinction is well-established in the law of armed conflict.[56] Indeed, the United States Army's *Operational Law Handbook*, a key source of guidance on law during military operations, specifically notes:

> [u]nprivileged belligerents may include spies, saboteurs, or civilians who are participating directly in hostilities or who otherwise engage in unauthorized attacks or other combatant acts. Unprivileged belligerents are not entitled to prisoner of war status, and may prosecuted under the domestic law of the captor.[57]

39. Simply put, it is not a violation of the law of armed conflict to kill a combatant, even when the individual doing so lacks the combatant privilege to use force. Neither is mere unprivileged belligerency a war crime.

C. Aiding the Enemy

40. Finally, there is no prohibition in the law of armed conflict on aiding the enemy. In the law of armed conflict, aiding the enemy is nothing more than a form of direct participation in hostilities. Indeed, some forms of "aiding the enemy" would not even rise to the level of direct participation by virtue of not being "direct enough" (insufficient nexus to the conduct of hostilities). Rather, acts amounting to aiding the enemy are treated in precisely the same manner as direct participation by a civilian in hostilities, i.e., the underlying conduct may only be considered by a judicial body to the extent personal and subject-matter jurisdiction lawfully exist in domestic law —unless that conduct amounts separately to a war crime.

41. That this is the appropriate treatment for direct participants is illustrated by the case of spies, who undoubtedly "aid the enemy" and, in many case, are directly participating in hostilities (and who the *Operational Law Handbook* groups with civilian who directly participate). Typical is the decision of the Dutch Special Court of Cassation in the 1949 *Flesche* case, "espionage…is a recognized means of warfare and therefore is neither an international delinquency on the part of the State employing the spy nor a war crime

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[55] See, e.g., *Ex parte Quirin*, 317 US at 32. The Qurin decision has been criticized for its deviation from law of armed conflict principles by several top scholars and practitioners in the field. For instance, W. Hays Parks, the Law of War Chair, Office of the General Counsel, Department of Defense, has noted that "*Quirin* is lacking with respect to some of its law of war scholarship." *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493 (2003), at fn. 31.

[56] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 234 (2004); Richard. R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs*, 1952 BRIT. Y.B. INT'L L. 323, *reprinted in* MIL. L. REV. (Bicentennial Issue) 487 (1975). See also, Derek Jinks, *The Declining Status of POW Status*, 45 HARV. INT'L L.J. 367, 436-439, who takes an even more permissive view of the issue.

[57] U.S. ARMY, JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK (2004), at p. 23.

proper on the part of the individual concerned."[58] Commentators are in accord,[59] as are the military manuals such as those of the U.S. Army[60] and U.K. Forces.[61]

42. In summary, none of the offenses as charged constitutes a war crime under the law of armed conflict.

Michael N. Schmitt
1 November 2004

WITH THE UNITED STATES ARMY IN GARMISCH-PARTENKIRCHEN, GERMANY:

I, [redacted] the undersigned official, do hereby certify that the foregoing affidavit was subscribed and sworn before me this 1st day of November, 2004, by MICHAEL N. SCHMITT, whose home address is Garmisch-Partenkirchen, Germany, and who is known to me to be an individual accompanying, serving with, or employed by the Armed Forces serving outside the United States. I do further certify that I am, at the date of this certificate, a commissioned offficer in the United States Army in the rank or grade stated below, that by statute no seal is required on this certificate, and same is executed by me in that capacity.

[redacted] U.S. Army Judge Advocate General's Corps
Legal Advisor, George C. Marshall Center

Authority: Title 10, United States Code, sections 936 and 1044a, and Army Regulation 27-55.

[58] Flesche (Holland, Special Court of Cassation, 1949) [1949] AD 266, 272 (see Dinstein, Conduct, at 211).

[59] Dinstein, Conduct of Hostilities, at 210, 213; Baxter, generally.

[60] Department of the Army Field Manual 27-10, The Law of Land Warfare, July 1956, para. 77 ("Resort to [espionage] involves no offense against international law").

[61] U.K. Ministry of Defence, The Manual of the Law of Armed Conflict (2004), para. 4.9.7 ("Spies are usually tried by civilian courts under the domestic legislation of the territory in which they are captured").

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	D18 GOVERNMENT'S RESPONSE To the Defense's Motion For Appropriate Relief (Strike Terrorism from Charge III) 22 January 2008

1. Timeliness: This motion is filed within the timelines established by the Military Judge's scheduling order of 18 January 2008.

2. Relief Requested: The Government respectfully submits that the Defense's motion to strike terrorism as an object of the conspiracy alleged in Charge III ("Def. Mot.") should be denied.

3. Overview:

a. Congress has clearly authorized military commission jurisdiction over "terrorism," as that offense is defined in the MCA. Congress has unquestioned authority "To define and punish . . . Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. And "terrorism" is plainly one such "Offense." Indeed, the offense of terrorism is so emphatically prohibited by the law of nations that it is triable by military commission, even in the absence of the MCA.

b. The Ex Post Facto Clause is irrelevant here because (i) binding precedent renders the Constitution inapplicable to the accused, (ii) the underlying conduct for which Khadr is charged was illegal—under both domestic and international law—prior to the passage of the Military Commissions Act of 2006 ("MCA"), and (iii) Khadr cannot conceivably argue that he is in a worse position on account of being forced to stand trial before a military commission. And even if it were true (which it is not) that international law created an ex post facto obligation on the United States, *no one*—including the Defense—has ever suggested that Congress would thereby be prohibited from passing inconsistent legislation.

c. For all of these reasons, the motion for appropriate relief should be denied.

4. Burden and Persuasion: As the moving party, the Defense bears the burdens of proof and persuasion. *See* Rule for Military Commissions ("RMC") 905(c)(2)(A); Military Commission Trial Judiciary ("MCTJ") Rules of Court, Rule 3(7)(a). Notwithstanding the Defense's suggestion to the contrary, its motion is not "jurisdictional in nature." Def. Mot. at 2. Rather, it is a motion to strike a particular charge as a matter of law. Therefore, the burdens of proof and persuasion are on the Defense.

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 DEFINED TERRORISM AS A WAR CRIME, TRIABLE BY MILITARY COMMISSION

i. The Constitution vests Congress with the exclusive authority "[t]o *define* and *punish* . . . Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10 (emphasis added). Exercising

that authority in the MCA, Congress unequivocally defined "terrorism"[1] as an offense triable and punishable by military commission.

a. As the Defense points out in two separate places, *see* Def. Mot. at 3 & 5, "[w]hen . . . neither the elements of the offense nor the range of permissible punishments is **defined by statute** or treaty, the precedent must be plain and unambiguous." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.) (emphasis added). As the Defense twice ignores, however, the offense of terrorism is unequivocally defined by statute. *See* 10 U.S.C. § 950v(b)(24) (authorizing military commissions to try "terrorism" as a substantive offense under the MCA). Congress has thus statutorily "define[d] and punish[ed]" terrorism as an "Offense[] against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. *Hamdan*'s "plain and unambiguous" dictum—along with the Defense's attempts to rely upon it—is therefore unavailing.

b. The MCA creates military commission jurisdiction for "any offense made punishable by this chapter [i.e., 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). Terrorism is undeniably an "offense made punishable by" the MCA,[2] and the facts clearly occurred "before, on, or after September 11, 2001." And just to make clear its intent that the MCA applies to offenses committed "before, on, or after September 11, 2001," Congress also emphasized that the MCA's punitive articles—including its definition of "terrorism"—may apply to "crimes that occurred *before* [October 17, 2006]." 10 U.S.C. § 950p(b) (emphasis added).

c. The Defense's suggestion that "Congress did not intend the MCA to apply retroactively" beggars belief. Def. Mot. at 6. It is a bedrock principle of statutory interpretation that "the plain language of the enacted text is the best indicator of intent." *Nixon v. United States*, 506 U.S. 224, 232 (1993). Here, Congress expressly provided in the MCA's plain text—not once, but ***twice***—that this Court has jurisdiction to try the substantive offense of "terrorism," even when committed prior to the MCA's enactment. It is difficult to imagine what more Congress could have done to express its intent, short of using bold-faced fonts or exclamation points. *Cf. Boumediene v. Bush*, 476 F.3d 981, 987 (D.C. Cir.) ("It is almost as if [Members of Congress] were slamming their fists on the table shouting 'When we say "all," we mean all—**without exception!**'") (emphasis in original), *cert. granted*, 127 S. Ct. 3078 (2007).

ii. All of the Defense's discussion regarding the scope of international law is irrelevant. *See* Def. Mot. at 3-5, 12. Congress has "defined" and "punished" terrorism as a violation of the law of nations. *See* U.S. Const. art. I, § 8, cl. 10; 10 U.S.C. § 950v(b)(24). And that ends the matter.

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[1] The Government has explained in other pleadings in this case that conspiracy is a well-established violation of the law of war. This brief—like the Defense's motion—is limited to the question of whether terrorism is a violation of the law of war, triable by military commission.

[2] As explained below, it is also an offense made punishable under the law of war. *See* pp. 5-14, *infra*.

a. In accordance with the offenses defined in the MCA, the Secretary of Defense promulgated the elements for terrorism, *see* Manual for Military Commissions ("MMC"), at IV-17 to -18 (Jan. 18, 2007).

b. Khadr does not claim that his charge sheet conflicts with the elements set forth in the MMC. Nor does he claim that the MMC conflicts with the MCA.

c. Instead, Khadr inexplicably claims that trying him for conspiracy to commit terrorism before a military commission is impermissible because it would violate *non-binding* principles of U.S. and international law—notwithstanding the fact that Congress expressly legislated that result. That argument is ridiculous, and it must be rejected. *See also* Part 6(C), *infra.*

iii. Because "terrorism" is a substantive offense triable by military commission, conspiracy to commit terrorism is also a substantive offense triable by military commission. *See* 10 U.S.C. § 950v(b)(28) (authorizing military commissions to try anyone "who conspires to commit one or more substantive offenses triable by military commission," including "terrorism"); *see also* MMC at IV-20 (defining the elements for "conspiracy" to commit terrorism).

B. TERRORISM IS A WELL-ESTABLISHED WAR CRIME

i. Congress has expressly defined terrorism as a war crime, triable before a military commission, and that determination must be dispositive. In order for the Military Judge to reach the question of whether terrorism is a well-established war crime beyond the MCA, this Court would have to be the ***first in the history of the United States*** to hold that Congress unconstitutionally "defin[ed]" and "punish[ed]" an "Offense[] against the Law of Nations."

a. *United States v. Furlong*, 18 U.S. (5 Wheat) 184 (1820), is not to the contrary. As an initial matter, *Furlong*'s statements about the outer-reaches of Congress's authority under the Offenses Clause are *dicta*, given that the Court's opinion was based on Congress's intent with respect to a particular statute, rather than the limits of Congress's authority under the Offenses Clause. *See id.* at 198. The Defense can point to no case—ever—holding that Congress exceeded its constitutional powers under the Offenses Clause.

b. In fact, numerous authorities recognize that the Offenses Clause entitles Congress to substantial deference in defining violations of the law of nations:

> [E]ven assuming that the acts described in [18 U.S.C. §§ 2332 & 2332a] are not *widely* regarded as violations of international law, it does not necessarily follow that these provisions exceed Congress's authority under [U.S. Const. art. I, § 8,] Clause 10. Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to "define" such offenses. Hence, provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to *define* offenses against the law of nations. *See United States v. Smith,*

> 18 U.S. (5 Wheat.) 153, 159 (1820) (Story, J.) ("Offenses . . . against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. . . . [T]herefore . . . , there is a peculiar fitness in giving the power to define as well as to punish."); Note, Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 Cornell L. Rev. 599, 611 (1987) ("Congress may define and punish offenses in international law, notwithstanding a lack of consensus as to the nature of the crime in the United States or in the world community.").

United States v. Bin Laden, 92 F. Supp. 2d 189 (S.D.N.Y. 2000) (footnote omitted), *criticized on other grounds by United States v. Gatlin*, 216 F.3d 207, 212 n.6 (2d Cir. 2000); *see also* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L.J. 121, 142 (2007) ("We might assume . . . that Congress, representing the United States' sovereign lawmaking body within the international system, has at least some leeway to aid in the development of the category of international offenses by pushing the envelope beyond where it already is."); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 335 (2001) ("While it might be unclear in some cases whether particular conduct violates international law, courts are likely to afford Congress substantial flexibility in making this determination, given that Congress is expressly given the power to 'define.'").

c. Thus, Congress has significant discretion in the exercise of its constitutional authority "to define and punish . . . Offenses against the Law of Nations." As Joseph Story emphasized in his prized treatise: "Offences against the law of nations are quite [] important, and cannot with any accuracy be said to be completely ascertained, and defined in any public code, recognized by the common consent of nations." Joseph Story, *Commentaries on the Constitution*, § 565, at 407 (R.D. Rotunda & J.E. Nowak eds., 1987). Given the importance and the ambiguity in the law of nations, the Framers intentionally gave Congress the "peculiar . . . power to *define* as well as to punish." *Id.* (emphasis added).[3]

ii. Moreover, the Defense is wrong about the appropriate standard for defining violations of the law of war.

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[3] The "peculiarity" of the Offences Clause bears emphasis; indeed, the power to "define" violations of the law of nations is one of the most sweeping powers given to Congress in Article I, § 8. By giving Congress the power to "define" such violations, the Offenses Clause stands in sharp contrast to other constitutional provisions, such as the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, which nowhere refers to Congress's authority to define the meaning of "Commerce." In addition, what actually is an offense against the law of nations is far closer to an inherently political question, not amenable to judicial review, than whether carrying a gun in a school is a commercial activity. *Compare, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.") (alteration in original) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952)), *with, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995). Accordingly, whatever level of deference is appropriate to Congress's judgments with respect to its interpretations of other constitutional provisions, such as the Commerce Clause, a far greater level of deference is required with respect to Congress's definition of law-of-war violations.

a. In the Defense's view, "[f]or an offense to constitute a violation of the law of war, it must be recognized as an offense against the law of war by 'universal agreement and practice both in this country and internationally.'" Def. Mot. at 3 (quoting the Court's plurality opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006)).

b. But the Defense can point to *no case*—and certainly nothing in the *non-binding* plurality opinion in *Hamdan*[4]—that suggests "universal agreement and practice" is the minimally acceptable standard for defining violations of the law of war. The Court has held that the line between unlawful combatants (like Khadr) and lawful ones is rooted in "universal agreement and practice," *see Ex Parte Quirin*, 317 U.S. 1, 30 (1942), but it has never suggested that *Quirin*'s dictum establishes a floor. To the contrary, as the Defense itself appears to concede, the standard is one of ***general acceptance***. *See* Def. Mot. at 3 (noting the force of the law of war derives from the fact that "'it has been generally accepted as a rule of conduct'") (quoting *The Paquete Habana*, 175 U.S. 677, 711 (1900)). Even the non-binding plurality opinion in *Hamdan* required nothing more than "a substantial showing" that the law of war has "acknowledged" a given offense. *See* 126 S. Ct. at 2780 (plurality). The Defense's suggestions (and selective quotations) to the contrary are belied by the very cases it cites.

iii. But even taking the Defense's motion on its own terms, and even assuming that the MCA somehow does not apply, it is simply untenable to argue that terrorism is not "proscribed by the international law of war," Def. Mot. at 3, as the Defense itself appears to recognize, *see id.* at 4 (conceding that "'terrorism' . . . encompasses a wide range of substantive offenses," which are triable by military commission).[5]

The Geneva & Hague Conventions

iv. Thus, regardless of the appropriate standard for "defin[ing]" violations of the law of nations, there is no question that "terrorism" constitutes such a violation. It is difficult to imagine a crime more offensive to the law of war than, for example, the hijacking of civilian aircraft and the use of those aircraft as weapons to slaughter almost 3,000 innocent civilians. Such an attack plainly violates the text and the principles of both the Geneva Conventions and the Hague

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[4] It should be obvious that any portion of an opinion that commands only a four-Justice plurality is not a binding precedent. *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); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 300 n.7 (D.C. Cir. 2006) (A plurality opinion "is not binding precedent but a 'considered opinion' that 'should be the point of reference for further discussion of the issue.'" (quoting *Texas v. Brown*, 460 U.S. 730, 737 (1983) (opinion of Rehnquist, J.))).

[5] In its reply brief for the motion to dismiss Charge IV (*see* p. 3), the Defense suggests it would be a "logical fallacy"—on par with concluding that "all trees are oaks"—to conclude that all terrorist acts are war crimes. That argument does indeed contain a "logical fallacy"—but it is a byproduct of the Defense's own circular reasoning. The only way to dispute that all acts of terrorism are war crimes is to presuppose, as the Defense does, that they are not.

Conventions—two treaties the Supreme Court has called "the major treaties on the law of war." *Hamdan*, 126 S. Ct. at 2781.[6]

a. For example, targeting and murdering thousands of innocent civilians clearly constitutes a "grave breach" (A) under the Geneva Conventions by killing "protecting persons," *see, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, (B) under the Hague Regulations by inflicting unnecessary death and suffering on the target population, *see* Regulations Respecting the Laws and Customs of War on Land, Art. 23, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, and (C) under Common Article 3 by purposely killing non-combatants, *see, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

b. As the authoritative treatise on the Geneva Conventions points out, it is a "cardinal principle of the law of war . . . that the civilian population must enjoy complete immunity." 4 International Committee of Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 3 (J. Pictet ed., 1958). Thus, Article 33 of the Fourth Geneva Convention expressly prohibits "all measures . . . of terrorism." Al Qaeda's terrorist attacks—carried out in complete contempt for that "cardinal principle" of the laws of war—constitute war crimes.[7]

c. Given that al Qaeda is not a State, and given the Supreme Court's decision that our war with al Qaeda is a conflict "not of an international character" that is governed by Common Article 3, *see Hamdan*, 126 S. Ct. at 2795, that provision is of particular relevance here.

1. As an initial matter, there can be no doubt that violations of Common Article 3 are war crimes. The federal War Crimes Act was amended in 1997 to cover expressly all violations of Common Article 3. *See* 18 U.S.C. § 2441 (2000). Every federal court to consider the issue has concluded that violations of Common Article 3 are "serious violations of international law" and "war crimes." *See Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998).

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[6] Of course, these instruments do not apply directly to al Qaeda. *See* Memorandum from the President, *Re: Humane Treatment of Taliban and al Qaeda Detainees*, The White House (Feb. 7, 2002). The President's determination turned, in part, on the Department of Justice's legal conclusion that al Qaeda systematically scorns the law of war, and it is therefore not entitled to its protections.

[7] Given the Defense's heavy reliance upon Additional Protocol I to the Geneva Conventions, *see* Def. Mot. at 12 nn. 19 & 23, it is ironic that the Defense ignores Article 51(2) of that Protocol, which provides: "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." To the extent the Defense thinks the Protocol is relevant, it is difficult to imagine a clearer enunciation of al Qaeda's war crimes. *See also* Additional Protocol II, Art. 4(2)(d) (prohibiting "acts of terrorism" "at any time and in any place whatsoever"); *id.*, Art. 13(2) ("Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."). Given that the United States refused to ratify both instruments because they afford *undue rights* to terrorists, *see infra* note 16, it should go without saying that the United States denounces terrorism at least as strongly as the Protocols do.

2. Although they are not binding on the United States, several other instruments of international law demonstrate a global consensus that violations of Common Article 3 are war crimes. For example, Article 8 of the Rome Statute specifically criminalizes violations of Common Article 3. Article 4 of the statute authorizing the International Criminal Tribunal for Rwanda also imposes individual criminal liability for serious violations of the provision, including "acts of terrorism." And although the statute authorizing the International Criminal Tribunal for the former Yugoslavia ("ICTY") does not expressly cover violations of Common Article 3, the ICTY held that the statute's provision concerning "other serious violations of the laws and customs of war" necessarily includes violations of Common Article 3. *See, e.g.*, *Prosecutor v. Tadic*, No. IT-94-1-AR72, ¶¶ 87-91 (ICTY Appeals Chamber 1995), *reprinted in* 35 I.L.M. 32 (1996). And the ICTY has charged and convicted a former military officer for "unlawfully inflicting terror upon civilians." *Prosecutor v. Galic*, No. IT-98-29-T, ¶ 12 (ICTY Trial Chamber 2003). Finally, the criminal law and military manuals of many other states recognize violations of Common Article 3 as war crimes. *See, e.g.*, Tom Graditzky, *Individual Criminal Responsibility for Violations of International Humanitarian Law in Non-International Armed Conflicts*, 322 Int'l Rev. Red Cross 29 (1998) (collecting sources).

d. The accused has never disputed his association with senior members of al Qaeda—including Osama bin Laden himself—in the years directly preceding the horrific attacks of September 11th. *See* AE 17, attachment 2. Those attacks plainly constituted "terrorism" in violation of the Geneva Conventions and the Hague Conventions. And in the wake of September 11th, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives, including IEDs—all with the object of supporting al Qaeda, which, as Khadr admits, is a terrorist organization. *See id.*, attachment 3.

Other Conventions & Sources of International Law

v. Moreover, the prohibitions of terrorism under international law extend beyond the Geneva Conventions and the Hague Conventions.

a. To apprehend and prosecute international terrorists, the United States relies upon no fewer than twelve antiterrorism treaties, some of which expressly condemn terrorist bombings (in general) and plane bombings (in particular), in addition to the killing of innocent civilians. *See* International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 726; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627; Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, 18 I.L.M. 1419, 1456 U.N.T.S. 1987; International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. Doc A/34/46 (Dec. 17, 1979), 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28

U.S.T. 1975, 1035 U.N.T.S. 167; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

b. In the 1990s, the United Nations Security Council—with the approval of the United States—repeatedly denounced Osama bin Laden and his associates as terrorists, and it emphatically condemned al Qaeda's actions as war crimes. *See, e.g.*, S.C. Res. 1189 (Aug. 13, 1998) (al Qaeda's attacks on US embassies in Kenya and Tanzania). In 1999, the Security Council established the "Al-Qaida and Taliban Sanctions Committee," again condemning Osama bin Laden's actions. *See* S.C. Res. 1267 (Oct. 15, 1999); *see also* S.C. Res. 1333 (Dec. 19, 2000); S.C. Res. 1390 (Jan. 16, 2002); S.C. Res. 1455 (Jan. 17, 2003); S.C. Res. 1526 (Jan. 30, 2004); S.C. Res. 1617 (July 29, 2005); S.C. Res. 1735 (Dec. 22, 2006).

c. In the wake of September 11th, the Security Council—again, with the support of the United States—reaffirmed its condemnation of international terrorism as a crime and as a threat to international security. *See* S.C. Res. 1373 (Sept. 28, 2001). Furthermore, it called on all member states to prosecute terrorists. *See id.* §§ 1-2, 4-5.

d. Thus, regardless of whether there is an "international consensus on the definition of terrorism," Def. Mot. at 4, it is abundantly clear that the international community (in general) and the United States (in particular) has uniformly and consistently defined al Qaeda as a terrorist organization and has condemned its agents—such as Khadr—as terrorists. It is untenable to argue that Khadr somehow thought that supporting and fighting for al Qaeda was "innocent when done." Def. Mot. at 8.

The Common Law of War

vi. Even beyond the formal principles codified in international treaties, conventions, and Security Council resolutions, terrorism (and conspiracy to commit it) has long violated the common law of war.

a. The year before he published what would become a cornerstone in the law of war,[8] Dr. Francis Lieber emphasized that "guerillas," and those who associate themselves with

[8] Lieber's *Instructions for the Government of the Armies of the United States in the Field* (1863), also known as *Lieber's Code*, became a cornerstone in the law of war when it was issued by President Lincoln as General Orders No. 100 during the Civil War. *See also* G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 Brit. Y.B. Int'l L. 173, 179 (1971) ("[T]he writings of Lieber were the first major attempt to give written form to the customary rules of land warfare prevailing at the end of the first half of the nineteenth century."). Like Lieber's *Guerilla Parties*, *Lieber's Code* emphasizes that those—such as Khadr—who dress as civilians and yet commit hostilities are subject to summary execution. *See Lieber's Code* ¶ 82 ("Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.").

guerillas, were subject to summary execution under the law of war. In a description that eerily applies with equal force to modern-day terrorists, Dr. Lieber emphasizes:

> [A] guerilla party means an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a guerilla party, to carry on what the law terms a *regular* war. The irregularity of the guerilla party consists in its origin, for it is either self-constituted or constituted by the call of a single individual, . . . and it is irregular as to the permanency of the band, which ban be dismissed and called again together at any time.

Francis Lieber, *Guerilla Parties Considered with Reference to the Laws and Usages of War* 8 (1862) (emphasis in original). Lieber goes on to explain that the term "guerilla" is often connected to "the idea of destruction for the sake of destruction," "the ideas of general and heinous criminality, . . . because the organization of the party being but slight and the leader utterly dependent upon the band, little discipline can be enforced," and the idea of a "spy, . . . because he that to-day passes you in the garb and mien of a peaceful citizen, may to-morrow, as a guerilla man, fire your house or murder you from behind the hedge." *Id.* at 8-9.

1. Lieber also emphasizes that the definition of the term "guerilla" is "particularly confused" under the law of war. *See id.* at 1. ***But, importantly, the lack of a clear definition for "guerillas" did not preclude their punishment.***[9]

2. To the contrary, during the Peninsular War (1808-1814), many guerillas "were shot when made prisoner." *Id.* at 7. Thus, Lieber concludes, "[g]uerilla parties . . . do not enjoy the full benefit of the law of war. They are apt to fare worse than either regular troops or an armed peasantry. The reasons for this are, that they are annoying and insidious, that they put on and off with ease the character of a soldier, and that they are prone, themselves, to treat their enemies who fall into their hands with great severity." *Id.* at 18.

3. Lieber then explains—in terms that almost exactly describe the circumstances under which Khadr fought and was captured—that:

> The law of war . . . would not extend [its protections] to small bodies of armed country people, near the lines, whose very smallness shows that they must resort to occasional fighting and the occasional assuming of peaceful habits, and to brigandage. The law of war would still less favor them when they trespass within the hostile lines to commit devastation, rapine, or destruction. Every European army has treated such persons, and it seems to me would continue, even in the improved state of the present usages of war, to treat them as brigands, whatever prudential mercy might decide upon in single cases.

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[9] Thus, it is irrelevant whether, as the Defense asserts, "there is not . . . international consensus on the definition of terrorism." Def. Mot. at 4. And even if it were relevant, there can be no question that Khadr's actions—including conspiring with al Qaeda for more than 5 years—constitute "terrorism" under ***anyone's*** definition.

Id. at 20. Brigands—even those who had not committed crimes, such as pillaging, independent of their brigandage—were "subject to the infliction of death, if captured." *Id.* at 10.

4. Like members of al Qaeda, different guerillas were motivated by different things. *See id.* at 9-21. But many of them, like Khadr, were motivated by their desire to fight, intimidate, and retaliate against legitimate armies. *See, e.g., id.* at 9;[10] *see also* 10 U.S.C. § 950v(b)(24) (defining "terrorism" as killing, inflicting "great bodily harm" or exhibiting "a wanton disregard for human life" as a means to, *inter alia*, "intimidat[e]" or "retaliate against government conduct"). And all of them, like Khadr, were guilty of violating the law of war.

b. In accordance with Lieber's view, the Attorney General long ago emphasized 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. 297, 312 (1865) (emphasis added).

c. In other words, an unlawful combatant, such as Khadr, violates the law of war simply by conspiring with 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 (1895, 2d ed. 1920).

d. 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"*—simply for working with guerilla forces or "[i]rregular armed bodies" to accomplish the groups' unlawful ends. *Id.* at 783-84 (emphasis added). *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").

1. For example, there were "numerous rebels . . . that . . . [we]re banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste to the country. All such persons are by the laws of war in every civilized country liable to capital punishment." H.R. Doc. No. 65, 55th Cong., 3d Sess., 234 (1894).

2. One well-recognized war crime—triable by military commission, if the offender was not summarily executed—was "consorting" or "cooperating" with the banditti,

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[10] As Lieber notes, guerilla warfare often resembles "the wars recorded in Froissart or Comines, or the Thirty Years' War, and the Religious Wars in France." Lieber's *Guerilla Parties* at 9. Jean Froissart's *Chroniques* and Philippe de Comines' *Mémoires sur les règnes de Louis XI et de Charles VIII* include famous descriptions of politically motivated guerilla warfare—such as the border skirmishes between Scotch guerillas and the English army after the Battle of Bannockburn (*see* Froissart, book I, ch. XIV). And the Thirty Years War—like the Religious Wars in France—was marked with politically motivated violence by guerilla groups, such as the bands of Bavarian peasants that attacked Gustavus Adolphus to retaliate against "Protestant fiends." *See* William P. Guthrie, *Battles of the Thirty Years War* 187 (2002).

jayhawkers, or guerillas. *See, e.g.*, U.S. War Dept., General Court-Martial Order No. 41, p. 1 (1864) ("G.C.M.O.") (indictment in the military commission trial of John West Wilson charged that Wilson "did join and co-operate with an armed band of insurgents and guerrillas who were engaged in plundering the property of peaceable citizens . . . in violation of the laws and customs of war"); G.C.M.O. No. 93, p. 9 (1864) (indictment in the military commission trial of James A. Powell charged "[t]ransgression of the laws and customs of war" and specified that he "did join himself to and, in arms, consort with . . . a rebel enemy of the United States, and the leader of a band of insurgents and armed rebels"); *id.* at 10-11 (indictment in the military commission trial of Joseph Overstreet charged "[b]eing a guerrilla" and specified that he "did join, belong to, consort and co-operate with a band of guerrillas, insurgents, outlaws, and public robbers").

e. Modern-day terrorists, including those that fight for al Qaeda, can trace their lineage indirectly to the guerillas that Lieber, Winthrop, and others emphatically condemned. As one scholar has explained:

> More recently guerilla activities have been conducted as a method of securing specific political objectives by groups or organizations disassociated from States or other belligerents, and directed at particular governments, their nationals and property, where and whenever opportunity presents itself. Thus we have arrived at a time when guerilla warfare, in the sense of sporadic and clandestine actions of armed violence for specific political purposes by loosely organized groups in varying degrees of associate with, or disassociation from, any government, is a feature of our age. Its manifestations are very diverse and often effective. The capacity of these groups, however small, to inflict substantial damage upon military formations during an armed conflict, and upon the civilian popular in times of relative normality, is not disputable.

G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 Brit. Y.B. Int'l L. 173, 183 (1971). Although this passage was written almost two decades before al Qaeda's formation, it perfectly describes that organization's guerilla-like tactics. And like its guerilla-party forefathers, al Qaeda's existence and operation constitutes terrorism in violation of the law of war.

vii. Against this overwhelming weight of authority, the Defense can muster only a half-hearted concession—namely, that "'terrorism' . . . encompasses a wide range of substantive offenses," which ***are*** triable by military commission,[11] although the Defense argues that "terrorism," as such, is not. Def. Mot. at 4-5. That argument is wrong for at least two reasons.

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[11] For example, there can be no argument that hostage-taking—which Khadr concedes is a form of terrorism—is a violation of the law of war and therefore triable by military commission. *See, e.g.*, Common Article 3, ¶ 1(b) (prohibiting "taking of hostages"); 18 U.S.C. § 2441(d)(1)(I) (same); International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. Doc A/34/46 (Dec. 17, 1979), 1316 U.N.T.S. 205. Likewise with hijacking. *See, e.g.*, International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 726; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Hague Convention for the Suppression of Unlawful

a. First, as a matter of historical fact, those who supported, conspired, and consorted with guerillas, jayhawkers, and banditti were charged with "Violation of the law war." *See, e.g.*, Winthrop, *Military Law and Precedents* at 784; G.C.M.O. Nos. 41 & 93, *supra*. To be sure, that charge was supported with specific allegations—such as murder, burning and destruction of property, etc.—but the charge was a general one. *See also* 11 Op. Att'y Gen. at 312 (emphasizing that the "Offence" is accomplished simply by supporting the banditti; the specific atrocities committed by the banditti provide additional "reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war"); *Trial of Shigeki Motomura and 15 Others*, 13 L. Rep. Trials of War Criminals 138 (1947) (describing violations of "the laws and customs of war," including "systematic terrorism"). So here: Khadr has been charged with conspiring to commit terrorism, but that charge is supported by specific allegations, including that Khadr met and conspired with senior al Qaeda leaders, attended al Qaeda training camps, unlawfully planted IEDs, and killed an American soldier—all because he is an admitted al Qaeda terrorist, *see* AE 17, attachment 3, who wants to wage a holy war against the United States, *see id.*, attachments 6 & 9. The specific allegations against Khadr provide "the reasons, and sufficient reasons they are, why such [terrorists] are denounced by the laws of war," but they do not change the fact that *terrorism* is a chargeable "Offence."

b. Second, it is ***irrelevant*** whether terrorism, as such, is a substantive offense under the law of war. "Guerrilla warfare . . . is a method of warfare and not a concept of the law of war," Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 Brit. Y.B. Int'l L. at 182, but no one could dispute that guerillas were triable by military commissions (if they were not summarily shot upon their capture) for being guerillas. *See, e.g.*, Winthrop, *Military Law and Precedents* at 783-84; G.C.M.O. Nos. 41 & 93, *supra*; *see also* G.C.M.O. No. 51, p. 1 (1866) (indictment in the military commission trial of James Harvey Wells charged "[b]eing a guerrilla"); G.C.M.O. No. 108, Head-Quarters Dept. of Kentucky, p. 1 (1865) (indictment in the military commission trial of Henry C. Magruder charged "[b]eing a guerrilla" and "join[ing]" "a band of guerrillas"). The important point—for guerillas and terrorists alike—is that the law of war unequivocally condemns their unlawful belligerency. And as a result, those accused of either are amenable to the jurisdiction of military commissions under the common law of war.

viii. Accordingly, long before Khadr began conspiring with and in support of al Qaeda, conspiracy to commit terrorism violated both U.S. and international law, and it has long been a well-established war crime. *See, e.g.*, Ingrid Detter, *The Law of War* 21-25 (2d ed. 2000); Christopher Greenwood, *War, Terrorism, and International Law*, 56 Current L. Probs. 505, 515 (2003); Derek Jinks, *September 11th and the Laws of War*, 28 Yale J. Int'l L. 1, 2 (2003). Thus, the MCA codifies "offenses that have traditionally been triable by military commissions." 10 U.S.C. § 950p(a).[12]

Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

[12] The Defense suggests in a footnote, *see* Def. Mot. at 6 n.15, that 10 U.S.C. § 950p(a) should not be read "as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to the adoption of the M.C.A." That argument violates the first and most important principle of statutory interpretation—namely, that Congress means what it says. *See, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute

C. KHADR'S EX POST FACTO ARGUMENTS ARE BASELESS

i. Because the Defense cannot plausibly deny that Khadr's conspiracy to commit terrorism was illegal when he engaged in it, the Defense focuses the vast majority of its argument on inapplicable ex post facto principles under U.S. and international law. *See* Def. Mot. at 5-12. While those arguments are long on words, they are short on law and logic.

ii. As an initial matter, controlling D.C. Circuit precedent unambiguously holds that the US Constitution does not apply to aliens held outside the United States, including those held at Guantanamo Bay, such as Khadr. *See Boumediene*, 476 F.3d at 992. The D.C. Circuit specifically rejected the argument—which Khadr also made unsuccessfully before the Court of Military Commission Review, *see* Br. for Appellee at 20-21—that the Ex Post Facto Clause imposes structural limitations on Congress. *See Boumediene*, 476 F.3d at 993. The D.C. Circuit has emphatically continued to follow *Boumediene*, even while that case is under review by the D.C. Circuit. *See Rasul v. Myers*, 2008 WL 108731, *14 & n.15 (D.C. Cir. Jan. 11, 2008). And Judge Allred recently followed *Boumediene* when he rejected Salim Hamdan's attempts to invoke the Ex Post Facto Clause (and other constitutional rights). *See United States v. Hamdan*, Reconsideration of Ruling on Motion to Dismiss for Lack of Jurisdiction, at 9 (Dec. 19, 2007). This Court need proceed no further to reject Khadr's constitutional claims.

a. 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 v. Rumsfeld*, 126 S. Ct. 2749, 2774-75 (2006); *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).[13] 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.

b. The ambitiousness of Khadr's assertion that *all three* branches of the U.S. Government misunderstood the constitutional boundaries of military commissions, is matched only by its erroneousness.

iii. Equally baseless is the Defense's suggestion that "Khadr could not have foreseen in 2002 that the offense of conspiracy to commit terrorism would be triable by military commission four years later, nor foreseen the significantly different consequences that would result from that fact." Def. Mot. at 1.

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a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

[13] In its reply to the motion to dismiss Charge IV (*see* p. 5), the Defense accuses the Government of "selectively" quoting Justice Breyer and suggests that Justice Breyer also wrote: "If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so." That statement, however, comes from ***Justice Kennedy's concurrence***. *See* 126 S. Ct. at 2800 (Kennedy, J., concurring). The Government remains puzzled by the Defense's accusation to the contrary.

a. In November 2001—almost a year before Khadr was captured—the President issued Military Commission Order No. 1. *See* 66 Fed. Reg. 57,833 (Nov. 13, 2001). And under that order, individuals who where members of al Qaeda, or who "conspired to commit [] acts of international terrorism," were subject to military commission jurisdiction. *See id.* at 57,834. Individuals subject to trial by military commission were eligible for execution after trials with fewer procedural and substantive rights than are afforded by the MCA.

b. Khadr's suggestion that he was somehow caught off guard, or materially prejudiced, by the MCA is therefore baseless. When he conspired with members of al Qaeda to commit terrorism, the prospect of a military commission trial was very real.

iv. Moreover, even on its own terms, Khadr's constitutional claim is meritless. The Supreme Court has emphasized that the Ex Post Facto Clause is implicated only where (1) Congress "retroactively alter[s] the definition of crimes or increase[s] the punishment for criminal acts," *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), or (2) the statute "disadvantage[s] the offender affected by [it]," *id.* at 41. Neither condition is met here.

a. First, the MCA does not "retroactively alter the definition of" terrorism.

1. As explained above, the commission of terrorism has been a well-established war crime since at least the Civil War. And under the law of war, unlawful combatants like Khadr faced military commissions (at best) and summary execution (at worst) for openly flaunting the rules and customs that govern armed conflict. Thus, the MCA does not "retroactively alter the definition of" or "increase the punishment for" material support of terrorism, within the meaning of the Ex Post Facto Clause.[14]

2. To be sure, the MCA expressly applies to conduct that occurred in the past. *See* 10 U.S.C. § 950p(b) ("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*.") (emphasis added); *id.* § 948d(a) (creating military commission jurisdiction for "any offense made punishable by this chapter [i.e., the MCA] or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001"). As a result, Khadr's so-called "presumption against retroactivity" is irrelevant. *See, e.g.*, *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the [statutory] language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."). But simply regulating past conduct—under the same

[14] Nor does the MCA "apply retroactively" in the sense described by the Supreme Court in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). That case held only that the Secretary of Health and Human Services was not statutorily authorized to require the retroactive recoupment of funds previously paid to private hospitals. As explained above, the MCA provides precisely the kind of statutory authority that was lacking in *Bowen*. Moreover, the MCA does not regulate "primary conduct," *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994); rather, it regulates the *procedure* for trying offenses that were already illegal under the preexisting law of war, *see* 10 U.S.C. § 950p(a).

substantive standards that have always applied to it—does not necessarily implicate the Ex Post Facto Clause, even where it is otherwise applicable.

3. It is therefore well established that changes to judicial tribunals and provisions governing venue or jurisdiction do not implicate the Ex Post Facto Clause, much less violate it. 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). Indeed, the Supreme Court has emphasized that it has "upheld intervening procedural changes [under the Ex Post Facto Clause] *even if application of the new rule operated to a defendant's disadvantage in the particular case*." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.28 (1994) (emphasis added).[15] 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.

b. Second, Khadr cannot conceivably claim that he has been "disadvantaged" by the MCA's passage.

1. As explained above, banditti, jayhawkers, guerillas, and their modern-day equivalents were traditionally liable to be shot immediately upon their capture. Where such individuals have instead been tried, the United States has prosecuted them based upon offenses under the common law of war. Indeed, the MCA represents one of the first attempts of the United States to set out clearly, in its domestic law, the law of war offenses triable by military commissions. The fact that Congress chose expressly to define these law of war offenses does not amount to the creation of "new" offenses for purposes of the Ex Post Facto Clause. To the contrary, Khadr is certainly better off based upon the clarity provide by Congress and the extensive array of procedural protections provided by the MCA, the likes of which no unlawful combatant has ever enjoyed in the history of warfare.

2. For example, unlike his historical predecessors, Khadr enjoys the statutory 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.* § 949*l*(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

[15] Thus, the MCA's evidentiary rules—including, for example, the broad admissibility of hearsay—do not violate the Ex Post Facto Clause. The accused, like the Government, can rely upon those rules to introduce evidence, and in that sense, the MCA's rules are closely akin to retroactive procedural changes that the Court has approved in the past. *See, e.g.*, *Carmell v. Texas*, 529 U.S. 513, 546 (2000) (noting that the legislature may retroactively alter rules governing the admissibility of evidence where doing so does not uniformly prejudice the defendant).

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).

3. Instead of summary execution, Khadr enjoys more legal process than any unlawful combatant ever detained or tried in any prior conflict anywhere in the world. Whatever an Ex Post Facto violation may entail, this is certainly not it.

v. Nor does international law impose an ex post facto limit on Congress.

a. First, the international law principles cited by Khadr are entirely non-binding and/or unenforceable. *See* Def. Mot. at 12 & nn.19-22.

1. The Rome Statute and the American Convention on Human Rights are obviously not binding, given that the United States has not ratified either instrument. Similarly, the Universal Declaration of Human Rights is a non-binding resolution passed by the General Assembly of the United Nations in 1948, which was never submitted to member states for ratification as a treaty and because it was never intended to be a binding instrument. *See, e.g.*, 5 M. Whiteman, Digest of Int'l L. 243 (1965).

2. Nor can Khadr invoke Executive Order 13107, section 6(a) of which expressly provides: "Nothing in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." 63 Fed. Reg. 68991, 68993 (Dec. 10, 1998). Similarly, the United States conditioned its ratification of the International Covenant on Civil and Political Rights upon its declaration that "Articles 1 through 27 of the Covenant"—including Article 15, cited by the Defense, *see* Def. Mot. at 12 n.23—"are not self-executing." Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, at 23 (1992). *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-09 (D.C. Cir. 1984) (Bork, J., concurring) (noting that non-self-executing treaties do not "create rights that are privately enforceable in courts" and therefore do not give individuals a right to enforce them, absent authorizing legislation).

3. Similarly, the Third and Fourth Geneva Convention may or may not be self-executing, *compare*, *e.g.*, *id.* ("the Geneva Convention for the Protection of Civilian Persons in Time of War [and] the Geneva Convention Relative to the Treatment of Prisoners of War [are not self-executing because they] expressly call for implementing legislation"), *with United States v. Khadr*, No. 07-001, at 4 n.4 (C.M.C.R. 2007) (citing *United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 (E.D. Va. 2002), which suggested that Articles 87 and 99 of the Third Geneva Convention are self-executing). But in any event, Khadr has not asserted—much less established—that he is entitled to either Convention's protections. And as an alien unlawful enemy combatant, he certainly is not.

4. Finally, the Defense cites Article 75 of Additional Protocol I, which, according to the Defense, has been "recognized as customary international law by the U.S.," Def. Mot. at 12 n.21—notwithstanding the fact that Khadr is not entitled to the protections of the Geneva Conventions (much less the broader protections afforded by the Additional Protocol),

see 10 U.S.C. § 948b(g), and notwithstanding the fact that the United States has steadfastly refused to ratify the Protocol.[16] For this proposition, the Defense cites an "unclassified memorandum" by a handful of Department of Defense employees. Needless to say, such unpublished musings—which, even on their face, simply comprise ***personal opinions***—do not amount to binding declarations as to what is customary international law.[17] Khadr's suggestion that such an "unclassified memorandum" constitutes the view of the United States is a drastic overstatement, to say the least.

5. To be sure, a former Deputy Legal Adviser at the U.S. State Department has provided a more reliable endorsement of the broad outlines of Article 75. *See* Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks before Session One of the Humanitarian Law Conference (Fall 1987), *in* 2 AM. U. J. INT'L L. & POL'Y 419, 427 (1987). Mr. Matheson, however, noted only that the United States supports, in principle,[18] "that no sentence [should] be passed and no penalty executed except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of

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[16] The United States refused to ratify Protocol I because it opposed extending the protections of the Geneva Conventions to terrorists and associated unlawful combatants, who flout the Conventions' strictures. As President Reagan explained:

> We must not, and need not, give recognition and protection to terrorist groups as the price for progress in humanitarian law. . . . The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.

President Ronald Reagan, Letter of Transmittal to the Senate of Protocol II additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977 (Jan. 29, 1987). Regardless of whether "Article 75 of Protocol I to the Geneva Conventions of 1949 articulates many of the fundamental guarantees 'which are recognized as indispensable by civilized peoples,'" *United States v. Khadr*, No. 07-001, at 15 n.24 (C.M.C.R. Sept. 24, 2007), it is perverse to argue that the United States should be bound, as a matter of customary international law, to provide terrorists and associated unlawful combatants the same protections it has steadfastly refused to grant them as a matter of treaty law.

[17] The "unclassified memorandum" expresses only its authors' personal opinions that Article 75's "fundamental guarantees" are part of customary international law; it does *not* purport to put forth the view of the United States. The memorandum provides only that "***[w]e*** view the following provisions as already part of customary international law." Unclassified Memorandum at 1 (emphasis added); *see also id.* (expressing "***our views***") (emphasis added); *id.* at 2 ("***we*** regard the following" as CIL) (emphasis added); *id.* ("The above lists are in the nature of ***an advisory opinion on our part***.") (emphasis added). It is a bedrock legal principle that an individual's views may be probative of customary international law *only* insofar as they provide "trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

[18] It bears emphasizing that Matheson's comments were entirely aspirational. *See* 2 AM. U. J. INT'L L. & POL'Y at 427 (noting that "we . . . *support* [a certain] principle") (emphasis added); *see also id.* at 471 (remarks of former Legal Adviser Abraham D. Sofaer) (noting that the United States "*intend[s]* to consult with our allies to develop appropriate methods for incorporating [certain] provisions" of Protocol I) (emphasis added). Such "speculations . . . concerning what the law *ought* to be" are utterly immaterial. *The Paquete Habana*, 175 U.S. at 700 (emphasis added). *See also Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 265 (2d Cir. 2003) (holding neither "the policy-driven or theoretical work of advocates" nor the "personal viewpoints expressed in the affidavits of international law scholars" can serve as sources of customary international law).

regular judicial procedure." *Id.* at 427-28 & n.39 (citing Protocol I, Art. 75(4)). Matheson did *not* endorse, nor did he even cite, any of the specific subparagraphs of Article 75(4), which contain the "rights" that the Defense attempts to invoke. To the contrary, he simply (and unremarkably) suggested that customary international law embraces the "judicial guarantees" that are codified in Common Article 3. And as Congress emphasized in the MCA, the rights provided in that statute—*not* the Additional Protocol—provide "all [of] the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions." 10 U.S.C. § 948b(f).[19]

6. Thus, none of the international legal "authorities" cited in Khadr's brief provide him with an enforceable right against ex post facto legislation.

b. Second, even if binding, all of these international-law principles are irrelevant in light of the MCA. Khadr has not cited one case for the proposition that Congress is bound by international law. As the Supremacy Clause makes clear, it is the *Constitution* that is the supreme law of the land, and not an "unclassified memorandum" by an employee of the Department of Defense or the Rome Statute. *See* U.S. Const. art. VI, cl. 2.

1. There is absolutely no doubt 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."); *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 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").

2. 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). And as explained above, *see* p. 4, *supra*, it is difficult to imagine how Congress could have more clearly expressed its intention that the MCA would apply to offenses—including terrorism—committed prior to its enactment.

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[19] Although the Defense fails to cite it, it is also true that the four-Justice plurality in *Hamdan* suggested that "it appears" as though the United States regards certain parts of Article 75 as customary international law, citing only a law review article written by a former Legal Adviser at the State Department. *See* 126 S. Ct. at 2797 (plurality op.) (citing Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (2003)). Of course, even the plurality did not endorse Article 75's ex post facto principle as customary international law. Moreover, as discussed above, the plurality's reasoning is not binding on this Court. *See supra* note 4 and accompanying text.

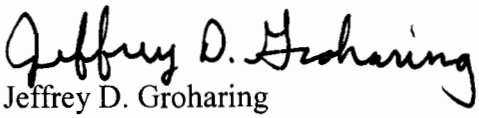
7. Oral Argument: In light of the fact that the MCA directly and conclusively addresses the issue presented, the Prosecution believes that the motion could be readily denied. To the extent, however, that the Military Judge orders the parties to present oral argument, the Government will be prepared to 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:



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UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** for Appropriate Relief (Strike Terrorism from Charge III) 11 December 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:** Mr. Khadr moves to strike "terrorism" as an object of the conspiracy alleged in Charge III.

3. **Overview:**

a. The terrorism as an object of the conspiracy alleged in Charge III must be struck because the Military Commission has no jurisdiction to try Mr. Khadr for conspiracy to commit terrorism. The MCA requires the object of the conspiracy to be an offense subject to trial by military commission. At the time of Mr. Khadr's alleged conduct, military commissions could only be used to try violations established by statute or by the law of war. At that time, neither U.S. law nor the law of war made terrorism an offense triable by military commission: the Uniform Code of Military Justice (UCMJ) set forth the applicable U.S. law at the time, and it does not identify terrorism as a crime triable by military commission. Likewise, the law of war does not proscribe terrorism. Treaties and international practice confirm that terrorism does not violate the law of war. Thus, conspiracy to commit terrorism cannot be tried by military commission.

b. Although the MCA identifies terrorism as an offense triable by military commission, that fact is wholly irrelevant to this case, because both U.S. and international law provide that individuals must be tried under the law as it existed at the time of their alleged offense. This constitutional prohibition on *ex post facto* legislation recognizes that there is a fundamental unfairness in holding individuals accountable for consequences that they could not have foreseen at the time of their alleged conduct. Mr. Khadr could not have foreseen in 2002 that the offense of conspiracy to commit terrorism would be triable by military commission four years later, nor foreseen the significantly different consequences that would result from that fact. Moreover, the prohibition on *ex post facto* legislation is a restraint on Congress as opposed to an individual right. To avoid this constitutional problem, MCA § 950v(b)(25) should be interpreted to apply prospectively only.

c. Accordingly, because Mr. Khadr must be tried based upon the law at the time the alleged offense occurred, and because at that time, terrorism was not one of the narrow category of crimes triable by military commission, this Military Commission lacks jurisdiction to try Mr. Khadr for conspiracy to commit terrorism. Therefore, this Commission should strike terrorism as an object of the conspiracy alleged in Charge III.

4. **Burdens of Proof and Persuasion:** Because this motion is jurisdictional in nature, the prosecution bears the burden of proving jurisdiction by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

5. **Facts:** This motion presents a question of law. However, the following facts, which are a matter of record in these proceedings, are germane to the Commission's disposition of the instant motion.

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

b. The government preferred charges against Mr. Khadr under the MCA on 2 February 2007. *See* Sworn Charge Sheet (2 Feb 2007) [hereinafter Sworn Charges]. Charges were re-preferred, with amendments, on 5 April 2007. These amended charges were referred to this Military Commission on 24 April 2007. *See* Charge Sheet (24 Apr 2007) [hereinafter Charge Sheet].

c. The Government alleges that Mr. Khadr conspired to commit terrorism in June and July of 2002. *See* Charge Sheet. The government has alleged that Mr. Khadr committed these offenses at the age of 15. *See* Sworn Charges.

d. Mr. Khadr is not alleged to have committed any acts forming the basis for the instant prosecution occurring after the date of the MCA's enactment. *See* Charge Sheet.

6. **Argument: Terrorism Must Be Dismissed As An Object Of The Alleged Conspiracy Because Terrorism Is Not An Offense Triable By Military Commission**

a. The Object of the Conspiracy Must Be An Offense Triable By Military Commission

(1) Assuming for the purpose of this motion that conspiracy is an offense triable by military commission,[1] for the charge to state an offense, the object of the alleged conspiracy must be a "substantive offense[] triable by military commission." MCA § 950v(b)(28). The government has alleged "terrorism" as one of the objects of the alleged conspiracy. (*See* Charge Sheet.) As discussed below, "terrorism" is not triable by military commission. Thus, it is not a valid object of conspiracy. Accordingly, this Commission does not have jurisdiction to try Mr. Khadr for conspiracy to commit terrorism.

b. Terrorism Was Not An Offense Triable By Military Commission At The Time Of The Alleged Conduct

(1) As the Supreme Court made clear in *Ex Parte Quirin*, the first question in a military commission case is "whether any of the acts charged is an offense against the law of war

[1] The defense raises this motion in the alternative to its motion to dismiss Charge III for lack of subject matter jurisdiction (D-010) filed on 7 December 2007.

cognizable before a military tribunal." 317 U.S. 1, 29 (1942).[2] At the time of Mr. Khadr's alleged conduct, military commissions could only be used to try violations if expressly made triable by military commission, or if proscribed by the international law of war. 10 U.S.C. § 821 (1998). Because terrorism charge does not fall into either category, this Commission has no jurisdiction try Mr. Khadr for conspiracy to commit terrorism. And while the MCA purports to make terrorism an offense triable by military commission, this provision of the MCA cannot be applied to Mr. Khadr because the MCA was not enacted until more than four years *after* the charged conduct. Thus, its application in this case would violate the prohibition on *ex post facto* legislation under both U.S. and international law.

(2) Neither U.S. nor international law defined terrorism as an offense triable by military commission at the time the charged offense in this case was allegedly committed. The statute applicable at that time—the Uniform Code of Military Justice (UCMJ)—made only two offenses triable by military commission, and terrorism was not one of them.[3]

(3) Because there is no statutory basis to try Mr. Khadr before a military commission for conspiracy to commit terrorism, the only possible basis for this Commission's jurisdiction is if terrorism plainly and unambiguously violates the law of war. *Hamdan*, 126 S. Ct. at 2780 (plurality) ("When . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous.") (citing *Quirin* 317 U.S. at 30). In order to justify a trial on that basis, however, the Government must "make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Id.* at 2780. For an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally." *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.) (quoting *Ex Parte Quirin*, 317 U.S. at 30); *see also, e.g.*, *The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct."). As with the conspiracy offense at issue in *Hamdan*, "[t]hat burden is far from satisfied here." *Id.*

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[2] *See also Hamdan*, 126 S. Ct. at 2777 ("[A] law-of-war commission has jurisdiction to try only two kinds of offense: 'Violations of the laws and usages of war cognizable by military tribunals only,' and '[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.'") (citing W. Winthrop, Military Law and Precedents 839 (rev. 2d ed. 1920)); *id.* (noting that it "is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge 'properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction.*'" (citing Winthrop at 842 (emphasis in original)); *In re Yamashita*, 327 U.S. 1, 13 (1946) ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is a violation of the law of war.").

[3] The only UCMJ offenses triable by military commission are aiding the enemy and spying. *See* Art. 104, UCMJ, 10 U.S.C. § 904; Art. 106, UCMJ, 10 U.S.C.§ 906. The latter offense possesses more elements than the spying offense with which Mr. Khadr was charged—including at least three elements that cannot be satisfied in Mr. Khadr's case. *See* Art. 104, UCMJ, 10 U.S.C. § 904; Art. 106, UCMJ, 10 U.S.C. § 906.

(4) Like a plurality of this Court found in *Hamdan* with respect to conspiracy, the offense of terrorism does not "appear either in the Geneva Conventions or the Hague Conventions – the major treaties on the law of war." *Hamdan*, 126 S. Ct. at 2781. Furthermore, there is not even international consensus on the definition of terrorism - is a position that the United States has repeatedly asserted in the global legal community. For example, in 1991, when the United Nations Secretary-General sought Member States' views on the possibility of convening an international conference to define terrorism, the U.S. did not support such a conference on the basis that it would not be useful as it would seek to "address a question on which there is little possibility of achieving consensus."[4] It noted that since "the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism, the international community has repeatedly failed in its efforts to reach consensus on a generic definition of terrorism."[5] Then in 1996, the U.S. Mission to the United Nations supported the decision of the International Law Commission to exclude "international terrorism" from the list of crimes contained in the Draft Code of Crimes Against the Peace and Security of Mankind.[6] At the drafting of the Rome Statute for the International Criminal Court,[7] the U.S. was strongly opposed to the inclusion of "terrorism" amongst the list of international crimes over which the Court would have jurisdiction. The final draft of the Statute, which has 139 signatory nations,[8] "provides the most comprehensive, definitive and authoritative list of war crimes,"[9] yet it does not list "terrorism" as a violation of the law of war. Finally, the in April 2004, the U.S. State Department reiterated this lack of an accepted definition of terrorism in its report on the "Patterns of Global Terrorism." It reported, "[n]o one definition of terrorism has gained universal acceptance."[10]

(5) Instead, "terrorism" remains a descriptive term, which encompasses a wide range of precise substantive offenses, such as hijacking and taking of hostages, rather than a

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[4] *See* "Submission, U.S. Permanent Representative to the United Nations, to UN Secretary General Regarding International Terrorism," April 15, 1991 *available at* http://www.state.gov/s/l/65586.htm.

[5] *Id.*

[6] *See* United States Mission to the United Nations, *Report of the International Law Commission: The Draft Code of Crimes: Statement by John R. Crook, Office of the Legal Advisor, Department of State*, Nov. 5, 1996 at 2.

[7] S*ee generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. The Crimes and Elements portion of which was drafted largely by the United States. David J. Scheffer, "The Global Challenge of Establishing Accountability for Crimes Against Humanity" Remarks, Centre for Human Rights, University of Pretoria, Pretoria, South Africa, Aug. 22, 2000 *available at* http://www.state.gov/documents/organization/6551.doc ("T]he United States led the UN negotiations for Elements of Crimes of the International Criminal Court. We drafted the primary document and for nearly 2 years we were in the trenches with South Africa and other governments to finish this work-engine document of the Court.").

[8] World Signatures and Ratifications, http://www.iccnow.org/?mod=romesignatures.

[9] Robert Cryer, *International Criminal Law v. State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979, 990 (2005).

[10] U.S. State Department, Patterns of Global Terrorism: 2003 (April 2004).

substantive offense itself. A perfect analogy is "white collar crime", which describes a particular class of offenses (such a securities fraud), but is not a substantive offense in and of itself.

(6) United States practice is consistent with the proposition that "terrorism" is not a law of war offense. The federal criminal statute punishing "war crimes" omitted (and continues to omit) "terrorism" as an offense punishable under that section. *See* 18 U.S.C. § 2441 (2007). And the most broadly defined terrorism offense in the United States – "acts of terrorism transcending national boundaries", 18 U.S.C. § 2332b, which does not encompass Mr. Khadr's conduct – was punishable exclusively, as a civilian criminal offense.

(7) Therefore, while there may exist a "handful of crimes to which the law of nations attributes individual responsibility,"[11] terrorism is not one of them.[12] The "handful" is reserved for those crimes that are particularly egregious in nature and for conduct that violates "well-established, universally recognized norms of international law".[13] When "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous."[14] Here, there is no plain and unambiguous precedent demonstrating that terrorism, as such, is a war crime. Because there continues to be international disagreement on the definition of terrorism, the government cannot carry its "minimum" burden of making "a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Hamdan*, 126 S. Ct. at 2780 (plurality). Therefore, this Commission has no jurisdiction to consider whether Mr. Khadr conspired to commit terrorism. Terrorism must be struck as an object of the alleged conspiracy.

c. The MCA Cannot Provide Jurisdiction Over Mr. Khadr Because It Was Not Enacted Until Four Years After the Charged Conduct

(1) <u>The MCA Should Not Be Interpreted To Apply Retroactively</u>

(a) As previously discussed, neither U.S. law nor the international "law of war" recognized terrorism as one of the narrow category of crimes triable by military commission at the time of Mr. Khadr's alleged offenses. *See supra* at 2-5. Indeed, the Government has implicitly conceded this point by charging Mr. Khadr with conspiracy to commit terrorism under the MCA, rather than under any statute in effect at the time of the alleged offense. But the MCA's conferral of jurisdiction on the military commission to try conspiracy to commit terrorism in 2006 is irrelevant to this case because the MCA was not enacted until four years *after* Khadr allegedly committed the offenses with which he is charged.

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[11] *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. 1984) (Edwards, Circuit Judge, concurring). These offenses include war crimes, crimes against humanity, and genocide.

[12] *Id*. (Edwards, Circuit Judge, concurring) (finding that torture, absent state action, and terrorism generally are not violations of the law of nations).

[13] *See Kadic v. Karadzic*, 70 F.3d 232, 243 (C.A.2 (N.Y.), 1995).

[14] *See Hamdan*, 126 S.Ct. at 2780 (plurality).

(b) It is well-established that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Here, Congress did not provide that the provisions of the MCA under which Mr. Khadr is charged should be applied retroactively. To the contrary, Congress made explicit that only one specific section of the MCA—its implementation of treaty obligations—should be applied retroactively. *See* Military Commissions Act, Pub. L. No. 109-366,§ 6(b)(2), 120 Stat. 2600, 2633 (2006) (amending 18 U.S.C. § 2441).

(c) Section 950p provides additional evidence that Congress did not intend the MCA to apply retroactively because it makes clear that Congress believed that the MCA "does not establish new crimes that did not exist before its enactment." 10 U.S.C. § 950p. While Congress's belief in this regard was erroneous— conspiracy to commit terrorism was not an offense triable in a military commission before the MCA's enactment—this erroneous belief nonetheless suggests that Congress did not intend to change existing law when it enacted the MCA.[15] It follows *a fortiori* that it would not have intended any inadvertent change in the law to apply retroactively—particularly in light of the general presumption against retroactive legislation, *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and the fact that retroactive application of such a change would raise serious constitutional questions under the *Ex Post Facto* Clause, as is discussed below.

(d) Section 948d(a) of the MCA is not to the contrary. That provision states that the commission has jurisdiction over "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). The best reading of this provision—and one which renders it consistent with section 950p—is that it simply clarifies that the commission's jurisdiction extends even to offenses that occurred prior to the commission's establishment by the MCA. To the extent that the MCA (contrary to its stated purpose) sets forth new offenses that are not also violations of the law of war, such offenses are not "made punishable by this chapter" if they occurred before enactment of the MCA, because under section 950p and the presumption against retroactivity, the MCA's substantive criminal provisions do not apply retroactively.

(e) Even if Section 948d(a) is read—in conflict with section 950p and the presumption against retroactivity—to suggest that the MCA was intended to apply retroactively, it would at best render the statute ambiguous. And any doubts about whether the MCA applies

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[15] To read § 950p as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to adoption of the M.C.A. violates bedrock separation of powers principle. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") This interpretation should be avoided because it would raise serious constitutional concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

to conduct prior to the law's passage should be resolved in favor of non-retroactivity, because a contrary holding would raise serious constitutional concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

(f) In this case, applying the MCA retroactively would violate the *Ex Post Facto* Clause of the U.S. Constitution. This rule of statutory construction is especially weighty in this case because, as discussed below, international law also prohibits the application of *ex post facto* laws, and the *Charming Betsy* doctrine compels U.S. courts to interpret statutes in accordance with international law whenever possible. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Interpreting the MCA in accordance with its own plain text, which identifies the statute as "declarative" rather that retroactive, § 950p, avoids these problems of constitutionality and comity, and is the better reading of the statute.

(2) <u>Applying The MCA Retroactively Would Violate Constitutional And International Prohibitions On Ex Post Facto Laws</u>

(a) Even assuming, *arguendo*, that Congress intended the MCA to apply retroactively, the MCA nonetheless cannot be so applied in this case because doing so would violate the *Ex Post Facto* Clause of the U.S. Constitution. The U.S. Constitution's prohibition on legislation that retroactively "alter[s] the definition of crimes or increase[s] the punishment for criminal acts" is clear and unequivocal. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990); *see* also U.S. Const. art. I, § 9, cl.3 ("No . . . ex post facto Law shall be passed."); *Kring v. Missouri*, 107 U.S. 221, 227 (1882) (noting that the Convention attached "[s]o much importance" to the ex post facto prohibition "that it is found twice in the Constitution").[16] It is well-established that this "constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to . . . aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925); *see also Collins*, 497 U.S. at 43. The *Ex Post Facto* Clause thus ensures that an individual can know the consequences of his actions when he commits them. *See Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) ("Through [the *Ex Post Facto*] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."). Here, Mr. Khadr could not have anticipated that the conduct he is alleged to have committed in 2002 would subject him to prosecution by a military commission in 2006.

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[16] The prohibition also appears as a limitation on the power of state legislatures. U.S. Const. art. I, § 10, cl.1 ("No State shall . . . pass any . . . ex post facto Law.").

(b) Applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause for two simple reasons. First, it retroactively changes the "criminal quality attributable to an act." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). Second, it alters the "nature or amount of the punishment imposed for its commission." *Id.*

(3) Terrorism, As Defined By The MCA, Was Not A Crime Under Federal Law At The Time Of The Alleged Offense

(a) First, applying the MCA to Mr. Khadr would violate the *Ex Post Facto* Clause because it changed the "criminal quality attributable to" Mr. Khadr's alleged conduct by making terrorism an offense triable by military commission. It is well-established that Congress is without power to make an action that "was innocent when done before the passing of the law . . . , criminal, and punish[ ] such action." *Calder v. Bull*, 3 U.S. 386, 390-91 (1798); *see also Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (Congress cannot retroactively change the "criminal quality attributable to an act"); *see also Collins*, 497 U.S. at 43. The *Ex Post Facto* Clause of the Constitution restricts congressional power by "confining the legislature to penal decisions with prospective effect." *Weaver v. Graham*, 450 U.S. 24, 29, 29 n.10 (1981).

(b) Furthermore, the Court has consistently stressed the "'lack of fair notice'" of the illegality of one's action as one of the "'central concerns of the Ex Post Facto Clause.'" *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (quoting *Weaver v. Graham*, 450 U.S. 24, 30); *see also Strogner v. California*, 539 U.S. 607, 611 (2003). The *Ex Post Facto* Clause thus ensures that an individual can know the consequences of his actions when he commits them. *See Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) ("Through [the *Ex Post Facto*] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."). At the time that Mr. Khadr is alleged to have committed the offense of conspiring to commit terrorism, terrorism as defined by the MCA was not illegal. Consequently, Mr. Khadr could not have anticipated that the conduct he is alleged to have committed in 2002 would subject him to prosecution by a military commission in 2006 or a United States court of any variety. Applying the MCA to Mr. Khadr's case violates the *Ex Post Facto* Clause because it makes an act that was innocent when done, criminal, and punishes that act.

(c) In short, because the Constitution expressly withholds from Congress the power to enact *ex post facto* legislation, the MCA offense of terrorism is without effect as applied to Mr. Khadr. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description."). Thus, this Commission should strike terrorism as an object of the alleged conspiracy.

(4) Even If Mr. Khadr's Alleged Acts Did Violate Existing Federal Law, Punishment By Military Commission Would Violate The *Ex Post Facto* Clause

(a) Moreover, even if U.S. law previously criminalized Mr. Khadr's actions as conspiring to commit terrorism – and the defense is not aware of any applicable U.S. law that

Mr. Khadr's actions would violate – punishment by this Military Commission under the MCA would nonetheless violate the Ex Post Facto Clause. What is material is that the law before the MCA did not recognize terrorism as one of the few crimes *triable by a military commission*. As a result of that change, Mr. Khadr faces prosecution before an entirely different adjudicative body with entirely different rules than would have been the case had he been tried in federal court. While "statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited," *Beazell*, 269 U.S. at 170, conferring jurisdiction on an entirely different body with entirely different rules of procedure is another matter altogether. In particular, because he faces trial before a commission rather than a court, Mr. Khadr will be (1) unable to receive the protections of the Juvenile Delinquency Act (the "JDA"), 18 U.S.C. §§ 5031 *et seq.*; (2) subject to adjudication absent procedural protections such as the right to a grand jury indictment, the right to the protections of the Federal Rules of Evidence, and the right to trial before a jury of his peers who, before conviction, would have to agree unanimously that the evidence proved his guilt beyond reasonable doubt.

(b) As a preliminary matter, if Mr. Khadr were tried in federal court, he would have the right to invoke the protections of the JDA because he was just 15 years old when his alleged offenses occurred. Under the JDA, Mr. Khadr could be tried as an adult only if a court, after making factual findings about several factors such as his age, social background, and psychological maturity, determined that such a trial was appropriate. *Id.* § 5032. If the MCA is applied to Mr. Khadr, he will be deprived of the JDA's protections because the MCA simply assumes, that all persons, even those who have not yet attained legal or psychological maturity under U.S. law, should be subject to the same procedures and consequences. *Cf. Roper v. Simmons*, 543 U.S. 551, 569 (2005) (noting that juveniles' "lack of maturity and an underdeveloped sense of responsibility," combined with their greater "susceptib[ility] to negative influences and outside pressures . . . render suspect any conclusion that a juvenile falls among the worst offenders").

(c) Further, applying the MCA to Mr. Khadr would subject him to a method of adjudication qualitatively different from a criminal trial in a domestic court. *Cf. Beazell*, 269 U.S. at 171 ("Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation . . . ."). Perhaps most significantly, if Mr. Khadr had been tried for conspiracy to commit terrorism in federal court, he could be convicted only if a jury of his peers unanimously found him guilty of the offense. *See* Fed. R. Crim. P. 31(a); *see also* U.S. Const. amend. VI. Under the MCA, by contrast, all that is required to convict the accused of "terrorism" is "concurrence of two-thirds of the [military commission] members present at the time the vote is taken." *See id.* § 949m(a). In addition, under the MCA, the accused has no right to grand jury indictment, *see* 10 U.S.C. § 948q(a), and the protections against the admission of unreliable evidence afforded by the Federal Rules of Evidence are significantly limited, *see id.* § 949a. Thus, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it "changes the criminal quality attributable to an act" by making it one subject to trial by military commission.

(d) Second, applying the MCA to Mr. Khadr also violates the *Ex Post Facto* Clause because it deprives him of the protections against arbitrary sentencing provided by federal sentencing law. *See Rita v. United States*, 127 S. Ct. 2456, 2463 (2007). Under federal law, courts are required to consider a number of different factors, including the "nature and circumstances of the offense and the history and characteristics of the defendant," to ensure that the sentence imposed is "no greater than necessary." 18 U.S.C. § 3553; *see, e.g., United States v. Fonseca*, 473 F.3d 1109, 1112 (10th Cir. 2007) (requiring courts to consider the recommendations of the Federal Sentencing Guidelines, including consideration of any applicable grounds for reductions in the otherwise recommended range). Under the MCA, by contrast, any person convicted of conspiracy to commit terrorism "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(d)(28). The MCA thus vests nearly unbridled discretion in the military commission to make the determination as to what sentence is appropriate in any given case, and the military commission is under no obligation analogous to that of federal courts to consider possible grounds, unique to Mr. Khadr's case, which might warrant a reduced sentence.

(e) In addition, and perhaps most significantly, in the federal system, Mr. Khadr would be unquestionably entitled to appellate review of both the procedural and substantive reasonableness of any sentence imposed by the district court. *See, e.g., United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006). By contrast, the Government will likely argue that Mr. Khadr does not have the right to appeal whatever sentence is ultimately imposed by the military commission.[17] Thus, applying the MCA to Mr. Khadr deprives him of the certain right to appellate review of his sentence he would have enjoyed under the preexisting law.

(f) These changes in the applicable sentencing regime are a clear violation of the *Ex Post Facto* Clause. In *Miller v. Florida*, the Supreme Court held that a change in sentencing laws could violate the *Ex Post Facto* Clause, and it was immaterial that the new law did not "'technically . . . increase . . . the punishment annexed to [the defendant's] crime.'" *Miller v. Florida*, 482 U.S. 423, 432-33 (1987) (quoting *Lindsey v. Washington*, 301 U.S. 397, 401 (1937)). The Court explained that the new law violated the *Ex Post Facto* Clause because under the new law "the trial judge did not have to provide any reasons, convincing or otherwise, for imposing the sentence, and his decision was unreviewable." *Id.* at 432-33. And while the Supreme Court has approved new statutes that "altered the methods employed in determining whether the death penalty was to be imposed" in a way that was "ameliorative" and provided "significantly more safeguards to the defendant than did the old," *Dobbert v. Florida*, 432 U.S. 282, 293, 294, 295 (1977), it has reached the opposite conclusion when—as in the case of the MCA—the new legislation does not heighten the protections available to the defendant. *See Miller*, 482 U.S. at 431-32 ("Unlike *Dobbert*, where we found that the 'totality of the procedural changes wrought by the new statute . . . did not work an onerous application of an *ex post facto* change,' here [defendant] has not been able to identify any feature of the revised guidelines law

[17] The MCA limits the jurisdiction of the Court of Appeals is "limited to the consideration of . . . (1) whether the final decision was consistent with the standards and procedures specified in [the MCA]; and . . . to the extent applicable, the Constitution and the laws of the United States." 10 U.S.C. § 950g.

that could be considered ameliorative.") (internal citation omitted). Moreover, the changes wrought by the MCA are not simply procedural; they deprive Mr. Khadr of the right to have his sentencing body consider mitigating factors that might warrant a reduction in his sentence and, even more fundamentally, they may deprive him of the uncontestable right to have that sentence reviewed by a higher court. Applying the MCA to Mr. Khadr thus changes the "nature and amount" of his punishment within the meaning of the *Ex Post Facto* Clause's prohibition, and the MCA therefore cannot serve as the basis for military commission jurisdiction over Mr. Khadr.

(g) And if courts-martial provide the appropriate benchmark, *see Hamdan*, 126 S. Ct. at 2791 (holding UMCJ requires courts-martial rules be applied to military commissions unless impracticable), applying the MCA to Mr. Khadr nonetheless violates the *Ex Post Facto* Clause. This Commission need look no further than the text of the MCA itself, which *explicitly* breaks from *court-martial* procedures. In Section 948b(d) ("Inapplicability of Certain Provisions"), the MCA identifies three crucial UCMJ protections that do *not* apply, including "any rule of courts-martial relating to speedy trial," 10 U.S.C. § 948b(d)(1)(A), the rules "relating to compulsory self-incrimination," *id.* § 948b(d)(1)(B), and those relating to pretrial investigation, *id.* § 948b(d)(1)(C). The other rules "shall apply to trial by military commission *only to the extent provided by this chapter*." *Id.* § 948b(d)(2) (emphasis added). This is little comfort, since the MCA provides, among other things, that *court-martial* principles of law and rules of evidence shall apply only insofar "as the Secretary [of Defense] considers practicable or consistent with military or intelligence activities." *Id.* § 949a(a). The very same section of the MCA notes that the Secretary may prescribe that under certain circumstances the "hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission." *Id.* § 949a(b)(2)(E). This includes, notably, the admission in certain circumstances of coerced testimony. *Id.* § 948r. While the Government lists in its response a number of purported rights available to Mr. Khadr under the military commission system,[18] the relevant question is not what rights the MCA provides, but what rights it takes away. As discussed above and in detail in Mr. Khadr's motion to dismiss, the retroactive application of the MCA to Mr. Khadr's case deprives him of many rights which are routinely provided in U.S. courts and courts-martial. (Def. Motion at 10-13.)

(h) Thus, regardless of whether the appropriate benchmark is trial in an Article III court or by court-martial, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it "aggravate[s]" the consequences for the conduct Mr. Khadr is alleged to have committed. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925).

[18] It is worth noting that some of the "rights" the Government identifies exist more in theory than they do in practice. For example, the Government states the accused has the right to cross-examine witnesses who testify against him, but because the Government can base its case exclusively on documentary and hearsay evidence, the accused may have no witnesses and/or no witnesses with personal knowledge to cross-examine. *See* 10 U.S.C. § 949a(b)(2). The Government also claims that the accused has the right to present evidence in his defense, but the accused cannot compel the attendance of witnesses at a commission in Guantanamo Bay.

(i) In addition to violating the express terms of the U.S. Constitution, interpreting the MCA to apply retroactively would conflict with international law. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Like U.S. law, international law – including the law of war,[19] international criminal law,[20] and human rights law,[21] – also prohibits the application of *ex post facto* laws. For example, Article 22 of the Rome Statute of the International Criminal Court provides that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, *a crime within the jurisdiction of the Court*."[22] The MCA, however, purports to do exactly what the Rome Statute prohibits: allow the military commission to hold individuals criminally responsible for conduct which, at the time it took place, was not a "crime within the jurisdiction of the Court." International law also clearly prohibits the imposition of heavier sentences than were applicable when the offense was committed.[23] Thus, international law, too, prohibits the *ex post facto* application of the MCA to this case.

(j) Because applying the MCA to Mr. Khadr would violate the *Ex Post Facto* Clause, he cannot be tried for any charges brought under it, including conspiracy to commit terrorism. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description.").

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[19] Protocol I, art. 75(4)(c) ("No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.") (recognized as customary international law by the U.S. in W. Hays Parks et al., Unclassified Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD (May 8, 1986) (entitled 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications); Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, art. 99(1), 75 U.N.T.S. 135; Geneva Convention IV, art. 67.

[20] *See* Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, art. 22, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

[21] American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, Article 9 (entered into force July 18, 1978; International Covenant on Civil and Political Rights (1966), art. 15(1), 999 U.N.T.S. 171 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."); Universal Declaration of Human Rights, art. 11(2), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) ("No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."); *see also* Executive Order 13107, "Implementation of Human Rights Treaties," Dec. 10, 1998 ("It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.").

[22] Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, art. 22, 2187 U.N.T.S. 3 (entered into force July 1, 2002) (emphasis added).

[23] *See, e.g.*, International Covenant on Civil and Political Rights art. 15(1) (entered into force Mar. 23, 1976); Protocol I of the Geneva Conventions art. 75(4)(c) (entered into force Dec. 7, 1979).

d. Conclusion

(1) Military commissions have long been defined, in large part, by their limited jurisdiction. Neither U.S. nor international law recognized terrorism as one of the narrow category of crimes triable by military commission at the time the charged conduct in this case is alleged to have occurred. The MCA requires the object of the conspiracy to be an offense subject to trial by military commission. And since terrorism is not an offense subject to trial by military commission, conspiracy to commit terrorism was also not an offense subject to trial by military commission at the time of the alleged conduct. Because both U.S. and international law recognize that an individual must be tried according to the law in effect at the time of his alleged offense, the MCA, which was not enacted until four years *after* the charged conduct in this case, cannot serve as a basis for jurisdiction over Mr. Khadr. Accordingly, the military commission does not have jurisdiction to consider a charge of conspiracy to commit terrorism. Therefore, this Commission should strike terrorism as an object of the conspiracy alleged in Charge III.

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

8. **Witnesses and Evidence:** Mr. Khadr intends to offer the testimony of William Fenrick to testify on issues relating to the international law of war consistent with R.M.C. 201A(b).

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:**

A. Sworn Charge Sheet (2 Feb 2007)

/s/
William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

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):
[redacted]

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*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
[redacted]	O-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER [redacted]		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.

[redacted]
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

[redacted]

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

MC FORM 458 JAN 2007

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).

[redacted]
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 instructions[1]: _____

_____

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

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

MC FORM 458 JAN 2007

UNITED STATES OF AMERICA	)	**CHARGES**
	)	
	)	**Murder in Violation of the Law of War**
	)	
	)	**Attempted Murder in Violation of the Law of War**
v.	)	
	)	
	)	**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.

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.

[redacted]

From: [redacted]
Sent: Monday, April 21, 2008 3:02 PM
To: [redacted]
Cc: [redacted]
Subject: US v Khadr - Ruling - D-018
Attachments: Ruling - D-018 US v Khadr.pdf

COL Brownback has directed that the attached ruling be sent to counsel and other interested persons.

v/r,

[redacted]
Military Commissions Trial Judiciary
Department of Defense

From: Pete Brownback [redacted]
Sent: Monday, April 21, 2008 2:05 PM
To: [redacted]
Subject: Ruling - D-018

[redacted]

Please forward the attached ruling in D-018 to the parties in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

[redacted]

[redacted] — [redacted]

Sent: Monday, January 28, 2008 11:46 AM

To: [redacted]

Cc: [redacted]

Subject: US v. Khadr - D018 - Def Reply in Support of Mtn to Strike Terrorism from Chg III

Signed By: [redacted]

Attachments: 2008-01-28 Def Reply in Support of Mtn to Strike Terrorism from Chg III - D018.pdf

[redacted]

I am sending this attachment on behalf of Ms. Snyder and LCDR Kuebler for US v. Khadr. Please find attached the defense reply in support of the motion to strike terrorism from Charge III.

V/R

[redacted]

[redacted]

From: [redacted]
Sent: Friday, January 25, 2008 2:38 PM
To: [redacted]

Subject: RE: U.S. v. Khadr -- D-018 Defense Reply/Motion to Strike Terrorism from Charge III-Extension GRANTED

COL Brownback has directed that the defense reply to the government response to the defense motion to strike terrorism from Charge III (D-018) is due NLT 1630 on 28 January 08.

v/r,

[redacted]al Judiciary
Department of Defense

[redacted] for Relief

Sir,

1. In the course of examining unclassified documents provided to the defense, the defense recently discovered that the prosecution had attempted to redact certain information from the documents, but that the redactions could be readily "removed" when the documents were viewed on the computer, revealing the redacted information. The defense has had access to the documents and reviewed them in the past, however, only became aware of the issue this week.

2. At least two of the faulty redactions discovered by the defense appear to pertain to potentially classified information. These documents are currently stored on unclassified computers and CDs. As a result, the defense believes that there may be a security violation requiring remedial action to remove the classified information from the unclassified media.

3. Out of an abundance of caution, in view of past issues concerning the handling of

classified information (and to avoid any appearance of impropriety), the defense, at the direction of the Chief Defense Counsel, has ceased handling the discovery until such time as the prosecution is able to serve properly redacted documents on the defense. The prosecution and defense are working to accomplish this as soon as possible.

4. In the meantime, the defense will be required to report the matter to security officials for appropriate action. What this will require in terms of time or impact on defense resources is yet to be determined.

5. Although the defense has elected not to reply to a number of the government responses to defense motions submitted on or about 11 Jan 08, the defense does wish to file a reply concerning the defense motion to strike terrorism from Charge III (D018). As a result of the above-described developments, defense counsel have had to devote time over the past 24 hours to dealing with this matter, in addition to preparing a planned reply to the government's response to the pending defense request for special relief regarding disclosure of documents (D018).

6. Based on the foregoing, the defense respectfully requests an extension of 24 hours to file a reply regarding D018 to 1630, 26 Jan 08. The prosecution and defense have conferred concerning the requested relief and the prosecution agrees to it.

VR,

LCDR Kuebler

[redacted]

From: [redacted]
Sent: Tuesday, January 22, 2008 4:33 PM
To: [redacted]

Subject: RE: Delay Granted - Prosecution Response - D-018 Motion to Strike Terrorism in Chg III - US v. Khadr
Signed By: [redacted]

Attachments: D18 Pros Resp to Def Mot. to Strk Terrorism from Charge III.pdf

D18 Pros Resp to Def Mot. to S...

All,

My apologies. This should be a PDF.

V/R,

[redacted]

[redacted]

Subject: Delay Granted - Prosecution Response - D-018 Motion to Strike Terrorism in Chg III - US v. Khadr

[redacted]

1. The response to D-018 filed by the government on January 18, 2008, 4:36 PM, is hereby vacated.

2. The government shall file a response NLT 1700 hours, 22 January 2008.

COL Brownback

[redacted], 2008 8:13 PM
Subject: Re: Filing Designation: D018 Motion to Strike Terrorism in Chg III - US v. Khadr

> Sir,
>
> 1. The Prosecution respectfully requests permission to withdraw our
> response to D018 and file a replacement filing NLT 1700, Tuesday, 22
> January.
>
> 2. In the process of completing our filing on D018, the Prosecution
> attempted to merge two documents and ultimately cut out a significant
> portion of our brief. As a result, our position is misstated
> regarding certain issues raised in the filing.
>
> 3. The Prosecution has attempted to confer with Defense Counsel
> regarding the requested relief; however was unable to reach them.
>
> V/R,
>
> Major Groharing
>
> Jeff Groharing wrote:
>
>> Sir,
>>
>> Prosecution response is attached.
>>
>> V/R,
>>
>> Major Groharing
>>
>> [redacted] wrote:
>>
>>> All parties,
>>> The filing designation for the 11 JAN 08 Defense Motion to Strike
>>> Terrorism as an Object of the Alleged Conspiracy in Charge III is

>>> D018 Motion to Strike Terrorism in Chg III - Khadr. See RC 5.
>>>
>>>
>>> v/r,
>>>
[redacted]ial Judiciary Department of Defense
>>>
>>>
>>> ----------
[redacted]
>>> Please find attached the defense motion to dismiss terrorism as an
>>> object of the alleged conspiracy in Charge III. V/r
>>> Ms. Snyder
>>
>>
>
> --
> Jeff Groharing
>
[redacted]

UNITED STATES OF AMERICA	}	**D-023** **Ruling on Defense Motion for Appropriate Relief (Strike Murder in Violation of the Law of War from Charge III)**
		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 and the government reply. The defense moves to strike "murder in violation of the law of war" as an object of the conspiracy alleged in Charge III.

2. The commission has determined (*See* Ruling - D-008, dated 21 April 2008.) that Congress properly enacted the offense of murder in violation of the law of war in the Military Commissions Act of 2006.

3. The commission has determined (*See* Ruling - D-010, dated 21 April 2008.) that Congress properly enacted the offense of conspiracy in the Military Commissions Act of 2006.

4. The commission has reviewed Charge III and its Specification. The Specification alleges an offense under the Military Commissions Act and murder is properly alleged as one of the objects of the conspiracy.

5. The defense motion for appropriate relief to strike "murder in violation of the law of war" as an object of the conspiracy alleged in Charge III is denied.

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

UNITED STATES OF AMERICA	D 23
v.	GOVERNMENT'S RESPONSE
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	To the Defense's Motion For Appropriate Relief (Strike Murder in Violation of the Law of War from Charge III) 25 January 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's motion to strike "murder in violation of the law of war" as an object of the conspiracy alleged in Charge III ("Def. Mot.") should be denied.

3. Overview: The Defense argues that, under the law of war, terrorists may kill American soldiers with impunity. To state that argument is to demonstrate its absurdity. While it is certainly true that the law of war evolved to handle armed conflicts involving *lawful* combatants (i.e., those who mutually respect the rules, conventions, and customs of warfare), it does not follow that terrorists who flout those rules—as the accused is alleged to have done—may take advantage of them and receive combatant immunity. Moreover, the law of war has long prohibited "treacherous" killing, and nothing could be more treacherous than an individual who lies in wait, dressed as a civilian, before attacking and killing a law-abiding American. Because murder has been a cognizable violation of the law of war for centuries, Khadr's ex post facto claims are baseless. The motion to dismiss should be denied.

4. Burden and Persuasion: The Defense bears the burden of raising the special defense that he is entitled to combatant immunity. *See United States v. Khadr*, CMCR 07-001, at 7 (Sept. 24, 2007). 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. THE MCA CONCLUSIVELY ESTABLISHES JURISDICTION

i. The Defense asserts that Congress cannot create military commission jurisdiction for murder in violation of the law of war because, in the Defense's view, Congress does not have the power to do so. That assertion is patently incorrect.

ii. The Constitution vests Congress with the exclusive authority "[t]o *define* and *punish* . . . Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10 (emphasis added). Exercising that authority in the Military Commissions Act of 2006 ("MCA"), Congress unequivocally declared murder in violation of the law of war to be a crime triable and punishable by military commissions.

a. The MCA codifies "offenses that have traditionally been triable by military commissions." 10 U.S.C. § 950p(a). One such offense, triable by a military commission, is murder committed in violation of the law of war. *See id.* § 950v(b)(15).

b. Congress's authority to "define and punish . . . "Offense[] against the Law of Nations" was recognized even by the plurality opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). There, four justices would have held that the petitioner in that case 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 id.* 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).

c. Moreover, numerous authorities have recognized that the Offenses Clause entitles Congress to substantial deference in defining violations of the law of nations:

> [E]ven assuming that the acts described in [18 U.S.C. §§ 2332 & 2332a] are not *widely* regarded as violations of international law, it does not necessarily follow that these provisions exceed Congress's authority under [Article I, Section 8,] Clause 10. Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to "define" such offenses. Hence, provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to *define* offenses against the law of nations. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820) (Story, J.) ("Offenses . . . against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. . . . [T]herefore . . . , there is a peculiar fitness in giving the power to define as well as to punish."); Note, Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 Cornell L. Rev. 599, 611 (1987) ("Congress may define and punish offenses in international law, notwithstanding a lack of consensus as to the nature of the crime in the United States or in the world community.").

United States v. Bin Laden, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000) (emphasis in original; first, second and third alterations added) (footnote omitted), *criticized on other grounds by United States v. Gatlin*, 216 F.3d 207, 212 n.6 (2d Cir. 2000); *see also* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L.J. 121, 142 (2007) ("We might assume . . . that Congress, representing the United States' sovereign lawmaking body within the international system, has at least some leeway to aid in the development of the category of international offenses by pushing the envelope beyond where it already is."); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 335 (2001) ("While it might be unclear in some cases whether particular conduct violates international law, courts are likely to afford Congress substantial flexibility in making this determination, given that Congress is expressly given the power to 'define.'"). In fact, the accused does not cite even a single case in which Congress's codification of a law-of-war violation has been reversed, nor are we aware of any. *Cf. United States v. Furlong*, 18 U.S. (5 Wheat) 184, 198 (1820) (discussing in dicta Congress's authority under the Offenses Clause, but limiting its holding to Congress's legislative intent with respect to the statute at issue).

d. Here, Congress has exercised its constitutional authority to define and codify offenses against the law of war, including with respect to murder. *See Hamdan*, 126 S. Ct. at 2774-75; *id.* at 2780 (plurality op.). Accordingly, because murder is a violation of the law of war, it has been properly charged as an object of the conspiracy in Charge III. The Defense's motion therefore should be denied.

B. MURDER IN VIOLATION OF THE LAW OF WAR IS A WAR CRIME, TRIABLE BY MILITARY COMMISSION

i. The MCA reflects Congress's exercise of its authority to "define and punish" murder and its attempt as "Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. Congress's judgment is firmly rooted in U.S. law and international law and custom, both of which recognize that a combatant commits murder when he kills another person in a manner that is not sanctioned by the laws of war.

ii. As an initial matter, the Defense is wrong about the appropriate standard for defining violations of the law of war.

a. In the Defense's view, "[f]or an offense to constitute a violation of the law of war, it must be recognized as an offense against the law of war by 'universal agreement and practice both in this country and internationally.'" Def. Mot. at 4 (quoting the Court's plurality opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006)).

b. But the Defense can point to *no case*—and certainly nothing in the *non-binding* plurality opinion in *Hamdan*[1]—that suggests "universal agreement and practice"

[1] Any portion of an opinion that commands only a four-Justice plurality is not a binding precedent. *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

is the minimally acceptable standard for defining violations of the law of war. The Court has held that the line between unlawful combatants (like Khadr) and lawful ones is rooted in "universal agreement and practice," *see Ex Parte Quirin*, 317 U.S. 1, 30 (1942), but it has never suggested that *Quirin*'s dictum established a floor. To the contrary, as the Defense itself appears to concede, the standard is one of ***general acceptance***. *See* Def. Mot. at 4 (noting the force of the law of war derives from the fact that "'it has been generally accepted as a rule of conduct'") (quoting *The Paquete Habana*, 175 U.S. 677, 711 (1900)). Even the non-binding plurality opinion in *Hamdan* required nothing more than "a substantial showing" that the law of war has "acknowledged" a given offense. *See* 126 S. Ct. at 2780 (plurality). The Defense's suggestions (and selective quotations) to the contrary are belied by the very cases it cites.[2]

Murder in Violation of the Law of War

iii. The Defense concedes, *see* Def. Mot. at 4-5, that killing through "prohibited means" constitutes a violation of the law of war. One of those "prohibited means"—which is as old as the law of war itself—is murder committed by a combatant who fails to fight as a lawful belligerent.[3] As Justice Iredell noted in 1795, "hostility committed without public authority" is "not merely an offence against the nation of the individual committing the injury, *but also against the law of nations . . . .*" *Talbot v. Janson*, 3 U.S. 133 (1795) (Iredell, J., concurring) (emphasis added).

a. Individuals "who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment." U.S. Army Field Manual No. 27-10, Article 80, 18 July 1956 (citation omitted). *See also id.*, Articles 81, 82. Historically, summary execution of those caught committing acts of unlawful

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that a plurality view that does not command a majority is not binding precedent); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 300 n.7 (D.C. Cir. 2006) (A plurality opinion "is not binding precedent but a 'considered opinion' that 'should be the point of reference for further discussion of the issue.'") (quoting *Texas v. Brown*, 460 U.S. 730, 737 (1983) (opinion of Rehnquist, J.)).

[2] In its reply brief on the motion to dismiss Charge I (*see* pp. 3-6 & nn. 5 & 8), the Defense argues at length that *only* international law is relevant to determining the contours of the law of war. Again, however, that assertion is belied by the very cases that the Defense cites so heavily. As the plurality opinion in *Hamdan* emphasized, the line between unlawful combatants, like Khadr, and lawful ones is, "by 'universal agreement and practice' both ***in this country*** and internationally, recognized as an offense against the law of war." 126 S. Ct. at 2780 (plurality op.) (emphasis added). The notion that domestic law is "irrelevant" (Reply Br. Mot. to Dismiss Charge I at 4) is patently and demonstrably false.

[3] The Defense argues—notably, without citation—that the law of war does not recognize "status crimes." Def. Mot. at 6. The Supreme Court, however, has held that the distinction between "lawful" and "unlawful" combatant status is founded in the "universal agreement of law and practice" under the law of war. *Ex parte Quirin*, 317 U.S. 1, 30 (1942). And unlawful combatants can be forced to stand trial before military commissions for *precisely* those "acts which render their belligerency unlawful." *Id.* Moreover, the Government did not criminally charge Khadr simply on the basis of his "status"; rather, he is charged with *committing murder* while maintaining the status of an unlawful enemy combatant.

belligerency, sometimes termed "unlawful combatants" or "unprivileged belligerents," has not been uncommon. *See, e.g.*, *United States v. List* ("Hostage Case"), 11 Trials of War Criminals 1223 (GPO 1950).

b. Colonel Winthrop—in a treatise that the Supreme Court has called the "the Blackstone of Military Law," *Hamdan*, 126 S. Ct. at 2777 (quoting *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957) (plurality))—noted:

> Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death.

Winthrop, *Military Law and Precedents*, 783 (1895, 2d ed. 1920). During the Civil War, military commissions were used frequently to try and punish unlawful combatants "who engaged in the killing . . . of peaceable citizens *or soldiers*." *Id.* at 784 (emphasis added). Critically for purposes of this motion, many were sentenced to death "for homicide." *Id.* at 784 n.57. *See also id.* at 839 (emphasizing that murder was one of the crimes "most frequently brought to trial before military commissions" during the Civil War).

c. Similarly, in a 143-year-old opinion, which remains binding on the Executive Branch, the Attorney General emphasized that "[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." 11 Op. Atty. Gen. 297, 314 (1865).

d. Lieber's Code, General Order No. 100, War Department, April 24, 1863, recognized the distinction between lawful and unlawful combatants as well. Under Article 57, "[s]o soon as a man is armed by a sovereign government, and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses." By contrast, those who "commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army . . . shall be treated summarily as highway robbers or pirates." Article 82.

i. Notwithstanding the bedrock principles enunciated in Lieber's Code, the Defense claims—incredibly—that Khadr's status as an *unlawful* combatant "is irrelevant to determining whether [Khadr] *violated the law* of war." Def. Mot. at 8 (emphasis added). That is akin to arguing that one's status as a licensed driver is irrelevant to determining whether one may lawfully operate a motor vehicle.

ii. As Lieber makes plain, only lawful combatants can lawfully "commit hostilities." Those, such as Khadr, who "divest[] themselves of the character or appearance of soldiers . . . shall be treated summarily as highway robbers or pirates."

e. Given that unlawful belligerents historically could be summarily

punished—and even executed—under the law of war, it follows *a fortiori* that they may be tried by military commissions. Thus, the Supreme Court has held:

> By universal agreement and practice the law of war draws a distinction between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. *Unlawful combatants* are likewise subject to capture and detention, but in addition they are *subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.*

Quirin, 317 U.S. at 30 (emphasis added).

f. Here, Khadr has been charged with committing murder without combatant immunity and in violation of the law of war. Specifically, Khadr unlawfully engaged in combat by fighting outside of responsible command, by fighting without wearing a distinctive emblem, by failing to carry his arms openly, and by flaunting the laws and customs of war by feigning to be a non-combatant. *Compare* Hague Regulations, Annex, Art. 1.

1. Under the law of armed conflict, only a lawful combatant enjoys "combatant immunity" or "belligerent privilege" for the lawful conduct of hostilities during armed conflict. *See, e.g., Padilla v. Bush*, 233 F. Supp. 2d 564, 592 (S.D.N.Y 2002), *rev'd on other grounds*, 542 U.S. 426 (2004). Those considered "lawful combatants" under the law of war cannot be prosecuted for belligerent acts—including the killing of an enemy soldier—if they abide by the law of armed conflict. *See id.* at 592 (*citing United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002)).

2. Here, Khadr has failed to challenge the *prima facie* evidence that he is an unlawful combatant. *See* Def. Mot. at 6 n.12.

g. Unlawful or unprivileged combatants—such as Khadr—violate the laws of war when they commit war-like acts, such as murder. The CMCR emphasized that proposition by noting that unlawful combatants may be "treated as criminals under the domestic law of the capturing nation," ***including the Military Commissions Act***, "for any and all unlawful combat actions." *Khadr*, CMCR 07-001, at 6. The CMCR reiterated the permissibility of Khadr's trial before military commission by citing passages from *Lindh* and *Quirin*, both of which emphasize that "'[u]nlawful combatants are . . . subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.'" *Khadr*, CMCR 07-001, at 6 (quoting *Quirin*, 317 U.S. at 30, and citing *Lindh*, 212 F. Supp. 2d at 554, the latter of which block-quoted the same language from *Quirin*).

Treacherous Killing

iv. Even for otherwise lawful combatants (which Khadr is not), one example of murder in violation of the law of war is the "treacherous[]" killing of "individuals

belonging to the hostile nation or army." Annex to Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907, Art. 23, ¶ 3 ("Hague Regulations"). Such killings have long been held to violate the laws of war, including under the Fourth Hague Convention, and they have violated the War Crimes Act since 1997, *see* Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. 105-118, § 583, 111 Stat. 2386, 2436 (26 Nov. 1997), long before Khadr treacherously killed Sergeant First Class Speer.

a. For example, Article 37(1)(c) of Additional Protocol I to the Geneva Conventions prohibits killing through "perfidy," including the murder of an adversary by an individual "feigning . . . civilian, non-combatant status." Although the United States has not ratified Protocol I, it views the perfidy provisions of Article 37 as reflecting customary international law. *See U.S. Army Operational Law Handbook* 15, 25 (J. Rawcliffe & J. Smith eds., 2006).

b. The Army's *Operational Law Handbook* similarly defines unlawful combatants to include "civilians who are participating in the hostilities or who otherwise engage in unauthorized attacks or other combatant acts." *Id.* at 17.

c. The Judge Advocate General's *Law of War Handbook* also emphasizes that attacking a soldier while feigning non-combatant status constitutes a war crime. *See* Int'l & Operational Law Department, *Law of War Handbook*, § 5(A)(2)(f), at 192 (Keith E. Puls et al. eds., 2005) ("Attacking enemy forces while posing as a [non-combatant] civilian puts all civilians at hazard.") (internal quotation marks and citations omitted).

d. Similarly, U.S. Air Force Pamphlet 110-31 prohibits "[p]erfidy or treachery," which includes murder by a combatant who "feign[s] . . . civilian, noncombatant status." U.S. Air Force Pamphlet 110-31, at 5-12.

e. Building on these and other materials, Article 8(2)(b)(xi) of the Rome Statute of the International Criminal Court similarly prohibits "killing or wounding treacherously individuals belonging to the hostile nation or enemy." *See also* Knut Dörmann, *Elements of War Crimes* 240-45 (2002).

f. These sources establish an irrefutable consensus, as a matter of United States and international law, that murder committed by an individual—like Khadr—who takes up arms without satisfying the conditions for lawful combat is a violation of the law of war. He was therefore appropriately charged, especially in light of the well-settled principle that "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Application of Yamashita*, 327 U.S. 1, 17 (1946).

Conclusion

v. The Defense is correct that "[t]he law of war plainly does not prohibit killing enemy soldiers," Mot. to Dismiss I at 4, but that is only true when the killing is done by a

soldier who fights under responsible command, wears a distinctive emblem, carries his arms openly, and obeys the laws and customs of war.[4] *See* Hague Regulations, Annex, Art. 1. To receive the protections afforded by the law of war for killing in combat, a person must conform to the requirements for lawful combatants that the laws of war prescribe.

a. In the Defense's view, by contrast, anyone can kill an American serviceman under any battlefield circumstances, so long as he does not use certain narrowly proscribed methods, which (conveniently enough for Khadr) do not include guerilla tactics.

b. That contention does violence to both the law of war and common sense. The law of war does not condone, much less immunize, killing undertaken in a manner that flouts its requirements for lawful combat—which is why it clearly recognizes the crime of unlawful killing, even where the target is a soldier. The Defense's argument to the contrary relies upon egregious misunderstandings and misinterpretations, under which the law of war somehow protects killing by terrorists, who openly flaunt the conventions, norms, customs, and rules that govern the conduct of warfare.

c. Because Khadr was an unlawful combatant under any conceivable interpretation of the law of war, his alleged killing is not even arguably immunized as lawful combat by those same laws. Hence, the charge of murder as alleged against Khadr is a cognizable war crime, which is properly heard before this Court.

C. THE DEFENSE'S EX POST FACTO ARGUMENTS ARE BASELESS

i. The Defense claims that the United States Constitution's Ex Post Facto Clause somehow precludes Khadr's trial before a military commission. That argument must be rejected.

a. The Supreme Court has made clear that an alien enemy combatant held outside the sovereign borders of the United States who has no connection to the United States other than his confinement possesses no rights under the Constitution. For instance, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a group of German nationals—who were captured in China by U.S. forces during World War II and imprisoned in a U.S. military base in Germany—sought habeas relief in federal court. Although the military base in Germany was controlled by the U.S. Army, *id.* at 766, the Supreme Court held that these prisoners, detained as enemies outside the United States, had no right under the Constitution either to petition for a writ of habeas corpus or to the protection of the Fifth Amendment, *see id.* at 782-85. This is so because the prisoners "at no relevant time were within any territory over which the United States is *sovereign*, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 777-78 (emphasis added).

[4] Khadr, of course, has not invoked this—or any other—basis for combatant immunity.

b. The Court further noted that to invest nonresident alien enemy combatants with rights under the Due Process Clause would potentially put them in "a more protected position than our own soldiers," who are liable to trial in courts-martial, rather than in Article III civilian courts. *Id.* at 783. The Court rejected the argument that alien enemy combatants should have more rights than our servicemen and women, and instead held that the Fifth Amendment had no application to alien enemy combatants detained outside the territorial borders of the United States:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

Id. at 784-85 (citation omitted).

c. Forty years later, the Supreme Court reaffirmed its conclusion that nonresident aliens outside United States sovereign territory have no constitutional rights, and explained that "[n]ot only are history and case law against [the alien], but as pointed out in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the result of accepting this claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990). Similarly, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court confirmed that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* at 693 (citing *Verdugo-Urquidez* and *Eisentrager*); *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . . ."). Following these precedents, the U.S. Court of Appeals for the D.C. Circuit consistently has held that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

d. Furthermore, even when an alien is found within United States sovereign territory, the alien's lack of *voluntary* connection to the Nation denies him protection under the Constitution. As the Supreme Court explained in *Eisentrager*, the alien has been accorded an "ascending scale of rights as he increases his identity with our society," 339 U.S. at 770, and the privilege of litigation has been extended to aliens "only because permitting their presence in the country implied protection," *id.* at 777-78. Thus, an alien seeking constitutional protections must establish not only that he has come within territory over which the United States has sovereignty, but also that he has developed substantial voluntary connections with this country. *See Verdugo-Urquidez*, 494 U.S. at

271-72; *accord Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.") (citing cases). In *Verdugo-Urquidez*, the Supreme Court held that a nonresident alien, who had no previous significant voluntary connection with the United States and was involuntarily transported to the United States and held against his will, had no Fourth Amendment rights with respect to the search of his property abroad by U.S. agents. 494 U.S. at 271. The Court reasoned that "this sort of presence [in the United States]—lawful but *involuntary*—is not of the sort to indicate any substantial connection with our country." *Id.* (emphasis added).

e. In light of these principles, the accused cannot reasonably claim any constitutional protections, including with respect to the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3. The accused is an alien who has no voluntary connection to the United States. Furthermore, he is detained at Guantanamo Bay, Cuba, and it is clear that Guantanamo is outside the sovereign territory of the United States. As the Supreme Court noted in *Rasul v. Bush*, 542 U.S. 466 (2004), under the 1903 Lease Agreement executed between the United States and Cuba, "'the United States recognizes the continuance of the *ultimate sovereignty of the Republic of Cuba* over the [leased areas],' while 'the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.'" *Id.* at 471 (emphasis added; other alterations in original) (quoting Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 (6 Bevans 1113) ("1903 Lease")). Indeed, in framing the question before it for review, the Court in *Rasul* expressly recognized a distinction between "ultimate sovereignty" and "plenary and exclusive jurisdiction" at Guantanamo.[5] 542 U.S. at 475 (internal quotation marks omitted); *see id.* ("The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"). *Cf. United States v. Spelar*, 338 U.S. 217, 221-22 (1949) (lease for military air base in Newfoundland "effected no transfer of sovereignty with respect to the military bases concerned"); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380-81 (1948) (U.S. naval base in Bermuda, controlled by United States under lease with Great Britain, was outside United States sovereignty).[6]

f. *Rasul*, moreover, did not extend constitutional rights to alien enemy combatants held at Guantanamo Bay, Cuba. Rather, its holding was clearly limited to whether Congress intended a federal statute to cover aliens held at a place such as Guantanamo, and said nothing as to whether the *Framers* could ever have intended the

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[5] Indeed, the 1903 Lease prohibits the United States from establishing certain "commercial" or "industrial" enterprises over Guantanamo, a restriction wholly inconsistent with control congruent with sovereignty. *See* 1903 Lease, art. II.

[6] It is worth noting that the Guantanamo Bay lease with Cuba gives the United States "substantially the same rights as it has in the Bermuda lease" that was held in *Connell* to describe territory *outside* United States sovereignty. *Connell*, 335 U.S. at 383.

Constitution to apply extraterritorially in such circumstances. *See* 542 U.S. at 475-79, 481, 484 ("Considering that [28 U.S.C.] § 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that *Congress* intended the *statute's* geographical coverage to vary depending on the detainee's citizenship.") (emphasis added); *see also Rasul v. Myers*, No. 06-5209, slip op. at 31 (D.C. Cir. 11 Jan. 2008) ("[I]n *Rasul*, the Supreme Court, significantly, did not reach the issue of whether Guantanamo detainees possess constitutional rights and instead based its holding on 28 U.S.C. § 2241 only.") (citing *Rasul*, 542 U.S. at 478-84).

g. By contrast, with respect to the *Constitution*, the Supreme Court has clearly, and repeatedly, held that alienage *is* a relevant factor in determining whether constitutional rights should be extended extraterritorially to nonresidents. As the Supreme Court noted in *Eisentrager*, "Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection." 339 U.S. at 769; *see also Verdugo-Urquidez*, 494 U.S. at 273 (rejecting the contention "that to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment to the United States Constitution"); *Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). Moreover, "even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens," *Eisentrager*, 339 U.S. at 769, to say nothing of alien enemies. Indeed, "[a]t common law 'alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war.' [1 Blackstone * 372, 373]." *Id.* at 775 n.6 (second alteration in original) (quoting *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (D.C. Cir. 1946)) (internal quotation marks omitted); *see also Case of the Three Spanish Sailors*, (1779) 96 Eng. Rep. 775, 776 (C.P.) (petitioners were "alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus"); *Moxon v. The Fanny*, 17 F. Cas. 942, 947 (D. Pa. 1793) (courts "will not even grant a habeas corpus in the case of a prisoner of war, because such a decision on this question is in another place, being part of the rights of sovereignty").

h. Accordingly, alien enemy combatants, such as the accused, held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no constitutional rights. *See, e.g.*, *Eisentrager*, 339 U.S. at 784-85. Moreover, even if the U.S. naval base at Guantanamo Bay, Cuba, were deemed for constitutional purposes to be U.S. territory—contrary to the lease agreement itself—nonresident aliens held there would still lack constitutional rights since they do not have the sort of *voluntary* contacts with the United States required to give rise to rights under the U.S. Constitution. *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 271 ("[T]his sort of presence—lawful but *involuntary*—is not of the sort to indicate any substantial connection with our country.") (emphasis added); *Jifry*, 370 F.3d at 1182 ("The Supreme

Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.").

i. In *Boumediene v. Bush*, the D.C. Circuit held that "[a]ny distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of [constitutional rights]." 476 F.3d 981, 992 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3067 (2007). The *Boumediene* court specifically rejected any contention that *Rasul* somehow compels a different result. *See id.* at 992 n.10 ("The *Rasul* decision, resting as it did on statutory interpretation, *see* 542 U.S. at 475, 483-84, could not possibly have affected the constitutional holding of *Eisentrager*. Even if *Rasul* somehow calls *Eisentrager*'s constitutional holding into question, as the detainees suppose, we would be bound to follow *Eisentrager*."). The D.C. Circuit has direct review over this court, *see* 10 U.S.C. § 950g, and its decisions are binding. *See also Rasul*, No. 06-5209, slip op. at 32 ("*Boumediene* does not conflict with *Rasul* and remains the law of this Circuit."); *cf. Agostini v. Felton*, 521 U.S. 203, 237-38 (1997).

j. As a nonresident alien with no connections to the U.S. other than his mere confinement at Guantanamo Bay, Cuba, the accused therefore has no standing to bring an ex post facto challenge on behalf of either himself or other alien unlawful enemy combatants subject to the MCA who may themselves possess rights under the Constitution (including legal permanent residents of the United States). *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987). This court need proceed no further to reject the accused's claim that his ex post facto rights have been violated.

k. Nor is the accused's argument any stronger when framed as a structural claim—that the Ex Post Facto Clause represents a substantive limit on Congress's power from which he benefits, regardless of whether he himself possesses constitutional rights. Rather, *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. Rather, as the D.C. Circuit recognized in *Boumediene v. Bush*, *Eisentrager* stands for the broader proposition that limitations on Congress set forth in the Constitution do not apply at all *vis-à-vis* nonresident alien enemy combatants detained outside the United States. *See* 476 F.3d at 993.

l. The D.C. Circuit in *Boumediene* rejected the argument that an alien enemy combatant, such as the accused, could invoke purported "limitation[s] on congressional power," even if he could not assert individual "constitutional right[s]." *Id.* 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. 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 the accused, notwithstanding that the former clauses do not expressly reference "individuals" or "rights." *Id.* Accordingly, under the binding precedent of *Eisentrager* and *Boumediene,* the accused cannot claim the protection of the Ex Post Facto Clause.[7]

m. In any event, any consideration of the accused's 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 *with respect to this very defendant. 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 Hamdan before a military commission].") (emphasis added). Were the accused to prevail in his argument that a prosecution for conspiracy is barred by the Ex Post Facto Clause, the Supreme Court's invitation to Congress and the President to authorize a system of military commissions would be transformed into a fool's errand. This Court need proceed no further to reject Khadr's constitutional claims.

ii. Nor does the Defense cite a single binding international obligation against ex post facto legislation.

a. The Defense relies wholly upon the Rome Statute—which the United States has emphatically refused to ratify—and Article 75 of the Additional Protocol. According to the Defense, Article 75 has been "recognized as customary international law by the U.S.," Def. Mot. at 9—notwithstanding the fact that Khadr is not entitled to the protections of the Geneva Conventions (much less the broader protections afforded by the Additional Protocol), *see* 10 U.S.C. § 948b(g), and notwithstanding the fact that the United States has steadfastly refused to ratify the Protocol.[8] For this proposition, the

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[7] In *Downes v. Bidwell*, 182 U.S. 244 (1901), which pre-dates 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.

[8] The United States refused to ratify Protocol I because it opposed extending the protections of the Geneva Conventions to terrorists and associated unlawful combatants, who flout the Conventions' strictures. As President Reagan explained:

> We must not, and need not, give recognition and protection to terrorist groups as the price for progress in humanitarian law. . . . The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.

Defense cites an "unclassified memorandum" by a handful of Department of Defense employees. Needless to say, such unpublished musings—which, even on their face, simply comprise ***personal opinions***—do not amount to binding declarations as to what is customary international law.[9] Khadr's suggestion that such an "unclassified memorandum" constitutes the view of the United States is a drastic overstatement, to say the least.

b. In any event, even if binding, any international-law principles are irrelevant in light of the MCA. Khadr has not cited one case for the proposition that Congress is bound by international law. As the Supremacy Clause makes clear, it is the *Constitution* that is the supreme law of the land, and not an "unclassified memorandum" by an employee of the Department of Defense or the Rome Statute. *See* U.S. Const. art. VI, cl. 2. There is no question that Congress may statutorily depart from 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."); *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 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").

iii. Moreover, even on its own terms, Khadr's ex post facto claim is meritless. The Supreme Court has emphasized that the Ex Post Facto Clause is implicated only where (1) Congress "retroactively alter[s] the *definition* of crimes or increase[s] the punishment for criminal acts," *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), or (2) the statute "disadvantage[s] the offender affected by [it]," *id.* at 41. Neither condition is met here.

President Ronald Reagan, Letter of Transmittal to the Senate of Protocol II additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977 (Jan. 29, 1987). Regardless of whether "Article 75 of Protocol I to the Geneva Conventions of 1949 articulates many of the fundamental guarantees 'which are recognized as indispensable by civilized peoples,'" *United States v. Khadr*, No. 07-001, at 15 n.24 (C.M.C.R. Sept. 24, 2007), it is perverse to argue that the United States should be bound, as a matter of customary international law, to provide terrorists and associated unlawful combatants the same protections it has steadfastly refused to grant them as a matter of treaty law.

[9] The "unclassified memorandum" expresses only its authors' personal opinions that Article 75's "fundamental guarantees" are part of customary international law; it does *not* purport to put forth the view of the United States. The memorandum provides only that "***[w]e*** view the following provisions as already part of customary international law." Unclassified Memorandum at 1 (emphasis added); *see also id.* (expressing "***our views***") (emphasis added); *id.* at 2 ("***we*** regard the following" as CIL) (emphasis added); *id.* ("The above lists are in the nature of ***an advisory opinion on our part***.") (emphasis added). It is a bedrock legal principle that an individual's views may be probative of customary international law *only* insofar as they provide "trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

a. First, the MCA does not "retroactively alter the definition of" murder in violation of the law of war.

1. As explained above, that offense has been a well-established war crime for centuries. And under the law of war, unlawful combatants like Khadr faced military commissions (at best) and summary execution (at worst) for openly flaunting the rules and customs that govern armed conflict. Thus, the MCA does not "retroactively alter the definition of" or "increase the punishment for" murder in violation of the law of war, within the meaning of the Ex Post Facto Clause.

2. It is well established that changes to judicial tribunals and provisions governing venue or jurisdiction do not implicate the Ex Post Facto Clause, much less violate it. Courts have therefore 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). Indeed, the Supreme Court has "upheld intervening procedural changes [under the Ex Post Facto Clause] *even if application of the new rule operated to a defendant's disadvantage in the particular case*." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.28 (1994) (emphasis added).[10] 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.

b. Second, Khadr cannot conceivably claim that he has been "disadvantaged" by the MCA's passage.

1. As explained above, banditti, jayhawkers, guerillas and their modern-day equivalents are traditionally liable to be shot immediately upon their capture. Where such individuals have instead been tried, the United States has prosecuted them based upon offenses under the common law of war. Indeed, the MCA represents one of the first attempts of the United States to set out clearly, in its domestic law, the law of war offenses triable by military commissions. The fact that Congress chose expressly to define these law of war offenses does not amount to the creation of "new" offenses for purposes of the Ex Post Facto Clause. To the contrary, Khadr is certainly better off based upon the clarity provide by Congress and the extensive array of procedural protections provided by the MCA, the likes of which no unlawful combatant has ever enjoyed in the history of warfare.

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[10] Thus, the MCA's evidentiary rules—including, for example, the broad admissibility of hearsay—do not violate the Ex Post Facto Clause. The accused, like the Government, can rely upon those rules to introduce evidence, and in that sense, the MCA's rules are closely akin to retroactive procedural changes that the Court has approved in the past. *See, e.g.*, *Carmell v. Texas*, 529 U.S. 513, 546 (2000) (noting that the legislature may retroactively alter rules governing the admissibility of evidence where doing so does not uniformly prejudice the defendant).

2. For example, unlike his historical predecessors, Khadr enjoys the statutory 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.* § 949*l*(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).

3. Further, the MCA makes clear that murder is, and has been, a violation of the law of war, and therefore has traditionally been triable by military commission: "The provisions of this subchapter [which include the offense of murder] 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." 10 U.S.C. § 950p(a) (emphasis added). Accordingly, murder is, and was at the time of the accused's offense, a violation of the law of war. It therefore may be tried in a military commission. *See Hamdan*, 126 S. Ct. at 2777 (plurality); *see also* 10 U.S.C. § 950p(b) ("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*.") (emphasis added). Because the MCA has codified only existing offenses and regulates past conduct under the same substantive standards that previously applied to it, neither the Act nor its application in this case violates the Ex Post Facto Clause.

4. Instead of summary execution, and far from any unfairness, Khadr enjoys more legal process than any unlawful combatant ever detained or tried in any prior conflict anywhere in the world. Whatever an ex post facto violation may entail, this is certainly not it.

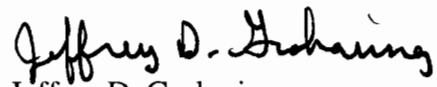
7. Oral Argument: The Government disagrees that the issues presented by these motions are "complex." Def. Mot. at 11. In light of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motions should be readily denied. To the extent, however, 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 these motions is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

11. Submitted by:



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UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** for Appropriate Relief (Strike Murder in Violation of the Law of War from Charge III) 18 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:** Mr. Khadr moves to strike "murder in violation of the law of war" as an object of the conspiracy alleged in Charge III.

3. **Overview:**

a. Murder in violation of the law of war must be struck as an object of the conspiracy alleged in Charge III. The Military Commission has no jurisdiction to try Mr. Khadr for conspiracy to commit murder in violation of the law of war alleged in Charge III because the government does not allege a conspiracy to commit a killing that that violates the law of war; the specification fails to state an offense with respect to this alleged object of the conspiracy. The MCA requires the object of the conspiracy to be an offense subject to trial by military commission. At the time of Mr. Khadr's alleged conduct, military commissions could only be used to try violations established by statute or by the law of war. At the time the alleged offense occurred in this case, neither U.S. law nor the international law of war proscribed murder as such as an offense triable by military commission. The Uniform Code of Military Justice (U.C.M.J.) set forth the applicable U.S. law at the time and, under the U.C.M.J., the only offenses triable by military commission were aiding the enemy and spying—not murder. Likewise, treaties and international practice confirm that murder, on the theory the government alleges, does not violate the law of war. Thus, conspiracy to commit murder in violation of the law of war alleged in Charge III cannot be tried by military commission.

b. The enactment of the 2006 Military Commissions Act ("MCA") does not alter this conclusion because both U.S. and international law provide that individuals must be tried under the law as it existed at the time of their alleged offense. The relevant provision of the MCA prohibits intentional killing "in violation of the law of war." 10 U.S.C. §950v(15). The law of war prohibits certain modes of warfare and attacks on certain protected persons, but the allegations against Mr. Khadr do not include any of this prohibited conduct. Put simply, because killing a soldier in combat is not a violation of the law of war, it is also not an offense made triable by military commission under the MCA. It is irrelevant that the Manual for Military Commissions ("MMC") states otherwise. *See* MMC, Part IV, para. 6(a)(15)(c). The MCA does not give the Executive Branch the authority to exercise its rulemaking power in a manner that would expand the class of conduct triable by military commission. Indeed, Congress expressly states that the statute is merely "declarative of existing law." Further, even if the Executive Branch did have such authority, the MMC's newly expanded definition of "murder in violation

of the law of war" could not be applied to Mr. Khadr even through a conspiracy charge, because doing so would violate the U.S. and international law prohibitions on *ex post facto* legislation.

c. Accordingly, because Mr. Khadr has not been charged with a violation triable by military commission, this commission lacks jurisdiction to try him for conspiracy to commit murder in violation of the law of war alleged in Charge III. *See* R.M.C. 907(b)(1).

4. **Burdens of Proof and Persuasion:** Because this motion is jurisdictional in nature, the prosecution bears the burden of proving jurisdiction by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

5. **Facts:** This motion presents a question of law. However, the following facts, which are a matter of record in these proceedings, are germane to the Commission's disposition of this motion.

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

b. The government preferred charges against Mr. Khadr under the MCA on 2 February 2007. *See* Sworn Charge Sheet (2 Feb 2007) [hereinafter Sworn Charges] (Attachment A). Charges were re-preferred, with amendments, on 5 April 2007. These amended charges were referred to this Military Commission on 24 April 2007. *See* Charge Sheet (24 Apr 2007) [hereinafter Charge Sheet].

c. The Government alleges that Mr. Khadr conspired to commit murder in violation of the law of war in June and July of 2002. *See* Charge Sheet. The government has alleged that Mr. Khadr committed these offenses at the age of 15. *See* Sworn Charges.

d. Mr. Khadr is not alleged to have committed any acts forming the basis for this prosecution occurring after the date of the MCA's enactment. *See* Charge Sheet.

6. **Argument: "Murder In Violation Of The Law Of War" Must Be Struck As An Object Of The Alleged Conspiracy Because It Is Not An Offense Triable By Military Commission**

a. The Object Of The Conspiracy Must Be An Offense Triable By Military Commission

(1) Assuming for the purpose of this motion that conspiracy is an offense triable by military commission,[1] for the charge to state an offense, the object of the alleged conspiracy must be a "substantive offense[] triable by military commission." MCA § 950v(b)(28). The government has alleged "murder in violation of the law of war" as one of the objects of the alleged conspiracy. (*See* Charge Sheet.) As discussed below, the government has not alleged an agreement to commit a killing that violates the law of war. As a result, the charged object of

[1] The defense raises this motion in the alternative to its motion to dismiss Charge III for lack of subject matter jurisdiction (D-010) filed on 7 December 2007.

"murder in violation of the law of war" is not triable by military commission. Thus, it is not a valid object of the conspiracy. Accordingly, this Commission does not have jurisdiction to try Mr. Khadr for conspiracy to commit murder in violation of the law of war.

b. "Murder In Violation Of The Law Of War" As Alleged By The Government Was Not An Offense Triable By Military Commission At The Time Of The Alleged Conduct

(1) As the Supreme Court made clear in *Ex Parte Quirin*, the first question in a military commission case is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal." 317 U.S. 1, 29 (1942).[2] At the time of the alleged conduct, military commissions could also try an accused for a statutory violation expressly made triable by military commission. 10 U.S.C. § 821 (1998).

(2) Mr. Khadr has not been charged with violating any statue in effect at the time of his alleged offenses. Nor could he have been so charged: as noted above, the Uniform Code of Military Justice (U.C.M.J.) set forth the applicable U.S. law at the time of Mr. Khadr's alleged offense, and there is no dispute that under the U.C.M.J. only aiding the enemy and spying—and not murder—are triable by military commission. Accordingly, this Commission has authority to try Mr. Khadr for conspiracy to commit murder only if murder is a violation of the law of war. However, as discussed below, it is not. This Commission therefore has no jurisdiction to try Mr. Khadr for conspiring to commit murder in violation of the law of war, and this object of the alleged conspiracy must be struck.

(A) Murder Is Not A Violation Of The Law Of War

(i) Mr. Khadr is charged with conspiring to commit murder in violation of the law of war. 2007 Charge Sheet. The overt acts that relate to this object of the conspiracy allege that Mr. Khadr planted improvised explosive devices where U.S. troops were expected to be traveling, killed two Afghan Militia Force members by engaging in small arms fire and killed Sergeant First Class Christopher Speer by throwing a grenade. *Id*. Two of these overt acts are the basis for Charges I and II alleging murder and attempted murder in violation of the law of war. *Id*. No other basis for the alleged conspiracy to commit murder in violation of the law of war can be gleaned from the charge sheet or discovery.

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[2] *See also Hamdan*, 126 S. Ct. at 2777 ("[A] law-of-war commission has jurisdiction to try only two kinds of offense: 'Violations of the laws and usages of war cognizable by military tribunals only,' and '[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.'") (citing W. Winthrop, Military Law and Precedents 839 (rev. 2d ed. 1920)); *id.* (noting that it "is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge 'properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction.*'" (citing Winthrop at 842 (emphasis in original)); *In re Yamashita*, 327 U.S. 1, 13 (1946) ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is a violation of the law of war.").

(ii) For an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally." *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.) (quoting *Ex Parte Quirin*, 317 U.S. at 30); *see also, e.g.*, *The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.").

(iii) A review of the relevant sources reveals that killing an enemy in combat, without more, does not meet this high standard and thus does not amount to a violation of the law of war. Accordingly, conspiring to kill an enemy combatant is also not a law of war violation.

(a) The Alleged Agreement to Commit Murder Does Not Violate the Law of War Because it Does Not Involve A Prohibited Mode or Object of Killing

1. The prohibitions on killing embodied in the law of war take two forms: certain means of warfare are banned, and certain objects of attack are forbidden.[3] Neither of these proscriptions applies to Mr. Khadr's alleged conduct: the charge against Mr. Khadr does not allege that he agreed to murder a protected person or agreed to kill using prohibited means.

2. First, the law of war prohibits only certain methods of killing, none of which form the basis for the charge at issue. Attacks with certain weapons, such as blinding lasers or poisonous gas, are not permitted.[4] Soldiers are likewise not allowed to employ "human shields" by using the presence of civilians to deter an enemy from attacking.[5] Similarly, soldiers may not engage in "perfidy," defined as "inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with an intent to betray that confidence."[6] But the alleged agreement to murder does not involve any of these illegal forms of combat. Rather, Mr. Khadr is alleged to have agreed to kill other soldiers with a hand grenade, small arms fire and explosive

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[3] *See* Major Richard Baxter, *So-Called Unprivileged and Belligerency: Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 326 (1951); Norman A. Goheer, The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent is not a War Crime, Bepress Legal Series Working Paper 1871, at 12 (Nov. 8, 2006), *available at* http://law.bespress.com/expresso/eps/1871; *see also* 1 International Committee of the Red Cross, Customary International Humanitarian Law 569 (Jean Marie Henckaerts & Louise Doswald-Beck eds., 2005) (listing war crimes compiled from a variety of international legal sources).

[4] *See* Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), International Red Cross Conference, 13 October 1995; Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, Feb. 8. 1928, 94 L.N.T.S. 65.

[5] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 28, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[6] Perfidy is listed as a war crime in military manuals throughout the world, including in the U.S. Army Field Manual. See Goheer, supra . 9, at 14.

devices—common weapons used in warfare. That does not constitute killing using prohibited means.

3. Mr. Khadr has also not been charged with agreeing to kill a protected individual. The law of war condemns attacks against vulnerable individuals, such as wounded soldiers, sick soldiers, civilians, prisoners of war, medical personnel not engaged in fighting, and soldiers who have laid down their arms—all "protected persons" under the fourth Geneva Convention.[7] The killing of these individuals, even in a time of war, is prohibited and constitutes a violation of the law of war.[8]

4. The face of the charge sheet demonstrates, however, that the alleged agreement to commit murder is based only on an alleged agreement to kill enemy soldiers. The law of war plainly does not prohibit killing enemy soldiers, as doing so is, almost by definition, a fundamental element of armed conflict.[9] For this reason, unqualified "murder" is not listed as an offense in the Geneva Conventions or the Hague Conventions—two treaties the Supreme Court has called "the major treaties on the law of war." *Hamdan*, 126 S. Ct. at 2781.[10] In fact, "[n]o treaty (including the statutes governing international courts such as the International Criminal Court, International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda) suggests that targeting a combatant is unlawful. Rather combatants are only protected from attack when they are *hors de combat* because they have surrendered, are sick or wounded and not carrying the fight, are shipwrecked, or have parachuted from a disabled aircraft."[11]

5. In sum, Mr. Khadr has not been charged with agreeing to kill using a prohibited means of killing, or agreeing to kill a protected person. Rather, he is alleged to have agreed to kill enemy soldiers using commonly employed weapons. Such conduct does not violate the law of war.

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[7] Common Article 3, Geneva Conventions of 1949; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), art. 4, 12-14, 6 U.S.T. 3217, 75 U.N.T.S. 31; Geneva Convention IV art. 4.

[8] *Id.*

[9] Peter Rowe, *Murder and the Law of War*, 42 N. Ir. Legal Q. 216 (1991) ("[A] fundamental effect of war is the killing of enemy soldiers.").

[10] *See also* Jack Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 Am. J. Int'l L. 56, 61 (2007) ("[A]bsent some other violation, a war crime based solely on the killing of a combatant who is engaged in hostilities is problematic under the Geneva Convention."). Further, murder is not listed as an offense triable by the International Criminal Court in the Rome Statute, a statute with more than 120 signatory nations that "provides the most comprehensive, definitive, and authoritative list of war crimes." Robert Cryer, I*nternational Criminal Law v. State Sovereignty: Another Round?* 16 Eur. J. Int'l L. 979, 990 (2005).

[11] Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi J. Int'l L. 511, 520 n.44 (citing, *inter alia*, Convention between the United States and other Powers respecting the Laws and Customs of War on Land, art 23(c), 36 Stat 2277 (1907); Geneva Convention I, art. 12.

(b) Mr. Khadr's Status As An "Enemy Combatant" Does Not Alter The Conclusion that His Alleged Conduct Does Not Violate the Law of War

1. The government will likely contend that Mr. Khadr was not participating in the armed conflict in Afghanistan as a traditional soldier, but rather as an "unlawful enemy combatant," and that this unprivileged status alone makes any agreement to kill a violation of the law of war. *See* Manual for Military Commissions (MMC), Part IV, para. 6(a)(15)(c) (explaining that "[f]or the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy."). That argument fails.

2. Merely holding the status of an "unlawful" combatant[12] does *not* mean that by causing a soldier's death the combatant has violated the law of war. The law of war does not recognize "status crimes:" the mere fact that a person is an "unlawful" combatant does not automatically subject him to liability under the law of war if he kills a lawful combatant. Rather, an "unlawful" combatant who kills another person will violate the law of war *only* if he does so using a prohibited means, or if the victim is a protected person. As discussed above, Mr. Khadr is not alleged to have used either a prohibited means of killing, or to have killed a protected person. He therefore did not violate the law of war, and his alleged status as an "unlawful" combatant cannot, by itself, alter this conclusion.

3. The position set forth in the MMC relies on a fundamental misunderstanding of the significance of "lawful" combatant status. The primary significance of that status is to render a person immune from domestic liability for acts that would ordinarily be punishable under domestic law. Thus, "lawful" or privileged combatants are not liable under domestic law for killing other human beings in combat because causing another's death is an inevitable part of war. *See United States. v. Lindh*, 212 F.Supp.2d 541, 554 (E.D. Va 2002). Unprivileged, unlawful combatants do not share in this privilege; when they kill another, they must face the normal consequences of doing so, including possible prosecution for murder under domestic law.[13] These consequences, though, are not a result of violating the law of war. If an unprivileged person kills a combatant, he may—unlike a lawful combatant—be subject to a murder charge under domestic law,[14] but he will not, without more, be subject to liability for

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[12] Mr. Kahdr does not admit that he is an unlawful enemy combatant. He reserves the right to challenge this Commission's prima facie jurisdiction in the future. *United States v. Khadr*, No. 07-001 at 21 (C.M.C.R. Sept. 24, 2007).

[13] *See* Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,* 5 Chi J. Int'l L. 511, 520 ("civilians who directly participate [in war] may be punished for their actions because they lack the 'combatant privilege' to use force against lawful targets").

[14] The CMCR's decision in this case reflects this well-established distinction in international law. In holding that "[u]nlawful combatants remain civilians and may properly be captured, detained by opposing military forces, and treated as criminals under the *domestic law* of the capturing nation for any and all unlawful combat actions," *Khadr*, CMCR 07-001, at 6 (emphasis added), the CMCR made clear that Mr. Khadr's status as a lawful or unlawful combatant was relevant to his ability to claim combatant immunity if tried under *domestic* law. Indeed, immediately following the above passage, the CMCR cites *United States v. Lindh*, 212 F. Supp. 2d 541, 554 (E.D. Va. 2002), a case in which the accused was tried in

committing a war crime. Rather, as discussed, "[a] war crime inherently requires an overt infraction of the law of war, not just committing a domestic crime without combatant immunity."[15]

4. The MCA, by its plain terms, makes clear that it is not a "domestic law" in the relevant sense—*i.e.*, it does not purport to govern the relations between civilians within the sovereign's territory. Rather, it expressly incorporates the "law of war" and proscribes only "murder *in violation of the law of war*." 10 U.S.C. § 950v(15) (emphasis added). It does not purport to reach murders conducted by individuals outside the context of armed conflict, as do our domestic laws.

5. As a result, even if it is ultimately determined that Mr. Khadr is an unprivileged combatant, that determination would mean only that he could be tried for conspiracy to commit murder under U.S. law. It does not mean that he could be tried by military commission for violating the "law of war."

6. In sum, Mr. Khadr is not alleged to have agreed to commit an attack against a protected person or through a prohibited means, and his potential status as an "unprivileged" enemy combatant has no relevance to the international law question of whether he violated the law of war. This Commission therefore has no subject matter jurisdiction to try Mr. Khadr for conspiracy to commit murder in violation of the law of war. Thus, murder in violation of the law of war must be struck as an object of the conspiracy.

c. Mr. Khadr's Alleged Conduct Does Not Violate the MCA, And Even If It Did, He Could Not Be Held Liable For Newly-Minted War Crimes Defined By That Statute

(1) The fact that Mr. Khadr has been charged under the MCA does not alter this analysis. *See* 2007 Charge Sheet (charging Mr. Khadr with a violation of the MCA, 10 U.S.C. §950v(b)(15)). Simply put, the MCA cannot provide a basis for jurisdiction in this case because Mr. Khadr's alleged conduct is not prohibited by the plain text of the act.

(2) Congress did not list "murder" as an offense to be tried by a military commission under the MCA; rather, it prohibited the more specific "murder in violation of the law of war." 10 U.S.C. §950v(15). This modifying clause confirms what is stated explicitly elsewhere in the statute: that in enacting the MCA, Congress intended only to codify "offenses that have

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federal district court for violations of U.S. law, *id.* at 547—not war crimes—and the question at issue was whether Lindh was immune from prosecution by virtue of the combatant immunity privilege. *Id.* at 544.

[15] Norman A. Goheer, The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent is not a War Crime, Bepress Legal Series Working Paper 1871, at 12 (Nov. 8, 2006), *available at* http://law.bespress.com/expresso/eps/1871. *See also Mohammed Ali v. Public Prosecutor*, 1968 All ER 488 (1968) (Malaysia Privy Council holding that a member of the Indonesian army who attacked an enemy while wearing civilian clothes in Singapore could be tried under Malaysian domestic law because he did not comply with the requirements of the Third Geneva Convention and was not operating as a member of the Indonesian forces at the time).

traditionally been triable by military commissions." 10 U.S.C. § 950p(a). Indeed, Congress was careful to point out that the MCA "does not establish new crimes that did not exist before its enactment." *Id.*[16] The MCA thus provides this Commission with jurisdiction over a murder or conspiracy to commit murder charge only when the alleged conduct constitutes a violation of the "law of war."

(3) However, as previously discussed, Mr. Khadr's charged conduct does not violate the law of war. *See supra* at 3-8. Accordingly, it falls outside the scope of the MCA, which only prohibits conduct traditionally proscribed by the "law of war." This commission therefore lacks jurisdiction to try Mr. Khadr for conspiracy to commit murder.

(4) It is true that the rules in the MMC, promulgated by the Secretary of the Defense, state that "for the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy," implying that an "unlawful" combatant violates the law of war any time he kills a combatant. *See* MMC, Part IV, para. 6(a)(15)(c) (cross-referencing para. 6(a)(13)(d)). But, as discussed above, that assertion is simply false: one's status as a privileged or unprivileged combatant is irrelevant to determining whether one violated the law of war. *See* supra at 5-6. The MMC's "interpretation" of the MCA is thus flatly inconsistent with the statute's plain language, which specifically limits murder offenses to those that violate the law of war.

(5) Because of this, the MMC's interpretation of the MCA exceeds the Executive's authority and should be given no effect. Congress gave the Executive Branch the authority to define the elements of the offenses listed in the MCA. 10 U.S.C. § 949a(a). But in exercising this authority, it is settled that the Executive may not define the elements in such a way as to *expand* the scope of a crime. *See Loving v. United States*, 517 U.S. 748, 768 (1996) ("We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, *and the regulations "confin[e] themselves within the field covered by the statute.*") (emphasis added); *see also Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 21 (D.C. 2000) (holding that an agency has no "authority to promulgate [a] rule . . . [when it] exceed[s] the scope of the authority delegated by Congress"). The Executive certainly may not define these elements in such a way as to *violate* a clear congressional command. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("If the intent of Congress 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."). Here, Congress plainly stated that

[16] To read § 950p as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to adoption of the M.C.A. violates the bedrock separation of powers principle. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") This interpretation should be avoided because it would raise serious constitutional concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

it did not intend for the MCA to create new crimes, but only to codify existing violations of the law of war. 10 U.S.C. § 950p(a). The MMC rules passed by the Secretary of the Defense purport to expand the scope of the law of war. The Secretary therefore exceeded his authority under the MCA, and this rule in the MMC should be given no effect.

(6) Moreover, even if the Executive did have the authority to expand the scope of the MCA in direct contravention of Congress's express limitations, and the MMC's interpretation of the MCA somehow rendered the act of killing an enemy soldier without having met the requirements for lawful combatancy triable by military commission, that newly-defined provision could not be applied in this case because the MCA was not enacted until four years *after* Mr. Khadr allegedly committed the offenses with which he is charged. As discussed above, at the time of the charged conduct, Mr. Khadr could not have been tried by military commission for his alleged offense. *See supra* at 2-6. Thus, applying the MCA (as interpreted by the MMC) to his case would violate the U.S. and international law prohibition on *ex post facto* legislation. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990); U.S. Const. art. I, § 9, cl.3 ("No . . . ex post facto Law shall be passed."); *Kring v. Missouri*, 107 U.S. 221, 227 (1882) (noting that the Convention attached "[s]o much importance" to the ex post facto prohibition "that it is found twice in the Constitution"); *see, e.g.*, Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, art. 22, 2187 U.N.T.S. 3 (entered into force July 1, 2002) (providing that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, *a crime within the jurisdiction of the Court*." (emphasis added)); Protocol I, art. 75(4)(c) ("No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.") (recognized as customary international law by the U.S. in W. Hays Parks et al., Unclassified Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD (May 8, 1986) (entitled 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications).

(7) This prohibition on *ex post facto* legislation recognizes the fundamental unfairness in holding individuals accountable for consequences that they could not have foreseen at the time of their alleged offense. Assuming Mr. Khadr could be tried in a U.S. federal court for conspiracy to commit murder, he could not have foreseen in 2002 that the offenses with which he is accused would be triable by military commission in 2006, or foreseen the significantly different consequences that would result from that fact. Trying Mr. Khadr in a military commission for conspiracy to commit "murder in violation of the law of war" as defined by the MMC, rather than in a U.S. court for conspiracy to commit murder (*see* 18 U.S.C. § 1114), violates the *Ex Post Facto* Clause in two respects. First, it retroactively changes the "criminal quality attributable to an act," *Beazell v. Ohio*, 269 U.S. 167, 170 (1925), and, second, it impermissibly alters the "nature or amount of the punishment imposed for its commission." *Id.*

(8) First, Mr. Khadr faces prosecution before an entirely different adjudicative body with entirely different rules than would have been the case had he been tried in federal court. In particular, because he faces trial before a commission rather than a court, Mr. Khadr will be (1) unable to receive the protections of the Juvenile Delinquency Act (the "JDA"), 18 U.S.C. §§

5031 *et seq.*; and (2) subject to adjudication absent procedural protections such as the right to a grand jury indictment, the right to the protections of the Federal Rules of Evidence, and the right to trial before a jury of his peers who, before conviction, would have to agree unanimously that the evidence proved his guilt beyond reasonable doubt.

(9) Second, this retroactive change alters the "nature or amount of the punishment imposed for its commission." *Beazell*, 269 U.S. at 170. It deprives Mr. Khadr of the protections against arbitrary sentencing provided by federal sentencing law, and deprives him of the certain right to appeal his sentence. Under federal law, courts are required to consider a number of different factors, including the "nature and circumstances of the offense and the history and characteristics of the defendant," to ensure that the sentence imposed is "no greater than necessary." 18 U.S.C. § 3553. Under the MCA, by contrast, any person convicted of conspiracy shall be punished by death "if death results to one or more of the victims 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). The MCA thus vests nearly unbridled discretion in the military commission to make the determination as to what sentence is appropriate in any given case, and the military commission is under no obligation analogous to that of federal courts to consider possible grounds, unique to Mr. Khadr's case, which might warrant a reduced sentence.

(10) By purporting to change retroactively the "criminal quality attributable to an act" and the "nature or amount of the punishment imposed for its commission," *Beazell v. Ohio*, 269 U.S. 167, 170 (1925), the MCA—if applied as interpreted by the MMC to Mr. Khadr's alleged conduct—would violate the U.S. Constitution's *Ex Post Facto* Clause, and would therefore be without legal effect. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description.").

(11) And if courts-martial provide the appropriate benchmark, *see Hamdan*, 126 S. Ct. at 2791 (holding UMCJ requires courts-martial rules be applied to military commissions unless impracticable), applying the MCA to Mr. Khadr still violates the *Ex Post Facto* Clause. The MCA *explicitly* breaks from *court-martial* procedures in key respects, which render its application to Mr. Khadr violative of the *Ex Post Facto* Clause. In Section 948b(d) ("Inapplicability of Certain Provisions"), the MCA identifies three crucial UCMJ protections that do *not* apply, including "any rule of courts-martial relating to speedy trial," 10 U.S.C. § 948b(d)(1)(A), the rules "relating to compulsory self-incrimination," *id.* § 948b(d)(1)(B), and those relating to pretrial investigation, *id.* § 948b(d)(1)(C). The problem is aggravated by language purporting to authorize the Secretary of Defense to prescribe rules tracking *court-martial* principles of law and rules of evidence only insofar "as the Secretary [of Defense] considers practicable or consistent with military or intelligence activities." *Id.* § 949a(a).[17] The very same section of the MCA notes that the Secretary may prescribe that under certain

[17] While the defense takes the position that the Secretary was, in effect, required to prescribe rules of evidence and procedure based on court-martial practice except where deviation was specifically mandated by Congress, (*see* Def. Mot. to Dismiss for Lack of Jurisdiction (Common Article 3), D-021), those deviations are themselves sufficient to render application of the MCA to Mr. Khadr an *Ex Post Facto* violation.

circumstances the "hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission." *Id.* § 949a(b)(2)(E). This includes, notably, the admission in certain circumstances of coerced testimony. *Id.* § 948r. Other rules that have been modified from those applicable to courts-martial, making it easier for the government to obtain a conviction, include the use of secret or classified evidence that the defendant cannot see or rebut in order to establish guilt, *id.* § 949d; a limited opportunity to call witnesses, *id.* § 949j; and expanded grounds for interlocutory appeals of rulings unfavorable to the government, *id.* § 950d. In responding, the Government may list purported rights available to Mr. Khadr under the military commission system, but the relevant question is not what rights the MCA provides – it is what rights it takes away. As discussed above, the retroactive application of the MCA to Mr. Khadr's case deprives him of many rights that are routinely provided in U.S. courts and courts-martial.

(12) Thus, whether the appropriate benchmark is trial in an Article III court or by court-martial, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it "aggravate[s]" the consequences for the conduct Mr. Khadr is alleged to have committed. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925).

d. Conclusion

(1) Military commissions have long been defined, in large part, by their limited jurisdiction. Neither U.S. nor international law recognized the killing of an enemy soldier by an unlawful combatant as one of the narrow category of crimes triable by military commission at the time the charged conduct is alleged to have occurred. The MCA requires the object of the conspiracy to be an offense subject to trial by military commission. And since the alleged theory of murder is not an offense subject to trial by military commission, conspiracy to commit murder in violation of the law of war was also not an offense subject to trial by military commission at the time of the alleged conduct. Because both U.S. and international law recognize that an individual must be tried according to the law in effect at the time of his alleged offense, the MCA, which was not enacted until more than four years *after* the alleged conduct occurred in this case, cannot serve as a basis for jurisdiction over Mr. Khadr. Accordingly, the military commission does not have jurisdiction to consider a charge of conspiracy to commit murder in violation of the law of war. Therefore, this Commission should strike "murder in violation of the law of war" as an object of the conspiracy alleged in Charge III.

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

8. **Witnesses and Evidence:** Sworn Charge Sheet (2 Feb 2007).

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:**

A. Sworn Charge Sheet (2 Feb 2007)

By: Rebecca S Snyder
William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

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):
[redacted]

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*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
[redacted]	O-4	Office of the Chief Prosecutor, OMC

5d. SIGNATURE OF ACCUSER	5e. DATE (YYYYMMDD)
[redacted]	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.

[redacted]
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

[redacted]

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

MC FORM 458 JAN 2007

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).

[redacted]
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 instructions[1]: _____

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

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

MC FORM 458 JAN 2007

UNITED STATES OF AMERICA	)	**CHARGES**
	)	
	)	**Murder in Violation of the Law of War**
	)	
	)	**Attempted Murder in Violation of the Law of War**
v.	)	
	)	
	)	**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.

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.

[redacted]

From: [redacted]
Sent: Monday, April 21, 2008 3:03 PM
To: [redacted]
Cc: [redacted]
Subject: US v Khadr - Ruling - D-023
Attachments: Ruling - D-023 US v Khadr.pdf

COL Brownback has directed the attached ruling be sent to counsel and other interested persons.

v/r,

[redacted]
Military Commissions Trial Judiciary
Department of Defense

From: Pete Brownback [redacted]
Sent: Monday, April 21, 2008 2:07 PM
To: [redacted]
Subject: Ruling - D-023

[redacted]

Please forward the attached ruling in D-023 to the parties in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

[redacted]

From: [redacted]
Sent: Sunday, February 03, 2008 11:48 AM
To: [redacted]
Cc: [redacted]

Subject: RE: Defense Reply - D-023

Sir,

1. The defense does not intend to file a reply in reference to D-023.

VR,

LCDR Kuebler

[redacted]

Counsel,

Please see COL Brownback's email below.

V/r,

[redacted]ial Judiciary

-----Original Message--
From: Brownback, Peter [redacted]
Sent: Sunday, February [redacted]

[redacted]

[redacted],

1. I realize that the Rules of Court do not require counsel to advise the Commission if a reply is not going to be filed.

2. However, in the email pasted below, the defense stated that it was not going to file a reply in D-016, D-017, and D-019. The defense did not state that it would not file a reply in D-023.

3. Could you please determine whether or not the defense intends to file a reply in D-023?

4. In the future, counsel for both sides should know that if a reply is not received within the time limits stated and there is no approved request for delay, MCTJ will not check to see if a reply is going to be filed. Instead, the Filings Inventory will contain an entry showing "N/A" for the reply and the remarks column will contain an entry "Reply not received by due date."

COL Brownback

[redacted]hadr -- Defense Repy (Ex Parte Proceedings) D15
Date: Thursday, January 24, 2008 4:22 PM

Sir,

1. Please find attached for filing the defense reply to the government response to the defense motion to preclude further ex parte proceedings (D015).

2. The defense notes that it has elected not to file reply briefs with respect to D016, D017, and D019, and instead to allow the motions to be decided by the Military Judge on the basis of the motions and responses alone.

3. The defense decision not to submit replies should not be construed as agreement with or acquiescence in any of the government's positions, factual or legal, as set forth in their responsive pleadings. Rather, given limitations on time and resources available to the defense, it cannot competently continue its preparation for trial, prepare for the 4 February hearing, and adequately respond to the government's pleadings.

VR,

LCDR Kuebler

[redacted]

From: [redacted]
Sent: Friday, January 25, 2008 4:28 PM
To: [redacted]

[redacted] for Appropriate Relief (Strike Murder from Chg III) - US v. Khadr

Attachments: D023 Motion to Dismiss - Strike Murder from Chg III - FINAL.doc

D023 Motion to Dismiss - Strik...

Sir,

Prosecution response is attached.

V/R,

Major Groharing

[redacted]

> All parties,
>
> The filing designation for the 18 JAN 08 Defense Motion for
> Appropriate Relief (Strike Murder from Chg III) is D023 Motion for
> Appropriate Relief (Strike Murder from Chg III) - Khadr. See RC 5.
>
>
> v/r,
>
[redacted]ial Judiciary
> Department of Defense
>
>
> ----------
> --
>
[redacted]

> [redacted]
> [redacted]
> [redacted]lief (Strike
> Murder from Chg III)
>
>
> [redacted]
>
> I am sending this motion on behalf of Ms. Snyder and LCDR Kuebler for
> US v. Khadr. Please find attached the defense motion for appropriate
> relief (Strike Murder from Chg III).
> V/R,
>
> [redacted]
>
>
>
>
>
>
>

--
Jeff Groharing

[redacted]

UNITED STATES OF AMERICA	}	**D-026** **Ruling on Defense Motion to Compel Discovery (Documents Relating to Charge III)** **23 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, as well as the oral arguments.

2. The standards for discovery are laid out in Rule for Military Commission (RMC) 701. RMC 701(c)(1) states in pertinent part: "After service of charges, upon request of the defense, the Government shall permit the defense counsel to examine…any books, papers, documents, photographs…which is in the custody or control of the Government and which is material to the preparation of the defense…."

3. The commission has considered the proper standard for discovery and disclosure under RMC 701(c). *U.S. v Yunis*, 867 F.2d 617 (D.C. Cir. 1989), cited in the Discussion, refers to *Rovario v. United States, 353 U.S. 53 (1957)* in creating a standard of "helpful to the defense of the accused" as the proper method to determine whether an item is "material to the preparation of the defense." While *U.S. v Yunis* is not, as stated by the government in oral argument on another motion, binding precedent upon this commission, it, and the cases cited therein, are indicative of the proper standard.

4. The primary issue is relevance. Are the intelligence reports and other documents sought by the defense in this motion relevant to the Specification of Charge III? Assuming, *arguendo*, that such documents proved beyond a reasonable doubt that the named individuals did not agree to various attacks alleged in language struck by the commission in its ruling on D-019, how does that make the existence or non-existence of a fact in issue more or less likely? What connection does it have with whether or not the accused conspired, in the June through July 2002 time period, with those individuals to commit the offenses alleged in the Specification of Charge III? The commission finds that the documents sought are not relevant.

5. Further, assuming, *arguendo*, that the reports and other documents were relevant, the commission is not convinced that they are helpful to the defense. The defense has shown

that it has possession of documents which show that two of the persons listed in the Specification of Charge III were opposed to the 9/11 attacks on the United States. (*See* paragraph 5, defense motion.) The defense has not shown that the reports listed in paragraph 5c would be helpful.

6. Having determined that the matters sought are neither relevant nor material, the commission does not address the balancing issue.

7. The defense motion to compel discovery (documents relating to Charge III) is denied.

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

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** **To Compel Discovery** (Documents Relating to Charge III) 3 March 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge's email order of 21 February 2008.

2. **Relief Sought:** The defense respectfully requests that this Commission order the government to produce intelligence reports and other documents in the possession, custody or control of the government tending to show that any of the individuals identified in Charge III as alleged co-conspirators did not agree to engage in one or more of the attacks listed in charge III. Such documents include, but are not limited to, the intelligence reports cited in footnotes 182-84 of Chapter Seven of The 9/11 Commission Report.

3. **Overview:**

a. The defense seeks information tending to show that the alleged co-conspirators did not agree to engage in one or more of the attacks alleged to be part of the conspiracy alleged in Charge III. This tends to undercut the government's argument that a single, large-scale conspiracy existed and, instead, tends to show that the attacks alleged in Charge III were part of separate conspiracies. The requested documents are exculpatory in nature and material to the preparation of the defense because they support the argument that the scope and scale of the conspiracy alleged in Charge III is much smaller and that the nature of the conspiracy is much less aggravating than the government alleges. Joining a conspiracy whose purpose is to engage in political terrorist attacks on the scale of those alleged from 1998 to 2002 is certainly more aggravating than conspiring to plant IEDs in the context of an armed conflict and engage in combat when approached by enemy military forces engaging in both ground and air assaults. If Mr. Khadr is convicted of Charge III and the defense succeeds in convincing the members that the nature, scope and scale of the alleged conspiracy is much different and smaller than the government claims, then Mr. Khadr would likely be sentenced to less confinement for Charge III than he otherwise would. The requested documents meet the minimal standard for production of being "helpful to the defense of [the] accused." Indeed, they are key to the defense's ability to test the government's case and to the factfinders' ability to weigh the evidence. Thus, the requested documents must be disclosed under R.M.C. 701(c)(1) and (e)(1).

4. **Burden of Proof:** The Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. R.M.C. 905(c)(2)(A). The Defense, however, need not show by a preponderance of the evidence that the requested discovery is material. *See generally, Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (On review, "[t]he question is not whether the defendant would more likely than not have received a different verdict with

the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”).

5. <u>Facts</u>:

a. On 9 November 2007, the defense submitted to the government a request for discovery that sought, among other items, the following: “All materials in the possession, custody and control of the government, including, without limitation, intelligence, law enforcement, or other files, relating to the participation of the following individuals in the conspiracy alleged in Charge III: i. Usama Bin Laden; ii. Ayman Al Zawahiri; iii. Saeyyd Al Masri; iv. Saif Al Adel; v. Ahmed Said Khadr.” (Def. Discovery Req. of 9 Nov 07, ¶ 3(b)) (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses)).

b. The government responded that: “The government has provided to the defense copies of statements made, specifically by Usama bin Laden and Ayman al Zawahiri, and other documents that it intends to use as evidence in the prosecution of the case in chief that relate to the conspiracy alleged in Charge III. The government has provided all documents that relate to the accused’s involvement (if any) with Usama Bin Laden, Ayman Al Zawahiri, Sayeed Al Masri, Saif Al Adel and Ahmed Said Khadr. (Govt Resp. of 4 Dec 07 to Def. Discovery Req., ¶ 3(b)) (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses)).

c. According to the 9/11 Commission Report prepared by the National Commission on Terrorist Attacks, Sheikh Saeed al Masri and Sayf al Adl – listed as Mr. Khadr’s alleged co-conspirators in Charge III, alleging conspiracy – opposed the 9/11 attacks on the United States. The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 251-52 (2004) [hereinafter 9/11 Report] (Attachment A). The 9/11 report cites the following sources for this conclusion:

- Intelligence report, interrogation of detainee, May 30, 2002 (the 9/11 report listed this source as an example, suggesting there are additional sources containing similar information);

- Intelligence report, interrogation of KSM, Oct. 27, 2003;

- Intelligence report, interrogation of detainee, June 20, 2002;

- Intelligence report, interrogation of detainee, June 27, 2003;

- Intelligence report, interrogation of KSM, Sept. 26, 2003;

- Intelligence report, interrogation of KSM, Jan. 9, 2004;

- Intelligence reports, interrogations of detainee, June 27, 2003, Dec. 26, 2003;

- Intelligence report, interrogation of detainee, Oct. 7, 2003;

- Intelligence reports, interrogations of KSM, Oct. 27, 2003, Sept. 27, 2003;

- Intelligence report, interrogation of KSM, Jan 9, 2004.

9/11 Report at 532 n.182-84.

6. <u>Discussion</u>:

a. The M.C.A., R.M.C., Regulations for Trial by Military Commission, the Due Process Clause and International Law Require Disclosure of Documents Tending to Show that the Alleged Co-conspirators did not Agree to Engage in One or More of the Attacks Alleged to be Part of the Conspiracy Alleged in Charge III

(1) <u>The MCA and Rules and Regulations Governing Military Commissions Require Disclosure</u>

(i) The M.C.A. states that "Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense." *See* 10 U.S.C. § 949j. The rules and regulation echo the statute. *See* R.M.C. 703(a) ("The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules."); Regulation for Trial by Military Commissions 17-2(a) ("Pursuant to 10 U.S.C.§ 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.").

(ii) Rule for Military Commission ("R.M.C.") 701(c)(1) requires the government to permit the defense to examine documents and things "within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial." (Emphasis added). The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16[1] governing discovery in the context of the Classified Information Procedures Act (CIPA), for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to "information [that] is at least 'helpful to the defense of [the] accused.'" *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) ("materiality standard is not a heavy burden") (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would "significantly help [ ] in 'uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal'") (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C.1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the

[1] The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical to R.M.C. 701(c)(1). It states: "Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense." Fed. R. Crim. Proc. 16(a)(1)(E)(i).

prosecution to turn over any information that is "at least helpful to the defense." In addition, R.M.C. 701(e)(1) requires the government to disclose "the existence of evidence known to the trial counsel which reasonably tends to … [n]egate the guilt of the accused of an offense charged."

(iii) In Charge III, the government alleges that the attacks on American Embassies in Kenya and Tanzania in August 1998, the USS Cole attack in October 2000, the 9/11 attacks on the United States, Mr. Khadr's alleged involvement in improvised explosive devices ("IEDs") in July 2002, Mr. Khadr's alleged killing of Sgt Speer during a four-hour firefight that ensued when U.S. troops encircled the compound where Mr. Khadr was staying in July 2002, and other unspecified attacks are all part of a single conspiracy as opposed to separate conspiracies. Evidence tending to show that not all of the alleged co-conspirators agreed to participate in each of the alleged attacks, undercuts the government's argument that a single massive conspiracy existed. *See United States v. Jones*, 36 M.J. 778, 779 (A.C.M.R. 1993) ("The essential element of the offense of conspiracy is that there is an agreement with one or more persons to commit a criminal act."). Evidence showing that the participants in each alleged attack were different, tends to show that the alleged attacks were part of separate conspiracies.

(iv) The requested documents are material to the preparation of the defense because they are relevant to the nature, scope and scale of the conspiracy alleged. Joining a conspiracy whose purpose is to engage in political terrorist attacks on the scale of those alleged from 1998 to 2002 is certainly more aggravating than conspiring to plant IEDs in the context of an armed conflict and engage in combat when approached by enemy military forces engaging in both ground and air assaults. If Mr. Khadr is convicted of Charge III and the defense succeeds in convincing the members that the scope and scale of the alleged conspiracy is much smaller and the gravity of the conspiracy is much less aggravating than the government claims it is, then it is very possible that Mr. Khadr would be sentenced to less confinement for this offense than he otherwise would.

(v) There is no question that the requested records meet the minimal standard of being "helpful to the defense of [the] accused" and negate the government's case against Mr. Khadr. Indeed, they are key to the defense's ability to test the government's case and to the factfinders' ability to weigh the evidence. Mr. Khadr is entitled to the requested discovery not only as a matter of fundamental fairness, but also to ensure that the instant proceedings elicit the truth and provide a fair trial worthy of confidence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (defining fair trial "as a trial resulting in a verdict worthy of confidence"); *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (same). Therefore, documents tending to show that the alleged co-conspirators did not agree to engage in one or more of the attacks alleged to be part of the conspiracy alleged in charge III must be disclosed under R.M.C. 701(c)(1) and (e)(1).

(2) <u>The Due Process Clause & MCA § 949j(d)(2) Require Disclosure</u>

(i) The disclosure requirement under the R.M.C. 701(c) echoes a fundamental principle of U.S. law: The government's failure to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment …." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The government's duty to disclose such evidence encompasses exculpatory evidence, including impeachment evidence. *United States v.*

Bagley, 473 U.S. 667, 675 (1985) (impeachment evidence falls within *Brady* rule); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (characterizing impeachment evidence as exculpatory evidence). Such evidence is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id. at* 682. "The message of Brady and its progeny is that a trial is not a mere 'sporting event'; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory." *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986); *see also Bagley*, 473 U.S. at 675 ("The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.").

(ii) The MCA makes *Brady*, at least with respect to exculpatory evidence, applicable to military commissions. *See* 10 U.S.C. § 949j(d)(2). Section 949j(d)(2) of the MCA states that the prosecution must disclose exculpatory evidence that it "would be required to disclose in a trial by general court-martial." *Brady* governs disclosure of exculpatory evidence in general courts-martial. *Mahoney*, 58 M.J. at 349. Therefore, by virtue of MCA § 949j(d)(2), *Brady* applies to military commissions.

(iii) Because the requested records will corroborate the defense claim that Mr. Khadr was not part of a single massive conspiracy as alleged by the government they are "exculpatory" in nature, and there is a "reasonable probability" that the disclosure of this evidence will yield a different result in the instant proceedings. *See Bagley*, 473 U.S. at 676, 682 ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). If the defense is denied access to that information, then counsel will be hamstrung in its ability to investigate and prepare the defense case. Such an outcome would obviously prejudice Mr. Khadr's most fundamental rights, but would also pervert the cause of justice and fair process. *Brady* and its progeny – made applicable to military commissions by MCA § 949j(d)(2) – therefore require disclosure of the requested records, independent of R.M.C. 701(c)(1)'s broader discovery provision.

(3) <u>International Law Requires Disclosure</u>

(i) The Military Commissions Act (M.C.A.) and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(f) ("A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions.")[2]; R.M.C., Preamble (stating that the Manual for Military Commissions

[2] Whether military commissions, in fact, comply with common article 3 is ultimately a judicial question that Congress does not have the power to answer. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") (emphasis added). Any congressional attempt to legislative an answer to such a judicial question violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). Because a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the

"provides procedural and evidentiary rules that [. . .] extend to the accused all the 'necessary judicial guarantees' as required by Common Article 3.") They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

(ii) The Geneva Convention Relative to the Treatment of Prisoners of War prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.[3] Article 75(a) provides that the procedures for trial "shall afford the accused before and during his trial all necessary rights and means of defense."[4]

(iii) Read in light of international law principles, precedents applying the U.S. Constitution, and the rules governing this Commission, the Government's denial of the Defense request for the documents at issue ignores fundamental concepts of fairness and places in question the integrity of these proceedings.

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intent of the legislature, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth*., 297 U.S. 288, 347 (1936), the only reasonable interpretation is that § 948b(f) is that it requires military commissions to comply with common article 3.

[3] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978 [hereinafter Additional Protocol]. The Protocol has not been ratified by the United States, but the U.S. government has acknowledged that Article 75 is customary international law. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (stating that the government "regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled"). *See also* Memorandum from W. Hays Parks, Chief, International Law Branch, DAJA-IA, et. al., to Mr. John H. McNeill, Assistant General Counsel (International), OSD (8 May 1986) (stating art. 75 of Additional Protocol I is customary international law). The Supreme Court has also relied on the Additional Protocol in construing the meaning of Common Article 3 of the Geneva Conventions as applied to military commissions. *See Hamdan*, 126 S.Ct. at 2796.

[4] The ICTY and the ICTR similarly provide "minimum guarantees" for the accused to "be entitled to a fair and . . . hearing." Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 21(2), U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), *adopted by* Security Council 25 May 1993, U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, art. 20(2), *adopted by* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

b. Denial of the Requested Documents Will Necessarily Result in Counsel Failing to Provide Competent Representation

(1) Failure to grant the defense request for discovery will deprive Mr. Khadr of competent representation by precluding the Defense from inquiring into possible challenging the nature, scope and scale of the conspiracy alleged in Charge III. Governing military ethics rules require Mr. Khadr's military counsel to provide "competent" representation. "Competent representation requires . . . access to evidence." JAGINST 5803.1C (9 Nov 04). "[I]nvestigation is an essential component of the adversary process." *Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)). Thus, the adversarial process will not function properly if the defense counsel fails to investigate his client's case or is denied access to evidence within the control of the government that is relevant to the investigation. *See id*. Here, the government's view of what evidence is relevant and material to the preparation of the defense is so narrow as to necessarily cause defense counsel to fail to provide competent representation to Mr. Khadr. Accordingly, this Commission should order the government to produce the requested documents.

c. Conclusion

(1) The Supreme court has said "that the United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Strickler*, 537 U.S. at 281 (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)). When the prosecution reserves to itself the determination of what evidence ought be considered, it disregards its duty to seek justice, and usurps the role of the court, defense counsel and the trier of fact. *Cf. Brady*, 373 U.S. at 87-88, n. 2. The integrity of these proceedings will be fatally undermined if the defense is not afforded the opportunity to independently investigate the factual allegations at issue in the case. At a minimum, this requires that the defense be allowed access to intelligence reports and other documents in the possession custody or control of the government tending to show that any of the individuals identified in Charge III as alleged co-conspirators did not agree to engage in one or more of the attacks listed in charge III. The Commission should therefore order the government to produce these documents.

7. <u>Oral Argument</u>: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions." Oral argument will allow for thorough consideration of the issues raised by this motion.

8. <u>Witnesses & Evidence</u>: The Defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the Prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following evidence for this motion:

Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))

Government Response of 4 December 07 to Defense Discovery Request of 9 Novmeber 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

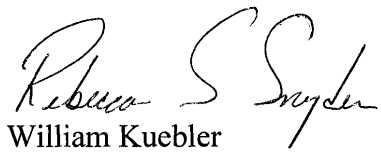
Attachment A: The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 251-52, 251-52 n.182-84 (2004)

9. 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:

A The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 251-52, 251-52 n.182-84 (2004)



William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

THE 9/11 COMMISSION REPORT

of the alert, word had begun to spread that an attack against the United States was coming. KSM notes that it was generally well known by the summer of 2001 that he was planning some kind of operation against the United States. Many were even aware that he had been preparing operatives to go to the United States, leading some to conclude that al Qaeda was planning a near-term attack on U.S. soil. Moreover, Bin Ladin had made several remarks that summer hinting at an upcoming attack and generating rumors throughout the worldwide jihadist community. Bin Ladin routinely told important visitors to expect significant attacks against U.S. interests soon and, during a speech at the al Faruq camp, exhorted trainees to pray for the success of an attack involving 20 martyrs. Others have confirmed hearing indications of an impending attack and have verified that such news, albeit without specific details, had spread across al Qaeda.[180]

Although Bin Ladin's top priority apparently was to attack the United States, others had a different view. The Taliban leaders put their main emphasis on the year's military offensive against the Northern Alliance, an offensive that ordinarily would begin in the late spring or summer. They certainly hoped that this year's offensive would finally finish off their old enemies, driving them from Afghanistan. From the Taliban's perspective, an attack against the United States might be counterproductive. It might draw the Americans into the war against them, just when final victory seemed within their grasp.[181]

There is evidence that Mullah Omar initially opposed a major al Qaeda operation directly against the United States in 2001. Furthermore, by July, with word spreading of a coming attack, a schism emerged among the senior leadership of al Qaeda. Several senior members reportedly agreed with Mullah Omar. Those who reportedly sided with Bin Ladin included Atef, Sulayman Abu Ghayth, and KSM. But those said to have opposed him were weighty figures in the organization—including Abu Hafs the Mauritanian, Sheikh Saeed al Masri, and Sayf al Adl. One senior al Qaeda operative claims to recall Bin Ladin arguing that attacks against the United States needed to be carried out immediately to support insurgency in the Israeli-occupied territories and protest the presence of U.S. forces in Saudi Arabia. Beyond these rhetorical appeals, Bin Ladin also reportedly thought an attack against the United States would benefit al Qaeda by attracting more suicide operatives, eliciting greater donations, and increasing the number of sympathizers willing to provide logistical assistance.[182]

Mullah Omar is reported to have opposed this course of action for ideological reasons rather than out of fear of U.S. retaliation. He is said to have preferred for al Qaeda to attack Jews, not necessarily the United States. KSM contends that Omar faced pressure from the Pakistani government to keep al Qaeda from engaging in operations outside Afghanistan. Al Qaeda's chief financial manager, Sheikh Saeed, argued that al Qaeda should defer to the Taliban's wishes. Another source says that Sheikh Saeed opposed the operation, both out of deference to Omar and because he feared the U.S. response to an

attack. Abu Hafs the Mauritanian reportedly even wrote Bin Ladin a message basing opposition to the attacks on the Qur'an.[183]

According to KSM, in late August, when the operation was fully planned, Bin Ladin formally notified the al Qaeda Shura Council that a major attack against the United States would take place in the coming weeks. When some council members objected, Bin Ladin countered that Mullah Omar lacked authority to prevent al Qaeda from conducting jihad outside Afghanistan. Though most of the Shura Council reportedly disagreed, Bin Ladin persisted. The attacks went forward.[184]

The story of dissension within al Qaeda regarding the 9/11 attacks is probably incomplete. The information on which the account is based comes from sources who were not privy to the full scope of al Qaeda and Taliban planning. Bin Ladin and Atef, however, probably would have known, at least, that

- The general Taliban offensive against the Northern Alliance would rely on al Qaeda military support.
- Another significant al Qaeda operation was making progress during the summer—a plot to assassinate the Northern Alliance leader, Ahmed Shah Massoud. The operatives, disguised as journalists, were in Massoud's camp and prepared to kill him sometime in August. Their appointment to see him was delayed.[185]

But on September 9, the Massoud assassination took place. The delayed Taliban offensive against the Northern Alliance was apparently coordinated to begin as soon as he was killed, and it got under way on September 10.[186]

As they deliberated earlier in the year, Bin Ladin and Atef would likely have remembered that Mullah Omar was dependent on them for the Massoud assassination and for vital support in the Taliban military operations. KSM remembers Atef telling him that al Qaeda had an agreement with the Taliban to eliminate Massoud, after which the Taliban would begin an offensive to take over Afghanistan. Atef hoped Massoud's death would also appease the Taliban when the 9/11 attacks happened. There are also some scant indications that Omar may have been reconciled to the 9/11 attacks by the time they occurred.[187]

Moving to Departure Positions

In the days just before 9/11, the hijackers returned leftover funds to al Qaeda and assembled in their departure cities. They sent the excess funds by wire transfer to Hawsawi in the UAE, about $26,000 altogether.[188]

The hijackers targeting American Airlines Flight 77, to depart from Dulles, migrated from New Jersey to Laurel, Maryland, about 20 miles from Washington, D.C. They stayed in a motel during the first week in September and spent

recently, Binalshibh has claimed that he neither called nor sent a letter to KSM, but rather passed a verbal message via Essabar. Intelligence report, interrogation of Binalshibh, Apr. 8, 2004. On Binalshibh's communication to Essabar, see Intelligence reports, interrogations of Binalshibh, Dec. 17, 2002; Nov. 6, 2003; Apr. 8, 2004.

174. On Binalshibh's travel, see FBI report, "Summary of Penttbom Investigation," Feb. 29, 2004 (classified version), p. 84. On Binalshibh's communication with Atta, see Intelligence report, Documents captured with KSM, Sept. 24, 2003; Intelligence report, interrogation of Binalshibh, Sept. 11, 2003. On Atta's call to his father, see Intelligence report, re Atta, Sept. 13, 2001. On Jarrah's letter, see German BKA report, investigative summary re Jarrah, July 18, 2002, p. 67.

175. Shortly after 9/11, Abdullah told at least one witness that the FBI was asking questions about his having received a phone a call from Hazmi in August. FBI report of investigation, interview, Sept. 24, 2001. In a July 2002 FBI interview, Abdullah asked whether the FBI had taped the call. FBI report of investigation, interview of Mohdar Abdullah, July 23, 2002. Also on possibility of Hazmi-Abdullah contact shortly before 9/11, see Danny G. interviews (Nov. 18, 2003; May 24, 2004). On the change in Abdullah's mood, see FBI report of investigation, interview of Mohdar Abdullah, July 23, 2001. On the sudden interest of Abdullah and Salmi in proceeding with marriage plans, see FBI report of investigation, interview, Sept. 24, 2001; FBI report of investigation, interview of Samir Abdoun, Oct. 21, 2001. On anticipated law enforcement interest in gas station employees and September 10, 2001, meeting, see FBI report of investigation, interview, May 21, 2002.

176. Intelligence report, interrogation of detainee, Feb. 5, 2002.

177. Intelligence reports, interrogations of KSM, Aug. 14, 2003; Feb. 20, 2004.

178. Intelligence reports, interrogations of KSM, June 3, 2003; Feb. 20, 2004; Apr. 3, 2004.

179. Intelligence reports, interrogations of detainee, Nov. 27, 2001; Feb. 5, 2002. Intelligence report, interrogation of detainee, May 30, 2002.

180. Intelligence report, interrogation of KSM, Jan. 9, 2004; Intelligence report, interrogation of detainee, June 27, 2003; Intelligence report, interrogation of detainee, Feb. 5, 2002. KSM also says that he and Atef were so concerned about this lack of discretion that they urged Bin Ladin not to make any additional remarks about the plot. According to KSM, only Bin Ladin, Atef, Abu Turab al Jordani, Binalshibh, and a few of the senior hijackers knew the specific targets, timing, operatives, and methods of attack. Intelligence reports, interrogations of KSM, Oct. 27, 2003; Feb. 23, 2004. Indeed, it was not until midsummer that Egyptian Islamic Jihad leader Ayman al Zawahiri learned of the operation, and only after his group had cemented its alliance with al Qaeda and Zawahiri had become Bin Ladin's deputy. Intelligence report, interrogation of KSM, Jan. 9, 2004.

181. See Intelligence report, interrogation of KSM, July 24, 2003.

182. On Omar's opposition, see, e.g., Intelligence report, interrogation of detainee, May 30, 2002, in which the detainee says that when Bin Ladin returned after the general alert during July, he spoke to his confidants about Omar's unwillingness to allow an attack against the United States to originate from Afghanistan. See also Intelligence report, interrogation of KSM, Oct. 27, 2003. There is some discrepancy about the position of Zawahiri. According to KSM, Zawahiri believed in following the injunction of Mullah Omar not to attack the United States; other detainees, however, have said that Zawahiri was squarely behind Bin Ladin. Intelligence report, interrogation of detainee, June 20, 2002; Intelligence report, interrogation of detainee, June 27, 2003; Intelligence report, interrogation of KSM, Sept. 26, 2003.

183. Intelligence report, interrogation of KSM, Jan. 9, 2004; Intelligence reports, interrogations of detainee, June 27, 2003; Dec. 26, 2003. On Abu Hafs's views, see Intelligence report, interrogation of detainee, Oct. 7, 2003.

184. Intelligence reports, interrogations of KSM, Oct. 27, 2003; Sept. 27, 2003, in which KSM also says Bin Ladin had sworn bayat to Omar upon first moving to Afghanistan, following the Shura Council's advice. KSM claims he would have disobeyed even had the council ordered Bin Ladin to cancel the operation. Intelligence report, interrogation of KSM, Jan. 9, 2004.

185. See Intelligence report, interrogation of KSM, July 24, 2003.

186. Abdul Faheem Khan interview (Oct. 23, 2003); see also Arif Sarwari interview (Oct. 23, 2003).

187. Intelligence reports, interrogations of KSM, May 8, 2003; July 24, 2003.

188. FBI report, "Hijackers Timeline," Dec. 5, 2003 (citing 315N-NY-280350, serial 3112; Western Union records; 315N-NY-280350-302, serials 28398, 37864). In addition, Nawaf al Hazmi attempted to send Hawsawi the debit card for Mihdhar's bank account, which still contained approximately $10,000. The package containing the card was intercepted after the FBI found the Express Mail receipt for it in Hazmi's car at Dulles Airport on 9/11. FBI report, "Summary of Penttbom Investigation," Feb. 29, 2004, p. 61.

189. FBI report, "Hijackers Timeline," Dec. 5, 2003 (citing 315N-NY-280350-WF, serial 64; 315N-NY-280350-BA, serials 273, 931, 628; 315N-NY-280350-302, serials 10092, 17495).

190. FBI report, "Hijackers Timeline," Dec. 5, 2003 (citing 315N-NY-280350, serials 6307, 9739). In the early morning hours of September 11, Jarrah made one final call to Senguen from his hotel. FBI report, "Hijackers Timeline," Dec. 5, 2003. The conversation was brief and, according to Senguen, not unusual. FBI electronic communication, Penttbom investigation, Sept. 18, 2001, pp. 5–6.

191. FBI report, "Hijackers Timeline," Dec. 5, 2003 (citing 315N-NY-280350-FD-302; 315N-NY-280350-

UNITED STATES OF AMERICA	D026
v.	GOVERNMENT'S RESPONSE
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	To the Defense Motion to Compel Discovery (Documents Relating to Charge III) 10 March 2008

1. Timeliness: This motion is filed within the timelines established by Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's e-mail order of 21 February 2008.

2. Relief Requested: The Government respectfully submits that the Defense's motion to compel discovery with respect to documents relating to Charge III ("Mot. to Compel") should be denied.

3. Overview:

a. The Defense misstates the relevance and materiality standards in *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989). Under the correct reading of *Yunis*, the information sought by the Defense is not discoverable because it is neither relevant nor material to the offense charged.

b. The Defense improperly invokes the Due Process Clause, which is inapplicable to the accused. As a result, the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), does not apply to the accused as a matter of constitutional law. Further, the accused overstates the extent to which *Brady* is incorporated into the Military Commissions Act of 2006 ("MCA") and the Manual for Military Commissions ("MMC"). In any event, neither *Brady*, nor the MCA or MMC, requires that *non*-exculpatory material be produced to the Defense, which is the only material the Defense seeks.

c. Although the Defense purports to rely on various principles of international law, the accused may not invoke the Geneva Conventions in general, or Common Article 3 in particular, in these proceedings. *See* 10 U.S.C. § 948b(g). In any event, even if there were some conflict between the MCA and pre-existing international law, the MCA would apply because it is a subsequently enacted statute.

d. Finally, the Defense's claim that not granting the instant motion will result in an incompetent defense is baseless. The MCA and MMC carefully define the evidence to which the Defense is entitled, and the Defense has proffered no basis for its assertion that implementing the MCA and MMC will deprive the accused of a fair trial.

4. Burden and Persuasion: As the moving party, the Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. *See* Rules for Military Commissions ("RMC") 905(c)(1), 905(c)(2)(A).[1]

5. Facts:

a. Except as set forth herein, the Prosecution does not controvert the facts cited in section 5 of the Defense's motion.

6. Discussion:

a. THE DEFENSE MISSTATES THE RELEVANCE AND MATERIALITY STANDARDS FROM *YUNIS*

i. The Defense misstates the standard it must meet in order to succeed in this motion. RMC 701(c) provides that

> the Government shall permit the defense counsel to examine . . . [a]ny . . . documents . . . which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense . . . .

As the discussion note to RMC 701(c) elucidates, the starting point for defining what is "material to the preparation of the defense" is *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989). In *Yunis*, the D.C. Circuit set forth a three-step analysis (of which only the first two are applicable for the present motion) for determining when the Government must disclose information to the Defense. In order for such information to be discoverable, the Defense must show that the requested information is both *relevant* and *material* to its case. *See id.* at 621-22.[2]

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[1] The Defense cites *Kyles v. Whitley*, 514 U.S. 419 (1995), for the proposition that "[o]n review, '[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" Mot. to Compel at 1-2 (second alteration in original). That standard, however, is an *appellate* standard—the Court in *Kyles* was analyzing what showing was required to reverse a judgment. Here, the question is whether the Defense has met its burden, by a preponderance of the evidence, as to whether the documents sought are either material to the preparation of the defense or exculpatory. In determining whether the Defense has made a sufficient showing, the applicable standard is preponderance of the evidence. *See* RMC 905(c)(1).

[2] Under *Yunis*, where the requested information is classified and the Government asserts privilege under the Classified Information Protection Act ("CIPA"), the court may permit disclosure of the evidence only after balancing the defendant's interest in disclosure against the Government's need to keep the information secret. *See id.* at 625. This balancing test occurs only after the Defense has proven the relevance and materiality of the requested information. *See id.* Under the MCA and MMC, however, the Government's authority to withhold discovery with respect to classified evidence is even broader than under CIPA. *See* 10 U.S.C. § 949d(f)(1); RMC 701(f). In any event, at present, the Government has not asserted the national security privilege with respect to the information sought by the Defense. Were the

ii. The first step in the *Yunis* inquiry is relevance. In *Yunis*, the D.C. Circuit applied Federal Rule of Evidence 401, which provides that evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Yunis*, 867 F.2d at 622 (quoting Fed. R. Evid. 401) (internal quotation marks omitted). There, the Court of Appeals noted that granting an accused access to his own statements generally requires only a minimal showing of relevance. *See id.* at 621-22. The court determined that the defendant in that case had failed to meet even this lower standard of relevance since "[n]othing in the classified documents in fact goes to the innocence of the defendant *vel non*, impeaches any evidence of guilt, or makes more or less probable any fact at issue in establishing any defense to the charges." *Id.* at 624.

iii. In the instant case, there can be no doubt that the information requested by the Defense fails to satisfy the above standard of relevance. As an initial matter, we note that the Defense does not benefit from the lower threshold cited in *Yunis*, since the statements of the accused are not at issue. Nonetheless, the Defense maintains that it must merely show that the information is "at least helpful to the defense" for it to be discoverable. Mot. to Compel at 4. This bit of legerdemain by the Defense is a misreading of the actual quotation from *Yunis*, which states that the defendant "is entitled *only* to information that is at least 'helpful to the defense of [the] accused.'" *Yunis*, 867 F.2d at 623 (emphasis added; alteration in original) (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)). That is, for information to be relevant it is *necessary*, but not sufficient, that the information be helpful to the defense. Rather, as *Yunis* makes clear, the "relevant" and "helpful to the defense" inquiries are distinct. *See id.* at 622.

iv. The Supreme Court in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), also set a higher relevance standard than that which the Defense claims should apply here. In *Valenzuela-Bernal*, the Supreme Court rejected the analysis of the Court of Appeals that a constitutional violation had occurred where the Government deprived the defense of evidence that could have produced a "conceivable benefit" to the defense. *See id.* at 862. Instead, the Supreme Court held that *Roviaro*'s test of materiality is the proper standard. *See id.* at 870-71. The Court elaborated upon this standard by explaining that there is no reversible error with respect to conviction unless there is "a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Id.* at 874. So, too, here, Defense counsel has failed to demonstrate that the information sought would have a reasonable likelihood of affecting the outcome in this case.

b. THE MATERIAL SOUGHT BY THE DEFENSE IS IRRELEVANT AND IMMATERIAL UNDER *YUNIS*

i. The terrorist attacks indentified in the charge sheet against the accused were pled to prove the existence of an armed conflict between al Qaeda and the United

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Government to assert such a privilege, numerous other obstacles would be raised to the Defense's instant motion.

States and as proof of a criminal conspiracy to kill Americans, both soldiers and civilians, throughout the world. Whether the attacks were part of a series of separate conspiracies or part of a broader conspiracy is irrelevant. The attacks were alleged with respect to the enterprise that the accused joined (al Qaeda)—an enterprise devoted to violating the law of war. Even if al Qaeda had committed only one of the specifically identified attacks, the accused could nevertheless be found guilty under the MCA and MMC of the offense of conspiracy. *See* 10 U.S.C. § 950v(b)(28); MMC IV-6(28).

ii. Moreover, even if it were true that the various co-conspirators identified in the charge sheet disagreed with certain tactics that were employed to effectuate the mission of killing Americans, or disagreed with the timing, mode or manner of how the attacks would be carried out (after previously agreeing that Americans should be killed), that would not make those conspirators anything less than conspirators. Nor would it suggest that those persons are any more innocent of conspiring than would be the case if two people agreed to kill someone, and one conspirator shot the victim on Monday while the other conspirator thought the victim was to be stabbed, not shot, on Tuesday. This is especially true when applied to an organization such as al Qaeda, whose intentions and goals are well publicized and known to all of its members, but whose operational security for terrorist attacks dictates that very few individuals know all aspects of the plot. Furthermore, it is important to note that the 9/11 Commission report cited by the Defense comes in regard to a *third* in a series of attacks targeting and killing American civilians.

iii. In addition, the Defense collapses the relevance and materiality requirements of *Yunis*. For example, in its Motion to Compel, the Defense argues that "[t]he requested documents are material to the preparation of the defense because they are relevant" to the conspiracy charge. Mot. to Compel at 4. This explanation of alleged relevance is void of any showing of materiality. In order to show that evidence is material it must be helpful or beneficial to the Defense. *Yunis*, 867 F.2d at 618. Here, because the information sought can have no impact on the accused's guilt or innocence, it is not material to the outcome of this case.

c. THE ACCUSED HAS NO RIGHTS UNDER THE DUE PROCESS CLAUSE, AND THE DEFENSE MISDESCRIBES THE NON-APPLICABILITY OF *BRADY*

i. The Defense invokes the "fundamental principle of U.S. law" that "[t]he government's failure to disclose 'evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Mot. to Compel at 4 (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). However, as the Prosecution has previously explained, *see, e.g.*, Government's Response to the Defense's Motion to Dismiss for Lack of Jurisdiction (Equal Protection) at 4-8 (18 Jan. 2008), the Due Process Clause does not apply to the accused.

ii. The Supreme Court has squarely held that alien enemy combatants held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no rights under the Due Process Clause. For example, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a group of German nationals—

who were captured in China by U.S. forces during World War II and imprisoned in a U.S. military base in Germany—sought habeas relief in federal court. Although the military base in Germany was controlled by the U.S. Army, *id.* at 766, the Supreme Court held that these prisoners, detained as enemies outside the United States, had no rights under the Fifth Amendment, *see id.* at 782-85. This is so because the prisoners "at no relevant time were within any territory over which the United States is *sovereign*, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 777-78 (emphasis added).

iii. The Court further noted that to invest nonresident alien enemy combatants with rights under the Due Process Clause would potentially put them in "a more protected position than our own soldiers," who are liable to trial in courts-martial, rather than in Article III civilian courts. *Id.* at 783. The Court easily rejected the argument that alien enemy combatants should have more rights than our servicemen and women, and held instead that the Fifth Amendment had no application to alien enemy combatants detained outside the territorial borders of the United States. *See id.* at 784-85 ("Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.") (citation omitted).

iv. Forty years later, the Supreme Court reaffirmed its conclusion that nonresident aliens outside United States sovereign territory have no constitutional rights, and explained that "[n]ot only are history and case law against [the alien], but as pointed out in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the result of accepting this claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (rejecting the contention "that to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment to the United States Constitution"). Similarly, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court confirmed that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* at 693 (citing *Verdugo-Urquidez* and *Eisentrager*); *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . . ."). Following these precedents, the U.S. Court of Appeals for the D.C. Circuit consistently has held that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

v. Furthermore, even when an alien is found within United States sovereign territory, the alien's lack of *voluntary* connection to the Nation denies him protection under the Constitution. As the Supreme Court explained in *Eisentrager*, the alien has

been accorded an "ascending scale of rights as he increases his identity with our society," 339 U.S. at 770, and the privilege of litigation has been extended to aliens "only because permitting their presence in the country implied protection," *id.* at 777-78. Thus, an alien seeking constitutional protections must establish not only that he has come within territory over which the United States has sovereignty, but also that he has developed substantial voluntary connections with this country. *See Verdugo-Urquidez*, 494 U.S. at 271-72; *accord Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.") (citing cases). In *Verdugo-Urquidez*, the Supreme Court held that a nonresident alien, who had no previous significant voluntary connection with the United States and was involuntarily transported to the United States and held against his will, had no Fourth Amendment rights with respect to the search of his property abroad by U.S. agents. 494 U.S. at 271. The Court reasoned that "this sort of presence [in the United States]—lawful but *involuntary*—is not of the sort to indicate any substantial connection with our country." *Id.* (emphasis added).

vi. In light of these principles, the accused cannot credibly claim any constitutional protections, including those of the Due Process Clause. The accused is an alien who has no voluntary connection to the United States. Furthermore, he is detained at Guantanamo Bay, Cuba, and it is clear that Guantanamo is outside the sovereign territory of the United States. As the Supreme Court noted in *Rasul v. Bush*, 542 U.S. 466 (2004), under the 1903 Lease Agreement executed between the United States and Cuba, "'the United States recognizes the continuance of the *ultimate sovereignty of the Republic of Cuba* over the [leased areas],' while 'the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.'" *Id.* at 471 (emphasis added; other alterations in original) (quoting Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 (6 Bevans 1113) ("1903 Lease")). Indeed, in framing the question before it for review, the Court in *Rasul* expressly recognized a distinction between "ultimate sovereignty" and "plenary and exclusive jurisdiction" at Guantanamo.[3] 542 U.S. at 475 (internal quotation marks omitted); *see id.* ("The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"). *Cf. United States v. Spelar*, 338 U.S. 217, 221-22 (1949) (lease for military air base in Newfoundland "effected no transfer of sovereignty with respect to the military bases concerned"); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380-81 (1948)

[3] Indeed, the 1903 Lease prohibits the United States from establishing certain "commercial" or "industrial" enterprises over Guantanamo, a restriction wholly inconsistent with control congruent with sovereignty. *See* 1903 Lease, art. II.

(U.S. naval base in Bermuda, controlled by United States under lease with Great Britain, was outside United States sovereignty).[4]

vii. Despite the accused's previous suggestion that *Rasul* extended constitutional rights to alien enemy combatants held at Guantanamo Bay, Cuba, *Rasul* did nothing of the sort. The *Rasul* Court's determination that persons detained at Guantanamo are "within 'the territorial jurisdiction' of the United States," 542 U.S. at 480, was only with respect to the habeas statute, and *not* with respect to rights guaranteed by the Constitution: "Considering that [28 U.S.C.] § 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that *Congress* intended the *statute's* geographical coverage to vary depending on the detainee's citizenship." *Id.* at 481 (emphasis added). Thus, *Rasul*'s holding was clearly limited to whether Congress intended a federal statute to cover aliens held at a place such as Guantanamo, and said nothing as to whether the *Framers* could ever have intended the *Constitution* to apply extraterritorially in such circumstances. *See id.* at 475-79, 484; *see also Rasul v. Myers*, No. 06-5209, slip op. at 31 (D.C. Cir. 11 Jan. 2008) ("[I]n *Rasul*, the Supreme Court, significantly, did not reach the issue of whether Guantanamo detainees possess constitutional rights and instead based its holding on 28 U.S.C. § 2241 only.") (citing *Rasul*, 542 U.S. at 478-84).

viii. Accordingly, because the Due Process Clause has no applicability to the accused, *Brady* and its progeny do not apply to the accused as a matter of constitutional law. Nevertheless, the accused argues that *Brady* applies based on the text of the MCA. In particular, the accused cites section 949j(d)(2) as evidence that Congress incorporated *Brady* into these military commissions. The accused, however, is mistaken.

ix. Section 949j(d)(1) provides that "[a]s soon as practicable, trial counsel shall disclose to the defense the existence of any evidence known to trial counsel that reasonably tends to exculpate the accused." This section also provides that "[w]here exculpatory evidence is classified, the accused shall be provided with an adequate substitute." *Id.* Section 949j(d)(2) glosses the term "evidence known to trial counsel" by explaining that, "in the case of exculpatory evidence, [it] means exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title."

x. Contrary to the Defense's claim, this section does not incorporate *Brady* into the MCA. *Brady* is never cited in the MCA, nor is it cited in the Manual for Military Commissions. The MMC makes clear that the Defense's right to obtained witnesses or other evidence exists only "as provided in these rules." RMC 703(a). RMC 701(e), which governs the production of exculpatory evidence by the Government, provides that trial counsel must "disclose to the defense the existence of [exculpatory] evidence known to the trial counsel." "[E]vidence known to the trial counsel" is, consistent with the

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[4] It is worth noting that the Guantanamo Bay lease with Cuba gives the United States "substantially the same rights as it has in the Bermuda lease" that was held in *Connell* to describe territory *outside* United States sovereignty. *Connell*, 335 U.S. at 383.

MCA, defined by reference to "exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title." *Id.*[5]

xi. Neither the MCA nor the MMC incorporates *Brady*, its progeny nor any of *Brady*'s remedial aspects. It is therefore incorrect to state—as the Defense does—that "[t]he MCA makes *Brady*, at least with respect to exculpatory evidence, applicable to military commissions." Mot. to Compel at 5. Rather, the only aspect of courts-martial practice that is incorporated into military commissions by MCA § 949j(d)(2) and RMC 701(e) is the degree of due diligence required of trial counsel before a piece of evidence is deemed "known to trial counsel." *See* RMC 701(e) Discussion Note. "Exculpatory evidence," on the other hand, is defined purely by reference to the plain language of RMC 701(e), namely, as evidence that "reasonably tends to: (1) [n]egate the guilt of the accused of an offense charged; (2) [r]educe the degree of guilt of the accused of an offense charged; or (3) [r]educe the punishment." As described below, the evidence sought by the accused fails to meet this clear definition of exculpatory evidence.

d. THE ACCUSED IS NOT ENTITLED UNDER RMC 703(e) TO THE INFORMATION SOUGHT BECAUSE IT IS NOT EXCULPATORY

i. The accused is charged with conspiracy under two separate theories of liability: One charge in the specification is that he "willfully join[ed]an enterprise of persons, to wit: al Qaeda . . . that has engaged in hostilities against the United States," to commit various offenses triable by military commission, including "attacking civilians; attacking civilian objects, murder in violation of the law of war; destruction of property in violation of the law of; and terrorism." *United States v. Khadr*, Referred Charges, at 1-2 (24 Apr. 2007). The charge sheet also lists examples of other illegal acts engaged in by al Qaeda, including the attacks against the American embassies in Kenya and Tanzania in 1998, the attack on the USS Cole in 2000 and the terrorist attacks of 9/11. *See id.* at 1.

ii. The information sought by the accused is not exculpatory. An example of potentially exculpatory evidence would be evidence that tends to show, for example, that the accused did not actually join al Qaeda, or that he did not know the criminal purpose of the enterprise or did not join it willfully. By contrast, whether the various participants in the attacks by al Qaeda were the same persons or different persons is irrelevant to the charge. Irrelevant material is obviously not exculpatory.

iii. The accused is also charged with "conspir[ing] and agree[ing]" with several named and unnamed members of al Qaeda to commit various violations of the law of war. *See Khadr*, Referred Charges, at 1. Whether these other members of al Qaeda were part of the same or different conspiracies is again irrelevant. The relevant facts are those that tend to show whether the accused conspired to commit violations of the law of war and committed an overt act in furtherance thereof. *See* 10 U.S.C.

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[5] In addition, as previously noted, *see supra* note 2, RMC 701(e) is further qualified by RMC 701(f), governing the national security privilege. The Defense does not once in its brief acknowledge the existence of RMC 701(f). In any event, were the Government to assert the national security privilege with respect to the information at issue, further obstacles would be raised to the Defense's motion.

§ 950v(b)(28); MMC IV-6(28). Because the accused's guilt under Charge III does not turn on whether the participants in the attacks were the same or different, evidence with respect to such facts is irrelevant and, *a fortiori*, not exculpatory.

iv. The Defense's attempt to impose further roadblocks to this case ever reaching trial by requesting irrelevant and immaterial information is meritless. Even were the Defense correct that the Government has documents that demonstrate that the bombing of the USS Cole, the attacks of 9/11, and the various other offenses cited in the charge sheet were part of separate conspiracies, that would not in any way mitigate the accused's guilt and would not be exculpatory. Because the evidence sought by the accused is not exculpatory, he has no right to it under either MCA § 949j(d) or RMC 701(e).

e. THE ACCUSED MAY NOT ASSERT ANY RIGHTS UNDER THE GENEVA CONVENTIONS, AND INTERNATIONAL LAW DOES NOT GRANT THE ACCUSED ANY RIGHTS THAT CONFLICT WITH THE MCA OR MMC THAT ARE ENFORCEABLE IN THIS COMMISSION

i. The Defense claims that the MCA and MMC "incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions." Mot. to Compel at 5. As previously discussed, however, the accused may not invoke the protections of Common Article 3 in this proceeding. *See* 10 U.S.C. § 948b(g) ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."); *see generally* Government's Response to the Defense's Motion to Dismiss for Lack of Jurisdiction (Common Article 3) (24 Jan. 2008). As the Prosecution has previously explained, Congress and the President jointly determined that the MCA meets all requirements of Common Article 3 and the Geneva Conventions, and therefore expressly provided that the accused may not seek to invoke any additional rights that might arguably be found in the Geneva Conventions. *See* 10 U.S.C. § 948b(f).

ii. This determination by Congress and the President as to the compliance of the Military Commissions Act—an Act that concerns foreign affairs, the war power and aliens—with a treaty such as the Geneva Conventions must be accorded tremendous deference by a reviewing court. *See, e.g.*, *Iceland S.S. Co., Ltd.–Eimskip v. U.S. Dep't of the Army*, 201 F. 3d 451 (D.C. Cir. 2000) ("To the extent that the meaning of treaty terms are not plain, we give 'great weight' to 'the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement.'") (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.") (quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976)); *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.") (alteration in original) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89

(1952)). It would be both extraordinary and unwarranted for a court to hold that the determination of both political branches with respect to the MCA's compliance with a treaty is incorrect.

iii. In enacting the MCA and delegating authority to the Secretary of Defense to promulgate the MMC, Congress and the President clearly intended that these instruments would wholly define the rights of the accused in this proceeding. Any principles of international law that may be to the contrary can have no effect in this court. *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."); *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 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").

iv. Similarly, even if Common Article 3 potentially applied to the procedures of the MCA, Congress always retains the authority to abrogate or repeal a treaty by a later-enacted statute. *See, e.g.*, *Edye v. Roberston (Head Money Cases)*, 112 U.S. 580, 599 (1884) ("A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. . . . In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal."); *see also Reid v. Covert*, 354 U.S. 1, 18 (1957) ("This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [B]ut, if the two are inconsistent, the one last in date will control the other . . . ."). Thus, even if Common Article 3 were somehow in tension with the MCA's various procedures, the MCA would remain lawful and enforceable, notwithstanding anything in Common Article 3, the Geneva Conventions or any other earlier-enacted treaty to the contrary.

v. Nor does the canon of construction articulated by *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), have any applicability. 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 Court of Appeals has 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). Here, Congress has unambiguously stated the procedures for discovering and admitting evidence. Because none of these provisions is ambiguous, *Schooner Charming Betsy*'s canon of construction is inapplicable. *Cf. Clark v. Martinez*, 543 U.S. 371, 382 (2005) ("The canon [of constitutional avoidance] is . . . a means of giving effect to congressional intent, *not of subverting it*.") (emphasis added). Moreover, Congress has expressly legislated that the accused may not invoke the Geneva Conventions as a source of rights, *see* 10 U.S.C. § 948b(g), which necessarily prevents him from relying on *Schooner Charming Betsy*'s canon of construction to impose Common Article 3 on the MCA and MMC.

vi. This likewise answers the accused's argument in footnote 2 of his motion that principles of constitutional avoidance require the Military Judge to disregard the framework that Congress and the President so carefully articulated in the MCA in favor of the accused's preferred reading of international law. Congress has surely not mandated that this court review the MCA and MMC with a fine-tooth comb looking for compliance *vel non* with Common Article 3. Rather, Congress and the President have emphatically stated that the MCA and MMC *comply* with Common Article 3. *See* 10 U.S.C. § 948b(f). As discussed in our prior brief, *see* Government's Response to the Defense's Motion to Dismiss for Lack of Jurisdiction (Common Article 3) at 12-24, that determination by Congress and the President is surely correct. However, even if it were not, the MCA and MMC were enacted *subsequent* to Common Article 3, and therefore it is the MCA and MMC that must govern in the event of any inconsistency with Common Article 3.[6]

vii. With respect to the Defense's other arguments, including the non-applicability of Additional Protocol I to the Geneva Conventions, we respectfully refer the Military Judge to our earlier arguments on this subject. *See, e.g.*, Government's Response to the Defense's Motion to Dismiss for Lack of Jurisdiction (Common Article 3) at 6 n.1.

f. DENYING THE DEFENSE'S MOTION AND ENFORCING THE DISCOVERY AND EVIDENTIARY PROVISIONS OF THE MCA AND MMC WILL NOT RENDER THE DEFENSE INCOMPETENT

i. The Defense's final argument is that the accused will receive incompetent representation if the Military Judge does not grant him every piece of information he seeks. *See* Mot. to Compel at 7 ("Failure to grant the defense request for discovery will deprive Mr. Khadr of competent representation . . . ."). However, the Defense is entitled only to evidence as provided under the MCA and MMC. *See* 10 U.S.C. § 949j(a)

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[6] We note that the accused in footnote 4 states that "[t]he ICTY and the ICTR similarly provide 'minimum guarantees' for the accused to 'be entitled to a fair and . . . hearing.' [sic]" Mot. to Compel at 6 n.4 (omission in original). This statement—whatever its degree of accuracy—is irrelevant, since the accused is not being tried before the ICTY or ICTR.

("Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence *as provided in regulations prescribed by the Secretary of Defense*.") (emphasis added); RMC 703(a) ("The defense shall have reasonable opportunity to obtain witnesses and other evidence *as provided in these rules*.") (emphasis added).

ii. Congress and the President certainly understood that a competent defense requires access to material and exculpatory evidence, subject to national security interests. The MCA and MMC implement that conclusion and define what evidence the accused may have access to. The Defense's implicit claim seems to be that the evidence available to it under the MCA and MMC fails to provide the accused with competent representation. However, Congress and the President have carefully defined what evidence the Defense is entitled to. That determination, which post-dates the various standards of competent representation to which the Defense cites, is the standard that governs this commission's decisions as to what evidence is discoverable or admissible. The accused's motion attempts to subvert this careful standard by asking this court to superimpose some vague standard in terms of what evidence the Defense is entitled to, while ignoring the generous and careful evidentiary provisions set forth in the text of the MCA and MMC. This court should reject the instant motion and follow the clear rules of the MCA and MMC.

g. CONCLUSION

i. Because the evidence sought by the accused is neither relevant, material nor exculpatory, he has no right to it under the MCA or MMC. In addition, Congress has provided that the accused may not invoke the Geneva Conventions in general, or Common Article 3 in particular, before this commission, thus defeating any attempt by the accused to invoke such sources of international law. Finally, the discovery and evidentiary provisions of the MCA and MMC are robust and fair, and enforcing them will not render the accused's defense incompetent.

ii. As a final matter, the Prosecution must note that the Defense alleges in its motion that the Government's denial of the Defense's request for information "ignores fundamental concepts of fairness and places in question the integrity of these proceedings." Mot. to Compel at 6. These baseless allegations must stop. While there will no doubt be disagreements between the Defense and Prosecution as to what discovery is required under the MCA, such disagreements fall far short of undermining the "integrity" of this proceeding and its participants. The MCA is the law of the Nation, and was overwhelmingly passed by Congress, operating pursuant to its Article I, §8 authority, before being signed into law by the Commander in Chief of our Armed Forces. The Prosecution believes it has provided, and will continue to provide, all materials that the MCA obligates the Prosecution to disclose. We understand that the Defense disagrees, and that this issue will be litigated. That is how our justice system was designed to work. However, by continually calling into question the integrity of the proceedings and of the Prosecution for following the MCA and MMC, the Defense disrespects this court, and calls into question the integrity of our Congress, our Commander in Chief, and fellow military officers, all of whom are sworn to uphold the

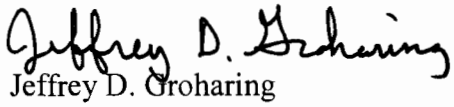
law. Such words will no doubt have a lasting effect on the world's perception of American military justice, and have no place in a motion to compel the production of information that the Prosecution has a good faith basis for not producing.

7. Oral Argument: In view of the authorities cited above, which directly, and conclusively, address the issues presented, the Prosecution believes that the motion to compel discovery should be readily denied. Should the Military Judge order the parties to present oral argument, the Government is 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: The Defense conferred with the Prosecution regarding the requested relief and the Prosecution objected.

10. Additional Information: None.



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John F. Murphy
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UNITED STATES OF AMERICA	}	**P-006** **Government Motion for Reconsideration Regarding Ruling of Defense Motion D030**
		23 April 2008
v	}	
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khahi"	}	

1. The government requests reconsideration of the commission's 13 March 2008 ruling on Defense motion D-030, which ordered the government to disclose to the defense certain materials relating to an investigation involving complaints filed by the former Chief Prosecutor of the Office of Military Commissions.

2. The commission has reviewed defense motion D-030 and the government response. The commission has considered the government motion for reconsideration and the oral argument by both sides.

3. The standards for discovery are laid out in Rule for Military Commission (RMC) 701. RMC 701(c)(1) states in pertinent part: "After service of charges, upon request of the defense, the Government shall permit the defense counsel to examine…any papers, documents …which is in the custody or control of the Government and which is material to the preparation of the defense…." The commission further interprets the provisions of the MCA and the RMC based on the statutory provision in 18 USC §949a:

> **§ 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.

4. The commission has considered the proper standard for discovery and disclosure under RMC 701(c). *U.S. v Yunis*, 867 F.2d 617 (D.C. Cir. 1989), cited in the Discussion, refers to *Rovario v. United States, 353 U.S. 53 (1957)* in creating a standard of "helpful to the defense of the accused" as the proper method to determine whether an item is "material to the preparation of the defense." While *U.S. v Yunis* is not, as stated by the government in oral argument on another motion, binding precedent upon this commission, it, and the cases cited therein, are indicative of the proper standard.

5. The primary question is relevance. The government contends that the material in the report is "wholly irrelevant" (paragraph 3, P-006 Motion). The investigation is certainly not relevant to the existence or non-existence of a fact in issue concerning the Specifications of the Charges. However, the defense has not contended that it is seeking the investigation as part of preparing for a factual defense. Rather, the defense is seeking the information to determine whether a pre-trial motion concerning unlawful command influence (or some other motion) should be brought. The commission finds that the investigation is indeed relevant to the issue of unlawful command influence.

6. The government further states that the public version of the investigation should suffice. To satisfy the defense and the commission, the government "has reviewed the complaint lodged by COL Davis….(and) a sworn statement by COL Davis taken as part of the Tate Assessment…. (Paragraph 6c, P-006 Motion). Having reviewed those documents, the government states that the matters put forth by the defense do not exist.

7. The commission has reviewed the briefs in this matter and it can readily envision, without resorting to speculation or hyperboles, at least three methods by which defense review of the entire investigation could be helpful to the preparation of the defense. Consequently, the commission finds that the investigation is material.

8. The government does not address the balancing of disclosure versus the interests to be protected. The commission has considered this matter. The commission finds that the balance is clearly in favor of disclosure.

9. The commission rejects the government suggestion that the commission review the investigation. The commission has and shall, when required, conduct an *in camera* review of documents. This matter does not require an *in camera* review.

10. Treating the government motion to reconsider as a motion to deny discovery of the Davis Investigation, the motion is denied.

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

UNITED STATES OF AMERICA	**P006**
v.	**Government's Motion for Reconsideration Regarding Ruling on Defense Motion D030**
OMAR AHMED KHADR	4 April 2008

1. Timeliness: This motion is timely filed. *See* Rule for Military Commissions ("RMC") 905(f).

2. Relief Sought: The Government respectfully moves this Court to reconsider its 13 March 2008 ruling on Defense motion D030 ("Ruling").

3. Overview: This Court's Ruling was based upon assertions by the Defense that—upon closer examination—are inaccurate. As such, the Ruling should be reconsidered, and the original Defense motion should be denied. The Military Judge has ordered the Government to disclose to the Defense materials relating to an internal investigation involving complaints filed by the former Chief Prosecutor. These materials contain vast amounts of sensitive information relating to the inner workings of the Chief Prosecutor's Office and the work performed by its members. While much of the sensitive material would undoubtedly be interesting to the Defense team, inasmuch as it would provide them with a voyeuristic peek into the window of the Chief Prosecutor's office, the simple fact remains that the material is wholly irrelevant to this case and is in no way material to the preparation of the defense. Accordingly, since the bases upon which the Defense relied to support their motion are not accurate, this Court's Ruling was equally based upon inaccurate information and must be reconsidered and reversed.

4. Burden and Persuasion: As the moving party, the Government bears the burden on this motion.

5. Facts: All of the relevant facts are in the record and in the discussion below.

6. Discussion:

a. On 4 March 2008, the Defense filed a Motion to Compel Production of Documents Relating to Allegations of Interference with the Office of the Chief Prosecutor. The motion was supported by an affidavit executed by LCDR Kuebler. The affidavit contained a recitation of statements that ex-Chief Prosecutor, COL Morris Davis, allegedly made during a meeting with the Office of Military Commissions Chief Defense Counsel's Office. According to the Defense, COL Davis purportedly related a story about a conversation he claims he had with the General Counsel of the Defense Department in which the timing of charges (including those against the accused) was supposedly discussed. It is that conversation that the Defense believes may provide the

basis for it to pursue an investigation (and possibly a later claim) of unlawful command influence. And it is the claim that—as indicated in LCDR Kuebler's affidavit—"this conversation was referenced in [COL Davis'] initial complaint" that supposedly provided the Defense with the need for the disclosure of the Tate Assessment.

b. The Defense reiterated its allegations at oral argument in GTMO on 13 March 2008. According to LCDR Kuebler:

> We asked for the report because according to Colonel Davis there is a specific reference in his complaint concerning an effort by Mr. Haynes, the DOD General Counsel, to accelerate the prosecution of this case along with the Hicks case. And we think that provides a potential basis for an unlawful command influence motion. And so that's why were [*sic*] asking for that document, not to get into the competing legal analysis of General Hartman [*sic*] and Colonel Davis on the provisions of the Military Commissions Act.

Unofficial Tr., RMC 803 Session, GTMO, 13 Mar. 2008, at 201.

c. The Government has reviewed the complaint lodged by COL Davis, and nowhere in the document does he discuss any such conversation. In addition, the Government has reviewed a sworn statement of COL Davis taken as part of the Tate Assessment, and again, nowhere in that statement does he discuss any such conversation.

d. The tenuous basis for the Defense request to review the Tate Assessment simply does not exist. The fact of the matter is that the Defense is attempting to justify a fishing expedition into an internal investigation. But the only justification the Defense has proffered for doing so can be found nowhere in the complaint filed by COL Davis.

e. Moreover, the Tate Assessment simply analyzes differing opinions regarding the roles of the Chief Prosecutor and the Legal Advisor to the Convening Authority—*which is a subject in which the Defense has expressly disclaimed interest.* When this Court directed the Defense to the publicly available final report that is on a DOD website, the Defense emphasized that the final report is irrelevant and unhelpful because it "basically talks about the apparent conflict between General Hartman [*sic*] and Colonel Davis over [their roles], ***which is not why we asked for the report.***" *See* Unofficial Tr., RMC 803 Session, GTMO, 13 Mar. 2008, at 201 (emphasis added). Thus, even according to the Defense's overbroad conception of the discovery rules, the material contained in the Tate Assessment is neither relevant nor material to the preparation of Khadr's case.

f. Finally, just to satisfy the Court that the Tate Assessment is wholly and unquestionably irrelevant in every possible respect, we note that COL Davis himself emphasized that his complaint about the Legal Advisor's role "does not apply to Hamdan and Khadr since they were referred to trial prior to the arrival of the current legal advisor." These are COL Davis's own words – quoted from his complaint – and they

should make clear that his complaint and the subsequent assessment are utterly irrelevant and immaterial to this case. But if this Court has any lingering doubts, the Government remains prepared—as it was on 13 March, *see* Unofficial Tr., RMC 803 Session, GTMO, 13 Mar. 2008, at 202—to provide the Tate Assessment for the Military Judge's *in camera* review pursuant to RMC 703(f)(4)(C).

g. In short, the Tate Assessment contains *nothing* that the Defense asked for and *everything* that the Defense has emphasized it does not want. Moreover, given that the disputes at issue in the Tate Assessment arose *months after* the referral of charges against Khadr, there is absolutely no basis whatsoever for its disclosure. The Ruling should be reconsidered, and the original motion should be denied.

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

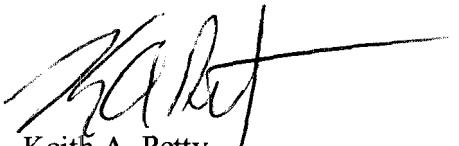
8. **Witnesses:** Not applicable.

9. **Conference:** The Defense opposes this motion.

10. **Additional Information:** None.

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 U.S. Attorney
Assistant Prosecutor

From: Snyder, Rebecca, Ms, DoD OGC [redacted]
Sent [redacted]
't Motion to Reconsider D-030

[redacted]

The defense does not intend to submit a written response to the government's motion to reconsider D-030.

V/r
Ms. Snyder

Rebecca S. Snyder
Attorney
Office of Military Commissions
nsel
[redacted]

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UNITED STATES OF AMERICA	}	**D--030** **Ruling on Defense Motion To Compel Production of Documents Relating to Allegations of Interference with the Office of the Chief Prosecutor**
		13 March 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.

2. The commission has further considered the non-binding Discussion to RMC 701(c)(3).

3. The commission orders that the government make available for examination by the defense the complete investigation conducted with regard to the allegations involving Colonel Davis. Once the defense has examined the complete investigation, the defense may request further relief, if required.

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

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** **To Compel Production of Documents** Relating to Allegations of Interference with the Office of the Chief Prosecutor 4 March 2008

1. **Timeliness:** This motion is filed within the timeframe established by R.M.C. 905 and the Military Judge's email order of 21 February 2008.

2. **Relief requested:** The defense respectfully requests the Military Judge to issue an order requiring the government to produce any and all documents relating to an investigation into allegations of interference in the Office of the Chief Prosecutor by the legal advisor to the convening authority.

3. **Overview:** The defense has requested all records relating to allegations of prosecutorial misconduct and unlawful interference in the Office of the Chief Prosecutor by the legal advisor to the convening authority. The prosecution has provided none of the requested documents. Mr. Khadr's fundamental right of access to potential evidence and witnesses is provided for in statute and in treaty, and Mr. Khadr hereby asserts that right. 10 U.S.C. § 949j (2006); Rule for Military Commission (R.M.C.) 701(j); Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, Common Article 3, entered into force Oct. 21, 1950 (hereinafter Common Article 3).

4. **Burdens of proof and persuasion:** As the moving party, the burden of persuasion is on the defense.

5. **Facts:**

a. On 15 November 2007, the Defense submitted a supplemental request for discovery requesting all documents relating to the complaints made by Colonel Morris Davis, USAF, the former Chief Prosecutor for Military Commissions, "relating to allegations of interference or attempts to improperly influence Colonel Davis in the performance of his duties." (Def. Supp. Discovery Req. of 15 Nov 07, ¶ 1 [hereinafter Def. 15 Nov 07 Discovery Req.] (Attachment A)). The defense specifically stated that production of these materials was necessary in order to enable the defense to investigate potential claims of unlawful command influence in violation of 10 U.S.C. § 949b. (Def. 15 Nov 07 Discovery Req. ¶ 2.)

b. On 2 December 2007, the prosecution denied the request, claiming that the defense had failed to establish how any of the information requested would be material to the preparation of the defense. (Govt. Resp. of 2 Dec 07 to Def. Supp. Discovery Req. of 15 Nov 07, ¶ 2 (Attachment B)).

c. On 19 February 2008, Colonel Davis related the following facts concerning the preferral of charges in this case: Colonel Davis was contacted by Mr. James Haynes, General Counsel, Department of Defense, in January 2007. Mr. Haynes told him that it was necessary to charge David Hicks. Colonel Davis objected that such action would be premature as the Regulation for Trial by Military Commission had not yet been issued and that it would be inappropriate to charge before the system was fully in place. Mr. Haynes also said that it would look strange if just Hicks were charged and therefore asked Colonel Davis if there were any other cases that could be brought at the same time. Colonel Davis indicated that this conversation was referenced in his initial complaint concerning improper interference with the functions of the Chief Prosecutor. Kuebler Aff., 4 Mar 08, ¶ 3 (Attachment C.)

d. Charges were initially preferred against Mr. Khadr on 2 February 2007. Sworn Charge Sheet of 2 Feb 07 (Attachment A to D008, Def. Mot. to Dismiss Chg. III). Colonel Davis indicated that Mr. Khadr's case was one of two cases for which charges were sworn so that Hicks would not be the only detainee facing charges. Kuebler Aff. ¶ 3.

6. **Law and argument:**

a. **The Government Should Be Ordered to Produce the Investigation Into Colonel Davis's Complaint**

(1) Rule for Military Commission (R.M.C.) 701(j) establishes the standard for discovery in military courts: Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence. *See also* 10 U.S.C. § 949j (2006) ("Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.").

(2) Furthermore, R.M.C. 701(c)(1) requires the government to permit the defense to examine documents and things "within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial." (Emphasis added). The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16[1] governing discovery in the context of the Classified Information Procedures Act (CIPA), for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to "information [that] is at least 'helpful to the defense of [the] accused.'" *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*,

[1] The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical to R.M.C. 701(c)(1). It states: "Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense." Fed. R. Crim. Proc. 16(a)(1)(E)(i).

992 F.2d 348, 351 (D.C. Cir. 1993) ("materiality standard is not a heavy burden") (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would "significantly help [ ] in 'uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal'") (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C. 1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is "at least helpful to the defense."

(3) Military courts recognize "a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts." *United States v. Reece*, 25 M.J. 93, 94 (C.M.A. 1987). Regarding discovery, "military law has been preeminent, jealously guaranteeing to the accused the right to be effectively represented by counsel through affording every opportunity to prepare his case by openly disclosing the Government's evidence." *United States v. Enloe*, 15 U.S.C.M.A. 256 (C.M.A. 1965). The rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

(4) A defendant has the right to prepare to meet the charges against him. *United States v. Strong*, 16 U.S.C.M.A. 43, 46 (C.M.A. 1966); *United States v. Woolheater*, 40 M.J. 170, 173 (C.M.A. 1994) ("In a criminal trial, the defendant has a constitutional right of access to witnesses and evidence."). To deny him any access to relevant evidence and witnesses until the trial of the charges against him "makes such entitlement 'in most part an empty and high-sounding phrase.'" *Aycock*, 15 U.S.C.M.A. at 162 (quoting *Leahy v. State*, 111 Tex. Crim. 570 (Tex. Crim. App. 1928)).

(5) In 2007, Colonel Morris Davis resigned due to alleged interference in his duties by the legal advisor to the convening authority. Colonel Davis filed a formal complaint because of the interference, which resulted in an official investigation. Colonel Davis has since publicly alleged that the convening authority in this case, and her staff, interfered with his office. Col. Morris Davis, *Military Justice Goes AWOL*, Toronto Star, Dec. 12, 2007 (Attachment D). Specifically, Colonel Davis alleges that the convening authority is actively directing the prosecution's pretrial preparation of cases and assigning prosecutors to cases. *Id.* "Intermingling convening authority and prosecutor roles perpetuates the perception of a rigged process stacked against the accused." *Id.*

(6) Based on Colonel Davis's 19 February remarks, it appears that the alleged improper interference extended to the instant case. At a minimum, improper influence resulted in a decision to charge Mr. Khadr months before he would have otherwise been charged and before the military commission system was "up and running." The defense does not know what other matters in the complaint or investigation relate to this case and therefore needs to review the entirety of these materials to determine whether there is a basis for a motion based on unlawful command influence.[2]

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[2] This case thus differs from *United States v. Hamdan*, in which the Military Judge recently denied a defense request for production of the investigation into Colonel Davis's complaint. In

(7) If substantiated, allegations of unlawful command influence and prosecutorial misconduct could warrant the dismissal of this case. *United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005). Even the appearance of unlawful command influence can require dismissal of charges with prejudice. *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). This is due to the fact that unlawful command influence is the "mortal enemy of military justice"[3] and the "appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial." *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003) (quoting *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002).

(8) The importance of the prevention of unlawful command influence is reflected in the Military Commissions Act (M.C.A.) itself. While Congress attempted to strip detainees of many of our most basic and cherished freedoms, Congress ensured that the prohibition against unlawful command influence contained in Article 37, UCMJ, was codified in the M.C.A. 10 U.S.C. § 949b (2006). The Prosecution's assertion that the discovery to the Defense of an official investigation into "the mortal enemy of military justice" is not potentially relevant, especially under the broad discovery provisions of R.M.C. 701, is patently absurd.

(9) The defense, as well as the prosecution, must comply with applicable rules and procedures governing the production and presentation of evidence at trial. *Williams v. Florida*, 399 U.S. 78, 82 (1970). This Commission has the authority to impose sanctions for noncompliance with discovery obligations, ranging from an order permitting discovery to an order prohibiting the offending party from offering evidence not disclosed. R.M.C. 701(l)(3). Based on the available evidence, it is beyond question that the defense has met its burden of showing that the requested documents are material to the preparation of the defense.

b. Conclusion:

(1) The available evidence clearly shows that the materials sought by the defense likely contain evidence of unlawful command influence in Mr. Khadr's case in violation of 10 U.S.C. § 949b. They are therefore material to the preparation of the defense and should be produced in accordance with R.M.C. 701.

7. **Oral Argument**: The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will allow for a thorough consideration of the issues.

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contrast to *Hamdan*, there is direct evidence to support the proposition that the Chief Prosecutor's discretion was materially interfered with in the decision to proceed in this case, as well as evidence that the materials sought by the defense contain evidence thereof. *See United States v. Hamdan*, Ruling on Motion to Compel Discovery, dated 15 February 2008 (Attachment E).

[3] *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

8. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

Attachments A – E

Sworn Charge Sheet of 2 Feb 07 (Attachment A to D008, Def. Mot. to Dismiss Chg III)

9. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

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. **Attachments:**

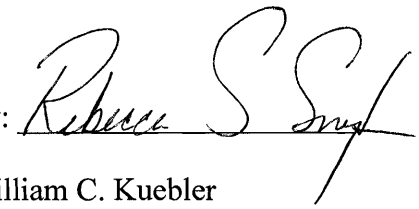
A. Defense Supplemental Discovery Request of 15 November 2007

B. Government Response of 2 December 2007 to Defense Supplemental Discovery Request of 15 November 2007

C. LCDR Kuebler Affidavit of 4 March 2008

D. Col. Morris Davis, *Military Justice Goes AWOL*, Toronto Star, Dec. 12, 2007

E. *United States v. Hamdan*, Ruling on Motion to Compel Discovery, dated 15 February 2008

By: 

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

15 November 2007

From: LCDR William C. Kuebler, JAGC, USN, Detailed Defense Counsel
To: MAJ Jeffrey Groharing, USMC, Trial Counsel

Subj: SUPPLEMENTAL REQUEST FOR DISCOVERY ICO U.S. V. OMAR KHADR

Ref: (a) R.M.C. 701(c)

1. Pursuant to reference (a), the defense respectfully requests production of, or the opportunity to inspect and photocopy, the following materials:

a. Any complaint or report of misconduct filed by or on behalf of Colonel Morris Davis, U.S. Air Force, against Brigadier General Thomas Hartmann, U.S. Air Force, or any other person, relating to allegations of interference or attempts to improperly influence Colonel Davis in the performance of his duties as Chief Prosecutor for Military Commissions;

b. Any complaint or report of misconduct filed by or on behalf of Brigadier General Hartmann relating to Colonel Davis;

c. Any investigation or inquiry conducted by the Office of the Convening Authority, Office of the General Counsel, Office of the Chief Prosecutor, or other entity relating to matters referenced in subparagraphs a or b above;

d. Any statement or summary of interview in the possession of the Office of the Convening Authority, Office of the General Counsel, Office of the Chief Prosecutor, or other entity relating to matters referenced in subparagraphs a or b above;

e. Any other document, electronic mail communication, or other writing relating to matters referenced in subparagraphs a or b above in the possession, custody or control of the U.S. Government.

2. Production of the aforementioned items is essential to the ability of the defense to investigate conduct potentially in violation of 10 U.S.C. § 949b. These matters are therefore "material to the preparation of the defense" within the meaning of reference (a). Should you have any questions or concerns regarding this request, please contact me at (202) 761-0133 (ext. 116).

/s/
W. C. KUEBLER

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
[redacted]

OFFICE OF THE CHIEF PROSECUTOR

December 2, 2007

MEMORANDUM FOR DEFENSE COUNSEL IN UNITED STATES V. OMAR KHADR

SUBJECT: DEFENSE SUPPLEMENTAL DISCOVERY REQUEST DATED 15 NOV 2007

1. The Government provides the following response to the Defense discovery request submitted by the Detailed Defense Counsel on 15 November 2007.

2. The Defense request does not establish how any of the information requested would be "material to the preparation of the defense." See United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989). Absent such showing, the Government will not provide any of the information requested.

3. I may be reached by phone a[redacted]

//s//
JEFF GROHARING
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Affidavit of LCDR William C. Kuebler in Support of Defense Motion To Compel Production of Documents** 4 March 2008

I, LCDR William C. Kuebler, would, if called as a witness, testify as follows:

1. I am the Detailed Defense Counsel for Omar Khadr in the military commission case of *United States v. Omar Khadr*.

2. On or about 19 February 2008, I attended a meeting with Colonel Morris Davis, USAF, at the Rosslyn office of the Office of the Chief Defense Counsel. In the course of that meeting, I had the opportunity to ask Colonel Davis questions about his participation in this case prior to stepping down as Chief Prosecutor.

3. Colonel Davis related the following facts: Colonel Davis was contacted by Mr. James Haynes, General Counsel, Department of Defense, in January 2007. Mr. Haynes told him that it was necessary to charge David Hicks. Colonel Davis objected that such action would be premature as the Regulation for Trial by Military Commission had not yet been issued and that it would be inappropriate to charge detainees before the system was fully in place. Mr. Haynes also said that it would look strange if just Hicks were charged and therefore asked Colonel Davis if there were any other cases that could be brought at the same time. Colonel Davis said that this conversation was referenced in his initial complaint concerning improper interference with the functions of the Chief Prosecutor. Colonel Davis indicated that Mr. Khadr's case was one of two cases for which charges were sworn so that Hicks would not be the only detainee facing charges.

LCDR William C. Kuebler, JAGC, USN

Subscribed to and sworn before me this 4th day of March 2008

Authority: 10 U.S.C. § 936

1 of 1 DOCUMENT

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December 12, 2007 Wednesday
Final Edition

SECTION: OPINIONS; Pg. A9

LENGTH: 860 words

HEADLINE: Military justice goes AWOL

BYLINE: MORRIS D. DAVIS

BODY:

I was the chief prosecutor for the military commissions at Guantánamo Bay, Cuba, until Oct. 4, the day I concluded that full, fair and open trials were not possible under the current system. I resigned on that day because I felt the system had become deeply politicized and that I could no longer do my job effectively or responsibly.

In my view -- and I think most lawyers would agree -- it is absolutely critical to the legitimacy of the military commissions that they be conducted in an atmosphere of honesty and impartiality. Yet the political appointee known as the "convening authority" -- a title with no counterpart in civilian courts -- was not living up to that obligation.

In a nutshell, the convening authority is supposed to be objective -- not predisposed for the prosecution or defence -- and must make important decisions at various stages in the process. The convening authority decides which charges filed by the prosecution go to trial and which are dismissed, chooses who serves on the jury, decides whether to approve requests for experts and reassesses findings of guilt and sentences, among other things.

Earlier this year, Susan Crawford was appointed by the U.S. secretary of Defence to replace Major General John Altenburg as the convening authority. Altenburg's staff had kept its distance from the prosecution to preserve its impartiality. But Crawford had her staff assessing evidence before the filing of charges, directing the prosecution's pretrial preparation of cases (which began while I was on medical leave), drafting charges against people who were accused and assigning prosecutors to cases, among other things.

How can you direct someone to do something -- use specific evidence to bring specific charges against a specific person at a specific time, for instance -- and later make an impartial assessment of whether they behaved properly? Intermingling convening authority and prosecutor roles perpetuates the perception of a rigged process stacked against the accused.

The second reason I resigned is that I believe even the most perfect trial in history will be viewed with skepticism if it is conducted behind closed doors. Telling the world, "Trust me, you would have been impressed if only you could have seen what we did in the courtroom" will not bolster our standing as defenders of justice. Getting evidence through the classification review process to allow its use in open hearings is time-consuming, but it is time well spent.

Crawford, however, thought it unnecessary to wait because the rules permit closed proceedings.

There is no doubt that some portions of some trials must be closed to protect classified information, but that should be the last option after exhausting all reasonable alternatives. Transparency is critical.

Finally, I resigned because of two memos signed by U.S. Deputy Secretary of Defence Gordon England that placed the chief prosecutor -- that was me -- in a chain of command under Defence Department General Counsel William J. Haynes. Haynes was a controversial nominee for a lifetime appointment to the 4th U.S. Circuit Court of Appeals, but

his nomination died in January 2007, in part because of his role in authorizing the use of the aggressive interrogation techniques some people call torture.

I had instructed the prosecutors in September 2005 that we would not offer any evidence derived by water-boarding, one of the aggressive interrogation techniques the administration has sanctioned.

Haynes and I have different perspectives and support different agendas, and the decision to give him command over the chief prosecutor's office, in my view, cast a shadow over the integrity of military commissions. I resigned a few hours after I was informed of Haynes' place in my chain of command.

The Military Commissions Act provides a foundation for fair trials, but some changes are clearly necessary. I was confident in full, fair and open trials when Altenburg was the convening authority and Brigadier General Tom Hemingway was his legal adviser. Collectively, they spent nearly 65 years in active duty, and they were committed to ensuring the integrity of military law. They acted on principle rather than politics.

The first step, if these truly are military commissions and not merely a political smokescreen, is to take control out of the hands of political appointees like Haynes and Crawford and give it back to the military.

President George W. Bush first authorized military commissions in November 2001, more than six years ago, and the lack of progress is obvious. Only one war-crime case has been completed. It is time for the political appointees who created this quagmire to let go.

U.S. Senators John McCain and Lindsey Graham have said that how we treat the enemy says more about us than it does about him.

If we want these military commissions to say anything good about us, it's time to take the politics out of military commissions, give the military control over the process, and make the proceedings open and transparent.

Morris D. Davis is the former chief prosecutor for the U.S. Office of Military Commissions. This commentary first appeared in the Los Angeles Times .

LOAD-DATE: December 12, 2007

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**RULING ON MOTION** To Compel Discovery D 017 15 February 2008 CORRECTED COPY

The Defense has moved this Commission for an order compelling the Government to provide discovery regarding two investigations into alleged prosecutorial misconduct that may touch upon or affect the case of this accused:

The first investigation occurred in 2004, and involved allegations made in an email from an Air Force officer, to the effect that the Prosecutors were destroying documents, concealing allegations of prisoner abuse, and that there was an atmosphere of deceit and secrecy in the Office of Chief Prosecutor (OCP). The Defense has in its possession a redacted copy of the Investigation, which is available on the Office of Military Commissions (OMC) web site.

The second investigation occurred in September of 2007, and followed allegations by the Chief Prosecutor, (Colonel Morris Davis, USAF), that the Legal Advisor to the Convening Authority (Brigadier General Hartman, USAF) was attempting to interfere with the performance of his duties as Chief Prosecutor. The Government objects to the discovery of these investigations on the grounds that they do not contain anything of relevance to the case. The Commission agreed to review both investigations *in camera* before deciding whether either must be disclosed to the Defense.

The 2004 Investigation consists of a 31 page summary of the statements of approximately 41 witnesses interviewed, and the conclusion that the Investigation was "Closed as unfounded." In conducting an *in camera* review of this investigation, the Commission spent five to six hours reading nearly 500 pages of transcribed testimony and witness statements. Each page of transcribed testimony was classified SECRET/NOFORN, although not every page appeared to contain SECRET information. The 2007 Assessment consists of a six page cover letter signed by Brigadier General Tate, followed by 225 pages of emails, transcribed testimony, and other documents. The Commission spent four to five hours reviewing each of these 231 pages.

Having reviewed these documents *in camera*, the Commission makes the following Findings:

WITH RESPECT TO THE 2004 INVESTIGATION:

1. The Report of this Investigation consists of a 31 page, unsigned cover document that summarizes the statements of 41 witnesses who were interviewed in connection with the investigation. The names of five of these witnesses are disclosed, the remaining 36 witnesses have had their names redacted by blacking out, throughout the investigative report.

2. Some witnesses are partially identified by rank and branch of service, federal agency or position within the organization, even though their names have been redacted.

3. In addition to the redaction of names, a cumulative total of about 35 lines of other text appear to have been redacted to protect classified information, organizational affiliations, or references to particular cases pending in the office of the Chief Prosecutor.

4. The Report's conclusion is that "The project is closed as unfounded."

5. Apart from the redactions, the 31 page document fairly summarizes the statements of the witnesses interviewed. The following statements from the redacted version of the report support this conclusion (paragraph numbers from the report are used as a reference):

6. This witness, identified as a Naval Reservist, "opined that allegations made by [name omitted] were not correct, but were likely made as a result of personality conflicts with the OMC."

7. This witness, a member of the U.S. Army, "related that he is not aware of any criminal or unethical conduct on the part of OMC personnel."

9. This witness, an Air Force Reservist, (who had heard an allegation of prisoner abuse from another Government official) indicated that "a full briefing of the possible mistreatment was provided to [two names omitted] upon his return from the trip. [Name omitted], U.S. Army, was briefed on the possible mistreatment . . . [and] the information was forwarded to the Criminal Investigation Task Force (CITF)." The same witness stated that he "had no knowledge of unethical or criminal conduct committed by OMC personnel."

10. This witness, a Marine, "did not have any knowledge of the specific allegations brought up in the emails . . . [and] has no knowledge of any destruction of evidence involving OMC, nor can he see any motivation to do so."

13. This witness, an NCIS agent, "is not aware of any information regarding abuse of detainees, or unethical or criminal conduct on the part of OMC Personnel."

15. This witness, apparently a civilian attorney from Washington D.C., "did not believe any statements or actions on the part of any OMC member constituted false statements, dereliction of duty, or other criminal violations of the UCMJ. Rather, he believed that major disagreements on specific issues amongst the prosecutors were due to greatly differing interpretations of certain information and events. [He] did not believe that anyone willfully and knowingly misinterpreted anything" and ascribed problems within the OMC to "serious leadership failings" on the part of one person.

16. This witness "refuted allegations that [name omitted] lied or made misrepresentations . . .[He] knows of no attempt to suppress FBI allegations of alleged detainee abuse .. . . [and] did not believe [name withheld] destroyed or hid evidence."

17. This witness, an NCIS Agent, "did recall receiving some information from OMC regarding suspected abuse of detainees."

18. This witness, a Marine, "believes that all allegations of abuse of detainees were forwarded to proper authorities. . . [and] was not aware of any criminal or ethical wrongdoing by anyone in the OCP, OMC, except for disrespectful conduct by [name omitted]."

19. Brigadier General Hemingway, USAF, then-serving Legal Advisor to the Appointing Authority, "considers the majority of the allegations relative to potential destruction of evidence to be management/leadership related issues versus allegations of criminal wrongdoing . . . [and] that "to suggest that [evidence could be destroyed by a Prosecutor] would be 'stupid'."

20. This witness, a member of the USAF, "did not have any direct knowledge of allegations related to destruction of evidence, missing statements, suppression of detainee statements, or any of the other allegations. She had never heard anyone in the OMC make material false statements or misrepresentations."

21. This witness, an Air Force Reservist, "When asked specifically if he was aware of any criminal wrongdoing or ethical misconduct in the OCP, replied in the negative . . . . [He] did not have any knowledge of the alleged systematic destruction of statements while detailed to the OCP."

23. This witness, from the FBI, "knows of no willful misrepresentations on the part of OMC personnel but noted OMC personnel did not appear to have a thorough understanding of their discovery obligations. . . . [He] has no knowledge of the systematic destruction of evidence or the suppression of information regarding the abuse of detainees."

25. This witness, a Resident Agent in Charge, felt that [names withheld] "did not have a good idea of the process of information flow pertaining to detainees and did not understand the 'big picture'."

27. This witness, a U.S. Marine, "had no first hand knowledge of any criminal or ethical misconduct, to include: false statements, destruction of evidence, allegations of missing notes from FBI 302, or suppression of statements of abuse."

29. This witness, a U.S. Marine, "was not aware of any criminal or ethical misconduct within the OCP to include destruction of evidence."

The Commission need not continue this recitation. It is sufficient to note that my own examination of the transcribed testimony of the numerous witnesses whose testimony was provided is consistent with these conclusions. The Commission found no evidence, in any part of the Investigation, to suggest that the problems in the Office of the Chief Prosecutor in 2004 resulted from anything other than leadership, management, or personality issues, or perhaps from inter-service tensions as a completely new office was established to try completely new [to the participants] offenses under the Law of Armed Conflict, in a system of Military Commissions

that was itself getting its own footings.

The Commission found no evidence of criminal or unethical behavior, nothing suggesting prosecutorial misconduct, and nothing related to the case of Mr. Hamdan. Beyond this, the Defense already has its own copy of this Investigation, *sans* names and a few other details, and can make its own conclusions whether any of the matters described in the report merit their further attention.

WITH RESPECT TO THE 2007 INVESTIGATION

The Defense has access to General Tate's six page summary of his investigation, which is publicly available. The Commission reviewed this document and the accompanying 225 pages of material, including email traffic, memoranda, and the transcribed testimony of several witnesses. With respect to this investigation, the Commission finds:

1. The investigation was conducted between 7 and 10 September 2007 by Brigadier Generals Clyde Tate (US Army) and Richard Harding (US Air Force) and Captain (now Rear Admiral (ret'd) Hal Dronberger, JAGC, US Navy. The members of this team did not refer to their undertaking as an "investigation," but rather as an "assessment and recommendation" regarding the organization and roles of the Legal Advisor to the Convening Authority and the Office of the Chief Prosecutor.

2. The completed report consists of a 6 page memorandum for the Department of Defense General Counsel's Office, and is dated 17 September 2007. Attached to the six-page memorandum are 225 pages of emails, documents, and the transcribed testimony from several key witnesses, including General Hartman, (Legal Advisor to the Convening Authority since 2 July 2007); General Hemingway (former Legal Advisor to the Appointing Authority, and later to the Convening Authority), and Colonel Morris Davis, (former Chief Prosecutor, OMC).

3. The "assessment" followed and resulted from a complaint filed by Colonel Davis, with Judge Susan Crawford, the Convening Authority, alleging that General Hartman's actions as Legal Advisor threatened to interfere with his performance as Chief Prosecutor. Distilled to its central themes, the complaint alleged three ways in which Colonel Davis believed that General Hartman threatened to exceed his authority:

A. INVOLVEMENT IN CASES BEING PREPARED FOR TRIAL

Colonel Davis believed that General Hartmann tried to get too much detailed information about individual cases, including the names of the witnesses, what they would say, and who they are. General Hartmann desired to consult in detail with Prosecutors, wanting to hear their opening and closing arguments, and to preview the precise manner in which they would present their cases. General Hartmann also wanted to have classified documents declassified, and insisted that the process proceed more quickly than it was taking.

Colonel Davis objected to this on several grounds: he feared that giving General Hartman written documents might make those documents discoverable to the Defense; he feared that

General Hartmann's Security Clearance was not then appropriate for him to be given certain classified information; and that he might be disqualified to conduct the post-trial legal review of the case by virtue of too much involvement in the prosecution's reparation of the case.

In testimony before the assessment team members, Colonel Davis testified on several occasions that after he objected to General Hartman's overtures, the General "backed off" on these demands. Colonel Davis further denied that this pressure impacted any particular case, because "we never gave him what he asked for at first." (*See* pages 132, 134, 137/225)

Given this state of the evidence, the Commission finds that Colonel Davis resisted the pressures he considered an improper excursion into his office and its decision making, and accepts Colonel Davis's testimony that his refusals to provide the requested information resulted in the General's "backing off" on his demands. There is no likelihood that access to the details of this information would give rise to a claim of improper command influence because Colonel Davis has testified that he did not submit to these demands.

B. GENERAL HARTMAN WANTED TO DICTATE THE ORDER IN WHICH CASES WOULD BE CHARGED

Colonel Davis objected to General Hartman's demands that certain cases, or certain types of cases, be brought to trial before others. Colonel Davis considered this a decision that belonged to him, by virtue of his assignment as Chief Prosecutor, his greater familiarity with the evidence, his better appreciation of the issues relating to the availability of getting witnesses ready to testify, and his better overall understanding of the Prosecutorial process.

Colonel Davis's testimony, given to the panel assessing the relationship between the Legal Advisor and the Chief Prosecutor, was that this pressure from General Hartman, though irritating and troublesome, did not affect his decisions. He told the assessment team that "We never changed the order of cases sent forward" in response to this pressure, in large part because the entire process of preparing cases for trial was "at a standstill" between June of 2007 and when CMCR issued its decision. (See page 144 of 225).

C. GENERAL HARTMAN WANTED THREE CASES TO BE READY FOR REFERRAL AS SOON AS THE CMCR ISSUED ITS DECISION IN US V. KHADR

Colonel Davis objected to General Hartman's efforts to accelerate the process of trying military commission cases soon upon his arrival. General Hartman wanted the Prosecutor to have three cases ready for referral as soon as the (presumptively favorable) CMCR decision was reached. As soon as General Hartman issued this demand, however, one prosecutor jumped up and declared that it was not possible, because of ongoing declassification reviews, interagency coordination, and other procedural hurdles that could not be surmounted that quickly. As history has borne out, no additional cases were referred with the announcement of the CMCR's decision.

With respect to whether this direction (to have three cases ready for referral as soon as CMCR issued its decision) affected his decision making, Colonel Davis responded: "I filed a complaint." He testified that he would not take a case forward to referral prematurely: "I'm not

going to sign a charge sheet until my prosecutor comes to me and says 'Look, I've interviewed the witnesses, I've got the evidence declassified, I've vetted these charges—we go through a vetting process internally on charges. We coordinate with the DOJ, the CIA, a number of other agencies. We've done that and a guy comes to me with a referral binder and tells me he's ready, then I'll move forward, not a day sooner." (See pages 153 and 154/225)

With respect to each of these instances of alleged over reaching, the Commission finds that they did not affect Colonel Davis in the performance of his duties, because he resisted General Hartman's demands. Colonel Davis either persuaded the General that his demands were unreasonable or otherwise persuaded him to "back off." With respect to each of the three ways in which Colonel Davis believed General Hartman was potentially interfering in the performance of the Prosecutorial function, General Hartman was persuaded to withdraw his demand, or Colonel Davis simply declined to comply with it. Thus, there was no impact on this case.

CHRONOLOGY OF EVENTS

The Commission has determined, from other documents filed in the case, the following order of events in the case of United States v. Hamdan (all dates in 2007):

Charges Referred for trial:	10 May
Dismissed for lack of jurisdiction:	5 June
Motion for Reconsideration Filed:	8 June
General Hartman Reports for Duty:	2 July
Judge Requests Supplemental Briefing:	6 August
Supplemental Briefing Provided:	17 August
Colonel Davis Files Complaint	23 August
CMCR Issues Decision:	24 September
Judge Grants Motion for Reconsideration:	17 October
Parties Assemble in Cuba to re-litigate the issue of Jurisdiction:	5 December
Judge finds Jurisdiction over accused	19 December

This chronology also makes it apparent that none of the General's activities affected this case for two other reasons: the case had already been referred, and was under the Commission's control between 2 July and 23 August; and because the period of this challenged activity—2 July to 23 August—the case was essentially inactive, while the parties briefed the case of *United States vs. Khadr* before the Court of Military Commission Review and awaited the Commission's ruling on the Motion for Reconsideration

Beyond this, the panel's assessment was that General Hartman's requests for information or cooperation from the OCP and his efforts to provide direction and guidance were not "unlawful" influence in any event, in light of Paragraph 8-6 of the Regulations for Trial by Military Commissions, which holds "The Chief Prosecutor shall report to the Legal Advisor to the Convening Authority" and "Unless stated otherwise, the person to whom an individual "reports" shall be deemed to be such individual's supervisor . . . ."

CONCLUSION AND RULING

With respect to the 2007 assessment of the relationship between the OCP and the Legal Advisor to the Convening Authority, this Commission finds that it is not relevant to the Defense of this case because it does not contain evidence of unlawful command influence; because this case was already insulated from General Hartman's actions by virtue of having previously been referred and placed under the control of the Commission; and because Colonel Davis himself expressly denied under oath that any of his decisions were affected by the General's actions.

The 2004 Investigation is also irrelevant for several reasons: it does not contain any reference to this case or allegation that this case was impacted; it was properly dismissed as unfounded; and it occurred four years ago before these charges were referred to this forum

The Defense Motion to Compel Production of these investigations is DENIED. All documents reviewed in connection with this motion, both the 2004 Investigation and the 2007 Assessment, shall be sealed and attached to the Record of Trial as the next two Appellate Exhibits in order.

Keith J. Allred
Captain, JAGC, US Navy
Military Judge

UNITED STATES OF AMERICA	D-030
v.	GOVERNMENT RESPONSE
	To Defense Motion To Compel Production of Documents
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	11 March 2008

1. Timeliness: This motion is filed within the timelines established by the Military Judge's 15 February 2008 email.

2. Relief Requested: The Defense request should be denied.

3. Overview:

a. The Defense has requested "all records relating to allegations of prosecutorial misconduct and unlawful interference in the Office of the Chief Prosecutor by the legal advisor to the convening authority," specifically requesting an "investigation" into complaints made by the former chief prosecutor, Colonel Morris Davis. Production of the "assessment" based on Colonel Davis' allegations, is not required under the Military Commissions Act.

b. The Government notes that the Defense again misstates the correct standard for discovery obligations under the Military Commissions Act. Rather than repeat the previous Government response on this issue, the Government respectfully requests the Military Judge to incorporate the Government response to D-26 Defense Motion to Compel – Discovery of Documents relating to Charge III.

c. The Defense's request should be denied. The Government has reviewed the assessment in question, and it contains no information at all relevant to the case of *United States v. Khadr*, much less any information suggesting any improper influence affecting the *Khadr* case, or any other case. The assessment contains no information that is relevant, helpful, or exculpatory and, therefore, it need not be provided to the Defense. If the Military Judge wishes to review the assessment, utilizing procedures similar to those used by the Military Judge in *United States v. Hamdan*, the Government will provide the assessment for the Judge's inspection.

4. Burden and Persuasion: As the moving party, the Defense bears the burden of showing good cause for the requested deposition.

5. Facts:

a. There are no additional facts necessary to deny this motion.

6. Discussion:

a. The Defense concedes—as it must—that a similar request filed by Prosecutors in the *Hamdan* case was denied by the Military Judge, Captain Keith Allred, USN, on 15 February 2008, after the military judge spent several hours reviewing all 231 pages of the subject assessment and its underlying documents. Captain Allred found that "the assessment was not relevant to the Defense of this case (Hamdan) because it does not contain evidence of unlawful command influence; because this case (Hamdan) was already insulated from General Hartmann's actions by virtue of having previously been referred and placed under the control of the Commission; and because Colonel Davis himself expressly denied under oath that any of his decisions were affected by the General's actions." *United States v. Hamdan*, "Motion to Compel Discovery D 017" at 7.

b. Procedurally, the *Khadr* and *Hamdan* cases are virtually identical. Both cases were sworn on 2 February 2007, and referred on 24 April 2007 and 10 May 2007, respectively. Brigadier General Hartmann did not arrive at the Office of the Convening Authority until July 2007, months after *Khadr* was referred for trial. He played no role in the referral of the *Khadr* case.

c. The defense attempts to distinguish the *Khadr* case from *Hamdan*, referencing a 19 February 2008 conversation between the Defense Counsel and Colonel Morris Davis, wherein Colonel Davis alleged that Mr. Haynes, General Counsel for the Department of Defense, made statements regarding the timing of referral of cases, specifically *United States v. Hicks*, *United States v. Hamdan*, and *United States v. Khadr*. At the time of the Tate Assessment, Colonel Davis' complaints focused primarily on the relationship between himself and Brigadier General Thomas Hartmann. The assessment focused on this relationship, and does not reveal any complaint made by Colonel Davis suggesting an unlawful command influence affecting this case.

d. The Defense appears to have all the access they need to pursue Colonel Davis's irrelevant complaint. If Colonel Davis believes any conduct by Mr. Haynes or any other official resulted in unlawful command influence, the Defense should file an appropriate motion, detailing how the actions in question amounted to unlawful command influence, and present evidence, if available, to support that conclusion. The Tate Assessment failed to provide the defense with any necessary or helpful information in this regard and the Military Judge should deny the request for its compelled production.

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

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

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

John F. Murphy
Assistant Prosecutor
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