

UNITED STATES OF AMERICA

Defense Motion

v.

to Suppress Out-of-Court Statements by the
Accused due to Coercive Interrogation

OMAR AHMED KHADR

29 May 2008

- 1. Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge.
- 2. Relief Sought:** Mr. Khadr moves for a pretrial order suppressing certain out-of-court statements made by him when he was a suspect in an ongoing criminal investigation but not yet apprised of his right against self-incrimination.
- 3. Overview:** Mr. Khadr was initially detained in July 2002 and was subjected to dozens of interrogations by agents of the United States Government over the ensuing three and a half years. Most of these interrogations occurred away from the battlefield and in the context of an ongoing criminal investigation in which Mr. Khadr was an identified suspect. Beginning in September 2002, CITF agents and others charged with investigating *crimes*, as opposed to gathering intelligence, attended the majority of interviews with Mr. Khadr. All of these interrogations occurred for the purpose of gathering information to be used by the *military* in a criminal trial of Mr. Khadr—before a military commission—no one on the Government’s side, whether civilian or military, ever made any pretense that they sought to charge Mr. Khadr in an Article III court. Mr. Khadr was apparently never made aware that he was the subject of an ongoing criminal investigation for alleged offenses that may carry a sentence of life imprisonment. Although Mr. Khadr has a right to remain silent and an absolute privilege concerning compulsory self-incrimination, the Government made a calculated decision not to advise him of his rights prior to any of its interrogations. Instead, the Government proceeded to interrogate Mr. Khadr without regard to his rights and began to assemble evidence to support the criminal case in which it now seeks to convict him based almost exclusively on those statements. The Defense seeks a pretrial ruling suppressing and excluding any and all statements of Mr. Khadr made during interrogations by Government personnel beginning on 16 September 2002. Accordingly, all statements of Mr. Khadr, beginning with his interrogation on 16 September 2002, as itemized below, should be suppressed.
- 4. Burden Proof:** As the moving party, the defense bears the burden of establishing by a preponderance of the evidence that it is entitled to the requested relief. R.M.C. 905(c)(2)(A).

5. Facts:

a. On 27 July 2002, Mr. Khadr was taken captured by coalition forces during an armed conflict then underway in Afghanistan. (*See* Affidavit of Omar Ahmed Khadr (Affidavit), Attachment H to Def. Mot. to Compel Discovery (Sgt C) filed 4 Mar 08.)

b. Mr. Khadr was taken to the Bagram Collection Point (BCP), Bagram Airbase, Afghanistan and eventually to JTF-GTMO, where he has been detained since. C. In the course of his detention, Mr. Khadr has been interrogated on several dozen occasions (as set forth below). Early interrogations conducted at the BCP appear to have been for the primary purpose of gathering intelligence. However, beginning on 16 September 2002, Mr. Khadr was interrogated by CITF agents and other law enforcement personnel. (*See* Agent's Investigation Report, 16 Sept 02, Bates No. 00766-000104 (Attachment A).)

c. The nature of the law enforcement interviews and the mere fact that Mr. Khadr had been detained as an "enemy combatant" show that his interrogators suspected him of having committed offenses triable by military commission.

d. The interview summaries generated as a result of these interrogations are detailed, purporting to describe the circumstances of the interview, including such minute details as whether Mr. Khadr was given any food to eat, if so, what food and/or drinks, and whether he was given any paper and/or magazines and which magazines he was given. None of the interrogations indicate that Mr. Khadr was informed that he was suspected of committing a crime or crimes triable by military commission (or otherwise), that his statements could be used against him, or that he possessed a right to remain silent. (*See, e.g.*, Form 302, 15 Nov 02, Bates No. 00766-000023 (Mr. Khadr was "advised of the purpose of the interview") (Attachment B); Form 302, 20 Feb 03, at 1, Bates No. 00766-000051 (Attachment C); Report of Investigative Activity, 16 Sep 05, at 1, Bates No. 00766-000187 (Attachment D).)

e. Mr. Khadr was never advised of a right against self-incrimination during the entire time he was interrogated.

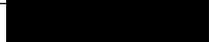
f. All of the interrogations described above occurred before the Military Commissions Act of 2006 was enacted and prior to the Secretary of Defense issuing any rules or regulations for the trial of crimes before Military Commissions constituted by the Military Commissions Act of 2006.

g. At all times he was interrogated, Mr. Khadr was entitled to the rights and privileges afforded by the Uniform Code of Military Justice for the conduct of courts martial and was entitled also to the rights and privileges afforded him under international law, including the rights and privileges set forth in the Geneva Conventions.

h. Mr. Khadr moves to suppress the following purported out of court statements:

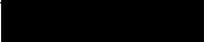
Interrogation	Date(s)	Bates - Begin	Interrogator(s)	Location of Interrogation
	12-Aug-02	00766-001178	Unknown to defense	Unknown to defense
	13-Aug-02	00766-001184	Unknown to defense	Unknown to defense
	14-Aug-02	00766-001189	Unknown to defense	Unknown to defense
	16-Aug-02	00766-001193	Unknown to defense	Unknown to defense
	17-Aug-02	00766-001195	Unknown to defense	Unknown to defense
	18-Aug-02	00766-001198	Unknown to defense	Unknown to defense
	22-Aug-02	00766-001200	Unknown to defense	Unknown to defense
	23-Aug-02	00766-001202	Unknown to defense	Unknown to defense
	28-Aug-02	00766-001204	Unknown to defense	Unknown to defense
	31-Aug-02	00766-000940	Unknown to defense	██████████
	31-Aug-02	00766-001207	Unknown to defense	Unknown to defense
	2-Sep-02	00766-001209	Unknown to defense	Unknown to defense
	3-Sep-02	00766-001171	Unknown to defense	██████████
	3-Sep-02	00766-001212	Unknown to defense	Unknown to defense
	5-Sep-02	00766-001614	Unknown to defense	Unknown to defense
	5-Sep-02	00766-001989C	Unknown to defense	Unknown to defense
	6-Sep-02	00766-001214	Unknown to defense	Unknown to defense
	7-Sep-02	00766-001216	Unknown to defense	Unknown to defense
	8-Sep-02	00766-001218	Unknown to defense	Unknown to defense
	9-Sep-02	00766-001220	Unknown to defense	Unknown to defense
	12-Sep-02	00766-001222	Unknown to defense	Unknown to defense

¹ This appears to be the location of the interview, but the defense is not certain as this location appears on documents for which interrogations were conducted in both Bagram and GTMO.

Interrogation	Date(s)	Bates - Begin	Interrogator(s)	Location of Interrogation
	15-Sep-02	00766-001225	Unknown to defense	Unknown to defense
	16-Sep-02	00766-000104	SA M.S.D., CID	Unknown to defense
	17-Sep-02	00766-000106	SA M.S.D., CID	Unknown to defense
	23-Sep-02	00766-000107	SA M.S.D., CID; Other Government Agency; SPC J.H., 377th MP Co.	Unknown to defense
	25-Sep-02	00766-001226	Unknown to defense	Unknown to defense
	5-Oct-02	00766-000108	SA J.D.B., CITF	Bagram Airbase, AF
	7-Oct-02	00766-001228	Unknown to defense	Unknown to defense
	7-Oct-02	00766-001256	SA R.F., FBI; SA M.T., FBI; SA J.D.B., Army CID	Bagram Detention Center
	10-Oct-02	00766-001259	Unknown to defense FBI agents; SA J.D.B., Army CID	Bagram Detention Facility
	14-Oct-02	00766-001270	Unknown to defense FBI agents	Bagram Detention Facility
	15-Oct-02	00766-001274	SA M.T. (HO); SA R.F. (NY/JTTF)	Bagram Detention Facility
	22-Oct-02	00766-001277	SA M.T. (HO); SA R.F. (NY/JTTF)	Bagram Detention Facility
	28-Oct-02 to 29-Oct-02	00766-000212	Unknown to defense	Fleet Hospital, GTMO
	28-Oct-02 to 29-Oct-02	00766-000958	SA L.D.G.; another US Govt official unknown to defense	Camp Delta, GTMO
	28-Oct-02 to 29-Oct-02	00766-001920C	Classified interrogator; Interrogator 11	Classified location
	29-Oct-02	00766-000195	Unknown to defense	
	29-Oct-02	00766-000197	Interrogator 11; Interrogator unknown to defense	

Interrogation	Date(s)	Bates - Begin	Interrogator(s)	Location of Interrogation
	29-Oct-02	00766-002081C	Interrogator 11; Interrogator unknown to defense	██████████?
	29-Oct-02	00766-002087C	Interrogator 11; Interrogator unknown to defense	██████████
	4-Nov-02	00766-000199	Interrogator 11; two classified interrogators unknown to defense	██████████
	4-Nov-02	00766-001548	Unknown to defense	Unknown to defense
	4-Nov-02	00766-002085C	Interrogator 11; Interrogator unknown to defense	██████████
	4-Nov-02	00766-002092C	Interrogator 11; two classified interrogators unknown to defense	██████████
	4-Nov-02	00766-001929C	Classified interrogator; Interrogator 11	Classified location
	4-Nov-02 to 5-Nov-02	00766-000010	SA L.D.G., FBI; US Govt Official unknown to defense	Fleet Hospital, GTMO
	4-Nov-02 to 5-Nov-02	00766-000109	SA L.D.G.; US Govt Official unknown to defense	Fleet Hospital, GTMO
	5-Nov-02	00766-000192	Interrogator 11; Interrogator unknown to defense	██████████
	5-Nov-02	00766-000196	Interrogator 11; Interrogator unknown to defense	██████████
	5-Nov-02	00766-000200	Interrogator 11; Interrogator unknown to defense	██████████
	5-Nov-02	00766-000202	Interrogator 11; Interrogator unknown to defense	██████████

Interrogation	Date(s)	Bates - Begin	Interrogator(s)	Location of Interrogation
5-Nov-02		00766-000221	Unknown to defense	Yellow Bldg, Rm 7, Radio Range Detention Facility, GTMO
5-Nov-02		00766-002077C	Interrogator 11; Interrogator unknown to defense	██████████
5-Nov-02		00766-002094C	Interrogator 11; Interrogator unknown to defense	██████████
5-Nov-02		00766-002098C	Interrogator 11; Interrogator unknown to defense	██████████
5-Nov-02		00766-001550	Unknown to defense	Unknown to defense
5-Nov-02		00766-001934C	Classified interrogator; Interrogator 11	Classified location
6-Nov-02 to 7-Nov-02		00766-000017	SA L.D.G., FBI; US Govt Official unknown to defense	Fleet Hospital, GTMO
6-Nov-02 to 7-Nov-02		00766-000113	SA L.D.G.; US Govt Official unknown to defense	Fleet Hospital, GTMO
6-Nov-02		00766-000219	Unknown to defense; "turned over to the team immediately for full exploitation and assessment"	Yellow Bldg, Rm 1, Radio Range Detention Facility, GTMO
6-Nov-02		00766-001938C	Classified interrogator; Interrogator 11	Classified location
7-Nov-02		00766-000224	Unknown to defense	Yellow Bldg, Rm 7, Radio Range Detention Facility, GTMO
7-Nov-02		00766-001553	Unknown to defense	Unknown to defense
7-Nov-02		00766-001942C	Classified interrogator; Interrogator 11	Classified location

Interrogation	Date(s)	Bates - Begin	Interrogator(s)	Location of Interrogation
	11-Nov-02	00766-000021	SA L.D.G., FBI; 2 other US Govt Officials	Fleet Hospital, GTMO
	11-Nov-02	00766-000115	SA L.D.G.m FBI; 2 other US Gt Officials	Fleet Hospital, GTMO
	11-Nov-02	00766-000226	Unknown to defense	Brown Bldg, Rm 6, Radio Range Detention Facility, GTMO
	11-Nov-02	00766-001555	Unknown to defense	Unknown to defense
	11-Nov-02	00766-001946C	L.D.G., FBI; Interrogator 11	Classified location
	14-Nov-02	00766-000229	Unknown to defense	Yellow Bldg, Rm 3, Radio Range Detention Facility, GTMO
	14-Nov-02	00766-001557	Unknown to defense	Unknown to defense
	14-Nov-02	00766-001950C	Classified interrogator; Interrogator 11	Classified location
	19-Nov-02	00766-000204	Unknown to defense	
	19-Nov-02	00766-002105C	Unknown to defense	
	20-Nov-02 & 22-Nov-02	00766-000023	SA G.R.F., NCIS; SA T.B.F., FBI; US Govt Official unknown to defense	Camp Delta, GTMO
	20-Nov-02	00766-000232	9th interrogation; Unknown to defense	Yellow Bldg, Rm 2, Radio Range Detention Facility, GTMO
	20-Nov-02	00766-000962	SA G.R.F., NCIS; SA T.B.F., FBI	Camp Delta, GTMO
	20-Nov-02 & 22-Nov-02	00766-000963	SA G.R.F.; SA T.B.F., FBI; US Govt Official unknown to defense	Camp Delta, GTMO

Interrogation	Date(s)	Bates - Begin	Interrogator(s)	Location of Interrogation
20-Nov-02 & 22-Nov-02		00766-000963	SA G.R.F., NCIS; SA T.B.F., FBI; US Govt Official unknown to defense	Camp Delta, GTMO
20-Nov-02		00766-001560	Unknown to defense	Unknown to defense
20-Nov-02		00766-001955C	Classified interrogator; Interrogator 11	Classified location
26-Nov-02 & 29-Nov-02		00766-000026	SA G.R.F., NCIS; SA T.B.F., FBI; US Govt Official unknown to defense	Camp Delta, GTMO
26-Nov-02		00766-000117	SA G.R.F.; SA T.B.F.; US Govt Official unknown to defense	Camp Delta, GTMO
26-Nov-02		00766-000117	SA G.R.F.; SA T.B.F., FBI; US Govt Official unknown to defense	Camp Delta, GTMO
26-Nov-02 & 27-Nov-02		00766-000235	SA G.R.F., NCIS; SA T.B.F., FBI; Interrogator 11	Yellow Bldg, Rm 2, Radio Range Detention Facility, GTMO
26-Nov-02 & 29-Nov-02		00766-000965	SA G.R.F.; SA T.B.F., FBI; US Govt Official unknown to defense	Camp Delta, GTMO
26-Nov-02		00766-001562	Unknown to defense	Unknown to defense
26-Nov-02		00766-001959C	2 classified interrogators; Interrogator 11	Classified location
29-Nov-02		00766-000239	Unknown to defense	Yellow Bldg, Rm 7, Radio Range Detention Facility, GTMO
29-Nov-02		00766-001965C	2 classified interrogators; interrogator 11	Classified location

Interrogation	Date(s)	Bates - Begin	Interrogator(s)	Location of Interrogation
	2-Dec-02	00766-000028	SA G.R.F., NCIS; SA T.B.F., FBI	Camp Delta, GTMO
	2-Dec-02	00766-000118	SA G.R.F., NCIS; SA T.B.F., FBI; SA Eric N. Christensen, FBI; SA Michael Gadsden, FBI	Camp Delta, GTMO
	3-Dec-02	00766-000030	SA G.R.F., NCIS; SA T.B.F., FBI; SA Eric N. Christensen, FBI; SA Michael Gadsden, FBI	Camp Delta, GTMO
	3-Dec-02	00766-000031	SA Eric N. Christensen, FBI; SA Michael A. Gadsen, FBI	Camp Delta, GTMO
	3-Dec-02	00766-000126	SA G.R.F., NCIS; SA T.B.F., FBI	Camp Delta, GTMO
	4-Dec-02	00766-000032	SA G.R.F., NCIS; SA T.B.F., FBI	Camp Delta, GTMO
	4-Dec-02	00766-000127	SA G.R.F., NCIS; SA T.B.F., FBI	Camp Delta, GTMO
	5-Dec-02	00766-000035	SA G.R.F., NCIS; SA T.B.F., FBI	Camp Delta, GTMO
	5-Dec-02	00766-000129	SA G.R.F., NCIS; SA T.B.F., FBI	Camp Delta, GTMO
	6-Dec-02	00766-000036	SA G.R.F., NCIS; SA T.B.F., FBI	Camp Delta, GTMO
	6-Dec-02	00766-000130	SA G.R.F., NCIS; SA T.B.F., FBI	Camp Delta, GTMO
	9-Dec-02 to 10-Dec-02	00766-000037	SA S.G., NCIS; SA T.B.F., FBI	Camp Delta, GTMO
	9-Dec-02	00766-000131	SA S.G., NCIS; SA G.R.F.; SA T.B.F., FBI	Camp Delta, GTMO
	9-Dec-02 to 10-Dec-02	00766-000132	SA S.G., NCIS; SA T.B.F., FBI	Camp Delta, GTMO
	16-Dec-02	00766-000039	SA S.G., NCIS; SA T.B.F., FBI	Camp Delta, GTMO
	16-Dec-02	00766-000134	SA S.G., NCIS; SA T.B.F., FBI	Camp Delta, GTMO

Interrogation	Date(s)	Bates - Begin	Interrogator(s)	Location of Interrogation
19-Dec-02 to 20-Dec-02		00766-000041	SA S.G., NCIS; SA T.B.F., FBI; C.A., MIMA; US Govt Official unknown to defense	Camp Delta, GTMO
19-Dec-02		00766-000136	SA S.G., NCIS; SA T.B.F., FBI; C.A., MIMA; US Govt Official unknown to defense	Camp Delta, GTMO
20-Dec-02		00766-000137	SA S.G., NCIS; SA T.F., FBI; someone or something blacked out	Camp Delta, GTMO
23-Dec-02		00766-000138	SA S.G., NCIS; SA T.B.F., FBI; and another person blacked out	Camp Delta, GTMO
6-Jan-03		00766-000044	SA S.G., NCIS; SA D.J.R., FBI	Camp Delta, GTMO
6-Jan-03		00766-000139	SA S.G., NCIS; SA D.J.R., FBI	Camp Delta, GTMO
16-Jan-03		00766-000046	SA S.G., NCIS; SA D.J.R., FBI	Camp Delta, GTMO
16-Jan-03		00766-000141	SA S.G., NCIS; SA D.J.R., FBI	Camp Delta, GTMO
18-Jan-03		00766-001999C	Unknown to defense	Unknown to defense
20-Jan-03		00766-002001C	Unknown to defense	Unknown to defense
20-Jan-03		00766-001971C	classified Interrogator	Unknown to defense
3-Feb-03		00766-000047	SA D.J.R., FBI; SA J.M.D., NCIS	Camp Delta, GTMO
3-Feb-03		00766-000142	SA D.J.R., FBI; SA J.M.D., NCIS	Camp Delta, GTMO
6-Feb-03		00766-001993C	Unknown to defense	Unknown to defense
13-Feb-03 to 16-Feb-03		00766-000148	Canadian Delegation	Camp Delta, GTMO
13-Feb-03 to 16-Feb-03		00766-009393	Canadian Delegation	Camp Delta, GTMO

Interrogation	Date(s)	Bates - Begin	Interrogator(s)	Location of Interrogation
	17-Feb-03	00766-000049	SA R.B., FBI; SA J.M.D., NCIS	Camp Delta, GTMO
	17-Feb-03	00766-000144	SA R.B., FBI; SA J.M.D., NCIS	Camp Delta, GTMO
	20-Feb-03	00766-000051	SA R.B., FBI; SA J.M.D., NCIS	Camp Delta, GTMO
	20-Feb-03	00766-000146	SA R.B., FBI; SA J.M.D., NCIS	Camp Delta, GTMO
	12-Mar-03	00766-000053	SA R.B., FBI; SA P.G.B., NCIS	Camp Delta, GTMO
	12-Mar-03	00766-000151	SA R.B., FBI; SA P.G.B., NCIS	Camp Delta, GTMO
	26-Mar-03	00766-002003C	classified Interrogator; Classified person	Unknown to defense
	27-Mar-03	00766-000153	SA P.G.B., NCIS; US Govt Official unknown to defense from window	Camp Delta, GTMO
	2-Apr-03	00766-000209	Interrogator 23; Classified interrogator unknown to defense	GTMO
	2-Apr-03	00766-002125C	Interrogator 23; Classified interrogator unknown to defense	GTMO
	4-Apr-03	00766-000208	Interrogator 21	
	4-Apr-03	00766-002123C	Interrogator 21	
	3-Jun-03	00766-000154	SA J.M.D., NCIS; US Govt Official unknown to defense	Camp Delta, GTMO
	3-Jun-03	00766-001987C	Interrogator 10; Interrogator 23; Classified interrogator	Unknown to defense
	7-Jul-03	00766-000055	SA M.R., FBI; SA J.M.D., NCIS; US Govt Official unknown to defense	Camp Delta Hospital, GTMO

Interrogation	Date(s)	Bates - Begin	Interrogator(s)	Location of Interrogation
7-Jul-03		00766-000155	SA M.R., FBI; SA J.M.D., NCIS; US Govt Official unknown to defense	Camp Delta Hospital, GTMO
7-Jul-03		00766-001988	Interrogator 10; Interrogator 23; Classified interrogator	Classified location
14-Jul-03		00766-000056	SA M.R., FBI; SA P.G.B., NCIS	Camp Delta, GTMO
14-Jul-03		00766-000156	SA M.R., FBI; SA P.G.B., NCIS	Camp Delta, GTMO
21-Jul-03		00766-000057	SA P.C.H., FBI; SA P.G.B., NCIS; SA O.L.W., Army CID	Camp Delta, GTMO
21-Jul-03		00766-000157	SA P.G.B., NCIS; SA P.C.H., FBI; SA O.L.W., Army CID	Camp Delta, GTMO
28-Jul-03		00766-000059	SA T.J.C., FBI; SA C.T.N., FBI	Camp Delta, GTMO
4-Aug-03		00766-000060	SA T.J.C., FBI; SA C.T.N., FBI	Camp Delta, GTMO
8-Aug-03		00766-000061	SA T.J.C., FBI; SA C.T.N., FBI	Camp Delta, GTMO
14-Aug-03		00766-000062	SA T.J.C., FBI; SA C.T.N., FBI	Camp Delta, GTMO
19-Aug-03		00766-000063	SA T.J.C., FBI; SA C.T.N., FBI	Camp Delta, GTMO
?-Sep-2003		00766-002278	Canadian Interviewers	GTMO
3-Oct-03		00766-000159	SA O.L.W., Army CID; A.Z., CITF	Unknown to defense
8-Oct-03		00766-000160	SA O.L.W., Army CID; A.Z., CITF	Camp Delta, GTMO
27-Oct-03		00766-009394	Unknown to defense	Unknown to defense
4-Dec-03		00766-001282	FBI agents Unknown to defense	Unknown to defense

Interrogation	Date(s)	Bates - Begin	Interrogator(s)	Location of Interrogation
	30-Mar-04	00766-000162	J.F.G., Canadian Interrogator; SA K.S., NCIS (monitored)	Camp Delta, GTMO
	19-Apr-04	00766-000064	SA T.R., FBI	Unknown to defense
	19-May-04	00766-000163	SA S.H., CITF; Other DoD Official	Camp Delta, GTMO
	7-Dec-04	00766-000165	SA S.H., CITF; SA A.G., CITF	Camp 5, GTMO
	8-Dec-04	00766-000166	SA S.H., CITF; SA A.G., CITF	Camp 5, GTMO
	4-Feb-05	00766-001991C	Unknown to defense	Unknown to defense
	9-May-05	00766-001995C	Unknown to defense	Unknown to defense
	11-Aug-05	00766-000185	SA S.C.M., Army CID; Interrogator unknown to defense	GTMO
	17-Aug-05	00766-001997C	Unknown to defense	Unknown to defense
	16-Sep-05	00766-000187	SA S.C.M., Army CID; SA P.G., FBI	GTMO
	11-Oct-05	00766-002056C	Interrogator 21	GTMO
	11-Nov-05	00766-002061C	Interrogator 21	GTMO
Unknown to defense		00766-001165	Unknown to defense	██████████
Unknown to defense		00766-001266	SA R.F. (NYO/JTTF); SA M.T. (HO); SA J.B. (ACTIF); SSG J.F. (Army 142nd MITF); SSG P.J.D. (Army 142nd MITF)	Bagram Airbase, AF

6. Law and Argument:

a. Mr. Khadr's Statements Must Be Suppressed Because They Were Obtained in Violation of the MCA's Right Against Self-Incrimination

(1) The Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (2006), codified at 10 U.S.C. §§ 948a-950w, provides a right against self-incrimination for all defendants tried before a military commission. *See* 10 U.S.C. § 948r(a) ("No person shall be required to testify against himself at a proceeding of a military commission under this chapter."). The Military Commission Rules of Evidence are to the same effect. Mil. Comm'n R. Evid. 301(a) ("No person shall be required to testify against himself at a proceeding of a military commission under these rules."). Mr. Khadr is such a person.

(2) Military Commission Rule of Evidence 301 specifically incorporates privileges against self-incrimination guaranteed by the Fifth Amendment to the Constitution of the United States and by Article 31 of the Uniform Code of Military Justice with regard to *any* testimonial evidence. Even unlawful enemy combatants, such as Mr. Khadr currently is categorized, have a statutory privilege against self-incrimination under Rule 301 and 10 U.S.C. § 948r. "Alien unlawful enemy combatants have a statutory privilege . . . under 10 U.S.C. § 948r. Other witnesses, such as United States citizens, may invoke privileges under the U.S. Constitution or Article 31 . . ." Comment to Rule 301.

i. To Have Any Integrity, the MCA's Right Against Self-Incrimination Must Extend to Pretrial Custodial Interrogations

(A) Mr. Khadr's statements were made prior to the swearing of charges in this case. Although the MCA does not explicitly apply the right against self-incrimination to statements made prior to the onset of a military commission proceeding, the MCA must be so interpreted to have any meaning. If not, any defendant before a tribunal constituted pursuant to the MCA could be confronted at trial with self-incriminating statements made out of court, thus stripping the exclusionary rule of any effect.

(B) If not applied to interrogations that occur prior to trial, the Prosecution could easily avoid the proscription in the MCA and in Rule 301 with abandon, simply by taking an accused's testimony *prior* to trial and then calling a witness to recite that testimony *at* trial. Hypothetically, the Government could detain anyone suspected of a crime indefinitely, interrogate him endlessly without making him aware that he had a right not to talk, and then prosecute him based entirely on the out-of-court statements he had made. It would be ludicrous to think that an accused's right against self-incrimination was honored if implemented only after his statements were taken. But that is precisely what the Prosecution intends to do with Mr. Khadr.

(C) What use is a privilege against self-incrimination at trial if the Prosecution can simply coerce incriminating statements during a period of indefinite pretrial custodial detention and then—while the defendant sits silent at trial—call to the stand witness after witness who will provide hearsay testimony regarding what Mr. Khadr allegedly said before he was

advised of his right to remain silent? Such a scenario virtually assures that Rule 301's prohibition against self-incriminating testimony can and will be circumvented in every case.

(D) The rule of *Miranda* and Article 31 stand for the incontrovertible proposition that the privilege against being compelled to be a witness against one's self is fully applicable during a period of pretrial custodial interrogation. As Chief Justice Warren wrote for the Court in applying the Fifth Amendment:

There can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.

Miranda v. Arizona, 384 U.S. 436, 467 (1966). No less should be the case with Rule 301.

ii. The MCA's Right Against Self-Incrimination Incorporates the Protections of the UCMJ and the Military Rules of Evidence

(A) In keeping with (but predating) the *Miranda* decision and its progeny, the Uniform Code of Military Justice ("UCMJ") and the Military Rules of Evidence prohibit the use at trial of unadvised statements such as Mr. Khadr's. *See* 10 U.S.C. § 831(a), (d); Mil. R. Evid. 301(a), 304(a), (c)(3), 305(c). The Military Commission Rules of Evidence require that the Military Rules of Evidence be applied in all Commission proceedings "[i]f not otherwise prescribed in this Manual or these rules, and insofar as practicable and consistent with military and intelligence activities, and not inconsistent with or contrary to the M.C.A. or this Manual." Mil. Comm'n R. Evid. 101(b)(1). There is nothing inconsistent with requiring admonitions in a military commission proceeding prior to obtaining incriminating pre-charge statements obtained during a time of pretrial detention but while the accused was a suspect in an ongoing criminal investigation. Nothing less would be required under the UCMJ and the Military Rules of Evidence. The MCA's stated right against self-incrimination in a proceeding would be entirely hollow, void, and meaningless if the Government could evade the proscription against self-incriminating statements merely by holding someone for years, without any guarantee that charges ever would be brought or release granted, and obtaining during that time of detention numerous incriminating and unadvised statements that later could be used in a military commission trial.

b. Mr. Khadr's Statements Must Be Suppressed Because They Were Obtained in Violation of the UCMJ, Which Governed at the Time the Statements Were Made

(1) At the Time Mr. Khadr Made the Statements, the UCMJ Applied Because the MCA Did Not Exist

(i) Out-of-court statements were made by Mr. Khadr from 2002 to February 2006, well before the MCA became law. Prior to enactment of the MCA, all proceedings

involving Mr. Khadr were required to afford him the rights and protections provided by the UCMJ and procedures governing courts martial. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786 (2006). Indeed, one of the basic holdings of the *Hamdan* case was that the military commission proceedings then utilized by the Department of Defense were unlawful precisely because they violated the Uniform Code of Military Justice and deviated from recognized procedures governing courts martial. “Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President’s use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself” *Id.*

(2) Obtaining Mr. Khadr’s Statements Without Advising Him of His Rights Violated the UCMJ

(i) The UCMJ, both by statute and rule, strictly prohibits the use at trial of any statements obtained from an accused prior to being advised of his or her right to remain silent. *See* 10 U.S.C. § 831(a) (“No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.”); Mil. R. Evid. 305(c) (“A person subject to the code who is required to give warnings under Article 31 may not interrogate or request any statement from an accused or a person suspected of an offense without first [advising the person of the nature of the charges, the right to remain silent, and that the statement may be used against him].”). The UCMJ and related rules of evidence for courts martial bar absolutely the introduction of evidence obtained in violation of the advising requirement. *See* 10 U.S.C. § 831(d) (“No statement obtained from any person in violation of this article . . . may be received in evidence”); Mil. R. Evid. 301(a) (“The privileges against self-incrimination provided by the Fifth Amendment to the Constitution of the United States and Article 31 are applicable only to evidence of a testimonial or communicative nature.”); Mil. R. Evid. 304(a), (c)(3) (“[A]n involuntary statement . . . may not be received in evidence against an accused” who moves to suppress or objects; a statement is involuntary “if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion”). In effect, Article 31 of the UCMJ contains the military justice equivalent of *Miranda* rights. *United States v. Lonetree*, 35 M.J. 396, 401 (C.M.A. 1992).

(ii) Mr. Khadr was never advised of his rights during the entire time he was interrogated by agents of the United States Government while in captivity. Under the UCMJ, Mr. Khadr was entitled to be advised of his rights and failure to advise makes use of his statements at trial unlawful. The Government cannot have it both ways—deliberately denying Mr. Khadr his rights under the UCMJ, but then proceeding to prosecute him at trial by use of evidence obtained precisely because of the deliberate denial of rights. As Justice Stevens wrote for the Court in June 2006, the Bush Administration’s deliberate attempt to prosecute another detainee -- Mr. Hamdan -- for alleged criminal activity without affording him the rights recognized by the UCMJ made that attempted prosecution unlawful and an unconstitutional abuse of Executive Power. *Khadr*, 126 S. Ct. at 2786-93. Use of Mr. Khadr’s statements at trial in this proceeding would be similarly unlawful because it would violate the UCMJ.

(iii) First, Mr. Khadr's interrogators were subject to Article 31. Some of the interrogators were civilians and not members of the armed forces, but they were acting "in furtherance of [a] military investigation, or . . . as an instrument of the military." *Lonetree*, 35 M.J. at 403 (internal quotation marks omitted). Here, there never has been any expectation or pretense on the part of the Government that Mr. Khadr would be charged in a civilian court. As the history of the case shows, the Government has gone to extraordinary lengths to keep Mr. Khadr out of and away from any state-side or Article III court, and it always has intended to try him before a *military* commission. As such, the Government's investigative techniques and procedures before 2006 must comply with the UCMJ, and an advisement was required.

(iv) Second, the vast majority of the interrogations of Mr. Khadr occurred, in part, in the context of an ongoing criminal investigation and were not undertaken purely for gathering military intelligence. In all but a few of the interrogations of which the defense has received evidence, either CITF or FBI personnel were present. So long as the questioning occurred in the context of an ongoing criminal investigation in which Mr. Khadr was then a suspect, he was entitled to an Article 31 warning, the absence of which makes his statements inadmissible at trial. Here, Mr. Khadr was being interrogated by law enforcement investigators as part of a law enforcement investigation of criminal activity in which he was, admittedly, a suspect.

c. If the MCA Does Not of Its Own Force Bar the Admission of Mr. Khadr's Unadvised Statements, It Would Violate the Ex Post Facto Clause of the U.S. Constitution to Retroactively Apply the MCA Rather Than the UCMJ

(1) If the Commission were to rule that the MCA does not of its own force prohibit the introduction of Mr. Khadr's unadvised statements, the statements still cannot be introduced in evidence at trial because doing so would violate the Ex Post Facto Clause of the U.S. Constitution. The Ex Post Facto Clause is violated by laws that "alter[] the legal rules of evidence, and receive[] less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

(2) In *Carmell v. Texas*, 529 U.S. 513, 533-34, 552-53 (2000), the Supreme Court held that Texas violated the Ex Post Facto Clause by using evidentiary rules in effect at the time of the prosecution, which rules allowed evidence of prior convictions based on the victim's testimony alone. The Court held, however, that Texas was obliged to use evidentiary rules in force at the time the offense was committed, rather than rules in force at the time of prosecution. Because the earlier rules in effect when the crime was committed required corroborating, independent evidence, the conviction was overturned. Similarly, allowing a conviction of Mr. Khadr based on unadvised, incriminating statements that were unlawful when taken, but theoretically in compliance with a subsequently enacted rule, would be error. As the Court ruled in *Carmell*, utilizing the later-enacted rule would constitute a significant decrease and change in the quantity and quality of evidence required to convict Mr. Khadr.

d. Mr. Khadr’s Statements Must Be Suppressed Under International Law

(1) As a defendant before a military commission, Mr. Khadr is entitled to invoke the Geneva Conventions and other sources of international law to ensure that he is afforded all the judicial guarantees that are recognized as indispensable by civilized peoples. *Hamdan*, 126 S. Ct. at 2795. This is particularly true for the period of his detention prior to enactment of the MCA. The right to remain silent is one such right. See Common Article 3 (requiring that Mr. Khadr be afforded “all the judicial guarantees which are recognized as indispensable by civilized peoples”); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (“Protocol I”), art. 75, ¶ 4(f), *opened for signature* 8 June 1977, 1125 U.N.T.S. 3 (“[N]o one shall be compelled to testify against himself or to confess guilt”); Rome Statute of the International Criminal Court, art. 55, July 17, 1998, 2187 U.N.T.S. 90 (“In respect of an investigation under this Statute, a person: (a) Shall not be compelled to incriminate himself or herself or to confess guilt.”); International Covenant on Civil and Political Rights (“ICCPR”), art. 14, ¶ 3, *opened for signature* 16 Dec. 1966, 999 U.N.T.S. 171 (“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (g) Not to be compelled to testify against himself or to confess guilt[.]”).

(2) Mr. Khadr is entitled to assert his right against self-incrimination under international law in addition to his entitlement under the MCA and UCMJ. Because he was not advised of such a right before the Government interrogated him and obtained allegedly incriminating evidence consisting of his own statements, all such statements must be suppressed and not allowed into evidence.

e. Mr. Khadr’s Statements Also Should Be Suppressed Because the Prosecution Has Failed to Produce Documents and Answer Relevant Discovery Requests Relating to Those Statements

(1) The Military Commission evidentiary rules provide:

If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement or otherwise to obtain information necessary to specify the grounds for a motion to suppress, the military judge may, subject to the requirements and protections of Mil. Comm’n R. Evid. 505, make any order required in the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

Mil. Comm’n R. Evid. 304(d)(3). As the Military Judge knows from the parties’ briefing on the Defense’s pending motions to compel discovery, the Prosecution has not yet provided access to all the interrogators who obtained Mr. Khadr’s statements and has not yet provided all documents, plans, and standard operating procedures relating to interrogations of Mr. Khadr. For this reason, too, then, suppression of Mr. Khadr’s out-of-court statements is required.

7. Oral Argument: The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that “Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.” Oral argument will allow for thorough consideration of the issues raised by this motion.

8. Witnesses & Evidence: The defense does not anticipate the need to call witnesses in connection with this motion. The defense relies on the following documents as evidence in support of this motion:

Attachments A-D

9. Conference: The defense has conferred with the prosecution regarding the requested relief. The government objects to the requested relief.

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

11. Attachments:

- A. Agent’s Investigation Report, 16 September 2002, Bates No. 00766-000104
- B. Form 302, 15 November 2002, Bates No. 00766-000023
- C. Form 302, 20 February 2003, at 1, Bates No. 00766-000051
- D. Report of Investigative Activity, 16 September 2005, at 1, Bates No. 00766-000187

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

7. **Oral Argument:** The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions." Oral argument will allow for thorough consideration of the issues raised by this motion.

8. **Witnesses & Evidence:** The defense does not anticipate the need to call witnesses in connection with this motion. The defense relies on the following documents as evidence in support of this motion:

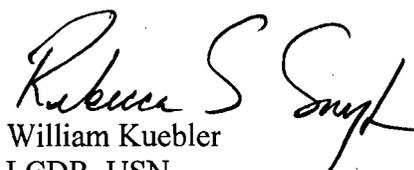
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UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khali”

D063

GOVERNMENT’S RESPONSE

To the Defense Motion to Suppress Out-of-Court Statements by the Accused due to Coercive Interrogation

5 June 2008

1. **Timeliness:** This motion is filed within the timelines established by Military Commissions Trial Judiciary Rule of Court 3(6)(b).

2. **Relief Requested:** The Government respectfully submits that the Defense’s motion to suppress out-of-court statements by the accused must be denied.

3. **Overview:**

a. The Defense’s Motion is without merit and must be denied. The only statutory grounds for the Defense’s motion are (i) the Uniform Code of Military Justice (UCMJ), which Congress *specifically rendered inapplicable* in the Military Commissions Act (MCA), and (ii) the MCA’s self-incrimination provision, which *on its very face* does not apply to out-of-court statements. Perhaps in recognition thereof, the Defense attempts to rely on to the U.S. Constitution and international law to support its claim, neither of which provide any relief. Accordingly, the Defense motion must be denied.

4. **Burden and Persuasion:** As the moving party, the Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. *See* Rules for Military Commissions (RMC) 905(c)(1), 905(c)(2)(A).

5. **Facts:**

a. All of the relevant facts are already in the record.

6. **Discussion:**

a. **THE PROVISIONS OF THE UNIFORM CODE OF MILITARY JUSTICE CITED BY THE DEFENSE ARE INAPPLICABLE TO THE ACCUSED.**

i. The Defense asserts that “the MCA’s right against self-incrimination incorporates the protections of the UCMJ and the Military Rules of Evidence,” Def. Mot. at 15, and that “Mr. Khadr’s statements must be suppressed because they were obtained in violation of the UCMJ.” *Id.* at 15. The Defense makes these arguments, over the course of a 29-page brief, without even acknowledging that the MCA specifically and emphatically renders the UCMJ’s self-incrimination provisions inapplicable.

ii. The MCA specifically provides – in two separate statutory sections – that the UCMJ does not apply to the separate and distinct system for military commissions unless Congress specifically incorporates the UCMJ through the MCA. *See* 10 U.S.C. § 948b(c); *id.* § 948b(d)(2). Thus, for example, Article 31 of the UCMJ is inapplicable here unless the MCA specifically incorporates it. But far from incorporating it, the MCA expressly singles out Article 31 of the UCMJ as one of the provisions that Congress intended to exclude from military commission proceedings. The MCA provides:

The following provisions of [title 10 U.S.C.] shall not apply to trial by military commission under this chapter: ... (B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.

Id. § 948b(c)(1)(B) (emphasis added).¹

iii. Then, just to make it abundantly clear that Congress intended to foreclose Mr. Khadr’s arguments, the MCA provides that all judicial interpretation of Article 31 of the UCMJ – including court-martial precedents cited by the Defense, *see* Def. Mot. at 16-17 – are completely inapplicable and non-binding in military commissions. *See* 10 U.S.C. § 948b(c). Finally, in a fatal blow to the Defense’s claims, Congress imposed four additional layers of statutory text that specifically provide for the introduction of all probative statements, *see id.* § 949a(b)(2)(A), including out-of-court statements, *see id.* § 949a(b)(2)(E), and including allegedly coerced statements that are nonetheless reliable, *see id.* §§ 948r(c), 949a(b)(2)(C).

iv. In the place of the UCMJ’s self-incrimination provisions – which the MCA specifically and emphatically renders inapplicable – Congress provided accused terrorists, such as Mr. Khadr, with a more limited right. Specifically, section 948r(a) provides: “No person shall be required to *testify* against himself ***at a proceeding of a military commission*** under this chapter.” (Emphasis added). As the Supreme Court has emphasized over and over, “Congress ‘says in a statute what it means and means in a statute what it says there.’” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). Thus, when “the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms.’” *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). There is absolutely no rational basis – notwithstanding the Defense’s argument to the contrary, *see* Def. Mot. at 14-15 – for interpreting the phrase “testify...at a proceeding of a military

¹ Congress did not except Article 31(c) of the UCMJ, which prohibits any service member from “compel[ing] any person to make a statement or produce evidence *before any military tribunal* if the statement or evidence is not material to the issue and may tend to degrade him.” 10 U.S.C. § 831(c) (emphasis added). Of course, even this provision does not apply in military commissions, given that the UCMJ applies only to the extent the MCA specifically incorporates it. *See id.* §§ 948b(c), 948b(d)(2). But even assuming *arguendo* that Congress intended Article 31(c) of the UCMJ to apply here, it would only prohibit a U.S. service member from compelling Khadr to testify “before any military tribunal” regarding immaterial or degrading matters. In absolutely no case would it prohibit any out-of-court statement, nor would it prohibit the introduction of any material, self-incriminating statement.

commission” to include *non-testimony* that is *not* given “at a proceeding of a military commission.”

v. In short, the MCA makes clear that the accused has one and only privilege against self-incrimination and it is limited to his testimony at trial before a military commission. The Secretary of Defense emphasized this point in yet another source of legal authority:

References to the Fifth Amendment of the U.S. Constitution and Article 31 of the U.C.M.J. that can be found in Mil. R. Evid. 301 have been deleted [from the Military Commission Rules of Evidence (MCREs)] as inapposite. Under the M.C.A., an alien unlawful enemy combatant’s privilege against self-incrimination is limited to his testimony before a military commission. *See* 10 U.S.C. § 948r(a).

MCRE 301(g), discussion note.

b. THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW DO NOT LIMIT THE ADMISSIBILITY OF THE ACCUSED’S STATEMENTS AT TRIAL.

i. Khadr’s repeated invocations of the Fifth Amendment, *see* Def. Mot. at 14-16, and the Ex Post Facto Clause, *see id.* at 17, are unsupportable. The Supreme Court has squarely held that aliens captured and detained on a U.S. military base in Germany have no rights under the Fifth Amendment of the U.S. Constitution. *See Johnson v. Eisentrager*, 339 U.S. 763, 782-85 (1950). The D.C. Circuit has specifically applied *Eisentrager*’s holding to detainees held at Guantanamo Bay and reached the same result. *See Boumediene v. Bush*, 476 F. 3d 981, 992 (D.C. Cir.)(holding that “[a]ny distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of [constitutional rights]”), *cert. granted*, 127 S. Ct. 3067 (2007). The D.C. Circuit further noted that the Ex Post Facto Clause is similarly inapplicable. *See Boumediene*, 476 F. 3d at 993. This Court must reach the same conclusion, *see Rasul v. Myers*, 512 F.3d 644, 665 (D.C. Cir. 2008)(emphasizing that “*Boumediene*...remains the law of this Circuit.”); *cf. Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). *See also U.S. v. Hamdan*, Ruling by CAPT Allred, Reconsideration of Ruling on Motion to Dismiss for Lack of Jurisdiction, 19 Dec. 2007, at 9 (concluding “all of this accused’s Constitutional arguments are...deemed to be without merit”).

ii. Khadr’s invocations of international law are similarly baseless. Specifically, the Defense invokes two treaties that the United States has steadfastly and emphatically refused to sign. *See* Def. Mot. at 18 (citing the Rome Statute and Additional Protocol I to the Geneva Conventions). It also cites Common Article 3, which says absolutely nothing about a right against self-incrimination – and even if it did, an unlawful enemy combatant such as Khadr could not invoke it. *See* 10 U.S.C. § 948b(g) (“Geneva Conventions Not Establishing Source of Rights. – No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva conventions as a source of rights.”). Last but not least, the Defense cites the

International Covenant on Civil and Political Rights, which is a non-self-executing treaty, see 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992) (“The Senate’s advice and consent is subject to the following declarations: That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.”), under which Khadr has no privately enforceable rights, see *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1(1st Cir. 1994). And it bears emphasis, as the Government has explained elsewhere in this litigation, that the MCA trumps any and every inconsistent provision of international law. See, e.g., *Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 599 (1884); *Reid v. Covert*, 354 U.S. 1, 18 (1957). The Defense’s invocation of international law – like its other arguments² – must be rejected.

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

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

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

11. Submitted by:

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


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

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney

² The Military Judge should also reject the Defense’s claim under MCRE 304(d)(3). The Government has fully complied with all of its discovery obligations, and is in the process of complying with any outstanding orders by the Military Judge. Khadr’s assertion to the contrary is without merit.

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

D063

Defense Response

To Military Judge's Oral Request for
Supplemental Briefing
(International Practice on the Exclusionary
Rule) on Defense Motion D-063

2 July 2008

1. **Timeliness:** This motion is filed within the timeframe ordered orally by the military judge at the hearing on 19 June 2008.

2. **Facts:**

1. On 29 May 2008, defense counsel moved this court to exclude out of court statements made by Mr. Khadr during his detention and the pendency of the criminal investigation into the instant case for the government's failure to apprise Mr. Khadr of his right against self-incrimination and right to remain silent before beginning interrogations.

2. On 5 June 2008, the prosecution filed a response, objecting to the defense motion.

3. From the bench, at the military commission hearing convened on 19 June 2008, the military judge ordered the defense to submit, by 3 July 2008, a short brief stating whether any international or foreign jurisdictions apply an exclusionary rule to remedy rights advisement violations.

3. **Argument:**

1. The application of the exclusionary rule to statements taken by interrogators in the absence of a rights warning is near-universally applied in foreign jurisdictions.

a. The application of the exclusionary rule for *Miranda*-type violations is recognized as one of the most widely shared aspects of modern criminal procedure. *See, e.g.,* Craig M. Bradley, *Mapp Goes Abroad*. 52 CASE W. RES. L. REV. 375, 399 (2001) ("In sum, it appears that *Miranda* has had a profound effect on other countries. Warnings similar to the *Miranda* warnings are almost universally required."); Gordon Van Kessel, *European Perspectives on the Accused as Source of Testimonial Evidence*. 100 W. VA. L. REV. 799, 830 (1998) ("Traditionally, European courts have taken a flexible approach in enforcement of rules governing pretrial interrogation of suspects that involved balancing the severity of the violation against other factors. The modern trend, however, is toward strict enforcement of caution rules, with Germany, Britain, France, Denmark, Italy and The Netherlands having adopted a mandatory exclusionary rule for violation of warning requirements.").

b. A recently published study, outlining criminal procedure in twelve foreign countries and the United States shows near universal imposition of the exclusionary rule for failing to provide a suspect a rights warning prior to interrogation. *See* Craig M. Bradley, Ed.,

CRIMINAL PROCEDURE: A WORLDWIDE STUDY 2D ED. (Carolina Academic Press 2007) (detailing the mandatory exclusionary rule in Argentina, Canada, Egypt, England, Germany, Italy, Mexico, Russia, South Africa and the United States).

c. As is detailed in the attached affidavit of Professor Craig Bradley, of the thirteen countries surveyed, all except China requires the equivalent of a *Miranda* warning be given prior to interrogation. Affidavit of Professor Craig Bradley, dated 1 July 2008, at para. 2 (“Bradley Affidavit”).

i. “Eleven of the twelve countries, moreover, mandate that statements obtained from the suspect in violation of the warning requirements, may not be used at trial.” *Id.* at para. 2(c).

ii. “Only Israel does not mandate exclusion when there are warning violations, but such violations are ‘one factor to be considered’ in the decision as to whether the confession should be excluded. However, in a 2006 case, *Issacharov*, the Israeli Supreme Court concluded that the failure to warn an accused who was unaware of his rights ‘deprived (him) of his ability to choose whether or not to cooperate with his interrogators,’ . . . and excluded his confession, suggesting that Israel, too, is moving toward a mandatory exclusionary rule.” *Id.* Moreover, Israel *per se* excludes any statements stemming from “violence or the threat of violence, the use of unfair interrogative methods, the exertion of unfair psychological pressure on the suspect, or the use of unfair artifice or entrapment.” Rinat Kitai-Sangero, “Israel” *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY at 286. Even Israel, therefore, no stranger to the threat of Islamic terrorism, recognizes that to preserve the integrity of criminal proceedings the courts must enforce safeguards against involuntary confessions, which includes confessions obtained without first advising the accused of his rights.

iii. The only country Professor Bradley identifies as not applying the exclusionary rule is China, where there are few or no rights to enforce by exclusion. Bradley Aff., at para. 2(a). Accordingly, the author of the chapter on China finds “it should not be surprising that China suffers from a high incidence of confessions obtained by coercion.” Ira Belkin, “China” *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY at 101.

2. International tribunals also recognize the right against self-incrimination and the right to remain silent and enforced those rights by excluding statements taken when the defendant is not warned of those rights.

a. The European Court of Human Rights, for example, has held in a series of cases that statements could not be used in a subsequent trial when defendants were unable to invoke their rights against self-incrimination. *See, e.g., Saunders v. United Kingdom*, Application No. 19187/91, dated 17 December 1996;¹ *Heaney and McGuinness v. Ireland*,

¹ Available at: <http://cmiskp.echr.coe.int////tkp197/viewhbkkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=590&sessionId=10712901&skin=hudoc-en&attachment=true>.

Application No. 34720/97, dated 21 December 2000² (“[T]he security and public order concerns of the Government cannot justify a provision which extinguishes the very essence of the applicants’ rights to silence and against self-incrimination.”).

b. The International Criminal Tribunal for Rwanda expressly looked to *Miranda* for guidance in articulating the minimum guarantees that controlled its procedures. In *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(C), dated 14 October 2004,³ the Court excluded statements proffered by the prosecution that were taken without a rights warning or the presence of counsel. *Id.* at paras. 16-18. The Court ruled that a warning was necessary to preserve the rights to silence and counsel, which were “rooted in the concern that an individual, when detained by officials for interrogation, is often fearful, ignorant and vulnerable; that fear and ignorance can lead to false confessions by the innocent; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation.” *Id.* at para. 16.

c. The International Criminal for Yugoslavia also applies the exclusionary rule for statements taken without the benefit of counsel or a voluntary waiver following a rights warning. *See, e.g., Prosecutor v. Hadzihasanovic & Kubura*, IT-01-47-T, Decision on the refreshment of a witness’s memory and on a motion for certification to appeal, dated 19 December 2003⁴ (excluding the introduction of a written statement that was taken without a rights warning) (“[A]s is laid down by many jurisdictions and Rules 90(E) and 91(A) of the Rules, a witness-suspect has the right not to make any statement which might tend to incriminate him and must therefore be informed of his rights by investigators at the start of any proceedings.”). *Miranda*-style rights warnings are seen as among the basic norms of criminal procedure and a model element of international due process. *See* Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*. 45 COLUM. J. TRANSNAT’L L. 635, 656-57 (2007) (“If anything, the ICTY, as befits an international tribunal, goes above and beyond the *Miranda* protections by providing for the free assistance of an interpreter and the requirement that the questioning be recorded.”).

3. Finally, exclusion for *Miranda* violations is a matter of course in courts across the United States and was reaffirmed as recently as the year 2000 as a necessary due process safeguard. *Dickerson v. United States*, 530 U.S. 428 (2000); *see also Withrow v. Williams*, 507 U.S. 680, 691 (1993) (“*Miranda* safeguards ‘a fundamental trial right.’”) (emphasis in original). Likewise, *Miranda* exclusion is thoroughly incorporated into court-martial practice over and above the protections afforded under the UCMJ and MCRE. *See, e.g., United States v. Gardinier*, 65 M.J. 60 (CAAF 2007); *Davis v. United States*, 512 U.S. 452, 463 (1994) (Scalia, J.

² Available at: <http://cmiskp.echr.coe.int///tkp197/viewbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=1678&sessionId=10712901&skin=hudoc-en&attachment=true>.

³ Available at: <http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/141004.htm>.

⁴ Available at: <http://www.un.org/icty/hadzihas/trialc/decision-e/031219.htm>.

concurring) (“[Art. 31 and RME 304, 305 may] be independent reasons why the confession here should be excluded, but they cannot *possibly* be reasons why [10 U.S.C.] § 3501 does not prevent *Miranda v. Arizona*, 384 U.S. 436 (1966), from being a basis for excluding them, which is the issue before us.”) (emphasis in original). Given this widespread application of the exclusionary rule internationally and *Miranda*’s fixed place within the Constitutional traditions of due process, exclusion for failure to provide a rights warning to a fifteen-year-old prisoner is both a proportionate and predictable remedy.

4. **Conclusion:** Accordingly, the defense asks that Defense Motion D-063 be granted.

5. **Attachments:**

A. Affidavit of Professor Craig Bradley, dated 1 July 2008


William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Affidavit of
Professor Craig Bradley**

I, Professor Craig Bradley, do hereby swear and attest that the following is true and accurate to the best of my knowledge:

1. My name is Craig Bradley. I am the Robert A. Lucas Professor of Law at Indiana University (Bloomington). I am the editor and co-author of *Criminal Procedure: a Worldwide Study* (2nd ed., 2007). The book covers the criminal procedure rules of thirteen countries. The countries considered are Argentina, Canada, China, Egypt, England and Wales, France, Israel, Italy, Germany, Mexico, Russia, South Africa, and the United States.

2. After reviewing the countries covered in the book, I can state that the following is true about interrogation rules in those countries.

a. All of the countries, except possibly China, which has few criminal procedure rules, mandatorily exclude involuntary confessions from consideration at trial.

b. Of the remaining twelve countries, all twelve require that interrogations be preceded by warnings, identical to or similar to America's *Miranda* warnings, as to rights to silence and counsel. Many countries require that a suspect meet with counsel prior to being interrogated, going further than American practice in this respect.

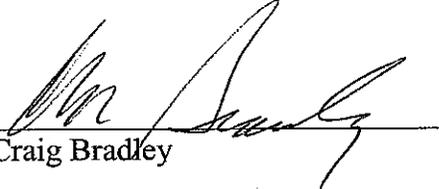
c. Eleven of the twelve countries, moreover, mandate that statements obtained from the suspect in violation of the warning requirements, may not be used at trial. Only Israel does not mandate exclusion when there are warning violations, but such violations are "one factor to be considered" in the decision as to whether the confession should be excluded. However, in a 2006 case, *Issacharov*, the Israeli Supreme Court concluded that the failure to warn an accused who was unaware of his rights "deprived (him) of his ability to choose whether or not to cooperate with his interrogators", *id.* p. 286, and excluded his confession, suggesting that Israel, too, is moving toward a mandatory exclusionary rule.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing information is true and correct.

Date:

7/1/08

Signed:


Craig Bradley

**UNITED STATES
OF
AMERICA**

v.

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

D63

Defense Motion
Suppress Out-of-Court Statements
by the Accused due to Coercive
Interrogation

Ruling

15 July 2008

1. The defense moved the commission to suppress certain out of court statements made by the accused during interrogations when he was suspected in an ongoing criminal investigation but not advised of his right against self-incrimination. All of the accused's statements at issue were made by the accused prior to the enactment of the Military Commissions Act of 2006 (MCA).

2. The defense asserts several bases for the assertion that Mr. Khadr's statements must be suppressed.

a. The defense asserts that the MCA provides a right against self-incrimination in 10 U.S.C. § 948r(a) (In General. – No person shall be required to testify against himself at a proceeding of a military commission under this chapter.) which it claims prohibits any out of court statement being used against an individual unless that person is duly advised of certain rights. The defense seems to imply that Mr. Khadr is entitled to be advised of the full panoply of rights against self-incrimination prior to any interrogation when he was suspected in any ongoing criminal investigation, the consequences of waiving those rights, and then he must voluntarily waive those rights before the government may use any of his out of court statements against him at trial. If it were correct that 10 U.S.C. § 948r(a) excludes the use of any unwarned out of court statement by an accused, then there would be no need for 10 U.S.C. § 948r(b), (c), or (d) which specifically exclude only certain out of court statements. Congress has statutorily excluded use of only certain out of court statements. Since Congress specifically excluded use of only certain out of court statements, it follows that Congress did not intend to exclude use of all out of court statements in 10 U.S.C. § 948r(a). None of the specified exclusions are grounded in whole or in part on the lack of a rights advisement against self-incrimination.

(i) Defense also asserts that the MCA incorporates the protections of the Uniform Code of Military Justice (UCMJ). Such an assertion is contrary to 10 U.S.C. §948b(d)(B) which specifically makes Articles 31(a), (b), and (d) of the UCMJ (10 U.S.C. § 810(a), (b), and (d)) inapplicable to a trial by the military commission. Additionally, 10 U.S.C. §948b(c) specifically provides that the UCMJ does not apply to trials by military commission except at specifically provided in the MCA.

(ii) The MCA was not in effect at the time of the accused's interrogations so it does not control this issue. However, if the MCA had been in effect at the time of Mr. Khadr's interrogations, a fair reading of the §948r(a) is that it only prohibits requiring an accused to testify at trial. Thus, contrary to the defense assertion, 10 U.S.C. § 948r(a) is not a valid basis to exclude Mr. Khadr's unwarned out of court statements.

b. The defense asserts that the UCMJ applied to Mr. Khadr prior to the enactment of the MCA. There is no evidence before the commission that Mr. Khadr is a person subject to the UCMJ as provided in Article 2, UCMJ (10 U.S.C. § 802). Because Mr. Khadr is not subject to the provisions of the UCMJ, there is no basis to provide him the protections afforded by the UCMJ.

c. The defense asserts that the ex post facto clause of the United States Constitution prohibits the use of current evidentiary rules which are less favorable to Mr. Khadr than those evidentiary rules applicable to Mr. Khadr in existence at the time of the alleged offense. The commission need not make a finding whether the ex post facto clause of the United States Constitution applies to the commissions. However, even if it does apply, it would not offer any relief to the defense. Mr. Khadr is not entitled to the greater protections of the military rules of evidence in existence at the time he was detained and interrogated because he is not subject to, nor protected by, the provisions of the UCMJ. Therefore, Mr. Khadr is not currently subject to rules of evidence which are less favorable than rules of evidence applicable to him at the time of his detention and interrogation.

d. The defense cites international law which it asserts requires any unwarned out of court statements to be suppressed. By passing the MCA, Congress made the provisions of the MCA superior to prior statutes, treaties, and customary international law under the last in time rule. Even if the commission were to assume, without making that specific finding, that prior statutes, treaties, or customary international law were applicable to the commissions and required certain statements to be suppressed, the provisions of the MCA are superior to any such prior law and control the issue.

e. The defense asserts that Mr. Khadr's statements should also be suppressed because the prosecution has failed to produce discovery relating to those statements. At this time, that part of the motion is denied on that basis. If there is a discovery issue, defense should raise that in a more particular discovery motion.

3. Congress, through the MCA, excludes only certain out of court statements for use against an accused. None of those limited circumstances apply to the basis for this particular motion. Accordingly, the motion to suppress any out-of-court statement made by Mr. Khadr during interrogations when he was suspected in an ongoing criminal investigation but not advised of his right against self-incrimination is denied.

So ordered.


Patrick J. Parrish
COL, JA
Military Judge