

UNITED STATES OF AMERICA,	)	IN THE COURT OF MILITARY
Appellant	)	COMMISSION REVIEW
	)	
	)	
v.	)	
	)	
MOHAMMAD JAWAD	)	
	)	
	)	
Accused	)	Convened by MCCO
	)	Presiding Military Judge
	)	COL Ralph Kolhmann
	)	

1. **Timeliness:** The issue of jurisdiction of this Tribunal to prosecute Mr. Jawad is never waived and therefore by definition is timely.

2. **Relief Sought:** Dismissal of all Charges and Specifications against Mr. Jawad.

3. **Overview:** The United States lacks *in personam* jurisdiction over Mr. Jawad.

Jurisdiction attaches at the time charges are sworn. (Rule for Military Commissions (RMC) 202

(c)). A military commission has no jurisdiction over a lawful enemy combatant. Military Commission Act of 2006, § 948d (b). Mr. Jawad asserts that he is a person protected by Article 4 of the third Geneva Convention concerning the Treatment of Prisoners of War (GCIII)<sup>1</sup> and Additional Protocol 1 (AP1), Article 45(1). Accordingly, Mr. Jawad is presumed to be a prisoner of war (PW). A PW is presumptively a lawful combatant.<sup>2</sup> A military commission has no jurisdiction over a lawful enemy combatant. Military Commission Act of 2006, § 948d (b).

<sup>1</sup> Mr. Jawad's position is premised upon the belief that at the time of his capture the United States was engaged in an international armed conflict and that the United States is proceeding in this prosecution under this theory of armed conflict.

<sup>2</sup> The notion of lawful combatancy is supported not only by Mr. Jawad's assertions of under GCIII but by a Combat Status Review Tribunal that found Mr. Jawad to be an enemy combatant, thus supporting his position that he currently is entitled to combat immunity.

Therefore, military commission jurisdiction could not legally attach to Mr. Jawad when the charges were sworn, and those charges are, consequently, a nullity and without legal effect. Moreover, such a presumption precludes this Commission from trying Mr. Jawad, pursuant to Article 102 of GCIII<sup>3</sup>. Only at such time as the United States provides Mr. Jawad with a status hearing conducted under the authority of Article 5 Tribunal of GCIII , AP1, Article 45, and in accordance with applicable DoD regulations, can his status as a lawful combatant be changed to a category of detention that allows for his prosecution in something other than a trial by Courts-Martial or prosecution in a U.S. Federal District court.

Therefore, the swearing of charges against Mr. Jawad are defective and without legal effect because the sworn charges were made against a presumed lawful combatant, thus precluding the creation of jurisdiction against him.

This point is separate and distinct from the issues addressed by the Court of Military Commission's Review (CMCR) in the case of United States v. Khadr, CMCR 2007-01 (2007). The parties in that case briefed and the CMCR decided the issue of *prima facie* jurisdiction in a case **referred** to trial by military commission. The court decided that *prima facie* jurisdiction existed in the referred case if certain prerequisite steps occurred: specifically, if charges were sworn alleging facts that constitute a violation of the Military Commissions Act of 2006 and the Convening Authority's legal advisor provides pretrial advice concluding there is jurisdiction over the individual charged. (Khadr at p. 21)<sup>4</sup> Moreover, the CMCR sites AP 1 Article 45 (2) as

---

<sup>3</sup> Article 102 states of GCIII "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." In other words, at present, Mr. Jawad may only be tried by a Courts-Martial or in federal district court.

<sup>4</sup> Mr. Jawad avers that this CMCR ruling in Khadr is in error. However, since Mr. Khadr's appeal to that decision is pending before the United States Circuit Court for the District of Columbia, Mr. Jawad concedes that the CMCR ruling is currently controlling precedent in this case. Mr. Jawad takes the same position outlined by Mr. Khadr in his briefs before the United States Circuit Court for the District of Columbia and will adopt those positions should the need to appeal the results of this tribunal arise.

Bay, Cuba. On October 19, 2004, almost two years after his capture, a Combat Status Review Board determined that Mr. Jawad's acts of throwing a grenade was an act of armed conflict, making him an enemy combatant. On October 9, 2007, Mr. Jawad was charged with three specifications of attempted murder in violation of the law of war and three specification of intentionally causing grievous bodily harm in violation of the law of war. Charges were referred on 30 January 2008.

#### **6. Law and Argument:**

##### **THE MILITARY COMMISSION ACT PROHIBITS THE ATTACHMENT OF MILITARY COMMISSION JURISDICTION TO A LAWFUL COMBATANT**

MCA § 948(d) (a) and (b) provides:

(a) JURISDICTION. 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.

(b) LAWFUL ENEMY COMBATANTS. Military Commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-Martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

##### **MR. JAWAD IS A PRESUMED TO BE A LAWFUL COMBATANT**

Article 5 of the GCIII provides:

The present Convention shall apply to the persons referred to in Article 4 (*a lawful combatant*) from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. (Emphasis added)

Article 45 of Additional Protocol 1 provides:

- (1) A person who takes part in hostilities and falls into the power of an adverse Party *shall be presumed to be a prisoner of war*, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, *or* if he appears to be entitled to such status, *or* if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before trial for the offence. (emphasis added)

AR 190-8 § 1-6 provides:

**1-6. Tribunals**

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

Read together, GCIII, Additional Protocol 1, and the Army Regulation<sup>5</sup> establish that the assertion by Mr. Jawad of PW status establishes a presumption of that status. No other proof is either necessary or required. However, extraneous evidence exists that suggests at the very least

---

<sup>5</sup> This regulation was jointly promulgated by the Headquarters of the departments of the Army, Navy, Air Force, and Marine Corps on October 1, 1997. The regulation explicitly states that its purpose is to implement international law as set forth in the GPW: "This regulation implements international law, both customary and codified, relating to EPW [enemy prisoners of war], RP [retained personnel], CI [civilian internees], and ODs [other detainees], which includes those persons held during military operations other than war. The principal treaties relevant to this regulation are: . . . (3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW)." AR 190-8 § 1-1(b).

Mr. Jawad is a “person” who has committed a “belligerent act,” and that when he committed this act he was an enemy combatant, giving even more credence to his PW assertion. This evidence is found in Mr. Jawad’s Combat Status Review Tribunal (CSRT), conducted on October 19, 2004.

The CSRT’s purpose is to determine if a detainee qualifies as an enemy combatant<sup>6</sup> thus giving the United States, according to the government, the indefinite right to detain that person.

An enemy combatant is defined as “any person who has committed a belligerent act or has directly supported hostilities in the aid of enemy armed forces.” (See 7 July 2004

MEMORANDUM FOR THE SECRETARY OF THE NAVY, paragraph a., by Deputy Secretary of Defense Paul Wolfowitz, attached as enclosure 1.) While not a perfect match, this definition matches close with GCIII, Article 4 (A) (1) definition of a PW. That language reads: “Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.”

Both the CSRT and GCIII recognize that an enemy combatant may be either a direct party to a conflict or a person who volunteers to assist a direct party in the prosecution of hostilities against the detaining power. Neither the CSRT nor GCIII Article 4 (A) (1) address whether or not the method of conducting those hostilities must be lawful in order to obtain the requisite status as an enemy combatant or a PW.

Mr. Jawad’s CSRT found him to be an enemy combatant on 19 October 2004. In particular, the CSRT found that he “associated with forces that are engaged in hostilities against

---

<sup>6</sup> The CSRT was not constituted or authorized to determine PW status under GCIII and thus substitute for an Article 5 Tribunal (*Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 162 (D.D.C. 2004), *rev’d*, 415 F.3d 33 (D.C. Cir. 2005).

the United States or its coalition forces.<sup>7</sup> (See unclassified Combatant Status Review Board dated 19 October 2004, attached as enclosure 2).

Finally, the Army Operational Law Handbook (August 2006), CHAPTER 2, Section XII. B. 2. provides well established, logical guidance on the status of individuals captured during combat. The guidance recognizes that a “wide array” of individuals are likely to be captured on the battle field. Accordingly, the handbook instruction that United States policy requires a broad interpretation of the term “international armed conflict” and sites DoD Directive 2311.01E for the proposition that the United States will follow the Law of War rules under GWIII regardless of the nature of the conflict. Accordingly “all enemy personnel should initially be accorded protections of the GPW Convention (GPW), *at least until their status may be determined.*” (Emphasis added).

Therefore, both applicable law<sup>8</sup> (GCIII and Article 45 of AP 1), long standing military policy and guidance, and factual conclusions of the United States (CSRT) support the presumptions that Mr. Jawad is a PW.

**GCIII AFFORDS MR. JAWAD THE PROTECTIONS OF THE CONVENTION,  
PRECLUDING TRIAL BY COMMISSION UNTIL MR. JAWAD'S STATUS HAS  
BEEN CHANGED BY A COMPETENT GCIII ARTICLE 5 TRIBUNAL**

The Military Commission Act states “Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-Martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this

---

<sup>7</sup> The defense does not concede that the underlying facts used to reach this conclusion are true in whole or part. The findings are only relevant in assessing the current legal status of Mr. Jawad.

<sup>8</sup> Relying on the written findings of Military Judge Captain Keith J. Allred in case of United States v. Salim Ahmed Hamdan, dated 17 December 2007, the defense argues that Military Commission Act §948b(g) that prohibits an unlawful enemy combatant subject to trial by military commission from invoking the protections of the Geneva Conventions as a source of rights is inapplicable because there has been no finding of that Mr. Jawad is an unlawful enemy combatant. See also U.S. v. Khadr, CMCR 07-001 (2007)

chapter.” §948d (2). As stated in the footnote above, CGIII, article 102 states “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.” Members of the United States armed forces and its war-time partners are by definition not subject to the jurisdiction of the Military Commission Act of 2006. Members of the United States Military may however be tried in U.S. District Courts under Title 18 of the United States Code for criminal misconduct or by Courts Martial, subject to the rules and procedures of the Uniform Code of Military Justice (Title 10 of the United States Code) and the Manual for Courts-Martial. Consequently, and in accordance with GCIII, Article 84, at present Mr. Jawad may only be tried by Courts-Martial or in a U.S. Federal District Court. He is precluded from facing trial by military commission because of his presumptive PW status.

**THE CHARGES AGAINST MR. JAWAD WERE DEFECTIVE AT  
PREFERRAL, MAKING ALL SUBSEQUENT ACTIONS WITHOUT LEGAL EFFECT**

As the Khadr court acknowledged, “jurisdiction of a military commission attaches at the swearing of charges”. (Rule for Military Commissions (RMC) 202(c)). However, if the allegations in the sworn charges are legally defective, then the preferral process is similarly defective and without legal effect. Unless something corrects this deficiency, then any action taken on the charge subsequently are defective and without legal effect. This includes any legal advice provided the Convening Authority and any action taken by the Convening Authority on those charges.

Charges sworn against a presumptively lawful combatant entitled to trial by Court-Martial – unless and until the presumption is duly rebutted by a competent tribunal – are a legal

nullity. The charges are facially defective – just as would be the case if the cases were sworn against a person who is, by definition, a US citizen (such as the president of the United States). The swearing of charges against an individual statutorily exempted from military commission jurisdiction – such as a presumptively lawful combatant – cannot create or effectuate jurisdiction. There is, under the MCA, no legislative authority for such jurisdiction. The swearing of charges against such an individual is, therefore, of no legal effect.

The charges sworn against Mr. Jawad are defective and therefore void because he a presumptively lawful combatant, that presumption never having been lawfully rebutted by a competent tribunal, in accordance with GWIII, AP I, Article 45 or the applicable DoD regulation, and as briefed above. Without this prerequisite jurisdictional requirement, the action taken pursuant to RMC 202 (c) is without legal effect. Consequently, any subsequent action, to include advice by the Convening Authority’s legal advisor and the referral are void and without legal effect.

**THIS COMMISSION MAY NOT SIT AS A “COMPETENT TRIBUNAL”**

The case against Mr. Mohammed Jawad is not properly before this commission. Nor is the defect in jurisdiction one that may be remedied by any action by this commission. This commission may not sit as a “competent tribunal” to conduct the necessary combatant status determination. This is so for three reasons, each of which is sufficient to dispose of the question.

First, the “competent tribunal” required under Article 5 of GC III and Article 45 of Protocol I must be composed of more than one person. A military commission judge, sitting alone, cannot, therefore, constitute a tribunal competent under the relevant law.<sup>9</sup>

---

<sup>9</sup> Both Army Regulation 190-8 and travaux for the Third Geneva Convention require a competent tribunal be comprised of more than one individual. Army Regulation 190-8 not only provides for a status determination by

**9. Conference with Opposing Counsel:** The defense has not conferred with opposing counsel on this motion.

  
By: MICHAEL SAWYERS  
Colonel, U.S. Army Judge Advocate General's Corps  
Office of the Chief Defense Counsel  
Office of Military Commissions  
1099 14<sup>th</sup> Street NW, Ste 2000E  
Washington, DC 20005  
(202) 761-0133, ext. 118



DEPUTY SECRETARY OF DEFENSE  
1010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1010

- 7 JUL 2004

MEMORANDUM FOR THE SECRETARY OF THE NAVY

**SUBJECT: Order Establishing Combatant Status Review Tribunal**

This Order applies only to foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba ("detainees").

*a. Enemy Combatant.* For purposes of this Order, the term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.

*b. Notice.* Within ten days after the date of this Order, all detainees shall be notified of the opportunity to contest designation as an enemy combatant in the proceeding described herein, of the opportunity to consult with and be assisted by a personal representative as described in paragraph (c), and of the right to seek a writ of habeas corpus in the courts of the United States.

*c. Personal Representative.* Each detainee shall be assigned a military officer, with the appropriate security clearance, as a personal representative for the purpose of assisting the detainee in connection with the review process described herein. The personal representative shall be afforded the opportunity to review any reasonably available information in the possession of the Department of Defense that may be relevant to a determination of the detainee's designation as an enemy combatant, including any records, determinations, or reports generated in connection with earlier determinations or reviews, and to consult with the detainee concerning that designation and any challenge thereto. The personal representative may share any information with the detainee, except for classified information, and may participate in the Tribunal proceedings as provided in paragraph (g)(4).

*d. Tribunals.* Within 30 days after the detainee's personal representative has been afforded the opportunity to review the reasonably available information in the possession of the Department of Defense and had an opportunity to consult with the detainee, a Tribunal shall be convened to review the detainee's status as an enemy combatant.

*e. Composition of Tribunal.* A Tribunal shall be composed of three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved in the apprehension.



detention, interrogation, or previous determination of status of the detainee. One of the members shall be a judge advocate. The senior member (in the grade of O-5 and above) shall serve as President of the Tribunal. Another non-voting officer, preferably a judge advocate, shall serve as the Recorder and shall not be a member of the Tribunal.

*f. Convening Authority.* The Convening Authority shall be designated by the Secretary of the Navy. The Convening Authority shall appoint each Tribunal and its members, and a personal representative for each detainee. The Secretary of the Navy, with the concurrence of the General Counsel of the Department of Defense, may issue instructions to implement this Order.

*g. Procedures.*

(1) The Recorder shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainee's designation as an enemy combatant.

(2) Members of the Tribunal and the Recorder shall be sworn. The Recorder shall be sworn first by the President of the Tribunal. The Recorder will then administer an oath, to faithfully and impartially perform their duties, to all members of the Tribunal to include the President.

(3) The record in each case shall consist of all the documentary evidence presented to the Tribunal, the Recorder's summary of all witness testimony, a written report of the Tribunal's decision, and a recording of the proceedings (except proceedings involving deliberation and voting by the members), which shall be preserved.

(4) The detainee shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members or testimony and other matters that would compromise national security if held in the presence of the detainee. The detainee's personal representative shall be allowed to attend all proceedings, except for proceedings involving deliberation and voting by the members of the Tribunal.

(5) The detainee shall be provided with an interpreter, if necessary.

(6) The detainee shall be advised at the beginning of the hearing of the nature of the proceedings and of the procedures accorded him in connection with the hearing.

(7) The Tribunal, through its Recorder, shall have access to and consider any reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any reasonably available records, determinations, or reports generated in connection therewith.

(8) The detainee shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. The Tribunal shall determine the

reasonable availability of witnesses. If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In the case of witnesses who are not reasonably available, written statements, preferably sworn, may be submitted and considered as evidence.

(9) The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issue before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances. The Tribunal does not have the authority to declassify or change the classification of any national security information it reviews.

(10) The detainee shall have a right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence.

(11) The detainee may not be compelled to testify before the Tribunal.

(12) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favor of the Government's evidence.

(13) The President of the Tribunal shall, without regard to any other provision of this Order, have authority and the duty to ensure that all proceedings of or in relation to the Tribunal under this Order shall comply with Executive Order 12958 regarding national security information.

*h. The Record.* The Recorder shall, to the maximum extent practicable, prepare the record of the Tribunal within three working days of the announcement of the Tribunal's decision. The record shall include those items described in paragraph (g)(3) above. The record will then be forwarded to the Staff Judge Advocate for the Convening Authority, who shall review the record for legal sufficiency and make a recommendation to the Convening Authority. The Convening Authority shall review the Tribunal's decision and, in accordance with this Order and any implementing instructions issued by the Secretary of the Navy, may return the record to the Tribunal for further proceedings or approve the decision and take appropriate action.

*i. Non-Enemy Combatant Determination.* If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, the written report of its decision shall be forwarded directly to the Secretary of Defense or his designee. The Secretary or his designee shall so advise the Secretary of State, in order to permit the Secretary of State to coordinate the transfer of the detainee for release to the detainee's

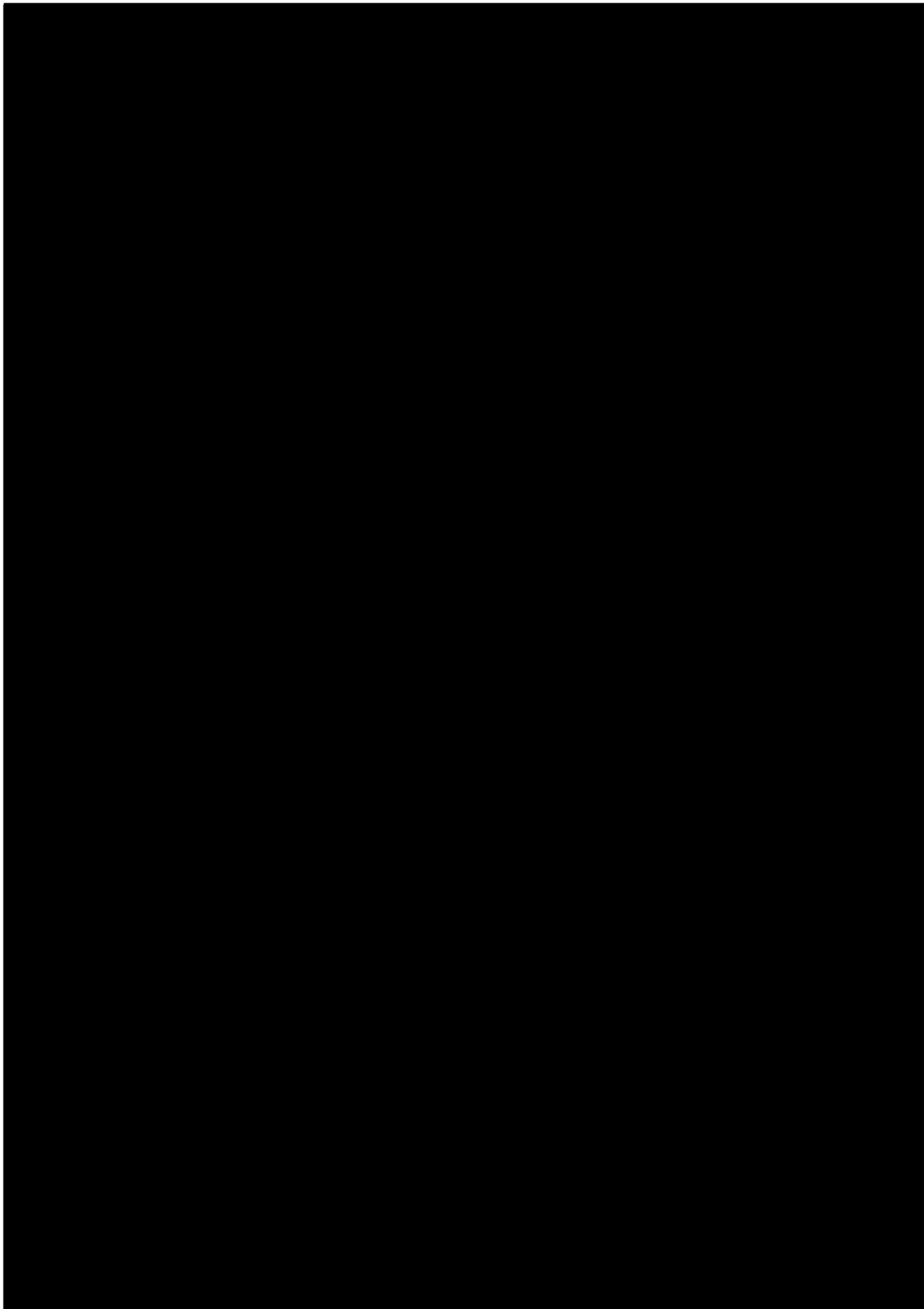
country of citizenship or other disposition consistent with domestic and international obligations and the foreign policy of the United States.

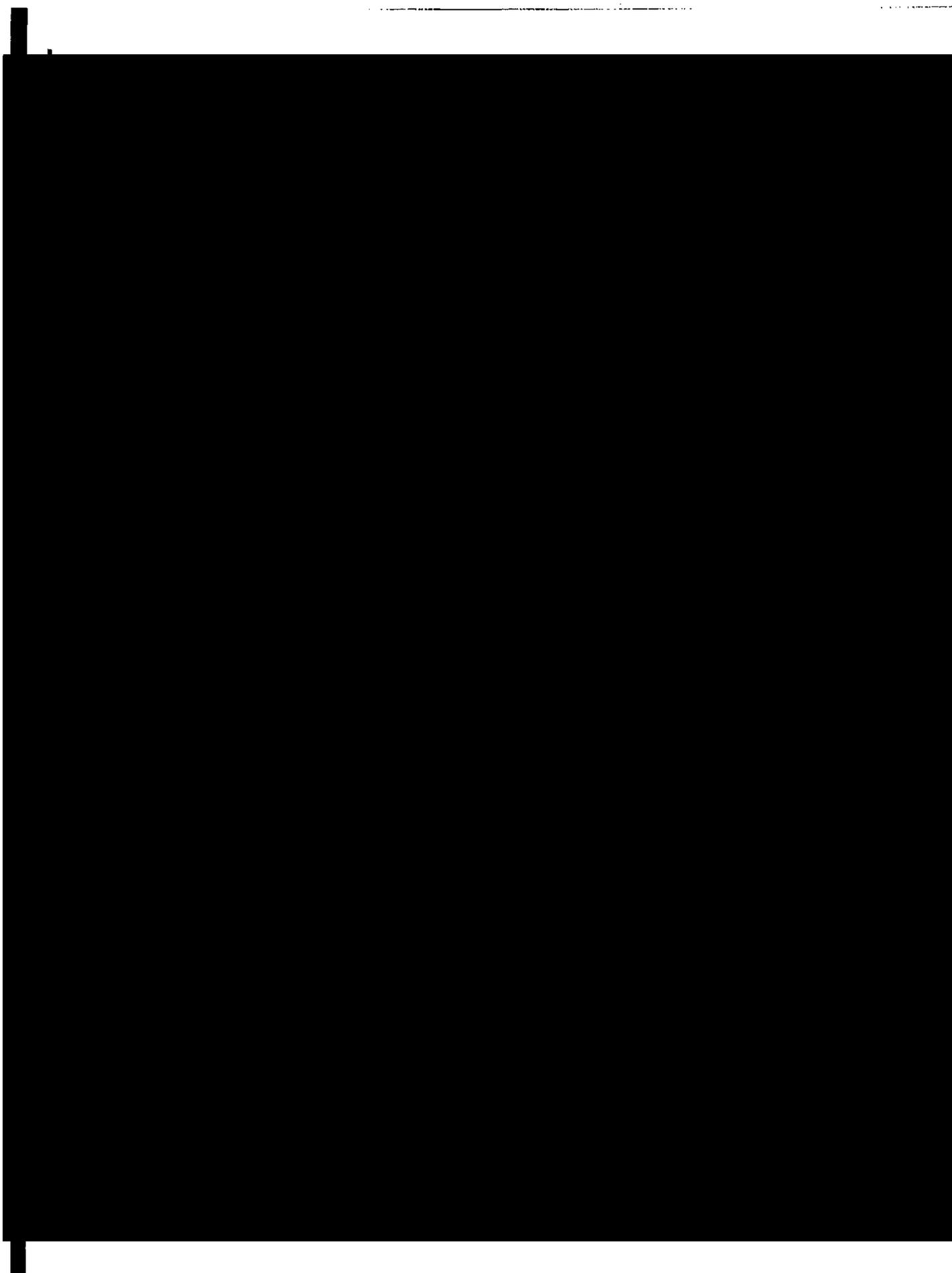
*j.* This Order is intended solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base, Cuba, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law, in equity, or otherwise by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

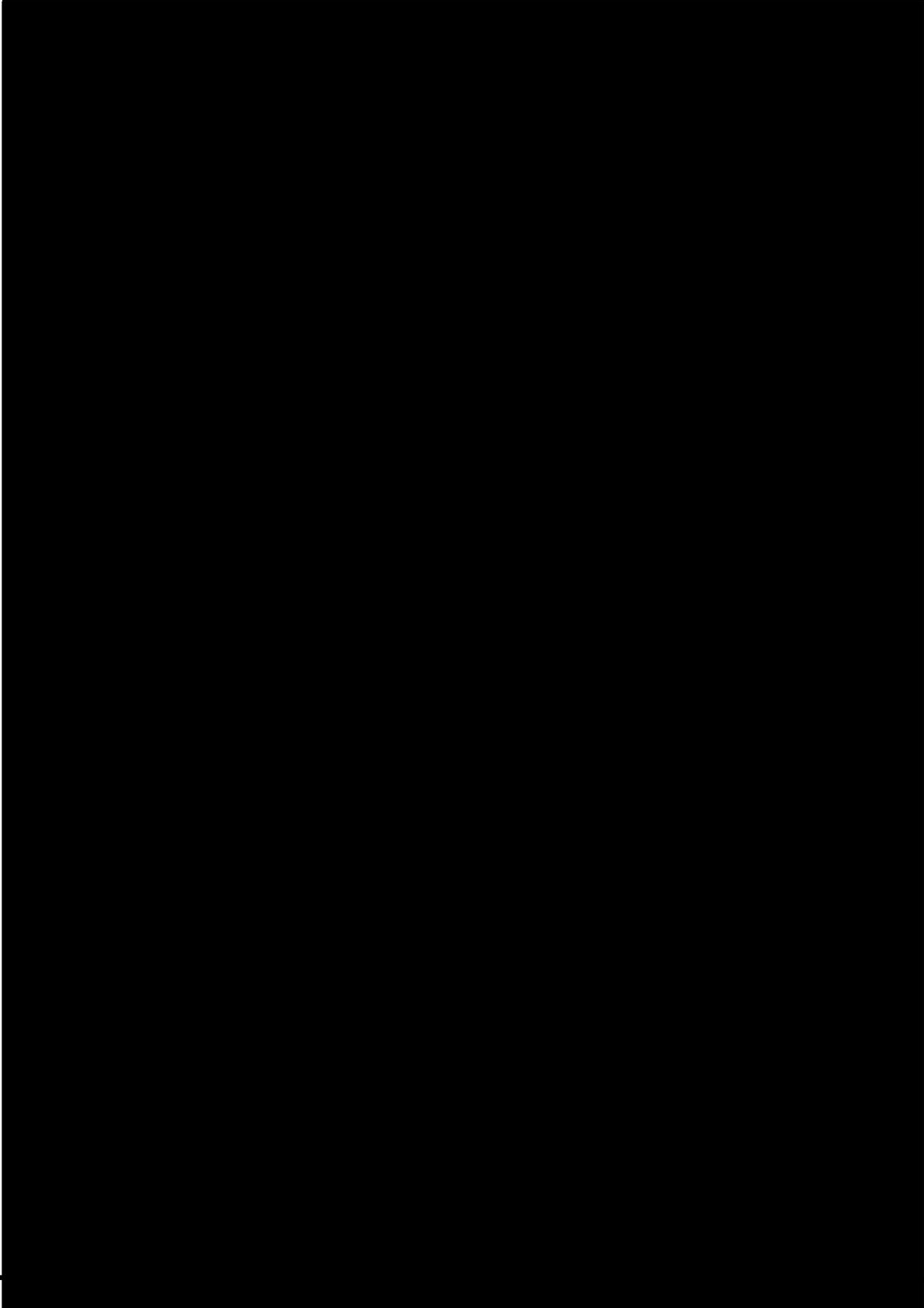
*k.* Nothing in this Order shall be construed to limit, impair, or otherwise affect the constitutional authority of the President as Commander in Chief or any authority granted by statute to the President or the Secretary of Defense.

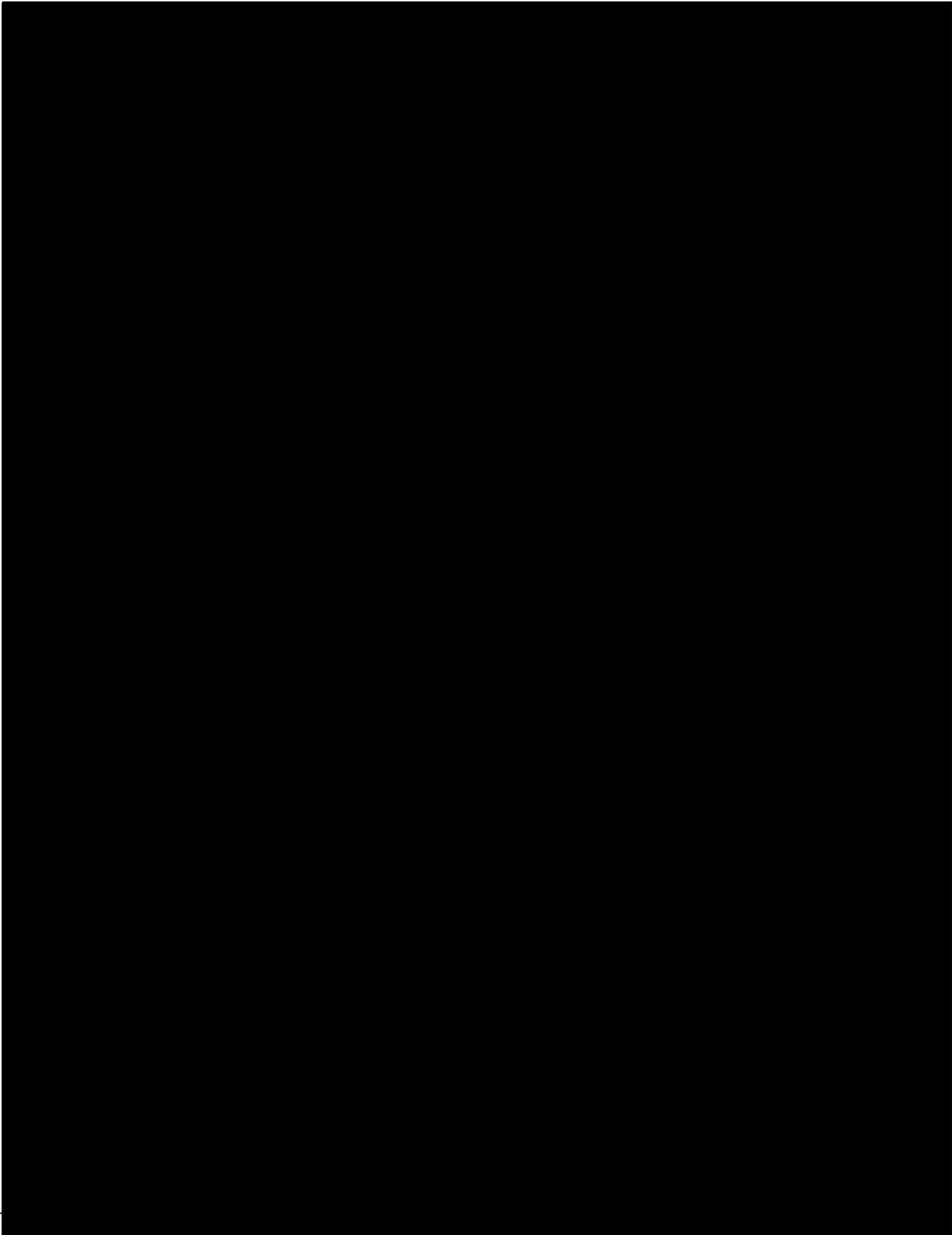
This Order is effective immediately.

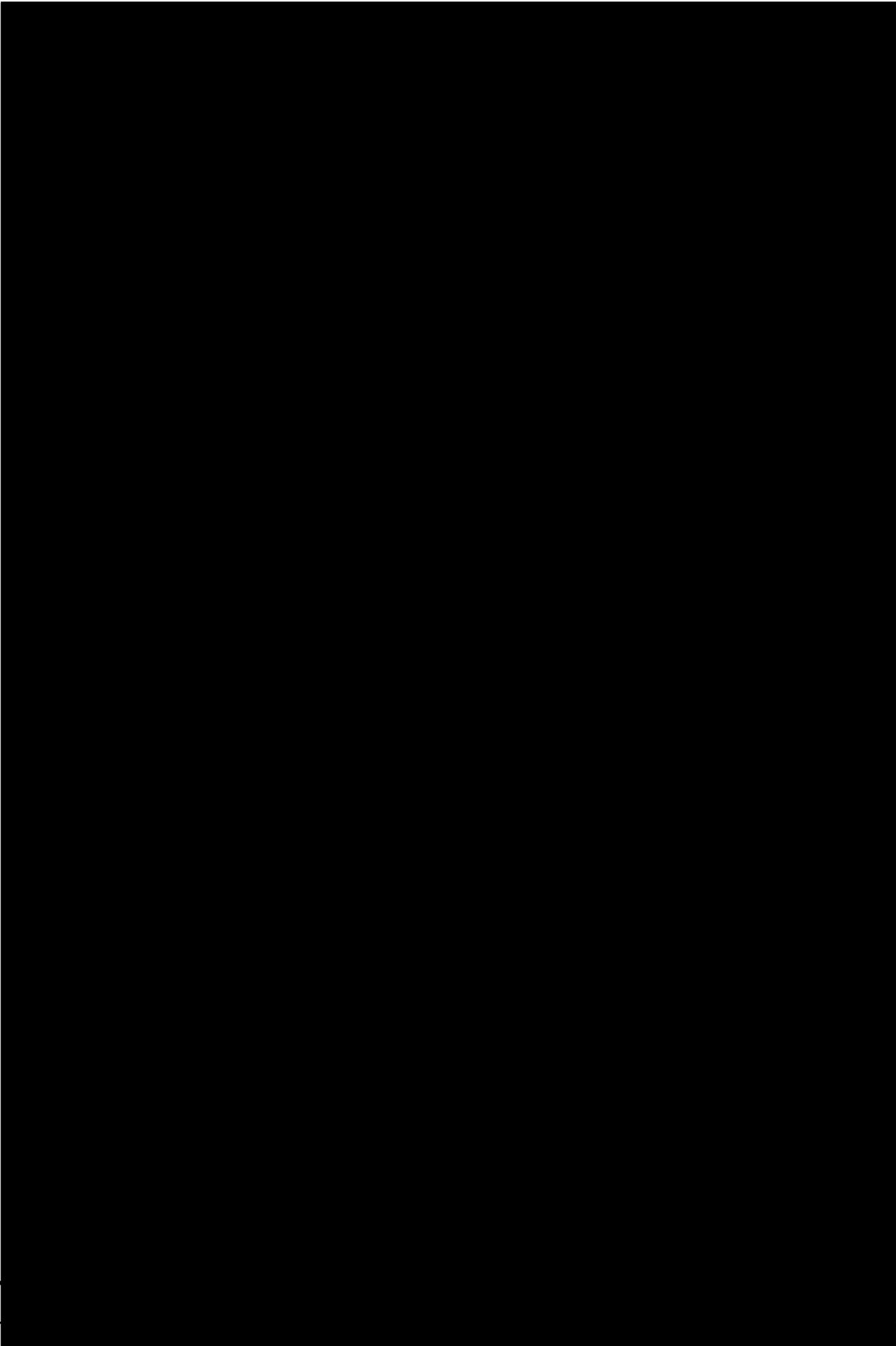
A handwritten signature in black ink, appearing to read "Paul Wolfowitz", is written over two horizontal lines. The signature is cursive and somewhat stylized.

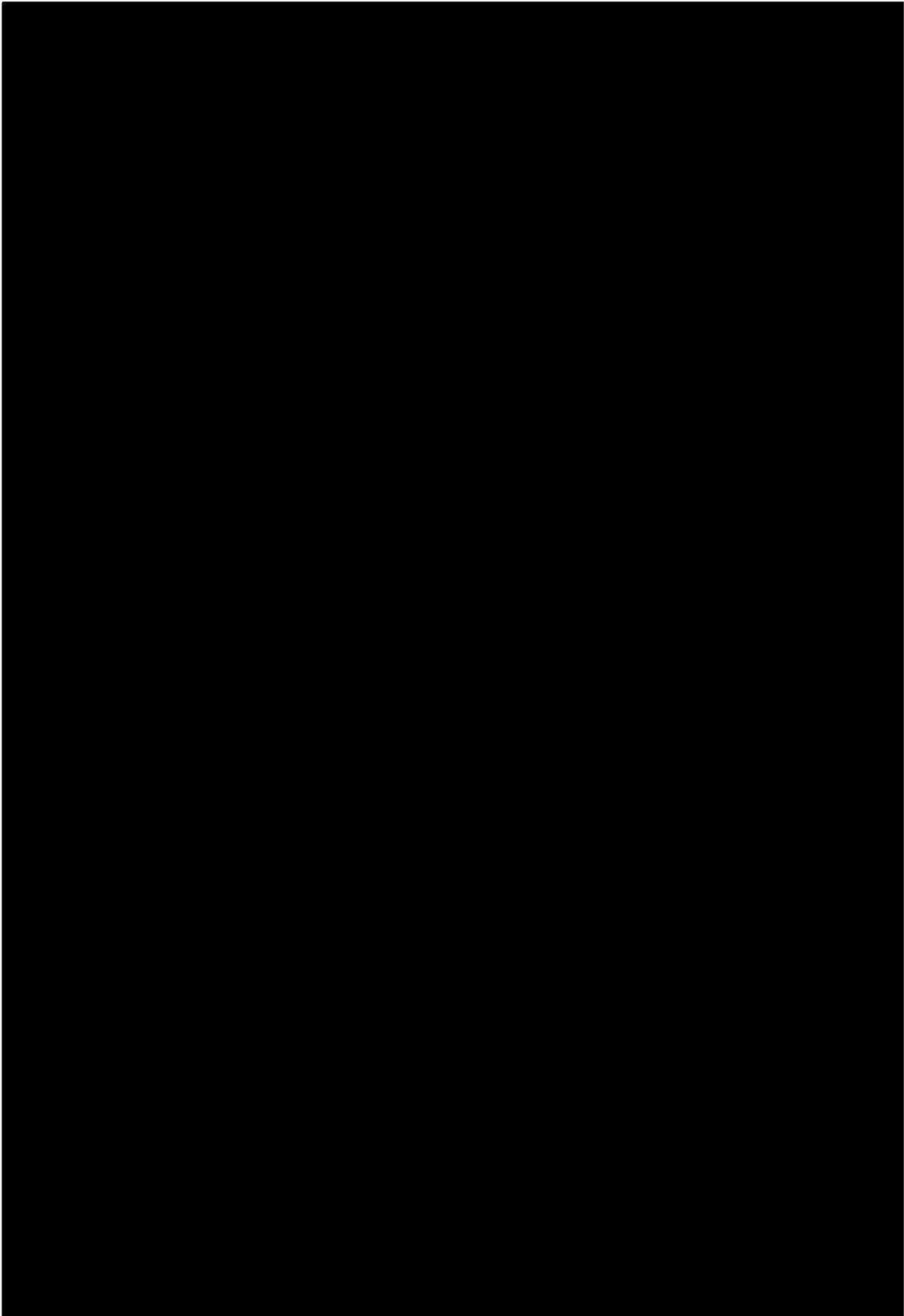


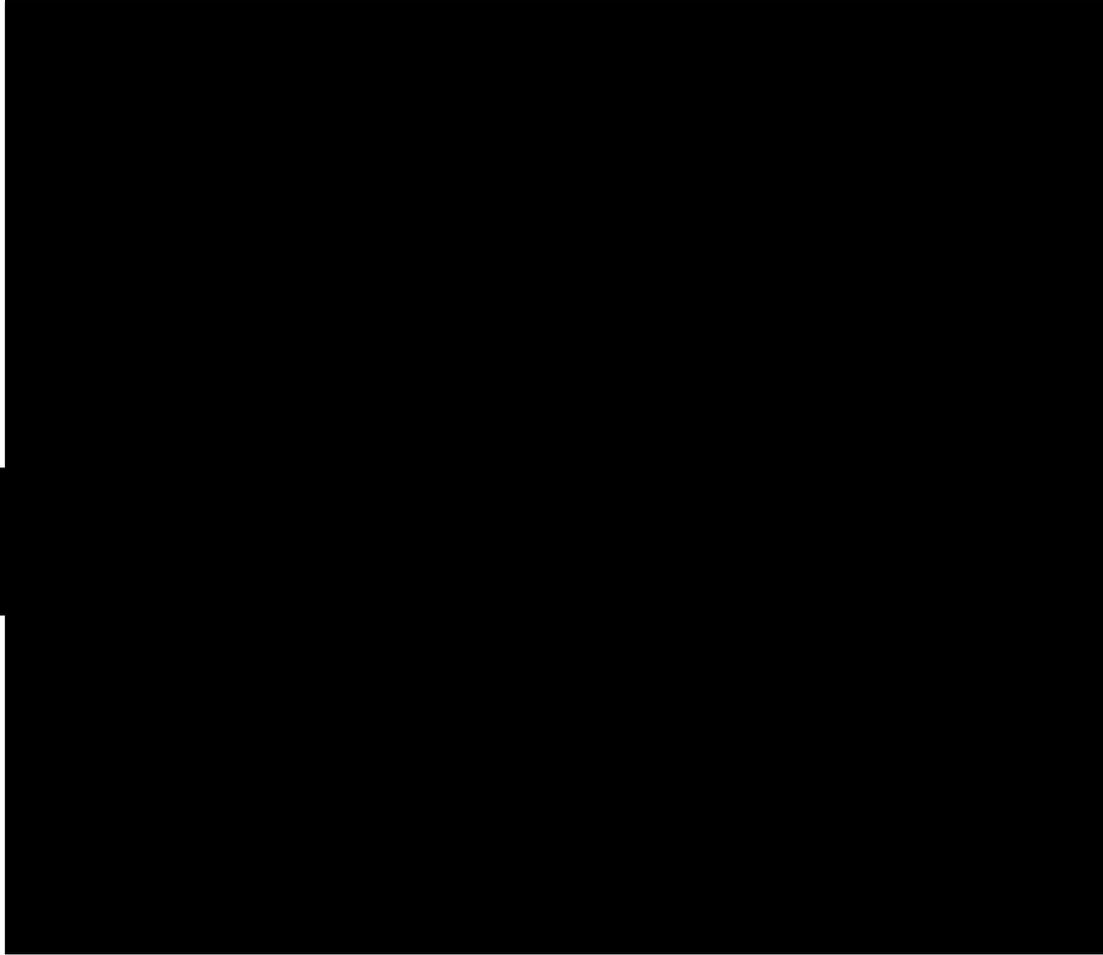




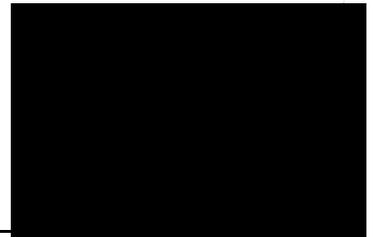








UNCLASSIFIED / FOUO



---

UNITED STATES OF AMERICA

**Government's Response**

v.

To the Defense's Motion to Dismiss  
for Lack of Personal Jurisdiction

MOHAMMED JAWAD

6 March 2008

---

1. **Timeliness:** This response is filed within the timelines established by the Military Commission Trial Judiciary Rules of Court.
2. **Relief Sought:** The Government respectfully submits that the Defense's motion to dismiss ("Def. Mot.")<sup>1</sup> should be denied.
3. **Overview:** The Defense's motion betrays its tripartite confusion as to the basis for jurisdiction in this case. First, this Military Commission's jurisdiction over Jawad is governed by the MCA—not international law. Second, even if international law is somehow relevant here, the process already provided to Jawad has more than satisfied it. Third, even if Jawad is due even more process than the superabundance he has already received, the Defense is wrong to argue that the Military Judge is "incompetent" to provide it. For any and all of these reasons, the Defense's motion must be denied.
4. **Burden of Proof:** Notwithstanding the Defense's confusion to the contrary, *see* Def. Mot. at 3, the Government bears the burden of establishing Jawad's status as an alien unlawful enemy combatant by a *preponderance of the evidence*. *See, e.g., United States v. Khadr*, CMCR No. 07-001, at 24-25 (Sept. 24, 2007); *United States v. Hamdan*,

---

<sup>1</sup> Although the Defense's motion is captioned "IN THE COURT OF MILITARY COMMISSION REVIEW," *see* Def. Mot. at 1, the Government assumes for purposes of this response that the Defense intends to litigate its motion before the Military Judge.

Ruling on Defense Motion for an Article 5 Status Determination, at 1 (CAPT Allred, Dec. 17, 2007); Rule for Military Commissions (“RMC”) 905(c)(1).

In *Khadr*, the CMCR emphatically stated—on three separate occasions—that the Government’s burden with respect to establishing personal jurisdiction before trial is governed by the “preponderance of the evidence” standard. *See Khadr*, CMCR No. 07-001, at 24 (citing RMC 905(c)(1), which provides that “the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence”); *id.* (citing “the long-standing history of military judges in general courts-martial finding jurisdictional facts by a preponderance of the evidence,” which applies to jurisdictional determinations under MCA § 948a(1)(A)(i)); *id.* at 25 (holding the Military Commission may “exercise . . . jurisdiction where ‘unlawful enemy combatant’ status has been established by a preponderance of the evidence”).

Against this unmistakable, thrice-repeated instruction, the Defense implicitly attempts to rely upon dicta—which the CMCR itself characterized as nothing more than part of the “legal backdrop” for status determinations in military commission proceedings—pertaining to RMC 916. *See Khadr*, CMCR 07-001, at 7. The Defense ignores, however, that Rule 916 governs *affirmative defenses*, which the accused may attempt to raise at trial to negate criminal liability on the merits. *See* RMC 916(a). A non-merits, jurisdictional challenge, by contrast, is governed by RMC 905(c), which specifically applies the “preponderance” standard “in the case of a motion to dismiss for lack of jurisdiction,” RMC 905(c)(2)(B). Moreover, the Rules expressly provide that satisfaction of this jurisdictional “preponderance” standard does not obviate the Government’s separate and subsequent burden at trial to rebut potential affirmative

defenses based on the accused's alleged status. *See* RMC 202(b), note, ¶ 1 (noting the “beyond a reasonable doubt” standard applies to affirmative defenses raised at trial). The Defense's attempt to conflate those distinct standards (and to front-load the heavier one) is directly belied by the Rules, and it finds no support in the CMCR's decision. Thus, under any faithful reading of the relevant authorities, the Government's burden upon a pretrial challenge to jurisdiction is governed by the “preponderance of the evidence” standard.

**5. Facts:**

A. On 17 December 2002, Mohammed Jawad threw a Soviet-manufactured hand grenade into a vehicle in which two U.S. Special Forces sergeants and their Afghan interpreter were riding. The victims had been driving through the streets of Kabul on a humanitarian mission. Jawad was dressed as an Afghan civilian, and he was approximately 18 years old at the time.<sup>2</sup>

B. Before throwing the grenade through the rear window of the vehicle in which the victims were riding, Jawad permitted other Coalition soldiers (including Turks and Germans) to pass by so that he could target Americans. During his subsequent interviews by Afghan and Coalition forces, Jawad admitted that he threw the grenade and boasted that, if given the chance, he would do so again.

C. The two Special Forces soldiers—one of whom almost bled to death—have endured dozens of surgeries and continue to suffer the effects of their wounds today. By contrast, photographs and medical examinations taken and conducted within hours

---

<sup>2</sup> Jawad has given conflicting accounts of his true age—sometimes claiming to be 19 years old, and sometimes claiming to be 17. A bone scan study later determined his age at the time of the attacks to be approximately 18 years old.

after Jawad's apprehension establish that he suffered no physical injuries before or after his capture.

D. The Special Forces unit appointed its battalion chaplain as a "human rights observer" to ensure that U.S. service members respected Jawad's rights at all times.

E. Jawad is currently detained at the U.S. Naval Station, Guantanamo Bay, Cuba.

**6. Law and Argument:**

**A. The MCA Provides the Only Applicable Law.**

As the CMCR's decision in *Khadr* made clear, jurisdiction in this case is governed by statute, specifically MCA § 948a(1)(A). Under the MCA and the CMCR's decision, the only jurisdictional question is whether Jawad, in fact, is an alien unlawful enemy combatant. And on that fundamental question, the Defense is—as it has been—silent.<sup>3</sup>

In *Khadr*, the CMCR held that charges sworn and referred in accordance with the MCA create prima facie jurisdiction for the Military Judge to determine his jurisdiction. *See Khadr*, CMCR No. 07-011, at 21. If the Military Judge determines whether Jawad is an alien unlawful enemy combatant under MCA § 948a(1)(A), then Jawad is statutorily barred from invoking the Geneva Conventions—including the Geneva Convention

---

<sup>3</sup> The Government, by contrast, stands ready to provide evidence that is more than sufficient to establish personal jurisdiction over Jawad under the MCA. For example, Jawad's Combatant Status Review Tribunal ("CSRT") has determined that he is an enemy combatant affiliated with an unlawful fighting force, thus satisfying the jurisdictional prerequisites established by MCA § 948a(1)(A)(ii). Moreover, even if the CSRT's finding is insufficient to establish jurisdiction, the record in this case will provide more than enough evidence for the Military Judge to make an independent determination that Jawad is an unlawful enemy combatant under MCA § 948a(1)(A)(i). *See Khadr*, CMCR No. 07-001, at 24-25.

Relative to the Treatment of Prisoners of War (“GPW”). *See* 10 U.S.C. § 948b(g).<sup>4</sup> If, on the other hand, the Military Judge determines that Jawad is *not* an alien unlawful enemy combatant, then this Court has no jurisdiction to do anything at all, including to hold a hearing under GPW Article 5. In either the event, the antecedent question—and

---

<sup>4</sup> A ruling that Jawad is an unlawful enemy combatant would also resolve the Defense’s bald assertion of so-called “combatant immunity.” It is a bedrock principle of international law that only a person who is a *lawful* combatant can assert combatant immunity as a defense to criminal charges. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 34 (1942) (quoting paragraph 351 of the U.S. Army *Rules of Land Warfare*: “men and bodies of men, who, without being lawful belligerents nevertheless commit hostile acts of any kind are not entitled to the privileges of prisoners of war if captured and may be tried by military commission and punished by death or lesser punishment”); *United States v. Lindh*, 212 F. Supp. 2d 541, 554 (E.D. Va. 2002) (quoting GPW arts. 87, 99: “it is generally accepted that [combatant] immunity can be invoked only by members of regular or irregular armed forces who fight on behalf of a state and comply with the requirements for lawful combatants”); Francis Lieber, *General Order No. 100: Instructions for the Government of the Armies of the United States In the Field* ¶¶ 56–57 (Apr. 24, 1863), *reprinted in Lieber’s Code and the Law of War* 45, 56 (Richard Shelly Hartigan ed., 1983) (confining immunity from punishment for acts committed during the course of hostilities to those entitled to the status of prisoners of war); Francis Lieber, *Guerilla Parties Considered with Reference to the Laws and Usages of War*, *reprinted in id.*, at 31, 41 (an unlawful combatant “is, of course, answerable for the commission of those acts to which the law of war grants no protection, and by which the soldier forfeits being treated as a prisoner of war if captured”); W. Winthrop, *Military Law and Precedents*, at 783–84 ¶ 1220 (reprint 1920) (persons “not being within the protection of the laws of war” can be “treated as criminals and outlaws not entitled, upon capture to be held as prisoners of war, but liable to be shot, imprisoned or banished”); U.S. Army Field Manual 27-10, at 34 ¶ 81 (“[P]ersons who, without having complied with the conditions prescribed by the laws of war for recognition as belligerents . . . commit hostile acts about or behind the lines of the enemy are not to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.”).

Moreover, it bears noting that the CMC has suggested in dicta that combatant immunity is an affirmative defense. *See Khadr*, CMC No. 07-011, at 7; *see also Lindh*, 212 F. Supp. 2d at 557-58; *but see* RMC 916 (enumerating “defenses” that may be raised at trial before a military commission but omitting “combatant immunity”). To the extent that combatant immunity is an affirmative defense, it must be properly raised and proved to the commission members at trial—not before it. *See, e.g., United States v. Hibbard*, 58 M.J. 71 (C.A.A.F. 2003); *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000); *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995); *United States v. Simmelkjaer*, 40 C.M.R. 118, 122 (C.M.A. 1969). And to properly raise an affirmative defense at trial, the Defense will have to do more than baldly assert it, as the Defense has here. *See, e.g., United States v. Bailey*, 444 U.S. 394, 415 (1980); *United States v. Tokash*, 282 F.3d 962, 967 (7th Cir. 2002) (requiring a defendant, as a prerequisite to submitting an affirmative defense to the jury, to present “‘more than a scintilla of evidence’ that demonstrates that he can satisfy the legal requirements for asserting the proposed defense”); *United States v. Caban*, 173 F.3d 89, 95 (2d Cir. 1999) (same); *United States v. Posada-Rios*, 158 F.3d 832, 873 (5th Cir. 1998) (same); *United States v. Montgomery*, 772 F.2d 733, 736 (11th Cir. 1985) (“[I]n order to have [an affirmative] defense submitted to a jury, a defendant must first produce or proffer evidence sufficient to prove the essential elements of the defense.”); *see also Lindh*, 212 F. Supp. 2d at 557–58 & n.36 (noting that a defendant bears the threshold burden of demonstrating that he is entitled to a lawful combatant immunity defense).

the only one properly before the Military Judge—is whether Jawad is an alien unlawful enemy combatant under the MCA. *See Khadr*, CMCR No. 07-011, at 21.

Against this ineluctable conclusion, the Defense attempts to distinguish the CMCR’s *Khadr* decision by claiming that it does not apply to a “presumed lawful combatant.” Def. Mot. at 2. The *Khadr* court made very clear, however, that prima facie jurisdiction exists where the charge sheet exhibits “*facial compliance* . . . with all of the pre-referral criteria contained in the Rules for Military Commissions.” *Khadr*, CMCR No. 07-011, at 21 (emphasis added). The Defense does not dispute that Jawad’s charge sheet exhibits “facial compliance” with the RMCs,<sup>5</sup> and it therefore effectively concedes that this case is governed by *Khadr*. The Defense’s bald assertion of “combatant immunity” (*see* footnote 4, *supra*)—made five months after charges were sworn<sup>6</sup> in this case and more than one month after the Convening Authority referred them for trial before this Military Commission—does not change the undeniable fact that the Government facially complied with the MCA when charges were sworn in October 2007 and referred in January 2008.

Instead of addressing the MCA’s statutory prerequisites for jurisdiction, the Defense invokes (albeit only vaguely) the protections afforded to prisoners of war

---

<sup>5</sup> Nor *could* the Defense dispute that Jawad’s charge sheet exhibits such facial compliance. The charge sheet in this case—like the one in *Khadr*—documents each of the relevant steps necessary to establish jurisdiction. *See Khadr*, CMCR No. 07-011, at 21. The CMCR’s “facial compliance” standard would preclude the swearing or referral of charges against, for example, a “*lawful enemy combatant*.” But absent such a misstep or other defect *on the face* of the charge sheet (as opposed to the face of Jawad’s motion), prima facie jurisdiction exists here (as it did in *Khadr*).

<sup>6</sup> Charges are “sworn” in military commissions—they are not “preferred.” *Compare* Rule for Military Commissions 202(c), *with* Rules for Courts-Martial 202(c)(2) & 307. The Defense’s confused and repeated use of the latter term, *see* Def. Mot. at 2-3, further underscores its misunderstanding of the basis for jurisdiction before military commissions.

(“POWs”) under GPW. The Defense, however, offers *nothing*—in the form of either legal citation or factual argument—to justify the applicability of Article 5 in this case.

In relevant part, Article 5 provides that:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

6 U.S.T. 3316, 3324. The Defense, however, has not even asserted which of the categories enumerated in Article 4 allegedly apply to Jawad, much less done anything to substantiate that applicability. While the “any doubt” standard may not be a high one, it surely requires more than block-quoting the Convention. *See* Def. Mot. at 4. An *ipse dixit* “argument” is not an argument at all. *Cf. United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002) (“[I]t is [the accused] who bears the burden of establishing the affirmative defense that he is entitled to lawful combatant immunity . . . . On this point, [the accused] has not carried his burden; indeed, he has made no persuasive showing at all on this point.”); *Kane v. Gonzales*, 236 Fed. Appx. 178, 179 n.1 (6th Cir. 2006) (court need not consider petitioner’s “*ipse dixit*” invocation of the Convention Against Torture).<sup>7</sup>

---

<sup>7</sup> Just as GPW is inapplicable here, so too is the Additional Protocol I to the Geneva Conventions. The United States refused to ratify Additional Protocol I because it would have extended the protections of the Geneva Conventions to certain terrorists and associated unlawful combatants who flout its strictures. As President Reagan explained:

We must not, and need not, give recognition and protection to terrorist groups as the price for progress in humanitarian law. . . . The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.

President Ronald Reagan, Letter of Transmittal to the Senate of Protocol II additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977 (Jan. 29, 1987). It would be the height of irony if Jawad could circumvent the statutory scheme that the United States has created to govern claims by accused terrorists by invoking a treaty provision that the United States has emphatically rejected.

**B. Even if Jawad is Entitled to an Article 5 Hearing, the CSRT Already Provided It.**

As explained above, jurisdiction in this case is governed by the MCA—not international law. Assuming *arguendo*, however, that the Defense’s blanket invocation of “POW status” is sufficient to require an Article 5 hearing, Jawad’s CSRT has already provided one. *See* Def. Mot. Encl. 2 (Jawad’s CSRT record).

The CSRT was patterned after the “competent tribunal” described in Article 5 and Army Regulation 190-8 (cited favorably in *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion)), but the CSRT provides even more process than the Geneva Conventions require. In Senator Lindsey Graham’s words, CSRTs are “Geneva Convention article 5 tribunals on steroids.” 151 Cong. Rec. S12,754 (daily ed. Nov. 14, 2005). Indeed, in the wake of the Supreme Court’s decision in *Hamdan*, Senator Graham discussed the bipartisan consensus behind the CSRT and its satisfaction of Article 5:

SEN. GRAHAM: Okay, now, so we have a CSRT procedure that Senator Levin and myself and others worked on that deals with determining enemy combatant status. That is a noncriminal procedure that is designed to comply with . . . Article 5 of the Geneva Convention, a competent tribunal. Does everyone at the panel believe that the CSRT procedures . . . , as constituted, meet[] the test of what the Geneva Convention had in mind in determining status?

GEN. ROMIG: Yes, sir.

GEN. BLACK: Yes, sir.

SEN. GRAHAM: Affirmative response from all the witnesses.

Not only does it meet the test; I’m quite proud of it. Now, because of people like yourselves, it’s gotten better over time. . . . Now, we did something unprecedented, the Detainee Treatment Act. Not only did we put in place the CSRT . . . procedure that would comply with Geneva Convention status determination/competent tribunal standards; we also allowed civilian review of those decisions for the first time.

Do all of you agree that has strengthened the procedures?

GEN. ROMIG: Absolutely.

SEN. GRAHAM: Affirmative response from all concerned.

Hearings Before the Senate Committee on Armed Services, *Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld*, S. Hrg. 109-881, at 62-63 (July 13, 2006); *see also* 152 Cong. Rec. S10,267 (Sept. 27, 2006) (statement of Sen. Graham) (“I am of the opinion that the Combat Status Review Tribunal . . . is fully compliant with article 5 of the Geneva Conventions.”). During the floor debate on the MCA, Senator Kyl echoed the point:

The CSRT process is modeled on and closely tracks the Article 5 hearings conducted under the Geneva Conventions. . . . [U]nder the Geneva Conventions, Article 5 hearings are given to detainees only when there is substantial doubt as to their status. In all American wars, only a small percentage of detainees have ever been given Article 5 hearings. Yet at Guantanamo, we have given a CSRT hearing to every detainee who has been brought there. And finally, it bears emphasis that *the CSRT gives unlawful enemy combatants even more procedural protections than the Geneva Conventions’ Article 5 hearing give[s] to lawful enemy combatants.*

*Id.* at S10,268 (emphasis added); *see also* 151 Cong. Rec. S12,652, S12,656 (daily ed. Nov. 10, 2005) (statement of Sen. Graham) (“[W]e have created an enemy combat status review that goes well beyond the Geneva Conventions requirements to detain someone as an enemy combatant.”); *id.* at S12,753 (The protections afforded by the CSRT process “go[] well beyond the Geneva Convention”).

An evaluation of the CSRT proceedings reveals just how robust they are. At a CSRT hearing, a detainee is entitled to call reasonably available witnesses, to question other witnesses, to testify or otherwise address the tribunal, and not to testify if he so chose. A detainee is additionally entitled to a decision, by the preponderance of the

evidence, by commissioned officers sworn to execute their duties impartially, and to review by the Staff Judge Advocate for legal sufficiency. *See* Memorandum from Gordon England, Secretary of the Navy, Regarding the Implementation of CSRT Procedures for Enemy Combatants Detained at Guantanamo (July 29, 2004), *available at* [www.defenselink.mil/news/Jul2004/d20040730comb.pdf](http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf).<sup>8</sup> In addition, unlike an Article 5 or Army Regulation 190-8 tribunal, the CSRT guarantees Jawad the right to have a personal representative for assistance in preparing his case, the right to receive an unclassified summary of the evidence before the hearing, and the right to introduce relevant documentary evidence. Finally, and far in excess of the protections enjoyed by anyone in the history of warfare, Jawad is entitled to the robust review of his CSRT determination in federal court. *See Bismullah v. Gates*, 501 F.3d 178, *reh'g denied*, 503 F.3d 137 (D.C. Cir. 2007), *reh'g en banc denied*, --- F.3d ---, 2008 WL 269001 (D.C. Cir. Feb. 1, 2008).

The Defense cannot—and, indeed, has not even attempted to—dispute that the CSRT process satisfies Article 5, even assuming Jawad is entitled to its protections.

**C. Even if the CSRT Does Not Satisfy Article 5, the Military Judge Himself Unquestionably Does.**

The Defense's suggestion that Jawad is entitled to *additional* procedural protections, over and above the unprecedented ones he has already received, is untenable. But even if it were true that Article 5 requires something more than a CSRT, the Military Judge himself may provide it.

---

<sup>8</sup> After Jawad's CSRT, the Department of Defense amended the CSRT regulations. *See* Memorandum from Gordon England, Secretary of the Navy, Regarding the Implementation of CSRT Procedures for Enemy Combatants Detained at Guantanamo (July 14, 2006), *available at* [www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf](http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf).

As noted above, the CMCR has emphasized that a military judge could satisfy international law—to the extent it applies at all and is not already satisfied—by entertaining a claim of POW status during a pretrial motion session. *See Khadr*, CMCR No. 07-011, at 25 & n.38. The court concluded that by doing so, the military judge could satisfy Additional Protocol I to the Geneva Conventions, *see id.* at n.38, which provides *even more* protections than the United States is obligated to provide. *See supra* note 7. It follows *a fortiori* that a military judge could satisfy Article 5 by entertaining a POW challenge at a pretrial motion session.

The CMCR’s decision accords with the history of Article 5. The GPW’s drafters viewed a tribunal established to determine criminal sanctions for enemy combatants as the gold standard for “competent tribunals.” Indeed, the Conventions’ drafters considered requiring that status be determined under Article 5 by the same “military tribunal” qualified to mete out criminal punishment for war crimes. *See International Committee of the Red Cross, III Commentaries on the Geneva Conventions* at 77 (J. Pictet, gen. ed. 1960). Negotiators ultimately decided to adopt the more flexible term “competent tribunal,” but harbored no doubt that a military commission convened for imposing criminal sanctions would meet that standard. *See id.*

Consideration of the policy underlying Article 5 makes this proposition even clearer. The phrase “competent tribunal” was designed to take important status decisions out of the hands of an officer in the field of battle, “often of subordinate rank,” and to invest those determinations in a tribunal with specified procedures and controlled by an officer of higher rank. *See ICRC, III Commentaries*, at 77. A military judge presiding over a military commission certainly satisfies that standard. Under the MCA, the

presiding military judge must be a commissioned officer of the armed forces, a lawyer admitted to the bar of a Federal court or highest court of a state, and certified “as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.” *See* 10 U.S.C. § 948j(b). The Rules for Military Commissions further require that the judge have at least two years’ experience as a judge for general courts martial, *see* RMC 503(b)(1), and the military judge is statutorily protected from adverse personnel action due to his performance as a military judge, *see* 10 U.S.C. § 948j(f).

Accordingly, even if Jawad were entitled to an Article 5 hearing—which he is not—and even if it were true that Article 5 requires something more than a CSRT—which, again, it is not—the Military Judge would still be “competent” to adjudicate Jawad’s POW status claim. The Defense offers no credible argument to the contrary. Therefore, the motion must be denied.

7. **Oral Argument:** The Government does not believe oral argument is necessary to deny the Defense’s motion. To the extent the Defense has requested oral argument, however, the Government will be prepared to present its case to the Military Judge.

8. **Witnesses:** The Government does not believe that witness testimony is necessary to deny the Defense’s motion. To the extent, however, that this Court decides to hear evidence on this motion, the Government respectfully requests the opportunity to call witnesses.

9. **Conference:** Not applicable.

10. **Additional Information:** None.

Respectfully submitted,



DARREL J. VANDEVELD  
LTC, JA, USAR  
Lead Prosecutor



ISAAC SPRAGG  
CPT, JA, USA  
Assistant Prosecutor

UNITED STATES OF AMERICA  v.  Mohammed Jawad	<b>D001 Defense Motion to Dismiss for Lack of Personal Jurisdiction AMENDED August 1, 2008</b>
--	--

1. **Timeliness:** At the 7 May 2008 hearing, with the military commission's permission, the defense withdrew the original D001 (filed by predecessor detailed counsel COL Sawyers, whose representation was never accepted by Mr. Jawad), reserving the right to file an amended version of the motion at a later time. Jurisdictional challenges may be raised "at any stage of the proceedings." Rule for Military Commission (R.M.C.) 907 (b)(1). Therefore, this motion is timely.

2. **Relief Sought:** Dismissal of all Charges and Specifications against Mr. Jawad.

3. **Overview:** The present motion to dismiss for lack of personal jurisdiction is brought pursuant to R.M.C. 907 (b)(1)(a). The swearing of charges against Mohammed Jawad for trial by military commission was legally invalid. The preferral of charges in the present case, consequently, was jurisdictionally defective. This commission therefore lacks *in personam* jurisdiction over Mohammed Jawad.

At the time the charges for trial by military commission were sworn against Mohammed Jawad, Mr. Jawad was, as a matter of binding legal presumption, a presumptively lawful combatant (and he remains so still). A combatant held in the control of enemy forces is legally presumed to be a lawful combatant.<sup>1</sup> That presumption may be rebutted only through a determination of unlawful combatant status by a competent tribunal composed of more than one

---

<sup>1</sup> The third Geneva Convention concerning the Treatment of Prisoners of War (GCIII) and Additional Protocol I (AP1), Article 45(1).

person. In the case of Mohammed Jawad, no competent-tribunal determination rebutting lawful combatant status has been made. At the time that charges were sworn against Mr. Jawad, and jurisdiction purportedly attached, he was, as he still remains, legally presumed to be a lawful combatant.

The Military Commissions Act of 2006 (MCA) provides (as the law of war requires) that, "Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants." MCA § 948d (b). Therefore, as a person presumed by the law to be a lawful combatant, Mr. Jawad was statutorily excluded from military commission jurisdiction at the time when charges were sworn against him. The charges sworn against Mohammed Jawad, consequently, do not and, as a matter of law, could not effectuate jurisdiction. The defect in the charges preferred is jurisdictional. Charges sworn purporting to effectuate, under the MCA, jurisdiction expressly *prohibited* by the MCA are a nullity and without legal effect. The charges sworn against, Mr. Jawad, therefore, did not—and could not, as a matter of law—cause military commission jurisdiction to attach.

The issue raised by the present motion is separate and distinct from the issues addressed by the Court of Military Commission's Review (CMCR) in the case of *United States v. Khadr*, CMCR 2007-01 (2007). Jurisdictional defect in the preferral of charges was not at issue in *Khadr*. The issue of defective preferral, raised in the present motion, was not raised, briefed, or decided in the *Khadr* case, nor has it been decided in any subsequent decision of the CMCR or military commission. The jurisdictional defect in the charges preferred against Mohammed Jawad, therefore, presents a question of first impression for this commission.

#### **4. Burden and Standard of Proof:**

According to Judge Allred in *U.S. v. Hamdan*,  
BURDEN OF PROOF

Having read the written briefs of both parties, and carefully reviewed the authorities cited in each, the Commission concludes that the burden upon the Government in an initial showing of jurisdiction is preponderance of the evidence. RMC 905(c)(1); *United States v. Khadr*, (CMCR 07-001, 24, 25). At trial, if the accused raises a affirmative defense, such as the defense of lawful combatancy, the Government will be required to disprove that defense beyond a reasonable doubt. RMC 916(b). *United States v. Khadr*, at 7. Thus, the burden of demonstrating that the accused is subject to the jurisdiction of this Commission is on the Government, by a preponderance of the evidence.

*U.S. v. Hamdan, Ruling on Defense Motion for Article 5 Status Determination, 17 December 2007.*

#### **5. Facts:**

i. Mohammad Jawad was arrested by Afghan police on 17 December 2002. At the time of his arrest, Mr. Jawad was either 16 or 17 years of age. Mr. Jawad was accused of throwing a grenade into a passing vehicle driving through the streets of Kabul, Afghanistan, injuring two American Special Forces soldiers and a local national hired to act as their interpreter. After 6 to 7 hours of interrogation by Afghan Police and the Afghan Interior Ministry, Mr. Jawad was turned over to American authorities at about 2300 that evening. The following day, 18 December 2002, he was taken to Bagram Prison, where he was held approximately 6 February 2003. On February 6, 2003, Mr. Jawad was shipped to Guantanamo Bay, Cuba.

ii. On October 19, 2004, almost two years after his capture, a Combatant Status Review Tribunal<sup>2</sup> determined, based on Mr. Jawad's alleged act of throwing a grenade, that he was an

---

<sup>2</sup> The defense does not concede that CSRTs are legally adequate forums to make such determinations, and indeed, the Supreme Court has recently suggested that they are not. "Although we make no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards, we agree with petitioners that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact." *Boumediene v. U.S.*, 553 U.S. \_\_\_\_ (2008) p.56 of slip opinion, available at <http://www.supremecourtus.gov/opinions/07pdf/06-1195.pdf> The defense reserves the right to contest that Mr. Jawad was an enemy combatant, but will assume *arguendo* that he is.

“enemy combatant.” (At no time has any tribunal addressed the question of lawful versus unlawful combatant status relative to Mr. Jawad.)

iii. On October 9, 2007, charges were preferred against Mr. Jawad accusing him of three specifications of attempted murder in violation of the law of war and three specification of intentionally causing grievous bodily harm in violation of the law of war (the latter charge and specifications were dismissed on 19 June 2008). Charges were referred for trial by military commission on 30 January 2008.

## **6. Law and Argument:**

### **MR. JAWAD IS A PRESUMED TO BE A LAWFUL COMBATANT**

The core safeguard for all POW rights under the law of war turns on a presumption. A combatant who is detained by the enemy is legally presumed to be a lawful combatant. A lawful combatant—or presumptively lawful combatant—who is detained by the enemy is entitled to be treated as a POW unless and until he is determined, through a specified legal procedure, to lack that status.<sup>3</sup>

The one procedure through which the presumption of entitlement to POW rights may be rebutted is a determination, made by a “competent tribunal,” that the person does not come within the criteria for lawful combatant status. Article 5 of the POW Convention thus states:

The present Convention shall apply to the persons referred to in Article 4 [defining “lawful combatant”] from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. (Emphasis added)

---

<sup>3</sup> See POW Convention, art. 5; Protocol I, art. 45(1).

The legal presumption of lawful combatant status, and the competent tribunal determination as the sole means for rebutting that presumption, are reiterated in Article 45(1) of Protocol I Additional to the Geneva Conventions of 1949 (Protocol I). Article 45(1) provides:

A person who takes part in hostilities and falls into the power of an adverse Party *shall be presumed to be a prisoner of war*, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, *or* if he appears to be entitled to such status, *or* if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.<sup>4</sup>

The legal presumption of lawful combatant status, and the bright-line rule that the presumption may be rebutted only by an article-5 competent tribunal, is explicitly adopted and implemented in Army Regulation 190-8 (AR 190-8), which provides:

#### **1-6. Tribunals**

*a.* In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

*b.* A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

---

<sup>4</sup> Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 45(1), Dec. 7, 1978, 1125 U.N.T.S. 3 [*hereinafter* "Protocol I"].

The U.S., which is not a party to Protocol I, has been explicit in stating that the provisions of Article 45 embody binding, customary international law of war, and are adopted and endorsed as such by the United States. *See, e.g.,* Michael Matheson, *The US Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks before Session One of the Humanitarian Law Conference*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987) (stating, in his official capacity as Deputy Legal Adviser, US State Department that, "We do support the principle that, should any doubt arise as to whether a person is entitled to [lawful] combatant status, he be so treated until his status has been determined by a competent tribunal.")

AR 190-8 was jointly promulgated by the Headquarters of the departments of the Army, Navy, Air Force, and Marine Corps on October 1, 1997. The regulation explicitly states that its purpose is to implement international law as set forth in the GPW:

This regulation implements international law, both customary and codified, relating to EPW [enemy prisoners of war], RP [retained personnel], CI [civilian internees], and ODs [other detainees], which includes those persons held during military operations other than war. The principal treaties relevant to this regulation are: . . . (3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW).<sup>5</sup>

International law, U.S. law, U.S. military regulations, and longstanding U.S. policy could not be clearer: A combatant detained by the enemy must be accorded treatment as a lawful combatant unless and until the presumption of lawful combatant status is rebutted through a contrary determination by an article-5 competent tribunal.

The primary goal motivating the promulgation of the article-5 competent tribunal requirement, in 1949, was to establish a system in which combatant status determinations would be made by a tribunal of several people rather than by an individual decision maker.<sup>6</sup> Like the other features of article 5, the requirement that an article 5 tribunal be composed of more than one person is implemented in AR 190-8, which states that a competent tribunal for the determination of combatant status shall be "composed of three commissioned officers."<sup>7</sup>

#### **THE MILITARY COMMISSIONS ACT PROHIBITS THE ATTACHMENT OF MILITARY COMMISSION JURISDICTION TO A LAWFUL COMBATANT**

The criteria for lawful combatant status are delineated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (POW Convention).<sup>8</sup> A combatant

---

<sup>5</sup>AR 190-8 § 1-1(b).

<sup>6</sup> See COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR .

<sup>7</sup> US Army Regulation 190-8, ch. 1, § 1-6(c).

<sup>8</sup> POW Convention, art. 4.

who falls within those criteria is a lawful combatant. A lawful combatant who is detained by the enemy is entitled to POW rights.

Among the rights afforded to POWs is the right, in case of criminal prosecution, to be tried “by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power. . . .”<sup>9</sup> Faithful to the POW Convention, the MCA provides that lawful enemy combatants held by the US may be prosecuted only before the same courts—courts-martial—as US service members would be. Accordingly, the MCA provides that the military commissions established under the Act shall have jurisdiction only over *unlawful* combatants.<sup>10</sup>

The MCA could not be clearer on this point. The MCA states that its purpose is to establish, “procedures governing the use of military commissions to try alien *unlawful* enemy combatants. . . .”<sup>11</sup> And the Act 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. . . .”<sup>12</sup> In an abundance of clarity, the Act further states that, “military commissions under this chapter shall *not* have jurisdiction over *lawful* enemy combatants.”<sup>13</sup> Rather, “[l]awful enemy combatants who violate the law of war are subject to [courts-martial].”<sup>14</sup>

#### **THE SWEARING AND PREFERRAL OF CHARGES AGAINST MR. JAWAD WERE JURISDICTIONALLY DEFECTIVE**

---

<sup>9</sup> POW Convention, *supra* note 14, art. 102.

<sup>10</sup> 10 U.S.C. § 948d(a).

<sup>11</sup> *Id.* § 948b(a).

<sup>12</sup> *Id.* § 948d(a).

<sup>13</sup> *Id.* § 948d(b).

<sup>14</sup> *Id.*

By law, then, a detained combatant is presumed to be a *lawful* combatant, and must be treated as a lawful combatant, unless and until that presumption is rebutted by a contrary determination by an article-5 competent tribunal. And the MCA is utterly clear that, “military commissions under this chapter shall not have jurisdiction over lawful enemy combatants.”<sup>15</sup> Rule for Military Commission (RMC) 202(c) states: “The jurisdiction of a military commission over an individual attaches upon the swearing of charges.”<sup>16</sup>

Since military commission jurisdiction may not lawfully attach to a lawful combatant under the MCA, charges for trial by military commission may not lawfully be sworn against a detainee—and military commission jurisdiction thereby attached—unless and until his presumptive status as a lawful combatant has been rebutted by an article-5 competent tribunal. The charges preferred against Mohammed Jawad, therefore, were invalid when sworn and are jurisdictionally defective.

This jurisdictional defect in the preferral of charges, raised in the present motion, has not been addressed by the CMCR or by another military commission but, rather, comes to this commission as a question of first impression. In *Khadr*, the CMCR concluded that,

The unambiguous language of the M.C.A., in conjunction with a clear and compelling line of federal precedent on the issue of establishing jurisdiction in federal courts, convince us the military judge possessed the independent authority to decide [whether the defendant was an unlawful enemy combatant for purposes of establishing the military commission’s initial jurisdiction to try him]. “[A] federal court always has jurisdiction to determine its own jurisdiction.” *United States v. Ruiz*, 536 U.S. 622, 627 (2002). A military commission is no different. See R.M.C. 201(b)(3) (“A military commission always has jurisdiction to determine whether it has jurisdiction.”).

Pursuant to that ruling of the CMCR in *Khadr*, this military commission is now called upon to determine its own jurisdiction in deciding the present motion to dismiss for lack of

---

<sup>15</sup> *Id.* § 948d(b).

<sup>16</sup> RMC 202(c).

personal jurisdiction. In reaching a holding on the present motion, the commission must, as always, apply the law to the facts. The law is that: 1) a detainee is presumed, by law, to be a lawful combatant unless a contrary status determination has been made by an article-5 competent tribunal; 2) military commission jurisdiction may not attach to a lawful combatant; and 3) military commission jurisdiction attaches upon the swearing of charges. The fact is that no combatant status determination rebutting the legal presumption of lawful combatant status had been made by an article-5 competent tribunal at the time when charges were sworn against Mohammed Jawad, and none has been made to date. Applying the law to the present facts leads inevitably to a finding that: 1) Mohammed Jawad is presumed, as a matter of law, to be a lawful combatant, because there has been no contrary status determination by an article-5 competent tribunal to rebut that presumptive status; 2) military commission jurisdiction may not attach to Mohammed Jawad, because he is legally presumed to be a lawful combatant; and, 3) the swearing of charges against Mohammed Jawad cannot effectuate attachment of military commission jurisdiction to Mohammed Jawad because the attachment of such jurisdiction is barred by statute. For these reasons, this commission is constrained, in fulfilling its duty lawfully to determine its own jurisdiction in deciding the motion before it, to hold that personal jurisdiction over Mohammed Jawad is lacking because the preferral of charges in this case was jurisdictionally defective.

RMC 905(b) governs motions concerning defective preferral of charges. The rule states:

(b) *Pre-trial motions*. . . . The following must be raised before a plea is entered:

(1) Defenses or objections based on defects (*other than jurisdictional defects*) in the *preferral*, forwarding, investigation, or referral of charges;

**Discussion**

Such nonjurisdictional defects include unsworn charges and inadequate pre-trial advice.

(2) Defenses or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to charge an offense, which objections shall be resolved by the military judge at any time during the pendency of the proceedings).<sup>17</sup>

As indicated in RMC 905(b), a defect in the preferral of charges may be jurisdictional or nonjurisdictional. If a defect in the swearing of charges is nonjurisdictional, then military commission jurisdiction is effectuated by that swearing of charges, notwithstanding the (nonjurisdictional) defect. By contrast, if a defect in the swearing of charges *is* jurisdictional, then military commission is *not* effectuated by that swearing of charges. As an example of a *non-jurisdictional* defect in preferred charges, the RMC Discussion note offers, “unsworn charges.” (The RMC does not offer an example of a defect in the preferral of charges that *would* be jurisdictional.) Preferral of charges for trial by military commission against a person in a category statutorily *excluded* from military commission jurisdiction is a prime example of a *jurisdictional* defect in preferral. A person presumed, as a matter of law, to be a lawful combatant is a person statutorily excluded from military commission jurisdiction. The MCA plainly states: “Military commissions under this chapter *shall not have jurisdiction over lawful enemy combatants.*”<sup>18</sup>

Charges sworn against a presumptively lawful combatant entitled to trial by Court-Martial – unless and until the presumption is duly rebutted by a competent tribunal – are a legal nullity. The charges sworn against Mohammed Jawad are facially jurisdictionally defective – just as would be the case if the cases were sworn against a US citizen. The swearing of charges against an individual statutorily exempted from military commission jurisdiction – such as a presumptively lawful combatant – cannot create or effectuate jurisdiction.

---

<sup>17</sup> RMC 905(b) (emphasis added) (internal references omitted).

<sup>18</sup> 10 U.S.C. § 948d(b).

No intervening action, by the convening authority or otherwise, has cured—or could cure—the jurisdictional defect in the charges preferred in this case. A detained enemy combatant remains a presumptively lawful combatant—over whom military commission jurisdiction *may not attach* under the MCA—unless and until the presumption of lawful combatant status is rebutted by an article-5 competent tribunal. In the absence of such a competent-tribunal determination, the accused is legally presumed to be a lawful combatant over whom, the MCA explicitly states, military commission jurisdiction is not authorized under the statute.

The charges in the present case were jurisdictionally defective when preferred, having been preferred against a person legally presumed to be a lawful enemy combatant—in direct violation of the MCA’s explicit prohibition. The preferral of charges in this case exceeded the authority conferred by Congress in the MCA; indeed, the charges were sworn outside the jurisdictional limitation expressly articulated in the statute. The charges preferred, lacking legislative authorization (having been sworn outside the scope of the legislative authority conferred by Congress in the Military Commissions Act of 2006), are jurisdictionally defective and without legal effect.

### **THIS COMMISSION MAY NOT SIT AS A “COMPETENT TRIBUNAL”**

The jurisdictional defect in the preferral of charges in the present case cannot be remedied by any action by this commission. This commission may not sit as a “competent tribunal” to conduct the necessary combatant status determination. This is so for two reasons, each sufficient to dispose of the question.

First, the “competent tribunal” required under Article 5 of GC III and Article 45 of Protocol I must be composed of more than one person. A military commission judge, sitting alone, cannot, therefore, constitute a tribunal competent under the relevant law.<sup>19</sup>

The second reason that this commission cannot sit as an article-5 competent tribunal relates to a critical safeguard for POW rights—specifically, to POW protections relating to criminal trials. Because POWs have the right to be tried only “in the same courts and by the same procedures as would apply to a member of the armed forces of the detaining state”<sup>20</sup> (as reflected in the MCA’s exclusion of lawful combatants from military commission jurisdiction) as well as other important rights relating to criminal prosecutions, the determination of combatant status is especially crucial for a detainee who is to stand trial. In light of the heightened significance of the status determination in that circumstance, the law of war provides that, if a detainee who has been determined by a competent tribunal to lack POW status is to stand trial for a crime arising from the hostilities, he is entitled to assert POW status and to have the question adjudicated *de novo*, in a procedure conducted with full judicial process.<sup>21</sup> The law of war thus requires a two-tiered status determination system for cases where a detained combatant *who is not held as a POW* is to be tried for an offense arising out of the hostilities. The MCA, as we shall see, when properly interpreted places responsibility for the *de novo* adjudication of combatant status with the military commission. In so doing, the MCA precludes the military

---

<sup>19</sup> *See, supra.* Both Army Regulation 190-8 and travaux for the Third Geneva Convention require a competent tribunal be comprised of more than one individual. Army Regulation 190-8 not only provides for a status determination by competent tribunal, but also goes further to define a “competent tribunal” as “composed of three commissioned officers,” (paragraph 1-6(c)). Similarly, the working documents or travaux preparatoires containing the state negotiations of GCIII describe the delegates’ concern that a competent tribunal must be comprised of more than one individual. (*See* Final Record of the Diplomatic Conference of Geneva of 1949, 270 -71 (1949).

<sup>20</sup> GCIII, art. 102.

<sup>21</sup> *See* Protocol I, art. 45.

commission from making the article-5 competent tribunal determination of status in the first instance.

This two-tiered system of combatant status determination is codified in Article 45 of Protocol I Additional to the Geneva Conventions of 1949 (Protocol I). The first paragraph of Article 45 reiterates and elaborates upon the core safeguards articulated in Article 5 of the POW Convention—the presumption of lawful combatant status, and the rule permitting that presumption to be rebutted only through a contrary status determination by an article-5 competent tribunal. The second paragraph of Article 45 articulates the additional safeguard for a detainee who is “not held as a prisoner of war” and is to be “tried for an offense arising out of the hostilities”—the right to a *de novo* status adjudication before a judicial tribunal:

If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a *judicial tribunal* and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence.<sup>22</sup>

That detainee—whom Article 45(2) specifies is “not held as a prisoner of war”—is, necessarily, either one who does not claim POW status or one who has been determined *by a competent tribunal* to lack POW status. A detainee who claims POW status, as we have seen, may lawfully be held as a *non-POW only if and when* a competent tribunal has found him to lack lawful combatant status.<sup>23</sup> Consequently, the person, referred to in Article 45(2)—who *asserts* entitlement to POW status, but is “not held as a [POW]”—is, necessarily, a person who has *already* been found, by a competent tribunal, to lack lawful combatant status and the right to be

<sup>22</sup> *Id.*, art. 45(2) (emphasis added).

<sup>23</sup> The term “unlawful combatant” does not appear in the Geneva Conventions. It is used here to refer, simply, to a combatant who does not come within the criteria for lawful combatant status. As shall be discussed below, the criteria defining “lawful combatant” status under the MCA are narrower than those of the POW Convention. The difference in criteria is not relevant for immediate purposes, but will be delineated as they become relevant, below.

held as a POW. A person in *that* situation, Article 45(2) provides, if he is to be tried for an offense arising out of the hostilities, “shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated.” The Article 45(2) status adjudication, therefore, is necessarily a separate proceeding, conducted subsequent to the competent tribunal determination that initially overcame the presumption of lawful combatant status and thereby permitted the detainee to be “not held as a POW.”

The US has long endorsed the two-tiered status determination procedure codified in Article 45(2) of Protocol I as a binding feature of the customary international law of war, and has advocated its recognition and enforcement. Protocol I was negotiated in the wake of the severe mistreatment of US soldiers who were wrongfully denied POW status and summarily convicted as war criminals in North Vietnam. “North Vietnam,” Howard Levie has written, “stated, in effect, that it would regard captured Americans as ‘pirates,’ people who have destroyed the property and massacred the population of the Democratic Republic of Vietnam, as major war criminals caught *in flagrante delicto* and liable for judgment in accordance with the laws of the Democratic Republic of Vietnam.”<sup>24</sup> In the light of that experience and analogous evasions of POW rights in the Korean war, Article 45(2) was promulgated, with US support and leadership, to strengthen POW protections by entitling a detainee to a public, judicial proceeding to determine combatant status—*de novo*—before that person could be tried for war crimes without POW rights at trial.<sup>25</sup> Ambassador George Aldrich, head of the US delegation in the negotiation of Protocol I, recalls:

---

<sup>24</sup> Howard S. Levie, *The US Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks before Session One of the Humanitarian Law Conference*, 2 AM. U. J. INT’L L. & POL’Y 533, 535 (1987).

<sup>25</sup> See George H. Aldrich, *Editorial Comments: The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 898 (2002)

[P]aragraph 2 of Article 45 of Protocol I . . . establishes a separate right of any person who has fallen into the power of an adverse party that intends to try him for an offense arising out of the hostilities to have his entitlement to POW status determined by a judicial tribunal. When that text was negotiated, the United States government was painfully aware of the experiences in Korea and Vietnam, where many American military personnel were mistreated by their captors and denied POW status by mere allegations that they were all criminals.<sup>26 27</sup>

Because the US opposed some of the provisions of Protocol I as it was ultimately adopted, the US did not become a party to the treaty. Yet there were certain provisions that the US not only supported, but viewed as crucially important. The US, therefore, in 1987, identified and endorsed specific provisions of Protocol I as customary international law, and urged other states also to recognize those provisions as binding.<sup>28</sup>

Article 45 of Protocol I featured prominently among the provisions that the United States so endorsed. Delineating the US position on Protocol I, Michael Matheson, then-Deputy State Department Legal Adviser, unequivocally articulated the United States' endorsement of: the presumption of entitlement to POW rights for all combatants held by the enemy; the requirement that the presumption remain in force unless a contrary status determination is made by a competent tribunal; and, the right to a subsequent judicial adjudication of combatant status where an individual who is held as a non-POW is to be tried for crimes arising from the hostilities.<sup>29</sup>

As he stated:

We do support the principle that, should any doubt arise as to whether a person is entitled to [lawful] combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner of war and is to be tried for an offense arising out of the hostilities, he should have the right to assert his entitlement to prisoner-of-war status before a

---

<sup>26</sup> George H. Aldrich, *Comments on the Geneva Protocols*, 320 INT'L REV. RED CROSS 508-10 (1997), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JNV2>.

<sup>27</sup> Aldrich, *supra* note 25, at 898 [internal citations omitted].

<sup>28</sup> See Michael Matheson, *The US Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks before Session One of the Humanitarian Law Conference*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987).

<sup>29</sup> *Id.* at 419-26.

judicial tribunal and to have that question adjudicated. Those principles are found in Article 45.<sup>30</sup>

State Department Legal Adviser Abraham Sofaer elaborated: “We therefore intend to consult with our allies to develop appropriate methods for incorporating these provisions . . . into rules that govern our military operations . . . .”<sup>31</sup> The US military has, indeed, incorporated the provisions of Article 45 into its regulations and operational guidelines<sup>32</sup> and has identified those provisions as reflecting customary international law.<sup>33</sup> The opinion of the CMCR in *Khadr*, too, notes that the rights embodied in Article 45 form part of the customary international law of war.<sup>34</sup>

In sum, under the international law of war—recognized and endorsed as such by the US—a combatant held by enemy forces is presumed to be a lawful combatant from the time he is taken into captivity. That presumption of lawful combatant status may be rebutted only through a determination of unlawful combatant status by an article-5 competent tribunal composed of more than one person. A combatant who is held as a non-POW and is to be tried for crimes arising from the hostilities has the right to assert POW status and to have a judicial adjudication of combatant status, separate and distinct from the status determination earlier

---

<sup>30</sup> *Id.* at 425–26.

<sup>31</sup> Abraham Sofaer, *The US Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 471 (1987).

<sup>32</sup> See, e.g., ARMY REGULATION 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES § § 1-1(b), 1-6 (1 Oct 1997)(stating that pursuant to the purpose of “customary international law, both customary and codified relating to [Enemy Prisoners of War]” that “a competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in the aid of enemy forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists”); DEPARTMENT OF THE NAVY, NWP 1-14M: THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 11-3 (1995), available at [http://lawofwar.org/naval\\_warfare\\_publication\\_N-114M.htm](http://lawofwar.org/naval_warfare_publication_N-114M.htm), (“Should a question arise regarding a captive’s entitlement to prisoner of war status, that individual should be accorded prisoner-of-war treatment until a competent tribunal convened by the captor determines the status to which that person is properly entitled. Individuals captured . . . as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated.”).

<sup>33</sup> See, e.g., JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK, JA 422 at 18-2 (1997); JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK, Ch. 2 (2002).

<sup>34</sup> *United States v. Khadr*, CMCR 07-001, 24 n. 38 (2007).

made by a competent tribunal. That body of law governing combatant status determination procedures constitutes a bedrock component of the customary international law of war—a component that is the foundational safeguard for all POW protections.

The MCA, properly interpreted, delineates a jurisdictional structure fully consistent with these requirements of the law of war. Consistent with the legal presumption of lawful combatant status embodied in Article 5 of the POW Convention and Article 45(1) of Protocol I, the MCA contemplates a competent tribunal determination rebutting the presumption of lawful combatant status before the valid preferral of charges and the resultant attachment of military commission jurisdiction. And, as required by Article 45(2), the MCA makes provision for a detainee, held as a non-POW, who is to be tried for an offense arising out of the hostilities, to receive a *de novo*, judicial adjudication of status—by the military commission—if he asserts POW status in a motion challenging personal jurisdiction. The MCA, thus interpreted, is internally consistent and fully in keeping with the two-tiered status determination system required by the law of war.

Fundamental canons of statutory interpretation require that the MCA be so interpreted. The Supreme Court stated in the *Charming Betsy* case that, “An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>35</sup> The Court has reiterated repeatedly, in the two centuries since deciding *Charming Betsy*, that statutory ambiguity should be resolved consistently with international law, when that is possible.<sup>36</sup> The CMCR, in its *Khadr* decision, cites and reiterates the *Charming Betsy* canon.<sup>37</sup>

The military commission must stand ready, under the law of war and the MCA, to provide the *de novo*, judicial adjudication of status entailed in article 45(2), for a detainee who is

---

<sup>35</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>36</sup> *See, e.g., F. Hoffman-La Roche, Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953).

<sup>37</sup> *Khadr*, CMCR 07-001, 24 n. 38.

not held as a POW – but asserts POW status – and is to be tried for a crime arising out of the hostilities. Clearly, then, the military commission cannot conduct the article-5 competent tribunal status determination. A military commission could hardly provide the required *de novo* adjudication of combatant status if the commission had, itself, made the administrative determination of combatant status in the first instance.

## CONCLUSION

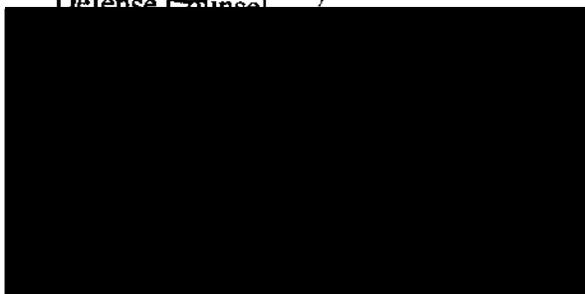
The MCA categorically states, “Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants.” MCA § 948 d(b). The Act of Congress establishing this military commission imparts to the commission its legal authority—its jurisdiction. The Act, in conveying that judicial authority, clearly defines the parameters of those powers. The exercise of jurisdiction over a person presumed by the law to be a lawful combatant is not within the powers conveyed to this commission by Congress. Not only did Congress not convey to military commissions jurisdiction over lawful combatants, but it expressly prohibited such an exercise of jurisdiction. In so doing, Congress supported and upheld the legal framework that safeguards POW protections. A purported exercise of such jurisdiction by this commission would be *ultra vires*.

7. **Request for Oral Argument:** The defense request oral argument.
8. **Request for Witnesses:** Professor Madeline Morris (the defense has requested Professor Morris be appointed by the Convening Authority as an expert consultant and witness).
9. **Conference with Opposing Counsel:** Based on the government’s response to the original D-001, it is clear that the Government opposes the motion and the relief sought.

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

Respectfully submitted,

  
By: DAVID J. R. FRAKT, Major, USAFR  
Defense Counsel



UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

**Government Response  
to  
AMENDED Defense Motion (D-001)**

to

**Dismiss  
for Lack of Personal Jurisdiction**

**8 Aug 2008**

**1. Timeliness:** This response is timely filed.

**2. Relief Sought:** The Government respectfully submits that Mr. Jawad's motion be denied.

**3. Overview:** The Defense's amended motion continues to betray its tripartite confusion as to the basis for jurisdiction in this case.<sup>1</sup> First, this Military Commission's jurisdiction over Mr. Jawad is governed by the MCA -- not international law. Second, even if international law is somehow relevant here, the process already provided to Mr. Jawad has more than satisfied it. Third, even if Mr. Jawad is due even more process than the superabundance he has already received, Mr. Jawad is wrong to argue that the Military Judge is "incompetent" to provide it. For any and all of these reasons, Mr. Jawad's motion must be denied.

**3. Burden of Proof:** The Government bears the burden of establishing Mr. Jawad's status as an alien unlawful enemy combatant by a preponderance of the evidence.

**4. Facts:**

i. Disagree: Mr. Jawad's age has never been established conclusively. A bone scan study conducted on 26 October 2003 showed Jawad's age on that date to be approximately 18 years old; medical authorities conducted the study after Jawad claimed to be nineteen years of age at the time.<sup>2</sup>

---

<sup>1</sup> The Defense contends that its re-working of its now-withdrawn motion "presents an issue of first impression" is wrong, as explained below.

<sup>2</sup> Mr. Jawad has given conflicting accounts of his true age, sometimes claiming to be 19 years old, and sometimes claiming to be 17 years old. A bone scan study later determined his age at the time of the attacks to be approximately 18 years old.

ii. Agree

iii. Disagree: Charges have been sworn and referred against Mr. Jawad.

## 5. Law and Argument:

### A. The MCA Provides the Only Applicable Law

As the CMCR's decision in *Khadr* made clear, jurisdiction in this case is governed by statute, specifically MCA 948a(1)(A). Under the MCA and the CMCR's decision, the only jurisdictional question is whether Mr. Jawad, in fact, is an alien unlawful enemy combatant. And on that fundamental question, the Defense is, as it has been, silent.<sup>3</sup>

In *Khadr*, the CMCR held that charges sworn and referred in accordance with the MCA create prima facie jurisdiction for the Military Judge to determine his jurisdiction. *See Khadr*, CMCR No. 07-011, at 21. If the Military Judge determines whether Mr. Jawad is an alien unlawful enemy combatant under MCA 948a(1)(A), then Mr. Jawad is statutorily barred from invoking the Geneva Conventions, including the Geneva Convention Relative to the Treatment of Prisoners of War ("GPW"). *See* 10 USC 948b(g).<sup>4</sup> If, on the other hand, the Military Judge determines that Mr. Jawad is not an

---

<sup>3</sup> The Government, by contrast, stands ready to provide evidence that is more than sufficient to establish personal jurisdiction over Mr. Jawad under the MCA. For example, Mr. Jawad's Combatant Status Review Tribunal (CSRT) has determined that he is an enemy combatant affiliated with an unlawful fighting force, thus satisfying the jurisdictional prerequisites established by MCA 948a(1)(A)(ii). Moreover, even if the CSRT's finding is insufficient to establish jurisdiction, the record in this case will provide more than enough evidence for the Military Judge to make an independent determination that Mr. Jawad is an unlawful enemy combatant under MCA 948a(1)(A)(i). *See Khadr*, CMCR No. 07-001, at 24-25.

<sup>4</sup> A ruling that Mr. Jawad is an unlawful enemy combatant would also resolve Mr. Jawad's bald assertion of so-called "combatant immunity." It is a bedrock principle of international law that only a person who is a lawful combatant can assert combatant immunity as a defense to criminal charges. *See e.g., Ex parte Quirin*, 317 U.S. 1, 34 (1942) (quoting paragraph 351 of the U.S. Army *Rules of Land Warfare*: "men and bodies of men, who, without being lawful belligerents nevertheless commit hostile acts of any kind are not entitled to the privileges of prisoners of war if captured and may be tried by military commissions and punished by death or lesser punishment"); *United States v. Lindh*, 212, F. Supp. 2d 541, 544 (E.D. Va. 2002) (quoting GPW arts. 87, 99: "it is generally accepted that [combatant] immunity can be invoked only by members of regular or irregular armed forces who fight on behalf of a state and comply with the requirements for lawful combatants"); Francis Lieber, *General Order No. 100: Instructions for the Government of the Armies of the United States in the Field* 56-57 (Apr 24 1863), reprinted in *Lieber's Code and the Law of War* 45,56 (Richard Shelly Hartigan ed., 1983) (confining immunity from punishment for acts committed during the course of hostilities to those entitled to the status of prisoners of war); Francis Lieber, *Guerilla Parties Considered with Reference to the Laws and Usages of War*, reprinted in *id.* at 31, 41 (an unlawful combatant "is, of course, answerable for the commission of those acts to which the law of war grants no protection, and by which the soldier forfeits being treated as a prisoner of war if captured"); W. Winthrop, *Military Law and Precedent*, at 783-84 1220 (reprint 1920) (persons "not being within the protection of the laws of war" can be "treated as criminals and outlaws not entitled, upon capture

alien unlawful enemy combatant, then this Commission has no jurisdiction to do anything at all, including hold a hearing under GPW Article 5. In either event, the antecedent question, and the only one properly before the Military Judge, is whether Mr. Jawad is an alien unlawful enemy combatant under the MCA. *See Khadr* at 21.

Against this ineluctable conclusion, the Defense attempts to distinguish the CMCR's *Khadr* decision by claiming that it does not apply to a "presumed lawful combatant." Def. Mot.at 2. The *Khadr* court made very clear, however, that prima facie jurisdiction exists where the charge sheet exhibits "facial compliance... with all of the pre-referral criteria contained in the Rules for Military Commissions." *See Khadr* at 21. The Defense does not dispute that Mr. Jawad's charge sheet exhibits "facial compliance" with the RMCs<sup>5</sup>, and it therefore effectively concedes that this case is governed by *Khadr*. The Defense's bald assertion of "combatant immunity" (see footnote 4 supra)

---

to be held as prisoners of war, but liable to be shot, imprisoned or banished"); U.S. Army Field Manual 27-10, at 34 81 ("[P]ersons who, without having complied with the conditions prescribed by the laws of war for recognition as belligerents...commit hostile acts about or behind the lines of the enemy are not to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.")

Moreover, it bears noting that the CMCR has suggested in dicta that combatant immunity is an affirmative defense. *See Khadr*, CIMCR No. 07-011, at 7; *see also Lindh*, 212 F. Supp. 2d at 557-58, but see RMC 916 (enumerating "defenses" that may be raised at trial before a military commission but omitting "combatant immunity"). To the extent that combatant immunity is an affirmative defense, it must be properly raised and proved to the commission members at trial, not before. *See, e.g. United States v. Hibbard*, 58 M.J. 71 (C.A.A.F. 2003); *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000); *United States v. Brown*, 43 M.J. 187, 189 (C.A.A.F. 1995) *United States v. Simmrkjaer*, 40 C.M.R. 118, 122 (C.M.A. 1969). And to properly raise an affirmative defense at trial, the Defense will have to do more than baldly assert it, as the Defense has here. *See, e.g. United States v. Bailey*, 444 U.S. 394, 415 (1980); *United States v. Toksash*, 282 F. 3d 962, 967 (7<sup>th</sup> Cir. 2002) (requiring a defendant, as a prerequisite to submitting an affirmative defense to the jury, to present "more than a scintilla of evidence 'that demonstrates that he can satisfy the legal requirements for asserting the proposed defense"); *United States v. Caban*, 173 F.3d 89, 95 (2d Cir. 1999) (same); *United States v. Posada-Rios*, 158 F.3d 832, 873 (5<sup>th</sup> Cir. 1998)(same); *United States v. Montgomery*, 772 F.2d 733, 736 (11<sup>th</sup> Cir. 1985) ("[I]n order to have [an affirmative] defense submitted to a jury, a defendant must first produce or proffer evidence sufficient to prove the essential elements of the defense."); *see also Lindh*, 212 F. Supp 2d at 557-58 and n.36 (noting that a defendant bears the threshold burden of demonstrating that he is entitled to a lawful combatant immunity defense.)

<sup>5</sup> Nor could the Defense dispute that Mr. Jawad's charge sheet exhibits such facial compliance. The charge sheet in the case, like the one in *Khadr*, documents each of the relevant steps necessary to establish jurisdiction. *See Khadr*, CMCR No. 07-001 at 21. The CMCR's "facial compliance" standard would preclude the swearing or referral of charges against, for example, a "lawful enemy combatant." But absent such a misstep or other defect on the face of the charge sheet (as opposed to the face of Mr. Jawad's motion), prima facie jurisdiction exist here, as it did in *Khadr*.

made nine months after charges were sworn<sup>6</sup> in this case and more than one month after the Conveying Authority referred them for trial before this Military Commissions does not change the undeniable fact that the Government facially complied with the MCA when charges were sworn in October 2007 and referred in January 2008.

Instead of addressing the MCA's statutory prerequisites for jurisdiction, the Defense invokes (albeit only vaguely) the protections afforded to prisoners of war ("POWs") under GPW. The Defense however, offers nothing in the form of either legal citation or factual argument to justify the applicability of Article 5 in this case.

In relevant part, Article 5 provides that:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protections of the present Convention until such time as their status has been determined by a competent tribunal.

6 U.S.T. 3316, 3324. The Defense, however, has not even asserted which of the categories enumerated in Article 4 allegedly apply to Mr. Jawad, much less done anything to substantiate that applicability. While the "any doubt" standard may not be a high one, it surely requires more than block-quoting the Convention. See Def Mot at 4. *An ipse dixit* "argument," is not an argument at all. Cf. *United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002) ("[I]t is [the accused] who bears the burden of establishing the affirmative defense that he is entitled to lawful combatant immunity... on this point, [the accused] has not carried his burden; indeed, he has made no persuasive showing at all on this point."); *Kane v Gonzales*, 236 Fed Appx. 178, 179 n. 1 (6th Cir. 2006) (court need not consider petitioner's "*ipse dixit*" invocation of the Convention Against Torture.)<sup>7</sup>

---

<sup>6</sup> Charges are "sworn" in military commissions, they are not "preferred." Compare Rule for Military Commissions 202(c) with Rules for Courts-Martial 202(c)(2) and 207. The Defense's confused and repeated use of the later term, see Def. Mot. at 4, 7, further underscores its misunderstanding of the basis for jurisdiction before military commissions.

<sup>7</sup> Just as GPW is inapplicable here, so too is the Additional Protocol I to the Geneva Conventions. The United States refused to ratify Additional Protocol I because it would have extended the protections of the Geneva Conventions to a certain terrorists and associated unlawful combatants who flout its strictures. As President Reagan explained:

We must not, and need not, give recognition and protection to terrorist groups as the price for progress in humanitarian law... The repudiation of Protocol I is one additional step, at the

**B. Even if Mr. Jawad is Entitled to an Article 5 Hearing, the CSRT Already Provided it.**

As explained above, jurisdiction in this case is governed by the MCA, not international law. Assuming arguendo, however, that the Defense's blanket invocation of "POW" status is sufficient to require an Article 5 hearing, Mr. Jawad's CSRT has already provided one.

The CSRT was patterned after the "competent tribunal" described in Article 5 and Army Regulation 190-8 (cited favorably in *Hamdi v Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion)). However, the CSRT provides even more process than the Geneva Conventions require. In Senator Lindsey Graham's words, CSRTs are "Geneva Convention Article 5 tribunals on steroids." 151 Cong. Rec. S12,754 (daily ed. Nov. 14 2005). Indeed, in the wake of the Supreme Court's decision in *Hamdan*, Senator Graham discussed the bipartisan consensus behind the CSRT and its satisfaction of Article 5:

SEN GRAHAM: Okay, now, so we have a CSRT procedure that Senator Levin and myself and others worked on that deals with determining enemy combatant status. That is a noncriminal procedure that is designed to comply with... Article 5 of the Geneva Convention, a competent tribunal. Does everyone at the panel believe that the CSRT procedures..., as constituted, meet the test of what the Geneva Convention had in mind in determining status?

GEN. ROMIG: Yes, sir.

GEN. BLACK: Yes, sir.

SEN GRAHAM: Affirmative responses from all the witnesses.

Not only does it meet the test; I'm quite proud of it. Now, because of people like yourselves, it's gotten better over time... Now, we did something unprecedented, the Detainee Treatment Act. Not only did we put in place the CSRT... procedure that would comply with Geneva Convention status determination/competent tribunal standards; we also allowed civilian review of those decisions for the first time.

---

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). It would be the height of irony if Mr. Jawad could circumvent the statutory scheme that the United States has created to govern claims by accused terrorists by invoking a treaty provision that the United States has emphatically rejected.

Do all of you agree that has strengthened the procedures?

GEN ROMIG: Absolutely

SEN GRAHAM: Affirmative response from all concerned.

Hearings Before the Senate Committee on Armed Services, Military Commissions in Light of the Supreme Court Decision in *Hamdan v. Rumsfeld*, S. Hrg. 109-881, at 62-63 (July 13, 2006); see also 152 Cong. Rec S10,267 (Sept 27, 2006) (statement of Sen. Graham) (“I am of the opinion that the Combat Status Review Tribunal... is fully compliant with Article 5 of the Geneva Conventions.”) During the floor debate on the MCA, Senator Kyl echoed the point:

The CSRT process is modeled on and closely tracks the Article 5 hearings conducted under the Geneva Conventions... Under the Geneva Conventions, Article 5 hearings are given to detainees only when there is a substantial doubt as to their status. In all American wars, only a small percentage of detainees have ever been given Article 5 hearings. Yet at Guantanamo, we have given a CSRT hearing to every detainee who has been brought there. And finally, it bears emphasis that the CSRT gives unlawful enemy combatants even more procedural protections than Geneva Conventions’ Article 5 hearing gives to lawful enemy combatants.

*Id.* at S10,268; see also 151 Cong. Rec. S12,652, S12,656 (daily ed. Nov 10, 2005) (statement of Sen. Graham) (“we have created any enemy combat status review that goes well beyond the Geneva Conventions requirements to detain someone as an enemy combatant.”); *Id.* at S12,753 (the protections afforded by the CSRT process “go well beyond the Geneva Convention.”)

An evaluation of the CSRT proceedings reveals just how robust they are. At a CSRT hearing, a detainee is entitled to call reasonably available witnesses, to question other witnesses, to testify or otherwise address the tribunal, and not to testify if he so chooses. A detainee is additionally entitled to a decision, by the preponderance of the evidence, by commissioned officers sworn to execute their duties impartially, and to review by the Staff Judge Advocate for legal sufficiency. *See* Memorandum from Gordon England, Secretary of the Navy, Regarding the Implementation of CSRT Procedures for Enemy Combatants Detained at Guantanamo (July 29, 2004), available at

[www.defenselink.mil/news/jul2004/d20040730comb.pdf](http://www.defenselink.mil/news/jul2004/d20040730comb.pdf).<sup>8</sup> In addition, unlike an Article 5 or Army Regulation 190-8 tribunal, the CSRT guarantees Mr. Jawad the right to have a personal representative for assistance in preparing his case, the right to receive an unclassified summary of the evidence before the hearing, and the right to introduce relevant documentary evidence. Finally, and far in excess of the protections enjoyed by anyone in the history of warfare, Mr. Jawad is entitled to the robust review of his CSRT determination in federal court. See *Bismullah v. Gates*, 501 F.3d 178, reh'g denied, 503 F.3d 137 (D.C. Cir. 2007), reh'g en banc denied, --F.3d--, 2008 WL 269001 (D.C. Cir. Feb 1, 2008).

The Defense cannot, and indeed has not, even attempted to dispute that the CSRT process satisfies Article 5, even assuming Mr. Jawad is entitled to its protections.

### **C. Even if the CSRT Does Not Satisfy Article 5, the Military Judge Himself Unquestionably Does**

The Defense's suggestion that Mr. Jawad is entitled to additional procedural protections, over and above the unprecedented ones he has already received, is untenable. But even if it were true that Article 54 requires something more than CSRT, the Military Judge himself may provide it.

As noted above, the CMCR has emphasized that a military judge could satisfy international law, to the extent it applies at all and is not already satisfied, by entertaining a claim of POW status during a pre-trial motion session. See *Khadr* at 25. The court concluded that by doing so, the military judge could satisfy Additional Protocol I to the Geneva Conventions, See *id.* at 38, which provides even more protections that the United States is obligated to provide. See *supra* note 7. It follows *a fortiori* that a military judge could satisfy Article 54 by entertaining a POW challenge at a pretrial motion session.

The CMCR's decision accords with the history of Article 5. The GPW's drafters viewed a tribunal established to determine criminal sanctions for enemy combatants as the gold standard for "Competent tribunals." Indeed, the Convention's drafters

---

<sup>8</sup> After Mr. Jawad's CSRT, the Department of Defense amended the CSRT regulations. See Memorandum from Gordon England, Secretary of the Navy, Regarding the Implementation of CSRT Procedures for Enemy Combatants Detained at Guantanamo (July 14, 2006), available at [www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf](http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf).

considered requiring that status be determined under Article 5 by the same “military tribunal” qualified to mete out criminal punishment for war crimes. *See* International Committee of the Red Cross, III Commentaries on the Geneva Conventions at 77 (J. Pictet, gen. ed. 1960) Negotiators ultimately decided to adopt the more flexible term “competent tribunal,” but harbored no doubt that a military commission convened for imposing criminal sanctions would meet that standard. *See id.*

Consideration of the policy underlying Article 5 makes this proposition even clearer. The phrase “competent tribunal” was designed to take important status decisions out of the hands of an officer in the field of battle, “often of subordinate rank,” and to invest those determinations in a tribunal with specified procedures and controlled by an officer of higher rank. *See* ICRC, III Commentaries, at 77. A military judge presiding over a military commission certainly satisfies that standard. Under the MCA, the presiding military judge must be a commissioned officer of the armed forces, a lawyer admitted to the bar of a Federal court or highest court of a state, and certified “as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.” *See* 10 U.S.C. 948j(b). The Rules for Military Commissions further require that the judge have at least two years experience as a judge for general courts martial, *see* RMC 503(b)(1), and the military judge is statutorily protected from adverse personnel action due to his performance as a military judge, *see* 10 U.S.C. 948j(f).

Accordingly, even if Mr. Jawad were entitled to an Article 5 hearing, which he is not, and even if it were true that Article 5 requires something more than a CSRT, which again it doesn’t, the Military Judge would still be “competent” to adjudicate Mr. Jawad’s POW status claim. The Defense offers no credible argument to the contrary. Therefore, the motion must be denied.

**7. Oral Argument:** The Government does not believe oral argument is necessary to deny the Defense’s motion. To the extent this Court requests it, however, the Government will be prepared for oral argument.

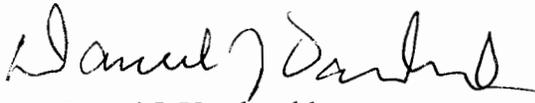
**8. Witnesses:** The Government does not believe that witness testimony is necessary to deny the Defense’s motion. To the extent, however, that this Court decides to hear

evidence on this motion, the Government respectfully requests the opportunity to call witnesses.

**9. Conference:** Not applicable.

**10. Additional Information:** Bone Scan Study of Mohammed Jawad, already in the record.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Darrel J. Vandeveld". The signature is written in a cursive style with a large initial "D".

Darrel J. Vandeveld  
LTC, JA, USAR  
Prosecutor

UNITED STATES OF AMERICA  v.  Mohammed Jawad	<b>D001 Defense reply to Government Response to Defense Motion to Dismiss for Lack of Personal Jurisdiction</b>  August 8, 2008
--	---

1. **Timeliness:** This reply is timely. The Government Response was received on 8 Aug 08.

Reply to Government Paragraphs by number

3. **Overview:** The government, in recycling old briefs and old insults has betrayed their own tripartite confusion about the basis of D001 and the applicable law.

First, the suggestion that international law is irrelevant is laughable. The opinion of the CMCR in *United States v. Khadr* could not reflect a clearer attention to international law in evaluating the jurisdictional provisions of the MCA. The CMCR’s opinion cites and invokes international law *explicitly* in fully a third of the footnotes in the opinion—including footnotes 4, 5, 6, 7, 8, 9, 23, 24, 27, and 38 and in the text accompanying all of those notes. The court finds it relevant that “The United States is a signatory nation to all four Geneva Conventions . . . . The Geneva Conventions stand preeminent among the major treaties on the law of war.” *Khadr*, at 4, n. 4. Nearing the close of its opinion in *Khadr*, the CMCR states, “This interpretation is consistent with the requirements of both the M.C.A. and with international law. *See Murray v. Scooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (acts of Congress will generally be constructed in a manner so as not to violate international law, as we presume that Congress seeks to comply with international law when legislating).” *Id.* at 25. In selecting the final words with which to close the first decision ever to be reached by that court, the CMCR chose to say, “Following the M.C.A. procedures, as we interpret them here, would allow an accused to assert a

claim of POW (i.e., lawful combatant) status at a pretrial motion session before the military judge. This pretrial determination of status would be fully in accord with Article 45(2) of Protocol I.” *Id.* at 25, n. 38. Not only the CMCR, but the United States Congress and the Supreme Court have emphasized the enduring importance of the Geneva Conventions and their application in the current context. By stating that military commissions are “regularly constituted courts” 10 U.S.C. § 948b(f), Congress specifically invoked the language of the Geneva Conventions, which the Supreme Court has determined apply to detainees at Guantanamo.<sup>1</sup>

Second, the Government misstates the issue: the question is not “how much process” is due but, rather, whether he has received the specific type of review required prior to the commission asserting jurisdiction. As the defense has argued (see further, below), Mr. Jawad is a presumed lawful combatant as a matter of law. The government’s invocation of the CSRT as an example of due process is bizarre. Mr. Jawad’s CSRT considered completely unreliable hearsay testimony including a demonstrably false confession, failed to call any witnesses, received no evidence in mitigation or extenuation, and did not even bother to ask whether Mr. Jawad constituted a current threat to the United States or its allies. In fact, the CSRT recognized that he might not actually be guilty of the offense of which he is charged, but found him to be an enemy combatant nonetheless. The suggestion that Mr. Jawad has received a “superabundance” of due process beggars belief.

Third, the defense has not suggested that the commission is incompetent to provide due process, but has demonstrated with unimpeachable authority that the military commission cannot

---

<sup>1</sup> The M.C.A. at 10 U.S.C. § 948b(f) does say that “alien unlawful enemy combatants subject to trial by military commission” may not “invoke the Geneva Conventions as a source of rights.” However, this provision does not apply to Mr. Jawad, who has not determined to be an “unlawful enemy combatant.” This provision is also clearly illegal.

sit as an Article 5 tribunal and has no personal jurisdiction now. The commission is quite capable of providing due process and will be providing due process by considering this motion and dismissing the charge.

#### **4. Facts:**

i. The illegal bone scan, conducted in October 2003, indicated that Mr. Jawad was about 18, confirming that he was about 17 when he was arrested. There is not a shred of evidence tending to suggest that Mr. Jawad was over 18 when he was arrested. As the State Department has acknowledged to the United Nations, Mr. Jawad was a minor.

iii. The government says they disagree, but they actually agree.

#### **5. Law and Argument – Reply to Specific Government paragraphs and footnotes:**

Footnote 3. The Government seems to be asserting that the CSRT's finding that Mr. Jawad was an enemy combatant establishes jurisdiction, a position rejected by the commission in both Hamdan and Khadr and affirmed by the CMCR.

Footnote 4. Mr. Jawad has never made any assertion of combatant immunity, as the defense has repeatedly stated. The defense has simply stated that under the applicable law, he is entitled to be treated as a lawful combatant (not triable by military commission) until otherwise determined by competent tribunal, which has not yet occurred.

Footnote 6. The government's quibbling over semantics is not only unseemly, but wrong. The government asserts that the defense's occasional use of the term "preferred" in its motion "underscores its misunderstanding of the basis for jurisdiction before military commissions. . . Charges are 'sworn' in military commissions, they are not 'preferred,'" To the contrary, the defense use of this term reflects the fact that the defense has actually read the Rules for Military Commissions in their entirety and understands that the words are used interchangeably in the R.M.C.. "Preferred" is used three times in the R.M.C.s, (R.M.C. 307(c)(7), 603(a), 603(d), and

once in the Discussion to rule 801(d). The word “preferral” is used in R.M.C. 905(b). Notably, R.M.C. 307, entitled “Swearing of Charges” uses the term “preferred” in place of the term “sworn.” R.M.C. 307(c)(7) states, “Multiple Offenses. Charges and specifications alleging all known offenses by an accused may be **preferred** at the same time.” (emphasis added). And, R.M.C. 905(b) relating to pretrial motions that must be raised before trial includes “[d]efenses or objections based on defects (other than for jurisdictional defects) in the preferral, forwarding, investigation, or referral of charges.” Once again, the government’s efforts to be clever have failed.

5A. The Government has badly misstated the issue. The question—and this is crucial—is *not* whether Mr. Jawad is an alien unlawful enemy combatant, but, rather, whether he was presumed, by binding law, a lawful combatant, excluded from military commission jurisdiction, when the charges against him were sworn and military commission jurisdiction purportedly attached. We come here to the fundamental distinction between the issue now before this commission—a jurisdictional defect in the charges preferred (or, if you prefer, sworn)—and the issue considered and decided by the CMCR in *Khadr*. The defense here brings before this commission a motion to dismiss for a jurisdictional defect in the swearing of charges. The jurisdictional defect rendered the swearing of charges against Mr. Jawad invalid—barred by statute; and the charges preferred are therefore jurisdictionally defective. No such defect in the sworn charges was ever raised by the parties or considered or ruled upon by the CMCR in *Khadr*. Rather, the CMCR in the *Khadr* case, entertained a motion which left the validity of the charged preferred unchallenged. The CMCR, accordingly, very appropriately considered the requirements for valid referral *when* the Government has complied “with all of the *pre-referral criteria* contained in the RMC.” *Khadr*, at 21.

Contrary to the Government’s erroneous assertion that “the defense does not dispute that Mr. Jawad’s charge sheet exhibits ‘facial compliance’ with the RMCs,” the defense *does* dispute *precisely* that. Mr. Jawad *was*, as a matter of binding law, a *lawful combatant* at the time that the charges were sworn against him. The Government itself states, in footnote 5 of its Response, that “The CMCR’s ‘facial compliance’ standard would preclude the swearing or referral of charges against, for example, a ‘lawful combatant.’” Gov. Mot. at 3, n. 5. That is *exactly* what happened. And, as the Government states, such a “misstep or other defect on the face of the

charge sheet” does indeed invalidate the charges sworn. *Id.* The CMCR in *Khadr* indicated that sworn charges together with the legal advisor’s pretrial advice is a sufficient basis for referral of charges. *Khadr*, at 21. Here, the charges sworn were invalid for the very reason the Government offers as exemplary of a jurisdictional defect in the sworn charges. The CMCR requires *valid* charges, in combination with the “other pre-referral criteria.” The *Khadr* court did not address the problem, not raised in the case then before it, of jurisdictionally defective swearing of charges.

The CMCR, in *Khadr*, instructed that this commission must exercise its jurisdiction to determine its own jurisdiction. It is called upon now to do so. In so doing, this Commission will decide a question not addressed previously by the CMCR or another military commission: the effect on its jurisdiction of a jurisdictional defect in the charges sworn.

This Commission must now apply the law to the facts to determine its jurisdiction, as mandated by law and articulated by the CMCR. The law, as delineated in the defense’s motion to dismiss, is that a combatant detained by enemy forces is legally presumed to be a lawful combatant unless and until a contrary determination is made by an article 5 competent tribunal, composed of more than one person. *See* D001, at 6. The fact is that no such article 5 competent tribunal had made a finding rebutting the presumptive lawful combatant status of Mr. Jawad at the time the charges against him were sworn. He was, therefore, in the eyes of the law, under bedrock treaty and customary international law and as incorporated and applied in the MCA, a lawful combatant. D001 is a motion to dismiss for lack of personal jurisdiction due to a fundamental jurisdictional defect in the swearing of charges. This Commission, in applying the law to the facts, is bound to grant the relief requested.<sup>2</sup>

## CONCLUSION

The government has simply recycled its old response to D001, with some very minor word changes, seemingly without even reading the amended D001 or any of the relevant precedents and authorities. The response is not responsive to the arguments actually set forth in D001 and is completely devoid of merit. Although this is disappointing, it is not surprising. After all, what could the government say? They have neither the facts nor the law on their side, so their only

---

<sup>2</sup> To be perfectly clear, the present motion is in no way the assertion of an affirmative defense. Quite the reverse, no affirmative defense is in order, because the Commission has no jurisdiction over the accused in the present case.

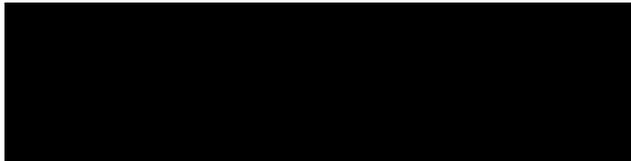
strategy is to try to confuse, mislead and obfuscate. Don't be fooled.

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

Respectfully submitted,

//signed//

By: DAVID J. R. FRAKT, Major, USAFR  
Defense Counsel  
Office of the Chief Defense Counsel



UNITED STATES OF AMERICA  v.  Mohammed Jawad	<b>D-001</b> <b>Government Reply to Defense Reply to</b> <b>Government Response to Defense</b> <b>Motion to Dismiss</b>  12 August 2008
--	--

1. **Timeliness:** This Government reply is within the timelines established by the Military Commissions Trial Judiciary Rules of Court.

2. **Overview and Facts:** The overview and facts of this case have been stated and restated, refuted, disputed, and, in part, agreed upon. The defense seeks dismissal of the Charges and Specifications against the accused, Mr. Jawad. The basis for the defense motion is either: (1) the argument that the facts and circumstances surrounding the accused's CSRT, the swearing of charges, and ultimate referral to this commission were so fundamentally different *or* (2) the claim and legal argument being raised by the defense in this case is so fundamentally different than the circumstances discussed in *United States v. Khadr*, Court of Military Commission Review (CMCR) 07-001, that dismissal of the Charges and Specifications is the only possible remedy for the commission.

3. **Law and Argument:**

a. The defense has attempted to portray a Mr. Jawad's procedural posture as legally distinguishable in some way from Mr. Khadr's in the CMCR *Khadr* decision, such that dismissal is the only remedy. In fact, the applicable law and the procedural stance of both cases is identical, and if the CMCR in *Khadr*, even if the *Khadr* court focused more on the case post-referral rather than pre-preferral (or, if you like, pre-swearing) of charges. In fact, there is no difference, the *Khadr* case is controlling, and the defense's motion is without merit.

b. The facts and circumstances leading the case of the accused to this commission are, as to the legally significant aspects, so indistinguishable from the situation faced by

the CMCR in *Khadr* that it is understandable the defense continues to argue the “novel” nature of the situation before this commission—as if repeating it enough will make it so. Mr. Jawad was found to be an “enemy combatant” by a CSRT convened at Guantanamo Bay, Cuba, just as Mr. Khadr’s CSRT had determined him to be in September 2004. Defense, however, argues that the CMCR “remedy” for a defective jurisdictional determination in *Khadr*, namely, a finding by the military judge that a particular accused is an *alien unlawful enemy combatant* cannot be applied in this case. How do we get here? The defense takes the commission on a “whirlwind tour” of the MCA, the *Khadr* decision, Geneva III, and Additional Protocol I to the Geneva Conventions, selectively choosing the parts from each that lead to the (only) result the defense believes the commission can make: Dismissal of the Charges and Specifications.

c. The MCA makes crystal clear, and the *Khadr* decision emphasizes that there are two “alternative approaches for establishing military commission jurisdiction.” One is a finding by a CSRT that the accused is an alien unlawful enemy combatant. The other is a finding by a military judge that *in personam* criminal jurisdiction exists because the evidence establishes the accused is an alien unlawful enemy combatant. *See* MCA Sec. 948a(1)A. Any discussion beyond Geneva “common Article 3” when dealing with binding authority on a military commission is—especially when it is being used as a sword to “trump” the clear language of the MCA and the CMCR in *Khadr*—misplaced.

d. In reading the defense motion and supplements, the following roadmap appears:

1. The accused’s CSRT was defective as far as establishing jurisdiction of this military commission.

2. Geneva Convention III, Article 5, definition of “competent tribunal” to establish jurisdiction must be considered in combination with Additional Protocol I, Article 45—which would mean, according to the defense, that only a tribunal with more than one judge is competent to determine jurisdiction.

3. This commission (tribunal) has one judge—therefore this commission is not competent to establish jurisdiction.

4. Therefore, this commission must dismiss the Charges and Specifications.

e. The problem with the defense roadmap is that there has been no authority cited which “legally trumps” the MCA and the decision in *Khadr*. The defense can cite no authority to warrant this commission adopting the Additional Protocol I interpretation of what an Article 5 “competent tribunal” is. The Deputy Legal Advisor to the State Department’s statement to a Humanitarian Law Conference does not “trump” President Ronald Reagan’s official rejection of Additional Protocol I—especially when this rejection was based in large part upon the desire of our President not to extend Geneva Convention protections to terrorists.

**4. Summary and Conclusion.** The Government believes the MCA and the CMCR decision in *Khadr* apply to the case of the accused. The military judge is a competent tribunal to establish jurisdiction over the accused. Additional Protocol I’s definition of what a “competent tribunal” must consist of do not apply to this commission, the learned Deputy Legal Advisor’s statement and opinion notwithstanding.

**5. Defense Request for Immediate Public Release.** The Government objects to any premature public release of this, or any, motion and response thereto.

Respectfully Submitted,



DOUGLAS M. STEVENSON  
Lt Col, USAF  
Prosecutor