RECORD OF TRIAL

(and accompanying papers)

of

OMAR AHMED KHADR
also known as AKHBAR FARHAD,
AKHBAR FARNAD,
and AHMED MUHAMMED KHALI

Name and any aliases charged

0766

Identification Number

By

MILITARY COMMISSION

Convened by the Convening Authority under 10 USC §948h

Office Military Commissions
(Name of Convening Authority)

Tried at

Guantanamo Bay, Cuba on Session 4- 8 Feb 2009

(place or Places of Trial) *(Date or Dates of Trial)*

Companion cases:
None.

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 William Fenrick 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

Attachment A

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

2. ALIASES OF ACCUSED:
Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0766

II. CHARGES AND SPECIFICATIONS

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

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER		**5e. DATE (YYYYMMDD)**
		20070202

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

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

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

Jeffrey O. Groharing
Signature

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).

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

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

_____
Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

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

_____.
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

_____
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

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

_____.

_____ subject to the following 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.

Attachment A

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.

Attachment A

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.

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

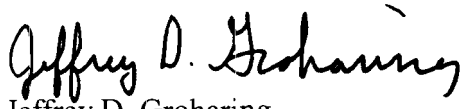
7. Oral Argument: The Government disagrees that the issues presented by these motions are "complex." Mot. to Dismiss I at 9; Mot. to Dismiss II at 10. In light of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motions should be readily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

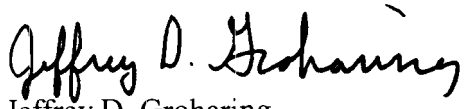
7. Oral Argument: The Government disagrees that the issues presented by these motions are "complex." Mot. to Dismiss I at 9; Mot. to Dismiss II at 10. In light of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motions should be readily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

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 William Fenrick 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

Attachment A

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

2. ALIASES OF ACCUSED:
Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0766

II. CHARGES AND SPECIFICATIONS

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

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER		**5e. DATE (YYYYMMDD)**
		20070202

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

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

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

Jeffrey O. Groharing
Signature

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).

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

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

_____
Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

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

_____.
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

_____
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

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

_____.

_____ subject to the following 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.

Attachment A

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.

Attachment A

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.

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

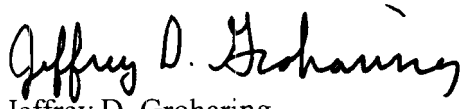
7. Oral Argument: The Government disagrees that the issues presented by these motions are "complex." Mot. to Dismiss I at 9; Mot. to Dismiss II at 10. In light of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motions should be readily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

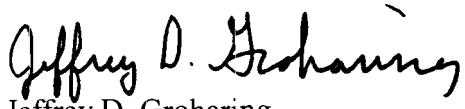
7. Oral Argument: The Government disagrees that the issues presented by these motions are "complex." Mot. to Dismiss I at 9; Mot. to Dismiss II at 10. In light of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motions should be readily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

Attachment A

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

2. ALIASES OF ACCUSED:
Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0766

II. CHARGES AND SPECIFICATIONS

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

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER		**5e. DATE (YYYYMMDD)**
		20070202

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

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

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

Jeffrey O. Groharing
Signature

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).

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

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

_____
Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

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

_____.
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

_____
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

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

_____.

_____ subject to the following 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.

Attachment A

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.

Attachment A

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.

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

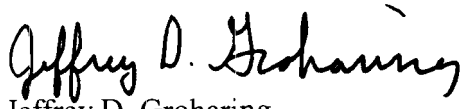
7. Oral Argument: The Government disagrees that the issues presented by these motions are "complex." Mot. to Dismiss I at 9; Mot. to Dismiss II at 10. In light of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motions should be readily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

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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

Attachment A

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

2. ALIASES OF ACCUSED:
Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0766

II. CHARGES AND SPECIFICATIONS

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

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER		**5e. DATE (YYYYMMDD)**
		20070202

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

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

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

Jeffrey O. Groharing
Signature

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).

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

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

_____
Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

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

_____.
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

_____
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

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

_____.

_____ subject to the following 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.

Attachment A

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.

Attachment A

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.

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

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

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

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

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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).

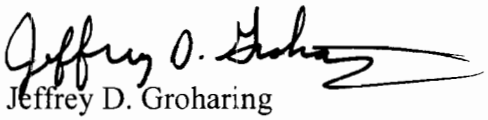
7. Oral Argument: The Prosecution disagrees that the issues presented by the Defense's motion are "complex." Mot. to Dismiss III at 12. In view of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motion should be readily denied. To the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



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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/
William Kuebler
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	**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

Attachment A

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

2. ALIASES OF ACCUSED:
Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0766

II. CHARGES AND SPECIFICATIONS

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

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER		**5e. DATE (YYYYMMDD)**
		20070202

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

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

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

Jeffrey O. Groharing
Signature

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).

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

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

_____
Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

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

_____.
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

_____
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

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

_____.

_____ subject to the following 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.

Attachment A

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.

Attachment A

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.

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]

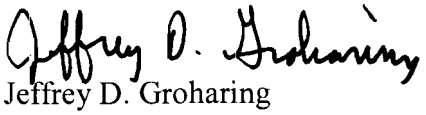
7. Oral Argument: The Government disagrees that the issues presented by this motion are "complex." Mot. to Dismiss IV at 14. In light of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motion should be readily denied. To the extent, however, 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	**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	**Defense Motion** to Dismiss Charge Five for Lack of Jurisdiction Over Charge V Alleging Spying 7 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's 28 November 2007 scheduling order.

2. **Relief Sought:** Mr. Khadr requests that this Military Commission dismiss Charge V, spying in violation of § 950v(b)(27) of the Military Commissions Act of 2006 ("MCA").

3. **Overview**:

a. The conduct at issue in Charge V, alleging spying, did not constitute a cognizable offense at the time of its alleged commission. The applicable law at the time of the alleged conduct was set forth in the Uniform Code of Military Justice (U.C.M.J.) and in the law of war. Neither of these sources provides a basis for trying Mr. Khadr for spying as defined by the MCA.

b. Although the MCA identifies spying 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 spying with which he is charged would be triable by military commission four years later, nor foreseen the consequences that would result from that fact. To avoid this constitutional problem, MCA § 950v(b)(27) 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, spying as set forth in the MCA was not one of the narrow category of crimes triable by military commission, this commission lacks jurisdiction to hear this charge against Khadr. Charge V 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. 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 Government alleges that on at least one occasion Khadr conducted surveillance of U.S. forces to collect information about U.S. convoy movements in or about June 2002. *See* Charge Sheet (24 Apr 2007) [hereinafter 2007 Charge Sheet].

b. The government alleges that Mr. Khadr committed the offense of spying "in or about June 2002." 2007 Charge Sheet.

c. The government alleges that U.S. forces captured Mr. Khadr in Afghanistan on 27 July 2002. Sworn Charge Sheet (2 Feb 2007) ¶ 12.

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

6. **Law and Argument: The Charge of Spying Must be Dismissed Because the Military Commission Lacks Jurisdiction to Hear it**

a. The MCA Offense Of Spying Was Not Subject Trial 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).[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). Neither statute nor the law of war provide a jurisdictional basis for Charge V. The offense of spying defined in section 950v(b)(27) is not a war crime and was not otherwise triable by military commission until 17 October 2006 when the President signed the Military Commissions Act into law after Mr. Khadr had spent more than four years in U.S. custody.

[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.").

(a) The UCMJ Spying Offense Is Materially Different From And Contains More Elements Than The MCA Spying Offense And, Therefore, Does Not Provide A Jurisdictional Basis For Charge V

(i) The U.C.M.J. authorized trial by military commission for spying in violation of Article 106, U.C.M.J. in 2002 when the conduct at issue allegedly occurred.[2] But the government did not charge Mr. Khadr with the U.C.M.J. offense of spying—nor could it, because it could not satisfy three elements of the U.C.M.J. offense that are missing from the MCA spying offense.[3] Instead, the government charged Mr. Khadr with spying under § 950v(b)(27) of the MCA. The elements of the U.C.M.J. offense are:

> (1) That the accused was found in, about, or in and about a certain place, vessel, or aircraft within the control or jurisdiction of an armed force of the United States, or a shipyard, manufacturing or industrial plant, or other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere;
>
> (2) That the accused was lurking, acting clandestinely or under false pretenses;
>
> (3) That the accused was collecting or attempting to collect certain information;
>
> (4) That the accused did so with the intent to convey this information to the enemy; and
>
> (5) That this was done in time of war.

MCM, UNITED STATES (2000 ed.), Part IV, para. 30b. The elements prescribed by the President for the MCA offense are:

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[2] *See also Ex parte Quirin*, 317 U.S. 1 (1942) (Nazi saboteurs were tried at a military commission for spying pursuant to Art. 82 of the Articles of War, a precursor to the U.C.M.J.).

[3] The government's allegations in the original charge sheet dated 7 November 2005 reveal that it cannot establish at least the first, second or fifth elements of the Article 106, U.C.M.J. First, the government alleges that Khadr was conducing surveillance at an airport near Khost, Afghanistan, 2005 Charge Sheet ¶ 22(b) – not at a place where the first element of Article 106 requires him to have been found. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, para. 30b(1). Second, Khadr was not captured while committing the conduct alleged in Charge Five as required by the UCMJ. *See* MCM, UNITED STATES (2000 ed.), Part IV, para. 30b(2), 30(c)(6)(b). The original Charge Sheet states that he was captured a full month later, at an al Qaeda/Taliban compound near the village of Ab Khail (*i.e.*, *after* he had allegedly rejoined al Qaeda and/or Taliban forces). 2005 Charge Sheet ¶¶ 20, 22(b). As Khadr "ma[de] good his return without being arrested, the jurisdiction for his offence does not attach but lapses." William Winthrop, MILITARY LAW AND PRECEDENTS (2nd rev. ed., 1896), vol. II, p. 770 [hereinafter WINTHROP]. Finally, the government has not alleged conduct that occurred during a time of war as defined by military law and required by Article 106, U.C.M.J. *See* MCM, UNITED STATES (2000 ed.), Part IV, para. 30b(5).

> (1) The accused collected or attempted to collect certain information by clandestine means or while acting under false pretenses;
>
> (2) The accused intended or had reason to believe the information collected would be used to injure the United States or to provide an advantage to a foreign power;
>
> (3) The accused intended to convey such information to an enemy of the United States or one of the co-belligerents of the enemy; and
>
> (4) The conduct took place in the context of and was associated with armed conflict.

MANUAL FOR MILITARY COMMISSIONS, UNITED STATES (2007), Part IV, para. 27(b). The elements of these two offenses are different in at least three material ways.

(ii) First, the first element of the U.C.M.J. offense requires that the accused be found in a particular place. *See* MCM, Part IV, para. 30b(1). The MCA offense drops this element. MMC, Part IV, para. 6(a)(27)(b) (containing no element requiring the accused to be found in a particular place).

(iii) Second, the U.C.M.J. requires that the accused be caught "lurking, acting clandestinely or under false pretenses." MCM, Part IV, para. 30(b)(2), 30(c)(6)(b) ("A spy who, after rejoining the armed forces to which the spy belongs, is later captured by the enemy incurs no responsibility for previous acts of espionage."). In defining the MCA offense, the executive cut this requirement. *See* MMC, Part IV, para. 6(a)(27)(b) (containing no element requiring the accused to be caught in the act). Even before the U.C.M.J. was enacted, military law required this element. Winthrop, whom the Supreme Court has called the "Blackstone of Military Law," *Hamdan*, 126 S.Ct. 2756 (plurality opinion) (citing *Reid v. Covert*, 354 U.S. 1, 19, n.38, 77 S. Ct. 122, 1 L. Ed. 2d 1148 (1957) (plurality)), explains that,

> A spy, to be triable and punishable as such, must be taken *in flagrante delicto*, or rather before he succeeds in getting through the lines and returning to the territory or army of his own nation or people. If he thus makes good his return without being arrested, the jurisdiction for his offence does not attach but lapses, and if, subsequent to such return, he is taken prisoner in battle or otherwise captured, he is not liable to trial or punishment for the original offense.

WINTHROP, vol. II, p. 770; *see also* MCM, Part IV, para. 30(c)(6)(b). This principle[4] is also recognized explicitly in every treaty governing the law of war since 1874 that has addressed the rules relating to spies, including: the Brussels Declaration;[5] the Hague Regulations;[6] and Additional Protocol I to the Geneva Conventions[7] as well as in U.S. military manuals.[8] Additionally, the customary international law status of this principle has been acknowledged by the International Committee of the Red Cross (ICRC) in its study of customary international law applicable during armed conflict.[9]

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[4] While spying is not a law of war offense as discussed *infra*, a spy who is acting under false pretenses or in a clandestine manner and who is also caught in the act of spying may be prosecuted domestically without the protection of combatant immunity. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1978), art. 46, 1125 U.N.T.S. 3 [hereinafter Protocol I]; INTERNATIONAL COMMITTEE OF THE RED CROSS, I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 390 (Jean-Marie Henckaerts and Louise Doswald-Beck eds. 2005) [hereinafter "ICRC Study"]; International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 564-65 ¶¶ 1770-72 (Yves Sandoz et al ed. 1987) *available at:* http://www.icrc.org/ihl.nsf/COM/470-750056?OpenDocument [hereinafter ICRC Commentary: Additional Protocols].

[5] Project of an International Declaration concerning the Laws and Customs of War (Brussels Declaration), Aug. 27, 1874, art. 21 *available at:* http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument ("A spy who rejoins the army to which he belongs and who is subsequently captured by the enemy is treated as a prisoner of war and incurs no responsibility for his previous acts.").

[6] Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (1907 Hague Regulations), art. 31, *opened for signature* Oct. 18, 1907 (ratified by the United States Nov. 27, 1909) ("A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.") *available at:* http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument; *see also* Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (1899 Hague Regulations), art. 31, *opened for signature* July 29, 1988 (ratified by the United States Apr. 9, 1902) *available at:* http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument [hereinafter Hague Convention II] (same).

[7] Protocol I, art. 46(4) ("A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs."); *see also* ICRC Commentary: Additional Protocols at 564-65 ¶¶ 1770-72 ("[T]he Conference [to draft the Protocol] did not intend to change the substance of the traditional rules of espionage adopted in The Hague, but merely sought to supplement and elaborate them. . . . Under the terms of the Hague Regulations, 'a spy taken in the act shall not be punished without previous trial' (Article 30). Does this mean that the spy can only be punished as such if he is caught in the act? In fact, this is certainly the sense of the Regulations . . . . The text of the Protocol is equally explicit . . . . ").

[8] Army Judge Advocate General's School, Operational Law Handbook, 25 ¶ XI.D (2006) [hereinafter Operational Law Handbook]; Law of War Handbook, 193-94 ¶ V.C (2005).

[9] ICRC Study at 390 (explaining that to be tried domestically for spying, the spy must be "captured in the act whilst in enemy-controlled territory").

(iv) Finally, the U.C.M.J. offense requires that the offense be committed during "time of war." MCM, Part IV, ¶ 30(b)(5). The executive's definition of the MCA offense does not. MMC, Part IV, ¶ 6(a)(27)(b). The Manual for Courts-Martial limits wars to (1) wars declared by Congress or (2) military operations for which the President has made a factual determination that the hostilities warrant a finding that a "time of war" exists for purposes of military law. MCM, Part IV, ¶ 30(c)(1). Neither of those conditions are satisfied here.

(v) In short, the jurisdiction of a military commission to charge and try an individual for the offense of "spying" prior to the enactment of the MCA on October 17, 2006 required proof of three facts that are not required for conviction of spying under the MCA – that the individual was captured (1) *in a particular place* (2) *while actually committing* the relevant conduct (3) *during a time of war*. As a result, the M.C.A. spying offense was not triable by military commission in 2002 when the conduct allegedly occurred. Thus, the statute applicable at the relevant time does not provide a basis for this Commission to exercise jurisdiction over Mr. Khadr for a violation of 10 U.S.C. § 950v(b)(27).

(b) <u>The Law of War Permits Spying</u>

(i) Because there is no statutory basis to try Mr. Khadr for spying before a military commission, the only possible basis for this Commission's jurisdiction for alleged conduct occurring in 2002 is if the MCA spying offense 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 [establishing the alleged offense] must be plain and unambiguous.") (citing *Quirin* 317 U.S. at 30). 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."). In order to justify a trial on this basis 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.*. And, as in *Hamdan*, "[t]hat burden is far from satisfied here." *Id.*

(ii) In fact, treaties dating back to at least 1899 have affirmatively recognized that spying is lawful under the law of war. Hague Convention II, art. 24 ("Ruses of war and the employment of methods necessary to obtain information about the enemy and the country, are considered allowable."). This has not changed.[10] Current U.S. military manuals still recognize that the law

[10] *See* Dep't of the Army, Field Manual 27-10, The Law of Land Warfare ¶ 77 (1956) ("[Spying is] no offense against international law. Spies are punished, not as violators of the laws of war . . . ."). Like a plurality of this Court found in *Hamdan* with respect to conspiracy, spying 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. Spying does not even appear among the offenses triable by the International Criminal Court in the Rome 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

of war permits spying. Operational Law Handbook, 25 ¶ XI.D (2006) (stating espionage, which is "acting clandestinely (or on false pretenses) to obtain information for transmission back to their side", "is not a law of war violation."); Law of War Handbook, 193-94 ¶ V.C (2005) (same). And international criminal tribunals do not list spying as an offense.[11] Thus, the law of war fails to provide a jurisdictional basis for Charge V.

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

(1) The MCA Should Not Be Interpreted To Apply Retroactively.

(a) Not only is spying as defined by the MCA not included in the narrow category of crimes triable by military commission at the time of Mr. Khadr's alleged offenses, but spying is not even a federal offense triable in U.S. federal courts. Indeed, the Government has implicitly conceded this point by charging Mr. Khadr with spying 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 spying in 2006 is irrelevant to this case because the MCA was not enacted until four years *after* Mr. 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

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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."); *see generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. The Rome Statute has more than 139 signatory nations, World Signatures and Ratifications, http://www.iccnow.org/?mod=romesignatures, and "provides the most comprehensive, definitive and authoritative list of war crimes," yet it does not list spying. Robert Cryer, *International Criminal Law v. State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979, 990 (2005).

[11] *See, e.g.*, Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90; Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, art. 1, 33 I.L.M. 1598; Statute of the International Criminal Tribunal for the former Yugoslavia, May 25, 1993, art. 1, 32 I.L.M. 1192. The Crimes and Elements portion of the Rome Statute 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."). The statute has 139 signatory nations, *see* *http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/ treaty11.asp*, and "provides the most comprehensive, definitive and authoritative list of war crimes." Robert Cryer, *International Criminal Law v. State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979, 990 (2005). Yet it pointedly omits spying.

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—spying as the MCA defines it 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.[12] 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*, 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

[12] 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 and statutes should be construed to avoid constitutional problems where possible. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

legislature. *Edward J. DeBartolo Corp.*, 485 U.S. at 575; *see also Ashwander*, 297 U.S. at 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").[13] 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.

(b) 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 spying 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.

[13] 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.").

(c) 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 V.

(d) 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,[14] international criminal law,[15] and human rights law,[16] – 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*."[17] 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." Thus, international law, too, prohibits the *ex post facto* application of the MCA to this case.

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[14] 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.

[15] *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].

[16] 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.").

[17] Rome Statute, art. 22(1) (emphasis added); *see also* Rome Statute, art. 22(2) ("The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.").

c. Conclusion

(1) Military commissions have long been defined, in large part, by their limited jurisdiction. Neither U.S. nor international law recognized spying as defined in the MCA 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 Charge V, 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) ("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 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 07)

b. 2005 Charge Sheet

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

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

11. **Attachments:**

A. Sworn Charge Sheet (2 Feb 2007)

B. 2005 Charge Sheet

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

Attachment A

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

2. ALIASES OF ACCUSED:
Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0766

II. CHARGES AND SPECIFICATIONS

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

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER		**5e. DATE (YYYYMMDD)**
		20070202

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

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

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

Jeffrey O. Groharing
Signature

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).

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

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

_____
Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

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

_____.
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

_____
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

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

_____.

_____ subject to the following 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.

Attachment A

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.

Attachment A

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.

UNITED STATES OF AMERICA	)	**CHARGES:**
	)	**CONSPIRACY;**
v.	)	**MURDER BY AN UNPRIVILEGED**
	)	**BELLIGERENT;**
OMAR AHMED KHADR	)	**ATTEMPTED MURDER BY AN**
a/k/a Akhbar Farhad	)	**UNPRIVILEGED BELLIGERENT;**
a/k/a Akhbar Farnad	)	**AIDING THE ENEMY**
	)	

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 30, 2005 that Omar Ahmed Khadr (a/k/a Akhbar Farhad, a/k/a Akhbar Farnad, hereinafter Khadr) is subject to his Military Order of November 13, 2001.

2. Khadr's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS (AL QAIDA)

3. Al Qaida ("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.

4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.

5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.

6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida 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.

8. 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.

9. 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."

10. 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."

11. Since 1989 members and associates of al Qaida, 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.

BACKGROUND

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

13. 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 Qaida to support terrorist training camps in Afghanistan. Ahmad Khadr was a senior al Qaida member and close associate of Usama bin Laden and numerous other senior members of al Qaida.

14. 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.

15. In 1996, Khadr moved with his family from Pakistan to Jalalabad, Afghanistan.

16. 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 Qaida 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 Qaida training camps and guest houses.

17. After al Qaida's terrorist attacks against the United States on September 11, 2001, the Khadr family moved repeatedly throughout Afghanistan.

18. In the summer of 2002, Khadr received one-on-one, private al Qaida basic training, consisting of training in the use of rocket propelled grenades, rifles, pistols, grenades and explosives.

19. After completing his training, Khadr joined a team of other al Qaida operatives and converted landmines into remotely detonated improvised explosive devices, ultimately planting them at a point where U.S. forces were known to travel.

20. U.S. Forces captured Khadr on July 27, 2002, after a firefight resulting in the death of one U.S. service member.

CHARGE 1: CONSPIRACY

21. Omar Ahmed Khadr did, in and around Afghanistan, from on or about June 2002 to on or about 27 July 2002, willfully and knowingly join an enterprise of persons who shared a common criminal purpose 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 of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

22. In furtherance of this enterprise and conspiracy, Khadr and other members of al Qaida committed the following overt acts:

a. On or about June 2002, Khadr received approximately one month of one-on-one, private al Qaida basic training from an al Qaida 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. On or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military. Khadr went to an airport near Khost, Afghanistan, and watched U.S. convoys in support of future attacks against the U.S. military.

c. On or about July 2002, Khadr received one month of land mine training.

d. On or about July 2002, Khadr joined a group of Al Qaida 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, Khadr and other Al Qaida members engaged U.S. military personnel when military members surrounded their compound.

During the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer. In addition to the death of SFC Speer, two Afghan Militia Force members who were accompanying U.S. Forces were shot and killed and several U.S. service members were wounded.

CHARGE 2: MURDER BY AN UNPRIVILEGED BELLIGERENT

23. Omar Ahmed Khadr did, in Afghanistan, on or about July 27, 2002, murder Sergeant First Class Christopher Speer, U.S. Army, while in the context of and associated with armed conflict and without enjoying combatant immunity, by throwing a hand grenade that caused Sergeant First Class Speer's death.

CHARGE 3: ATTEMPTED MURDER BY AN UNPRIVILEGED BELLIGERENT

24. Omar Ahmed Khadr did, in Afghanistan, between, on, or about June 1, 2002 and July 27, 2002, attempt to murder divers persons, while in the context of and associated with armed conflict and without enjoying combatant immunity, by converting land mines to improvised explosive devices and planting said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

CHARGE 4: AIDING THE ENEMY

25. Omar Ahmed Khadr did, in Afghanistan, on divers occasions between on or about June 1, 2002 and July 27, 2002, while in the context of and associated with armed conflict, intentionally aid the enemy, to wit: al Qaida.

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 V (Spying)** 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 V, spying under 10 U.S.C. § 950v(b)(27) ("Mot. to Dismiss V"), should be denied.

3. Overview: Congress has defined spying as an offense under the law of war and has plainly given this Court jurisdiction to try that offense. The MCA defines spying in accordance with the common law of war, and any differences between them are irrelevant. The Ex Post Facto Clause is likewise 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—long before 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 SPYING 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 spying as a crime triable and punishable by military commissions.

a. As the Defense points out, *see* Mot. to Dismiss V at 6, "[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). The Defense ignores, of course, that the offense of spying is unequivocally defined by statute. *See* 10 U.S.C. § 950v(b)(27).

b. In the MCA, Congress statutorily "define[d] and punish[ed]" spying as an "Offense[] against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10. Therefore, *Hamdan*'s "plain and unambiguous" dictum—along with the Defense's attempts to rely upon it—is irrelevant.

c. 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). Spying 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 V at 4-7, 10. The "Law of Nations," as applicable here, includes the war crime of spying, as defined in the MCA.

a. In accordance with the offense defined in the MCA, the Secretary of Defense promulgated the elements for spying. *See* Manual for Military Commissions ("MMC"), at IV-20 (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, the Defense makes two claims, both of which are baseless.

1. First, the Defense claims that the MCA deviates from the preexisting law of war, and that the latter must trump the former. That argument is incorrect. Spying is well-recognized as an offense under the law of war, and the MCA definition is fully consistent with established principles of law. Moreover, as explained below, the Defense's invocation of the common law of war is beside the point. Congress has the constitutional authority "[t]o define and punish . . . Offenses against the Law of Nations." U.S. Const. Art. I, § 8, cl. 10. *Regardless* of the common law of war that predates the MCA, Congress has made spying—as that offense is statutorily defined—triable by military commission.

2. Second, the Defense claims that trying Khadr before a military commission for acts committed prior to the MCA's passage 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 wrong, and it must be rejected.

B. SPYING IS A WELL-ESTABLISHED OFFENSE UNDER THE LAW OF WAR

i. As noted above, the MCA is the only relevant and applicable source of law here, and because Khadr was properly charged under that statute, the motion to dismiss must fail. But even if this Court were to examine the common law of war, it would find that spying—as it is defined in the MCA—is a well-established war crime. Thus, Congress

[1] As explained below, it is also an offense made punishable under the law of war. *See* pp. 4-8, *infra*.

was clearly correct in the statutory determination that the MCA codifies "offenses that have traditionally been triable by military commissions." 10 U.S.C. § 950p(a).

ii. The Defense concedes that the UCMJ has long authorized the trial of spies before military commission. *See* Mot. to Dismiss V at 3; *see also* Mot. to Dismiss I (Murder) at 1 (conceding that military commissions have long had jurisdiction to try spies under Article 106 of the UCMJ). The Defense insists, however, that there are three "material" differences between the elements of spying under the UCMJ and the MCA. Whatever differences there may be between those two statutes, they certainly are *not* "material."

a. First, the Defense claims that "the U.C.M.J. offense requires that the accused be found in a particular place." Mot. to Dismiss V at 4. That assertion is plainly belied by the text of the UCMJ, which requires the accused to be found in a series of particular places "*or elsewhere*." 10 U.S.C. § 906 (emphasis added). Army Field Manual 27-10 specifically notes that, although the issue is unsettled, "the phrase 'or elsewhere' [may] justif[y] trial by a military tribunal of *any* person who is not found in one of the places designated . . . ." U.S. Army Field Manual 27-10, *The Law of Land Warfare*, ¶ 76, at 32 (1956). Khadr's argument on this point relies upon a distinction without a difference.

b. Second, the Defense claims that spies are triable by military commission only if they are caught in the act of spying. *See* Mot. to Dismiss V at 4-5. That argument, however, makes no sense. The United States may prosecute an individual who has committed the act of spying no matter whether he is caught in the act or whether he manages to avoid captured until a later time. The Defense's argument to the contrary rests entirely on the claim a lawful combatant may make to combatant immunity—a claim wholly unsupported by the facts of this case.

1. For example, the Defense quotes Colonel Winthrop for the proposition that spies may be tried by military commission only where they are caught "*in flagrante delicto*." Mot. to Dismiss V at 4. *See also* Hague Regulations, Art. 31. The Defense ignores, however, the principle underlying that proposition—namely, that a former spy is immunized from past espionage *only when he returns to lawful combatancy*. As both of the military's law of war handbooks put it, "[r]eaching friendly lines immunizes [a] spy for past espionage activities. Therefore, upon later capture ***as a lawful combatant***, [a] past spy cannot be tried for past espionage." *U.S. Law of War Handbook* 194 (Keith E. Puls ed., 2005) (emphasis added); *see also U.S. Army Operational Law Handbook* 25 (John Rawcliffe & Jeannine Smith eds., 2006) ("[U]pon later capture as a ***lawful combatant***, the alleged 'spy' cannot be tried for past espionage.") (emphasis added).[2]

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[2] The Defense cites both handbooks, *see* Mot. to Dismiss V at 5 n.8, but conspicuously fails to note the passages quoted here. Instead, the Defense cites (and quotes at length) the Protocol Additional to the Geneva Conventions of 12 August 1949 ("API") and the ICRC's commentary on it. *See id.* at 5 & nn. 4, 7, and 9. Of course, *the United States did not ratify Additional Protocol I*—a fact that the Defense inexplicably fails to note. Indeed, the President decided not to submit it for the Senate's consideration precisely because he feared that it would afford undeserved protections to individuals like Khadr. As President Reagan explained: "We must not, and need not, give recognition and protection to terrorist

2. Colonel Winthrop himself notes this truism in a footnote following the passage block-quoted in Khadr's motion. *See* Winthrop, *Military Law and Precedents*, 770 n.25 (1895, 2d ed. 1920) (citing *Kennedy's Case*, Gen. Order No. 24, Dept. of the East (1865)). *Kennedy's Case* involved a captain in the Confederate Army who snuck across Union lines, wearing a disguise, and attempted to burn down New York City. Captain Kennedy "escaped, without arrest, into Canada," where he found refuge with "agents of his government." *Id.* Notwithstanding the fact that he was *not* captured *in flagrante delicto*, he was convicted of spying in violation of the law of war and hanged. And the rationale for that result is simple: Kennedy—like Khadr—was an unlawful combatant, who flaunted the law of war, and after both men finished their espionage efforts, neither showed any inclination to abide by the rules and customs that govern armed conflict. Under the law of war, both men are subject to trial by military commission, regardless of when or where they are captured.

3. This point is further confirmed by the text of the Hague Regulations. As the Defense points out, *see* Mot. to Dismiss V at 5, Article 31 of the Hague Regulations provides: "A spy who, ***after rejoining the army to which he belongs***, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."[3] (Emphasis added.) This provision, by its own terms, emphatically does *not* apply to unlawful terrorists who never rejoin any lawful "army." *Cf.* Hague Regulations, Art. 1 (lawful combatants are those who fight under responsible command, wear fixed insignia, carry their arms openly, and conduct their operations in accordance with the laws of war). Thus, as a leading treatise writer points out, "Article 31 applies only to spies who belong to the armed forces of the enemy; civilians who act as spies, and are captured later, may be punished." II H. Lauterpacht, *Oppenheim's International Law* § 161, at 339 (5th ed. 1935).

c. Third, Khadr claims that spies are triable by military commission only during "time of war." *See* Mot. to Dismiss V at 6. It strains credulity to argue that a "time of war" has not existed since at least September 11, 2001.[4]

1. During al Qaeda's attacks on that day, the United States responded militarily by deploying attack aircraft to intercept and destroy, if necessary, hijacked civilian airliners. In the immediate aftermath of the attacks, the President described them as "an act of war." *See, e.g.*, Address Before a Joint Session of the Congress on the

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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).

[3] Article 46 of API similarly applies only to "member[s] of the armed forces of a Party." As noted above, *see* note 2, *supra*, API does not directly bind the United States.

[4] Of course, it is the position of the United States that the present armed conflict began well before September 11th.

United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347, 1347 (Sept. 20, 2001) ("On September 11th, enemies of freedom committed an act of war against our country."). And Congress agreed. *See, e.g.*, S.J. Res. 22, 107th Cong. (Sept. 12, 2001) (enacted) (declaring that the United States is "entitled to respond [to the attacks] under international law" and referring to a "war" against terrorism). Indeed, consistent with the War Powers Resolution, Congress authorized the President to use "to use all necessary and appropriate force against" al Qaeda. Authorization for Use of Military Force, Pub. L. 107-40, § 2(a) (Sept. 18, 2001) ("AUMF").

2. The United States actively sought U.N. Security Council action on the matter, and the Security Council passed multiple resolutions condemning the attacks and recognizing the "inherent right" of the United States to defend itself militarily. *See, e.g.*, S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., at 1, U.N. Doc. S/RES/1368 (2001); *see also* S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

3. Pursuant to these authorizations, the President deployed U.S. armed forces against al Qaeda and the Taliban regime in Afghanistan, where they have remained locked in armed conflict ever since. *See* President's Military Order of November 13, 2001, § 1(a), 66 Fed. Reg. 57,833 ("International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces."); *see also* Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, Consistent with the War Powers Resolution (June 15, 2007) ("It is not possible to know at this time either the precise scope or duration of the deployment of U.S. Armed Forces necessary to counter the terrorist threat to the United States."). That state of war will continue to exist, regardless of Khadr's assertions to the contrary, until the President says otherwise.

4. Congress passed the MCA under this understanding and made clear that members of al Qaeda, like Khadr, could be prosecuted by military commissions as unlawful enemy combatants, and it made clear that the military commission would have jurisdiction to try offenses no matter whether they were committed "before, on, or after September 11, 2001." 10 U.S.C. § 948d(a).

iii. The foregoing makes clear that the law of war—as applied to an unlawful combatant like Khadr, who fails to wear a uniform and who flagrantly violates the rules that govern armed conflict—condemns spying.

a. The Defense's suggestions to the contrary, *see* Mot. to Dismiss V at 6-7, again, are belied by the very sources cited in the motion to dismiss.[5] For example, the

[5] Indeed, Colonel Winthrop—whom both the Defense, *see* Mot. to Dismiss V at 4, and the Supreme Court, *see Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2756 (2006), have called the "Blackstone of Military Law"—emphasizes that "[a] spy, under capture, is not treated as a prisoner of war but as an outlaw, and is to be tried and punished as such. Under the law of nations and of war, his offense is an exclusively military

Government has never contended that mere "[r]uses of war" are triable by military commissions. *See id.* at 6. Nor could it. *See, e.g.*, FM 27-10, *supra*, ¶ 51, at 22-23 (describing "legitimate ruses"). And the Government has never contended that espionage—*qua* espionage, and when conducted by a State in accordance with the law of war—is a war crime.

b. What the Government *does* contend, and what the law of war firmly establishes, is that spies—like Khadr—who conduct their activities clandestinely, without wearing a uniform, without the sanction of a State, and under the guise of a civilian, are triable by military commission and are punishable up to and including death. *See, e.g.*, Proceedings of a Board of General Officers Respecting Major John André, 2 Chandler, C.T. 185 (Sept. 29, 1780) (British officer, wearing a civilian disguise that belonged to Joshua Hett Smith, was tried for spying and hanged); Gen. Order No. 10, Dept. of Tenn. (1863) (ordering that guerillas or Southern soldiers caught "in civilian dress will be treated as spies"); *see also Ex Parte Quirin*, 317 U.S. 1, 31 (1942) (holding that spies who conduct their operations "secretly and without uniform" are "offenders against the law of war subject to trial and punishment by military tribunals").

c. Thus, while it is true that belligerent *Nations* may lawfully employ certain forms of espionage as part of their war-fighting efforts, it is also true that "persons committing acts of espionage or war treason are . . . considered war criminals and may be punished." *Oppenheim's International Law*, *supra*, § 159 at 337; *see also* Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 Am. J. Int'l L. 53, 67 (1984) (collecting sources and concluding that "espionage in war is 'legal,' although the unfortunate spy himself may be executed if not in uniform"); Ingrid Detter, *The Law of War* 148 (2d ed. 2000) (same). That proposition applies *a fortiori* to terrorists, like Khadr, who do not fight on behalf of a Nation.

C. KHADR'S EX POST FACTO ARGUMENTS ARE BASELESS

i. Because the Defense cannot plausibly deny that Khadr's espionage was illegal in 2002, it focuses its argument on the so-called "presumption against retroactivity" and the U.S. Constitution's Ex Post Facto Clause.[6] *See* Mot. to Dismiss V at 7-10. While those arguments are long on words, they are short on law and logic.

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one, cognizable only by military tribunals." *Military Law and Precedents*, *supra*, at 769. In another passage that the Defense fails to quote, Colonel Winthrop continues: "It has always been legal . . . to proceed *summarily without trial* against spies; and in some of our earlier cases . . . the death penalty was presently executed." *Id.* at 770 (emphasis in original).

[6] Citing avowed sources of customary international law (including the Rome Statute of the International Criminal Court, 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 because "international law . . . prohibits the *ex post facto* application of the MCA to this case." Mot. to Dismiss V at 10. 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");

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).[7] 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 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.

a. First, the MCA does not "retroactively alter the definition of" spying.

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 spying, whether committed before, on or after enactment of the MCA.

[7] 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.

1. As explained above, spying 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" spying, 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 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.

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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 V at 8. 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.

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, spies have traditionally been liable to trial by military commission, if not summary execution. *See, e.g.*, note 5, *supra*. The United States has repeatedly prosecuted spies based upon offenses under the common law of war. Indeed, the MCA represents one of the first attempts of the United States to actually 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 spy 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

[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).

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 trial and 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.

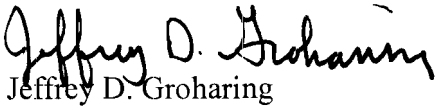
7. Oral Argument: The Government disagrees that the issues presented by these motions are "complex." Mot. to Dismiss V at 11. In light of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motion should be readily denied. To the extent, 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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UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** to Dismiss for Lack of Jurisdiction (Bill of Attainder) 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 Sought:** The Defendant seeks dismissal of all charges and specifications for lack of jurisdiction.

3. **Overview:**

(1) The Military Commissions Act of 2006 ("MCA" or "Act"), the sole source of this Commission's jurisdiction, is an unconstitutional bill of attainder as applied to Mr. Khadr, who was detained as an alleged unlawful enemy combatant prior to the MCA's enactment. The MCA is a bill of attainder because it singles out a particular class of individuals for a legislative punishment based on past conduct and imposed without judicial trial. The MCA punishes a known group of individuals being detained in U.S. custody as suspected unlawful enemy combatants. It does so by altering the rules of evidence and procedure that applied before, during and after their alleged conduct (until 17 October 2006); depriving them of civil and political rights and privileges, including the right to a fair trial; and depriving them of the right to access the courts. Because the Constitution expressly withholds from Congress the power to enact bills of attainder, the MCA is without effect. This Commission is thus without authority to hear this case.

(2) In the alternative, and in order to avoid constitutional difficulties, the MCA must be interpreted to apply only prospectively to those who have allegedly engaged in or supported hostilities against the United States *after* the enactment of the MCA. This prospective interpretation of the MCA clearly excludes Mr. Khadr, who is therefore not subject to this Commission's jurisdiction.

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:**

a. The government alleges that Mr. Khadr, a Canadian citizen, was captured by U.S. forces in Afghanistan on July 27, 2002, when he was 15 years of age. Sworn Charges ¶ 12 (2 Feb 07).

b. In June 2006, the Supreme Court held in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that the President did not have the authority to create the military commissions as constituted, that the commissions were "illegal" and violated U.S. and international law, including Common Article 3 of the Geneva Conventions.

c. In September 2006, both houses of Congress passed the Military Commissions Act of 2006, and the President signed it into law on October 17, 2006. *See* P.L. 109-366, 120 Stat. 2600. The MCA was enacted in part as a response to *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). *See infra* note 10 at 8.

d. All the charges against Mr. Khadr relate to conduct that is alleged to have occurred on or before the date of his capture in July 2002, well before the passage of the MCA. *See* Charge Sheet (24 Apr 2007).

6. Argument:

1. This Commission Lacks Jurisdiction Over Mr. Khadr Because The Act That Grants This Commission Jurisdiction Is An Unconstitutional Bill Of Attainder

a. The Constitution Divests Congress Of Authority To Enact Bills Of Attainder

(1) The Military Commissions Act (MCA), the source of this Commission's authority to hear the present case, is an unconstitutional bill of attainder, at least as applied to Mr. Khadr and others held in custody as alleged unlawful enemy combatants prior to the MCA's enactment. The Constitution prohibits the enactment of bills of attainder, U.S. CONST. art. I, § 9, cl. 3, which consist of "[t]he singling out of an individual for legislatively prescribed punishment . . . whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Selective Serv. Sys. v. Minn. Pub. Interest Rsch. Group*, 468 U.S. 841, 847 (1984) (internal quotation and citation omitted). Thus, under the U.S. Constitution, for an improper bill of attainder to exist, there must be: (a) an individual or group singled out; (b) for a legislative punishment imposed without judicial trial; (c) where the punishment was imposed based on irreversible past conduct. *Selective Serv. Sys.*, 468 U.S. at 847.

(2) The individual or group of people singled out by the MCA for legislative punishment are the class of individuals detained at Guantanamo Bay and elsewhere *before* the MCA was enacted. The "legislative punishment" in the case at bar is a federal statute (the MCA) that subjects targeted individuals to imprisonment and possible execution without a fair trial that fully affords them their legal rights. The MCA punishes this group for alleged conduct that occurred *before* the MCA was passed. The MCA, therefore, operates as a bill of attainder when applied to Mr. Khadr and others who were already in U.S. custody before the MCA's enactment.

(3) The Constitution denies Congress the power to enact bills of attainder, and any bill of attainder enacted is of no force and effect. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901). This conclusion does not depend on what rights, if any, Mr. Khadr retains under the

Constitution because the prohibition on bills of attainder is a structural limitation on Congress' legislative power. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder . . . shall be passed,' . . . it goes to the competency of Congress to pass a bill of *that description*.") (emphasis in original). Because the MCA is a bill of attainder, it is of no force and effect. Lacking any other basis for its jurisdiction, the Commission must dismiss Mr. Khadr's case in its entirety.

b. The Military Commissions Act Imposes Legislative Punishment Without Judicial Trial

(1) The Supreme Court has held that the prohibition on bills of attainder is "to be read in light of the evil the Framers had sought to bar: *legislative punishment, of any form or severity*, of specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965) (emphasis added). The MCA imposes two such legislative punishments, both of which have been held by the Court to constitute attainder. The MCA imposes the punishment of "deprivation or suspension of political or civil rights," including the right to a fair trial, and "disqualification . . . from the privilege of appearing in the courts." *Cummings v. Missouri*, 71 U.S. 277, 322, 320 (1867). These legislative punishments are imposed without a prior judicial trial by a "duly constituted court." *Lovett*, 328 U.S. at 317.

(a) <u>Altering The Rules Of Evidence And Procedure That Applied Before, During And After The Alleged Conduct Until 17 October 2006 And Depriving Targeted Individuals Of Civil And Political Rights And Privileges, Including The Right To A Fair Trial And The Right To Access To Courts Is Legislative Punishment</u>

(i) The MCA deprives targets of the Act their civil and political rights and privileges, including the right to a fair trial and the right to access to courts. These rights' deprivations, which violate U.S. domestic and international law, impermissibly punish Mr. Khadr. The impermissible punishment includes:

- depriving targeted individuals all rights under the Geneva Conventions, 10 U.S.C. § 948b(g);[1]

[1] Common Article 3(d) of the four Geneva Conventions of 1949 provides that "the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons. . . ."(d) 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."

While, MCA § 948b(f) states that the Act complies with the Common Article 3 of the Geneva Conventions, "[i]t is emphatically the province and duty of the *judicial department* to say what the law is." *Id.* (emphasis added). Thus, 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.").

- permitting targeted individuals to be charged with crimes never before recognized under the laws of war (e.g., conspiracy, "providing material support for terrorism," and spying as defined in 10 U.S.C. § 950v(b)(27));
- depriving targeted individuals of their right to a fair trial, either from a court-martial (for alleged violations of the law of war) or a regular civilian court;
- suspending rules that bar hearsay evidence, § 949a(b)(2);[2]
- The MCA permits coerced evidence to be admitted even if the evidence is obtained as a result of cruel, inhuman, or degrading treatment (if the 'degree of coercion' involved is disputed), § 948r;
- severely limiting a targeted individual's ability to call witnesses in his defense, § 949j; RMC 703(c)(2);
- subjecting targeted individuals to trials presided over by a judge and military commissioners (rather than a civilian judge and jury)[3] who are not sufficiently independent and who are not immune from political pressure, §§ 948i and 948j;
- depriving targeted individuals of the right to bring an action addressing or redressing egregious treatment at the hands of one's jailers, which the targeted individuals had before 17 October 2006, MCA § 7(a);
- depriving targeted individuals of the right to challenge one's detention under the Great Writ of *habeas corpus*, MCA § 7(a).[4]

(ii) All of these restrictions constitute impermissible legislative punishment. The Supreme Court has long held that the types of punishment forbidden by prohibition on attainder are "not . . . restricted . . . to the deprivation of life, liberty, or property, but also embrac[e] deprivation or suspension of political or civil rights." *Cummings*, 71 U.S. at 322. In *Cummings*, the Court held provisions of the Missouri Constitution to operate as a bill of attainder because "[t]he clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable." *Id.* at 328. The MCA's unfair trial provisions constitute this same sort of impermissible punishment. The legislative history of the MCA suggests that the central purpose of the MCA provisions establishing military commissions was "to ensure criminal convictions" and thereby to impose criminal sentences. *See* 152 Cong. Rec. S10,244 (daily ed. Sep. 27, 2006) (statement of Sen. Levin). The fact that the MCA provides for the illusion of a fair trial as a way point on the road to conviction does not alter the conclusion that it constitutes legislative punishment. In addition, the *habeas*- and other court-stripping provisions constitute that sort of "disqualification . . . from the privilege of appearing in

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[2] Military Rules of Evidence 801-07 applied to military commissions at the time of the alleged conduct and prior to 17 October 2006. *See* 10 U.S.C. §§ 821, 836 (1998); *Hamdan*, 126 S.Ct. at 2792-93.

[3] Certainly applicable to those detainees alleged to have engaged in conduct only in violation of federal terrorism statutes applicable at the time of their actions.

[4] *But see Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (June 29, 2007) (No. 06-1195).

courts" that was also held by the *Cummings* Court to be an impermissible legislative punishment. *Id.* at 320; *see also Rasul v. Bush*, 542 U.S. 466 (2004).

(iii) Furthermore, these punishments are imposed without any antecedent judicial trial. In a case such as this one, where the unfair trial procedures are themselves part of the legislative punishment being imposed, such unfair proceedings cannot render the punishment lawful. In this case, Mr. Khadr will have no recourse to any fair judicial process before being subjected to the Commission's punitive proceeding. *See United States v. Khadr*, No. 07-001 (Ct. Mil. Comm'n Rev. Sep. 24, 2007) (holding that, if personal jurisdiction is challenged by the accused, the Commission itself must determine whether Mr. Khadr is an unlawful enemy combatant properly subject to its jurisdiction).

(iv) The fact that Congress could have achieved legitimate nonpunitive goals in a less burdensome manner but chose the more restrictive route, is evidence that the MCA restrictions constitute impermissible legislative punishment. *See Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 482 (1977) (noting "the existence of less burdensome alternatives by which [the] legislature . . . could have achieved its legitimate nonpunitive objectives."). Congress could have opted to permit enemy combatants to be tried in regularly constituted courts of the military justice system as it required before the MCA was enacted. *See* 10 U.S.C. §§ 821, 836 (1998); *Hamdan*, 126 S.Ct. at 2792-93. However, Congress chose instead to craft a *sui generis* commission system that imposes the punitive and unprecedented deprivations of rights listed above to a targeted group of individuals for past conduct. Congress considered and rejected a version of the bill that would have tracked the courts-martial procedures much more closely and thereby eliminated many of the punitive aspects of the Commissions process. *See* 152 Cong. Rec. S10,263 (daily ed. Sep. 27, 2006) (rejecting the substitute bill written by the Senate Armed Services Committee and proposed as an amendment by Senator Levin).[5] Furthermore, with respect to the *habeas*-stripping provisions of the MCA, Congress could simply have refrained from enacting this punitive provision, as it came within two votes of doing. *See* 152 Cong. Rec. S10,369 (2006) (rejecting by a vote of 51-48 Senator Specter's amendment, which would have eliminated the *habeas*-stripping provision). Instead, it chose to authorize a system employing rules of evidence and procedure tailored to fit an existing group of cases, depriving detainees of key legal protections in order to facilitate "convictions."

(v) By subjecting targeted individuals to an unfair trial and depriving them of their legal rights and access to courts, the Congress has imposed an impermissible legislative punishment. Because no proper judicial tribunal will determine whether targeted individuals are subject to the punitive jurisdiction of the military commission—the unfair procedures of the

[5] In urging his fellow Senators to vote for his amendment Senator Levin described the bill that was ultimately passed as "the product of negotiations" "with an administration that has been relentless in its determination to legitimize the abuse of detainees *and to distort the military commission procedures to ensure criminal convictions*." 152 Cong. Rec. S10,244 (daily ed. Sep. 27, 2006) (statement of Sen. Levin) (emphasis added). Senator Reed noted that, unlike the rejected version of the bill, which "start[ed] with the rules applicable in trials by courts-martial as the governing provision, and then establish[ed] exceptions," in the enacted version "the Secretary of Defense is required to make trials by commission consistent with those rules only when he considers it is practical. The exception has swallowed up the rule." 152 Cong. Rec. S10,259 (statement of Sen. Reed).

Commission itself govern such determinations—the MCA clearly imposes these punishments without judicial trial and is thus a bill of attainder.

c. The Military Commissions Act Impermissibly Punishes Members Of A Readily Identifiable Class Based On Their Irreversible Past Conduct

(1) Unconstitutional bills of attainder single out classes of individuals in "terms of conduct which, because it is past conduct, operates only as a designation of particular persons," *United States v. Lovett*, 328 U.S. 303, 315 (1946), particularly where the past conduct at issue consists of "irreversible acts." *Selective Serv. Sys.*, 468 U.S. at 848. The MCA clearly singles out those who were being detained in U.S. custody as suspected unlawful enemy combatants because of alleged past conduct on the battlefield or elsewhere. The plain text of the MCA indicates that the commissions apply only to alien unlawful enemy combatants, defined in part as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States." 10 U.S.C. § 948a(1)(A)(i) (emphasis added).[6] This definition 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.[7]

(2) That the definition above is intended to be retrospective is made clear by surrounding provisions of the Act. The second part of the definition of unlawful enemy combatant includes those determined by a CSRT to be an unlawful enemy combatant "*before* . . . the date of enactment" of the MCA. § 948a(1)(A)(ii) (emphasis added). And the habeas-stripping provisions of the MCA also apply retrospectively to those already in U.S. custody at the time of enactment. *See* MCA, Pub. L. No. 109-366 § 7(b), 120 Stat. 2600, 2635-36 (2006) (to be codified at 28 U.S.C. § 2241(e)). 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.

(3) Furthermore, the committee hearings and floor debates on the MCA indicate that Congress intended for the Act to apply to those already in U.S. custody at Guantanamo Bay and elsewhere. *See, e.g.*, 152 Cong. Rec. S10,243 (daily ed. Sep. 27, 2007) (statement of Sen. Frist) (contending that "[u]ntil Congress passes this legislation, terrorists such as Khalid Shaikh

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[6] Under the Court of Military Commission Review opinion of September 24, 2007, this Commission's jurisdiction over Mr. Khadr must be predicated on this part of the definition of an unlawful enemy combatant and not on any CSRT determination per 10 U.S.C. § 948a(1)(A)(ii). *United States v. Khadr*, No. 07-001 (Ct. Mil. Comm'n Rev. Sep. 24, 2007).

[7] To be sure, the definition also encompasses individuals who are in custody for engaging in or supporting hostilities *after* the MCA's enactment. The MCA would not constitute a bill of attainder as applied to such individuals. However, all of the individuals so far charged in the military commissions are being prosecuted for conduct that occurred well before the MCA's enactment.

Mohammed [who was already in U.S. custody at the time] cannot be tried for war crimes," and thus clearly contemplating retrospective application of the Act); *id.* at S10,259 (statement of Sen. Reed) (pointing out that the military commissions will apply to "all of the individuals we are talking about today—the 14 [high-value] detainees at Guantanamo Bay and others—[who] are [all] enemy combatants"). There are in fact at least two references in the record to the specific case of Mr. Khadr. *See id*. at S10,273 (statement of Sen. Cornyn) (describing Mr. Khadr's particular case as a reason to support the habeas-stripping provisions); *id.* at S10,368 (daily ed. Sep. 28, 2006) (statement of Sen. Graham) (same).

(4) In any case, the context of the MCA's passage makes it unmistakably clear that it was intended to create a Commissions system that would apply retroactively to individuals like Mr. Khadr. The Administration freely concedes that the MCA was a direct response to the Supreme Court's decision in *Hamdan*, in which it ruled, *inter alia*, that the commissions as then constituted were beyond the President's authority without additional congressional authorization.[8] Mr. Khadr was among the individuals charged under the old commissions system and it is clear that the Congress and Administration intended for the MCA simply to provide statutory authorization necessary to establish new commissions to replace the old. *See* H. Doc. 109-133 (Sep. 17, 2006) (message from the President accompanying draft proposed MCA, noting that "[t]his draft legislation responds to . . . *Hamdan v. Rumsfeld* by establishing for the first time in our Nation's history a comprehensive statutory structure for military commissions that would allow for the fair and effective prosecution of captured members of al Qaeda and other unlawful enemy combatants") (citation omitted).

(5) The historical context, legislative history, and statutory text together make it unmistakably clear and very "easily ascertainable," *Lovett*, 328 U.S. at 315, that the MCA was specifically intended to encompass suspected unlawful enemy combatants already in U.S. custody and to subject them to its punitive provisions.

(6) Put simply, Congress, by enacting the MCA, has targeted Mr. Khadr for acts allegedly occurring *before* passage of the act, allowing him no way to escape the punitive deprivation of legal rights and the threat of punishment that the MCA imposes. This sort of "singling out of an individual for legislatively prescribed punishment" due to "past conduct" is precisely what the prohibition on attainder was directed against. *Selective Serv. Sys.*, 468 U.S. at 847. Indeed, the Supreme Court has noted that retrospective punishment—as opposed to prospective regulation—is one of the hallmarks of bills of attainder. *See Flemming v. Nestor*, 363 U.S. 603, 614 (1960) ("The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation . . . .") (quoting *De Veau v. Braisted*, 363

[8] In a speech given on the occasion of the administration submitting draft military commission legislation to Congress, the President described the immediate impetus for the legislation as follows: "The Supreme Court determined that military commissions are an appropriate venue for trying terrorists, but ruled that military commissions needed to be explicitly authorized by the United States Congress. So today, I'm sending Congress legislation to specifically authorize the creation of military commissions to try terrorists for war crimes." Address of President George W. Bush at the White House, Sep. 6, 2006, *available at* http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.

U.S. 144, 160 (1960) (plurality opinion)); *accord United States v. Brown*, 381 U.S. 437, 462 (1965) (White, J., dissenting); *see also supra* note 8 at 6 (explaining that the purpose of the imposition of punishment is irrelevant). Because The MCA cannot be understood as a prospective regulation, at least as applied to Mr. Khadr and others held in custody as alleged unlawful enemy combatants prior to the MCA's enactment, it must be regarded as just the sort of retrospective punishment that Congress is forbidden from imposing.

(7) Under the U.S. Constitution, for an improper bill of attainder to exist, there must be: (a) an individual or group singled out; (b) for a legislative punishment imposed without judicial trial; (c) where the punishment was imposed based on irreversible past conduct. It is axiomatic that a court must dismiss an action if the statute that purports to grant jurisdiction is unconstitutional. *Marbury v. Madison*, 5 U.S. 137 (1803). Accordingly, this Commission must dismiss this case against Mr. Khadr.

d. In The Alternative, In Order To Avoid Constitutional Difficulties, This Commission Should Interpret The Military Commissions Act To Apply Only Prospectively

(1) As shown above, if interpreted to apply retrospectively, the unlawful enemy combatant definition impermissibly and unconstitutionally subjects targeted individuals to legislative punishment based on irreversible past conduct. This Commission should therefore find the Military Commissions Act invalid and unconstitutional as applied to Mr. Khadr. However, the Supreme Court has stated that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 465-66 (1989). Thus, in the alternative, we ask this Commission to construe the Military Commissions Act so as to avoid rendering it an unconstitutional bill of attainder as applied to Mr. Khadr. Specifically, this Commission should not read the words of the crucial unlawful enemy combatant definition to apply retrospectively. "[I]f such a construction is fairly possible" this Commission should adopt it in order to "avoid raising doubts of [the Act's] constitutionality." *St. Martin Lutheran Evangelical Church v. South Dakota*, 451 U.S. 772, 780 (1981).

(2) The MCA defines an unlawful enemy combatant, in relevant part, as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States." 10 U.S.C. § 948a(1)(A)(i). This definition does not itself explicitly state that such hostilities must have occurred *before* the passage of the MCA (unlike the second part of the definition, which explicitly states that it applies to any person determined to be a unlawful enemy combatant by a CSRT "before, on, or after" the date of enactment, §948a(1)(A)(ii)). This provision of the Act does not apply to Mr. Khadr as this Commission and the Military Commission Court of Review have already found since no CSRT has determined that Mr. Khadr is an unlawful enemy combatant. It thus could be argued that it is "fairly possible," to construe the statute so that the unlawful enemy combatant definition applies only *prospectively*, and includes only those individuals who have "engaged in . . . or . . . supported hostilities" *after* the passage of the Act. *St. Martin Lutheran*, 451 U.S. at 780; 10 U.S.C. § 948a(1)(A)(i).

(3) By construing the definition prospectively, the Act would no longer plausibly be a bill of attainder, because it would no longer target individuals for past conduct and would function as a regulation of future behavior rather than a punishment for irreversible past acts. Such a definition would exclude Mr. Khadr, who was captured on the battlefield in 2002, has been in U.S. custody since then, and has not "engaged in . . . or supported hostilities" after the MCA's passage in 2006. On this alternative interpretation, this Commission must dismiss for lack of jurisdiction because Mr. Khadr cannot come within the MCA definition of an unlawful enemy combatant subject to trial by military commission.

e. Conclusion

(1) The Military Commission Act constitutes a bill of attainder when applied to Mr. Khadr. Because congress is without the power to enact bills of attainder, the MCA is of no effect in this case. Accordingly, the charges must be dismissed.

(2) In the alternative, in order to avoid ruling on a constitutional question, this Commission should construe the unlawful enemy combatant definition, 10 U.S.C. § 948a(1)(A)(i), to apply only prospectively to those who have engaged in or supported hostilities against the United States *after* the passage of the MCA. As all of Mr. Khadr's alleged hostile conduct occurred well before the MCA's passage, the Commission must dismiss the case because he does not come within this interpretation of the MCA's definition of an unlawful enemy combatant subject to trial by military commission.

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.

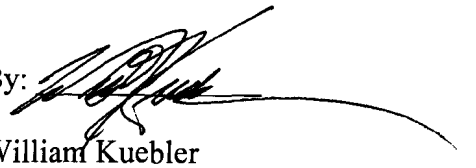
8. **Witnesses and Evidence:** None.

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. **List of attachments:**

A. Sworn Charges (2 Feb 07)

By: 

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

Attachment A

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

2. ALIASES OF ACCUSED:
Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0766

II. CHARGES AND SPECIFICATIONS

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

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER		**5e. DATE (YYYYMMDD)**
		20070202

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

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

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

Jeffrey O. Groharing
Signature

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).

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

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

_____
Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

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

_____.
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

_____
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

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

_____.

_____ subject to the following 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.

Attachment A

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.

Attachment A

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.

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 for Lack of Jurisdiction (Bill of Attainder)** 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 all charges and specifications for lack of jurisdiction ("Mot. to Dismiss (Bill of Attainder)"), should be denied.

3. Overview:

a. Under the Supreme Court's opinion in *Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950), and the Court of Appeals' decision in *Boumediene v. Bush*, 476 F.3d 981, 992 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007), the constitutional limitations on bills of attainder do not apply *vis-à-vis* Khadr—an "alien[] without property or presence within the United States," *id.* at 992-93—and he is not entitled to the protections of the Bill of Attainder Clause. Moreover, even if the Bill of Attainder Clause were generally to apply to Khadr, nothing in the MCA would even approach a violation of it. The MCA provides robust trial procedures that protect the rights of unlawful enemy combatants to a degree unprecedented in the history of warfare, and any punishment under it would be imposed only *after* a full and fair trial. The MCA is therefore not "a legislative act which inflicts punishment without a judicial trial," *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866), and accordingly is not an unconstitutional bill of attainder.

b. The Defense's alternative argument that the MCA can plausibly be interpreted as prospective only is refuted by both the text and legislative history of the Act—a point made clear in the Defense's own brief. *See* Mot. To Dismiss (Bill of Attainder) at 6-7.

c. Accordingly, nothing in the Bill of Attainder Clause remotely suggests that Khadr cannot be tried under the MCA for conduct that predates enactment of the Act. The motion to dismiss 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. Under the Supreme Court's opinion in *Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950), and the Court of Appeals' decision in *Boumediene v. Bush*, 476

F.3d 981, 992 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007), the constitutional limitations on bills of attainder do not apply to Khadr, an alien outside the sovereign borders of this country.

i. Although the Constitution provides that "[n]o Bill of Attainder . . . 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 Eisentrager*, 339 U.S. at 783-85. Pursuant to this principle, the U.S. Court of Appeals for the D.C. Circuit has 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*, 476 F.3d at 992; *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 the charges against him violate the Bill of Attainder Clause.

ii. *Eisentrager*'s holding that alien enemy combatants detained in foreign territory 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 the 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 Bill of Attainder 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 Bill of Attainder Clause.[1]

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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

b. Even if the Bill of Attainder Clause does apply *vis-à-vis* Khadr, nothing in the MCA violates that clause.

i. The Bill of Attainder Clause prohibits the imposition of "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them *without a judicial trial*." *United States v. Lovett*, 328 U.S. 303, 315 (1946) (emphasis added); *see also Cummings*, 71 U.S. (4 Wall.) at 323 ("A bill of attainder is a legislative act which inflicts punishment without a judicial trial."). It defies logic to argue that the creation of a trial process, particularly one that ensures the presumption of innocence, *see* 10 U.S.C. § 949*l*(c)(1), constitutes the "inflict[ion of] punishment without a judicial trial."

ii. The bill of attainder provision at issue in *Lovett* denied compensation to three Executive Branch employees who were named in the legislation. *See* 328 U.S. at 314 ("What is involved here is a congressional proscription of Lovett, Watson, and Dodd, prohibiting their ever holding a government job."). The forbidden "punishment" in *Lovett* was the denial of Government compensation, and, because the penalty was automatic and did not permit any sort of court review, it was necessarily imposed "without a judicial trial," and therefore in violation of the Bill of Attainder Clause.

iii. Similarly, in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), the Supreme Court invalidated a provision of the Missouri constitution that penalized anyone who failed to take a loyalty oath. The following penalty was imposed by Missouri on all those who refused to take the oath:

> Every person who is unable to take this oath is declared incapable of holding, in the State, "any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority, or of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation."

Id. at 317. The Supreme Court regarded these "disabilities created by the constitution of Missouri" as "penalties—they constitute punishment." *Id.* at 320; *see also Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (holding that a federal loyalty oath required of attorneys with respect to certain past acts was an unconstitutional bill of attainder). As Justice Frankfurter explained in *Lovett*, "the provisions involved in [*Cummings* and *Garland*] did not condemn or punish specific persons by name, they proscribed all guilty of designated offenses. Refusal to take a prescribed oath operated as an admission of guilt, and automatically resulted in the disqualifying punishment." *Lovett*, 328 U.S. at

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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.

327 (Frankfurter, J., concurring). That is a far cry from what has occurred under the MCA.

iv. The Military Commissions Act asserts jurisdiction over alien unlawful enemy combatants. *See* 10 U.S.C. § 948c. The term "unlawful enemy combatant" means:

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
>
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Id. § 948a(1)(A). To the extent Khadr is an alien who comes within either of the above classes of persons, he may be tried under the MCA. It is the *result* of that trial that will determine whether Khadr is punished, and, if so, to what degree.

v. The procedures under which Khadr will be tried are robust, permitting him the assistance of defense counsel, *see* RMC 502(d)(6), 506; a right to discovery, including a right to exculpatory evidence or an adequate substitute if such evidence is classified, *see* RMC 701; the right to take depositions, *see* RMC 702; the right to call witnesses, *see* RMC 703; and many other rights that are carefully described in the Rules for Military Commissions and the MCA. In addition, Khadr will have his case heard before an impartial judge, *see* RMC 902, and will have the right to challenge the impartiality of the members who will decide his guilt, *see* RMC 902. Should Khadr be convicted, the convening authority will be authorized to set aside a finding of guilty or to reduce the severity of the offense or punishment; the convening authority may *never* increase the severity of the offense or punishment. *See* RMC 1107. If Khadr is convicted, he has the right to have his case reviewed by the Court of Military Commission Review. *See* RMC 1201. Beyond that, the Rules for Military Commissions provide that Khadr may petition for his case to be reviewed by the U.S. Court of Appeals for the D.C. Circuit, and even by the U.S. Supreme Court. *See* RMC 1205.

vi. This is more process than has ever been guaranteed to enemy combatants in any war ever fought, and cannot possibly be described as "a legislative act which inflicts punishment without a judicial trial." *Cummings*, 71 U.S. (4 Wall.) at 323. Because any punishment that is imposed on Khadr will only take effect after a "judicial trial" containing an unprecedented panoply of procedural protections for him, including the opportunity for judicial review before an Article III tribunal, the Bill of Attainder Clause has no applicability to the present case.

vii. The Defense attempts to avoid this conclusion by arguing that it is not the result of trial by military commission (with the various procedural and appellate safeguards already described) that constitutes punishment, but the trial itself. However, this reading of the Bill of Attainder Clause turns Supreme Court precedent on its head. The Government is aware of no case holding that merely trying a defendant before an Article I judge *itself* counts as punishment.

viii. Nothing in the Bill of Attainder Clause forbids Congress from prescribing the procedures to be used in military commissions involving a finite class of individuals. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court rejected the President's attempt to set up a system of military commissions without prior express authorization from Congress. *See id.* at 2786. Even among the Justices who voted to strike down the pre-MCA military commissions system, virtually all appeared to agree that it would be appropriate for Congress and the President jointly to enact a system of military commissions. *See, e.g.*, *id.* at 2799 (Breyer, J., concurring, joined by Kennedy, Souter and Ginsburg, JJ.) ("Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary."). Here, Congress and the President have done precisely that and carefully specified the persons subject to the jurisdiction of the military commissions. These limitations on the jurisdiction of the military commissions, which cabin the jurisdiction of the commissions to unlawful enemy combatants, were required by the plurality in *Hamdan*, *see id.* at 2776 (plurality op.) (describing the jurisdiction of those military commissions "convened as an 'incident to the conduct of war'" as being "limited to offenses cognizable during time of war"), and necessarily apply to a finite group of persons concerning a finite group of offenses. Accordingly, they do not remotely pose constitutional problems.

ix. Nor is the extension of the court's jurisdiction to a finite group of persons a "punishment" that could not be accomplished without a trial; rather, it is the prescription of a *process* by which those persons will be tried. This cannot conceivably conflict with the Bill of Attainder Clause. After all, the purpose of the Bill of Attainder Clause is to ensure that a penalty is not imposed until after a fair trial has occurred. It would be perverse, and ultimately self-defeating, if the very act of subjecting a person to the trial itself *violates* the Clause. Nothing in the Constitution compels such an absurd result.

x. The Defense's argument that other provisions of the MCA violate the Bill of Attainder Clause is likewise specious. The Defense argues that the MCA violates the Bill of Attainder Clause by (1) "depriving" Khadr of his rights under the Geneva Conventions; (2) permitting him "to be charged with crimes never before recognized under the law of war"; (3) depriving him of his "right" to a fair trial "either from a court-martial . . . or regular civilian court"; (4) altering hearsay rules; (5) permitting the admission of coerced statement that are reliable, probative and whose admission would serve the interests of justice; (6) altering his ability to call witnesses, as apparently compared to the court-martial procedure; (7) permitting him to be tried before a non-Article III court; (8) limiting his ability to bring actions over detainment conditions; and

(9) "depriving" him of his right to challenge his detention through a writ of habeas corpus. Mot. to Dismiss (Bill of Attainder) at 3-4.

xi. Each of these various claims is easily refuted.

1) *Geneva Conventions:* The Defense claims that the MCA "depriv[es] targeted individuals [sic] all rights under the Geneva Conventions." Mot. to Dismiss (Bill of Attainder) at 3. The only "right" under the Geneva Conventions that arguably applies to Khadr is Common Article 3, which requires that he be tried before "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See Hamdan*, 126 S. Ct. at 2796. Congress has reasonably determined that the MCA affords Khadr such a forum. *See* 10 U.S.C. § 948b(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."). This determination is unquestionably correct, as the MCA and RMC afford Khadr a panoply of procedural protections that far exceed any granted to an unlawful enemy combatant in the history of warfare. Accordingly, the MCA easily meets the requirements of Common Article 3, and Khadr has therefore not been deprived of any rights thereunder.[2]

2) *Charging Khadr with conspiracy, material support for terrorism and spying:* As explained in the Government's other responsive motions filed today, each of the offenses of conspiracy, material support for terrorism and spying is, and was at the time of Khadr's conduct, a violation of the law of war. But even if that were not so, that would mean, at most, that this court might lack jurisdiction over particular charges, and *not* that this court is anything other than a proper judicial forum for purposes of the Bill of Attainder Clause. *See Cummings*, 71 U.S. (4 Wall.) at 323 ("A bill of attainder is a legislative act which inflicts punishment without a judicial trial.").

3) *Right to a fair trial before either a court-martial or regular civilian court:* As described above, the MCA and RMC provide robust procedural protections for Khadr and are modeled after the court-martial rules, which Khadr appears to concede are fair. *See* 10 U.S.C. § 949(a). To the extent the military commission procedures differ from those governing courts-martial, the differences reflect the unique needs of military and intelligence activities implicated by military commissions. Those differences between the MCA and the Uniform Code of Military Justice are limited in scope and do not render a trial under the MCA unfair.

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[2] Khadr does not say of what, if any, other rights under the Geneva Conventions he believes himself to have been "depriv[ed]." Given that Khadr has presented no plausible argument that he qualifies for prisoner of war status under article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135, we are not aware of any rights under the Geneva Conventions of which he may have been "depriv[ed]."

4) *Adapting the Military Rules of Evidence to account for military and intelligence realities:*

(a) The Defense makes much of the fact that the hearsay and other evidentiary rules in military commissions differ from those in civilian courts or courts-martial. However, the limited differences between court-martial rules and those under the MCA merely reflect military and intelligence realities. Unyielding rules of hearsay and discovery are simply impractical when evidence or statements may be sought that were collected half-a-world away in the midst of a battle, as well as in light of the significant amount of classified information likely to be at issue in military commissions. Moreover, nothing in the Constitution prevents Congress from modifying procedural protections, including those governing the admission of hearsay. The Supreme Court has repeatedly upheld Congress's authority to modify procedural and evidentiary trial rules and to make such modifications retroactive. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994) ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity."); *see also id.* at 275 n.26 ("While we have strictly construed the Ex Post Facto Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case.") (citing cases); *see also Hopt v. Utah*, 110 U.S. 574, 589 (1884) ("Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.").

(b) We also note that the more liberal evidentiary rules in the MCA (such as the greater admissability of hearsay) do not necessarily work to the accused's disadvantage, since he may rely on such rules to introduce evidence in his own defense. In that sense, the liberalized hearsay rules under the MCA are closely akin to retroactive procedural changes that the Supreme Court has approved in the past. *See, e.g.*, *Carmell v. Texas*, 529 U.S. 513, 546 (2000) (holding that a statute that retroactively lowered the quantum of evidence required to convict violated the Ex Post Facto Clause, but noting that rules liberalizing the *admissibility* of evidence would not: "The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant.").

5) *Trial before a non-Article III court:* The Defense argues that Khadr is being "punished" because he is being tried before an Article I court, rather than an Article III court. *See* Mot. to Dismiss (Bill of Attainder) at 4. This argument fails because Khadr was not subject to trial in an Article III court even before the enactment of the MCA. Rather, under 10 U.S.C. §§ 821, 836 (1998), Khadr was liable to be tried before a military commission authorized under Article I, and not in an Article III court.

(Ironically, even the alternative the Defense favors—court-martial—is an Article I court.) That Khadr will still be tried in an Article I court under the MCA indicates that he is not being retroactively "punished" by the MCA's requirement that he be tried before a military judge.

6) *Actions to challenge detainment and habeas challenges:* Limitations on Khadr's ability to challenge his detention through a habeas petition or otherwise do not violate the Constitution. As the Supreme Court held in *Eisentrager*, and as the Court of Appeals affirmed in *Boumediene*, Khadr enjoys no constitutional right to bring a habeas challenge to the conditions of his confinement or otherwise. Both decisions are binding on this court. In addition, Congress's authority retroactively to limit defendants' ability to bring habeas challenges to their confinement has been repeatedly upheld. *See, e.g.*, *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (retroactive change to habeas statute constitutional). Accordingly, none of the procedural or other provisions of the MCA constitutes "punishment" in violation of the Bill of Attainder Clause.

xii. Given the offenses with which Khadr has been charged, the claim that his trial before this military commission is itself punishment is without merit. 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). 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). 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"). Here, Khadr is not being shot on sight or anything of the sort. 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." Nothing more is required.

xiii. Finally, the Defense's selective quoting from the legislative record to support its argument that the Military Commissions Act was intended to guarantee convictions is highly misleading. In support of its argument, the Defense relies on a statement from Senator Levin that the purpose of the Act was "to ensure criminal

convictions." Senator Levin, of course, was an *opponent* of the Act and voted against it, *see* 152 Cong. Rec. S10354-02, S10420 (daily ed. Sept. 28, 2006) (Roll Call Vote No. 259), and his condemnation and critical description of it is therefore, at the very least, suspect. In any event, as described above, the MCA accords the accused an unprecedented level of process in time of war.

c. The Defense's alternative argument that the MCA should be interpreted prospectively is belied by its text and legislative history.

i. The Defense argues that the MCA could plausibly be interpreted to apply prospectively only, and that it should therefore be construed as such under the canon of constitutional avoidance. *See* Mot. to Dismiss (Bill of Attainder) at 8; *see also Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 465-66 (1989) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (internal quotation marks omitted).

ii. The basis for this alternative reading, according to the Defense, is that the first definition of unlawful enemy combatants in the MCA, *see* 10 U.S.C. § 948a(1)(A)(i) ("a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)"), lacks the expressly retroactive language found in the second definition for unlawful enemy combatants, *see id.* § 948a(1)(A)(ii) ("a person who, *before, on, or after* the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.") (emphasis added). This slight linguistic discrepancy, read in context, cannot possibly support the interpretation that the statute was intended to apply only prospectively.

iii. First, as explained by the Defense, "the committee hearings and floor debates of the MCA indicate that Congress intended for the Act to apply to those already in U.S. custody at Guantanamo Bay and elsewhere." Def. Mot. to Dismiss (Bill of Attainder) at 6 (citing sources). This is the only plausible reading of the Act, given its opening statement 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*." 10 U.S.C. § 948d(a) (emphasis added).

iv. The MCA's retroactive application is confirmed by the opening provisions of its Punitive Matters section, which provides 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) (emphasis added). The final

italicized clause has no plausible interpretation *other than* that the MCA was fully intended to apply to conduct that predates its enactment. Accordingly, the canon of constitutional avoidance cited by the Defense has no applicability here, since there is no plausible interpretation of the MCA that is faithful both to its text and congressional intent whereby it could be read to apply only prospectively.

d. Conclusion

i. Under binding precedent, the constitutional limitations on bills of attainder do not apply to enemy alien combatants outside the country, like Khadr. Even if they did, however, nothing in the MCA approaches a violation of the Bill of Attainder Clause. Moreover, the Defense's alternative argument that a plausible reading exists whereby the MCA could be interpreted only prospectively is conclusively refuted by the text and legislative history of the Act. Accordingly, the motion to dismiss should be denied.

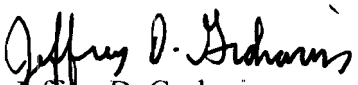
7. Oral Argument: The Prosecution disagrees that the issues presented by the Defense's motion are "complex." Mot. to Dismiss (Bill of Attainder) at 9. In view of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motion should be readily 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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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.

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**D-013** **Defense Reply to Government Response to Defense Motion** to Dismiss for Lack of Subject Matter Jurisdiction (Bill of Attainder) 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 government seeks to avoid the conclusion that the Military Commissions Act of 2006 (MCA) as applied to Mr. Khadr is an unconstitutional bill of attainder by arguing (1) that he may not invoke the "protection" of the Bill of Attainder Clause; and (2) that if he can, the MCA does not constitute legislative punishment in violation of the Clause. Both contentions are without merit.

b. The U.S. Constitution's prohibition against bills of attainder is a structural limitation on the power of Congress. Its application is not a function of the place where Mr. Khadr is detained and the government's reliance on *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S.Ct. 3078 (2007), to claim otherwise is sorely misplaced.

c. Moreover, nothing in the government's response alters the inescapable fact that the MCA constitutes legislative punishment by depriving Mr. Khadr of the right to a fair and regular trial, as well as other important civil and political rights. Significantly, the government does not contend that the MCA is intended to facilitate the "trial" of anyone other than detainees at Guantanamo Bay based on their irreversible past conduct. Thus, the only remaining issue is whether Congress' creation of a trial system, long after Mr. Khadr's alleged conduct, employing specially-tailored rules of evidence and procedure designed to ensure his conviction is "punishment." It most certainly is.

3. **Reply: This Military Commission is Without Jurisdiction to Proceed Because the Sole Basis for its Authority, the MCA, is an Unconstitutional Bill of Attainder**

a. The Bill of Attainder Clause is a Structural Limitation on the Power of Congress Which Applies Regardless of Where Mr. Khadr is Detained

(1) The government seeks to avoid the obvious conclusion that the MCA is an unconstitutional bill of attainder by arguing that the "protection" of the Bill of Attainder Clause (as well as "structural or other protections of the Constitution") does not apply to Mr.

Khadr. (Govt. Resp. at 4.) For this outlandish proposition, the government relies principally on the decision of the D.C. Circuit Court of Appeals in *Boumediene*. This reliance is sorely misplaced. The Bill of Attainder Clause is a structural limitation on congressional power. 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."). Accordingly, the Bill of Attainder Clause (like the *Ex Post Facto* Clause) prohibits legislative punishment regardless of where the individuals affected by it are detained.

(2) *Boumediene v. Bush*, 476 F.3d 981 (2007), currently on review at the Supreme Court, does not hold otherwise. While the prosecution argues that *Boumediene* held that the "Constitution does not apply" to alien enemy combatants held at Guantanamo, (Govt. Resp. at 4), *Boumediene* did no such thing. *Boumediene* was concerned solely with the Suspension Clause of the Constitution, and did *not* address the applicability of the Bill of Attainder 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.

(3) 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).

(4) 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).

(5) But even assuming, *arguendo*, that the Bill of Attainder 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).

b. The MCA Constitutes Legislative Punishment

(1) As noted above, the government does not contend that the MCA is anything other than an act aimed at an identifiable class of persons based on irreversible past conduct.[1] Instead, the government bases its argument on the claim that the MCA is not "punishment" because any punishment imposed on Mr. Khadr will only follow trial with "robust" procedures. (Govt. Resp. at 6.) The government's argument entirely misses the point. It does not matter how "robust" the procedures authorized by the MCA may be, they are less protective of Mr. Khadr than the procedures for trial by court-martial or by a federal court and are designed to facilitate his conviction using evidence that does not meet conventional standards of reliability.

(2) There can be little doubt that deprivation of the right to a fair trial itself constitutes punishment. The government does not contend otherwise, arguing instead that Mr. Khadr will receive a fair trial under the "robust" procedures for trial by military commission. The Government lists in its response a number of purported rights available to Mr. Khadr under the military commission system,[2] but the relevant question is not what rights the MCA provides,

[1] The government cites *Hamdan* for the dubious proposition that the Court "invited the politically accountable branches" to pass a bill of attainder. 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.

[2] It is worth noting that some of the "rights" the Government identifies exist more in theory than they do

rather it is what rights it takes away.[3] The government contends that the MCA is "modeled after" courts-martial, however, the MCA *explicitly* breaks from *court-martial* procedures in key respects. 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. Thus, application of the MCA to Mr. Khadr's case deprives him of many rights which are routinely provided in courts-martial. In does so notwithstanding the fact that the rules and procedures for courts-martial are flexible and designed to accommodate the needs of military operations. *See, e.g.*, M.R.E. 505 (governing discovery and use of classified information), 803, 804, and 807 (relating to hearsay).

(3) The government attempts to defend these irregularities on the basis of necessity, claiming that the "limited differences between court-martial rules and those under the MCA merely reflect military and intelligence realities." (Govt. Resp. at 9.) This is nonsense. The only "reality" the MCA is designed to account for is the fact that the United States Government has relied on absurd and outdated legal positions to indefinitely detain and mistreat numerous suspected "terrorists" in the so-called "Global War on Terror"[4] (such as Mr. Khadr) and now finds itself in the position of having to create a justice system from whole cloth to facilitate convictions of select detainees using unreliable evidence. *See* MCA § 948r (providing for use of evidence obtained through coercion).

(4) The government's reference to evidence collected in "the midst of battle" as a justification for disregarding traditional restrictions on hearsay is a complete red-herring. Well-developed rules of evidence exist providing for the use of hearsay under exigent

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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.

[4] *See, e.g.*, the authorities cited at p. 10 of the government's response (and elsewhere in the government response briefs) to support the proposition that "unlawful combatants" lack enforceable rights and can be "shot on sight" or summarily executed under the law of war. The position, of course, ignores a century and a half of evolution of the law of armed conflict and was definitively rejected by the Supreme Court in *Hamdan*.

circumstances, providing that the evidence can be shown to be reliable. *See, e.g.*, M.R.E. 803, 804, and 807. Moreover, interrogations conducted for operational or intelligence purposes have been specifically exempted from requirements to comply with Article 31b of the UCMJ (10 U.S.C. § 831). *See, e.g. United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990); *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). It is only because the government seeks to convict on the basis of statements and other evidence taken for law enforcement purposes that is *unreliable* that the special evidentiary rules of the MCA are necessary. Likewise, the government's invocation of the need to shield "classified information" is unpersuasive. Again, a well-developed body of law exists to deal with classified information in courts-martial. *See, e.g.*, M.R.E. 505. The only "necessity" justifying military commissions' extraordinary departures from court-martial practice is the "necessity" to ensure convictions.

(5) The MCA deprives Mr. Khadr of other important rights, including his rights under the Geneva Conventions.[5] The government argues that the only right Mr. Khadr has under the Geneva Conventions is his right to be tried by a "regularly constituted court" affording indispensable judicial guarantees under Common Article 3 thereof.[6] Because Congress has declared military commissions to comply therewith, the government argues, there is no deprivation. (Govt. Resp. at 8.) The argument is fallacious for at least two reasons.

(i) First, the right to a fair trial is not the only right guaranteed under Common Article 3. Common Article also protects Mr. Khadr's right to be free from "outrages upon person dignity, in particular humiliating and degrading treatment[.]"[7] The MCA deprives Mr. Khadr of his right to access the courts to seek redress for violations of this right under Common Article 3, and provides for the use of evidence obtained in violation of this right against Mr. Khadr at trial.

(ii) Second, the military commission by which Mr. Khadr will be tried under the MCA is not a "regularly constituted court" affording all indispensable judicial guarantees. Congress' declaration to the contrary is of no avail because Congress has no power to declare the MCA compliant with Common Article 3. *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.") In *Hamdan*, a majority of the Supreme Court defined a "regularly constituted court" for purposes of Common Article 3 as one "established and organized in

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[5] In support of its contention that Mr. Khadr has been deprived of no rights under the Geneva Conventions, the government argues that Mr. Khadr "has presented no plausible argument that he qualifies for prisoner of war status under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War[.]" (Govt. Resp. at 8.) The defense notes that the question of whether Mr. Khadr may have a basis on which to claim entitlement to POW status is dependent upon factual discovery yet to be conducted in this case. Moreover, regardless of the precise theory on which Mr. Khadr might claim POW status, it is abundantly clear that he is presumptively entitled to such status until the "competent tribunal" contemplated by Article 5 of GPW determines otherwise. To the extent the MCA purports to divest Mr. Khadr of this right, it constitutes a further deprivation of his rights under the Geneva Conventions.

[6] The defense expects to further brief the issue of whether the military commission convened to try Mr. Khadr complies with Common Article 3 of the Geneva Conventions.

[7] *See, e.g.*, GPW, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135.

accordance with the laws and procedures already in force in a country." *Hamdan*, 126 S.Ct. at 2797. Thus, the Supreme Court concluded that Mr. Hamdan was entitled under Common Article 3 to be tried by a tribunal employing the rules and procedures applicable in trial by courts-martial absent some "practical need" justifying deviation from court-martial practice. *Id.* Because the government had not shown any practical need justifying deviation from court-martial practice, Mr. Hamdan's military commission was deemed "illegal."

(iii) Nothing has changed. As shown above, the rules and procedures for courts-martial are designed to be flexible and to accommodate exigencies associated with military operations. The only "practical need" justifying the procedures for military commissions under the MCA is the "need" to secure convictions using tainted evidence. As a result, the military commission that will try Mr. Khadr is not a regularly constituted court affording indispensable judicial guarantees and the MCA constitutes punishment because it seeks to strip him of this right as well.

(8) Finally, the government argues that the deprivation of Mr. Khadr's right to access the federal courts via habeas corpus is not punishment because he has no "constitutional right to bring a habeas challenge to the conditions of his confinement or otherwise." (Govt. Resp. at 10.) This is again beside the point. Whether Mr. Khadr's rights arise by statute or otherwise, the MCA is an unconstitutional bill of attainder if it deprives him of those rights as legislative punishment. As shown herein, it most certainly does.

4. Conclusion

a. The MCA is intended to deprive Mr. Khadr (and other detainees at Guantanamo Bay) of the right to a fair and regular trial and other important civil and political rights. It singles them out specifically and on the basis of past conduct. It is therefore an unconstitutional bill of attainder. As the MCA is the sole basis for the Commission's jurisdiction, all charges and specifications should be dismissed and proceedings against Mr. Khadr terminated.

By: _____

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