ORIGINAL

VOLUME 1 of 1

RECORD OF TRIAL

(and accompanying papers)

of

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

Name and any aliases charged

0766

Identification Number

By

MILITARY COMMISSION

Convened by the Convening Authority under 10 USC §948h

Office Military Commissions
(Name of Convening Authority)

Tried at

Guantanamo Bay, Cuba on 4 June 2007

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

Companion cases:
None.

CHRONOLOGY SHEET [1]

In the case of OMAR AHMED KHADR also known as AKHBAR FARHAD, AKHBAR FARNAD, and AHMED MUHAMMED KHALI ISN: 0766

(Name of Accused)

Date of alleged commission of earliest offense tried: _____ , _____

(Enter Date)

Date record forwarded to Court of Military Commission Review: _____ , _____

(Enter Date)

_____

(Signature and Rank of Legal Advisor)

1 The Trial counsel is responsible for completion of the Chronology Sheet. Trail counsel should report any authorized deductions and reasons for unusual delay in the trial of the case.

2 In computing days between two dates, disregard the first day and count day. The actual number of days in each month will be counted.

3 Only this item may be deducted.

4 If no further action is required, items 1 to 8 will be completed and chronology signed by such convening authority or his/her representative.

ACTION		DATE _____	CUMULATIVE ELAPSED DAYS [2]
1. Charges sworn *(date of affidavit)*			
2. Charges received by convening authority			
3. Charges referred to trial			
4. Sentence or acquittal			
Less days:			
Delay at request of defense			
Total authorized deduction [3]			
5. Net elapsed days to sentence or acquittal			
6. Record received by convening authority			
Action [4]			

REMARKS

PRETRIAL ALLIED PAPERS

UNITED STATES OF AMERICA	)	
	)	
	)	
	)	
	)	**CERTIFICATE OF**
v.	)	**NOTICE OF APPEAL**
	)	
	)	
	)	
OMAR AHMED KHADR	)	
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	**3 JULY 2007**
a/k/a "Ahmed Muhammed Khali"	)	

1. On June 4, 2007, at or about 1145, the Military Judge issued a ruling dismissing the charges and specifications in the above-captioned case without prejudice. On June 8, 2007, the Prosecution filed a motion for reconsideration of the Military Judge's dismissal of charges. The Military Judge denied the motion to reconsider in a written ruling transmitted to the Prosecution via email at 1552 on June 29, 2007.

2. Notice is hereby given that the Prosecution appeals each of the decisions of the Military Judge under 10 U.S.C. § 950d(b). The Military Judge will be served with this notice no later than 1700 on July 3, 2007. The appeal will be filed directly to the Court of Military Commission Review as required by 10 U.S.C. § 950d(c).

3. Additionally, as required by the Manual for Military Commissions, the Prosecution certifies that the appeal is not taken for the purpose of delay.

4. **Submitted by**:

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

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

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

UNITED STATES OF AMERICA	)	
v.	)	**LEGAL ADVISOR'S PRETRIAL ADVICE**
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	)	APR 13 2007

[redacted]

[redacted]

APR 13 2007

[redacted]

APR 1 3 2007

[redacted]

APR 1 3 2007

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

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

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

II. CHARGES AND SPECIFICATIONS

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

SPECIFICATION:

See Attached Charges and Specifications.

SVC 4-24-07

III. SWEARING OF CHARGES

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

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

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

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

Jeffrey O. Groharing
Signature

IV. NOTICE TO THE ACCUSED

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

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

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

Jeffrey D. Groharing
Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

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

_____
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

SKC 4-24-07

_____
Signature

VI. REFERRAL

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

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

_____ subject to the following instructions[1]: _____

By _____ of _____
Command, Order, or Direction

_____
Typed Name and Grade of Officer

_____
Official Capacity of Officer Signing

_____
Signature

VII. SERVICE OF CHARGES

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

_____
Typed Name of Trial Counsel

_____
Grade of Trial Counsel

_____
Signature of Trial Counsel

FOOTNOTES

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

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

INTRODUCTION

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

JURISDICTION

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

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

BACKGROUND

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

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

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

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

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

8. From 1996 to 2001, the Khadr family traveled throughout Afghanistan and Pakistan, including yearly trips to Usama bin Laden's compound in Jalalabad for the Eid celebration at the end of Ramadan. While traveling with his father, Omar Khadr saw or personally met senior al Qaeda leaders, including Usama bin Laden, Doctor Ayman Al-Zawahiri, Muhammad Atef (a/k/a Abu Hafs al Masri), and Saif al Adel. Khadr also visited various al Qaeda training camps and guest houses.

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

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

11. After completing his training, Khadr joined a team of other al Qaeda operatives and converted landmines into remotely-detonated improvised explosive devices, ultimately planting these explosive devices to target U.S. and coalition forces at a point where they were known to travel.

12. U.S. Forces captured Khadr on July 27, 2002, after a firefight resulting in the death of three members of the U.S. led coalition and injuries to several other U.S. service members.

GENERAL ALLEGATIONS

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13. Al Qaeda ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

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

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

16. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

17. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmad Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

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

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

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

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

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

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

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

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

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

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

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

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

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

April 24, 2007

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

SUBJECT: Service of Referred Charges

You are hereby served with a copy of the charges referred against you on the 24th day of April, 2007, pursuant to the Military Commissions Act of 2006 (MCA) and the Manual for Military Commissions (MMC). A copy of the referred charges are being provided to you and your detailed defense counsel.

(Pursuant to Rules of Military Commission (RMC) 602, a copy of the referred charges shall be served in English and, if appropriate, in another language that the accused understands. If the accused has questions when served with charges, the accused should be told to discuss the matter with defense counsel.)

AFFIDAVIT OF SERVICE

I hereby certify that a copy of the referred charges were served on the above named detainee this 24th day of April, 2007.

[redacted]
Signature

Joint Task Force - GTMO
Organization

[redacted] MSgt
Typed or Printed Name and Grade

APO AE 09360
Address of Organization

RECORD OF PROCEEDINGS

RECORD OF TRIAL

of

OMAR AHMED KHADR also known as AKHBAR FARHAD, AKHBAR FARNAD, and AHMED MUHAMMED KHALI — 0766

(Name and any aliases charged) — *(Identification Number*

By

MILITARY COMMISSION

Convened by the Convening Authority under 10 USC §948h

Office of Military Commissions

(Name of Convening Authority)

Tried at

Guantanamo Bay, Cuba on 4 June 2007

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

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TESTIMONY			
NAME OF WITNESS *(Last, First, Middle Initial)*	DIRECT AND INDIRECT	CROSS AND RECROSS	COURT
PROSECUTION			
None			
DEFENSE			
None			
COURT			
None			

EXHIBITS			
NUMBER OR LETTER	DESCRIPTION	PAGE WHERE –	
		OFFERED	ADMITTED/ REFERRED TO
AE 001	Charge Sheet (referred 24 Apr 07)		2
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AE 005	E-Mail dtd 25 Apr 07, Detail of Military Judge, Initial Notice, and scheduling of initial hearing		
AE 006	Request for Continuance and Ruling dtd 27 Apr 07		
AE 007	Detailed Prosecutors - Maj Groharing and CPT Petty dtd 25 Apr 07		
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AE 016	Military Judge's E-mail to Chief Defense Counsel re Excusal of LtCol Vokey dtd 7 Jun 07		
AE 017	Prosecution Motion to Reconsider (Dismissal Order) dtd 8 Jun 07 (Attachment 1 is contained on a DVD maintained by the Court Reporter)		
AE 018	Military Judge's E-mail denying prosecution requested relief (to extend appeal deadline) dtd 08 June 07		
AE 019	E-mail Traffic Between Chief Defense Counsel and Chief Prosecutor re Excusal of LtCol Vokey dtd 31 May 07		
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AE 021	SecNav (designated by Dep SECDEF) Implementation of Procedures for CSRTs dtd 29 Jul 04		
AE 022	DC Email stating there will be no Defense Response to Prosecution Motion to Reconsider (Dismissal Order) dtd 20 Jun 07		
AE 023	Disposition of Prosecution Motion to Reconsider US v Khadr dtd 29 Jun 07		
AE 024	E-mail from Military Judge Directing Transmittal of Disposition to all Parties dtd 29 Jun 07		

COPIES OF RECORD [1]

_____ copy of record furnished the accused or defense counsel as per attached certificate or receipt.

_____ Copy(ies) of record forwarded herewith.

RECEIPT FOR COPY OF RECORD [2]

I hereby acknowledge receipt of a copy of the record of trial in the case of United States v. _____,

delivered to me at _____ this _____ of _____, _____

_____
(Signature of accused)

I hereby acknowledge receipt of a copy of the record of trial in the case of United States v. _____,

delivered to me at _____ this _____ of _____, _____

_____
(Signature of accused)

1 *For instructions as to preparation of copies of record, see Military Commission Regulations, Chapter 18.*
2 *If copy of record prepared for accused contains matters requiring security protection, see RMC 1104d, MMC 2007.*

CERTIFICATE IN LIEU OF RECEIPT

_____ _____
(Place) *(Date)*

I certify that on this date a copy of the record of trial in the case of United States v. _____

was transmitted (delivered) to the accused, _____
(Name of accused)

at _____ , by _____
(Place of delivery, or address sent to) (Means of effecting delivery, i.e., mail, messenger, etc.)

and that the receipt of the accused had not been received on the date this record was forwarded to the convening authority. The receipt of the accused will be forwarded as soon as it is received.

_____
(Signature of trial counsel)

OR

_____ _____
(Place) *(Date)*

I certify that on this date a copy of the record of trial in the case of United States v. _____

was transmitted (delivered) to the accused's defense counsel, _____
(Rank and Name)

at _____ , by _____
(Place of delivery, or address sent to) (Means of effecting delivery, i.e., mail, messenger, etc.)

because (it was impracticable to serve the record of trial on the accused because he/she was transferred to _____

_____) (the accused requested such at trial) (the accused so
(Place)

requested in writing, which is attached) (_____)
(Other reason)

_____
(Signature of trial counsel)

OR

The accused was not served personally because (_____
(Other reason)

_____).

Accused has no defense counsel to receive the record because (defense counsel has been excused under RMC 505(d)(2)(B))
(_____).
(Other reason)

_____ _____
(Date) *(Signature of trial counsel)*

ERRATA SHEET

UNITED STATES v. OMAR AHMED KHADR, also known as AKHBAR FARHAD, AKHBAR FARNAD, AHMED MUHAMMED KHALI ISN: 0766	Office of Military Commissions Office of the Convening Authority Washington, D.C.	Date Submitted to PROS: Via electrons 5 June 2007
Reporter: SGM [redacted] USA	Date(s) of Trial 4 June 2007	Date Submitted to DDC Via electrons 5 June 2007
	Date Submitted to MJ	Date Completed by MJ
Date Record Completed 5 April 2007	Date Completed by PROS: / Date Completed by DDC:	Date Authenticated

Page	Line	Change	To	PROS Initials	DDC Initials	MJ Initials
2	22	Forgeign	Foreign	JG		
2	23	Forgeign	Foreign	JG		
3	20	"with the RMC 807"	"with RMC 807"	JG		
6	22	"amount time"	"amount of time"	JG		
6	22	"work with Khadr to"	"Work with Khadr so"	JG		
11	17	"948a(I) and II"	"948a(1)(A)(i) and 948a(1)(A)(ii)	JG		
16	5	"948a(1)(a)(2)	"948a(1)(a)(ii)	JG		
16	8	"artfully"	"inartfully"	JG		
16	9	"Contemplates the MCA"	"Contemplates that in the MCA"	JG		
		NONE				

COT

COT

Typed Name & Grade (Military Judge) PETER J. BROWNBACK, COL, USA	Signature	Date
Typed Name & Grade (Prosecutor) JEFF D. GROHARING, Major, USMC	Signature	Date
Typed Name & Grade (Detailed Defense Counsel) WILLIAM KUEBLER, LCdr, USN	Signature	Date

ERRATA SHEET

UNITED STATES v. OMAR AHMED KHADR, also known as AKHBAR FARHAD, AKHBAR FARNAD, AHMED MUHAMMED KHALI ISN: 0766	Office of Military Commissions Office of the Convening Authority Washington, D.C.	Date Submitted to PROS: Via electrons 5 June 2007
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	Date Submitted to MJ	Date Completed by MJ
Date Record Completed 5 April 2007	Date Completed by PROS: / Date Completed by DDC:	Date Authenticated

Page	Line	Change	To	PROS Initials	DDC Initials	MJ Initials
		NONE.				

Typed Name & Grade [Military Judge] PETER J. BROWNBACK, COL, USA	Signature	Date
Typed Name & Grade [Prosecutor] JEFF D. GROHARING, Major, USMC	Signature	Date
Typed Name & Grade [Detailed Defense Counsel] WILLIAM KUEBLER, LCDR, USN	Signature	Date 12 JUNE 2007

PROCEEDINGS OF A MILITARY COMMISSION

The military judge called the R.M.C. 803 session to order at Guantanamo Bay, Cuba, at 1045 hours, 04 June 2007, pursuant to the following order:

Military Commissions Convening Order Number 07-02, Department of Defense, Office of Military Commissions, Office of the Convening Authority, Washington D.C., dated 8 March 2007.

[END OF PAGE]

There were no Convening Orders published in 2006

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
OFFICE OF THE CONVENING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

MILITARY COMMISSION CONVENING ORDER
NUMBER 07-02 8 March 2007

Pursuant to the authority vested in the Secretary of Defense in accordance with the Military Commissions Act of 2006, 10 U.S.C. § 948h, and my appointment as Convening Authority for Military Commissions on February 6, 2007, a military commission is hereby convened. It may proceed at Guantanamo Bay, Cuba, unless otherwise directed, to try such persons as may be properly brought before it. The military commission is convened with the following members:

MEMBERS

RANK	NAME	SVC	ASSIGNMENT
Col.	[redacted]	USAF	[redacted]
Capt.	[redacted]	USN	[redacted]
Col.	[redacted]	USMC	[redacted]
COL	[redacted]	USA	[redacted]
COL	[redacted]	USA	[redacted]
Col.	[redacted]	USAF	[redacted]
Capt.	[redacted]	USN	[redacted]
Lt.Col.	[redacted]	USAF	[redacted]
MAJ	[redacted]	USA	[redacted]
CW5	[redacted]	USA	[redacted]

Susan J. Crawford
Convening Authority
for Military Commissions

DISTRIBUTION:
Individual (1)
Record of Trial (1)
Reference Set (1)

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

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

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

II. CHARGES AND SPECIFICATIONS

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

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER		**5e. DATE (YYYYMMDD)**
		20070405

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

Jeffrey D. Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

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

Jeffrey D. Groharing
Signature

MC FORM 458 JAN 2007

IV. NOTICE TO THE ACCUSED

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

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

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

Jeffrey D. Groharing
Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

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

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

CW3
Grade

Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)
Convening Authority 10USC §948h Appointed on 6 Feb 2007	Arlington, Va	20070424

Referred for trial to the (non)capital military commission convened by military commission convening order 07-02 dated 8 March 2007.

subject to the following instructions[1]: this case is referred non-capital; see continuation sheet

By _____ of _____
Command, Order, or Direction

Susan J. Crawford
Typed Name and Grade of Officer

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

Susan J. Crawford
Signature

VII. SERVICE OF CHARGES

9. On 20070424, 1500 I (caused to be) served a copy these charges on the above named accused.

Jeffrey D. Groharing
Typed Name of Trial Counsel

0-4
Grade of Trial Counsel

Jeffrey D. Groharing
Signature of Trial Counsel

FOOTNOTES

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

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

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

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

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

This case is referred non-capital.

Date: 4-24-07

Susan J. Crawford
Hon. Susan J. Crawford
Convening Authority
for Military Commission

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

CHARGE 1: VIOLATION OF 10 U.S.C. §950v(b)(15), MURDER IN VIOLATION OF THE LAW OF WAR

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

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

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

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

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

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criminal purpose known to the accused to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; ~~hijacking or hazarding a vessel or aircraft~~; SJC 4.24.07 and terrorism.

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

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi.", consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

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

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

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

5. On or about July 27, 2002, Khadr ~~and/or other suspected al Qaeda members~~ SJC 4.24.07 engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.

6. Khadr ~~and/or the other suspected al Qaeda members~~ SJC 4.24.07 threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

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

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

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

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

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi.", consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

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

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

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

5. On or about July 27, 2002, Khadr ~~and/or other suspected al Qaeda members~~ SJC 4.24.07 engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.

6. Khadr ~~and/or the other suspected al Qaeda members~~ SJC 4.24.07 threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

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

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

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

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi.", consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

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

HV

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

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

5. On or about July 27, 2002, Khadr ~~and/or other suspected al Qaeda members~~ S/C 4-24-07 engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.

6. Khadr ~~and/or the other suspected al Qaeda members~~ S/C 4-24-07 threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

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

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

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

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MJ: This Military Commission is called to order.

PROS: This Military Commission is appointed by Convening Order Number 07-02, dated 8 March 2007, copies of which have been furnished to the military judge, counsel, and the accused and which has been marked as Appellate Exhibit 2 and attached to the record. The charges have been marked as Appellate Exhibit 1 and have been properly approved by the Convening Authority and referred to this Commission for trial. The prosecution caused a copy of the charges to be served on the accused on April 24, 2007.

The prosecution is ready to proceed in the arraignment of the *UNITED STATES versus OMAR KHADR, also known as AKHBAR FARHAD, AKHBAR FARNAD and AHMED MUHAMMED KHALI*. The determination by the Combatant Status Review Tribunal that the accused has been determined to be an alien unlawful enemy combatant has been marked as Appellate Exhibit 11.

The accused and the following personnel detailed to this commission are present:

COLONEL PETE BROWNBACK, MILITARY JUDGE;

MAJOR JEFF GROHARING, PROSECUTOR;

CAPTAIN KEITH PETTY, ASSISTANT PROSECUTOR;

LIEUTENANT [sic] WILLIAM KUEBLER, DETAILED DEFENSE COUNSEL;

MR. DENNIS EDNEY, FOREIGN AREA [sic] CONSULTANT; and

MR. NATE WHITLING, FOREIGN AREA [sic] CONSULTANT.

Lieutenant Clay Trivett has been detailed as a prosecutor and is not present. Staff Sergeant [redacted] has been detailed as a paralegal for the prosecution and is present. All the members are absent.

Sergeant Major [redacted] has been detailed as court reporter for this Commission and has been previously sworn.

MJ: I note that it's Lieutenant Commander Kuebler; correct?

DDC: Yes, sir.

MJ: And Mr. Edney and Mr. Whitling are "Foreign Attorney Consultants," not "Foreign Area Consultants."

I've been detailed to this case by the Chief Judge of the Military Commissions Trial Judiciary as seen in Appellate Exhibits 3 and 4, and I'm sworn in accordance with RMC 807, on 24 April 2007. I am certified and qualified in accordance with Article 26 of the Uniform Code of Military Justice.

Trial, please tell me by whom you've been detailed and your qualifications.

PROS: Sir, all members of the prosecution have been detailed by the chief prosecutor. All members are qualified under RMC 503 and we have been previously sworn in accordance with RMC 807. No member of the prosecution has acted in any manner which would tend to disqualify us in this proceeding.

MJ: Thank you. The Commission notes that Mr. Khadr is not in civilian clothes, but is instead in his camp uniform. Trial, did the government offer the defense its assistance in providing civilian attire for Mr. Khadr?

PROS: Yes, sir.

MJ: Defense, the Commission is not going to require Mr. Khadr to appear in civilian attire. However, the Commission does note that the wear of a camp or detainee uniform could influence some observers, an influence which might not be favorable to the presumption of innocence. Before any future sessions, I would urge the defense to do what it can to have Mr. Khadr appear in civilian attire.

Okay, Lieutenant Commander Kuebler, AE 8 shows that on February 22, 2007, Lieutenant Colonel Colby Vokey was detailed as Detailed Defense Counsel, and you were detailed as Associate Defense Counsel. AE 9 shows that on 30 May 2007, the Chief Defense Counsel, Colonel Sullivan, excused Lieutenant Colonel Vokey as Detailed Defense Counsel. He did not announce the reason for this excusal. AE 10 shows that on 30 May 2007, Colonel Sullivan detailed you as Detailed Defense Counsel. To the best of your knowledge, are those facts correct?

DDC: Yes they are, sir.

MJ: Lieutenant Commander Kuebler, have you acted in any manner inconsistent with your detail as defense counsel in this case?

DDC: I have not, sir.

MJ: Have you been previously sworn?

DDC: Yes, sir.

MJ: Please, Lieutenant Commander Kuebler, identify the other personnel at your table.

DDC: Sir, immediately to my left is Mr. Nathan Whitling, Foreign Attorney Consultant. To his left is Mr. Dennis Edney, Foreign Attorney Consultant. Both Mr. Whitling and Mr. Edney are Mr. Khadr's Canadian counsel.

MJ: Okay. We've had two significant RMC 802 sessions in this case. One was last night at 2000 to about 2100 and one was this morning for about half an hour. Present at them were the trial counsel, defense counsel, the foreign attorney consultants, and the defense paralegal whom I note is not sitting –- I can't see, is she inside –- no, she's behind the bar.

[The military judge pointed to the bar separating the spectator gallery, where the defense paralegal was seated.]

MJ: We discussed several items which I'm going to highlight. If either side wishes to add to or correct what I say, please feel free to do so. First, we discussed the counsel issue. Commander Kuebler explained his prior participation in this case and his

ability, or lack thereof, to go forward today. He has not met his client. He did not meet him this morning and does not feel that he can represent him until he at least gets and an opportunity to meet with him. Mr. Khadr has expressly fired all United States attorneys whom he's met.

Is that correct, Commander Kuebler; to the best of your knowledge?

DDC: Yes, sir.

MJ: Okay. The FACs, a shorthand term for "Foreign Attorney Consultants," have met with Mr. Khadr. They're still attempting to enlarge the relationship -- their relationship with Mr. Khadr, and have hopes of doing so. The defense counsel, the FACs, and the trial counsel all understand the provisions of the MCA concerning counsel. The defense counsel and the FACs are preparing a brief on how the FACs might be brought into the counsel process without violating the MCA, but yet ensuring that Mr. Khadr is represented during these proceedings. Further, the defense counsel and the FACs are concerned that if required to make a counsel election this morning, Mr. Khadr will lock himself into a position that neither side wants.

All parties agree that no one wants to see Mr. Khadr proceed without representation. The defense counsel and the FACs want a substantial but undetermined amount of time to work with Khadr so that they may provide him representation in some form. The trial

counsel wants Mr. Khadr to be represented, but they're not willing to sign on to an indeterminate delay.

Trial, is that basically what we went over about counsel?

PROS: That's accurate, sir.

DDC: Yes, sir.

MJ: Thank you. Continuing on the counsel issue and I note for the record that in asking these questions of Mr. Edney, I am not speaking to him as a counsel, but I'm going to allow him to respond which doesn't offend my knowledge of the MCA.

Does it yours, trial counsel?

PROS: Just ----

MJ: I'm just going to let him respond to questions.

PROS: Just as a consultant. Yes, sir.

MJ: Great. Mr. Edney, if I understand this correctly -- and this came as news to me last night because I don't know the facts -- you represent Mr. Khadr's family in Canada; is that correct?

[Mr. Edney, FAC, stood up and prepared to respond to the military judge.]

MJ: And when you talk please speak up. There's a microphone right there next to Mr. Khadr.

FAC: I represent Mr. Khadr's older brother, Abdulla Khadr, in criminal proceedings in Canada.

MJ: Okay. Do you also represent him in some sort of proceedings in the United States?

FAC: We do not, sir.

MJ: Okay, thank you, thanks a lot.

[Mr. Edney, FAC, resumed his seat.]

MJ: There was a concern voiced by the –- at the 802 as to whether this might lead to some sort of conflict between Mr. Edney providing, and I presume Mr. Whitling that you are also assisting Mr. Edney on representing Mr. Khadr’s brother. Is that correct?

[Mr. Whitling, FAC, stood up and prepared to respond to the military judge.]

FAC: That’s correct, sir. I’m co-counsel with Mr. Edney.

MJ: Okay, I apologize. I was just trying to get the questions out.

[Mr. Whitling, FAC, resumed his seat.]

MJ: There's a concern that there might be some sort of conflict between providing Mr. Khadr advice while representing Mr. Khadr’s brother, and Mr. Edney and Mr. Whitling stated in this 802 session that they would discuss this with Mr. Khadr in the event that their consultancy or whatever continues and if necessary we will bring in an independent attorney to talk to him. Is that basically what we said?

[Mr. Edney, FAC, stood up and prepared to respond to the military judge.]

FAC: That's correct, sir.

[Mr. Edney, FAC, resumed his seat.]

MJ: Trial?

PROS: Yes, sir.

MJ: Now, having gone through that, the second major issue we discussed was one raised s*ua sponte* by the military judge. Looking at AE 11 which is the CSRT determination, Combatant Status Review Tribunal, the court will use "CSRT" for now on; the court noted -- I noted that the CSRT designated Mr. Khadr as an "Enemy Combatant." That appears to conflict with the requirement of the MCA, in section 948d, Jurisdiction, which states that the jurisdiction of the military commission is limited to "Unlawful Enemy Combatants."

Commander Kuebler stated that he had seen the issue but did not believe it was proper for him to raise the issue prior to trial due to his, at that point, nonexistent relationship, other than being his detailed counsel with Mr. Khadr. Trial counsel stated they're aware of the issue. They are waiting for the defense counsel to raise it and were prepared to argue the issue.

Is that right, Commander Kuebler?

DDC: Yes, sir.

MJ: Trial?

PROS: Yes, sir.

MJ: Is there anything further that anyone -- either side thinks I need to –- to make this 802, what we did sound right?

PROS: No, sir.

DDC: No, sir. I believe that’s an accurate summary of the 802.

MJ: Okay. Commander Kuebler, you've stated that you don't believe that it is correct at this time for you to argue the issue of jurisdiction. Are you ready to listen, or do you want me to go into counsel rights right now?

DDC: Sir, if the military judge believes it’s appropriate to address the jurisdictional issue, I have no objection to that.

MJ: Okay. Trial, feel free to argue on the military judge’s *sua sponte* motion to dismiss for lack of jurisdiction. I have before me in connection with this, AE 11 which once again is the CSRT determination; AE 13 which is the President’s letter of 7 February 2002, subject; “Humane treatment of al Qaeda and Taliban Detainees”; and the DEPSECDEF memorandum of 7 July 2004, subject, “Order establishing Combatant Status Review Tribunals.”

APROS: Your Honor, the issue as you’ve stated, is that the CSRT found ----

MJ: If you’ll go up and stand at the microphone; people can’t hear you.

[CPT Petty, APROS, moved from the counsel table to the podium in the center of the courtroom, as directed by the military judge.]

APROS: Your Honor, the issue as you've stated, is that the CSRT found Omar Khadr to be an enemy combatant; whereas the MCA requires that for jurisdictional purposes he be an alien unlawful enemy combatant. And as you mentioned, the CSRT is attached as Appellate Exhibit 11. First, the CSRT and the MCA use sufficiently similar standards, so that the CSRT in this instance can be dispositive. The factual predicate is the same. The CSRT defines enemy combatant in the 7 July 2004, Deputy Secretary of Defense order establishing CSRT's, Appellate Exhibit 14; "as an individual who is part of or supporting the Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners." This was the order in place at the time of Omar Khadr's CSRT.

The MCA defines an unlawful enemy combatant in section 948a(1)(A)(i) and (ii). This includes a person who is a part of al Qaeda, such as the accused. Therefore, because they use the same factual predicate, the CSRT should be dispositive. Furthermore, if we look at the CSRT, and we read that in conjunction with the Presidential determination of 7 February 2002, marked as Appellate Exhibit 13, Omar Khadr clearly qualifies as an unlawful enemy combatant.

The CSRT establishes Omar Khadr as an enemy combatant. The presidential determination states that members of al Qaeda and the Taliban are unlawful combatants. Therefore, because of Omar Khadr's membership and his participation with al Qaeda, he is an unlawful combatant. Therefore, read together, he is an unlawful enemy combatant. This analysis is supported by the discussion in RMC 202(b), also Congress has endorsed the standards of the CSRT's -- of the Presidential determination standards through the MCA.

Your Honor, if the court disagrees with the first two arguments, the MCA anticipates that a competent tribunal other than a CSRT, may determine the accused's status. This court is competent to make such a determination, and the government will prove the jurisdictional element at trial by a preponderance of the evidence. In the event, Your Honor, that you're not willing to go forward absent a finding of jurisdiction by a preponderance of the evidence, the government is willing to prove jurisdiction today.

The government will produce a video showing Omar Khadr engaged in unlawful combat activities including wearing civilian attire and making and planting roadside bombs. The government is prepared to call Special Agent [redacted], who will sponsor admissions by the accused and statements taken by others that the accused is an unlawful enemy combatant.

The bottom line, Your Honor, is that Omar Khadr deserves his day in court. Justice in this case will be best served without further delays. In order to avoid these delays the status of Omar Khadr should not be relitigated. It has already been established by the CSRT which applies the same standard as the MCA. Because the CSRT process provides detainees with the opportunity to challenge their status, the MCA recognizes that the status determination to be dispositive for purposes of personal jurisdictions of a military commission.

MJ: You stopped?

APROS: Yes, Your Honor.

MJ: Okay. I'm not picking on you, Captain Petty, but what does the MCA say the CSRT has to say?

APROS: "Unlawful enemy combatant," sir.

MJ: Does the CSRT say that?

APROS: No sir, the CSRT says ----

MJ: It doesn't say that; right? Okay. If you look at the AE 14, the DEPSECDEF's memo, it says, "enemy combatant shall mean an individual who is part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States." If you look at 948a(2), Lawful Enemy Combatant; a lawful enemy combatant means a person who is a member of the regular forces of the state party engaged in hostilities against the United States.

The definition used by the DEPSECDEF in establishing a CSRT doesn't comport with the definition in the statute. If Mr. Khadr was a member of a force, according to the CSRT he could be an enemy combatant which you want me to equate to unlawful enemy combatant.

APROS: No, Your Honor. The distinction here ----

MJ: Well I agree there is.

APROS: ---- the distinction here is that if he were a member of a recognized state armed forces, that would qualify him under 948a(2) as a lawful combatant. However, the criteria that should be applied is found in the preceding sections of 948 ----

MJ: I'm with you on that one. I've just read you the definition used by the CSRT, "an individual who is part of or supporting Taliban or other -- or al Qaeda forces or associated forces that engaged in hostilities against the United States." It doesn't eliminate people who are members of other forces. You can't say that A is equal to C because it is not. Reasonable minds might differ on that.

Let's assume for a second, Captain Petty, that I disagree with you and that I think Congress meant what they said when they wrote this. And they wrote that you've got to have a determination that there is an unlawful enemy combatant. Your first suggestion is that I sit here and litigate the entire issue; right?

APROS: No, Your Honor. My first suggestion is that we do not litigate the entire issue. In fact, it's that the CSRT should be dispositive as it stands because the MCA adopts ----

MJ: I agree. The CSRT is the dispositive. We agree on that one. We don't agree about on what it is dispositive of. Okay, well forget that one. Go on to the next one.

APROS: The next argument was that the CSRT finding read in conjunction with the Presidential determination memo, Appellate Exhibit 13, clearly indicate that Omar Khadr falls within the status of an unlawful enemy combatant as required by the MCA. First, the CSRT establishes the second-half that he is an enemy combatant. As a member of al Qaeda which is explicitly mentioned in the Presidential determination as an unlawful combatant he, therefore, is an unlawful enemy combatant.

MJ: Okay. Go on, what's your next one? What do you want me to do if I don't agree with those two?

APROS: The third argument, Your Honor, was that we could -- the government would be willing to prove before the military commission that he is, in fact, an unlawful enemy combatant. And if the court is not willing to move forward without a jurisdictional determination, then we are willing to produce such evidence proving his status today.

MJ: Okay. Anything else you want to say about that?

APROS: No, Your Honor.

MJ: I wasn't cutting you off. Do you have anything?

APROS: Your Honor, briefly, if I may?

MJ: I said, do you have anything.

APROS: The MCA in section 948a(1)(a)(ii) uses the language, "before, on, or after," contemplating that any CSRT that had been done before, on, or after would be dispositive. Although the language is different, the one word inartfully, whatever, it's just not there. This contemplates the MCA Congress intended that the standards used -- the standard applied at the CSRTs were to be those same standards used for jurisdictional determinations before military commissions.

MJ: Okay. While you are standing there, you are the United States of America, but I realize that you are not in fact responsible for everything that may have been done or not done, this memorandum was issued on the 7th of July 2004. Off the top of your head, do you know when the MCA was passed?

APROS: August of 2006, Your Honor.

MJ: October of 2006.

APROS: October 2006.

MJ: This determination that you gave me is dated 10 September 2004, and it states that Mr. Khadr is an enemy combatant. A quick

look at 948d shows that Congress recognized two categories of enemy combatants, lawful and unlawful. Correct?

APROS: Yes, Your Honor.

MJ: I mean, was anything done to change the CSRT? Did we run a new review tribunal on people we have to see who matches the Congressional -- I mean, this is a law. This isn't what people complained about before, this isn't the President making up rules -- and I'm not going to say anything about the effect of Hamdan v. Rumsfeld on AE 13. We have a law now. Do you know? I'm not going to bug you if you don't know. Do you know if anyone thought about going back and doing new review tribunals so that we would be brought in compliance with the law?

APROS: Your Honor, I do not know.

MJ: Okay. Thanks.

Commander Kuebler, you still do not believe that it would be proper for you to argue; is that correct?

DDC: That is correct.

MJ: Okay. I've got 1113. I'll be back in here at 1130.

Court's in recess.

[The session recessed at 1113 hours, 4 June 2007.]

[The session was called to order at 1135 hours, 4 June 2007.]

MJ: The commission will come to order. Let the record reflect that all parties present when the commission recessed are once again present.

A military commission is a court of limited jurisdiction. The jurisdiction is set by statute – the Military Commissions Act of 2006, the MCA.

Section 948d establishes the jurisdiction of a military commission. 948d(a) states: "(a) Jurisdiction. A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter, when committed by an alien unlawful enemy combatant." Section 948d(b) specifically states that military commissions, “shall not have jurisdiction over lawful enemy combatants.” Thus, in the MCA, Congress denominates for the purposes -- for the purpose of establishing jurisdiction two categories of enemy combatants – lawful and unlawful. A military commission only has jurisdiction to try an unlawful enemy combatant.

Further, in Section 948d(c), Congress stated that a finding by a Combatant Status Review Tribunal, "CSRT," that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction by military commissions.

In considering Section 948d, it is clear that the MCA contemplates a two-part system. First, it anticipates that there shall be an administrative decision by the CSRT which will establish

the status of a person for purposes of the MCA. The CSRT can find, for MCA purposes, that a person is a lawful enemy combatant or an unlawful enemy combatant.

Second, once the CSRT finds that a person is an unlawful enemy combatant, the provisions of the MCA come into play. Such person may have charges sworn against him, those charges may be referred to a military commission for trial, and a military commission may try him. A strict reading of the MCA would appear to require that, until such time as a CSRT or other competent tribunal makes a finding that a person is an unlawful enemy combatant, the provisions of the MCA do not come into play and such person may not be charged, charges may not be referred to a military commission for trial, and the military commission has no jurisdiction to try him.

There is, of course, the counter-argument. This argument is: the military commission itself is a competent tribunal under 948d(c) to determine if a person brought before it is an unlawful enemy combatant. While appealing, this argument has two major flaws:

First, in order to make that determination, the military judge would have to conduct a mini-trial to decide if a person is an unlawful enemy combatant. Or would he or she? Perhaps, since this determination might require factual determinations, the panel would have to make it. Congress provided in the MCA for many scenarios – none of them anticipated that the military commission would make the

lawful/unlawful enemy combatant determination for initial jurisdictional purposes.

Second, and I'm paraphrasing from Justice Stephens, "A person has a right to be tried only by a court which he knows has jurisdiction over him." If the military commission were to make the determination of initial jurisdiction, a person could be facing trial for months without knowing if the court, in fact and in law, had jurisdiction.

Persons familiar with the court-martial system might state that jurisdiction is always assumed by the court-martial and it's attacked only by motion. That is true, but a court-martial is a different creature than a military commission.

A soldier is in court in uniform with her first sergeant and company commander who most likely preferred the charges sitting in the courtroom. If you look at DD Form 458, the Charge Sheet, it contains the following information in Block I – Personal Data: Name of accused, SSN, Grade or Rank, Pay Grade, Unit or Organization, Initial Date and Term of Current Service, Pay Per Month, Nature of Restraint of Accused, and the Dates Imposed.

So when a military judge at Fort Bragg looks at the charge sheet and the accused who is in uniform, she knows that Private First Class William B. Jones is a member of Bravo Company, 3rd Battalion (Airborne), 325th Parachute Infantry Regiment, 82nd Airborne

Division, Fort Bragg, North Carolina. She knows how much he is being paid, if he has been restrained, when he came on active duty this tour, and by comparing the unit to the name of the accuser in Block III – Preferral, she can see if it was PFC Jones' company commander who preferred the charges.

Contrast this with the information found on MC Form 458 Charge Sheet in this case. The military judge is told that the name of the accused is Omar Ahmed Khadr. Three aliases are given, and the last four of an unidentified acronym, the ISN, is given. There is nothing on the face of the charge sheet to establish or support jurisdiction over Mr. Khadr, except for a bare allegation in the wording of the Specifications of the Charges.

The military judge is not ruling that no facts could be properly established concerning Mr. Khadr which might fit the definition of an unlawful enemy combatant in Section 948a(a) of the MCA. The military judge is ruling that the military commission is not the proper authority, under the provisions of the MCA, to determine that Mr. Khadr is an unlawful enemy combatant in order to establish initial jurisdiction for this commission to try Mr. Khadr.

The military judge is not ruling that Mr. Khadr may not, if his case is referred to trial after a proper determination, attack those facts in the elements of the offense referred which might

combine to show him to be an unlawful enemy combatant. Such an attack is a proper part of a military commission.

The military judge is not ruling that the charges against Mr. Khadr must be resworn. That would seem to be the more prudent avenue to take, but that issue is not currently before the commission.

If there were no two-step process required to try a person under the MCA, then a prosecutor could swear charges, the convening authority could refer charges, and a military commission could try a person who had had no determination as to his status whatsoever before the trial started. That is not what Congress intended to establish in the MCA.

The charges are dismissed without prejudice.

Anything further before I adjourn, trial?

PROS: Sir, the prosecution requests 72 hours to consider whether to file an appeal.

MJ: You got it.

You don't have anything you want to say, do you? You can.

DDC: No, sir, I don't.

MJ: Court's adjourned.

[The session adjourned at 1145 hours, 4 June 2007.]

[END OF PAGE]

AUTHENTICATION OF RECORD OF TRIAL

IN THE CASE OF

UNITED STATES v. OMAR AHMED KHADR,
also known as AKHBAR FARHAD,
AKHBAR FARNAD,
AHMED MUHAMMED KHALI
ISN: 0766

AE 023 - DISPOSITION OF PROSECUTION MOTION TO RECONSIDER - P001 - WAS APPENDED TO THE RECORD OF TRIAL PRIOR TO AUTHENTICATION.

I received the completed record of trial for review and authentication on 29 JUNE 2007,

and authenticated same on 29 JUNE, 2007.

PETER E. BROWNBACK III
Colonel, JA, USA
Military Judge

ACKNOWLEDGEMENT OF RECEIPT AND EXAMINATION

I received the completed record of trial for review in the foregoing case on _____ 20____.

_____

William Kuebler
Lieutenant Commander, JAGC, USN
Detailed Defense Counsel

AUTHENTICATION OF RECORD OF TRIAL

IN THE CASE OF

UNITED STATES v. OMAR AHMED KHADR,
also known as AKHBAR FARHAD,
AKHBAR FARNAD,
AHMED MUHAMMED KHALI
ISN: 0766

I received pages 1 through 22 of the transcript for review and authentication on _____20____,

and authenticated same on _____, 20___ . This authentication is for purposes of review by the Court of Military Commission Review pursuant to an appeal under 10 U.S.C. §950d.

_____
PETER J. BROWNBACK III
Colonel, JA, USA
Military Judge

ACKNOWLEDGEMENT OF RECEIPT AND EXAMINATION

I received page 1 through 22 of the transcript for review in the foregoing case on 5 JUNE 20 07.

_____
William Kuebler
Lieutenant Commander, JAGC, USN
Detailed Defense Counsel

APPELLATE EXHIBITS

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

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

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

II. CHARGES AND SPECIFICATIONS

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

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER		**5e. DATE (YYYYMMDD)**
		20070405

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

Jeffrey D. Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

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

Jeffrey D. Groharing
Signature

IV. NOTICE TO THE ACCUSED

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

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

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

Jeffrey D. Groharing
Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

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

Location

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

CW3
Grade

Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)
Convening Authority 10USC §948h Appointed on 6 Feb 2007	Arlington, Va	20070424

Referred for trial to the (non)capital military commission convened by military commission convening order 07-02 dated 8 March 2007

subject to the following instructions[1]: this case is referred non-capital; see continuation sheet

By _____ of _____
Command, Order, or Direction

Susan J. Crawford
Typed Name and Grade of Officer

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

Susan J. Crawford
Signature

VII. SERVICE OF CHARGES

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

Jeffrey D. Groharing
Typed Name of Trial Counsel

0-4
Grade of Trial Counsel

Signature of Trial Counsel

FOOTNOTES

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

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

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

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

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

This case is referred non-capital.

Date: 4-24-07

Susan J. Crawford

Hon. Susan J. Crawford
Convening Authority
for Military Commission

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

CHARGE 1: VIOLATION OF 10 U.S.C. §950v(b)(15), MURDER IN VIOLATION OF THE LAW OF WAR

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

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

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

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

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

criminal purpose known to the accused to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; ~~hijacking or hazarding a vessel or aircraft~~; SFC 4.24.07 and terrorism.

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

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi.", consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

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

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

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

5. On or about July 27, 2002, Khadr ~~and/or other suspected al Qaeda members~~ SFC 4.24.07 engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.

6. Khadr ~~and/or the other suspected al Qaeda members~~ SFC 4.24.07 threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

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

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

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

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

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi.", consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

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

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

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

5. On or about July 27, 2002, Khadr ~~and/or other suspected al Qaeda members~~ SJC 4.24.07 engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.

6. Khadr ~~and/or the other suspected al Qaeda members~~ SJC 4.24.07 threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

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

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

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

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi.", consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

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

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

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

5. On or about July 27, 2002, Khadr ~~and/or other suspected al Qaeda members~~ SJC 4-24-07 engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.

6. Khadr ~~and/or the other suspected al Qaeda members~~ SJC 4-24-07 threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

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

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

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

There were no Convening Orders published in 2006

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
OFFICE OF THE CONVENING AUTHORITY
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

MILITARY COMMISSION CONVENING ORDER
NUMBER 07-02 8 March 2007

Pursuant to the authority vested in the Secretary of Defense in accordance with the Military Commissions Act of 2006, 10 U.S.C. § 948h, and my appointment as Convening Authority for Military Commissions on February 6, 2007, a military commission is hereby convened. It may proceed at Guantanamo Bay, Cuba, unless otherwise directed, to try such persons as may be properly brought before it. The military commission is convened with the following members:

MEMBERS

RANK	NAME	SVC	ASSIGNMENT
Col.	[redacted]	USAF	[redacted]
Capt.	[redacted]	USN	[redacted]
Col.	[redacted]	USMC	[redacted]
COL	[redacted]	USA	[redacted]
COL	[redacted]	USA	[redacted]
Col.	[redacted]	USAF	[redacted]
Capt.	[redacted]	USN	[redacted]
Lt.Col.	[redacted]	USAF	[redacted]
MAJ	[redacted]	USA	[redacted]
CW5	[redacted]	USA	[redacted]

Susan J. Crawford
Convening Authority
for Military Commissions

DISTRIBUTION:
Individual (1)
Record of Trial (1)
Reference Set (1)

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

Colonel Ralph H. Kohlmann
[redacted]

March 1, 2007

Colonel Kohlmann:

In accordance with Rule for Military Commissions 503(b)(2) of the Manual for Military Commissions, you are hereby appointed as the Chief Judge of the Military Commissions Trial Judiciary. You were selected from a pool of certified military judges nominated for that purpose by The Judge Advocates General of each of the military departments. R.M.C. 503(b)(1). The Military Commissions Trial Judiciary shall consist of the Chief Trial Judge and such military judges as have been nominated under R.M.C. 503(b)(1) to comprise the pool from which military judges will be detailed to military commissions. R.M.C. 503(b)(3).

Susan J. Crawford
Hon. Susan J. Crawford
Convening Authority
for Military Commissions

[redacted] SFC, DoD OGC

From: [redacted], LTC, DoD OGC
Sent: Monday, April 30, 2007 2:01 PM
To: [redacted] SFC, DoD OGC
Cc: [redacted] Ms, DoD OGC
Subject: FW: United States v. Omar Ahmed Khadr: Detailing of Military Judge AE 004

AE 004.

v/r,

LTC [redacted] USAR
>Sen[redacted]dvisor
Military Commissions Trial Judiciary

[redacted]

-----Original Message-----
From: Kohlmann Col Ralph H [redacted]
Sent[redacted] 24, 20[redacted]
To: [redacted] LTC, DoD OGC
Cc: [redacted]s, DoD OGC; Pete Brownback
Subj[redacted]ates v. Omar Ahmed Khadr: Detailing of Military Judge

LTC [redacted],

1. Pursuant to R.M.C. 503, I hereby detail Colonel Peter Brownback as the Military Judge in the Military Commission case of United States v. Omar Ahmed Khadr.

V/R,

Ralph H. Kohlmann
Colonel, U.S. Marine Corps
Chief Judge

[redacted]

[redacted] SFC, DoD OGC

From: [redacted]
Sent: Wednesday, April 25, 2007 2:29 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Detail of Military Judge and Initial Notice to Counsel, United States v. Khadr
Attachments: Biographical Summary.doc; Voir Dire- RMC 902 Matters.doc

COL Brownback has directed that I send the email below to the parties.

v/r,

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

From: Pete Brownback [redacted]
Sent: Wednesday, April 25, 2007 12:24
To: OMJ - [redacted]
Subject: Detail of Military Judge and Initial Notice to Counsel

Subject: United States v. Khadr, Detail of Military Judge and Scheduling of Initial Session

LTC [redacted],

Please forward the email below to counsel in the case of United States v. Khadr and other interested parties.

COL Brownback

Counsel in the case of United States v. Khadr,

1. The Chief Judge of the Military Commissions Trial Judiciary (CJMCTJ) has detailed the undersigned as the Military Judge in the case of United States v. Khadr.

2. The addressees on this email have been identified to the Military Commissions Trial Judiciary (MCTJ) Staff as counsel on this case. Chief Prosecutor and Chief Defense Counsel will confirm that all counsel on the case are addressees.

3. All detailed counsel shall provide a signed copy of the detailing memorandum via email to the MCTJ Staff NLT 1600 hours, 26 April 2007.

4. Civilian Defense Counsel who wish to make an appearance in this case should immediately notify MCTJ Staff. The required paperwork will be forwarded ASAP. Civilian Defense Counsel should note that the paperwork requirements for entering an appearance may change in the event of official promulgation of a Department of Defense Trial Regulation for Military Commissions.

5. All email traffic with the Military Judge will also be addressed to:

a. The MCTJ Staff: LTC [redacted] Ms. [redacted] and SFC [redacted] Their email addresses are contained in the header of the email forwarding this communication.

b. All counsel, civilian and military, on the case.

c. The Chief Prosecutor and Chief Defense Counsel along with the Chief Legal NCOs for the Prosecution and the Defense, and the paralegals assisting the counsel.

6. I have selected 7 May 2007 as the date for the arraignment in this case. All counsel shall make the necessary arrangements to be present in the Guantanamo Bay Courtroom for this session. If either party believes that the party can not comply with the scheduled arraignment date, the lead counsel - on behalf of all counsel for the party - will immediately request a continuance setting forth a requested date and stating the reasons why such a continuance is necessary. This request shall be contained in the body of an email and must be provided to the MCTJ Staff not later than 1400 hours, 27 April 2007.

7. As authorized by RMC 108, the CJMCTJ will issue Rules of Court for the Military Commissions. They will be provided to all counsel by MCTJ Staff. The MCTJ Staff will also provide a trial guide for use at the initial session.

8. Should either side wish to conduct any *voir dire* of the Military Judge, you must submit your questions to the MCTJ Staff, not later than 1200 on 4 May 2007. A mini-biography and RMC 902 matters are attached. Voir dire questions must be relevant to an RMC 902 determination; if the question is not facially relevant, it will not be answered unless the relevance is explained as part of the question.

9. At the arraignment, I will establish a full schedule for the litigation of this case. Prior to the session, counsel are encouraged and urged to discuss scheduling and endeavor to agree upon a schedule that works as well as possible for both sides. Counsel must take into account, *inter alia*, the time constraints set forth in RMC 707 and appropriate phasing of motions (i.e.: discovery; witness production; law motions; evidentiary motions).

Peter E. Brownback III
Colonel, USA
Military Judge

Matters Concerning Voir Dire - United States v. Khadr

1. I am qualified under the provisions of RMC 502(c).
2. I have been detailed under the provisions of RMC 503(b).
3. I have no personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings.
4. I have not acted as counsel, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.
5. I have not been nor will I be a witness in the case, I am not the accuser in the case, I have not forwarded charges in the case with a personal recommendation as to disposition, and I have not expressed an opinion concerning the guilt or innocence of the accused.
6. Neither myself, my spouse, nor any person within the third degree of relationship to myself or my spouse or the spouse of any such person is a party to the proceeding, is known by me to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding, is to my knowledge likely to be a material witness in the case.
7. I am aware of no matter which might cause my impartiality to reasonably be questioned.

Peter E. Brownback III
Colonel, USA
Military Judge

Biographical Summary

Peter E. Brownback III

Born 22 October 1947 in Philadelphia, PA. Graduated from Johns Hopkins University in Baltimore, MD, in June 1969 with a Bachelors of Arts in International Affairs.

Received a Regular Army commission as an infantry officer in June 1969. After initial officer training, assigned as a platoon leader in 3/325 PIR, 82d Abn Div, Fort Bragg, NC from October 1969 to February 1970.

Vietnam service from June 1970 - June 1971 as an infantry platoon leader, armored cavalry platoon leader, and battalion S-1, all with the 173d Airborne Brigade.

Served with 5th Special Forces Group at FBNC from June 71 to February 1973 as an A Detachment Commander and Battalion S-3.

Infantry Officer Advanced Course -- June 1973 - May 1974.

Funded Legal Education Program student at TC Williams School of Law, University of Richmond, 1974-77. Summers at Fort Lee working as assistant trial and assistant defense counsel. Admitted to Virginia Bar, June 1977.

Assigned to Office of the Staff Judge Advocate, 82d Airborne Division, FBNC, 1977-1980. Trial Counsel, Chief Administrative Law, Chief Military Justice.

Senior Defense Counsel, Fort Meade, MD. 1980-81.

Operations Officer, US Army Trial Defense Service, Falls Church, VA. 1981-84.

Legal Advisor/Legal Instructor, USAJFK Center for Special Warfare, FBNC, 1984-85.

Legal Advisor, Joint Special Operations Command, FBNC, 1985-88.

Senior Military Judge, Mannheim, FRG, 1988-1991.

Director of Legal Operations, JSOC, FBNC, Jan 91 - Apr 91.

Staff Judge Advocate, 22d SUPCOM/ARCENT Forward, Dhahran, KSA, May 91 - May 92.

Chief Circuit Judge, 2d Judicial Circuit, FBNC, 1992 - 1996.

Chief Circuit Judge, 5th Judicial Circuit, Mannheim, FRG, 1996 - 1999.

Entered on the retired rolls on 1 July 1999.

Retiree recall on 13 July 2004.

AWARDS: Combat Infantryman's Badge, Special Forces Tab, Ranger Tab, Master Parachutist Badge, DSM, LOM x 3, BSM x 5, MSM x 2, JSCM x 2, ARCOM x 2, AAM, JMUA x 2, NDSM, VSM, SWABS, HSM, RVNGCUC, RVNCAMU, KUKULISM

[redacted] SFC, DoD OGC

From: [redacted] LTC, DoD OGC
Sent: Monday, April 30, 2007 4:17 PM
To: [redacted]
Cc: [redacted]
Subject: AE 006 REQUEST FOR CONTINUANCE and RULING US V. KHADR 6

Attachments: Attachment 1.pdf; Attachment 2.pdf; Attachment 3.pdf; Attachment 4.pdf

From: [redacted] LTC, DoD OGC
Sent: Friday, April 27, 2007 14:49
To: [redacted]
Subject: FW: Continuance - United States v. Khadr

COL Brownback has directed that I send the email below to the parties.

v/r,

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

From: Pete Brownback [redacted]
Sent: Friday, April 27, 2007 14:30
To: OMJ - LTC [redacted]
Subject: Continuance - United States v. Khadr

LTC [redacted],

Please forward the below email to counsel in the case of United States v. Khadr and to other interested parties.

COL Brownback

Counsel in the case of United States v. Khadr,

1. I have reviewed and considered:

a. LTC [redacted] email of 25 April 2007, 2:29PM, Subject: FW: Detail of Military Judge and Initial Notice to Counsel, United States v. Khadr.

b. LTC Vokey's email of 26 April 2007, 20:42, Subject: Request for Continuance ICO US v. Omar Khadr.

c. MAJ Groharing's email of 27 April 2007, 13:09, Subject: RE: Request for Continuance ICO US v. Omar Khadr.

2. I have also considered the provisions of Rule for Military Commissions 707.

3. I find:

a. The requested delay is for a total of 30 days.

b. There have been no previous defense requests for delay in this proceeding.

c. On its face, the request is reasonable.

d. The matters set forth by the prosecution in 1c above are matters which need to be resolved in a timely fashion, but these are matters which are appropriate for the defense to attempt to resolve before the initial appearance in court.

e. The prosecution sets forth no specific harm to its case which would result from granting this delay.

f. The public interest in a speedy trial will not be harmed by the delay in the arraignment which has been requested by the defense.

g. LTC Vokey, by statute, is charged with representing the accused and, until and unless his representational duties are changed or withdrawn, he must be given latitude to determine the best interests of the accused.

h. With regard to the provisions of R.M.C. 707(b)(4)(E)(ii)(A), I specifically find that the interests of justice are served by granting a continuance and those interests outweigh the best interests of the public and the accused in a prompt trial.

i. I specifically do not find that arraignment within 45 days of service of charges is not prompt.

j. With regard to the provisions of R.M.C. 707(b)(4)(E)(ii)(B), the defense is the party responsible for the delay occasioned by this continuance.

4. The defense request for a continuance is granted insofar as it extends until 1300 hours, 4 June 2007. If, after performing those tasks which are mentioned in 1b, the defense still believes that it needs until 6 June, the defense may make a further request. The military judge will be located at Guantanamo Bay as of 2 June 2007, and any such request may be made prior to 0900 hours, 4 June 2007.

Peter E. Brownback III

COL, JA, USA

Military Judge

From: Groharing, Jeff, Maj, DoD OGC
Sent: Friday, April 27, 2007 13:09
To: [redacted] LTC, DoD OGC
Cc: [redacted]
Subject: RE: REQUEST FOR CONTINUANCE ICO US V. OMAR KHADR

Sir,

The Prosecution opposes the Defense request to delay the arraignment currently set for 7 May 2007 to 6 June 2007.

The information provided by Lieutenant Colonel Vokey concerning his commitments and the commitments of his civilian co-counsel, Professor Ahmad, is too vague for the Prosecution to address with particularity. For example, there is no averment of what is scheduled, when it was scheduled, how long it is expected to last, whether any of their commitments were the subject of prior delays, whether any effort was made to reschedule anything that conflicts with the 7 May arraignment date, and the difficulty and inconvenience, if any, of rescheduling their commitments. In a prepared statement by the defense provided to the news media on 24 April 2007, the defense laments that Mr. Khadr has spent "nearly 5 years in such conditions." (See attachments 1 and 2). The information in the defense request for delay does not articulate why, given the length of time Mr. Khadr has been detained and their expressed concern for him, their other commitments outweigh the interests of Mr. Khadr in resolution of the charges against him at the earliest.

More importantly, it is imperative to resolve on the record the issue of Mr. Khadr's desires with respect to legal representation. According to statements in the press by Mr. Khadr's mother following a telephone conversation with him on or about 7 March 2007, Mr. Khadr stated he "doesn't want any American lawyer to represent him, he will not be seeing any American lawyers." (See attachment 3). Another newspaper reports that Mr. Khadr told his family in the telephone conversation that "he no longer wishes to be represented by Lt.-Col. Vokey and his team." (See attachment 4). Mr. Khadr has often refused to meet with members of the defense legal team and there is no record of him meeting with any of them since he told his family he did not want the services of any American lawyers. This is a critical matter that should be settled, on the record, at the earliest.

Finally, the portion of the request for delay pertaining to an additional unnamed civilian defense counsel is irrelevant. The Military Commissions Act (10 U.S.C. §949c.(3)) and the Regulation for Trial by Military Commission (Rule 9-5.a.1) state that an accused may retain civilian counsel. There is no showing that Mr. Khadr chose to retain this unnamed person. Again, this is a matter that should be resolved on the record at the earliest.

Accordingly, the Prosecution opposes the request to delay the arraignment.

[redacted] [redacted] [redacted] [redacted]

Attachment 1.pdf (104 B) Attachment 2.pdf (104 B) [redacted] 3.pdf (16 KB) Attachment 4.pdf (104 B)

V/R,

Major Groharing

-----Original Message-----
From: Groharing, Jeff, Maj, DoD OGC
Sent: Friday, April 27, 2007 11:02
To: [redacted] LTC, DoD OGC
Cc: [redacted]
Subject: Re: REQUEST FOR CONTINUANCE ICO US V. OMAR KHADR

Sir,

The Prosecution opposes the request. I am on my way to Crystal City andI will provide a complete response as soon as I get there.

V/R

Major Groharing

CAUTION: Information contained in this message may be protected by the attorney/client, attorney work product, deliberative process or other privileges. Do not disseminate further without approval from the Office of the DoD General Counsel.

Sent from my BlackBerry Wireless Handheld

From: [redacted] LTC, DoD OGC
Sent: Friday, April 27, 2007 7:57 AM
To: [redacted]
Subject: RE: REQUEST FOR CONTINUANCE ICO US V. OMAR KHADR

Major Groharing,

Please respond via email ASAP whether you concur with or oppose the defense request. (COL Davis, if the lead counsel is not available this morning, please advise ASAP.)

Thank you.

v/r,

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

From: Vokey LtCol Colby C [redacted]
Sent: Thursday, April 26, 2007 20:42
To: [redacted], LTC, DoD OGC
Subject: REQUEST FOR CONTINUANCE ICO US V. OMAR KHADR

Col Brownback,

This is to request a continuance in the arraignment of US v. Omar Khadr from 7 May to 6 June.

With an arraignment date of 6 June, the defense plans to travel to Gunatanamo around 2 June. This would allow for time to handle administrative and security issues and meet with the client on the 4th and 5th prior to the court hearing.

A continuance is needed to accommodate the schedules of myself and co-counsel. Prior to 1 June, I have a court appearance and scheduled pretrial matters in another case, and other previously scheduled official duties and travel. My civilian co-counsel, Muneer Ahmed, is a professor of law at American University and has professional obligations until the last half of May after the school year ends.

Additionally, the defense has added a new defense counsel who we anticipate taking over over the duties of lead counsel very soon. His security clearance application was submitted at the end of March but we have not received word yet as to whether clearance, or at least interim clearance, has been granted. We anticipate resolution of that issue within the next

two weeks so that he may travel to Guantanamo and visit with our client prior to the arraignment.

V/R
LtCol Vokey

Lieutenant Colonel Colby C. Vokey, U.S. Marine Corps
[redacted]

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The Miami Herald
Found on Miami.com
The Miami Herald

April 24, 2007 Tuesday

LENGTH: 426 words

HEADLINE: Guantánamo defense team angry over Khadr charges

BODY:

Here is the full text of the statement from the attorneys for Omar Khadr of Canada, an enemy combatant at Guantánamo Bay, Cuba, following the Defense Department's announcement that he would be tried by military commission:

``We have just learned that our client, Omar Khadr, has been charged by the United States government with several offenses that are not even valid war crimes, for which he will be tried by military commission under The Military Commissions Act of 2006. This is the third set of charges laid against Omar. Yet, no matter how many times the government issues new charges, the military commissions system will continue to be an illegitimate one. Indeed, the system is virtually indistinguishable from the one previously invalidated by the Supreme Court in Hamdan v. Rumsfeld just last year.

'The recent plea agreement accepted by David Hicks after less than a day of military commission proceedings and after significant negotiations between Australia and the U.S. demonstrates that the resolution of these cases is political and not the result of a legal process. Clearly, the U.S. is using the case of Omar in an attempt to rehabilitate the military commissions, which Hicks' plea demonstrated is a tainted process. In doing so, the U.S. will be the first country in modern history to try an individual who was a child at the time of the alleged war crimes. Indeed, the charge of conspiracy against Omar is based on alleged acts some of which occurred when Omar was less than 10 years of age.

``Omar Khadr was taken into U.S. custody at the age of 15 and has been detained at Guantánamo since he was 16, in conditions equal to or worse than those given to convicted adult criminals, such as prolonged solitary confinement and repeated instances of torture. After nearly 5 years in such conditions, the government is now demanding his appearance before what can only amount to a kangaroo court. The fact that this Administration has seen fit to designate this youth for trial by military commission is abhorrent.

``Now is the time for Canada and the U.S. to negotiate a political resolution because the commissions system is incapable of justice. Otherwise, Omar, just barely twenty years of age and a minor at the time of the alleged crimes, is guaranteed to be convicted in one of the greatest show trials on earth. This should not be the legacy of America or Canada."

Signed,

Muneer Ahmad

Kristine Huskey

Richard Wilson

American University

College of Law

Washington D.C.

Lt. Col. Colby Vokey

U.S. Marine Corps.

Lt. Cmdr. William Kuebler

U.S. Navy

LOAD-DATE: April 25, 2007

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The Record (Kitchener-Waterloo, Ontario)

April 25, 2007 Wednesday
Early Edition

SECTION: FRONT; Pg. A1

LENGTH: 525 words

HEADLINE: Khadr charged by U.S.; Canadian held almost five years at Guantanamo

BYLINE: MICHELLE SHEPHARD, Toronto Star

BODY:

Canadian Omar Khadr is set to become the first Guantanamo detainee to stand trial for murder after nearly five years in captivity.

The Pentagon yesterday charged Khadr, 20, with murder, attempted murder, aiding the enemy, conspiracy and spying.

He's accused of throwing a grenade that killed U.S. Delta Forces soldier Sgt. Christopher Speer during a firefight in Afghanistan on July 27, 2002. He was 15 at the time and was held for three months in Afghanistan before being transferred to the U.S. detention centre at Guantanamo Bay, Cuba, where he remains today in segregation.

Khadr's lawyers dismissed the military trial he faces as a "kangaroo court," and urged the Canadian government to intervene and negotiate Khadr's release.

"Now is the time for Canada and the U.S. to negotiate a political resolution because the (military) commissions system is incapable of justice," his legal team, led by U.S. marine Lt.-Col. Colby Vokey, wrote in a statement yesterday.

"Otherwise, Omar, just barely 20 years of age and a minor at the time of the alleged crimes, is guaranteed to be convicted in one of the greatest show trials on earth. This should not be the legacy of America or Canada."

Former Liberal deputy prime minister John Manley also urged the Conservative government to act.

"We need the U.S. to be a moral leader and the government of Canada should point out that (Guantanamo) undermines this," he said in Quebec City, where he was speaking at a counterterrorism conference yesterday.

"He should be tried in a U.S. court. Why does he need go before a military trial in Guantanamo?"

Vokey also argues that since Khadr was 15 when detained, the Bush administration would make history as the first government to put a child on trial for war crimes.

"After nearly five years in such conditions, the government is now demanding his appearance before what can only amount to a kangaroo court. The fact that this administration has seen fit to designate this youth for trial by military commission is abhorrent," Vokey said.

Guantanamo chief prosecutor Moe Davis first listed the charges against Khadr in February, but the process could not begin until yesterday when the military commission's convening authority officially referred the charges.

Now Khadr is required to appear before a Guantanamo court in 30 days, and a jury must be selected for his trial within four months.

Khadr has vowed to boycott the trial and stopped co-operating with his American attorneys, his mother Maha Elsamnah said last month. In the first phone call Khadr has been allowed since his capture almost five years ago, he reportedly told his family he wanted nothing to do with the hearings.

He said he would meet with his family's Canadian lawyers -- Edmonton-based Dennis Edney and Nate Whitling. Yesterday, they received word from Canada's Foreign Affairs Department that they'd been cleared to travel to Guantanamo.

This is the second time the Bush administration has charged Khadr -- the U.S. Supreme Court ruled the first process was unconstitutional. The new Congress-endorsed Military Commissions Act, signed into law in October, has not yet been tested by the high court.

GRAPHIC: Colour Photo: Omar Khadr

LOAD-DATE: April 25, 2007

Send To: GROHARING, JEFF
DOD OFFICE OF GENERAL COUNSEL
1155 DEFENSE PENTAGON RM 5A689
WASHINGTON, DC 20301-1155

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The Globe and Mail (Canada)

March 8, 2007 Thursday

SECTION: NATIONAL NEWS; Pg. A1

LENGTH: 826 words

HEADLINE: Khadr phones home after 5 years in Gitmo

BYLINE: COLIN FREEZE

DATELINE: TORONTO

BODY:

Omar Khadr, the 20-year-old Canadian citizen being held in Guantanamo Bay, was allowed to call his Toronto family this week for the first time since his arrest on suspicion of killing a U.S. soldier in Afghanistan nearly five years ago.

In conventional criminal cases, phone calls to family occur within hours of a suspect landing in custody, but the special considerations surrounding the facility and Canada's Khadr family meant this call took years to arrange. The mother of the Afghanistan-raised Mr. Khadr said yesterday that it was jarring to hear him speak with a man's voice for the first time.

"When we heard his voice, I was almost collapsing, and then he said 'Don't cry, hold on,' " Maha Elsamnah, the Khadr family matriarch, said in an interview yesterday.

She said that in the 50-minute phone conversation that was arranged by both governments on Tuesday morning her son told her he plans to boycott U.S. justice and quickly return to Canada.

"He wishes he will be with us, that next Eid, he will be with us, next Ramadan he will be with us," she said.

But she is far less optimistic.

"Five years to get a phone call - I don't know how long it will take him to get him here, or to get him out," she said, adding her son speaks a more Saudi-inflected Arabic than when she last heard him speak.

A trip back to Canada for Mr. Khadr is unlikely any time soon. He is detained in the near-isolation of Guantanamo Bay's Camp 6, where he spends his time memorizing the Koran.

The Pentagon is preparing to lay new charges involving murder and al-Qaeda membership against him in coming weeks, paving the way for his appearance before a new military tribunal as early as this summer.

Yet the detainee says "he wouldn't be going to the trial. That everything that was happening over there wasn't fair," said his sister Zaynab, who also spoke to him on the phone. She said she heard her brother sniffle at points, and he referred to his U.S. jailers as "criminals."

Mr. Khadr's mother added that her son said "he doesn't want any American lawyer to represent him, he will not be seeing any American lawyers" and that he is insisting he will work only with the family's Canadian lawyer, Dennis Edney.

Speaking alongside the family yesterday, Mr. Edney said he wants his client to be given the same rights and privileges afforded to Guantanamo detainees from Australia and Britain. These countries, stauncher U.S. allies in the war on terrorism, have arranged for some of their prisoners to be sent home to serve sentences, or to have their own lawyers attend proceedings in Cuba.

Yet "Canada hasn't been able to exert the most simplest and basic assistance to Omar," Mr. Edney said. ". . . But I did get a phone call - five years later.

"What is the message we send to the Americans about how we value Canadian citizens when they're detained abroad?"

The lawyer said Canada's Department of Foreign Affairs arranged the telephone call with the Pentagon, which laid down conditions. The lawyer said he was not allowed to be present during the phone call, nor were members of the news media, and the U.S. military taped the call.

Mr. Khadr is one of Guantanamo Bay's youngest and longest-held detainees.

His father, Ahmed Said Khadr, was an Egyptian-Canadian telecom engineer who moved his family to Afghanistan in the early 1980s. He was among the fundamentalist Muslims who were involved in an anti-Soviet uprising in Afghanistan, before becoming involved with al-Qaeda figures.

After the Sept. 11, 2001, attacks that killed 3,000 in the United States, Khadr family members fled Afghanistan with al-Qaeda families, taking refuge in the mountains of the tribal areas of Pakistan. One of Mr. Khadr's brothers recently told police that his father instructed Omar to go back to Afghanistan to work as a translator for an al-Qaeda commander known as Abu Laith al-Libi.

In the summer of 2002, invading U.S. forces raided an alleged al-Qaeda compound. The ensuing battle killed all militants inside except 15-year-old Omar. Pentagon officials allege he lobbed a grenade that killed a U.S. soldier and wounded others, before the soldiers shot him three times. He was eventually sent to Guantanamo Bay, where he has spent a quarter of his life awaiting trial.

Mr. Khadr spoke this week only to his mother, grandmother and sister, and the conversation mostly appears to have involved family matters. He apparently did not discuss the details of the battle or case, beyond saying he still has shrapnel in his body and is blind in his left eye.

Until now he has been communicating with his family in Canada only through letters exchanged through the Red Cross. His family feels not all of their correspondence is getting through to him.

Before an operator in Guantanamo Bay ended the phone call, Omar Khadr told his family he used to study and exercise a lot, but that he has largely lost interest because of his long detention.

He told them to have faith in God.

GRAPHIC: Illustration

LOAD-DATE: March 8, 2007

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Ottawa Citizen

March 9, 2007 Friday
Final Edition

SECTION: NEWS; Pg. A5

LENGTH: 140 words

HEADLINE: Khadr plans to boycott his terror trial

BYLINE: The Ottawa Citizen

DATELINE: WASHINGTON

BODY:

WASHINGTON - The chief U.S. defence lawyer for Omar Khadr said yesterday he shares his client's frustrations about a looming military trial and the fact he won't have a Canadian lawyer.

"We have repeatedly asked for Canadian lawyers to be assigned, at least as foreign attorney consultants," Lt.-Col. Colby Vokey said in an e-mail.

Mr. Khadr, the only Canadian at the Guantanamo Bay prison camp for terror suspects, told his family in a phone call this week he plans to boycott his trial and no longer wishes to be represented by Lt.-Col. Vokey and his team.

Under the tribunal system, Mr. Khadr is not allowed to choose his own lawyer.

"We will discuss the issue of his representation with him next month," said Lt.-Col. Vokey, adding he was pleased Mr. Khadr was able to talk with his mother in Toronto for the first time in almost five years.

LOAD-DATE: March 9, 2007

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

April 25, 2007

MEMORANDUM FOR MAJOR JEFFREY D. GROHARING USMC
CAPTAIN KEITH A. PETTY USA
LIEUTENANT CLAY G. TRIVETT JR. USN

SUBJECT: Detailed Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Rule 501(b), Manual for Military Commissions, dated January 18, 2007, the above named counsel are detailed and designated as follows for the case of United States v. Omar Ahmed Khadr:

Detailed Prosecutor:
Major Jeffrey D. Groharing, USMC

Detailed Assistant Prosecutor:
Captain Keith A. Petty, USA
Lieutenant Clay G. Trivett Jr., USN

MORRIS D. DAVIS
Colonel, United States Air Force
Chief Prosecutor
Office of Military Commissions

cc:
Deputy Chief Prosecutor

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

February 22, 2007

MEMORANDUM FOR LCDR William C. Kuebler, JAGC, USN

Subject: Detailing as Associate Defense Counsel in the Military Commission Case of *United States v. Omar Khadr*

Pursuant to Rule for Military Commissions 503(c), I hereby detail you as Associate Defense Counsel in the military commissions case of *United States v. Omar Khadr*.

D. H. Sullivan
Col, USMCR
Chief Defense Counsel

Copy to:
LtCol Colby Vokey, USMC

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

February 22, 2007

MEMORANDUM FOR LtCol Colby C. Vokey, USMC

Subject: Detailing as Detailed Defense Counsel in the Military Commission Case of *United States v. Omar Khadr*

Pursuant to Rule for Military Commissions 503(c), and in accordance with the Judge Advocate General of the Navy's letter of 18 January 2006 making you available to serve as detailed defense counsel in the military commission case of *United States v. Omar Khadr*, I hereby detail you as Detailed Defense Counsel in the military commission case of *United States v. Omar Khadr*.

D. H. Sullivan
Col, USMCR
Chief Defense Counsel

Copy to:
LCDR William C. Kuebler, JAGC, USN

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

May 30, 2007

MEMORANDUM FOR LtCol Colby C. Vokey, USMC

Subject: Excusal as Detailed Defense Counsel in the Military Commission Case of *United States v. Omar Khadr*

Pursuant to Rule for Military Commissions 505(d)(2)(B)(i), I hereby excuse you as detailed defense counsel in the military commission case of *United States v. Omar Khadr*.

D. H. Sullivan
Col, USMCR
Chief Defense Counsel

[redacted] SSG, DoD OGC

From: [redacted] Ms, DoD OGC
Sent: Friday, June 01, 2007 10:11 AM
To: [redacted]

Cc: [redacted]

Subject: US vs Khadr Schedule/802 Session on 3 June 07

By direction of COL Brownback:

1) Regarding the request by prosecution for a conference call today; any discussion of this matter can be raised at the 802 session currently scheduled for 3 June 07 in the Judges Chamber.

2) Further communication at this time regarding any matters in the 4 June 07 hearing and 3 June 07 802 session of U.S. v. Khadr should be addressed via LTC [redacted] at his SOUTHCOM email address. Please understand there will be short delay in return communications due to travel schedules of participants.

v/r
[redacted]
Attorney Advisor
Military Commissions Trial Judiciary
[redacted]

[redacted] **SSG, DoD OGC**

From: Groharing, Jeff, Maj, DoD OGC
Sent: Friday, June 01, 2007 8:34 AM
To: [redacted]
Cc:

Subject: Detailed Counsel in U.S. v. Khadr

Importance: High

Attachments: 31 May 2007 - Email from CDC.pdf

Sir,

Please pass to Colonel Brownback:

The Prosecution requests a conference call today with the Military Judge, the Chief Defense Counsel, Lieutenant Colonel Vokey, and Lieutenant Commander Kuebler.

The Prosecution received an email yesterday from Colonel Sullivan stating that he had removed Lieutenant Colonel Vokey from the case and detailed Lieutenant Commander Kuebler. In light of this recent development, the Prosecution requests a conference call to discuss outstanding issues regarding counsel.

V/R,

31 May 2007 - Email from CDC.p...

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

[redacted]SSG, DoD OGC

From: Sullivan, Dwight, COL, DoD OGC
Sent: Friday, June 01, 2007 8:48 AM
To: [redacted]
Cc: [redacted]
Subject: RE: Detailed Counsel in U.S. v. Khadr
Attachments: khar - excusal letter - vokey.pdf

I do not believe a conference call would be appropriate. Any matter concerning counsel should be taken up on the record in the presence of the accused, whose counsel rights are at issue. If there is nevertheless to be a conference call, I will be unavailable between 1230 and 1500 today, but am otherwise generally available. However, LtCol Vokey is no longer involved in the military commissions system, having been excused as detailed defense counsel in the military commission case of *United States v. Khadr*. (See attachment.) He should not be involved in any conference call regarding the *Khadr* case.

Respectfully,
Dwight Sullivan

khar - excusal letter - vokey....

Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Military Commissions
[redacted]

From: Groharing, Jeff, Maj, DoD OGC
Sent: Friday, June 01, 2007 08:34
To: [redacted]
Cc: [redacted]
Subject: Detailed Counsel in U.S. v. Khadr
Importance: High

Sir,

Please pass to Colonel Brownback:

The Prosecution requests a conference call today with the Military Judge, the Chief Defense Counsel, Lieutenant Colonel Vokey, and Lieutenant Commander Kuebler.

The Prosecution received an email yesterday from Colonel Sullivan stating that he had removed Lieutenant Colonel Vokey from the case and detailed Lieutenant Commander Kuebler. In light of this recent development, the Prosecution requests a conference call to discuss outstanding issues regarding counsel.

V/R,

<< File: 31 May 2007 - Email from CDC.pdf >>

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

Groharing, Jeff, Maj, DoD OGC

From: Sullivan, Dwight, COL, DoD OGC
Sent: Thursday, May 31, 2007 12:57 PM
To:
Cc:

Subject: RE: Detailed Defense Counsel for U.S. v. Khadr

Col Davis,

Yesterday I excused LtCol Vokey as the detailed defense counsel in the case of United States v. Khadr. Yesterday I also formally detailed LCDR Kuebler as the detailed defense counsel in the case. No civilian defense counsel has entered an appearance in the case.

Respectfully,
Dwight Sullivan

Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Military Commissions

-----Original Message-----

Subject: Detailed Defense Counsel for U.S. v. Khadr

On 25 April 2007 you sent an email naming LTC Colby Vokey as the detailed defense counsel for U.S. v. Khadr and LCDR William Kuebler as the associated detailed defense counsel. A news article by Michelle Shephard in today's Toronto Star (immediately below) states that you excused LTC Vokey, in writing, from representation of Mr. Khadr. The headline in an article by Carol Rosenberg in the Miami Herald (second item below) states: "Young detainee fires all his American lawyers."

Please advise who you have detailed as Mr. Khadr's military defense counsel. Additionally, please identify any other military or civilian defense counsel in this case.

MORRIS D. DAVIS, Colonel, USAF
Chief Prosecutor
Office of Military Commissions

CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of

DoD channels without prior authorization from the sender.

Military dismisses Khadr's lead lawyer
As Canadian faces hearing at Guantanamo, it is unclear if lawyers of his choice can defend him May 31, 2007 Michelle Shephard Staff Reporter Guantanamo Bay's chief defence counsel has dismissed Omar Khadr's lead attorney after the 20-year-old Canadian stated he no longer wants Americans representing him.
Col. Dwight Sullivan sent a letter yesterday to Khadr's military-appointed counsel, Lt. Col. Colby Vokey, stating that Vokey had been "excused" from the case and can no longer act on Khadr's behalf.
Khadr is to appear Monday before a military commission at the U.S. detention camp in Cuba.
"I'm disappointed but I just want what's best for Omar," Vokey said yesterday.
"I'm not surprised. I wouldn't trust American lawyers, especially ones in uniform, after what he has been through."
Vokey has publicly attacked the commission process, highlighted allegations of detainee abuse and defended Khadr in the media. Last year, he was put under a gag order and threatened with punishment by his superiors. Vokey also travelled to Pakistan and Afghanistan last year to interview witnesses in preparation for Khadr's trial.
American University law professors Muneer Ahmad and Rick Wilson, who are acting as Khadr's civilian attorneys, will also not be in Guantanamo next week.
Since Khadr was first charged with war crimes in late 2005, he has met more than a dozen times with his American legal team. But since September he has refused to come out of his cell during their visits.
Last week, Khadr's Canadian lawyers Dennis Edney and Nate Whitling received security clearance to travel to Guantanamo and meet him for the first time. Edney said Khadr vowed to deal only with them in the future.
But Navy lawyer Lt. Cmdr. William Kuebler, just appointed to the Khadr case, is expected to be in the Guantanamo hearing room Monday because the commission rules stipulate a military lawyer must be present.
Whether the Canadian lawyers can represent Khadr is likely be the first of many legal issues debated at Khadr's trial. Vokey hopes the Canadian government will get involved.
"If Canada is going to allow the United States to subject its citizens to these unfair proceedings, then Canada should demand that Omar receive qualified and meaningful representation that Omar can trust."
Khadr is charged with murder in violation of the law of war, attempted murder, conspiracy, providing material support for terrorism and spying. The Pentagon alleges he threw the grenade that killed Delta Forces soldier and medic, Sgt. Chris Speer, during a firefight in Afghanistan in July 2002.
Khadr, 15 at the time, was shot twice in the chest before his capture. He received medical care while in custody in Afghanistan until his transfer to the U.S. Naval Base prison at Guantanamo in October 2002. He has been there since.
Next week, he will have his charges read - the start of the U.S. government's second attempt to try him after the Supreme Court struck down the first military commission last year as illegal.
With the return home earlier this month of Australian detainee David Hicks to serve a 9-month sentence, Khadr is now the only detainee from a Western country still imprisoned in Guantanamo.

Posted on Thu, May. 31, 2007
Young detainee fires all his American lawyers BY CAROL ROSENBERG Guantánamo's youngest known detainee, facing a war-crimes charge of murder, has fired all his American lawyers almost on the eve of his arraignment before a Military Commission, his now-fired Marine Corps lawyer said Wednesday night.
Canadian Omar Khadr, 20, is slated to appear before a U.S. war court for the most serious charges so far at 8 a.m. on Monday.
The Toronto-born scion of a radical Muslim family has been in U.S. custody since his July 2002 capture --at age 15-- in a firefight with U.S. forces in Afghanistan.
Khadr met with two family lawyers from Canada last week and told them he was firing his Pentagon-appointed defense attorney, and also dismissing a team of American University law professors who have been suing on his behalf in federal court.
So, Khadr's Pentagon-appointed attorney, Marine Lt. Col. Colby Vokey, told The Miami Herald late Wednesday that he would not be traveling to the remote U.S. Navy base for Khadr's commission session before U.S. Army Col. Peter Brownback.
''He doesn't trust American lawyers, and I don't particularly blame him,'' said Vokey.

``The United States is responsible for his interrogation and his treatment under a process that is patently unfair.''
Moreover, Vokey said his supervisor, Marine Col. Dwight Sullivan, had formally excused him from his obligation to serve as Khadr's uniformed defense counsel.
In consideration of his young age, Pentagon prosecutors have not sought a death sentence if Khadr is convicted at President Bush's Military Commissions.
He is accused of murder in the grenade killing of a U.S. Army Special Forces medic, Sgt. First Class Christopher Speer, 28, of New Mexico -- and separately of planting roadside bombs meant to shred passing U.S. patrols in Afghanistan.

Bottom of Form 1

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

May 30, 2007

MEMORANDUM FOR LCDR WILLIAM C. KUEBLER, JAGC, USN

Subject: Detailing as Detailed Defense Counsel in the Military Commission Case of *United States v. Omar Khadr*

Pursuant to Rule for Military Commissions 503(c), I hereby detail you as Detailed Defense Counsel in the military commission case of *United States v. Omar Khadr*.

D. H. Sullivan
Col, USMCR
Chief Defense Counsel

Department of Defense
Director, Combatant Status Review Tribunals

[redacted]

10 September 2004

FOR OFFICIAL USE ONLY

[redacted]

FOR OFFICIAL USE ONLY

10 Sep 04

MEMORANDUM

From: Legal Advisor
To: Director, Combatant Status Review Tribunal

Subj: LEGAL SUFFICIENCY REVIEW OF COMBATANT STATUS REVIEW TRIBUNAL FOR DETAINEE ISN # 766

Ref: (a) Deputy Secretary of Defense Order of 7 July 2004
(b) Secretary of the Navy Implementation Directive of 29 July 2004

Encl: (1) Appointing Order for Tribunal #5 of 17 August 2004
(2) Record of Tribunal Proceedings

1. Legal sufficiency review has been completed on the subject Combatant Status Review Tribunal in accordance with references (a) and (b). After reviewing the record of the Tribunal, I find that:

a. The detainee was properly notified of the Tribunal process and voluntarily elected not to participate in the Tribunal.

b. The Tribunal was properly convened and constituted by enclosure (1).

c. The Tribunal complied with the provisions of references (a) and (b). Note that some information in exhibits R-3, R-6, and R-8 was redacted. The FBI properly certified in exhibit R-2 that the redacted information would not support a determination that the detainee is not an enemy combatant.

d. The detainee made no requests for witnesses or other evidence.

e. The Tribunal's decision that detainee # 766 is properly classified as an enemy combatant was unanimous.

f. The detainee's Personal Representative was given the opportunity to review the record of proceedings and declined to submit comments to the Tribunal.

2. The proceedings and decision of the Tribunal are legally sufficient and no corrective action is required.

Subj: LEGAL SUFFICIENCY REVIEW OF COMBATANT STATUS REVIEW TRIBUNAL FOR DETAINEE ISN # 766

3. I recommend that the decision of the Tribunal be approved and the case be considered final.

James R. Crisfield Jr.
CDR, JAGC, USN

Department of Defense
Director, Combatant Status Review Tribunals

17 Aug 04

From: Director, Combatant Status Review Tribunals

Subj: APPOINTMENT OF COMBATANT STATUS REVIEW TRIBUNAL #5

Ref: (a) Convening Authority Appointment Letter of 9 July 2004

By the authority given to me in reference (a), a Combatant Status Review Tribunal established by "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba" dated 29 July 2004 is hereby convened. It shall hear such cases as shall be brought before it without further action of referral or otherwise.

The following commissioned officers shall serve as members of the Tribunal:

MEMBERS:

MICHAEL D. ALTOM, Colonel, U.S. Air Force; President

JOSEPH D. JACOBSON, Lieutenant Colonel, U.S. Air Force; Member (JAG)

DAVID M. McFARLAND, Lieutenant Commander, U.S. Navy; Member

J. M. McGARRAH
Rear Admiral
Civil Engineer Corps
United States Naval Reserve

HEADQUARTERS, OARDEC FORWARD
GUANTANAMO BAY, CUBA
APO AE 09360

MEMORANDUM FOR DIRECTOR, CSRT

FROM: OARDEC FORWARD Commander

SUBJECT: CSRT Record of Proceedings ICO ISN# 766

1. Pursuant to Enclosure (1), paragraph (I)(5) of the *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba* dated 29 July 2004, I am forwarding the Combatant Status Review Tribunal Decision Report for the above mentioned ISN for review and action.

2. If there are any questions regarding this package, point of contact on this matter is the undersigned at DSN 660-3088.

DAVID L. TAYLOR
Colonel, USAF

[redacted]

(U) Combatant Status Review Tribunal Decision Report Cover Sheet

(U) This Document is UNCLASSIFIED Upon Removal of Enclosures (2) (3) and (4).

(U) TRIBUNAL PANEL: #5

(U) ISN#: 766

Ref: (a) (U) Convening Order for Tribunal #5, 17 August 2004 (U)
(b) (U) CSRT Implementation Directive of 29 July 2004 (U)
(c) (U) DEPSECDEF Memo of 7 July 2004 (U)

Encl: (1) (U) Unclassified Summary of Basis For Tribunal Decision (U)
(2) (U) Classified Summary of Basis for Tribunal Decision (S/NF)
(3) (U) Summary of Detainee/Witness Testimony (Not Used)
(4) (U) Copies of Documentary Evidence Presented (S/NF)
(5) (U) Personal Representative's Record Review (U)

1. (U) This Tribunal was convened by references (a) and (b) to make a determination as to whether the detainee meets the criteria to be designated as an enemy combatant as defined in reference (c).

2. (U) On 7 September 2004 the Tribunal determined, by a preponderance of the evidence, that Detainee #766 is properly designated as an enemy combatant as defined in reference (c).

3. (U) In particular, the Tribunal finds that this detainee is a member of, or affiliated with al-Qaida as more fully discussed in the enclosures.

4. (U) Enclosure (1) provides an unclassified account of the basis for the Tribunal's decision. A detailed account of the evidence considered by the Tribunal and its findings of fact are contained in enclosures (1) and (2).

Michael D. Altom

MICHAEL D. ALTOM, Colonel, USAF
Tribunal President

[redacted]

[redacted]

[redacted]

Filings Inventory – US v. Khadr
(Version 1)

As of 1700 hours, 03 JUN 2007

This Filings Inventory includes only those matters filed since 1 March 2007.

Dates in red indicate due dates

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	AE
P 001				•	
P 002:					

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 001:				•	
D 002:				•	
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MJ Designations

Designation Name (MJ)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
MJ 001: Detail of Military Judge, and Scheduling of First Session	• sent to all parties 25 Apr 07 w/arraignment date of 7 May • A. DC request continuance on 26 Apr to 6 Jun • B. TC opposition on 27 Apr • C. MJ ruling on 27 Apr - arraignment on 4 Jun • email instructions to parties setting 802 session for 3 Jun 07 and arraignment for 0900, 4 Jun 07	OR - 005 A - 006 B - 006 C – 006 (none)
MJ 002: Voir Dire	• MJ sent bio and Matters re Voir Dire 25 Apr 07 directing questions be submitted 4 May 07 •	OR -005
MJ 003: Rules of Court	• sent to all parties 25 Apr 07	005
MJ 004:	•	
	•	

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	# of Pages in Order	Date Signed	Topic	AE
1	Protective Order # 1	3	X Xxx X	• Motion Filed by Prosecution on 27 May 07 - Classified, FOUO or LES and other markings	
2	Protective Order # 2	1	X Xxx X N/A	• Motion Filed by Prosecution on 29 May 07 - ID of Witnesses and Investigators • Attachments 1-19 to Protective Order # 2 (FOUO and LES) (94 pages)	

Inactive Section

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
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Inactive Section

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
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Inactive Section

MJ Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE

[redacted] UNCLASSIFIED

THE WHITE HOUSE

WASHINGTON

February 7, 2002

MEMORANDUM FOR THE VICE PRESIDENT
THE SECRETARY OF STATE
THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL
CHIEF OF STAFF TO THE PRESIDENT
DIRECTOR OF CENTRAL INTELLIGENCE
ASSISTANT TO THE PRESIDENT FOR NATIONAL SECURITY AFFAIRS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of al Qaeda and Taliban Detainees

1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

2. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:

a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.

b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to

[redacted]
Reason: 1.5 (d)
Declassify on: 02/07/12

NSC DECLASSIFICATION REVIEW [E.O. 12958 as amended]
DECLASSIFIED IN FULL ON 6/17/2004
by R.Soubers

UNCLASSIFIED

[redacted] UNCLASSIFIED

exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.

c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."

d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.

3. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

4. The United States will hold states, organizations, and individuals who gain control of United States personnel responsible for treating such personnel humanely and consistent with applicable law.

5. I hereby reaffirm the order previously issued by the Secretary of Defense to the United States Armed Forces requiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

6. I hereby direct the Secretary of State to communicate my determinations in an appropriate manner to our allies and other countries and international organizations cooperating in the war against terrorism of global reach.

[redacted]

UNCLASSIFIED

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 0-5 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.

UNITED STATES OF AMERICA	}	**Order on Jurisdiction**
v	}	
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khahi"	}	**04 June 2007**

1. A military commission is a court of limited jurisdiction. The jurisdiction is set by statute – the Military Commissions Act of 2006 (MCA).

2. Section 948d establishes the jurisdiction of a military commission. 948d(a) states:

(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter…when committed by an alien unlawful enemy combatant.

3. Section 948d(b) specifically states that military commissions "shall not have jurisdiction over lawful enemy combatants."

4. Thus, in the MCA, Congress denominates for the purpose of establishing jurisdiction two categories of enemy combatants – lawful and unlawful. A military commission only has jurisdiction to try an unlawful enemy combatant.

5. Further, in Section 948d(c), Congress stated that a finding by a Combatant Status Review Tribunal (CSRT) that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction by military commissions.

6. In considering Section 948d, it is clear that the MCA contemplates a two-part system. First, it anticipates that there shall be an administrative decision by the CSRT which will establish the status of a person for purposes of the MCA. The CSRT can find, for MCA purposes, that a person is a lawful enemy combatant or an unlawful enemy combatant.

7. Second, once the CSRT finds that a person is an unlawful enemy combatant, the provisions of the MCA come into play. Such person may have charges sworn against him, those charges may be referred to a military commission for trial, and a military commission may try him. A strict reading of the MCA would appear to require that, until such time as a CSRT (or other competent tribunal) makes a finding that a person is an unlawful enemy combatant, the provisions of the MCA do not come into play and such person may not be charged, charges may not be referred to a military commission for trial, and the military commission has no jurisdiction to try him.

8. There is, of course, the counter-argument. The military commission itself is a competent tribunal (948d(c)) to determine if a person brought before it is an unlawful enemy combatant. While appealing, this argument has two major flaws:

a. First, in order to make the determination, the military judge would have to conduct a mini-trial to decide if the person is an unlawful enemy combatant. Or would s/he? Perhaps, since this determination might require factual determinations, the panel would have to make it. Congress provided in the MCA for many scenarios – none of them anticipated that the military commission would make the lawful/unlawful enemy combatant determination for initial jurisdictional purposes.

b. Second, and I'm paraphrasing from Justice Stevens, "A person has a right to be tried only by a court which he knows has jurisdiction over him." If the military commission were to make the determination of initial jurisdiction, a person could be facing trial for months, without knowing if the court, in fact and in law, had jurisdiction.

9. Persons familiar with the court-martial system might state that jurisdiction is always assumed by the court-martial and it is attacked only by motion. That is true, but a court-martial is a different creature than a military commission. A soldier is in court in uniform with her first sergeant and company commander (who most likely preferred the charges) sitting in the courtroom. DD Form 458, the Charge Sheet, contains the following information in Block I – Personal Data: Name of accused, SSN, Grade or Rank, Pay Grade, Unit or Organization, Initial Date and Term of Current Service, Pay Per Month, Nature of Restraint of Accused, and Date(s) Imposed. So when a military judge at Fort Bragg looks at the Charge Sheet and the accused (Who is in uniform.), she knows that Private First Class William B. Jones is a member of Bravo Company, 3rd Battalion (Airborne), 325th Parachute Infantry Regiment, 82nd Airborne Division, Fort Bragg, North Carolina. She knows how much he is being paid, if he has been restrained, when he came on active duty this tour, and by comparing the unit to the name of the accuser in Block III – Preferral – she can see if it was PFC Jones' company commander who preferred the charges.

10. Contrast this with the information on MC Form 458 in this case. The military judge is told that the name of the accused is Omar Ahmed Khadr. Three aliases are given. And, the last four of an unidentified acronym, the ISN, are given. There is nothing on the face of the charge sheet to establish or support jurisdiction over Mr. Khadr, except for a bare allegation in the wording of the Specifications of the Charges.

11. The military judge is not ruling that no facts could be properly established concerning Mr. Khadr which might fit the definition of an unlawful enemy combatant in Section 948a(a) of the MCA. The military judge is ruling that the military commission is not the proper authority, under the provisions of the MCA, to determine that Mr. Khadr is an unlawful enemy combatant in order to establish initial jurisdiction for this commission to try Mr. Khadr.

12. The military judge is not ruling that Mr. Khadr may not, if his case is referred to trial after a proper determination, attack those facts in the elements of the offenses referred which might combine to show him to be an unlawful enemy combatant. Such an attack is a proper part of a military commission.

13. The military judge is not ruling that the charges against Mr. Khadr must be resworn. That would seem to be the more prudent avenue to take, but that issue is not currently before this commission.

14. If there were no two-step process required to try a person under the MCA, then a prosecutor could swear charges, the convening authority could refer charges, and a military commission could try a person who had had no determination as to his status whatsoever. That is not what Congress intended to establish in the MCA.

16. The charges are dismissed without prejudice.

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

[redacted], SSG, DoD OGC

From: [redacted], SSG, DoD OGC
Sent: Thursday, June 07, 2007 5:03 PM
To: [redacted], SSG, DoD OGC
Subject: FW: Excusal of LtCol Vokey US v Khadr AE 00?
Attachments: Khadr Memo 30 Oct 02 and 24 May 07 (2).pdf

From: Sullivan, Dwight, COL, DoD OGC
Sent: Thursday, June 07, 2007 16:34
To: [redacted]
Cc: [redacted]
Subject: RE: Excusal of LtCol Vokey US v Khadr

Judge Brownback,

1. In accordance with R.M.C. 505(d)(2)(B)(i), I excused LtCol Vokey as detailed defense counsel at the request of the accused.

2. As requested, a copy of the accused's written request is attached.

Respectfully submitted,
Dwight H. Sullivan

Colonel Dwight H. Sullivan, USMCR
Chief Defense Counsel
Office of Military Commissions
[redacted]

From: [redacted] LTC, DoD OGC
Sent: Thursday, June 07, 2007 16:04
To: Sullivan, Dwight, COL, DoD OGC
Cc: [redacted]
Subject: FW: Excusal of LtCol Vokey US v Khadr

COL Brownback has directed that I send the email below to Col Sullivan and the parties.

v/r,

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

From: Pete Brownback [redacted]
Sent: Thursday, June 07, 2007 15:28
To: OMJ - LTC [redacted]
Subject: Excusal of LtCol Vokey

LTC [redacted],

Please forward the attached to COL Sullivan. Please cc the parties to the case and others on the normal case distribution list.

COL Brownback

COL Sullivan,

1. Reference is made to your 30 May 2007, Memorandum for LtCol Colby C. Vokey, USMC, Subject: Excusal as Detailed Defense Counsel in the Military Commission Case of *United States v. Omar Khadr*.

2. In the reference, you state that pursuant to Rule for Military Commissions 505(d)(2)(B)(i), you excused LtCol Vokey as detailed defense counsel.

3. R.M.C. 505(d)(2)(B)(i) states that you may excuse such counsel only a) upon request of the accused or b) an application for withdrawal by such counsel under R.M.C. 506(b).

4. Request that you provide the undersigned the reason for the 30 May 2007 excusal of LtCol Vokey. If the reason was the request of the accused, please provide the request. If the reason was an application for withdrawal, please provide the application.

5. In order to complete the Record of Trial, I need the information NLT 1200 hours, 8 June 2007.

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

30. Oct. 2006

I Omar. A. Khadr with drow every /all / any lawyer from representing me in Habeas Corpus, Military Commission or any form of U.S Courts, And do not allow any body to do any thing on my behalf in any way in any form of U.S Court or military Commission.
And donot allow any U.S lawyer to do any thing on my behalf and pull all my atharaizations that i have given them

Omar Ahmed. Khadr
Omar A. Khadr

May 24, 2007

I Omar A. Khadr confirm my decision above.

I dismiss all lawyers, including:

Lt. Col. Colby Vokey, Capt. John Merriam, Muneer Ahmad, Richard Wilson and Kristine Huskey

and anybody else from doing anything on my behalf except Dennis Edney and Natha Whitling.

Omar A. Khadr

UNITED STATES OF AMERICA	)	Prosecution Motion For Appropriate Relief
	)	
	)	
	)	
	)	**Motion for Reconsideration**
v.	)	
	)	
OMAR AHMED KHADR	)	
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	**8 June 2007**
a/k/a "Ahmed Muhammed Khali"	)	

1. **Timeliness**. This motion is timely filed.

2. **Relief**. Pursuant to Rule for Military Commission ("RMC") 905(f) the Prosecution requests the Military Judge reconsider his 4 June 2007 order dismissing all charges and specifications, without prejudice, in U.S. v. Khadr.[1]

3. **Overview**. The Prosecution believes the dismissal of all charges and specifications was in error and that personal jurisdiction has been sufficiently established over Omar Ahmed Khadr. In addition, in the absence of a prior dispositive administrative determination of military commission jurisdiction, the Military Commissions Act ("MCA") requires that the Prosecution be given the opportunity to establish jurisdiction through the introduction of evidence before the Military Commission.

4. **Burden of proof**. The Prosecution has the burden of proof.

5. **Facts**.

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

[1] Trial counsel indicated on the record that the government requested time to consider an appeal to the Court of Military Commission Review under R.C.M. 908. However, an appeal by the government would be premature if noticed prior to a decision on this motion for reconsideration. Accordingly, the Prosecution will await a decision on this motion and then consider its options regarding appeal, if even necessary. To the extent that it would be required - and out of an abundance of caution – the Prosecution asks that any time period for the filing of a notice of appeal regarding this issue be tolled pending a decision on this motion.

[2] See Criminal Investigative Task Force Report of Investigative Activity ("CITF Form 40"), Subject Interview of accused, 28 October 2002. (Attachment 2)

b. On 11 September 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy.[3]

c. On 7 February 2002, the President determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.[4]

d. After al Qaeda's terrorist attacks on 11 September 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives.[5]

e. Following this training the accused received an additional month of training on landmines and soon thereafter joined a group of al Qaeda operatives and converted landmines into improvised explosive devices (IEDs) capable of remote detonation.

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

g. In or about July 2002, Khadr planted improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

h. On or about 27 July 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan.[6]

i. Prior to the firefight beginning, U.S. forces approached the compound and asked the accused and the other occupants to surrender.[7]

j. The accused and three other individuals decided not to surrender and "vowed to die fighting."[8]

k. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound.[9]

l. Toward the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer.[10] American forces then shot and wounded the accused, and after his capture, American medics administered life saving medical treatment to the accused.[11]

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[3] *See The 9/11 Commission Report,* FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, pgs. 4-14 (2004).
[4] See White House Memorandum, 7 February 2002.
[5] See attached CITF Form 40, Subject Interview of accused, 4 December 2002. (Attachment 3)
[6] See attached CITF Form 40, Subject Interview of Major _____, 20 April 2004. (Attachment 4) (Protected information withheld).
[7] See attached CITF Form 40, Subject Interview of accused, 3 December 2002. (Attachment 5)
[8] Id.
[9] Id.
[10] Agent's Investigation Report ("AIR"), ROI No. T-157, Interview of accused, 17 September 2002. (Attachment 6)

m. Approximately one month after the accused was captured, U.S. forces discovered a videotape at the compound where the accused was captured. The videotape shows the accused and other al Qaeda operatives constructing and planting improvised explosive devices while wearing civilian attire.[12]

n. During an interview on 5 November 2002, the accused described what he and the other al Qaeda operatives were doing in the video.[13]

o. When asked on 17 September 2002 why he helped the men construct the explosives the accused responded "to kill U.S. forces."[14]

p. The accused then related during the same interview that he had been told the U.S. wanted to go to war against Islam. And for that reason he assisted in the building and later deploying of the explosives, and later threw a grenade at the American.[15]

q. During an interrogation on 4 December 2002, the accused agreed his efforts in land mine missions were also of a terrorist nature and that he is a terrorist trained by al Qaeda.[16]

r. The accused further related that he had been told about a $1500 reward being placed on the head of each American killed and when asked how he felt about the reward system he replied "I wanted to kill a lot of American[s] to get lots of money."[17] During a 16 December 2002 interview, the accused stated that a "jihad" is occurring in Afghanistan and if non-believers enter a Muslim country then every Muslim in the world should fight the non-believers.[18]

s. The accused was designated as an enemy combatant as a result of a Combatant Status Review Tribunal (CSRT) conducted on 7 September 2004.[19] The CSRT also found that the accused was a member of, or affiliated with, al Qaeda.[20]

t. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. Importantly, after receiving the Legal Adviser's formal "Pretrial Advice" that Khadr is an "unlawful enemy combatant" and thus that the military commission had jurisdiction, those charges were referred for trial by military commission on 24 April 2007. [*See* Pretrial Advice, Allied Papers].

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[11] CITF Form 40, Subject Interview of Major ____, 20 April 2004. (Attachment 4) (Protected information withheld).
[12] See Attachment (1) (Video of accused manufacturing and emplacing Improvised Explosive Devices, seized from site of accused's capture in a compound in the village of Ayub Kheil, near Khowst, Afghanistan) and also AIR Interview of accused, 5 November 2002.
[13] See AIR Interview of accused, 5 November 2002. (Attachment 7)
[14] AIR Interview of accused, 17 September 2002. (Attachment 6)
[15] Id.
[16] CITF Form 40, Subject Interview of accused, 4 December 2002. (Attachment 3)
[17] CITF Form 40, Subject Interview of accused, 6 December 2002. (Attachment 8)
[18] CITF Form 40, Subject Interview of accused, 16 December 2002. (Attachment 9)
[19] See Appellate Exhibit 11. Unclassified Summary of CSRT proceedings.
[20] Id.

6. Discussion.

a. This case presents the first instance of judicial interpretation of the jurisdictional provisions of the Military Commissions Act ("MCA"). Nevertheless, the Military Judge decided this bedrock legal question without inviting briefing from the parties. The Military Judge, in dismissing the charges under section 948d, overlooked relevant provisions in section 948a and in the implementing regulations issued by the Secretary of Defense. These omissions are crucial; when taken into account, the Military Judge's interpretation cannot be reconciled with the statute's text and structure. Accordingly, the Prosecution respectfully requests reconsideration of the ruling dismissing this case for lack of jurisdiction. The Military Judge's interpretation of the Military Commissions Act in his 4 June opinion upends the careful and comprehensive system for military commissions established by Congress and must be corrected.

b. Section 948a of the MCA unambiguously establishes two separate paths for determining "unlawful enemy combatant" status and thereby Military Commission jurisdiction. The June 4 order addresses only one, however. As such, the Military Judge denied the Prosecution the chance to employ one of those methods, which provides for the Military Judge to hear evidence directly on the elements of "unlawful enemy combatant" status under section 948a(1)(A)(i) of the statute based upon the submissions of the parties and to determine whether those elements are met. The Military Judge's ruling cannot be reconciled with the bifurcated structure of the statute, which the June 4 opinion does not address, and that omission requires reconsideration. After the Military Judge determined that the CSRT determination was not sufficient to establish jurisdiction, dismissing the charges without receiving evidence directly on the elements of section 948a(1)(A)(i) was contrary to the statute. Because the Prosecution is ready and able to present evidence in satisfaction of section 948a(1)(A)(i), the Prosecution respectfully requests reconsideration to avoid the unnecessary delay—contrary to the system established by Congress—of requiring the United States to convene another tribunal to make this finding.

c. The Military Judge's ruling that the Prosecution had failed to establish jurisdiction under the second method set out by the MCA—by establishing a prior determination of "unlawful enemy combatant" status by a CSRT or other competent tribunal—is also erroneous and requires reconsideration. The Military Judge held that Khadr's CSRT determination, and by implication any CSRT ever conducted, or that ever would have been conducted under rules in place at the time of the MCA's enactment, was not sufficient for jurisdiction. The basis for this ruling is a difference in the title of the CSRT's ultimate finding—that Khadr was an "enemy combatant" rather than an "*unlawful* enemy combatant." The opinion overlooks, however, the President's determination that Taliban and al Qaeda fighters are unlawful combatants and—crucially—Congress's awareness and ratification of existing CSRT standards and the President's determination in enacting section 948a of the statute. When these features are considered, it is clear that the MCA deemed CSRT determinations under rules in place at the time of the MCA's enactment sufficient to establish Military Commission jurisdiction. The Military Judge's contrary interpretation would render this separate method of establishing jurisdiction under section 948a(1)(A)(i) a nullity. Although clear from the statute's text, structure, and history, the Secretary of Defense also reached the conclusion that CSRT determinations under existing rules

are dispositive of Military Commission jurisdiction. That interpretation of the statute—embodied in implementing regulations promulgated at the behest of Congress—is worthy of the Military Judge's deference, and the Military Judge should grant reconsideration to address that interpretation under the appropriate legal standard.

The Military Commission has authority to determine jurisdiction over the accused.

d. The Military Judge's 4 June 2007 order states that "it is clear that the MCA contemplates a two-part system. First, it anticipates that there shall be an administrative decision by the CSRT which will establish the status of a person for purposes of the MCA." The order further states "Congress provided in the MCA for many scenarios – none of them anticipated that the military commission would make the lawful/unlawful enemy combatant determination for initial jurisdictional purposes." This interpretation is unsupported by any language in the MCA or MMC.

e. The MCA authorizes the Secretary of Defense to try alien "unlawful enemy combatants" for violations of the law of war and other offenses triable under the Act. The statute expressly provides two independent definitions of the term "unlawful enemy combatant." *See* 10 U.S.C.§ 948a(1). First, "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." 10 U.S.C.§ 948a(1)(i). Second, "a person who, before, on, or after the date of enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense." 10 U.S.C. § 948a(1)(ii).

f. These two alternative definitions are separated in the statutory text by the word "or," thus making clear that they provide separate bases for Military Commission jurisdiction. The Rules for Military Commissions ("RMC") likewise set out these two alternative routes for designating the accused as an "unlawful enemy combatant." *See* RMC 103(a)(24).

g. In other words, Congress unequivocally provided that an accused may be determined to be an unlawful enemy combatant either (i) though a factual showing to the Military Commission that the accused has "engaged in hostilities or purposefully and materially supported hostilities" or, in the current conflict, is part of the Taliban, al Qaeda or associated forces, or (ii) through a showing of the fact of an administrative determination of such status by a CSRT or "other competent tribunal." The statutory word "or" makes sense only if the Military Judge has the ability to make a determination of jurisdiction based on a showing of fact by the Prosecution, in the absence of a determination by an administrative tribunal.

h. The importance of the first method of establishing Military Commission jurisdiction is shown by the fact that the MCA is not limited to the detainees at Guantanamo who have received CSRT hearings. Rather, the Military Commission scheme created by that statute covers all

aliens who meet the definition set out in subsection (i) of 948a(1).[21] The Secretary of Defense recognized this point in the official notes to the Commission Rules, stating that [t]he MCA does not require that an individual receive a status determination by a CSRT or other competent tribunal before the beginning of a military commission proceeding. *See* RMC 202(b). In such cases, if the Commission's jurisdiction is challenged, the Military Judge must render a ruling on whether the accused, as a threshold matter, meets the subsection (i) definition. *Id.*[24]

i. Thus, Military Judges, acting for the Commission, can at the outset render a determination whether the Prosecutor's submissions establish the facts to meet the subsection (i) definition. The dismissal order in this case did not address this point, although the Military Judge did suggest that the Commission could not review such evidence because to do so would be to exercise jurisdiction before jurisdiction has been established. (The Military Judge discussed this point in the context of determining if the Military Commission could serve as a "competent tribunal" under the second subsection of section 948a(1).) As the Commission Rules explain, however, [a] military commission always has jurisdiction to determine whether it has jurisdiction. RMC 201(b)(3).

j. Even if the Military Judge were to conclude he lacks authority to make this determination under the definition in section 948a(1)(A)(i), the Commission clearly is a "competent tribunal" within the meaning of the MCA and thus may make this determination under section 948a(1)(A)(ii)[25] Accordingly, whether or not the CSRT determination sufficed to establish jurisdiction, the Military Judge was not authorized to dismiss the charges without more. Instead, the Military Judge was required by section 948a(1)(A)(i) to hear evidence from the Prosecution either under subsection (i) of that section, or under subsection (ii) as a "competent tribunal."

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[21] During hearings on the MCA Senator Jon Kyl noted that critics argued CSRTs should be required for all future detainees in all future wars. "What is now given as a matter of executive grace, they contend, should be transformed into a legislative mandate," he said. 152 Cong. Rec. S10270, Sep. 27, 2006.

[24] The June 4 opinion did not address fundamental features of the statute's text and structure, and reconsideration should be granted for the Military Judge to do so. The interpretation underlying the dismissal is also squarely inconsistent with that adopted by the Secretary of Defense in the Manual for Military Commissions. As we explain below, because the MCA has been interpreted to permit the Military Judge to determine the Commission's jurisdiction by the agency charged by Congress to implement the statute, this interpretation may be overruled only if it is plainly contrary to the text of the statute or unreasonable. *See infra.*

[25] Hamdan v. Rumsfeld, 415 F.3d 33, 43 (D.C. Cir. 2005), rev'd on other grds, 126 S.Ct. 2749 (2006). "We therefore see no reason why Hamdan could not assert his claim to prisoner of war status before the military commission at the time of his trial and thereby receive the judgment of a "competent tribunal" within the meaning of Army Regulation 190-8."

k. In this way, the decision of a Combatant Status Review Tribunal, or of "another competent tribunal," serves as a safe harbor for establishing the jurisdiction of the Commission. That the Commission could directly determine its jurisdiction is crucial to the structure of the Act, which was designed to govern the trial of war criminals not only in the current armed conflict with al Qaeda but also in future armed conflicts in which Combatant Status Review Tribunals might not be held. *See* 152 Cong. Rec. S10354-02, S10403 (Sept. 28, 2006) (statement of Sen. Cornyn) (discussing the premise of the MCA that "we do not want to force the military to hold CSRT hearings forever, or in all future wars");152 Cong. Rec. 10243-01, S10268 (Sept. 27, 2006) (statement of Sen. Kyl) (same).

l. The Military Judge's reason for failing to make the appropriate jurisdictional finding himself – that he would be taking evidence even though jurisdiction had not yet been established – is contrary to accepted legal practice in the American system of law. It is perfectly normal for a court or tribunal to exercise jurisdiction in order first to determine its own jurisdiction. *See Cargill Ferrous Intern. v. SEA PHOENIX MV*, 325 F.3d 695, 704 (5th Cir. 2003) (A bedrock principle of federal courts is that they have jurisdiction to determine jurisdiction); *Nestor v. Hershey*, 425 F.2d 504 (D.C. Cir. 1969) (we always have jurisdiction to determine our jurisdiction). *See also United States v. Mine Workers*, 330 U.S. 258, 291 (1947); *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006); and *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000) ("When an accused contests personal jurisdiction on appeal, we review that question of law de novo, accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record."). In the federal court system, facts are often critical to establishing or removing jurisdiction. In civil cases, whether examining jurisdiction *sua sponte* or in adjudicating a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a court may rely on the facts as pled by the plaintiff or may consider and weigh evidence outside the pleadings to determine if it has jurisdiction." *Gould Electronics Inc. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000). Similarly, courts in civil cases render factual findings to determine whether the facts oust the courts jurisdiction. *See, e.g., Argaw v. Ashcroft*, 395 F.3d 521, 523 (4th Cir.2005) ("We have jurisdiction, however, to determine whether the facts that would deprive us of jurisdiction are present."). Courts in criminal cases similarly examine factual submissions to determine whether the court may exercise criminal jurisdiction over an accused. *See, e.g., United States v. Anderson*, 472 F.3d 662, 666-67 (9th Cir. 2006). Likewise, here, the Military Judge can determine personal jurisdiction over the accused based on the facts set forth by the Prosecution.

m. The facts alleged against the accused as set forth above (and the exhibits supporting those facts attached hereto) are more than sufficient to demonstrate that the accused meets the subsection (1) definition, or alternatively meets the subsection (2) definition if the Military Commission were acting as a competent tribunal. If the Military Judge would prefer, the Prosecution was and remains fully prepared to present evidence that would clearly establish jurisdiction over the accused. Specifically, the Prosecution was ready to play a videotape found at the site of the accused's capture in Afghanistan showing the accused, in civilian attire, constructing and placing improvised explosive devices. Additionally, the Prosecution was prepared to admit numerous statements from the accused admitting his involvement with al Qaeda and his terrorist activities. Specifically the accused has admitted to receiving training

from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. The accused has admitted that following that training, he received an additional month of training on landmines, then joined a group of al Qaeda operatives, and converted landmines into improvised explosive devices ("IEDs") capable of remote detonation. He also has admitted conducting surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan, and planting improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling. Additionally, the accused has admitted throwing a grenade that killed Sergeant First Class Christopher Speer. Finally, a member of the U.S. armed forces provided a first-hand account of the fire fight and capture of the accused. These facts are more than sufficient to allow the Commission sitting together, or the Military Judge sitting alone, to hold that Khadr satisfies the MCA's definition of unlawful enemy combatant and thereby establish jurisdiction over the accused.

The Military Judge should also reconsider the ruling that personal jurisdiction over the accused here is not sufficiently established based upon the CSRT determination that the accused is an enemy combatant.

n. In enacting MCA section 948a(1)(ii), Congress understood that CSRT determinations made "before" the date of enactment of the MCA would satisfy the Act's requirements and would permit a detainee found to be an unlawful enemy combatant to be charged before a military commission, even though the CSRTs did not employ the definition set out in section 948a(1)(i).

o. The CSRT process does not render formal unlawful enemy combatant determinations. Rather, the determination of the CSRT is whether the alien detainee was properly classified as an enemy combatant. The CSRT process allows the detainee to contest his designation as an enemy combatant, which is defined for the purpose of the CSRT process, as:

> [A]n 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.

p. The definition of enemy combatant employed by the CSRT extends only to individuals who are part of or supporting unlawful military organizations, namely, Taliban or al Qaeda forces, or associated forces. On February 7, 2002, the President determined that members of al Qaeda and the Taliban were not lawful combatants. Congress was well aware of that fact, and recognized in enacting section 948a(1)(ii) that a finding by the CSRT process that an individual is an enemy combatant, given the Presidential determination, is actually a finding that the individual is an unlawful enemy combatant under the law of war. *See* Manual for Military Commissions, Rule for Military Commissions 202 discussion note reference (b). Congress likewise recognized in section 948a(1)(A)(i) that a person who was "part of the Taliban, al Qaeda, or associated forces" was an unlawful enemy combatant. Congress's incorporation of the President's interpretation is not surprising: It is beyond dispute that the terrorist organization

responsible for the deaths of nearly 3000 Americans on September 11th is engaged in hostilities that are unlawful.[26]

q. Moreover, Congress was aware of the CSRT definition when it enacted the MCA and nonetheless expressly provided that the CSRT determination would render a detainee an "unlawful enemy combatant" under section 948a(1)(A)(ii). Under the Detainee Treatment Act of 2005 ("DTA"), the Secretary of Defense was required to and did report the CSRT procedures to Congress, three months before the enactment of the Military Commissions Act. *See* DTA § 1005(a)(1)(A). Nevertheless, Congress deemed those historical CSRT determinations sufficient to establish Military Commission jurisdiction. If the Military Judge's interpretation of the statute were correct, Congress's inclusion of CSRT determinations "before [or] on . . . the date of the enactment of the Military Commissions Act of 2006" would be a nullity. As the Supreme Court has recognized, to "read" a term "out of the statute . . . would violate basic principles of statutory interpretation." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995). To claim that CSRT determinations under the existing and known "enemy combatant" standard—to which a large and essentially closed class of detainees were subject at the time of the MCA's enactment—do not establish Military Commission jurisdiction would be to render section 948a(1)(A)(ii) of the statute wholly inexplicable. There is no evidence that Congress expected the Department of Defense to conduct new CSRTs, or hold new hearings before other tribunals, for each and every member of al Qaeda charged with a war crime. Thus, the CSRT determination that an individual is an "enemy combatant," should constitute a determination that the individual is an unlawful enemy combatant for purposes of 10 U.S.C. § 948a(1)(A)(ii).

r. There is another independent ground for reconsideration. The Manual for Military Commissions—containing rules and procedures governing this Commission issued by the Secretary of Defense—adopted this interpretation of the statute. The Manual analyzed the Combatant Status Review Tribunal standard at the time of the MCA's enactment and provided that, due to the prior determination of the United States "that members of al Qaeda and the Taliban are unlawful combatants," CSRT decisions before the MCA's enactment would suffice to establish jurisdiction. *See* Manual for Military Commissions, Rule for Military Commissions 202 discussion note reference (b).[28] The Manual is an authoritative interpretation of the MCA, by the agency that Congress charged with its implementation, issued in the manner specified by

[26] The President's 7 February 2002 order, incorporated into the statutory scheme by Congress, provides an explanation for Congress's use of the term "unlawful" in the statute—contrary to any possible claim that the Government's interpretation reads the term "unlawful" out of the statute. Indeed, the reasoning of the 4 June opinion suggests that Khadr could meet the definition of "lawful combatant" in the MCA. *See* 10 U.S.C. § 948(a)(2). The President's order makes clear that he cannot; and no one has suggested to the contrary.

[28] "Military commissions may try any offense under the M.C.A. or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001. 10 U.S.C. § 948d (a); R.M.C. 203. A Combatant Status Review Tribunal determined on September 7, 2004, that Khadr is an enemy combatant and a member of or affiliated with al Qaeda. The M.C.A. defines such persons as unlawful enemy combatants. 10 U.S.C. § 948a(1).

that statute. *See* 10 U.S.C. § 949a(a) (authorizing the Secretary of Defense to issue rules and procedures for military commissions under the MCA). As such, that interpretation is entitled to deference by the Commission; the interpretation may be set aside only if it is plainly contrary to the statute or unreasonable. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); *see also See Nat'l Cable & Telecomms. Ass'n v. Brand X*, 545 U.S. 967, 980-81 (2005) (*Chevron* applies where Congress delegated to the agency the authority to "prescribe such rules and regulations as may be necessary" to carry out a certain statute, and where the agency exercised its authority). The Military Judge's opinion, however, did not address the Manual's resolution of this question, and did not evaluate it under the required legal standard. The Commission should grant reconsideration, at a minimum, to apply the correct legal standard.

s. In sum, in the accused's CSRT of 7 September 2004, the tribunal found that he was a member of al Qaeda. There can be no doubt, based on a careful reading of his CSRT record, coupled with the President's determination that all al Qaeda operatives are unlawful enemy combatants, and the Secretary of Defense's determination in the MMC, that the accused is an unlawful enemy combatant and satisfies the jurisdictional requirements of the MCA.

7. **Oral argument**. The Prosecution does not request oral argument; however the Prosecution recognizes that the Military Judge may wish oral argument, given that the foregoing constitutes the first briefing he has received on this important matter.

8. **Witnesses**. None.

9. **Certificate of conference**. Not applicable.

10. **Additional information**. None.

11. **Attachments**.

a. The Prosecution offers the following attachments in support of the Motion to Reconsider:

(1) DVD copy of video of accused manufacturing and emplacing Improvised Explosive Devices, seized from site of accused's capture in a compound in the village of Ayub Kheil, near Khowst, Afghanistan.

(2) CITF Form 40, Subject Interview of the accused, 28 October 2002.

(3) CITF Form 40, Subject Interview of accused, 4 December 2002.

(4) CITF Form 40, Subject Interview of Major ____, 20 April 2004.[29]

(5) CITF Form 40, Subject Interview of accused, 3 December 2002.

[29] The subject of the interview is intentionally withheld. It appears in the attachment. Please note that that document should not be released without redacting protected information.

(6) Agent's Investigation Report ("AIR"), Interview of accused, 17 September 2002.

(7) AIR Interview of accused, 5 November 2002.

(8) CITF Form 40, Interview of the accused on 6 December 2002.

(9) CITF Form 40, Interview of the accused on 16 December 2002.

12. **Submitted by**:

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

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

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

Attachment a.(1) is a video clip.

You can access it via this link: Att a(1) if you are viewing this electronically, or view it under the Attachments tab of this document.

The classification of the video clip is: UNCLASSIFIED/FOUO

CRIMINAL INVESTIGATIVE TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY	2. PLACE	3. ACTIVITY NUMBER
28 Oct 02	GTMO, CUBA	00000023041937

4. REMARKS

Subject Interview of:

Date/Place: 28 Oct 02/GTMO, CUBA

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THIS DOCUMENT CONTAINS NEITHER RECOMMENDATIONS NOR CONCLUSIONS OF CITF. IT IS THE PROPERTY OF THE CITF AND IS LOANED TO YOUR AGENCY; THIS DOCUMENT IS NOT TO BE RELEASED OUTSIDE YOUR AGENCY.

4. REMARKS (Continued)

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4. REMARKS (Continued)

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4. REMARKS (Continued)

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4. REMARKS (Continued)

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CRIMINAL INVESTIGATIVE TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY	2. PLACE	3. ACTIVITY NUMBER
04 Dec 02	Guantanamo Bay, Cuba	10247023410959

4. REMARKS

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5. CONDUCTED BY	6. SIGNATURE
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4. REMARKS (Continued)

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CRIMINAL INVESTIGATIVE TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY	2. PLACE	3. ACTIVITY NUMBER
20 Apr 04	Ogden Police Department, Ogden, UT	12000041821405

4. REMARKS

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4. REMARKS (Continued)

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CRIMINAL INVESTIGATIVE TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY	2. PLACE	3. ACTIVITY NUMBER
03 Dec 02	Guantanamo Bay, Cuba	10247023390811

4. REMARKS

Subject Interview of: ([redacted]

Date/Place: [redacted]

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AGENT'S INVESTIGATION REPORT

CID Regulation 195-1

ROI NUMBER [redacted]

17 - 5 ep

DETAILS

[redacted]

TYPED AGENT'S NAME AND SEQUENCE NUMBER	ORGANIZATION
SA [redacted]	[redacted]

SIGNATURE	DATE	EXHIBIT

AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS
REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY	2. PLACE	3. ACTIVITY NUMBER
05 Nov 02	GTMO, cuba	10245023101841

4. REMARKS

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4. REMARKS (Continued)

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CRIMINAL INVESTIGATIVE TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY	2. PLACE	3. ACTIVITY NUMBER
06 Dec 02	Guantanamo Bay, Cuba	10247023411027

4. REMARKS

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CRIMINAL INVESTIGATIVE TASK FORCE (CITF)

REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY	2. PLACE	3. ACTIVITY NUMBER
16 Dec 02	Guantanamo Bay, Cuba	12105023561700

4. REMARKS

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4. REMARKS (Continued)

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[redacted] SSG, DoD OGC

From: [redacted] SSG, DoD OGC
Sent: Monday, June 11, 2007 11:29 AM
To: [redacted] SSG, DoD OGC
Subject: FW: U.S. v. Khadr Motion for Reconsideration AE 018

From: [redacted] LTC, DoD OGC
Sent: Friday, June 08, 2007 18:08
To: [redacted]
Subject: RE: U.S. v. Khadr Motion for Reconsideration

COL Brownback has directed that I send the email below to counsel and the parties.

v/r,

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

From: Pete Brownback [redacted]
Sent: Friday, June 08, 2007 17:57
To: OMJ - LTC [redacted]
Subject: United States v. Khadr - Motion for Reconsideration - Denial of Request for Specific Relief

LTC [redacted],

Please forward the message below to the counsel in the case of United States v. Khadr. Please cc other interested parties.

COL Brownback

Counsel in the case of United States v. Khadr,

The undersigned received the Prosecution Motion for Reconsideration dated 8 June 2007 at 1704 hours. This message specifically denies what appears to be a request for relief contained therein. It does not address either the merits of the motion or any other procedural aspects of or matters contained in the motion.

Reference is made to Footnote 1 to the Motion for Reconsideration.

R.M.C. 908b (2) and (7) state that "If the United States elects to appeal, the trial counsel shall provide the military judge with written notice to this effect not later than five days after the ruling or order."

R.M.C. 103a(11) states "When a period of time is expressed in a number of days, the period shall be in calendar days, unless otherwise specified. Unless otherwise specified, the date on which the period begins shall not count, but the date on which the period ends shall count as one day."

The ruling in question was issued on 4 June 2007. The five day period stated in R.M.C. 908b(2) and (7) began on 5

June and the last day of the period is 9 June.

The military judge is not aware of any authority which he possesses to toll the period established by the Secretary of Defense in R.M.C. 908.

Further, the military judge is aware of the provisions of 10 U.S.C. Sec. 950d, Appeal by the United States. Sec. 950d(b) Notice of Appeal, states that "The United States shall take an appeal of an order or ruling under subsection (a) by filing a notice of appeal with the military judge within five days after the date of such order or ruling." The military judge is certainly not aware of any authority on his part to toll the time frame established by statute."

Footnote 1 states in part:

"To the extent that it would be required - and out of an abundance of caution - the Prosecution asks that any time period for the filing of a notice of appeal regarding this issued be tolled pending a decision on this motion."

Insofar as footnote 1 is a request for relief, that relief is denied.

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

-----Original Message-----
From: Jeff Groharing[redacted]
Sent: Friday, June 08, 2007 17:00
To [redacted]
Subject: U.S. v. Khadr Motion for Reconsideration

Sir,

Please forward the attached motion and attachments to Colonel Brownback.

V/R,

--
Jeff Groharing
Major, U.S. Marine Corps
Prosecutor, Office of Military Commissions
[redacted]

[redacted] **SSG, DoD OGC**

From: [redacted] SSG, DoD OGC
Sent: Monday, June 18, 2007 3:07 PM
To: [redacted] SSG, DoD OGC
Subject: FW: Detailed Defense Counsel for U.S. v. Khadr AE Next

> -----O
> From: [redacted]
> Sent:
> To: [redacted]

> Subject: RE: Detailed Defense Counsel for U.S. v. Khadr
>
> Col Davis,
>
> Yesterday I excused LtCol Vokey as the detailed defense counsel in the
> case of United States v. Khadr. Yesterday I also formally detailed
> LCDR Kuebler as the detailed defense counsel in the case. No civilian
> defense counsel has entered an appearance in the case.
>
> Respectfully,
> Dwight Sullivan
>
>
> Colonel Dwight H. Sullivan, USMCR
> Chief Defense Counsel
> [redacted]

> -----Original Message-----
> From: Davis, Morris, COL, DoD OGC
> Sent: Thursday, May 31
o: [redacted]
[redacted]'
[redacted]ense Counsel for U.S. v. Khadr
>
> On 25 April 2007 you sent an email naming LTC Colby Vokey as the
> detailed defense counsel for U.S. v. Khadr and LCDR William Kuebler as
> the associated detailed defense counsel. A news article by Michelle
> Shephard in today's Toronto Star (immediately below) states that you
> excused LTC Vokey, in writing, from representation of Mr. Khadr. The
> headline in an article by Carol Rosenberg in the Miami Herald (second
> item below) states: "Young detainee fires all his American lawyers."

>
> Please advise who you have detailed as Mr. Khadr's military defense
> counsel.
> Additionally, please identify any other military or civilian defense
> counsel in this case.
>
> MORRIS D. DAVIS, Colonel, USAF
> Chief Prosecutor
>
> [redacted]
>
> CONFIDENTIALITY NOTICE: This electronic transmission may contain
> attorney work-product or information protected under the
> attorney-client privilege, both of which are protected from disclosure
> under the Freedom of Information Act, 5 USC 552. Do not release
> outside of DoD channels without prior authorization from the sender.

[redacted] SSG, DoD OGC

From: [redacted] SSG, DoD OGC
Sent: Monday, June 18, 2007 2:59 PM
To: [redacted] SSG, DoD OGC
Subject: FW: Query concerning the Briefing of Jurisdiction in the Case of United States v. Hamdan

---

From: Pete Brownback [redacted] com]
Sent: Monday, June 18, 2007 12:48
To: OMJ - LTC [redacted]
Subject: Query concerning the Briefing of Jurisdiction in the Case of United States v. Hamdan

[redacted]

Please answer the following questions concerning the case of United States v. Hamdan from the official records you maintain in your capacity as the clerk in receipt of all filings from the parties in all cases referred to a Military Commission. Please make your response the next AE in order in the case of United States v. Khadr. Please advise me of the AE designation of your response.

1. Q -- Was the issue of jurisdiction briefed in the case of United States v. Hamdan?

A -- Yes. Titled: Defense Motion to Dismiss Jurisdiction. It contained five nonclassified attachments and one SECRET attachment. Jurisdiction was the only issue raised and it was thoroughly briefed.

2. Q -- a) What date was the initial brief filed?
b) How long was the brief, not counting attachments?
c) Was the Chief Prosecutor CC'd on the email which filed the brief?
d) What AE number was the brief assigned?

A -- a) 18 MAY 2007.
b) 18 pages.
c) Yes.
d) AE 8 - motion and attachments A, C, D, E, F; AE 9 - attachment B (Sealed) .

3. Q -- a) What date was the response brief filed?
b) How long was the brief, not counting attachments?
c) Was the Chief Prosecutor CC'd on the email which filed the brief?
d) What AE number was the brief assigned?

A -- a) 2018 hours 25 MAY 2007.
b) 12 pages.
c) Yes.
d) AE 10.

4. Q -- a) What date was the reply brief filed?
b) How long was the brief, not counting attachments?
c) Was the Chief Prosecutor CC'd on the email which filed the brief?
d) What AE number was the brief assigned?

A -- a) 1 JUNE 2007.
b) 14 pages.
c) Yes.

d) AE 13.

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

THE SECRETARY OF THE NAVY
WASHINGTON, D.C. 20350-1000

29 July 2004

MEMORANDUM FOR DISTRIBUTION

Subj: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba

Ref: (a) Deputy Secretary of Defense Order of July 7, 2004
(b) Convening Authority Appointment Letter of July 9, 2004

Encl: (1) Combatant Status Review Tribunal Process
(2) Recorder Qualifications, Roles and Responsibilities
(3) Personal Representative Qualifications, Roles and Responsibilities
(4) Combatant Status Review Tribunal Notice to Detainees
(5) Sample Detainee Election Form
(6) Sample Nomination Questionnaire
(7) Sample Appointment Letter for Combatant Status Review Tribunal Panel
(8) Combatant Status Review Tribunal Hearing Guide
(9) Combatant Status Review Tribunal Decision Report Cover Sheet

1. Introduction

By reference (a), the Secretary of Defense has established a Combatant Status Review Tribunal (CSRT) process to determine, in a fact-based proceeding, whether the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation. The Secretary of the Navy has been appointed to operate and oversee this process.

The Combatant Status Review Tribunal process provides a detainee: the assistance of a Personal Representative; an interpreter if necessary; an opportunity to review unclassified information relating to the basis for his detention; the opportunity to appear personally to present reasonably available information relevant to why he should not be classified as an enemy combatant; the opportunity to question witnesses testifying at the Tribunal; and, to the extent they are

reasonably available, the opportunity to call witnesses on his behalf.

2. Authority

The Combatant Status Review Tribunal process was established by Deputy Secretary of Defense Order dated July 7, 2004 (reference (a)), which designated the undersigned to operate and oversee the Combatant Status Review Tribunal process. The Tribunals will be governed by the provisions of reference (a) and this implementing directive, which sets out procedures for Tribunals and establishes the position of Director, Combatant Status Review Tribunals. Reference (b) designates the Director, CSRT, as the convening authority for the Tribunal process.

3. Implementing Process

The Combatant Status Review Tribunal Process is set forth in enclosure (1). Enclosures (2) and (3) set forth detailed descriptions of the roles and responsibilities of the Recorder and Personal Representative respectively. Enclosure (4) is a Notice to detainees regarding the CSRT process. Enclosure (5) is a Sample Detainee Election Form. Enclosure (6) is a Sample Nominee Questionnaire for approval of Tribunal members, Recorders, and Personal Representatives. Enclosure (7) is an Appointment Letter that will be signed by the Director of CSRT as the convening authority. Enclosure (8) is a CSRT Hearing Guide. Tribunal decisions will be reported to the convening authority by means of enclosure (9). This implementing directive is subject to revision at any time.

CC:
Secretary of State
Secretary of Defense
Attorney General
Secretary of Homeland Security
Director, Central Intelligence Agency
Assistant to the President for National Security Affairs
Counsel to the President

Deputy Secretary of Defense
Secretary of the Army
Secretary of the Navy
Secretary of the Air Force
Chairman of the Joint Chiefs of Staff
Director, Federal Bureau of Investigation
Director of Defense Agencies
Director, DOD Office of Detainee Affairs

Combatant Status Review Tribunal Process

A. Organization

Combatant Status Review Tribunals (CSRT) will be administered by the Director, Combatant Status Review Tribunals. The Director will staff and structure the Tribunal organization to facilitate its operation. The CSRT staff will schedule Tribunal proceedings, provide for interpreter services, provide legal advice to the Director and to Tribunal panels, provide clerical assistance and other administrative support, ensure information security, and coordinate with other agencies as appropriate.

B. Purpose and Function

This process will provide a non-adversarial proceeding to determine whether each detainee in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba, meets the criteria to be designated as an enemy combatant, defined in reference (a) as follows:

> An "enemy combatant" for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida 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 whose status will be reviewed by a Tribunal has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense.

The Director, CSRT, shall convene Tribunals pursuant to this implementing directive to conduct such proceedings as necessary to make a written assessment as to each detainee's status as an enemy combatant. Each Tribunal shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.

Adoption of the procedures outlined in this directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

C. Combatant Status Review Tribunal Structure

(1) Each Tribunal shall be composed of a panel of three neutral commissioned officers of the U.S. Armed Forces convened to make determinations of enemy combatant status pursuant to this implementing directive. Each of the officers shall possess the appropriate security clearance and none of the officers appointed shall have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The senior member of each Tribunal shall be an officer serving in the grade of O-6 and shall be its President. The other members of the Tribunal shall be officers in the grade of O-4 and above. One of

the officers appointed to the Tribunal shall be a judge advocate. All Tribunal members have an equal vote as to a detainee's enemy combatant status.

(2) **Recorder**. Each Tribunal shall have a commissioned officer serving in the grade of O-3 or above, preferably a judge advocate, appointed by the Director, CSRT, to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of the proceedings. The Recorder shall have an appropriate security clearance and shall have no vote. The Recorder shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Recorder are set forth in enclosure (2).

(3) **Personal Representative**. Each Tribunal shall have a commissioned officer appointed by the Director, CSRT, to assist the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT. The Personal Representative shall be an officer in the grade of O-4 or above, shall have the appropriate security clearance, shall not be a judge advocate, and shall have no vote. The Personal Representative shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Personal Representative are set forth in enclosure (3).

(4) **Legal Advisor.** The Director, CSRT, shall appoint a judge advocate officer as the Legal Advisor to the Tribunal process. The Legal Advisor shall be available in person, telephonically, or by other means, to each Tribunal as an advisor on legal, evidentiary, procedural or other matters. In addition, the Legal Advisor shall be responsible for reviewing each Tribunal decision for legal sufficiency. The Legal Advisor shall have an appropriate security clearance and shall have no vote. The Legal Advisor shall also not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process.

(5) **Interpreter.** If needed, each Tribunal will have an interpreter appointed by the President of the Tribunal who shall be competent in English and a language understood by the detainee. The interpreter shall have no vote and will have an appropriate security clearance.

D. Handling of Classified Material

(1) All parties shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Tribunal, Recorder and Personal Representative shall coordinate with an Information Security Officer in the handling and safeguarding of classified material before, during and after the Tribunal proceeding.

(2) The Director, CSRT, and the Tribunal President have the authority and duty to ensure that all proceedings of, or in relation to, a Tribunal under this Order shall comply with Executive Order 12958 regarding national security information in all respects. Classified information may be used in the CSRT process with the concurrence of the

originating agency. Classified information for which the originating agency declines to authorize for use in the CSRT process is not reasonably available. For any information not reasonably available, a substitute or certification will be requested from the originating agency as cited in paragraph E (3)(a) below.

(3) The Director, CSRT, the CSRT staff, and the participants in the CSRT process do not have the authority to declassify or change the classification of any classified information.

E. Combatant Status Review Tribunal Authority

The Tribunal is authorized to:

(1) Determine the mental and physical capacity of the detainee to participate in the hearing. This determination is intended to be the perception of a layperson, not a medical or mental health professional. The Tribunal may direct a medical or mental health evaluation of a detainee, if deemed appropriate. If a detainee is deemed physically or mentally unable to participate in the CSRT process, that detainee's case will be held as a Tribunal in which the detainee elected not to participate. The Tribunal President shall ensure that the circumstances of the detainee's absence are noted in the record.

(2) Order U.S. military witnesses to appear and to request the appearance of civilian witnesses if, in the judgment of the Tribunal President those witnesses are reasonably available as defined in paragraph G (9) of this enclosure.

(3) Request the production of such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including 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 records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter the "Government Information").

(a) For any relevant information not provided in response to a Tribunal's request, the agency holding the information shall provide either an acceptable substitute for the information requested or a certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant. Acceptable substitutes may include an unclassified or, if not possible, a lesser classified, summary of the information; or a statement as to the relevant facts the information would tend to prove.

(4) Require each witness (other than the detainee) to testify under oath. The detainee has the option of testifying under oath or unsworn. Forms of the oath for Muslim and non-Muslim witnesses are in the Tribunal Hearing Guide (enclosure (8)). The Tribunal Recorder will administer the oath.

F. The Detainee's Participation in the CSRT Process

(1) The detainee may elect to participate in a Combatant Status Review Tribunal or may waive participation in the process. Such waiver shall be submitted to the Tribunal in writing by the detainee's Personal Representative and must be made after the Personal Representative has explained the Tribunal process and the opportunity of the detainee to contest this enemy combatant status. The waiver can be either an affirmative statement that the detainee declines to participate or can be inferred by the Personal Representative from the detainee's silence or actions when the Personal Representative explains the CSRT process to the detainee. The detainee's election shall be noted by the Personal Representative on enclosure (5).

(2) If a detainee waives participation in the Tribunal process, the Tribunal shall still review the detainee's status without requiring the presence of the detainee.

(3) A detainee who desires to participate in the Tribunal process shall be allowed to attend all Tribunal proceedings except for proceedings involving deliberation and voting by the members and testimony or other matters that would compromise national security if held in the presence of the detainee.

(4) The detainee may not be compelled to testify or answer questions before the Tribunal other than to confirm his identity.

(5) The detainee shall not be represented by legal counsel but will be aided by a Personal Representative who may, upon the detainee's election, assist the detainee at the Tribunal. He shall be provided with an interpreter during the Tribunal hearing if necessary.

(6) The detainee may present evidence to the Tribunal, including the testimony of witnesses who are reasonably available and whose testimony is considered by the Tribunal to be relevant. Evidence on the detainee's behalf (other than his own testimony, if offered) may be presented in documentary form and through written statements, preferably sworn.

(7) The detainee may present oral testimony to the Tribunal and may elect to do so under oath or affirmation or as unsworn testimony. If the detainee testifies, either under oath or unsworn, he may be questioned by the Recorder, Personal Representative, or Tribunal members, but may not be compelled to answer questions before the Tribunal.

(8) The detainee's Personal Representative shall be afforded the opportunity to review the Government Information, and to consult with the detainee concerning his status as an enemy combatant and any challenge thereto. The Personal Representative may share the unclassified portion of the Government Information with the detainee.

(9) The detainee shall be advised of the foregoing by his Personal Representative before the Tribunal is convened, and by the Tribunal President at the beginning of the hearing.

G. Tribunal Procedures

(1) By July 17, 2004, the convening authority was required to notify each detainee of the opportunity to contest his status as an enemy combatant in the Combatant Status Review Tribunal process, the opportunity to consult with and be assisted by a Personal Representative, and of the jurisdiction of the courts of the United States to entertain a habeas corpus petition filed on the detainee's behalf. The English language version of this Notice to Detainees is at enclosure (4). All detainees were so notified July 12-14, 2004.

(2) An officer appointed as a Personal Representative will meet with the detainee and, through an interpreter if necessary, explain the nature of the CSRT process to the detainee, explain his opportunity to personally appear before the Tribunal and present evidence, and assist the detainee in collecting relevant and reasonably available information and in preparing for and presenting information to the CSRT.

(3) The Personal Representative will have the detainee make an election as to whether he wants to participate in the Tribunal process. Enclosure (5) is a Detainee Election Form. If the detainee elects not to participate, or by his silence or actions indicates that he does not want to participate, the Personal Representative will note this on the election form and this detainee will not be required to appear at his Tribunal hearing. The Director, CSRT, as convening authority, shall appoint a Tribunal as described in paragraph C (1) of this enclosure for all detainees after reviewing Nomination Questionnaires (enclosure (6)) and approving Tribunal panel members. Enclosure (7) is a sample Appointment Letter.

(4) The Director, CSRT, will schedule a Tribunal hearing for a detainee within 30 days after the detainee's Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above. The Personal Representative will submit a completed Detainee Election Form to the Director, CSRT, or his designee when the Personal Representative has completed the actions above. The 30-day period to schedule a Tribunal will commence upon receipt of this form.

(5) Once the Director, CSRT, has scheduled a Tribunal, the President of the assigned Tribunal panel may postpone the Tribunal for good cause shown to provide the detainee or his Personal Representative a reasonable time to acquire evidence deemed relevant and necessary to the Tribunal's decision, or to accommodate military exigencies as presented by the Recorder.

(6) All Tribunal sessions except those relating to deliberation or voting shall be recorded on audiotape. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

(7) **Admissibility of Evidence.** 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 issues 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.

(8) **Control of Case.** The President of the Tribunal is authorized to order the removal of any person from the hearing if that person is disruptive, uncooperative, or otherwise interferes with the Tribunal proceedings following a warning. In the case of the removal of the detainee from the Tribunal hearing, the detainee's Personal Representative shall continue in his role of assisting the detainee in the hearing.

(9) **Availability of Witnesses.** The President of the Tribunal is the decision authority on reasonable availability of witnesses.

(a) 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 adversely affect combat or support operations.

(b) If such witnesses are not from within the U.S. Armed Forces, they shall not be considered reasonably available if they decline properly made requests to appear at a hearing, if they cannot be contacted following reasonable efforts by the CSRT staff, or if security considerations preclude their presence at a hearing. Non-U.S. Government witnesses will appear before the Tribunal at their own expense. Payment of expenses for U.S. Government witnesses will be coordinated by the CSRT staff and the witness's organization.

(c) For any witnesses who do not appear at the hearing, the President of the Tribunal may allow introduction of evidence by other means such as e-mail, fax copies, and telephonic or video-telephonic testimony. Since either video-telephonic or telephonic testimony is equivalent to in-person testimony, the witness shall be placed under oath and is subject to questioning by the Tribunal.

(10) **CSRT Determinations on Availability of Evidence.** If the detainee requests witnesses or evidence deemed not reasonably available, the President of the Tribunal shall document the basis for that decision; to include, for witnesses, efforts undertaken to procure the presence of the witness and alternatives considered or used in place of that witness's in-person testimony.

(11) **Burden of Proof.** Tribunals shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant. There is a rebuttable presumption that the Government Evidence, as defined in paragraph H (4) herein, submitted by the Recorder to support a determination that the detainee is an enemy combatant, is genuine and accurate.

(12) **Voting.** The decisions of the Tribunal shall be determined by a majority of the voting members of the Tribunal. A dissenting member shall prepare a brief summary of the basis for his/her opinion, which shall be attached to the record forwarded for legal review. Only the Tribunal members shall be present during deliberation and voting.

H. Conduct Of Hearing

A CSRT Hearing Guide is attached at enclosure (8) and provides guidance on the conduct of the Tribunal hearing. The Tribunal's hearing shall be substantially as follows:

(1) The President shall call the Tribunal to order, and announce the order appointing the Tribunal (see enclosure (7)). The President shall also ensure that all participants are properly sworn to faithfully perform their duties.

(2) The Recorder shall cause a record to be made of the time, date, and place of the hearing, and the identity and qualifications of all participants. All proceedings shall be recorded on audiotape except those portions relating to deliberations and voting. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

(3) The President shall advise the detainee of the purpose of the hearing, the detainee's opportunity to present evidence, and of the consequences of the Tribunal's decision. In cases requiring an interpreter, the President shall ensure the detainee understands these matters through the interpreter.

(4) The Recorder shall present to the Tribunal such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the evidence so presented shall constitute the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also separately provide such evidence to the Tribunal.

(5) The Recorder shall present to the Tribunal an unclassified report summarizing the Government Evidence and any evidence to suggest that the detainee should not be designated as an enemy combatant. This report shall have been provided to the detainee's Personal Representative in advance of the Tribunal hearing.

(6) The Recorder shall call the witnesses, if any. Witnesses shall be excluded from the hearing except while testifying. An oath or affirmation shall be administered to each witness by the Recorder. When deemed necessary or appropriate, the Tribunal members can call witnesses who are reasonably available to testify or request the production of reasonably available documentary or other evidence.

(7) The detainee shall be permitted to present evidence and question any witnesses. The Personal Representative shall assist the detainee in obtaining unclassified documents and in arranging the presence of witnesses reasonably available and, if the detainee elects, the Personal Representative shall assist the detainee in the presentation of

information to the Tribunal. The Personal Representative may, outside the presence of the detainee, present or comment upon classified information that bears upon the detainee's status if it would aid the Tribunal's deliberations.

(8) When deemed necessary and appropriate by any member of the Tribunal, the Tribunal may recess the Tribunal hearing to consult with the Legal Advisor as to any issues relating to evidence, procedure, or other matters. The President of the Tribunal shall summarize on the record the discussion with the Legal Advisor when the Tribunal reconvenes.

(9) The Tribunal shall deliberate in closed session with only voting members present. The Tribunal shall make its determination of status by a majority vote. The President shall direct a Tribunal member to document the Tribunal's decision on the Combatant Status Review Tribunal Decision Report cover sheet (enclosure (9)), which will serve as the basis for the Recorder's preparation of the Tribunal record. The unclassified reasons for the Tribunal's decision shall be noted on the Tribunal Decision Report cover sheet, and should include, as appropriate, the detainee's organizational membership or affiliation with a governmental, military, or terrorist organization (*e.g.*, Taliban, al Qaida, etc.). A dissenting member shall prepare a brief summary of the basis for his/her opinion.

(10) Both documents shall be provided to the Recorder as soon as practicable after the Tribunal concludes.

I. Post-Hearing Procedures

(1) The Recorder shall prepare the record of the hearing and ensure that the audiotape is preserved and properly classified in conformance with security regulations.

(2) The detainee's Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

(3) The Recorder shall provide the completed record to the President of the Tribunal for signature and forwarding for legal review.

(4) In all cases the following items will be attached to the decision which, when complete and signed by the Tribunal President, shall constitute the record:

(a) A statement of the time and place of the hearing, persons present, and their qualifications;

(b) The Tribunal Decision Report cover sheet;

(c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;

(d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with all applicable security regulations; and

(e) A dissenting member's summary report, if any.

(5) The President of the Tribunal shall forward the Tribunal's decision and all supporting documents as set forth above to the Director, CSRT, acting as Convening Authority, via the CSRT Legal Advisor, within three working days of the date of the Tribunal decision. If additional time is needed, the President of the Tribunal shall request an extension from the Director, CSRT.

(6) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with all applicable security regulations. These tapes may be reviewed and transcribed as necessary for the legal sufficiency and Convening Authority reviews.

(7) The CSRT Legal Advisor shall conduct a legal sufficiency review of all cases. The Legal Advisor shall render an opinion on the legal sufficiency of the Tribunal proceedings and forward the record with a recommendation to the Director, CSRT. The legal review shall specifically address Tribunal decisions regarding reasonable availability of witnesses and other evidence.

(8) The Director, CSRT, shall review the Tribunal's decision and may approve the decision and take appropriate action, or return the record to the Tribunal for further proceedings. In cases where the Tribunal decision is approved and the case is considered final, the Director, CSRT, shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies.

(9) If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, and the Director, CSRT, approves the Tribunal's decision, the Director, CSRT, shall forward the written report of the Tribunal's decision directly to the Secretary of the Navy. The Secretary of the Navy shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies, in order to permit the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release or other disposition consistent with applicable laws. In these cases the Director, CSRT, will ensure coordination with the Joint Staff with respect to detainee transportation issues.

(10) The detainee shall be notified of the Tribunal decision by the Director, CSRT. If the detainee has been determined to no longer be designated as an enemy combatant, he shall be notified of the Tribunal decision upon finalization of transportation arrangements or at such earlier time as deemed appropriate by the Commander, JTF-GTMO.

Recorder Qualifications, Roles and Responsibilities

A. Qualifications of the Recorder

(1) For each case, the Director, CSRT, shall select a commissioned officer in the grade of O-3 or higher, preferably a judge advocate, to serve as a Recorder.

(2) Recorders must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Recorders.

B. Roles of the Recorder

(1) Subject to section C (1), below, the Recorder has a duty to present to the CSRT such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also provide such evidence to the Tribunal.

(2) The Recorder shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Recorder shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and following the Tribunal process.

C. Responsibilities of the Recorder

(1) For each assigned detainee case under review, the Recorder shall obtain and examine the Government Information as defined in paragraph E (3) of enclosure (1).

(2) The Recorder shall draft a proposed unclassified summary of the relevant evidence derived from the Government Information.

(3) The Recorder shall ensure appropriate coordination with original classification authorities for any classified information presented that was used in the preparation of the proposed unclassified summary.

(4) The Recorder shall permit the assigned Personal Representative access to the Government Information and will provide the unclassified summary to the Personal Representative in advance of the Tribunal hearing.

(5) The Recorder shall ensure that coordination is maintained with Joint Task Force-Guantanamo Bay and the Criminal Investigative Task Force to deconflict any other ongoing activities and arrange for detainee movements and security.

(6) The Recorder shall present the Government Evidence orally or in documentary form to the Tribunal. The Recorder shall also answer questions, if any, asked by the Tribunal.

(7) The Recorder shall administer an appropriate oath to the Tribunal members, the Personal Representative, the paralegal/reporter, the interpreter, and all witnesses (including the detainee if he elects to testify under oath).

(8) The Recorder shall prepare a Record of Proceedings, and, if applicable, a record of the dissenting member's report. The Record of Proceedings should include:

(a) A statement of the time and place of the hearing, persons present, and their qualifications;

(b) The Tribunal Decision Report cover sheet;

(c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;

(d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with applicable security regulations; and

(e) A dissenting member's summary report, if any.

(9) The Recorder shall provide the detainee's Personal Representative the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

(10) The Recorder shall submit the completed Record of Proceedings to the President of the Tribunal who shall sign and forward it to the Director, CSRT via the CSRT Legal Advisor. Once signed by the Tribunal President, the completed record is considered the official record of the Tribunal's decision.

(11) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with applicable security regulations. These tapes are considered part of the case record and may be reviewed and transcribed as necessary for the legal sufficiency and convening authority reviews.

Personal Representative Qualifications, Roles and Responsibilities

A. Qualifications of Personal Representative

(1) For each case, the Director, CSRT, shall select a commissioned officer serving in the grade of O-4 or higher to serve as a Personal Representative. The Personal Representative shall not be a judge advocate.

(2) Personal Representatives must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Personal Representatives.

B. Roles of the Personal Representative

(1) The detainees were notified of the Tribunal process per reference (a). When detailed to a detainee's case the Personal Representative shall further explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal.

(2) The Personal Representative shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Personal Representative shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and after the Tribunal process.

C. Responsibilities of the Personal Representative

(1) The Personal Representative is responsible for explaining the nature of the CSRT process to the detainee. Upon first contact with the detainee, the Personal Representative shall explain to the detainee that no confidential relationship exists or may be formed between the detainee and the Personal Representative. The Personal Representative shall explain the detainee's opportunity to make a personal appearance before the Tribunal. The Personal Representative shall request an interpreter, if needed, to aid the detainee in making such appearance and in preparing his presentation. The Personal Representative shall explain to the detainee that he may be subject to questioning by the Tribunal members, but he cannot be compelled to make any statement or answer any questions. Paragraph D, below, provides guidelines for the Personal Representative meeting with the enemy combatant prior to his appearance before the Tribunal.

(2) After the Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above, the Personal Representative shall complete a Detainee Election Form (enclosure (5)) and provide this form to the Director, CSRT.

(3) The Personal Representative shall review the Government Evidence that the Recorder plans to present to the CSRT and shall permit the Recorder to review documentary evidence that will be presented to the CSRT on the detainee's behalf.

(4) Using the guidelines set forth in paragraph D, the Personal Representative shall meet with the detainee, using an interpreter if necessary, in advance of the CSRT. In no circumstance shall the Personal Representative disclose classified information to the detainee.

(5) If the detainee elects to participate in the Tribunal process, the Personal Representative shall present information to the Tribunal if the detainee so requests. The Personal Representative may, outside the presence of the detainee, comment upon classified information submitted by the Recorder that bears upon the presentation made on the detainee's behalf, if it would aid the Tribunal's deliberations.

(6) If the detainee elects not to participate in the Tribunal process, the Personal Representative shall assist the detainee by presenting information to the Tribunal in either open or closed sessions and may, in closed sessions, comment upon classified information submitted by the Recorder that bears upon the detainee's presentation, if it would aid the Tribunal's deliberations.

(7) The Personal Representative shall answer questions, if any, asked by the Tribunal.

(8) The Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

D. Personal Representative Guidelines for Assisting the Enemy Combatant

In discussing the CSRT process with the detainee and completing the Detainee Election Form, the Personal Representative shall use the guidelines provided below to assist the detainee in preparing for the CSRT:

> You have already been advised that a Combatant Status Review Tribunal has been established by the United States government to review your classification as an enemy combatant.
>
> A Tribunal of military officers shall review your case in "x" number of days [or other time frame as known], and I have been assigned to ensure you understand this process. The Tribunal shall review your case file, offer you an opportunity to speak on your own behalf if you desire, and ask questions. You also can choose not to appear at the Tribunal hearing. In that case I will be at the hearing and will assist you if you want me to do so.
>
> You will be provided with an opportunity to review unclassified information that relates to your classification as an enemy combatant. I will be able to review additional information that is classified. I can discuss the unclassified information with you.

You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence and I will attend.

You will have the opportunity to question witnesses testifying at the Tribunal.

You will have the opportunity to present evidence to the Tribunal, including calling witnesses to testify on your behalf if those witnesses are reasonably available. If a witness is not considered by the Tribunal as reasonably available to testify in person, the Tribunal can consider evidence submitted by telephone, written statements, or other means rather than having a witness testify in person. I am available to assist you in gathering and presenting these materials, should you desire to do so. After the hearing, the Tribunal shall determine whether you should continue to be designated as an enemy combatant.

I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.
I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so. I am also available to speak for you at the hearing if you wish that kind of assistance.

Do you understand the process or have any questions about it?

The Tribunal is examining one issue: whether you are an enemy combatant against the United States or its coalition partners. Any information you can provide to the Tribunal relating to your activities prior to your capture is very important in answering this question. However, you may not be compelled to testify or answer questions at the Tribunal hearing.

Do you want to participate in the Tribunal process and appear before the Tribunal?

Do you wish to present information to the Tribunal or have me present information for you?

Is there anyone here in the camp or elsewhere who can testify on your behalf regarding your capture or status?

Do you want to have anyone else submit any information to the Tribunal regarding your status? [If so,] how do I contact them? If feasible and you can show the Tribunal how the information is relevant to your case, the Tribunal will endeavor to arrange for evidence to be provided by other means such as mail, e-mail, faxed copies, or telephonic or video-telephonic testimony.

Do you have any questions?

Combatant Status Review Tribunal Notice to Detainees*

You are being held as an enemy combatant by the United States Armed Forces. An enemy combatant is an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. The definition includes any person who has committed a belligerent act or has directly supported such hostilities.

The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held. The Tribunal will provide you with the following process:

1. You will be assigned a military officer to assist you with the presentation of your case to the Tribunal. This officer will be known as your Personal Representative. Your Personal Representative will review information that may be relevant to a determination of your status. Your Personal Representative will be able to discuss that information with you, except for classified information.

2. Before the Tribunal proceeding, you will be given a written statement of the unclassified factual basis for your classification as an enemy combatant.

3. You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence. Your Personal Representative will attend in either case.

4. You will be provided with an interpreter during the Tribunal hearing if necessary.

5. You will be able to present evidence to the Tribunal, including the testimony of witnesses. If those witnesses you propose are not reasonably available, their written testimony may be sought. You may also present written statements and other documents. You may testify before the Tribunal but will not be compelled to testify or answer questions.

As a matter separate from these Tribunals, United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention. You will be notified in the near future what procedures are available should you seek to challenge your detention in U.S. courts. Whether or not you decide to do so, the Combatant Status Review Tribunal will still review your status as an enemy combatant.

If you have any questions about this notice, your Personal Representative will be able to answer them.

[*Text of Notice translated, and delivered to detainees 12-14 July 2004]

Enclosure (4)

Sample Detainee Election Form

Date/Time: _____

ISN#: _____

Personal Representative: _____
[Name/Rank]

Translator Required? _____ Language? _____

CSRT Procedures Read to Detainee or Written Copy Read by Detainee?_____

Detainee Election:

☐ Wants to Participate in Tribunal

☐ Wants Assistance of Personal Representative

☐ Affirmatively Declines to Participate in Tribunal

☐ Uncooperative or Unresponsive

Personal Representative Comments:

_____

_____

_____

_____

_____

_____

_____
Personal Representative

Enclosure (5)

Sample Nomination Questionnaire

Department of Defense
Director, Combatant Status Review Tribunals

As a candidate to become a Combatant Status Review Tribunal member, Recorder, or Personal Representative, please complete the following questionnaire and provide it to the Director, Combatant Status Review Tribunal (CSRT). Because of the sensitive personal information requested, no copy will be retained on file outside of the CSRT.

1. Name (Last, First MI)_____ 2. Rank/Grade_____

3. Date of Rank_____ 4. Service _____ 5. Active Duty Service Date _____

6. Desig/MOS _____ 7. Date Current Tour Began: _____

8. Security Clearance Level _____ 9. Date of clearance: _____

10. Military Awards / Decorations:_____

_____

11. Current Duty Position_____ 12. Unit: _____

13. Date of Birth _____ 14. Gender ____ 15. Race or Ethnic Origin _____

16. Civilian Education. College/Vocational/Civilian Professional School: _____

17. Date graduated or dates attended (and number of years), school, location, degree/major:_____

_____

_____

18. Military Education. Dates attended, school/course title._____

_____

_____

19. Duty Assignments. Last four assignments, units, and dates of assignments. _____

_____

_____

_____

20. Have you had any relative or friend killed or wounded in Afghanistan or Iraq? _____ Explain.

_____

_____

_____

Enclosure (6)

21. Have you had any close relative or friend killed, wounded, or impacted by the events of September 11, 2001? ____ Explain._____

_____

_____

_____

22. Have you ever been in an assignment related to enemy prisoners of war or enemy combatants, to include the apprehension, detention, interrogation, or previous determination of status of a detainee at Guantanamo Bay? _____ Explain._____

_____

_____

_____

23. Do you believe you may be disqualified to serve as a Tribunal member, Recorder, or Personal Representative for any reason? Explain. _____

_____

_____

_____

24. Your name or image as well as information related to the enemy combatant may be released to the public in conjunction with the Combatant Status Review Tribunal process. Could this potential public affairs release affect your ability to objectively serve in any capacity in the Tribunal process?
Y/N_____Explain._____

_____

_____

_____

SIGNATURE OF OFFICER:_____DATE: _____

Approved____ Disapproved_____ Director, CSRT

Sample Appointment Letter for Combatant Status Review Tribunal Panel

Department of Defense
Director, Combatant Status Review Tribunals

Ser

From: Director, Combatant Status Review Tribunals

Subj: APPOINTMENT OF COMBATANT STATUS REVIEW TRIBUNAL

Ref: (a) Convening Authority Appointment Letter of 7 July 2004

By the authority given to me in reference (a), a Combatant Status Review Tribunal established by DCN XXX "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba" is hereby convened. It shall hear such cases as shall be brought before it without further action of referral or otherwise.

The following commissioned officers shall serve as members of the Tribunal:

MEMBERS:

XXX, 999-99-9999; President*

YYY, 999-99-9999; Member*

ZZZ, 999-99-9999; Member*

J.M. MCGARRAH
RADM, CEC, USNR

[* The Order should note which member is the Judge Advocate required to be on the Tribunal.]

Enclosure (7)

Combatant Status Review Tribunal Hearing Guide

RECORDER: All rise. (The Tribunal enters)

[In Tribunal sessions where the detainee has waived participation, the Tribunal can generally omit the *italicized* portions.]

PRESIDENT: This hearing shall come to order.

RECORDER: This Tribunal is being conducted at [Time/Date] on board Naval Base Guantanamo Bay, Cuba. The following personnel are present:

_____, President

_____, Member

_____, Member

_____, Personal Representative

_____, Interpreter,

_____, Reporter/Paralegal, and

_____, Recorder

[Rank/Name] is the Judge Advocate member of the Tribunal.

PRESIDENT: The Recorder will be sworn. Do you, (name and rank of the Recorder) swear (or affirm) that you will faithfully perform the duties assigned in this Tribunal (so help you God)?

RECORDER: I do.

PRESIDENT: The reporter/paralegal will now be sworn.

RECORDER: Do you (name and rank of reporter/paralegal) swear or affirm that you will faithfully discharge your duties as assigned in this tribunal?

REPORTER/PARALEGAL: I do.

PRESIDENT: *The interpreter will be sworn. [If needed for witness testimony when detainee not present]*

RECORDER: Do you swear (or affirm) that you will faithfully perform the duties of interpreter in the case now hearing (so help you God)?

INTERPRETER: I do.

PRESIDENT: *We will take a brief recess while the detainee is brought into the room.*

RECORDER: *All Rise.*

[Tribunal members depart, followed by the Recorder, Personal Representative, Interpreter, and Court Reporter. The detainee is brought into the room. All participants except the Tribunal members return to the Tribunal room.]

RECORDER: *All Rise. [The Tribunal members enter the room.]*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: This hearing will come to order. You may be seated.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *(NAME OF DETAINEE),* this Tribunal is convened by order of the Director, Combatant Status Review Tribunals under the provisions of his Order of XX July 2004. It will determine whether *you [or Name of Detainee]* meet the criteria to be designated as an enemy combatant against the United States or its allies or otherwise meet the criteria to be designated as an enemy combatant.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: This Tribunal shall now be sworn. All rise.

INTERPRETER: *(TRANSLATION OF ABOVE).*

[All persons in the room stand while Recorder administers the oath. Each voting member raises his or her right hand as the Recorder administers the following oath:]

RECORDER: Do you swear (affirm) that you will faithfully perform your duties as a member of this Tribunal; that you will impartially examine and inquire into the matter now before you according to your conscience, and the laws and regulations provided; that you will make such findings of fact and conclusions as are supported by the evidence presented; that in determining those facts, you will use your professional knowledge, best judgment, and common sense; and that you will make such findings as are appropriate according to the best of your understanding of the rules, regulations, and laws governing this proceeding, and guided by your concept of justice (so help you God)?

MEMBERS OF TRIBUNAL: I do.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: The Recorder will now administer the oath to the Personal

Representative.

INTERPRETER: *(TRANSLATION OF ABOVE).*

[The Tribunal members lower their hands but remain standing while the following oath is administered to the Personal Representative:]

RECORDER: Do you swear (or affirm) that you will faithfully perform the duties of Personal Representative in this Tribunal (so help you God)?

PERSONAL REPRESENTATIVE: I do.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: Please be seated. The Reporter, Recorder, and Interpreter have previously been sworn. This Tribunal hearing shall come to order.

[All personnel resume their seats.]

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: ***(NAME OF DETAINEE), you are hereby advised that the following applies during this hearing:***

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: You may be present at all open sessions of the Tribunal. However, if you become disorderly, you will be removed from the hearing, and the Tribunal will continue to hear evidence.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: You may not be compelled to testify at this Tribunal. However, you may testify if you wish to do so. Your testimony can be under oath or unsworn.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: You may have the assistance of a Personal Representative at the hearing. Your assigned Personal Representative is present.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: You may present evidence to this Tribunal, including the testimony of witnesses who are reasonably available. You may question witnesses testifying at the Tribunal.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *You may examine documents or statements offered into evidence other than classified information. However, certain documents may be partially masked for security reasons.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *Do you understand this process?*

INTERPRETER: *(TRANSLATION OF ABOVE)*

PRESIDENT: *Do you have any questions concerning the Tribunal process?*

INTERPRETER: *(TRANSLATION OF ABOVE)*

[In Tribunal sessions where the detainee has waived participation substitute:

PRESIDENT: [Rank/Name of Personal Representative] you have advised the Tribunal that [Name of Detainee] has elected to not participate in this Tribunal proceeding. Is that still the situation?

PERSONAL REPRESENTATIVE: Yes/No. [Explain].

PRESIDENT: Please provide the Tribunal with the Detainee Election Form marked as Exhibit D-a.]

[Presentation of Unclassified Information by Recorder and Detainee or his Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc.]

[The Interpreter shall translate as necessary during this portion of the Tribunal.]

PRESIDENT: Recorder, please provide the Tribunal with the unclassified evidence.

RECORDER: I am handing the Tribunal what has previously been marked as Exhibit R-1, the unclassified summary of the evidence that relates to this detainee's status as an enemy combatant. A translated copy of this exhibit was provided to the Personal Representative in advance of this hearing for presentation to the detainee. In addition, I am handing to the Tribunal the following unclassified exhibits, marked as Exhibit R-2 through R-x. Copies of these Exhibits have previously been provided to the Personal Representative.

PRESIDENT: Does the Recorder have any witnesses to present?

RECORDER: Yes/no.

If witnesses appear before the Tribunal, the Recorder shall administer an appropriate oath:

Form of Oath for a Muslim

Do you [Name], in the Name of Allah, the Most Compassionate, the Most Merciful, swear that your testimony before this Tribunal will be the truth?

Form of Oath or Affirmation for Others

Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

INTERPRETER: (TRANSLATION AS NECESSARY)

[Witnesses may be questioned by the Tribunal members, the Recorder, the Personal Representative, or the detainee.]

RECORDER: Mr./Madam President, I have no further unclassified information for the Tribunal but request a closed Tribunal session at an appropriate time to present classified information relevant to this detainee's status as an enemy combatant.

PRESIDENT: *[Name of detainee]* (or Personal Representative), *do you* (or does the detainee) want to present information to this Tribunal?

[If detainee not present, Personal Representative may present information to the Tribunal.]

INTERPRETER: (TRANSLATION OF ABOVE).

[If the detainee elects to make an oral statement:]

PRESIDENT: [Name of detainee] would you like to make your statement under oath?

INTERPRETER: (TRANSLATION OF ABOVE).

[After statement is completed:]

PRESIDENT: [Name of detainee] does that conclude your statement?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: [Determines whether Tribunal members, Recorder, or Personal Representative have any questions for detainee.]

PRESIDENT: *[Name of detainee] do you have any other evidence to present to this Tribunal?*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: All unclassified evidence having been provided to the Tribunal, this concludes this Tribunal session.

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *(Name of detainee), you shall be notified of the Tribunal decision upon completion of the review of these proceedings by the convening authority in Washington, D.C.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *If the Tribunal determines that you should not be classified as an enemy combatant, you will be released to your home country as soon as arrangements can be made.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *If the Tribunal confirms your classification as an enemy combatant you shall be eligible for an Administrative Review Board hearing at a future date.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *That Board will make an assessment of whether there is continued reason to believe that you pose a threat to the United States or its allies in the ongoing armed conflict against terrorist organizations such as al Qaida and its affiliates and supporters or whether there are other factors bearing upon the need for continued detention.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *You will have the opportunity to be heard and to present information to the Administrative Review Board. You can present information from your family that might help you at the Board. You are encouraged to contact your family as soon as possible to begin to gather information that may help you.*

INTERPRETER: *(TRANSLATION OF ABOVE).*

PRESIDENT: *A military officer will be assigned at a later date to assist you in the Administrative Review Board process.*

INTERPRETER: *(TRANSLATION OF ABOVE)*

PRESIDENT: This Tribunal hearing is adjourned.

RECORDER: All Rise. [If moving into Tribunal session in which classified material will be discussed add:] This Tribunal is commencing a closed session. Will everyone but the Tribunal members, Personal Representative, and Reporter/Paralegal please leave the Tribunal room.

PRESIDENT: [When Tribunal room is ready for closed session.] You may be seated. The Tribunal for [Name of detainee] is now reconvened without the detainee being present to prevent a potential compromise of national security due to the classified nature of the evidence to be considered. The Recorder will note the date and time of this session for the record.

[Closed Tribunal Session Commences, as necessary, with only properly cleared personnel present. Presentation of classified information by Recorder and, when appropriate, Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc. All evidence will be properly marked with the security classification.]

PRESIDENT: This Tribunal session is adjourned and the Tribunal is closed for deliberation and voting.

RECORDER: Notes time and date when Tribunal closed.

[CLASSIFICATION]

Combatant Status Review Tribunal Decision Report Cover Sheet

[CLASSIFICATION]: UNCLASSIFIED Upon Removal of Enclosure(s) (2) [and (3)]

TRIBUNAL PANEL: _____

ISN #: _____ DATE: _____

Ref: (a) Convening Order of XX YYY 2004
(b) CSRT Implementation Directive of XX July 2004
(c) DEPSECDEF Memo of 7 July 2004

Encl: (1) Unclassified Summary of Basis for Tribunal Decision (U)
(2) Classified Summary of Basis for Tribunal Decision (U)
(3) Copies of Documentary Evidence Presented (U)

This Tribunal was convened by references (a) and (b) to make a determination as to whether the detainee meets the criteria to be designated as an enemy combatant as defined in reference (c).

The Tribunal has determined that he (is) (is not) designated as an enemy combatant as defined in reference (c).

[If yes] In particular the Tribunal finds that this detainee is a member of, or affiliated with, _____ (al Qaida, Taliban, other), as more fully discussed below and in the enclosures.

Enclosure (1) provides an unclassified account of the basis for the Tribunal's decision, as summarized below. A detailed account of the evidence considered by the Tribunal and its findings of fact are contained in enclosure (2).

_____
_____
_____
_____
_____
_____
_____

_____
(Rank, Name) President

Enclosure (9)

[redacted] **SSG, DoD OGC**

From: Kuebler, William, LCDR, DoD OGC
Sent: Wednesday, June 20, 2007 12:55 PM
To: [redacted]

Subject: RE: P001 Motion for Reconsideration-Khadr United States v. Khadr

Sir,

With respect to the Prosecution's Motion for Reconsideration -- upon further consultation and reflection, I believe it would inappropriate, in light of my current status, to file a responsive pleading on behalf of Mr. Khadr. Please extend my apologies to the Military Judge for any inconvenience. Thank you.

VR,

LCDR Kuebler

-----O ----
From: [redacted] LTC, DoD OGC
Sent: [redacted] 2007 16:43
To: am, LCDR, DoD [redacted] ates v. Khadr

Yes, on or before 20 June will be considered timely.

v/r,

LTC [redacted], USAR
>Sen A Advisor
Military Commissions Trial Judiciary

[redacted]

-----Original Message-----
From: Kuebler, William, LCDR, DoD OGC
Sent 5, 2007 16:23
To: [redacted] LTC, DoD OG [redacted] Pete Brownback'; C; [redacted], [redacted] ates v. Khadr

Sir,

The Defense does intend to file a response to the Government's Motion For Reconsideration. That motion was received by the Defense at 1700 on 8 June 2007. It is the Defense's understanding of the MCTJ Rules of Court that the motion is deemed "received" on Monday, 11 June (pursuant to RC 3.5(b)(2)) and that any response is due on or before Wednesday, 20 June (pursuant to RC 3.6(b)(1) ("Timing. Unless the Military Judge provides otherwise, a response is due within 7 calendar days after a motion is received.") and RC 1.6 (". . . When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation."). The Defense, therefore, believes and wishes to confirm that a Response filed on or before 20 June 2007 will be considered timely.

Thank you.

VR,

LCDR Kuebler

-----O ----
From: [redacted] LTC, DoD OGC
Sent: [redacted] 2007 11:55
To: [redacted]am, LCDR, DoD [redacted] Pete Brownback'; [redacted] C; [redacted], [redacted] on-Khadr United States v. Khadr

COL Brownback has directed that I send the email below to counsel and the parties.

v/r,

LTC [redacted], USAR
Seni[redacted]dvisor
Military Commissions Trial Judiciary

[redacted]

From: Pete Brownback [redacted]
Sent [redacted]15
To: [redacted], LTC, DoD OGC
Subj[redacted]n for Reconsideration-Khadr

LTC [redacted]

1. Please determine, by means of an email to the defense counsel in the case of United States v. Khadr with copies to all counsel and other interested parties, if the defense intends to file a response to the government Motion for Reconsideration (P 001).

2. UP RC 3.5.b.(2) and RC 3.6.b.(1), a response would be due on 18 June 2007.

COL Brownback

UNITED STATES OF AMERICA	}	**Disposition of Prosecution Motion for Reconsideration P 001**
v.	}	
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khahi"	}	**29 June 2007**

1. Overview. This disposition comments upon the Prosecution Motion for Reconsideration (Appellate Exhibit (AE) 017) of the undersigned's ruling on 4 June 2007 (AE 015), which dismissed the charges against the accused without prejudice.

a. Having reviewed and considered the government motion, as well as the matters presented, both in writing and orally, at the 4 June 2007 session, the Commission determines that the prosecution has produced nothing in AE 017 to show that the facts have changed or that the law has changed since the Commission made its ruling on 4 June 2007. Consequently, the Commission declines the opportunity to reconsider its ruling. In light of the government's motion, the Commission elects to clarify and make clearer the rationale for its 4 June 2007 ruling. Further, in the event that an appellate court might determine that an appeal can be taken from either the 4 June 2007 ruling or from this disposition, the Commission provides detailed rulings on the procedure and the merits herein.

b. The Commission is making this disposition without any defense response to the Prosecution Motion for Reconsideration. While the detailed defense counsel stated on 15 June 2007 that the defense intended to submit a response, the detailed defense counsel advised the Commission on 20 June 2007 that no response would be submitted. (*See* AE 022.)

2. Request for relief. As a preliminary matter, the request for relief (to extend the deadline for timely filing an appeal), improperly placed in Footnote 1 of the motion (*See* RC 3.4), was disposed of on 8 June 2007, within 70 minutes of receipt of AE 017. (*See* AE 018.) The Military Judge has no authority to toll or delay the requirements imposed by the Military Commissions Act of 2006 (M.C.A.) or the Manual for Military Commissions (M.M.C.) (*See Bowles v. Russell*, S.Ct., 14 June 2007.) The Military Judge can not and does not decide whether or not an appellate court should rule that an appeal from either the 4 June 2007 ruling or this disposition is timely under the pertinent provisions of the M.C.A. and the M.M.C., or the Rules established by the Court of Military Commission Review, or the Federal Rules of Appellate Procedure.

3. Procedural grounds. The Government asserts as a ground for reconsideration that it did not have a proper opportunity to brief the matter, argue it, and to present evidence.

a. Notice and opportunity to brief.

(1) In paragraph 6a of the motion, the prosecution states that "…the Military Judge decided this bedrock legal question without inviting briefing from the parties." This is a true statement, but it says nothing about the Military Judge offering or allowing the parties to brief the issue.

(2) On 25 May 2007, Ms. Natalie Bley, Military Commissions Trial Judiciary, at the direction of the undersigned Military Judge, sent a copy of the trial script to parties for both sides. The 13th, 14th, and 15th lines of that script contain the following words for the Prosecutor to state in open court:

"The determination by the Combatant Status Review Tribunal (CSRT) that the accused has been determined to be an alien unlawful enemy combatant has been marked as AE ___."

The prosecution is the proponent for jurisdiction over an individual in any case. In this case, the prosecution was alerted well ahead of time that it was going to be required to state in open court that there was a CSRT determination that the accused was an alien *unlawful* enemy combatant. Such a determination was not presented.

(3) On 3 June 2007, a Rules for Military Commissions (R.M.C.) 802 conference was held at NAS Guantanamo Bay, Cuba (Guantanamo). The prosecution was present. As the transcript (pp. 9-10) of the 4 June 2007 trial session shows, the prosecution was advised during the R.M.C. 802 conference that the Military Judge was going to raise the issue of jurisdiction *sua sponte*. The Military Judge discussed with the parties the question of which counsel would be arguing the motion for a given party. The prosecution did not request a continuance or any delay to brief the issue - either at the R.M.C. 802 conference or at the 4 June 2007 session.

(4) The undersigned notes that a jurisdictional issue closely akin to the one in *Khadr* was briefed and argued in the case of *United States v. Hamdan* - which also was heard on 4 June 2007. The prosecution in *Khadr* did not request to use the *Hamdan* briefs in the *Khadr* case.

b. Opportunity to argue and present evidence. The undersigned rejects the implication that the prosecution was not allowed to present argument or evidence on jurisdiction.

(1) A review of the transcript of the 4 June 2007 session shows that the prosecution did present argument on the issue of jurisdiction. A review of the transcript

of the 4 June 2007 session also shows that the prosecution did not make a formal offer of proof concerning any of the evidence which it now proposes be used.

(2) During the prosecution argument on the issue of jurisdiction (transcript, pp. 10-17), the prosecution, on page 17, stated that the government was prepared to prove that the accused is an unlawful enemy combatant (*See* page 12 of the transcript for a greater description of what evidence the prosecution was prepared to offer). However, the prosecution did not offer this proof that was referred to.

(3) The Military Judge offered the prosecution the opportunity to present matters and no motion was made and no offer of evidence or proof was made by the prosecution. (*See*, *e.g*., transcript, p.16, lines 1 - 4 and p. 22, line 14.)

c. Ruling as to procedural issues. In its Motion for Reconsideration, the government presented no new law, facts, or argument which were not presented, or fairly raised, or implied in its argument on 4 June 2007. Further, the prosecution presented no evidence or facts which the prosecution did not have the opportunity to present at the 4 June 07 session. The only factual issue - the written CSRT finding - is not disputed, as shown by AE 011. Having presented no new law and no new facts, there is no basis to reconsider and the Military Judge declines the opportunity to reconsider the 4 June 07 ruling.

4. Ruling on the merits of the motion. Notwithstanding the ruling in paragraph 3c above, the Commission is also making a ruling on the merits of the government's Motion for Reconsideration. It makes this ruling in the interest of conserving judicial and other resources should the Court of Military Commission Review or the United States Court of Appeals for the District of Columbia Circuit (DC Circuit Court) decide the ruling in paragraph 3c is incorrect.

a. In Paragraphs 6d thru 6r of its motion, the government appears to assert that the Military Judge was unaware of his authority to determine his jurisdiction in the case. In subparagraph 6i, the government directs the Military Judge's attention to R.M.C. 201(b)(3) - "A military commission always has jurisdiction to determine whether it has jurisdiction." This entire line of argument is confusing given the ruling complained about by the prosecution in this case. The Military Judge determined that he had jurisdiction to decide jurisdiction. He then decided that the Military Commission did not have jurisdiction. The written order is entitled "Order on Jurisdiction" (AE 015).

b. The law of a Military Commission has a hierarchy. The authority to convene a Military Commission, and many of the procedural aspects, are set out in the M.C.A. The R.M.C., as well as decisions of the Convening Authority and other rules and regulations, must be consistent with the M.C.A. Conflicts must be resolved in favor of the M.C.A.

c. The M.C.A. makes clear that only certain persons may be tried by a Military Commission, and those persons must be alien *unlawful* enemy combatants. This makes sense in light of certain requirements of international law -- lawful enemy combatants

must be tried by other types of tribunals. The term “unlawful” is not excess baggage and it is not mere semantics; it is a critical predicate to jurisdiction.

d. In Section 948d of the M.C.A., Congress provided:

‘‘(c) DETERMINATION OF UNLAWFUL ENEMY COMBATANT STATUS DISPOSITIVE.—A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter."

(1) In addition, Congress specifically noted, in the jurisdictional statute, that a Military Commission could try an unlawful enemy combatant but it could not try a lawful enemy combatant. (10 USC Sec. 948d - Jurisdiction of Military Commissions)

(2) While the government did have available a CSRT determination for the accused, there was no CSRT determination presented at the 4 June 07 hearing finding that the accused was an *unlawful* enemy combatant. This means the existing CSRT determination was deficient in that there was an incomplete determination to establish jurisdiction. A CSRT determination that does not comport with what Congress directs cannot serve to fulfill the Congressional mandate.

(3) The government asserts that the Military Judge can serve as “another competent tribunal” (Sec. 948d(c)). This assertion simply belies logic for the following reasons:

(a) While it would appear that the government will have to prove beyond reasonable doubt at trial facts which could establish that the accused was an unlawful enemy combatant, the M.C.A. requires the determination be made in advance for there to be jurisdiction to refer charges against the accused. This is what Congress directed, and the Military Judge lacks authority to ignore this mandate.

(b) Congress knew that it was writing a statute about Military Commissions when the M.C.A was drafted and passed. No issue is more dispositive or important to any court or tribunal than whether or how that court or tribunal has jurisdiction. If Congress had wanted the Military Commission to be included in the category of entities authorized to make the initial determination on jurisdiction, it could easily have written that into the statute. It did not.

(c) The Military Judge, furthermore, does not accept that the Military Commission is the type of “competent tribunal” Congress envisioned. The words “*another* competent tribunal” follow the words Combatant Status Review Tribunal - meaning a tribunal like a CSRT. While a Commission is a tribunal, as is a CSRT, a Military Commission and a CSRT have few similarities given the difference in their purpose and procedures. An Article 5 tribunal (Geneva Convention III) would be similar

to a CSRT and seems, without deciding that issue, to fall within the scope of “another competent tribunal." Fundamental fairness to an accused dictates that a statute, such as the M.C.A, can not be interpreted in such a manner that jurisdiction to try an accused is founded upon something beyond the express wording of the law. A Military Commission is a competent tribunal to do many things, but it is not the statutorily-envisioned, competent tribunal to make the required "get in the courthouse door" jurisdictional determination for the following reasons:

(i) First, *see* 4d(3)(c) above. Such an interpretation of the M.C.A. would violate the statutory requirement.

(ii) Second, such an interpretation of the M.C.A. would require the Military Judge to hold a mini-trial on the subject; something which judges understandably do not favor; especially when the panel members are going to have to consider the same facts and arguments in reaching their determinations on the guilt or innocence of the accused.

(iii) Third, such an interpretation of the M.C.A. has the potential of prejudicing the panel members in this case. The publicity which would result from the evidence introduced and the Military Judge's rulings thereon would be extremely difficult for the panel members to ignore. (*See*, for instance, the prosecutor's argument on p. 13 of the transcript concerning the matters which the government would wish to present on the issue.)

(iv) Fourth, in order for such a determination to assist the government, the Military Judge's determination would have to be effective *nunc pro tunc*. (*See* paragraphs 4f(3) and (4) below.)

(v) Fifth, such an interpretation of the M.C.A. would be substituting a military criminal law procedure for the current administrative CSRT procedures.

(vi) Sixth, the government's proposal would have the Military Commission, as a 948d(c) "competent tribunal," make a finding which would be "dispositive." Presumably this finding would be dispositive in terms of some later challenge to jurisdiction during the Military Commission proceedings. That makes no sense whatsoever. Any ruling made by the Military Judge is dispositive during the course of the proceedings - the only intelligible reading of 948d(c) is that the competent tribunal mentioned therein is that it is a tribunal (other than the CSRT) established by the President or the Secretary of Defense for the purpose of, or with an additional duty of, determining the combatant status of various parties brought before it.

(d) The Commission is familiar with the DC Circuit Court's opinion in *Hamdan v. Rumsfeld* (DC Cir., 415 F.3d 33, 2005) and the statement "(W)e believe that the military commission is such a (competent) tribunal..." to determine Hamdan's Prisoner of War status; a determination analogous to the unlawful enemy combatant determination required for initial jurisdiction under the M.C.A. However, as

the court went on to explain, the military commission to which it referred was one established under the President's Military Order of 13 November 2001. That military commission had three colonels sitting on it and none of those officers was serving as a Military Judge. The statement from the Hamdan decision, above, simply does not apply to a Military Commission convened pursuant to the M.C.A.

e. An obvious question is why the government must initially establish jurisdiction before trial. Certainly there are thousands of cases every day in which some accused is brought before a court (or tribunal) and the judge (or other presiding official) does not require that the government show that it has jurisdiction over the accused before the court hears the case. Why are Military Commissions under the M.C.A. different? Although there is no clear statutory directive in the M.C.A. that the government must establish initial jurisdiction before it is allowed into court, the Commission has determined that the following factors require such initial jurisdiction before the Commission can proceed:

(1) The Supreme Court held in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), that Common Article 3 of the Geneva Conventions applies to the trial of detainees by Military Commissions. Common Article 3(1)(d) requires that such trials be conducted by "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

(2) While it is true that most courts do not insist upon proof of jurisdiction before starting a trial of an accused, Military Commissions are distinct and different from any other court in the United States. Moreover, often proof of jurisdiction is required in other courts. For example, in a felony court in any state in the Union, a judge would want to insure that the court had jurisdiction over the accused before starting proceedings if the accused was alleged to be from a different state, the crime alleged had occurred in a third state, and the police officials bringing the accused before the court were from yet another state. This is merely part of regular judicial procedure that becomes necessary and is utilized when required by events or circumstances.

(3) Although there is no express statutory directive that the government must establish jurisdiction before it is allowed to proceed with a Military Commission, there are clear and unambiguous indicia that Congress intended that such initial jurisdiction be established before the mechanism set up by the M.C.A. was used in the case of a given person;

(a) The statute clearly recognizes (Sec. 948d) that the class of "enemy combatant" can be divided into two categories: lawful and unlawful.

(b) The statute certainly anticipates some sort of initial challenge to jurisdiction. Otherwise, there is no reason for the insertion of Sec. 948d(c) into the M.C.A, that the unlawful enemy combatant status determination is dispositive.

(c) The statute was obviously written with knowledge of the CSRT procedures, and the statute anticipates a prior determination by the CSRT (or other

competent tribunal) that an accused would be determined to be an unlawful enemy combatant before proceedings under the M.C.A. are initiated. Otherwise, there is no reason for the use of the word "dispositive" in 948d(c) in reference to all unlawful enemy combatant status determinations.

(d) Section 948d(a) states that the M.C.A. "establishes procedures governing the use of military commissions to try alien unlawful enemy combatants. …" Section 948d states the statutory requirements for jurisdiction of Military Commissions. Section 948q outlines the swearing of "(C)harges and specifications against an accused in a military commission. …" Section 948h authorizes certain people to convene Military Commissions. Thus, logic and reason dictate that charges should not be sworn under Section 948 and charges can not be referred to a Military Commission for trial under Section 948h unless there is jurisdiction under Section 948d, because Section 948a only authorizes the use of Military Commissions and the procedures established in the M.C.A. when dealing with an unlawful enemy combatant. This conclusion is further buttressed by the fact that "lawful" enemy combatants can never be tried by a Military Commission, should be excluded by a proper CSRT at the front end of the process, and should never be subjected to the Military Commission system or process.

(e) Reading the provisions of Section 948d of the M.C.A. in conjunction with Section 1005 of the Detainee Treatment Act of 2005 (DTA) (P.L. 109-148 Dec 30, 2005 119 STAT. 2739), it is evident that Congress was well aware of the CSRT process and that Congress expected that the CSRTs would determine the status of all detainees at Guantanamo. Further, reading the two sections together, it is apparent that Congress knew what the standards were for the CSRT, expected that the CSRT would have its standards modified to meet the requirements of the M.C.A., and that "lawful" enemy combatants would not be subject to the Military Commission process.

(f) The intent of Congress becomes even clearer when one considers the history of the CSRT process. On 29 June 2004, the Supreme Court ruled in the cases of *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Rasul* held that federal courts had jurisdiction to hear habeas claims from detainees at Guantanamo. (Rasul was an alien detainee at Guantanamo.) In *Hamdi*, the plurality opinion stated that some sort of military hearing on detention might give Hamdi, an American citizen, all of the necessary protections to which he was entitled and further intimated that habeas courts should give some sort of deference to a military hearing set up to determine whether detention was proper. In response, the Deputy Secretary for Defense established the CSRT process with his order of 7 July 2004 (AE 014) and the Secretary of the Navy, as the executive agent for the Department of Defense for CSRTs, published operating procedures on 29 July 2004 (AE 021). It was against this backdrop that Congress passed the DTA and required that all detainees at Guantanamo be given CSRT reviews. *See* DTA, Section 1005(a)(1) and (a)(1)(A), "(T)he Secretary of Defense shall submit...the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay. …" Then, in response to the Supreme Court's decision in

Hamdan, Congress passed the M.C.A. with its "dispositive" language, which expressly required the acceptance of a CSRT determination. It is clear that Congress intended that all detainees be reviewed by the CSRT process, that the CSRT separate the "unlawful enemy combatant" detainees from the "enemy combatant" detainees, and that only those detainees designated as unlawful enemy combatants by a CSRT or other competent tribunal be handled by the Military Commission process established by the M.C.A.

(4) While it is true that in normal courts-martial practice the Military Judge does not ordinarily insist that jurisdiction be shown before the case can proceed in court, there are significant differences between the jurisdiction of a court-martial and the jurisdiction of a Military Commission under the M.C.A. and there are also differences in the realities of courtroom practice. (*See, e.g.*, paragraphs 9 and 10 of AE 015.) For example, Article 2 (10 USC Sec 802) of the Uniform Code of Military Justice (UCMJ) lists twelve separate categories of personnel who are subject to court-martial jurisdiction - while a Military Judge usually expects to see active duty soldiers, a Military Judge would not be surprised to see a reservist, for instance. In contrast, under the M.C.A., a Military Commission has jurisdiction over only one specifically defined category - those persons who are alien unlawful enemy combatants. Consequently, while a Military Judge under the UCMJ generally has no reason to question her authority over a person brought before her, a Military Judge under the M.C.A. knows that the M.C.A. is to be used only for one category of persons and that determination should be made in conformity with the M.C.A. and should be available to the Convening Authority before proceedings are initiated and to the Military Judge before any initial hearing.

(5) Finally, the use of military courts, tribunals, and commissions to try civilians - and there has certainly been no allegation that Mr. Khadr is not a civilian - has faced and continues to face great disfavor in the United States. While such trials have been ratified by the federal court system on occasion, the federal courts have also been inclined to determine that military courts do not have jurisdiction or competence to try civilians. In fact, during the undersigned Military Judge's service in the Army, the Supreme Court has even strictly limited the ability of courts-martial to try active duty members of the United States armed forces. (*See, e.g., O'Callahan v. Parker*, 395 U.S. 258 (1969), *Relford v. Commandant*, 401 U.S. 355 (1971).) Given that the use of military courts to try civilians is not favored, Congress could not have intended the logical, if unintended, result of the government's argument and position in this case: the military can seize whomever it wants, charge them, refer them to trial by Military Commission, and only then, after the Commission has been called to order, will the initial question of jurisdiction in accordance with the M.C.A. be resolved.

f. A brief summary of the pertinent substantive matters follows:

(1) On 4 June 2007, the Military Judge was presented with two documents. The charge sheet (AE 001), on its face, contained a bare allegation that Mr. Khadr was an unlawful enemy combatant. Because the CSRT finding (AE 011) was that Mr. Khadr was an enemy combatant, not an *unlawful* enemy combatant, the CSRT finding (AE 011) does not support trial of Mr. Khadr by a Military Commission.

(2) The prosecution was aware of this failure of the CSRT finding to establish jurisdiction based on the paperwork in the case. The Military Judge raised the issue of jurisdiction *sua sponte* and the prosecution was given an opportunity to argue on the matter and present evidence.

(3) The prosecution presented no evidence of any prior determination of the status of the accused other than the CSRT and the President's Memorandum of February 2002 (AE 013).

(4) In the Motion for Reconsideration, the prosecution has still not presented any evidence of any prior determination of the status of the accused other than the CSRT and the President's Memorandum of February 2002.

(5) Instead of offering a CSRT that met the jurisdictional standards required by the M.C.A., the government insisted, both in argument on 4 June 2007 and in its motion, that:

(a) The CSRT and the President's Memorandum established jurisdiction, or, alternatively;

(b) The Military Judge is a competent tribunal to determine jurisdiction and should hear evidence to do so.

(6) The Military Judge does not find that the CSRT and the President's Memorandum establish jurisdiction;

(a) The CSRT determination was made for purposes of determining continued detention of Mr. Khadr; not for purposes of determining jurisdiction for trial by a Military Commission.

(b) The CSRT finding applied and used a different standard for enemy combatant than the M.C.A. definition of unlawful enemy combatant.

(c) The CSRT preceded the enactment of the M.C.A. by two years and the enactment of the DTA by one year.

(d) The President's Memorandum was not an individualized determination concerning Mr. Khadr.

(7) The Military Judge does not find that the Commission is a competent tribunal to establish initial jurisdiction. (*See* 4d(3) above.)

(8) Having received no evidence of a prior determination that the accused is an *unlawful* enemy combatant, and having received evidence that a statutorily

recognized tribunal found that the accused was an enemy combatant, the Commission finds that initial jurisdiction to try the accused has not been established.

(9) The Military Judge adheres to and incorporates by reference his written order of 4 June 2007 (AE 015).

g. Ruling. Assuming, *arguendo*, that the disposition of the Motion for Reconsideration on procedural grounds in paragraph 3c is erroneous, the Military Judge denies the Motion for Reconsideration on the merits as outlined in this paragraph.

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

[redacted], SSG, DoD OGC

From: [redacted], LTC, DoD OGC
Sent: Friday, June 29, 2007 3:52 PM
To: [redacted]

Subject: FW: Disposition - Khadr - Motion to Reconsider - P001

Attachments: US v. Khadr - MTR Disposition.pdf

US v. Khadr - MTR Disposition....

COL Brownback has directed that I send the email below and the attached Disposition to the parties.

v/r,

LTC [redacted] USAR
Seni[redacted]visor
Military Commissions Trial Judiciary

[redacted]

From: Pete Brownback [[redacted]
Sent: Friday,
To: OMJ - LTC [redacted]
Subject: Dispo[redacted] Khadr - Motion to Reconsider - P001

LTC [redacted],

Please forward the attached Disposition of the Prosecution Motion to Reconsider in the case of United States v. Khadr, P001, to the parties in the case and to other interested parties.

The Disposition will be AE 23.

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

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM – This form and the M.M.C., Rule 1103, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial for trials by military commission.

COPIES – See R.M.C. 1103(b). The convening authority may direct the preparation of additional copies.

ARRANGEMENT – When forwarded to the convening authority for review, the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 5, 6, and 13e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 12 will be inserted by either trial counsel or the convening authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of MC Form 490.

2. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.

3. Briefs of counsel submitted after trial, if any.

4. MC Form 490, “Commission Data Sheet.”

5. Military Commission orders promulgating the result of trial as to each accused, in 10 copies.

6. When required, signed recommendation of legal advisor, in duplicate, together with all clemency papers, including clemency recommendation by commission members.

7. Matters submitted by the accused.

8. MC Form 458, “Charge Sheet” (unless included at the point of arraignment in the record).

9. Congressional inquiries and replies, if any.

10. Advice of legal advisor.

11. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

12. Records of former trials.

13. Record of trial in the following order:

a. Errata sheet, if any.

b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt

c. Record of proceedings in court, including R.M.C. 803 sessions, if any.

d. Authentication sheet, followed by certificate of correction, if any.

e. Action of convening authority.

f. Exhibits admitted in evidence.

g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.

h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.