

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion**  
for Appropriate Relief

(Certain Evidentiary Rules Are  
As-Applied Ex Post Facto Violations)

11 July 2008

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the Military Judge's 19 June 2008 scheduling order.

2. **Relief Requested:** The defense requests that this Commission find section 948r of the Military Commission Act (MCA) and Military Commission Rules of Evidence (M.C.R.E.) 304(a)(2), 304(c) and 304(g) unconstitutional as applied to Mr. Khadr on the basis that they violate the *Ex Post Facto* Clause. The defense requests that the Commission apply the rules in place at the time of the alleged conduct, which are the rules contained within Military Rule of Evidence (M.R.E.) 304.

3. **Overview:**

a. As applied to Mr. Khadr, MCA § 948r and M.C.R.E. 304(a)(2), 304(c) and 304(g) violate the prohibition against *ex post facto* laws. Accordingly, the Military Commission should apply M.R.E. 304 – the rule in place at the time of the alleged conduct – instead.

b. The Constitution's prohibition against *ex post facto* laws is a structural limitation on Congress's power to enact legislation, rendering *ex post facto* laws void. This limitation applies no matter who the legislation may affect. And the accused need not possess any particular "right" in order to alert a tribunal of an *ex post facto* violation. Indeed, the Supreme Court's decisions in *Hamdan v. Rumsfeld* and *Boumediene v. Bush* demonstrate that structural limitations on the powers of the government imposed by the Constitution will be enforced by the courts, even at the behest of a non-citizen such as Mr. Khadr.

c. The evidentiary rules at issue fall into the fourth category of *ex post facto* laws: "[E]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender" is an *ex post facto* law prohibited by the Constitution. *Carmell v. Texas*, 529 U.S. 513, 522-25 (citing *Calder*, 3 U.S. (Dall) at 390). At the time of the alleged offense, the Military Rules of Evidence applied to military commissions. They generally prohibited uncorroborated and involuntary statements of the accused from being admitted into evidence upon motion of the accused. More than four years after the alleged conduct the government changed the rules of evidence to allow the accused's uncorroborated and involuntary statements to be admitted into evidence. These changed rules both reduce the quantum required to obtain a conviction – by eliminating the corroboration requirement - and remove a protection to the accused – by allowing his involuntary statements to be admitted. Significantly, the changes always benefit only the

government and always make it easier for the government to obtain a conviction – two critical factors relied on by the Supreme Court in finding an *ex post facto* violation. See *Carmell v. Texas*, 520 U.S. 513 (2000). In short, the evidentiary rules at issue violate the prohibition against *ex post facto* laws when retroactively applied to Mr. Khadr, therefore requiring this Commission to apply M.R.E. 304 instead.

4. **Burdens of Proof and Persuasion:** Because this motion is jurisdictional in nature, the prosecution bears the burden of proving jurisdiction by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

5. **Facts:**

a. The alleged conduct forming the basis for the charges allegedly occurred in June and July 2002. (Charge Sheet.) Mr. Khadr has been in U.S. captivity since 27 July 2002. (Sworn Charges, 2 Feb 07, para. 12 (attachment A to D008).)

b. At the time of the alleged conduct, Military Rules of Evidence governed the admissibility of evidence at a military commission. 10 U.S.C. § 836 (2002); *Hamdan*, 126 S. Ct. at 2790. M.R.E. 304(g) requires that before a statement by an accused may be admitted into evidence, the statement must be corroborated. And M.R.E. 304(a) provides that with limited exceptions, “an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.”

c. On 17 October 2006, more than four years after Mr. Khadr was detained, Congress enacted the Military Commissions Act (MCA). See Pub. L. No. 109-366, 120 Stat. 2600 (2006), codified at 10 U.S.C. §§ 948a-950w. The MCA expressly states that involuntary statements may be admitted into evidence where the government disputes the degree of coercion. 10 U.S.C. § 948r(c). It also authorized the Secretary of Defense to create rules of evidence governing military commissions, which he did on 18 January 2007. 10 U.S.C. § 949a(a). M.C.R.E. 304(c) mirrors MCA § 948r(c). M.C.R.E. 304(g) eliminated the corroboration requirement previously applicable. M.C.R.E. 304(g), Discussion (explaining the rule departs from M.R.E. 304(g) and “contains no requirement for corroboration for admission of an inculpatory statement of the accused”).

6. **Argument: THE MCA VIOLATES THE *EX POST FACTO* CLAUSE AS APPLIED TO MR. KHADR BY ALTERING THE RULES OF EVIDENCE IN EFFECT AT THE TIME OF THE ALLEGED OFFENSE**

a. **The *Ex Post Facto* Clause Applies to Congress’s Exercise of Legislative Power With Respect to Guantanamo Bay Detainees**

(1) The United States Constitution limits the legislative power of Congress by expressly prohibiting the passage and application of *ex post facto* laws. U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or *ex post facto* Law shall be passed.”). *Ex post facto* laws consist of:

- 1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action.
- 2d. Every law that aggravates a crime, or makes it greater than it was, when committed.
- 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
- 4th. Every law that alters the legal rules of evidence, and receives 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. (Dall.) 386, 390 (1798); *see also Stogner v. California*, 539 U.S. 607, 611 (2003) (*Calder* provides the “authoritative account of the scope of the *Ex Post Facto* Clause”). As discussed in detail in Part B below, MCA § 948r and M.C.R.E. 304(a)(2), 304(c) and 304(g) violate the fourth category of *ex post facto* laws.<sup>1</sup> The practical effect of this is that such laws are void.

A. This is because the *Ex Post Facto* Clause is a structural limitation on the power of Congress imposed by the Constitution. *Downes v. Bidwell*, 182 U.S. 244, 277 (1901). In *Downes v. Bidwell* – one of the leading *Insular Cases* relied on by the Supreme Court in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), in ruling the Suspension Clause limited Congress’s power with respect to Guantanamo Detainees – the Supreme Court expressly identified the *Ex Post Facto* Clause as a constitutional provision that *always* limits congressional power, wherever and whenever it may be exercised:

There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only ‘throughout the United States’ or among the several states. Thus, when the Constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed,’ . . . it goes to the competency of Congress to pass a bill of that description.

*Downes*, 182 U.S. at 277; *see also Boumediene*, 128 S. Ct. at 2259 (“Even when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject ‘to such restrictions as are expressed in the Constitution.’”) (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)); *United States v. Lovett*, 328 U.S. 303, 314 (1946) (explaining courts must uphold *ex post facto* limitations by “declar[ing] all acts contrary to the manifest tenor of the Constitution void”). Indeed, the Supreme Court has emphasized in military commission cases that “Congress and the President, like the courts, possess no power not derived from the Constitution.” *Ex Parte Quirin*, 317 U.S. 1, 25 (1942); *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2740, 2774 n.23, 2790-92, 2794 (2006) (finding the President’s established military commissions in a manner unauthorized by Congress thereby violating separation of powers principles).

B. As a result, the obligation of this Commission to enforce the *Ex Post Facto* Clause cannot be avoided by a contention (which would in any event be erroneous) that it does not confer a right on Mr. Khadr. “The presence or absence of an affirmative,

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<sup>1</sup> Motions D008 through D012 addressed portions of the MCA that fall all into all four categories of *ex post facto* laws prohibited by the Constitution.

enforceable right is not relevant . . . to the *ex post facto* prohibition.” *Weaver*, 450 U.S. at 30. Since the M.C.A. “need not impair a ‘vested right’ to violate the *ex post facto* prohibition,” *id.*, whether or not non-resident aliens held at Guantanamo Bay are entitled to personal rights from the Constitution is irrelevant. “The inquiry looks to the challenged provision,” and “when a court engages in *ex post facto* analysis” it is “concerned solely with whether a statute assigns more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred.” *Id.* at 33, 33 n.13. Therefore, this Commission need only recognize that “Congress and the President, like the courts, possess no power not derived from the Constitution,” *Quirin*, 317 U.S. at 25, and that any law repugnant to the Constitution is void and unenforceable, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

(2) Indeed, just four weeks ago, the Supreme Court confirmed that “[b]ecause the Constitution’s separation-of-powers structure . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles.” *Boumediene*, 128 S. Ct. at 2246 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); *INS v. Chadha*, 462 U. S. 919, 958–959 (1983)). Separation of powers principles are the underpinning for one of the two chief purposes of the *Ex Post Facto* Clause, which are to “restrict[] governmental power by restraining arbitrary and potentially vindictive legislation” and “to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.” *Carmell v. Texas*, 529 U.S. 513, 566 (2000) (Ginsburg, J., dissenting) (citations omitted). Consistent with separation of powers, “[c]ritical to relief under the *Ex Post Facto* Clause is . . . the lack of . . . governmental restraint.” *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

A. The relief granted to a Guantanamo detainee by the Supreme Court in *Hamdan v. Rumsfeld* was rooted in separation of powers. The basis for the *Hamdan* holding was that the President had exceeded statutory limitations that Congress imposed on his power. *Hamdan*, 126 S.Ct. at 2790-92, 2794; *id.* at 2774 n.23 (“[T]he President . . . may not disregard the limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). Certainly if statutory limitations apply to the exercise of Presidential power with respect to Guantanamo detainees based on separation of powers principles, the constitutional limitations imposed by the *Ex Post Facto* Clause apply as well.

B. Consequently, the prosecution cannot validly contend, as it has already argued in this case, that such limits can be ignored because Mr. Khadr is not a U.S. citizen. (Govt. Resp. to D008, para 6(D); Govt. Resp. to D009, para 6(D); Govt. Resp. to D D010, para. 6(D); Govt. Resp. to D011, para. 6(C); Govt. Resp. to D12, para. 6(C).) This argument boils down to the position that the branches of government cease to be confined to their constitutional spheres when they act with respect to an alien. If the prosecution’s argument is correct, then the Supreme Court wrongly decided *Hamdan* and *Boumediene*. And the President should have been free to disregard the statutory limitations on his power because the only injured party was a Guantanamo detainee with no right to “invoke” the structural limitations on his power, an argument rejected by the Supreme Court in both *Hamdan* and *Boumediene*. If that argument is taken to its legal conclusion, Congress could pass a law declaring that Mr. Khadr is guilty of murder or any other offense and order that he be executed because – in the

prosecution's view – structural limitations on Congress's authority do not apply if the targets of that authority are aliens at Guantanamo Bay. This argument, however, overlooks the fact that structural limitations imposed by the Constitution protect the authority of each of the other branches and the integrity of the constitutional allocation of power.

C. Moreover, the extent of Congress's power to make law cannot exceed constitutional restrictions on that power. In this respect, it is important to note that the *Ex Post Facto* Clause is not part of the Bill of Rights but rather appears in the original text of the Constitution and in the same Article setting forth Congress's authority to legislate.<sup>2</sup> The government cannot invoke Article I in the Constitution to create law applicable to Guantanamo detainees, while disregarding portions of Article I that restrict Congress's power to create that law. "To hold that the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" *Boumediene*, 128 S. Ct. at 2236 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

(3) Even assuming, *arguendo*, that the *Ex Post Facto* Clause confers individual rights rather than imposes structural limits on the exercise of legislative authority, it still applies here. *Boumediene* makes clear that Guantanamo detainees are entitled to fundamental constitutional rights.

A. More than 75 years ago, "the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution.'" *Boumediene*, 128 S. Ct. at 2255 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (noting that the Court's decisions in the *Insular Cases* established that "'fundamental' constitutional rights are guaranteed to inhabitants of those [unincorporated] territories" controlled by the United States); *id.* at 277 (with regard to the prosecution of an alien, "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.") (Kennedy, J., concurring).

B. Even 75 years ago, the notion that noncitizens living outside the formally sovereign United States were guaranteed fundamental constitutional rights was not new. *See Late Corp. of Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 44 (1890). Among the most fundamental of these rights is due process. *Cf. Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring in the judgment) (stating that with respect to the trial of a foreign national in the United States, "[a]ll would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.").

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<sup>2</sup> It should also be noted that the *Ex Post Facto* Clause immediately follows the Suspension Clause – in Art. I, § 9, cl. 3 – which also limits the authority of the government to deprive an individual of his freedom, no matter who the individual is. *See, e.g., Boumediene*, 476 F.3d 981, 996-98 (Rogers, J., dissenting). The proximity of the *Ex Post Facto* Clause in the original Constitutional text to the Suspension Clause provides more evidence of the fact that the *Ex Post Facto* Clause has "full effect at Guantanamo Bay." *Boumediene*, 128 S. Ct. at 2262.

C. The *ex post facto* application of a change in evidentiary rules to obtain a conviction does not comport with due process. *See Carmell*, 529 U.S. at 531 (stating that “one of the principal interests that the *Ex Post Facto* Clause was designed to serve [is] fundamental justice”). Accordingly, even if enforcement of the *ex post facto* prohibition requires the accused to have a right to do so, Mr. Khadr has such a right and may seek enforcement.

(4) Finally, there is no “national security” exception to the *Ex Post Facto* Clause. Even in times of war, the Supreme Court has upheld the prohibition on *ex post facto* laws. *See Cummings v. Missouri*, 4 Wall. 277, 326-27 (1867). “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.” *Boumediene*, 128 S. Ct. at 2277. In fact, Article III courts have successfully handled a broad array of terrorism cases, including those involving terrorists trained abroad, *see, e.g., U.S. v. Khan*, 461 F.3d 477 (4th Cir. 2006); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998), U.S. citizens involved with al-Qaeda in the United States and abroad, *see, e.g., United States v. Nettles*, 476 F.3d 508 (7th Cir. 2007); *United States v. Reid*, 369 F.3d 619 (1st Cir. 2004), *see, e.g., United States v. El-Hage*, 213 F.3d 74 (2d Cir. 2000); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002), and non-citizens charged with conduct occurring both inside and outside the United States, *see, e.g., United States v. Ressam*, 474 F.3d 597 (9th Cir. 2007) (Algerian citizen who had trained with al Qaeda abroad and was detained while attempting to bring bomb parts into the United States); *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *see also United States v. Bin Laden*, 93 F. Supp. 2d 484 (S.D.N.Y. 2000).

**b. M.C.R.E. 304(a)(2), 304(c) and 304(g) and MCA § 948r Violate the *Ex Post Facto* Clause as Applied to Mr. Khadr**

(1) “[E]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender” is an *ex post facto* law prohibited by the Constitution. *Carmell*, 529 U.S. at 522-25 (citing *Calder*, 3 U.S. (Dall) at 390). MCA § 948r and sections of M.C.R.E. 304 fall into this category of *ex post facto* laws because they allow the Prosecution to obtain a conviction on less evidence, in the case of M.C.R.E. 304(g), and different evidence, in the case of MCA § 948r and M.C.R.E. 304(a)(2) and 304(c), than allowed by the evidentiary rules in force at the time the alleged offense was committed. Significantly, both rules benefit only the government.

(2) Elimination of the Corroboration Requirement Reduces the Sufficiency of Evidence Required for Conviction and, Therefore, Violates the *Ex Post Facto* Clause as Applied to Mr. Khadr

A. At the time of the alleged offenses and until 17 October 2006, the evidentiary rules applicable in military commissions were the same as those used in courts-martial. *See Hamdan*, 126 S. Ct. at 2790; *see also* 10 U.S.C. § 836 (2002). M.R.E. 304(g) requires that before a statement by an accused may be admitted into evidence, the statement must

be corroborated.<sup>3</sup> After the M.C.A. was passed and more than four years after the alleged conduct, the rules of evidence applicable to military commissions were changed. *See* 10 U.S.C. § 949a(a) (authorizing the Secretary of Defense to prescribe rules of evidence governing military commissions). The new rule, M.C.R.E. 304(g), eliminated the corroboration requirement previously applicable; the discussion to M.C.R.E. 304(g) states unequivocally that the rule departs from M.R.E. 304(g) and “contains no requirement for corroboration for admission of an inculpatory statement of the accused.” The Supreme Court has already ruled that application of a rule of evidence eliminating a corroboration requirement on facts that are identical to these circumstances in all material aspects violates the Constitution’s *ex post facto* prohibition.

B. In *Carmell v. Texas*, 529 U.S. 513 (2000), the Supreme Court held that a rule of evidence eliminating a corroboration requirement that existed at the time of the alleged offense violated the *ex post facto* prohibition as applied to Carmell. Under the law in effect when the acts were allegedly committed, the victim’s testimony could not be used to sustain the conviction unless the government produced evidence to corroborate the testimony. *Id.* at 516-19, 530. After the acts were allegedly committed, but before Carmell was charged, the law was changed to eliminate the corroboration requirement. *Id.* at 516-17. The Court found that elimination of the corroboration requirement made “it easier [for the government] to meet the threshold for overcoming the presumption” of innocence by allowing the government to convict Carmell with “less than the previously required quantum of evidence.” *Id.* at 531-32.

C. Central to the Court’s holding was the un-evenhanded nature of the change:

[T]he government refuse[d], after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.

*Id.* at 533. The Court recognized that that rules lowering the sufficiency of the evidence necessary to convict “*always* run in the prosecution’s favor.” *Id.* at 546 (emphasis in original). “This is so even if the accused is not in fact guilty, because the coercive pressure of a more easily obtained conviction may induce a defendant to plead to a lesser crime rather than run the risk of conviction on a greater crime.” *Id.*

D. Like Carmell, Mr. Khadr faces the prospect of conviction under a changed rule that has made it easier for the government to obtain a conviction by lowering the sufficiency of the evidence necessary to convict. *Carmell* held this is an *ex post facto* violation.

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<sup>3</sup> “An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of truth.” Mil.R.Evid. 304(g).

Therefore, this Commission should apply M.R.E. 304(g) – the rule applicable at the time of the conduct – in Mr. Khadr’s trial.

(3) Elimination of the Prohibition Against Receiving Coerced Statements of the Accused into Evidence Violates the *Ex Post Facto* Clause as Applied to Mr. Khadr Because Elimination of this Protection Benefits Only the Government and Makes it Easier for the Government to Obtain a Conviction

A. The evidentiary rules in place at the time of the alleged conduct provided that, with limited exceptions, “an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.” Mil.R.Evid. 304(a). Not only is this language omitted in its entirety from the new rules of evidence governing military commissions, but MCA § 948r(c) and M.C.R.E. 304(a)(2) and 304(c) expressly *permit* the use of statements obtained involuntarily if the government disputes “the degree of coercion.”<sup>4</sup> And statements obtained before 30 December 2005, but not after that date, may be admitted into evidence even if they were obtained as a result of “cruel, inhuman, or degrading treatment.” *Compare* 10 U.S.C. § 948r(c) *with* 10 U.S.C. § 948r(d); *compare* Mil.Comm.R.Evid. 304(c)(1) *with* 304(c)(2).

B. Like the elimination of the corroboration requirement in *Carmel*, the elimination of this protection benefits only the government and makes it easier for the government to establish guilt. While admissibility of evidence rules *generally* do not amount to *ex post facto* violations because they can usually run in favor of both parties and, as a result, do not always make it easier for the government to obtain a conviction, exactly the opposite is true here. *Carmel*, 529 U.S. at 531-32, 546. Moreover, the Supreme Court has viewed eliminations of protections for the accused after the offense was allegedly committed as *ex post facto* violations for at least 110 years. *See Thompson v. Missouri*, 171 U.S. 380, 386 (1898) (“The

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<sup>4</sup> M.C.R.E. 304(c) provides:

(c) *Statements allegedly produced by coercion.* When the degree of coercion inherent in the production of a statement offered by either party is disputed, such statement may only be admitted in accordance with this section.

(1) As to statements obtained before December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would best be served by admission of the statement into evidence.

(2) As to statements obtained on or after December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; (B) the interests of justice would best be served by admission of the statement into evidence; and (C) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment.

legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.”).

C. The elimination of both the corroboration requirement and the prohibition against receiving coerced statements into evidence (not to mention other changes to the rules of evidence) has a synergistic effect, making the changed rules much more advantageous to the government when combined than standing alone. As a result, the retroactively applied rules are a much larger thumb on the scale in favor of the government here than the rule at issue in *Carmell*. The statute in *Carmell* changed the rules for only one type of evidence. Here, the rules regarding both corroboration and coerced statements are retroactively changed. And working together, the rules not only allow the Commission to decide the accused’s guilt using his uncorroborated or coerced statements, *they allow his coerced statements to be the sole basis for the conviction*. Under *Carmell*, such un-evenhanded, retroactive changes in the rules of evidence are *ex post facto* violations because they “*always run in the prosecution’s favor*” and “*always make it easier to convict the accused.*” See *Carmell*, 529 U.S. at 531-32, 546.

(4) Finding that Certain Evidentiary Rules Violate the *Ex Post Facto* Clause when Applied to Mr. Khadr is Consistent with Restraining “Arbitrary and Potentially Vindictive Legislation” – a Purpose of the *Ex Post Facto* Clause

A. Finding M.C.R.E. 304(a)(2), 304(c) and 304(g) and M.C.A. § 948r(c) are *ex post facto* violations in Mr. Khadr’s case is consistent with the reasons the Framers drafted the *Ex Post Facto* Clause. One of the purposes of the *Ex Post Facto* Clause is to ensure that the legislature cannot pass laws solely to facilitate the prosecution of one person or class of persons it has in mind. Indeed, the *Ex Post Facto* Clause “restricts governmental power by restraining arbitrary and potentially vindictive legislation”.<sup>5</sup> *Carmell v. Texas*, 529 U.S. 513, 566 (Ginsberg, J., dissenting). “[L]ike its textual and conceptual neighbor the Bill of Attainder Clause, the *Ex Post Facto* Clause aims to ensure that legislatures do not meddle with the judiciary’s task of adjudicating guilt and innocence in individual cases.” *Id.* (citing *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981)); see also, *Ogden v. Saunders*, 12 Wheat, 213, 266, 6 L.Ed. 606 (1827). Here, the government has shaped the rules to fit the evidence available after the government’s investigation and seeks to apply them retroactively. “[L]aws of this character are oppressive, unjust and tyrannical; and, as such, are condemned by the universal sentence of

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<sup>5</sup> While not a required showing for an *ex post facto* violation, the retroactive rule reveals the government changed the rule for the express purpose of making it easier for the government to obtain convictions. This is shown by the fact that evidence produced from “cruel, inhuman, or degrading treatment” after 2005 is inadmissible, but may be admitted if those methods were used to obtain evidence before that date. Mil.Comm.R.Evid. 403(c). The vast majority, if not all, of the statements the government obtained from detainees were extracted before 30 December 2005.

civilized man.” *Ogden v. Saunders*, 12 Wheat, 213, 266, 6 L.Ed. 606 (1827). The creation and retroactive application of the rules at issue fall squarely within this set of laws, and are meant to be prohibited by the *Ex Post Facto* Clause.

**c. Conclusion.**

(1) “[T]wo critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.” *Weaver*, 450 U.S. at 29. Both of those elements are satisfied here. Since it is not within the “competency” of Congress to pass an *ex post facto* law, Mr. Khadr may not be tried using rules of evidence that violate *ex post facto* prohibitions. *See Downes*, 182 U.S. at 277. The “proper relief” is “to apply, if possible, the law in place when his crime occurred.” *Weaver*, 450 U.S. at 36 n.22. Therefore, this Commission should apply M.R.E. 304 rather than retroactively apply the changed rules.

**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.

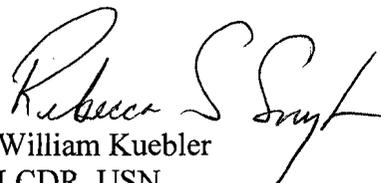
**8. Witnesses and Evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution’s response raise issues requiring rebuttal testimony. The defense relies on the following as evidence in support of this motion:

Charge Sheet

Sworn Charges, 2 February 2007 (attachment A to D008)

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

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



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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"

D-066

GOVERNMENT RESPONSE

To Defense Motion for Appropriate Relief  
(Ex Post Facto)

25 July 2008

1. **Timeliness:** This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 19 June 2008.

2. **Relief Requested:** The Government respectfully submits that the Defense motion to apply Military Rule of Evidence ("MRE") 304, rather than the Military Commission Rules of Evidence ("MCRE") to this Military Commission should be denied. Section 948r of the Military Commissions Act ("MCA") and MCRE 304 should be applied in this Commission, just as Congress and the President clearly intended. Accordingly, the Government respectfully requests that the Defense Motion for Appropriate Relief be denied.

3. **Overview:**

a. The Uniform Code of Military Justice ("UCMJ") does not, and never has, applied to the accused. The accused has acted in violation of the law of war and is an alien unlawful enemy combatant. Accordingly, the UCMJ is inapplicable to him. As a result, he has no right to be tried under the UCMJ's evidentiary provisions, which have never applied to him.

b. Even if the UCMJ's evidentiary provisions had applied to the accused at the time of his capture and detention, applying the MCA's evidentiary provisions rather than the UCMJ's would not violate the Ex Post Facto Clause, U.S. Cons. art. I, § 9, cl. 3, even if it were applicable to the accused (which it is not). With respect to retroactive changes in evidentiary rules, permitting the admission of *additional evidence*, in contradistinction to lowering the proof required for conviction, is not an ex post facto violation. Accordingly, any ex post facto objection to applying the MCA's evidentiary rules to the accused is meritless.

c. Although the Military Judge need not reach this issue, an alien unlawful enemy combatant, such as the accused, who has been charged under the MCA, has no rights under the Ex Post Facto Clause. The Supreme Court's holding in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), was narrow and limited to the extraterritorial reach of the Constitution's Suspension Clause, U.S. Const. art I, § 9, cl. 2. That decision, like the Court's prior decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), was based on separation of power concerns and on the Court's concern with providing an appropriate vehicle for detainees to challenge their detention. Neither decision, however, concerned

whether individuals could raise specific constitutional challenges in punitive proceedings, with respect to the Ex Post Facto Clause or otherwise. With respect to such challenges, the Court's prior precedents in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), clearly refute any claim that the accused is entitled to the protections of the Ex Post Facto Clause. The Defense Motion for Appropriate Relief should be denied.

**4. Burden of Persuasion:** As the moving party, the accused bears the burden of persuasion on this motion. See Rule for Military Commissions ("RMC") 905(c)(2)(A). Contrary to the Defense's claim, nothing about the accused's pleading is "jurisdictional." Def. Mot. at 2. The accused claims that the Ex Post Facto Clause requires that one set of evidentiary rules should apply rather than another. This is no different than any other evidentiary motion (notwithstanding that a constitutional claim undergirds it), and the accused accordingly bears the burden of persuasion.

**5. Facts:**

a. The accused's charged conduct occurred in June and July 2002. Following enactment of the MCA in 2006, charges were referred against the accused on 24 April 2007.

b. In *Hamdan v. Rumsfeld*, a narrow majority of the Supreme Court interpreted Article 36(a) of the UCMJ, 10 U.S.C. § 836 (2000) (as it then read) to require that the Presidentially authorized rules governing military commissions not be "contrary to or inconsistent with" the UCMJ. See 126 S. Ct. 2749, 2790 (2006). The Court also held that Article 36(b) required that the rules governing military commissions "be the same as those applied to courts-martial unless such uniformity proves impracticable." *Id.* The Court eventually determined that the Presidentially created rules for military commissions failed to satisfy Article 36(b)'s "uniformity requirement" (i.e., since it differed from the UCMJ) and that no practical exigency excused this lack of uniformity. See *id.* at 2791-92.

c. *Hamdan* was primarily a separation of powers decision. Accord Def. Mot. at 4 ("The relief granted to a Guantanamo detainee by the Supreme Court in *Hamdan v. Rumsfeld* was rooted in separation of powers."). The narrow majority that invalidated the President's actions expressly grounded its decision on the lack of a congressional imprimatur for the procedures governing Hamdan's military commission. See, e.g., 126 S. Ct. at 2799 (Breyer, J., concurring, joined by Kennedy, Souter and Ginsburg, JJ.) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.' Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. *Nothing* prevents the President from returning to Congress to seek the authority he believes necessary.") (emphasis added) (citation omitted). Likewise, Justice Kennedy, joined by Justices Souter, Ginsburg and Breyer, explained that "[i]t is imperative, then, that when military tribunals are established, full and proper authority exists for the Presidential directive." *Id.* at 2800 (Kennedy, J., concurring in part); see also *id.* at 2808 (Kennedy, J., concurring in part) ("[A]s presently structured, Hamdan's military commission exceeds

the bounds Congress has placed on the President's authority in §§ 836 and 821 of the UCMJ. Because Congress has prescribed these limits, Congress can change them . . . .”).

d. Congress accepted the *Hamdan* Court's invitation and enacted the MCA, thus amending Article 36 of the UCMJ and making it inapplicable to the newly authorized system of military commissions codified by the MCA. See MCA § 4(a)(3). Accordingly, the applicable rules of evidence in military commissions are those contained in the MCA, as well as in the subsequently promulgated Manual for Military Commissions (“MMC”). See 10 U.S.C. § 949a(a) (authorizing the Secretary of Defense, in consultation with the Attorney General, to prescribe rules of evidence in military commissions); MCA § 3(b) (same). Thus, Article 36(b)'s uniformity requirement no longer requires that military commissions employ the UCMJ, but rather specifically exempts military commissions authorized by the MCA from the uniformity requirement.

e. Under the MCA and MCRE, statements obtained by torture may never be admitted in a military commission proceeding, except against a person accused of torture as evidence the statement was made (not relevant here). 10 U.S.C. § 948r(b). With respect to statements where the degree of coercion is disputed, such statements may be admitted *only* where the totality of the circumstances renders the statements reliable and probative, *and* where the interests of justice would best be served by admission of the statements. 10 U.S.C. § 948r(c), (d). In addition, with respect to statements obtained on or after 30 December 2005<sup>1</sup>, such statements may be admitted only if the interrogation methods used to obtain them did not amount to cruel, inhuman or degrading treatment prohibited by the DTA. 10 U.S.C. § 948r(d)(3). Military Commission Rule of Evidence 304(c) largely mirrors MCA § 948r's requirements with respect to the introduction of statements allegedly elicited through coercion.

f. Under the rules of evidence applicable in courts-martial, an inculpatory statement by the accused generally must be corroborated in order for that statement to be admissible. See MRE 304(g). Pursuant to the more flexible evidentiary standards mandated by the MCA, *see, e.g.*, 10 U.S.C. § 949a(a) (authorizing the Secretary of Defense to promulgate rules for military commissions that deviate from those for courts-martial based upon military or intelligence necessities); *id.* § 949a(b)(2)(C) (“A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.”), MCRE 304 does not require corroboration of confessions of the accused. Rather, MCRE 304 adopts the more general standard required by the MCA for admitting evidence, *i.e.*, that reliable and probative evidence is generally admissible in military commission proceedings.

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<sup>1</sup> 30 December 2005 is the date of enactment of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Title X, 119 Stat. 2680 (2005) (“DTA”), which provides, among other things, that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.” DTA, § 1003(a), 119 Stat. at 1739.

g. That being said, MCRE 304 does *not require* the admission of uncorroborated confessions. Rather, the Rule *permits* the admission of such statements, *provided that* they are reliable and probative. In assessing those factors, the degree of corroboration, as well as other factual circumstances, may be considered. See MCRE 304(g) Discussion Note (“Mil. Comm. R. Evid. 304 contains no requirement for corroboration for admission of an inculpatory statement by the accused (*compare* Mil. R. Evid. 304(g)); however, in determining the probative value and reliability of such a statement, the military judge may consider the degree of corroboration, if any.”). Thus, MCRE 304(g) permits the admission of *reliable* uncorroborated statements, consistent with the evidentiary scheme enacted by Congress in the MCA.

## 6. Discussion:

### a. The UCMJ does not, and never has, applied to the accused.

i. The Government has alleged that, at the time of the accused’s capture and detention, he was an alien unlawful enemy combatant. The accused has not challenged that designation before this Commission, and this Commission has made a *prima facie* determination that the accused is an alien unlawful enemy combatant. See *United States v. Khadr*, Trans. of 803 Session, at 89 (8 Nov. 2007) (Military Judge: “Reviewing the CMCR ruling, the commission has determined that in the absence of a defense motion to dismiss for lack of jurisdiction, there is no challenge to the jurisdiction of the commission. Consequently, there is no need for a preliminary hearing on the unlawful enemy combatant status of the accused.”).

ii. The accused has never been subject to the protections of the UCMJ, which expressly lists the classes of persons subject thereto. At the time of the accused’s capture and detention, the only relevant category of persons in the jurisdictional provision of the UCMJ was “[p]risoners of war in custody of the armed forces.” 10 U.S.C. § 802(a)(9) (2000). The accused—who was not a member of a foreign organized armed forces and did not conduct his actions in accordance with the law of war—clearly fails to qualify as a “prisoner of war.” See III Geneva Convention, art. 4.<sup>2</sup> Accordingly, at the time of the accused’s capture and detention, he was not a prisoner of war, and was therefore not subject to the protections of the UCMJ.<sup>3</sup> Therefore, the accused does not

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<sup>2</sup> With respect to “militias [other than the armed forces of a Party to the conflict] and members of other volunteer corps belonging to a Party to the conflict,” “prisoner of war” status requires that the detainee “be[] commanded by a person responsible for his subordinates”; “hav[e] a fixed distinctive sign recognizable at a distance”; “carry[] arms openly”; and “conduct[ his] operations in accordance with the laws and customs of war.” *Id.*

<sup>3</sup> In the Military Commission of Salim Hamdan, the Military Judge recently came to that very conclusion:

The Defense . . . argues that the accused’s statement should be suppressed because the UCMJ applied to Hamdan between his apprehension in 2001 and the ultimate enactment of the Military Commissions Act. . . . The difficulty with this position is that the UCMJ applies only to those entitled to Prisoner of War status, and the United States has consistently insisted that neither Mr. Hamdan nor any of his al-Qaeda associates or

possess any vested rights to evidentiary provisions of the UCMJ in effect at a time when he was *not subject to* the UCMJ.

iii. With respect to the non-application of the UCMJ to Khadr, the Supreme Court's *Hamdan* decision held only that a military commission authorized by Articles 21 and 36 of the UCMJ had to be conducted in general conformity to the UCMJ. That ruling was not based on any rights that inhered in Hamdan by virtue of Article 2 of the UCMJ (concerning the scope of the UCMJ), but rather was based on the then-requirement of Article 36 that military commission rules largely mirror those of courts-martial. *See Hamdan*, 126 S. Ct. at 2790-93.

iv. Congress in the MCA, however, expressly amended Article 36 so that Hamdan and others similarly situated, such as Khadr, could be tried under procedures *distinct from* the UCMJ. That Congress in the immediate aftermath of World War II may have once believed that military commissions should generally employ the same procedures of the UCMJ is irrelevant to the question here presented—whether Congress intended permanently to imbue war criminals with rights under the UCMJ. Congress's amendment of Article 36 clearly shows that it intended that persons subject to trial by military commission be tried under the procedures of the MCA, rather than those of the UCMJ.

v. Khadr is subject to the jurisdiction of this Commission because he is an alien unlawful enemy combatant. *See* 10 U.S.C. § 948c. Khadr has not challenged his status as an alien unlawful enemy combatant before this Commission. *See Khadr*, 8 Nov. 2007 Trans., *supra*, at 88-92. Accordingly, Khadr is not subject to, and never was subject

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other battlefield detainees are so entitled. The Commission has determined that the accused was in fact an unlawful enemy combatant, *and thus it is clear that he was never entitled to the protections of the UCMJ. Thus, while the UCMJ was in force between 2001 and 2006, it did not apply to Mr. Hamdan and he could not claim its protections.*

....

[T]he Defense argues that permitting the narrower standard of the MCA (which protects only against self incrimination during the proceeding itself) to deprive the accused of protections that were in place when he was captured (i.e. the UCMJ provision that prevents coerced or unwarned statements taken before trial from being introduced at trial), violates the Constitution's Ex Post Facto prohibition by exposing him to a less generous evidentiary rule than was in effect when he made his statements. . . . Even if . . . ex post facto protection applies, it is not true that the accused was once entitled to a higher level of protection. The UCMJ's protections under Article 31 have always been reserved for those entitled to Prisoner of War status. The United States has consistently asserted that this accused was not entitled to those protections, and adamantly refused to consider any trial that would accord to members of international terrorist organizations the protections of the Third Geneva Convention. *Thus, because Hamdan was never entitled to the UCMJ's protections, he has not now been subjected to a less favorable evidentiary rule than was once in force.*

*United States v. Hamdan*, D-030 Ruling on Motion to Suppress Statements of the Accused, at 3-4 (Mil. Comm'n 6 June 2008) (Allred, J.) (emphasis added).

to, the protections of the UCMJ, and accordingly was never entitled to its trial protections, including with respect to rules concerning self-incrimination. Therefore, to paraphrase Judge Allred in the *Hamdan* Military Commission, “because [Khadr] was never entitled to the UCMJ’s protections, he has not now been subjected to a less favorable evidentiary rule than was once in force.” *Hamdan*, D-030 Ruling on Motion to Suppress Statements of the Accused, at 4. Accordingly, because the UCMJ’s evidentiary protections were not among “the law required at the time of the commission of the offense,” Def. Mot. at 1 (quoting *Carmell v. Texas*, 529 U.S. 513, 522 (2000)) (quoting *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798) (Chase, J.)), applying the MCA’s evidentiary protections to the accused does not violate any ex post facto principle.

**b. Even if the accused were previously entitled to the protection of the evidentiary provisions of the UCMJ, applying the MCA’s and MMC’s provisions to the accused does not violate any ex post facto principles.**

i. In its motion, the Defense identifies *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), as setting forth the applicable test for assessing the constitutionality of retroactive changes to evidentiary rules. As analyzed above, the rules of evidence applicable to the accused have *not* been changed retroactively, since he was never subject to the UCMJ. See 10 U.S.C. § 802 (2000). However, even if the accused were somehow subject to the UCMJ’s evidentiary protections for acts committed prior to enactment of the MCA, the MCA’s evidentiary provisions *do not violate* the Ex Post Facto Clause.

ii. *Calder* identifies four categories of ex post facto laws:

- 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
- 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed.
- 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
- 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

3 U.S. (3 Dall.) at 390 (Chase, J.) (emphasis added). As Justice Chase explains, however, “every retrospective law is not an ex post facto law.” *Id.* at 391. In *Carmell v. Texas*, 529 U.S. 512 (2000), the Supreme Court recently clarified the scope of Justice Chase’s fourth category. In *Carmell*, the Court considered an ex post facto challenge to a Texas law that retroactively authorized convictions for certain sex offenses based on the uncorroborated testimony of a victim. See *id.* at 552-53. In holding that the Texas statute violated the Ex Post Facto Clause, U.S. Const. art I, § 10, the Court identified the Texas law as one that lowered the quantum of proof required to convict, and held that such provisions are generally unconstitutional:

A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the

burden of proof. In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption . . . .

*Id.* at 532 (citation omitted).

iii. By contrast, the Court held that laws that merely permit the introduction of additional evidence for the trier of fact to consider do *not* violate the Ex Post Facto Clause:

We do not mean to say that every rule that has an effect on whether a defendant can be convicted implicates the *Ex Post Facto* Clause. Ordinary rules of evidence, for example, do not violate the Clause. Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case. More crucially, such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption. Therefore, to the extent one may consider changes to such laws as “unfair” or “unjust,” they do not implicate the same *kind* of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard. Moreover, while the principle of unfairness helps explain and shape the Clause’s scope, it is not a doctrine unto itself, invalidating laws under the Ex Post Facto Clause by its own force.

*Id.* at 533 n.23 (citation omitted). The evidentiary provisions attacked by Khadr fall into the class of retrospective changes to evidentiary rules that was approved in *Carmell*. The liberal evidentiary standards of the Manual for Military Commissions regarding the admission of hearsay evidence, *see* MCRE 803, and allegedly coerced statements, *see* 10 U.S.C. § 948r; MCRE 304(c), do not lower the threshold amount of evidence required for conviction, but rather permit the trier of fact to consider additional evidence in arriving at its verdict. The required quantum of proof for conviction is not implicated in any way. Moreover, the MMC’s more liberal evidentiary provisions benefit *both* the Prosecution and the accused, since either can rely on it to introduce evidence. Accordingly, even if the accused had some prior right to the UCMJ’s evidentiary protections, the revised procedures under the MCA and MMC do not uniformly prejudice the accused.

iv. The same conclusion applies with respect to MCRE 304(g). Military Commission Rule of Evidence 304 does not contain a general corroboration requirement for admission of an inculpatory statement of the accused, in contrast to the Military Rules of Evidence, which do contain such a general requirement. *Compare* MRE 304(g). However, MCRE 304 *does* permit the Military Judge to consider the degree of corroboration in assessing that statement’s probative value and reliability. *See* MCRE 304(g) Discussion Note (“[I]n determining the probative value and reliability of [an inculpatory statement by the accused], the military judge may consider the degree of corroboration, if any.”). Although only inculpatory statements of the accused are affected by this rule, once again, the *quantum* of proof required in order to convict an

accused is *not* being lowered by this rule. Rather, the trier of fact is merely being permitted to consider additional evidence in determining whether the Government has proven each element of the offense beyond a reasonable doubt, which is precisely what was approved in *Carmell*: “The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained.” *Carmell*, 529 U.S. at 546.<sup>4</sup> Thus, *even if* the accused were to possess constitutional rights under the Ex Post Facto Clause, *and even if* the accused were, at the time of his capture and detention, entitled to be tried under the evidentiary provisions of the UCMJ, his trial under the MCA’s and MMC’s evidentiary provisions fully complies with the Ex Post Facto Clause.

**c. Although the Military Judge need not reach this issue, an alien unlawful enemy combatant, such as the accused, who has been charged under the MCA, has no rights under the Ex Post Facto Clause, and accordingly the Defense Motion for Appropriate Relief must be denied.**

i. The Constitution’s provision that “[n]o . . . ex post facto Law shall be passed,” U.S. Const. art. I, § 9, cl. 3, does not apply to alien unlawful enemy combatants, such as the accused, who are detained at Guantanamo Bay, Cuba, to be tried for war crimes. *See Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950). In the Supreme Court’s recent *Boumediene* decision, the Court addressed a narrow question—whether the Suspension Clause of the Constitution, art. I, § 9, cl. 2, applies to alien enemy combatants detained at Guantanamo Bay, who are being held based solely upon the determination of a Combatant Status Review Tribunal. The Court concluded that uncharged enemy combatants at Guantanamo Bay must, after some period of time, be afforded the right to challenge their detention through habeas corpus. In reaching that conclusion, the Court considered both the historical reaches of the writ of habeas corpus, *see* 128 S. Ct. at 2244-51, and the “adequacy of the process” that the petitioners had received, *see id.* at 2262-74. The Court signaled no intention of extending the individual rights protections of the Constitution to alien enemy combatants tried by military commission.

ii. To the contrary, the Court emphasized that “[i]t bears repeating that our opinion does not address the content of the law that governs petitioners’ detention. That is a matter yet to be determined.” *Id.* at 2277. The Court emphasized that the petitioners in that case had been held for over six years without ever receiving a hearing before a

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<sup>4</sup> Likewise, it is well established that changes to judicial tribunals and provisions governing venue or jurisdiction do not implicate the Ex Post Facto Clause, much less violate it. Courts have long held that the Clause does not apply to the abolition of old courts and the creation of new ones, *see, e.g., Duncan v. State*, 152 U.S. 377 (1894), the creation or alteration of appellate jurisdiction, *see, e.g., Mallett v. North Carolina*, 181 U.S. 589 (1901), the transfer of jurisdiction from one court or tribunal to another, *see, e.g., People ex rel. Foote v. Clark*, 119 N.E. 329 (Ill. 1918), or the modification of a trial panel, *see, e.g., Commonwealth v. Phelps*, 96 N.E. 349 (Mass. 1911). Indeed, the Supreme Court has emphasized that it has “upheld intervening procedural changes [under the Ex Post Facto Clause] *even if application of the new rule operated to a defendant’s disadvantage in the particular case.*” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.28 (1994) (emphasis added).

judge, *see id.* at 2275, and the Court specifically contrasted the circumstances of the petitioners with the enemy combatants in *Quirin* and *Yamashita* who had received a trial before a military commission (albeit under procedures far more circumscribed than those applying here). The Court noted that it would be entirely appropriate for “habeas corpus review . . . to be more circumscribed”— if the court were in the posture of reviewing, not the detention of uncharged enemy combatants, but those who had held a hearing before a judgment of a military commission “involving enemy aliens tried for war crimes.” *See id.* at 2270-71.

iii. *Boumediene* thus was a decision concerning the separation of powers under the Constitution and the role that the courts may play, under the unique circumstances of detention at Guantanamo Bay, in providing for the judicial review of the detentions of individuals who had not received any adversarial hearing before a court or military commission. *See id.* at 2259 (“[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality op.) (“[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”). In considering whether the Suspension Clause would apply, *Boumediene* articulated a multi-factored test of which the first factor required consideration of “the detainees’ citizenship and status and the adequacy of the process through which status was determined.” *See id.* at 2237. In this case, there is no dispute that the accused is an alien, and he is being tried before a military commission established by an Act of Congress and with the panoply of rights secured by the MCA. If the accused chooses to contest his status as an alien unlawful enemy combatant—something he has not done to-date before this Commission—the Commission will determine his status only after a full and fair adversarial hearing before the Military Judge.

iv. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a group of German nationals—who were captured in China by U.S. forces during World War II and imprisoned in a U.S. military base in Germany—sought habeas relief in federal court. Although the military base in Germany was controlled by the U.S. Army, *id.* at 766, the Supreme Court held that these prisoners, detained as enemies outside the United States, had no rights under the Fifth Amendment, *see id.* at 782-85. In so holding, the Court noted that to invest nonresident alien enemy combatants with rights under the Due Process Clause would potentially put them in “a more protected position than our own soldiers,” who are liable to trial in courts-martial, rather than in Article III civilian courts. *Id.* at 783. The Court easily rejected the argument that alien enemy combatants should have more rights than our servicemen and women, and held instead that the Fifth Amendment had no application to alien enemy combatants detained outside the territorial borders of the United States. *See id.* at 784-85 (“Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.”) (citation omitted).

v. In *Boumediene*, the Supreme Court cited *Eisentrager* approvingly. See, e.g., 128 S. Ct. at 2259 (“[T]he outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*.”). The Supreme Court also “[d]id not question the Government’s position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay.” *Id.* at 2252. The Supreme Court in *Boumediene* expressly contrasted the petitioners in that case to the litigants in *Eisentrager*:

Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court’s assertion that they were “enemy alien[s].” *Ibid.* In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager*, *supra*, at 766, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution’s witnesses.

In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. . . .

*Id.* at 2259-60 (alteration in original) (citations omitted).

vi. Thus, in contrast to the *Eisentrager* petitioners who had received an adversarial trial and who were found not to enjoy constitutional protections, the *Boumediene* petitioners had not received a “trial by military commission for violations of the laws of war.” *Id.* at 2259. As the Supreme Court said, “The difference is not trivial.” *Id.* In reliance on such a distinction, the District Court in the recent habeas appeal of Salim Hamdan, which had sought to enjoin his then-imminent military commission, held that the differences between a robust trial by military commission under the MCA versus the much lower degree of process afforded the *Boumediene* petitioners made reliance on *Boumediene* largely inapposite with respect to military commission defendants:

Unlike the detainees in *Boumediene*, Hamdan has been informed of the charges against him and guaranteed the assistance of counsel. He has been afforded discovery. He will be able to call and cross-examine witnesses, to challenge the use of hearsay, and to introduce his own exculpatory evidence. He is entitled to the presumption of innocence.

And, most importantly, if Hamdan is convicted, he will be able to raise each of his legal arguments before the D.C. Circuit, and, potentially, the Supreme Court.

*Hamdan v. Gates*, Civil Action No. 04-1519, Memorandum Order, at 12-13 (D.D.C. 18 July 2008) (denying motion for preliminary injunction of Hamdan’s military commission). Thus, *Boumediene* did not provide either Hamdan or Khadr with any rights under the Suspension Clause. It goes without saying that Khadr may not lay claim to any other rights referenced in the Constitution.

vii. Indeed, even if the Defense could claim an entitlement under *Boumediene* to rights under the Suspension Clause, the Supreme Court’s decision did not, in any terms, upset the well-established holdings that the Fifth Amendment and other individual rights principles of the Constitution do not apply to alien enemy combatants lacking any voluntary connection to the United States. The Supreme Court has recognized that the writ of habeas corpus historically has had an “extraordinary territorial ambit.” *See Rasul v. Bush*, 542 U.S. 466, 482 n.12 (2004). By contrast, the Court has made clear—in precedents that *Boumediene* did not question—that the individual rights provisions of the Constitution run only to aliens with a substantial connection to our country and not to alien enemy combatants detained abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *see also Johnson v. Eisentrager*, 339 U.S. 763 (1950) (finding “no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses”).

viii. Indeed, even when an alien is found within United States territory (as was the nonresident alien in *Verdugo-Urquidez*) the degree to which constitutional protections apply depends on whether the alien has developed substantial *voluntary* contacts with the United States. 494 U.S. at 271. The accused’s contacts with the United States, which consist solely of unlawfully waging war against the Nation and being detained in a U.S. military base, “is not the sort to indicate any substantial connection with our country.” *Id.*; *see Eisentrager*, 339 U.S. at 783 (finding “no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses”). As the *Eisentrager* Court explained, “[i]f [the Fifth] Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers” because “American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans.” *Id.*

ix. *Boumediene*’s holding was premised on the unique role of habeas corpus in policing the separation of powers in our constitutional system, *see Boumediene*, 128 S. Ct. at 2259, and on a factual difference between *Eisentrager*’s petitioners and those in *Boumediene*: the former did not contest their *status* as enemy combatants; the latter did so contest their status and thus required a remedy in habeas. *See id.* Nothing in *Boumediene*, however, casts doubt on *Eisentrager*’s well-established (and subsequently applied) denial that the Constitution applies *in toto* to nonresident aliens. *Boumediene*

certainly does not extend the Constitution's individual-rights protections, contrary to *Eisentrager*, *Verdugo-Urquidez* and other cases, to alien unlawful enemy combatants before congressionally-constituted military commissions. To paraphrase the *Boumediene* Court itself, "if the [petitioner's] reading of [*Boumediene*] were correct, the opinion would have marked not only a change in, but a complete repudiation of" long-standing precedent. *Id.* at 2258. Because the Supreme Court did not disturb those holdings in *Boumediene*, they remain binding precedent before this Commission. As the Court explained in *Agostini v. Felton*, 521 U.S. 203 (1997), "if a precedent of this Court has direct application in a case, yet appears to rest on reason rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 237-38 (quotation omitted); see also *Public Citizen v. U.S. Dist. Court for Dist. of Columbia*, 486 F.3d 1342, 1355 (D.C. Cir. 2007) ("The Supreme Court has repeatedly cautioned that 'we should [not] conclude [that its] more recent cases have, by implication, overruled an earlier precedent.'" (alteration in original) (quoting *Agostini*, 521 U.S. at 237)). Thus, the recognition that *Boumediene* did not overrule those cases is sufficient in and of itself to deny the accused's motion.

x. Contrary to *Agostini*, the Defense would read *Boumediene* as, *sub silentio*, overruling the Court's existing precedents and providing a multi-factored test for the analysis of other constitutional rights. It is clear, however, that the test enunciated by the Court to determine whether the Suspension Clause applied to the *Boumediene*-petitioners was specifically geared to measuring whether the Suspension Clause—and not any other constitutional provision—applies to those petitioners. See *id.* at 2237. That three-part test was clearly intended by the Court only to resolve the limited issue before it, and is inapposite to the question whether other portions of the Constitution apply to alien detainees at Guantanamo.

xi. Even so, under the functional analysis endorsed in *Boumediene* with respect to the Suspension Clause, enemy aliens abroad do not come within the protection of the Ex Post Facto Clause. The Government has broad latitude when it operates in the international sphere, where the need to protect the national security and conduct our foreign relations is paramount. See *Haig v. Agee*, 453 U.S. 280, 292, 307-308 (1981); see also *Palestine Information Office v. Schultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (holding that, in applying constitutional scrutiny to challenged Executive action within the United States, court must give particular deference to political branches' evaluation of our interests in the realm of foreign relations and selection of means to further those interests). In the international arena, distinctions based on alienage are commonplace in the conduct of foreign affairs. See, e.g., *DKT Memorial Fund, Inc. v. Agency for International Development*, 887 F.2d 275, 290-291 (D.C. Cir. 1989) (recognizing that the government speaks in the international sphere "not only with its words and its funds, but also with its associations"). Drawing a distinction between aliens abroad, on the one hand, and those who make up part of our political community, on the other hand, is a basic feature of sovereignty. See *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); *Foley v. Connelie*, 435 U.S. 291, 295-296 (1978); cf. *Mathews v. Diaz*, 426 U.S. 67, 80, 85 (1976) (recognizing that it is "a routine and normally legitimate part" of the business

of the Federal Government to classify on the basis of alien status and to “take into account the character of the relationship between the alien and this country”).

xii. Even as to U.S. citizens detained within the borders of the United States, to whom the Due Process Clause clearly applies, the Supreme Court has emphasized the need to take into account military exigencies, and to tailor otherwise applicable constitutional protections in order to “alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” *Hamdi*, 542 U.S. at 533-534 (plurality op.). Similarly, the Supreme Court has recognized that military exigencies may justify tolling of applicable civil and criminal limitations periods, without regard to the Ex Post Facto Clause. *See Stogner v. California*, 539 U.S. 607, 620 (2003) (citing *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 503-05 (1870) (upholding tolling statute as valid exercise of Congress’s war powers).

xiii. In *Downes v. Bidwell*, 182 U.S. 244 (1901), the Supreme Court held that “when the Constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed,’ and that ‘no title of nobility shall be granted by the United States,’ it goes to the competency of Congress to pass a bill *of that description*.” *Id.* at 277. However, *Downes* concerned only the applicability of “the revenue clauses of the Constitution . . . to our newly acquired territories.” *Id.* at 249. *Downes* clearly did not consider the extent of constitutional rights enjoyed by alien enemy combatants held outside the territorial sovereignty of the United States. The controlling case on that point is *Eisentrager*, which held that alien enemy combatants detained outside the United States do not enjoy the protections of the Constitution. This interpretation is fully consistent with *Boumediene*, a case that relied on separation of power concerns (i.e., the authority of the federal courts to review detention), which are absent from the wholly individual rights issues raised by the Ex Post Facto Clause.

xiv. We also note that the First Amendment uses similar language to the Ex Post Facto Clause. *Compare* U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech”), *with* U.S. Const. art. I, § 9, cl. 3 (“No . . . *ex post facto* Law shall be passed.”). Both provisions are phrased as limitations on Congress’s authority, notwithstanding that both provisions, at bottom, concern individual rights, rather than the separation of power concerns raised by *Boumediene* and *Hamdi*. However, caselaw is clear that the First Amendment does *not* apply extraterritorially. *See, e.g., Cuban Am. Bar Ass’n v. Christopher*, 43 F.3d 1412 (11th Cir. 1995) (Cuban and Haitian migrants temporarily provided safe haven at Guantanamo Bay do *not* possess First Amendment rights); *see also Eisentrager*, 339 U.S. at 784 (*dicta*). In *Cuban American Bar Association*, the Court of Appeals noted that

[o]ur decision that the Cuban and Haitian migrants have no First Amendment or Fifth Amendment rights which they can assert is supported by the Supreme Court’s decisions declining to apply extraterritorially either the Fourth Amendment, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990) (rejecting Fourth Amendment limits to search and seizure of property owned by a non-resident alien conducted in Mexico by United States agents), or the Fifth Amendment, *Johnson v.*

*Eisentrager*, 339 U.S. 763, 784 (1950) (rejecting claim that aliens outside the sovereign territory of the United States are entitled to Fifth Amendment rights).

43 F.3d at 1428. Thus, the court concluded that, despite being phrased as a limitation on Congress rather than an “individual right,” the First Amendment does not apply to Cuban and Haitian migrants temporarily housed at Guantanamo. The same result necessarily holds for other individual rights protections, such as the Ex Post Facto Clause.

xv. The fact that the Ex Post Facto Clause appears in Article I, rather than in the Bill of Rights is of no consequence. The Ex Post Facto Clause appears in Article I, rather than in the Bill of Rights, because *there was no* Bill of Rights in the unamended Constitution, and therefore limitations on Congress were set forth in section 9 of Article I. Thus, the distinction the Defense seeks to draw between “individual rights” in the Bill of Rights and “structural rights” in Article I is illusory. *See* Def. Mot. at 5. *All* such restrictions are ultimately restrictions on the Government *vis-à-vis* individuals, whether set forth in Article I of the Constitution or in the Bill of Rights. Thus, the non-applicability of the First Amendment to Guantanamo Bay, *see Cuban Am. Bar Ass’n*, the non-applicability of the Fourth Amendment there, *see Verdugo-Urquidez*, and the non-applicability of the Fifth Amendment there, *see Eisentrager*, compels the conclusion that the Ex Post Facto Clause similarly does not apply there. The fact that the Suspension Clause, given the unique separation of powers concerns it implicates, may be invoked by Guantanamo detainees does not undermine this conclusion. *See also Downes*, 182 U.S. at 277 (suggesting that the extraterritorial application of the Ex Post Facto Clause should be considered coextensively with the First Amendment). Accordingly, the Ex Post Facto Clause is inapplicable to the accused.

#### **d. Conclusion**

i. The UCMJ does not, and never has, applied to the accused. Accordingly, the accused has no right to be tried under the UCMJ’s evidentiary provisions, which have never applied to him. Moreover, even if the UCMJ’s evidentiary provisions had applied to the accused at the time of his capture and detention, applying the MCA’s evidentiary provisions rather than the UCMJ’s would not violate the Ex Post Facto Clause, even if it were applicable to the accused (which it is not). Because the MCA’s more liberal evidentiary rules do not lower the quantum of proof required for conviction, but rather merely permit the trier of fact to consider additional evidence in reaching a verdict, permitting the admission of additional evidence does not violate the Ex Post Facto Clause. Accordingly, any ex post facto objection to applying the MCA’s evidentiary rules to the accused is meritless.

ii. Although the Military Judge need not reach this issue, an alien unlawful enemy combatant, such as the accused, who has been charged under the MCA, has no rights under the Ex Post Facto Clause. The Supreme Court’s holding in *Boumediene* was narrow and limited the extraterritorial reach of the Constitution’s Suspension Clause, U.S. Const. art I, § 9, cl. 2. Such concerns are inapposite with respect to whether the Ex Post Facto Clause should apply extraterritorially, and based on prior Supreme Court

decisions in *Verdugo-Urquidez* and *Eisentrager*, and Court of Appeals decisions, such as *Cuban American Bar Association*, the Clause clearly does not apply extraterritorially. The Defense Motion for Appropriate Relief should be denied.

**7. Oral Argument:** In view of the authorities cited above, which directly, and conclusively, address the issues presented, the Government believes that the motion to dismiss should be readily denied. Should the Military Judge orders the parties to present oral argument, the Government is prepared to do so.

**8. Witnesses and Evidence:** All of the evidence and testimony necessary to deny this motion is already in the record.

**9. Certificate of Conference:** Not applicable.

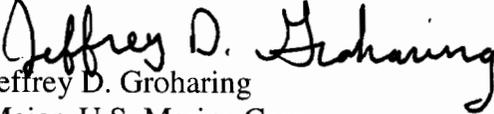
**10. Additional Information:** None.

**11. Attachments:**

a. *Hamdan v. Gates*, Civil Action No. 04-1519, Memorandum Order (D.D.C. 18 July 2008).

b. *United States v. Hamdan*, D-030 Ruling on Motion to Suppress Statements of the Accused (Mil. Comm'n 6 June 2008) (Allred, J.).

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UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

D-066

**Defense Reply  
to Government Response  
to Defense Motion for Appropriate Relief**

(Certain Evidentiary Rules Are  
As-Applied Ex Post Facto Violations)

11 August 2008

1. **Timeliness:** This reply is filed within the timeframe established by Rule for Military Commission (RMC) 905 and the military judge.

2. **Burdens of Proof and Persuasion:** The defense inadvertently stated an incorrect burden of proof in its motion. The correct standard is that, as the moving party, the defense bears the burden of establishing any factual issues necessary to resolve the motion by a preponderance of the evidence. R.M.C. 905(c)(2)(A).

3. **Reply: THE MCA VIOLATES THE *EX POST FACTO* CLAUSE AS APPLIED TO MR. KHADR BY ALTERING THE RULES OF EVIDENCE IN EFFECT AT THE TIME OF THE ALLEGED OFFENSE**

**a. In 2002, the Military Rules of Evidence Applied to Trials by Military Commission**

(1) In its initial brief, the defense argued that the MCA's retroactive changes to evidentiary rules applicable to trial by military commission in 2002 – Military Rules of Evidence – eliminating (1) the requirement that an accused's admission be supported by corroborating evidence to be admitted into evidence for the purpose of sustaining a conviction, and (2) the rule prohibiting the admission of coerced statements into evidence violate the Constitution's *ex post facto* prohibition.<sup>1</sup> In response, the government asserts that alien unlawful enemy combatants have never been subject to the UCMJ, therefore the Military Rules of Evidence have never applied to Mr. Khadr and there is no *ex post facto* violation. (Govt. Br. at para. 6(a).) There are at least two fatal flaws in the government's argument.

(2) First, the government's contention that alien unlawful enemy combatants have never been subject to the UCMJ is incorrect. Article 18, UCMJ, states that "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal . . ." 10 U.S.C. § 818. Even the government's own expert on Military Criminal Law testified in *United States v. Hamdan* that "military commissions have always been,

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<sup>1</sup> When the defense refers to the rule prohibiting the admission of coerced statements throughout this Reply and the initial Brief, the reference encompasses statements obtained involuntarily or through coercion, unlawful influence or unlawful inducement. See M.R.E. 304(c).

since 1950 part of military law.” Testimony of MG Altenberg offered by the government on D-075, at 827, 859.

(3) Second, the Supreme Court has already held that under the law that existed in 2002, “the rules applicable in courts-martial must apply” to military commissions. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2792 (2006). It did not, as the government asserts, hold “only that a military commission authorized by Articles 21 and 36 of the UCMJ had to be conducted in *general conformity* to the UCMJ.” (Govt. Br. at para. 6(a)(iii) (emphasis added).) In concluding that the “the rules applicable in courts-martial must apply,” the Supreme Court explained that Article 36 requires “the rules applied to military commissions . . . [to] be the same as those applied to courts-martial unless such uniformity proves impracticable.” *Id.* at 2790. By 2006, the President had not made any practicability determination that justified variances from the procedures governing courts-martial. *Id.* at 2791. And the Supreme Court found that it was not impracticable to apply “the usual principles of . . . admissibility” of evidence.<sup>2</sup> *Id.* at 2792. Accordingly, the Supreme Court found that the “rules applicable in courts-martial must apply” to military commissions. *Id.*

(4) Without addressing the impact of this holding on Mr. Khadr’s case, the government argues that because the MCA amended Article 36 “making it inapplicable to the *newly authorized* system of military commissions,” the prior “uniformity requirement *no longer* requires that military commissions employ the UCMJ.” (Govt. Br. at para. 5(d) (emphasis added).) It argues that only the amended evidentiary rules apply to Mr. Khadr because that is what Congress intended. (Govt. Br. at para. 6(a)(iv).) Oddly, the government does not recognize this fact pattern as presenting an *ex post facto* issue. The retroactive alteration of penal law to the disadvantage the accused is one of the central evils against which the *Ex Post Facto* Clause is directed. *Carmell v. Texas*, 529 U.S. 513, 566 (2000) (Ginsburg, J., dissenting) (explaining one of the two chief purposes of the *Ex Post Facto* Clause is to “restrict[] governmental power by restraining arbitrary and potentially vindictive legislation”). While the Justices Breyer and Kennedy noted in their concurring opinions that if the President was unsatisfied with the law governing military commissions, he could petition Congress to change it, the Court did not invite Congress to pass *ex post facto* laws. *See Hamdan*, 126 S.Ct. at 2799-2800 (“If Congress, after due consideration, deems it appropriate to change the controlling

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<sup>2</sup> In rejecting the government’s argument that “requiring compliance with the court-martial rules imposes an undue burden” on the government, the Supreme Court discussed the genesis of military commissions, explaining:

The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission’s procedures typically have been the ones used by courts-martial. . . . Article 36 . . . strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war. That Article not having been complied with here, the rules specified for Hamdan’s trial are illegal.

*Hamdan*, 126 S.Ct. at 2792-93.

statutes, *in conformance with the Constitution and other laws*, it has the power ad prerogative to do so.”) (Kennedy, J., concurring) (emphasis added). Indeed, not all changes to the rules governing military commissions in 2002 amount to ex post facto violations.

(5) In short, more than two years ago, the Supreme Court resolved the issue of which rules applied to trial by military commission in 2002 when offenses are alleged to have been committed: the Military Rules of Evidence. *See Hamdan*, 126 S.Ct. at 2792.

**b. M.C.R.E. 304(a)(2), 304(c) and 304(g) and MCA § 948r Violate the *Ex Post Facto* Clause as Applied to Mr. Khadr**

(1) In its initial brief, the defense explained that M.C.R.E. 304(a)(2), 304(c) and 304(g) and MCA § 948r fall into the fourth category of laws that violate the *ex post facto* prohibition – “law[s] 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. (Dall.) 386, 390 (1798). The government has two general responses to this argument. Both fail to distinguish the Supreme Court’s holding in *Carmell v. Texas*, 529 U.S. 513 (2000), which is squarely on point with respect to the elimination of the corroboration requirement effected by M.C.R.E. 304(g) and also compels the conclusion that elimination of the rule prohibiting the admission of coerced statements into evidence violates the *Ex Post Facto* clause.

(2) First, the government tries to cast both changes to the evidentiary rules as “merely permitting the introduction of additional evidence.” (Govt. Br. at para. 6(b)(iii).) This is because “admissibility of evidence” rules *generally* do not amount to *ex post facto* violations because they usually run in favor of both parties and, as a result, do not *always* make it easier for the government to obtain a conviction. *Carmell*, 529 U.S. at 531-32, 546. Neither evidentiary rule at issue is saved on this theory.

A. The government argues that the new provisions eliminating the corroboration requirement and removing the prohibition on the admission of statements of the accused obtained involuntarily or through coercion, unlawful influence or unlawful inducement, “benefit *both* the Prosecution and the accused, since either can rely on it [*sic*] to introduce evidence.” (Govt. Br. at para. 6(b)(iii) (emphasis in original).) This is a stunning statement. The defense is unaware of any circumstance under which these rules benefit the accused or allow the accused to introduce evidence that it could not have introduced under the Military Rules of Evidence in 2002. Apparently, the government is also unaware of any such instance. It did not give one example of how the amended rules apply evenhandedly to the parties. In fact, the government later states that “only inculpatory statements of the accused are affected by this rule [M.C.R.E. 304(g)].” (Govt. Br. at para. 6(b)(iv).) And the Supreme Court has recognized that rules lowering the sufficiency of the evidence necessary to convict, such as M.C.R.E. 304(g), “*always* run in the prosecution’s favor.” *Carmell*, 529 U.S. at 546 (emphasis in original).

B. M.C.R.E. 304(g), making uncorroborated statements of the accused admissible to sustain a conviction, is emphatically not an “admissibility of evidence” rule. Rather, it is a sufficiency of evidence rule just as the rule at issue in *Carmell* that also

retroactively eliminated a corroboration requirement. This is demonstrated by the very portions of *Carmell* that the government quotes in its brief.<sup>3</sup> (See Govt. Br. at para. 6(b)(ii)-(iv).) “Sufficiency of evidence rules (by definition) do just that – they inform us whether the evidence introduced is sufficient to convict as a matter of law (which is not to say the jury *must* convict, but only that, as a matter of law, the case may be submitted to the jury and the jury may convict).” *Carmell*, 529 U.S. at 547. In both *Carmell* and this case, the evidentiary rules applicable when the offenses were allegedly committed did not allow a conviction to be based on uncorroborated evidence – in *Carmell*, it was the uncorroborated testimony of the victim; here, it is the uncorroborated admissions or confessions of the accused. In both cases, the retroactive elimination of the corroboration requirement reduced the “quantum of evidence necessary to meet the burden of proof.”<sup>4</sup> *Carmell*, 529 U.S. at 532-33.

C. Inexplicably, the government asserts that a rule amended to allow a conviction to be based on an uncorroborated admission of the accused where the rule previously required corroboration of the admission to sustain a conviction based on the admission does not lower “the quantum of proof required in order to convict an accused.” (Govt. Br. at para. 6(b)(iv).) The government’s conclusion squarely contradicts *Carmell*. The government’s argument appears to be based on a fundamental misunderstanding of the difference between admissibility of evidence rules and “sufficiency of evidence rules.

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<sup>3</sup> In paragraph 6(b)(ii), the government recognized that *Carmell* found that an evidentiary rule that retroactively eliminated a requirement that the victim’s testimony be corroborated lowered the quantum of proof required to convict and held that such provisions are unconstitutional. In paragraph 6(b)(iii), the government quoted a section of *Carmell* explaining that “admissibility of evidence” rules (such as hearsay rules) are unlike sufficiency of evidence rules (such as rules pertaining to corroboration of evidence requirements) “because they do not concern whether the admissible evidence is sufficient to overcome the presumption” of innocence. Finally, in paragraph 6(b)(iv), the government quotes a portion of *Carmell* distinguishing “admissibility of evidence” rules from “sufficiency of evidence” rules. The quoted portion makes the defense’s point that rules preventing a conviction from being based on uncorroborated evidence are not “admissibility of evidence” rules because the former goes to whether the “evidence is sufficient to convict the defendant” and “whether a conviction, as a matter of law, may be sustained” and the latter does not. *Carmell*, 529 U.S. at 546.

<sup>4</sup> In paragraph 6(b)(ii), the government quotes a portion of *Carmell*, but leaves out the portion applicable to both the facts in *Carmell* and the facts here. This leaves the mistaken impression that a law “reducing the quantum of evidence required to convict” must reduce “the number of elements it [the government] must prove to overcome that presumption . . . .” (See Govt. Br. at para 6(b)(ii) (quoting *Carmell*, 529 U.S. at 532).) The relevant portion of the quote that the government omitted is italicized:

A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof. In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; *or by making it easier to meet the threshold for overcoming the presumption.*”

*Carmell*, 529 U.S. at 532 (emphasis added).

The issue of the admissibility of evidence is simply different from the question of whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained. Prosecutors may satisfy all the requirements of any number of witness competency rules, but this says absolutely nothing about whether they have introduced a quantum of evidence sufficient to convict the offender. Sufficiency of evidence rules (by definition) to just that – they inform us whether the evidence introduced is sufficient to convict as a matter of law . . . .

*Carmell*, 529 U.S. at 546-47. Rules governing the admission of hearsay are examples of admissibility of evidence rules. Hearsay rules “do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained.” *Carmell*, 529 U.S. at 546. By contrast, a rule providing that the admission of the accused or the testimony of the victim cannot be relied upon to sustain a conviction unless corroborating evidence is admitted is a sufficiency of evidence rule because it goes to “whether the evidence introduced is sufficient to convict as a matter of law.” *Id.* at 547.

D. Similarly, M.C.R.E. 304(a)(2) and 304(c) and MCA § 948r are not saved as admissibility of evidence rules. Although they are not sufficiency of the evidence rules, the change is un-evenhanded. The new rule always benefits the government and makes “it easier [for the government] to meet the threshold for overcoming the presumption” of innocence. *Carmell*, 529 U.S. at 531. Thus, they are not typical admissibility of evidence rules. As discussed in the defense’s initial brief, the un-evenhanded nature of the amended rules at issue in *Carmell* was central to the court’s holding. Under *Carmell*, violate M.C.R.E. 304(a)(2) and 304(c) and MCA § 948r the *ex post facto* prohibition as applied to Mr. Khadr.

**c. The *Ex Post Facto* Clause Applies to Congress’s Exercise of Legislative Power With Respect to Guantanamo Bay Detainees**

(1) In responding to the defense’s argument that the Constitution limits the legislative power of Congress by expressly withholding all authority for the passage of *ex post facto* laws, the government begins by engaging in a lengthy discussion of *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), and *Johnson v. Eisentrager*, 339 U.S. 763 (1950)<sup>5</sup>, that is largely irrelevant to the *ex post facto* issue before this Commission. (Govt. Br. at para. 6(c).) There is one exception. The government states that the *Boumediene* decision revolves around separation of powers concerns. (Govt. Br. at para. 6(c)(iii), (ix).) As the defense’s motion discussed at length, the Constitution’s *ex post facto* prohibition is rooted in separation of powers principles. (Def. Br. at paras. 6(a)(2)(A)-(C).) The government did not address this portion of the defense’s brief. Thus, even according to the government’s view of *Boumediene*, the Supreme Court’s

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<sup>5</sup> In citing *Eisentrager* to argue that the Constitution does not apply to Guantanamo Bay detainees, the government fails to note that the Supreme Court has twice distinguished the facts of *Eisentrager* from the facts surrounding the detention of Guantanamo bay detainees to hold that they had a right to habeas corpus. *Boumediene*, 128 S.Ct. at 2257-61; *Rasul v. Bush*, 542 U.S. 466, 475-76 (2004); *id.* at 486 (Kennedy, J., concurring in judgment).

holding in that case supports a finding that other constitutional provisions rooted in separation of powers, such as the *Ex Post Facto* Clause, apply extraterritorially.

(2) Contrary to the government’s argument, the *Ex Post Facto* Clause is not co-extensive with the First Amendment. (Govt. Br. at para. 6(c)(xiv)-(xv).) Not only the *Ex Post Facto* Clause is in Article I of the Constitution, which grants, withholds and defines the authority of Congress, it is rooted in separation of powers principles unlike the First Amendment.

(3) The government attempts to argue there is a national security and foreign relations exception to the *Ex Post Facto* Clause. (Govt. Br. at para. 6(c)(xi)-(xii).) However, only one of the nine cases the government cites addresses the *Ex Post Facto* Clause. And all but two are *civil* cases; the *Ex Post Facto* Clause only applies to penal laws. *See Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798). The one case that addresses the *Ex Post Facto* Clause, *Stogner v. California*, 539 U.S. 607 (2003), held that a law retroactively extending the statute of limitations period violated that clause. The only other criminal case cited is *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), but it does not address the *Ex Post Facto* Clause. The government cites *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493 (1870), for the proposition that “military exigencies may justify tolling . . . criminal limitations periods.” (Govt. Br. at para. 6(c)(xii).) But *Stewart* involved a civil, not a criminal, limitations statute and did not discuss the *Ex Post Facto* Clause. *Stewart*, 78 U.S. (11 Wall.) 493; *Stogner*, 539 U.S. at 620.

(4) In short, the government cites no case standing for the proposition that the *Ex Post Facto* Clause does not apply here.

**d. Guantanamo Bay is not a Constitution-free zone.**

(1) As mentioned above, the government’s engages in a lengthy discussion of *Boumediene* and *Eisentrager* that is largely irrelevant to the issue at hand. Much of this discussion centers around whether the Fifth Amendment Due Process Clause applies to Guantanamo Bay detainees. As the *Ex Post Facto* Clause is in Article I of the Constitution, whether the Fifth Amendment applies is not pertinent to this issue. Nonetheless, the defense will address this argument in the event the Commission sees a relevance not obvious to the defense.

(2) The government contends that the Supreme Court in *Boumediene* made no ruling with respect to the extraterritorial application of the Constitution. Rather, the government contends *Boumediene* decided only the “narrow” question of the Suspension Clause’s reach. (Govt. Br. at para. 6(a)(ii).) This is patently incorrect. The core of the *Boumediene* holding is that even if Guantanamo Bay is technically Cuban territory, the government cannot treat it as a law-free zone. The Constitution is not a matter of political grace. *See Boumediene v. Bush*, 128 S.Ct. 2229, 2254 (2008) (“[T]he Constitution has independent force in these territories, a force not contingent upon acts of legislative grace.”).

(3) To evade *Boumediene*, trial counsel relies upon two cases that it claims are both controlling and undisturbed – *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). *Eisentrager* dealt with German prisoners who had been tried by military commission and held in a military prison in occupied Germany after WWII. *Verdugo* dealt with a warrantless search conducted by U.S. law enforcement in Mexico.

In both of these cases, the Court held that what U.S. officials did in a foreign country implicated the relations between the United States and that foreign government. Accordingly, the U.S. Constitution did not supplant that countries' local law unless the individuals involved had some other significant connection to the United States that would warrant it.<sup>6</sup>

(i) *Boumediene* held, however, that the “*de jure* sovereignty” Cuba ostensibly exercises over Guantanamo Bay as a function of its lease with the United States is sovereignty in name only – a finding the government failed to address. For all practical purposes, the United States has exercised “*de facto* sovereignty” over Guantanamo Bay ever since it was taken over from the Spanish in 1898, along with Puerto Rico, Guam, the Mariana Islands and all of the other, so called, “unincorporated territories.” *Boumediene*, 128 S.Ct. at 2253.

(ii) The result was that because the government can, and does, treat Guantanamo Bay as if it were U.S. soil, it cannot take the position that Guantanamo Bay is foreign soil when it comes to the Constitution. Because unlike Germany and Mexico, there is no local law in Guantanamo Bay. A ring of landmines around Guantanamo Bay is one of many steps taken to ensure that Cuban law does not apply. *Boumediene*, 128 S.Ct. at 2261. There is no conflict between the Constitution and foreign law. There is a choice between the Constitution or no law at all.

(iii) *Boumediene* therefore distinguished *Eisentrager* and *Verdugo* because the Constitution does not allow such a vacuum, even if it appears to be the formal consequence of a lease. “Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.” *Boumediene*, 128 S.Ct. at 2259; *see also id.* at 2260 (“The Court’s holding in *Eisentrager* was thus consistent with the Insular Cases, where it had held there was no need to extend full constitutional protections to territories the United States did not intend to govern indefinitely. Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.”).

(4) While *Boumediene* reserved judgment on the full breadth of the Constitution’s application in GTMO, there can be no question that its territorial status and the alienage of the individuals held there are not dispositive or even compelling factors. *Boumediene*, 128 S.Ct. at 2256. And the government’s argument that voluntary contacts with the United States are a prerequisite for application of the Constitution, (Govt. Br. at para. 6(c)(vii)-(viii)), is contradicted by *Boumediene*’s application of the Great Writ to Guantanamo detainees. *Boumediene*, 128 S.Ct. at 2262 (“We hold that Art. I, § 9, Cl. 2, of the Constitution has full effect at Guantanamo Bay.) As with any of the other unincorporated territories, the scope of the

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<sup>6</sup> *See Verdugo*, 494 U.S. at 274-75. (“At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application. For better or for worse, we live in a world of nation-states in which our Government must be able to ‘functio[n] effectively in the company of sovereign nations.’ *Perez v. Brownell*, 356 U.S. 44, 57 (1958). Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country.”).

Constitution’s application is a function of practicality and given that Guantanamo Bay is both closer to the continental United States and less politically fraught, the government must meet a high burden in demonstrating why Guantanamo Bay is any less subject to the Constitution than Puerto Rico. *Id.* at 2258. While the defense concedes that there is room for debate at the margins, *Boumediene* presumes the application of due process, as does a long series of Supreme Court precedents beginning with the Insular Cases.<sup>7</sup> In articulating its central holding on whether CSRT proceedings substituted for habeas corpus, *Boumediene* reasoned that, “Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry.” *Boumediene*, 128 S.Ct. at 2270. Any argument, therefore, that the United States can conduct a criminal trial that does not comply with the due process standards of the Constitution is baseless and an embarrassment. The political branches have no power “to switch the Constitution on or off at will.” *Id.* at 2259.

/s/

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<sup>7</sup> See, e.g., *Balzac v. Porto Rico*, 258 U. S. 298, 313 (1922) (“The guaranties of certain fundamental personal rights declared in the Constitution, *as, for instance, that no person could be deprived of life, liberty, or property without due process of law*, had from the beginning full application” in the unincorporated territories.) (emphasis added).