

UNITED STATES
OF
AMERICA

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

4 April 2008

v

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

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

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

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002, to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-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. In Section 949a of the Military Commissions Act of 2006, Congress authorized the Secretary of Defense to establish certain rules and procedures in connection with military commissions:

“§ 949a. Rules

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

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

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

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

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

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

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

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

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

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

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

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

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

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