

UNITED STATES OF AMERICA

v.

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Defense Motion
to Dismiss

for Violation of the Sixth Amendment Right to
a Speedy Trial

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 dismiss the Charges against Mr. Khadr with prejudice for the deprivation of his Sixth Amendment entitlement to a speedy trial.

3. **Overview:** The constitutional right to a speedy trial is a core protection of due process. In light of the Supreme Court's decision in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), there is no longer any doubt as to the applicability of basic Fifth and Sixth Amendment due process requirements to this Military Commission. Three of the Charges in this case were not referred until November 2005, three and a half years after his initial detention, and Charges IV and V were not even referred until May 2007, after nearly five years in custody. Under well-established military and Supreme Court precedent, the six-year delay in bringing Mr. Khadr to trial demonstrates a gross violation of the speedy trial right. The extraordinary delay in this case was caused exclusively by the government and in the face of Mr. Khadr's request for prompt trial five years ago. Mr. Khadr has suffered significant prejudice to his ability to defend against the charges and to his mental and physical development, having spent nearly a third of his life confined in a manner grossly inappropriate for his age. The military commission should therefore dismiss the Charges in their entirety, or, at a minimum, dismiss Charges IV and V as necessarily breaching Mr. Khadr's constitutional right to a speedy trial.

4. **Burdens of Proof and Persuasion:** The Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. R.M.C. 905(c)(2)(A).

5. **Facts:**

a. On 16 November 2001, the President signed an executive order notifying the agents of the government that he intended to prosecute individuals captured in Afghanistan, such as Mr. Khadr, by military commission. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 F.R. 57833 (Nov. 16, 2001) ("PMO").

b. By March of 2002, the military commission process had been established by an order that "implement[ed] policy, assign[ed] responsibilities, and prescribe[d] procedures ... for

trials before military commissions of individuals subject to the President's Military Order." Military Commission Order No. 1 (March 21, 2002).

c. Mr. Khadr was detained in Afghanistan on 27 July 2002 and has been held in U.S. custody ever since. (Sworn Charges, 2 February 2007, para. 12 (attachment A to D008).)

d. The earliest record of a law enforcement interrogation produced to the defense is dated 16 September 2002. (Investigative Report, 16 Sept 02, Bates No. 00766-000104-05 (attachment E to Def. Mot. to Compel (Sgt C), D-027).) That interrogation was conducted by Army CID in Bagram, Afghanistan. *Id.*

e. On 7 November 2005, charges were preferred against Mr. Khadr and were referred to a military commission that same day. ([Charge Sheet, 7 Nov 05 \(attachment A\)](#).) The first session of the military commission established to try Mr. Khadr convened the week of 9 January 2006. ([See Email of Keith Hodges, First Session in US v. Khadr \(PO 1\), dated 2 December 2005 \(attachment B\)](#).)

f. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court invalidated the military commissions system in which Mr. Khadr was charged.

g. On 5 April 2007, new Charges were referred against Mr. Khadr pursuant to the Military Commissions Act of 2006. (Charge Sheet.)

h. On 4 June 2007, the military judge, *sue sponte*, dismissed the Charges against Mr. Khadr for lack of jurisdiction. The Court of Military Commission Review reversed that decision on 24 September 2007.

6. Argument:

I. Fifth and Sixth Amendment Rights to a Speedy Trial Apply to Detainees Held at GTMO

a. In *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), the Supreme Court reversed the authority trial counsel has consistently relied upon for the proposition that the "Constitution does not apply to aliens held outside the United States, including those held at Guantanamo Bay, such as Khadr." (*See, e.g.*, Government Response to the Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder), D-013, dated 14 December 2007, at para. 6(a)(i); Government Response to the Defense Motion to Dismiss for Lack of Jurisdiction (Equal Protection), D-014, dated 18 January 2008, at para. 6(a)(ix); Government Response to the Defense Motion to Dismiss for Lack of Personal Jurisdiction (Child Soldier), D-022, dated 25 January 2008, at n2.)

(1) The Court held that "questions of extraterritorial[] [application of the Constitution] turn on objective factors." *Boumediene*, 128 S.Ct. at 2253. These factors include whether the application of constitutional mandates would cause "friction with the host government," *id.* at 2261, the degree to which the federal government exercises plenary authority over the area, *id.*, and whether logistical or security difficulties would make the application of a particular constitutional provision "impracticable or anomalous," such as if the area is "located in an active theater of war." *Id.* at 2262.

(2) Weighing these factors in the context of the Guantanamo detainees, such as Khadr, the Court concluded, GTMO is “a territory that, while technically not part of the United States, is under the complete and total control of our Government.” *Id.* Like Puerto Rico, Guam and the other territories that have remained under the “complete jurisdiction and control” of the federal government since the conclusion of the Spanish American war, the federal government retains “de facto sovereignty over this territory.” *Id.* at 2253.

(3) Before applying a particular constitutional provision in the context of this military commission, therefore, the military judge must now make a two-part inquiry. First, does the constitutional provision generally govern unincorporated territories, such as GTMO, that are nevertheless “within the constant jurisdiction of the United States”? *Boumediene*, 128 S.Ct. at 2261. Second, as this is a military commission convened under Article I, does the constitutional provision generally govern military proceedings? *See Weiss v. United States*, 510 U.S. 163 (1994); *Middendorf v. Henry*, 425 U.S. 25 (1976) (“Dealing with areas of law peculiar to the military branches, the Court of Military Appeals’ judgments are normally entitled to great deference.”); *see also* MCA sec. 948b(c) (“The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice)”).

(A) In first resolving the question of extraterritorial application, the Supreme Court placed GTMO alongside its sister territories, over whom the United States obtained and has continued to exercise “de facto sovereignty” since the conclusion of the Spanish American War. *Boumediene*, 128 S.Ct. at 2253.

i. The Court held that as soon as the federal government sought to govern the unincorporated territories, its authority was subject to “those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments.” *Id.* at 2260 (citing *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 44 (1890)). The Supreme Court never questioned that “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. *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922).

ii. Moreover, the Court recognized that “over time the ties between the United States and any of its unincorporated territories strengthen in ways that are of constitutional significance.” *Boumediene*, 128 S. Ct. at 2262. This analysis led the Court to draw an express analogy between the status of GTMO and Puerto Rico, where, of course, the provisions of the Bill of Rights are in full force and effect. Discussing the status of Puerto Rico, the Supreme Court has said that whatever factors may have cautioned against the application of the Constitution soon after Puerto Rico’s annexation, they provide no continuing basis “for questioning the application of the Fourth Amendment-or any other provision of the Bill of Rights.” *Id.* (quoting *Torres v. Puerto Rico*, 442 U.S. 465, 475-476 (1979) (Brennen, J., concurring)). Likewise, given the exercise of “de facto sovereignty” by the United States at GTMO, there is no legitimate basis on which to limit the application of the Bill of Rights or otherwise distinguish GTMO from territories such as Puerto Rico.

iii. Accordingly, there is no longer any doubt that such territories enjoy “the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment.” *Examining Board v. Flores de Otero*, 426 U.S. 572, 600 (1976). Among those “fundamental personal rights” that is universally applied to the unincorporated territories is the right to a speedy trial. *See, e.g., Klopfer v. North Carolina*, 386 U.S. 213, 222-24 (1967) (recognizing that the right to a speedy trial is “fundamental”); *People of Territory of Guam v. Ibanez*, 993 F.2d 884 (9th Cir. 1993) (Sixth Amendment speedy trial right applies in Guam); *United States v. Quinones*, 516 F.2d 1309 (1st Cir. 1976) (Sixth Amendment speedy trial right applies in Puerto Rico).

(B) Second, the Sixth Amendment right to a speedy trial is well recognized within military justice over and above the provisions of UCMJ Article 10. *See United States v. Cossio*, 64 M.J. 254 (C.A.A.F. 2007); *United States v. Vogan*, 35 M.J. 32 (C.M.A. 1992) (citing *United States v. Lovasco*, 431 U.S. 783 (1977); *Barker v. Wingo*, 407 U.S. 514 (1972)). By way of historical precedent, the military commissions at issue in *Ex parte Quirin* were convened within *two weeks* of the defendants being apprehended. *See Ex parte Quirin*, 317 U.S. 1, 23 (1942). Likewise, despite complex evidence, the need for international coordination and limited technological resources, the Nuremberg Trials were convened by November 1945, just over six months after Victory in Europe and three months after Victory in Japan. *See THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS* (London 1946). There is therefore no basis for arguing that military justice is somehow tolerant of government delays or that the constitutional guarantee of a speedy trial warrants any less significance within the military, especially since, had the government complied with the UCMJ, most of these trials would have been completed by now.

(C) With respect to both the extraterritorial application of the constitutional speedy trial guarantee and its recognition within the military, there is no ambiguity. The constitutional protections of the Fifth and Sixth Amendment apply to safeguard the rights of an accused and of society to see the prompt resolution of criminal proceedings. The only question that remains is whether Mr. Khadr has been afforded a trial that survives constitutional scrutiny.

II. The Government has Violated Mr. Khadr’s Right to a Speedy Trial

b. The Sixth Amendment affords defendants “in all criminal prosecutions” the fundamental right to a “speedy trial.” U.S. CONST. amend VI. The right to a speedy trial serves to: (1) prevent undue and oppressive incarceration prior to trial; (2) minimize “anxiety and concern accompanying public accusation”; and (3) limit the possibility that long delay will impair the ability of an accused to defend himself. The right to a speedy trial attaches from the moment when the government indicts the accused or arrests him, whichever comes first. *See, e.g., United States v. Marion*, 404 U.S. 307, 313, 320 (1971); *Dillingham v. United States*, 423 U.S. 64, 65 (1975) (“the government constituted petitioner an ‘accused’ when it arrested him and thereby commenced its prosecution of him”). While there is no formal indictment in military proceedings, the Court of Military Appeals reasoned that for the purposes of the Sixth Amendment, “preferral or referral of charges or pretrial restraint” is analogous. *United States v. Vogan*, 35 M.J. 32, 33 (C.M.A. 1992). To determine whether an accused has been deprived of

his Sixth Amendment right to a speedy trial, therefore, the military judge must weigh the four *Barker* factors:

- 1) the length of the delay;
- 2) the reason for the delay;
- 3) whether, when, and how the defendant asserted his right to a speedy trial; and
- 4) prejudice to the defendant.

Barker v. Wingo, 407 U.S. 514, 530, 534, 536 (1972). The inquiry is a factual one and may necessitate a hearing for ultimate resolution if the complete facts are either unknown or in dispute. *See Doggett*, 505 U.S. at 653. “[N]one of the four factors identified above [are] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors, and must be considered together with such other circumstances as may be relevant.” *Barker*, 407 U.S. at 533.

(1) **The length of the delay**

(A) “Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay.” *Doggett*, 505 U.S. at 652 (8.5 year lag between indictment and arrest warranted dismissal); *Barker*, 407 U.S. at 534 (five-year delay was “extraordinary”). How much time is “presumptively prejudicial” is a factual matter, but courts have found “a general consensus that a delay of over eight months meets this standard.” *See, e.g., United States v. Vassell*, 970 F.2d 1162, 1164 (2d Cir.1992).

(B) In the military, the amount of delay tolerated is considerably less. Pursuant to UCMJ Article 10, for example, twenty days of pretrial confinement before the government took any action on a case was deemed prejudicial enough to warrant its dismissal. *United States v. Calloway*, 47 M.J. 782, 784 (N.M.C.C.A. 1998). The CAAF has also held that the passage of 106 days before trial, 48 days of which were deemed inordinate delay, warranted dismissal under Article 10. *United States v. Hatfield*, 44 M.J. 22 (C.A.A.F. 1996).

(C) Here, Khadr has languished in indefinite pre-trial detention for six years. Only in November 2005, nearly three and a half years after his capture, did the government even begin to commence the first of a series of attempts to prosecute him by military commission, even though law enforcement interrogations began less than two months after his capture. The charges Mr. Khadr now faces were not even referred until May 2007 and include, for the first time, specifications of Spying and Material Support for Terrorism.¹ (Charge Sheet at

¹ Neither of these Charges was alleged in the November 2005 indictment, despite the fact that both were available at the time as offenses enumerated in Military Commission Instruction No. 2. *See* Department of Defense, Military Commission Instruction No. 2, Crimes and Elements for Trial by Military Commission, 30 Apr 03 (“MCI2”). Spying was expressly punishable by MCI2 para. 6(B)(6), and the elements of Material Support for Terrorism were encompassed by the Charge of Aiding and Abetting, MCI2 para. 6(C)(1), in support of Terrorism, MCI2 para. 6(B)(1). At a minimum, the failure to allege these promptly should require them to be waived.

4.) The amount of delay in this case is therefore “presumptively prejudicial” enough to trigger speedy trial analysis.

(2) **The reason for the delay**

(A) In evaluating whether the government has breached the right to a speedy trial, the military judge must consider whether the delay was “inevitable and wholly justifiable.” *Doggett*, 505 U.S. at 656. For example, it is justifiable delay if law enforcement officials “need time to collect witnesses against the accused, oppose his pretrial motions, or, if [the accused] goes into hiding, track him down.” *Id.* Here, however, all of the delay is attributable to the government and for none of these justifiable reasons. The government waited three and a half years after the relevant conduct to charge Mr. Khadr. This delay was not due to Mr. Khadr’s absence from U.S. custody. This delay was not due to Mr. Khadr’s defense counsel seeking a continuance of this process – in fact, he didn’t even have defense counsel during this period.² This delay was not even attributable to a crowded government docket. When Khadr was charged before this commission, he was one of three cases. Even as of today, less than thirty individuals have had charges preferred against them.³

(B) Instead, the delay was due to the fact that the government chose to bypass the military commission process established by Congress. Even the Bush Administration recognized that the first process it created was inadequate, and accordingly revamped their rules and procedures. This second iteration, the Supreme Court ruled was illegal in *Hamdan*. At any time, the government could have prosecuted Mr. Khadr using the procedures set forth in the UCMJ. It chose, instead, to delay.

i. On 16 November 2001, eight months prior to Mr. Khadr’s arrest, the President signed an executive order notifying the agents of the government that he intended to prosecute individuals captured in Afghanistan, such as Mr. Khadr, by military commission. Military Order of 13 November 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 F.R. 57833 (Nov. 16, 2001) (“PMO”). By March of 2002, four months prior to Mr. Khadr’s capture, the first of the three military commission systems had been established by an order that “implement[ed] policy, assign[ed] responsibilities, and prescribe[d] procedures ... for trials before military commissions of individuals subject to the President’s Military Order.” Military Commission Order No. 1 (March 21, 2002). At the time, the only statute that governed military justice by the United States was the UCMJ, *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2792 (2006), and by the standard of Article 10, the government failed spectacularly to promptly bring Mr. Khadr to trial.

² In fact, even now that the trial process has begun, the vast majority of the delay is a consequence of the prosecution’s refusal to comply with discovery requests and delay in producing documents ordered by the military judge. At the May 2008 hearing, for example, the military judge threatened to abate proceedings if trial counsel did not produce particular documents within two weeks.

³ <http://www.defenselink.mil/news/commissions.html>.

ii. Even if six years of delay could be explained by the government's serial attempts to establish a lawful military commission system, the delay is no more excusable. In 2002, the government had unambiguous authority to convene military commissions pursuant to UCMJ Article 21. Instead of abiding by the military commissions procedures contained in the UCMJ, the government pursued a policy of depriving these defendants of the procedural protections they would otherwise be afforded under the UCMJ until the Article III courts reprimanded them for doing so. In its first iteration following the PMO, the commission system was enjoined because of fatal "procedural problems with the Commission's rules," such as depriving the defendant of the right to be present. *Hamdan v. Rumsfeld*, 344 F.Supp.2d 152, 171 (D.D.C. 2004). Chastened, the government tried again, implementing a system that "strengthened wording concerning defendants' access to the proceedings."⁴ This next system was ultimately invalidated by the Supreme Court for failing to afford the minimal guarantees of Common Article 3 and because of its substantial and unjustified deviations from the UCMJ. Now, after securing the passage of the MCA, the government is on its third attempt. Incrementally affording defendants a modicum more rights with each step is nothing more than an attempt to test the limits of due process for a discrete class of defendants. It is precisely the kind of effort by the government "to gain tactical advantage," *United States v. Marion*, 404 U.S. 307, 325 (1971), or "to hamper the defense [that] should be weighted heavily against the government." *Barker*, 407 U.S. at 531.

(C) The delay was not even due to the government being having difficulty obtaining "law enforcement" information from and about Mr. Khadr. On 27 February 2002, the U.S. Secretary of Defense stated "[w]e are now starting the process of doing a series of interrogations that involve law enforcement."⁵ Accordingly, from at least 16 September 2002, Mr. Khadr was interrogated by law enforcement agents intent on collecting evidence against him for use in a future prosecution. Since then, law enforcement has interrogated Mr. Khadr dozens and dozens of time. It is not Mr. Khadr, therefore, that should bear the cost of this policy of delay, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Barker*, 407 U.S. at 531.⁶

⁴ Kathleen T. Rhem, Officials Announce Changes to Military Commissions Procedures. American Forces Press Service, 31 August 2005.

⁵ Interview with KSTP-ABC, St Paul, Minnesota.

⁶ The court there noted that the reason for delay is critically important in the speedy trial analysis. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.*

(3) **The defendant's assertion of his right.**

Mr. Khadr was not afforded any opportunity to meet with counsel until November 2004, two and a half years after his initial arrest.⁷ Prior to this, Mr. Khadr was interrogated over a hundred times, frequently by law enforcement agents about his own conduct in June-July 2002, the circumstances of his capture, and the allegations contained in the Charge Sheet. Significantly, on 4 August 2003, Mr. Khadr declined to submit to a polygraph and then specifically stated that he would prefer to be taken to trial. (FBI Interrogation Summary, dated 4 August 2003, Bates No. 00766-000060 (attachment C).) Given the fact that when Mr. Khadr made that statement he was still unrepresented, presumably had no knowledge of the governing law and was only 16 years of age, this can be fairly interpreted as a demand for a speedy trial. Mr. Khadr therefore has demanded for the past five years that he be given a trial.

(4) **Prejudice to the Accused**

(A) “Unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, including ‘oppressive pretrial incarceration,’ ‘anxiety and concern of the accused,’ and ‘the possibility that the [accused's] defense will be impaired’ by dimming memories and loss of exculpatory evidence.” *Doggett*, 505 U.S. at 654 (citing *Barker*, 407 U.S. at 532). Of these types of prejudice, “the most serious is the last, because the inability of a defendant to prepare his case skews the fairness of the entire system.” *Id.*; *Barker*, 407 U.S. at 532. The presumption that pretrial delay has prejudiced the accused intensifies over time both in terms of his ability to prepare for trial or the restrictions on his liberty. *Doggett*, 505 U.S. at 652; *United States v. Taylor*, 487 U.S. 326, 340 (1988).

i. The extent of prejudice to Mr. Khadr's defense is substantial, and is the direct result of the six-year delay in bringing him to trial.

(a) As would be expected, in its depositions and interviews of material a witness over the past few months, defense counsel have routinely discovered that witnesses cannot recall events that transpired six years ago.⁸ Worse than the faded memories of potential witnesses, however, are the contaminated memories. This case has received extensive media coverage and is the subject of a civil lawsuit against Mr. Khadr by one of the government's witnesses. Indeed, that witness, L.M., is noteworthy as a frequent public purveyor of the myth that Mr. Khadr was the sole “combatant” in the compound to have survived the aerial bombardment on 27 July 2002, and thus that Mr. Khadr must have been responsible for SSG Speer's death. When L.M. was confronted with the revelation that at least one other combatant was alive and fighting when U.S. forces entered the compound, L.M. said he was

⁷ The Navy and Marine Corps, by contrast, require the assignment of defense counsel to persons confined within ten days. See Commander, Naval Legal Service Command Instruction, 5800(1)(E) available at: http://www.jag.navy.mil/Instructions/58001e_ch1.pdf.

⁸ Despite the fact that LTC W was deposed more than three months ago, defense counsel have still not been provided with a deposition transcript. According to defense counsel's notes of the deposition, however, LTC W. repeatedly indicated that he could not remember core facts of the battle at issue in the case due to the passage of time.

“shocked” and that this contradicted what “everyone had told” him over the years. (*See Injured U.S. soldier “shocked” Khadr wasn’t alone*, Toronto Star, Feb. 6, 2008 (attachment D).) L.M.’s comments show just how much this case was discussed, and how much misinformation about the facts of the case has been conveyed in the media and amongst the witnesses since 2002.

Compounding the already tainted atmosphere surrounding this case, 17 of the 29 witnesses interviewed in connection with this case, had their statements taken *after* the charges had been referred. Even under the best circumstances, the knowledge of such charges and trial counsel’s theory of the case would skew both the witnesses’ ability to recall events three and a half years prior as well as the neutrality and openness of the investigators questions. *Barker*, 407 U. S. at 532 (“There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record, because what has been forgotten can rarely be shown.”).

(b) Not only have the witnesses’ memories suffered spoliation, but so have the “crime scene” and the available forensic evidence.

(i) At the request of SSG Speer’s family, no autopsy was performed on SSG Speer’s body other than a superficial examination of his wounds. (Request to Stop Autopsy - Sergeant First Class Christopher Speer, Bates # 00766-001431 (attachment E); Final Report of Postmortem Examination (attachment F).) No physical evidence has been preserved that could identify with certainty what ordinance actually caused these wounds. The defense requested copies of SSG Speer’s X-rays, which would have been able to provide more than the superficial photographic evidence available, but the prosecution has thus far been unable to produce them. Trial counsel have not exhumed SSG Speer’s body and have not given the defense any indication that it intends to do so.

(ii) The crime scene was left unsecure and, within hours of the firefight, had been contaminated by local villagers. The compound was ultimately destroyed by U.S. soldiers several weeks after the firefight, making the site visit undertaken by previous defense counsel in 2006 a largely futile exercise. The government did not even preserve physical evidence from the landmines Mr. Khadr is alleged to have planted, either to demonstrate their consistency with those it alleges he is shown making on a video recording or to reveal whether they bear his fingerprints.

(iii) The delay in this case and government negligence in preparing it have created the situation where a murder trial is moving forward without the defense being provided any physical evidence to make up for the fact that there were no witnesses to the crime.

(c) Perhaps most damning, however, is the impairment of defense counsel’s ability to ever know or demonstrate what Mr. Khadr’s mental state would have been at age 15.

(i) Both defense counsel and previous habeas counsel for Mr. Khadr have sought to have him evaluated by mental health professionals for over four years and have been rebuffed by the government on each attempt. *See O.K. v. Bush*, 344 F.Supp.2d 44 (D.D.C. 2004); Memorandum from Convening Authority, 20 May 2008

(Attachment D to D064). In fact, central to the District Court's denial of habeas counsel's effort to have him evaluated in 2004 was its finding that there had not been a showing that "charges will be brought at any point in the foreseeable future." *O.K.*, 344 F.Supp.2d, at 54.

(ii) The government did not even conduct a mental health evaluation of Mr. Khadr in the weeks and months immediately following his capture. It may be impossible to estimate what Mr. Khadr's state of maturity and awareness would have been in June-July 2002. Such assessments are routine when a court determines whether a juvenile is even fit to stand trial in adult court, *see, e.g.*, 18 U.S.C. 5032, let alone whether they could have acted with the necessary *mens rea* to incur criminal liability.

(iii) Mr. Khadr will stand trial as a twenty-two-year-old man for conduct he is alleged to have committed as a fifteen-year-old boy. Whatever his mental status now may be, he is standing trial for a series of events that occurred nearly a third of his life ago.

ii. Though inordinate delay between indictment, arrest and trial may impair a defendant's ability to present an effective defense, "the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *United States v. Marion*, 404 U.S. 307, 320 (1971). Delay will "seriously interfere with a defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Marion*, 404 U.S. at 320; *see also Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967).

(a) The restraints on Mr. Khadr's liberty and the conditions of his confinement for the past six years demonstrate unusual prejudice of this kind. Following his capture at age 15, Mr. Khadr was transported to Bagram Airbase, where he was secured to a stretcher and interrogated while still drugged and recovering from battlefield wounds. If he was perceived as not cooperating, interrogators would stretch and shackle his limbs in such a manner as to cause extreme pain to his chest which had two, fresh, golf-ball sized holes in it. (Khadr Affidavit, 22 February 2008, at ¶ 7 ("Khadr Affidavit") (attachment E to D064).) Mr. Khadr was abused physically, put into stress positions, threatened with torture, told he would be subject to homosexual rape and rendered to countries notorious for torture. His captors took advantage of his eye wounds by shining extremely bright lights "right up against" his face, causing his eyes to tear incessantly and causing tremendous pain, potentially contributing to his now permanent vision loss. (Khadr Affidavit, ¶ 25.)

(b) At barely sixteen years old, Mr. Khadr was transferred to GTMO, a maximum security prison that the government has repeatedly described as designed for the "worst-of-the-worst."⁹ Upon his arrival, and without explanation, he was stripped naked and subjected to a manual search of his anus. (Khadr Affidavit at ¶ 34). When not in solitary confinement, Mr. Khadr was held with adult detainees, who because of his age and cultural differences, were hostile and would often yell at him. (*See* Form 302, 3 Feb 03, Bates No. 00766-000047-48 (Attachment J to D064); Form 302, 17 Feb 03, Bates No 00766-

⁹ *See, e.g.*, Press Briefing by Ari Fleischer, dated 23 January 2002.

000049-50 (Attachment K to D064); RIA, 17 Feb 03, Bates No. 00766-000144-45 (Attachment L to D064).)

(c) What makes Mr. Khadr's long and indefinite detention all the more egregious is the government's awareness at the time that its course of conduct would have pernicious effects due to his young age. Holding juveniles in custody is widely accepted as unique, and the conditions considered appropriate for juveniles are not coextensive with those considered appropriate for an adult. Federal law recognizes this and makes clear that juveniles accused of crimes "may be detained only in a juvenile facility or such other suitable place [and not in any place where] the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges." 18 U.S.C. § 5035; *see also* The Recommended Course of Action for Reception and Detention of Individuals Under 18 Years of Age, dated 14 January 2003 ("GTMO RCA") (attachment D to D062). None of these proscriptions were heeded. Mr. Khadr matured from a boy into a man in one of the world's most severe detention facilities and all before he was ever tried and convicted of any crime.

iii. Finally, the defendant need not prove actual prejudice to prevail under the Sixth Amendment. "[C]onsideration of prejudice is not limited to the specifically demonstrable, and ... affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett*, 505 U.S. at 655. As the Supreme Court recognized, "Excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Id.* at 655. Even when delay did not demonstrably prejudice the defendant, government negligence and the excessive length of the delay gives rise to a presumption of trial prejudice. *Id.* at 656-58. Indeed, the federal courts have presumed prejudice from the government's "truly neglectful attitude, bad faith, a pattern of neglect, or other serious misconduct." *United States v. Wells*, 893 F.2d 535, 539 (2d Cir. 1990). The outrageousness of the government's conduct in the case of Mr. Khadr may itself warrant dismissal of the charges. *See Rochin v. California*, 342 U.S. 165 (1952) (dismissal is warranted for government conduct that "shocked the conscience"); *United States v. Fletcher*, 62 M.J. 175 (CAAF 2005) (dismissal is warranted for outrageous prosecutorial conduct). At a minimum, it demonstrates the kind of prejudice the Supreme Court had in mind when in *Barker*, it opined that "time spent in jail is simply dead time." *Barker*, 407 U. S. at 533.

III. The Military Judge must Dismiss the Charges for to Preserve the Right to a Speedy Trial

c. When a defendant has established, as Mr. Khadr has here, a violation of the constitutional right to a speedy trial, dismissal is a "severe remedy . . . but it is the only possible remedy." *Barker*, 407 U.S. at 522; *see also Strunk v. United States*, 412 U.S. 434, 440 (1973) ("[I]n light of the policies which underlie the right to a speedy trial, dismissal must remain, as *Barker* noted, 'the only possible remedy'"). Under well-established military precedent as well, the only remedy for an Article 10 violation is the dismissal of charges. *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993). Mr. Khadr has demonstrated a six-year delay caused exclusively by the government in the face of his request for trial and during which time he has spent nearly a third of his life confined in a manner grossly inappropriate for his age. At a minimum, the military judge should dismiss Charges IV and V, as they were not even specified until May 2007. "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.’” *Boumediene*, 128 S.Ct. at 2259. The Constitution regulates the government’s powers to try and detain individuals by mandating that it either execute those powers expeditiously or forfeit them altogether.

7. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h). Oral argument will assist the Court in understanding and resolving the complex legal issues presented by this motion.

8. **Witnesses and Evidence:** 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:

Attachments A through F

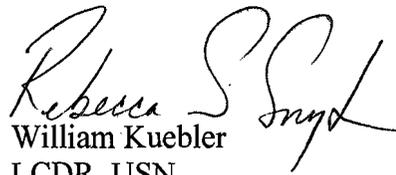
Investigative Report, 16 Sept 02, Bates No. 00766-000104-05 (Attachment E to Def. Mot. to Compel (Sgt C), D-027

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

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

11. **Attachments:**

- A. Charge Sheet, 7 November 2005
- B. Email of Keith Hodges, First Session in *US v. Khadr* (PO 1), 2 December 2005
- C. FBI Interrogation Summary, 4 August 2003
- D. *Injured U.S. soldier "shocked" Khadr wasn't alone*, Toronto Star, Feb. 6, 2008
- E. Request to Stop Autopsy - Sergeant First Class Christopher Speer
- F. Final Report of Postmortem Examination


William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Detailed Assistant Defense Counsel

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

JURISDICTION

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

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

GENERAL ALLEGATIONS (AL QAIDA)

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

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

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

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

7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

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

9. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of “International Islamic Front for Fighting Jews and Crusaders,” issued a *fatwa*

(purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to “plunder their money.”

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

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

BACKGROUND

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

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

14. In late 1994, Ahmad Khadr was arrested by Pakistani authorities for providing money to support the bombing of the Egyptian Embassy in Pakistan. While Ahmad Khadr was incarcerated, Omar Khadr returned with his siblings to Canada to stay with their grandparents. Khadr attended school in Canada for one year while his father was imprisoned in Pakistan before returning to Pakistan in 1995.

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

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

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

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

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

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

CHARGE 1: CONSPIRACY

21. Omar Ahmed Khadr did, in and around Afghanistan, from on or about June 2002 to on or about 27 July 2002, willfully and knowingly join an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al adel, Ahmad Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

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

- a. On or about June 2002, Khadr received approximately one month of one-on-one, private al Qaida basic training from an al Qaida member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmad Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades and explosives.
- b. On or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military. Khadr went to an airport near Khost, Afghanistan, and watched U.S. convoys in support of future attacks against the U.S. military.
- c. On or about July 2002, Khadr received one month of land mine training.
- d. On or about July 2002, Khadr joined a group of Al Qaida operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
- e. On or about July 27, 2002, Khadr and other Al Qaida members engaged U.S. military personnel when military members surrounded their compound.

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

CHARGE 2: MURDER BY AN UNPRIVILEGED BELLIGERENT

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

CHARGE 3: ATTEMPTED MURDER BY AN UNPRIVILEGED BELLIGERENT

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

CHARGE 4: AIDING THE ENEMY

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

[REDACTED]

From: Hodges, Keith [REDACTED]
Sent: Friday, December 02, 2005 10:30 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: First Session in US v. Khadr (PO 1)

1. This email is being sent at the direction of the Presiding Officer, COL [REDACTED].
2. The Presiding Officer intends to hold a session, without the other members, in US v. Khadr the week of 9 Jan 2006 at Guantanamo Bay, Cuba. At that session, the Presiding Officer intends to arraign the accused, obtain the accused's desires with respect to counsel, permit voir dire of the Presiding Officer, and to discuss docketing and other scheduling, a motion schedule, discovery, and other matters to ensure a full and fair trial. The Presiding Officer will soon provide you with materials and the answers to a questionnaire used in other cases to make voir dire efficient.
3. Advise soonest, but not later than 1200, 8 Dec 2005 (Thursday) of any reasons - personal or professional - that would preclude your attending and participating in this session.
4. POM 4-3 and POM 3-1 provide that any emails to the Presiding Officer also be provided to the Assistant, Opposing Counsel, paralegals, and the Chief Paralegals. That requirement is satisfied by a "reply all" to this email.
5. This email is being placed on the filings inventory as PO 1. The filings inventory system is addressed in POM 12-1.
6. All current POMs (Rules of Court) can be found at http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

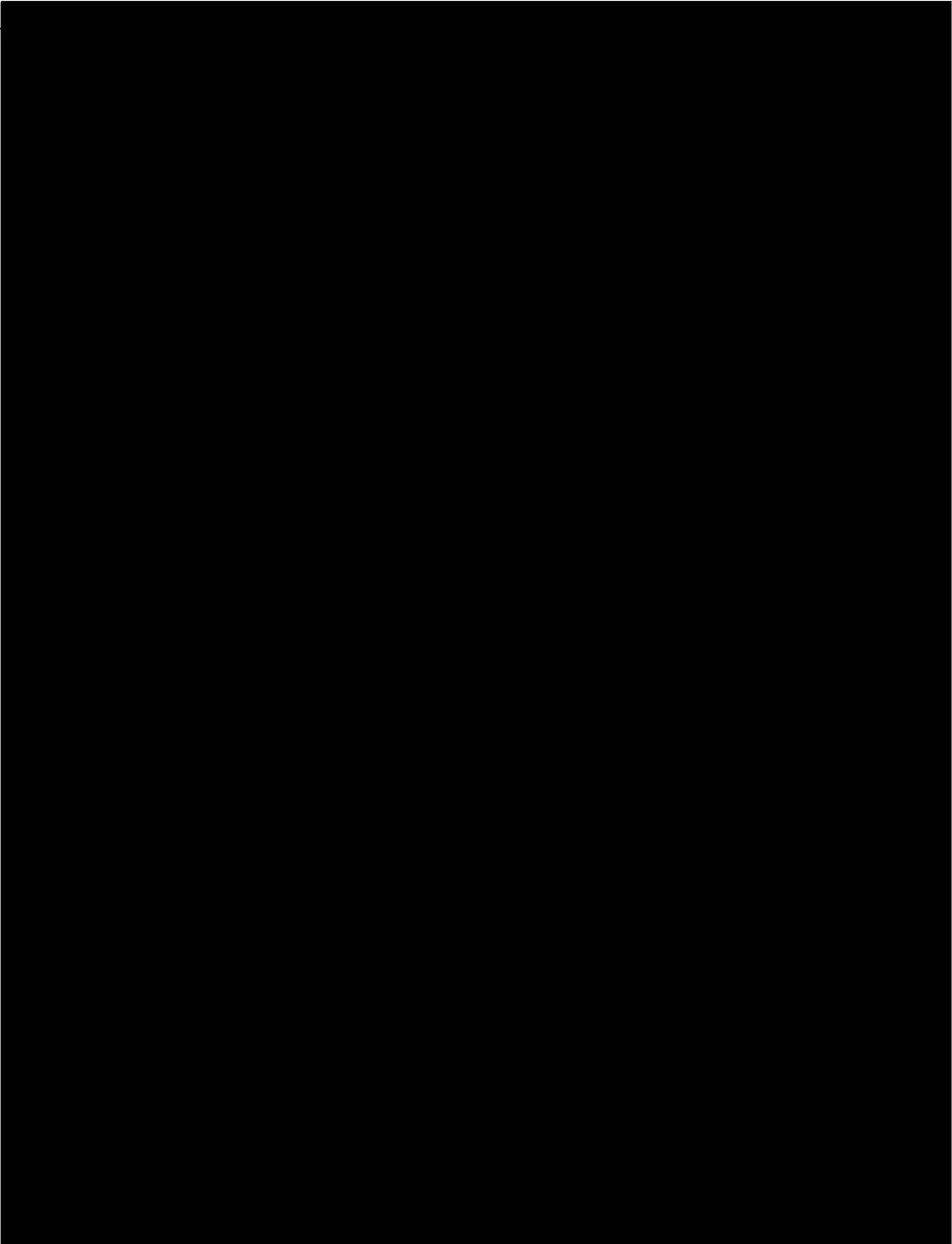
BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
[REDACTED]

Attachment B

RE 1 (Khadr)
Page 1 of 1

12/2/2005



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Injured U.S. soldier 'shocked' Khadr wasn't alone

'Everyone told me from the get-go that there was only one guy in there,' ex-Green Beret says

February 06, 2008

MICHELLE SHEPHARD
NATIONAL SECURITY
REPORTER

GUANTANAMO BAY
— A U.S. Special
Forces soldier
injured in the battle
where Omar Khadr
was captured says he was shocked to learn that the Canadian teenager wasn't the only one alive when a grenade fatally wounded another soldier.



MICHELLE SHEPHARD/TORONTO STAR

The Star's Michelle Shephard is in Guantanamo Bay, Cuba, following the case of Canadian Omar Khadr. She offers a glimpse of life inside the controversial prison.

Layne Morris, a former U.S. Green Beret who was blinded in one eye during the 2002 firefight in Afghanistan and forced to retire from the Army, said he always maintained that Khadr was the sole survivor in the compound.

"That was a total shock to me," Morris said in a telephone interview from his Utah home. "Everyone had told me from the get-go that there was only one guy in there."

A document inadvertently released to reporters here Monday disclosed that after the grenade was thrown, a U.S. operative killed another suspect and then shot Khadr twice in the back. The revelation casts doubt on the Pentagon's assertion that Khadr threw the grenade that fatally wounded Delta Force soldier and medic Christopher Speer.

Attachment D

Khadr is charged with "murder in violation of the laws of war" for Speer's death in addition to attempted murder, conspiracy, spying and providing material support to terrorism.

Morris had been airlifted from the battle scene before Speer was injured, but said that other soldiers involved in the firefight had told him that Khadr was the only one who could have tossed the grenade.

The five-page classified document, however, states that an unidentified operative reportedly saw someone with an AK-47 beside him, moving and "moaning" after the grenade was thrown. He shot him in the head, killing him.

"When the dust rose, he saw a second man sitting up facing away from him leaning against the brush. This man, later identified as Khadr, was moving ... (the operative) fired two rounds, both of which struck Khadr in the back."

It appears no one witnessed Khadr throwing the grenade, but that the operative concluded that Khadr was responsible based on his position and the trajectory of the grenade.

Khadr was 15 years old during the firefight and has been held now in U.S. custody for almost six years. This is the Pentagon's third attempt to try Khadr after charges were dismissed twice before — first by the U.S. Supreme Court who deemed the process illegal, and then by a military judge who ruled he didn't have jurisdiction to hear the case.

Up until this week it had been the military commission process itself that has been on trial — with Khadr's lawyers and international civil rights groups challenging the legality of the Guantanamo commissions.

But with this first official account of the firefight, and as Khadr's trial nears, the prosecution's evidence is also being called into question.

Canada's opposition parties pressed Prime Minister Stephen Harper this week to intervene on Khadr's behalf, insisted that the Canadian be rehabilitated rather than prosecuted.

But Foreign Affairs Minister Maxime Bernier maintained the government's hands-off approach to the Khadr case today, telling reporters in Ottawa that U.S. officials have assured Canada that Khadr is "well treated over there."

Khadr's trial is scheduled to start in May although it's likely his defense lawyers will ask for an extension. In addition to having to prove that Khadr

was responsible for Speer's death, the prosecution must show that Khadr provided support for Al Qaeda and conspired with its members.

Khadr is also being held accountable for the deaths of two Afghan soldiers, according to his charge sheet. Although he's not charged with their murders, it's alleged he conspired with others to kill them. Guantanamo's chief prosecutor, Col. Lawrence Morris, said that they will prove Khadr "shared the criminal intent of those who did the shooting."

The Afghan soldiers were shot dead after they approached the suspected Al Qaeda compound where Khadr hid, asking the group to come out.

Layne Morris said despite the new information released this week he isn't concerned about the upcoming trial or conflicting reports of what happened on July 27, 2002. He said he believes there's evidence to show that it was Khadr's job to throw the grenades during the battle, while the other men in the house used their AK-47s. "Omar was the grenade man," Morris said.

Guantanamo's chief prosecutor also told reporters today that the document is only one part of the prosecution's overall case.

"We're confident that we'll prove the case beyond a reasonable doubt once we get to the courtroom," Army Col. Morris said.



[REDACTED]

6 Aug 02

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Attachment E

[REDACTED]

ARMED FORCES REGIONAL MEDICAL EXAMINER
 LANDSTUHL REGIONAL MEDICAL CENTER
 TEL. NO. DSN 486-7492
 FAX DSN 486-7502
 CIV. 011(49)6371-86-7492

A02-65

FINAL REPORT OF POSTMORTEM EXAMINATION

DATE OF BIRTH: 9 September 1973
 DATE OF INCIDENT: 27 July 2002
 DATE OF DEATH: 6 August 2002
 DATE OF AUTOPSY: 8 August 2002
 INVESTIGATIVE AGENCY: None present.

I. CIRCUMSTANCES OF DEATH: The decedent is a 29 year old White male, active duty U.S. Army, SFC, E7, who was found unresponsive following shrapnel injuries sustained during a fire fight in Afghanistan, 27 July 2002. He was hospitalized at Homburg University in Germany and pronounced at 11 o'clock, 6 August 2002. [REDACTED]

II. AUTHORIZATION: Armed Forces Regional Medical Examiner under Title 10 U.S. Code, Section 1471. The autopsy is restricted to an external examination and identification only at the request of the next of kin.

III. IDENTIFICATION: Visual recognition; specimens for DNA obtained.

IV. ANATOMIC FINDINGS:

1. Deep shrapnel penetrations of the frontal and left fronto-temporal head.
2. Superficial healing shrapnel penetrations of the right thigh and lower leg.
3. Evidence of medical treatment.
4. [REDACTED]

V. TOXICOLOGY: Not performed due to prior hospitalization.

VI. CAUSE OF DEATH: Shrapnel injuries of the head.

VII. MANNER OF DEATH: Combat related.

VIII. OPINION: Based on these autopsy findings and the investigative and clinical information available to me, the cause of death of this 29 year old White male, Christopher Speer, is deep shrapnel penetrations of the head resulting in severe injury to the underlying brain. The decedent's military and professional gear at the time of the incident are not available for evaluation. The manner of death, in my opinion, is combat related.

[REDACTED]

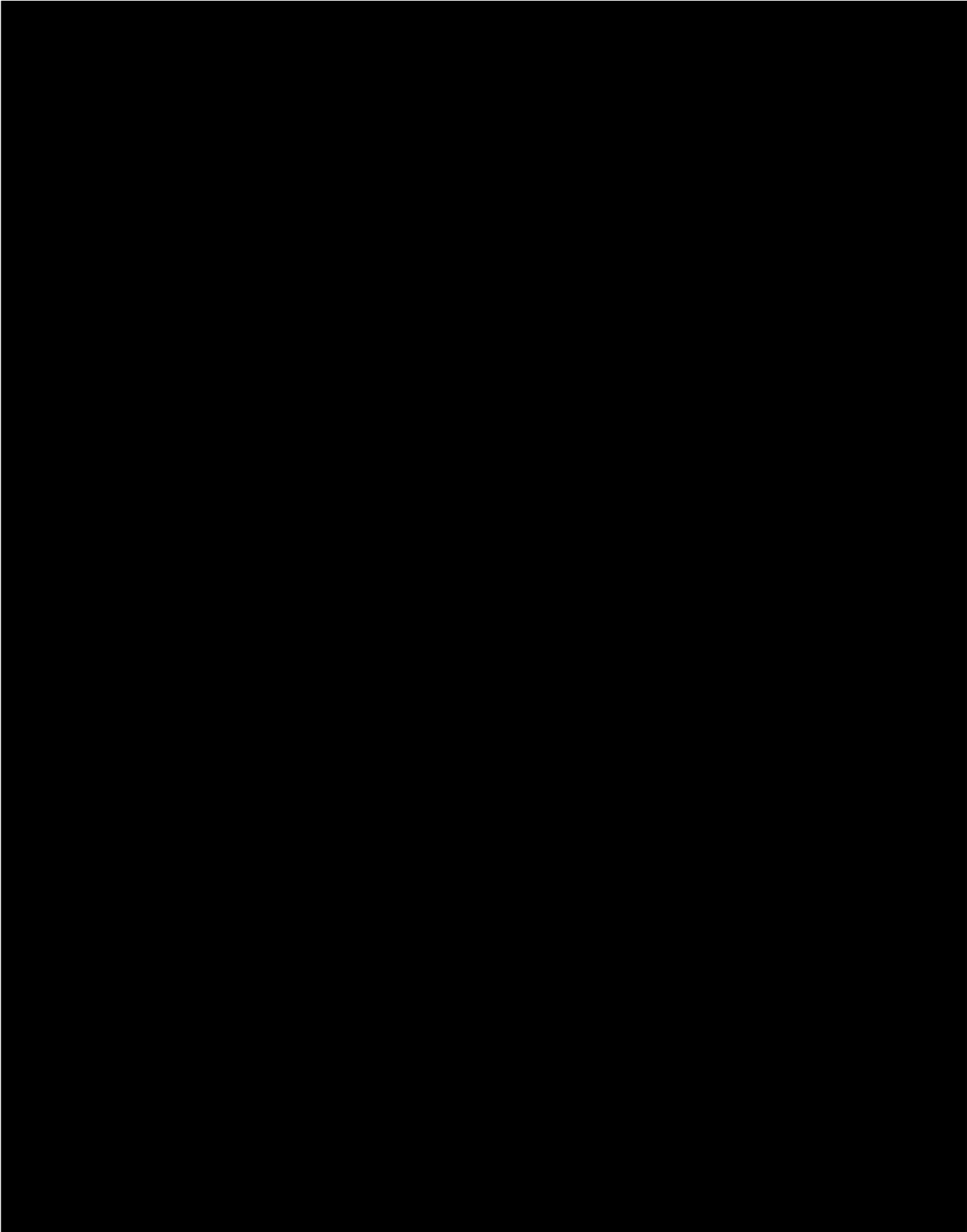
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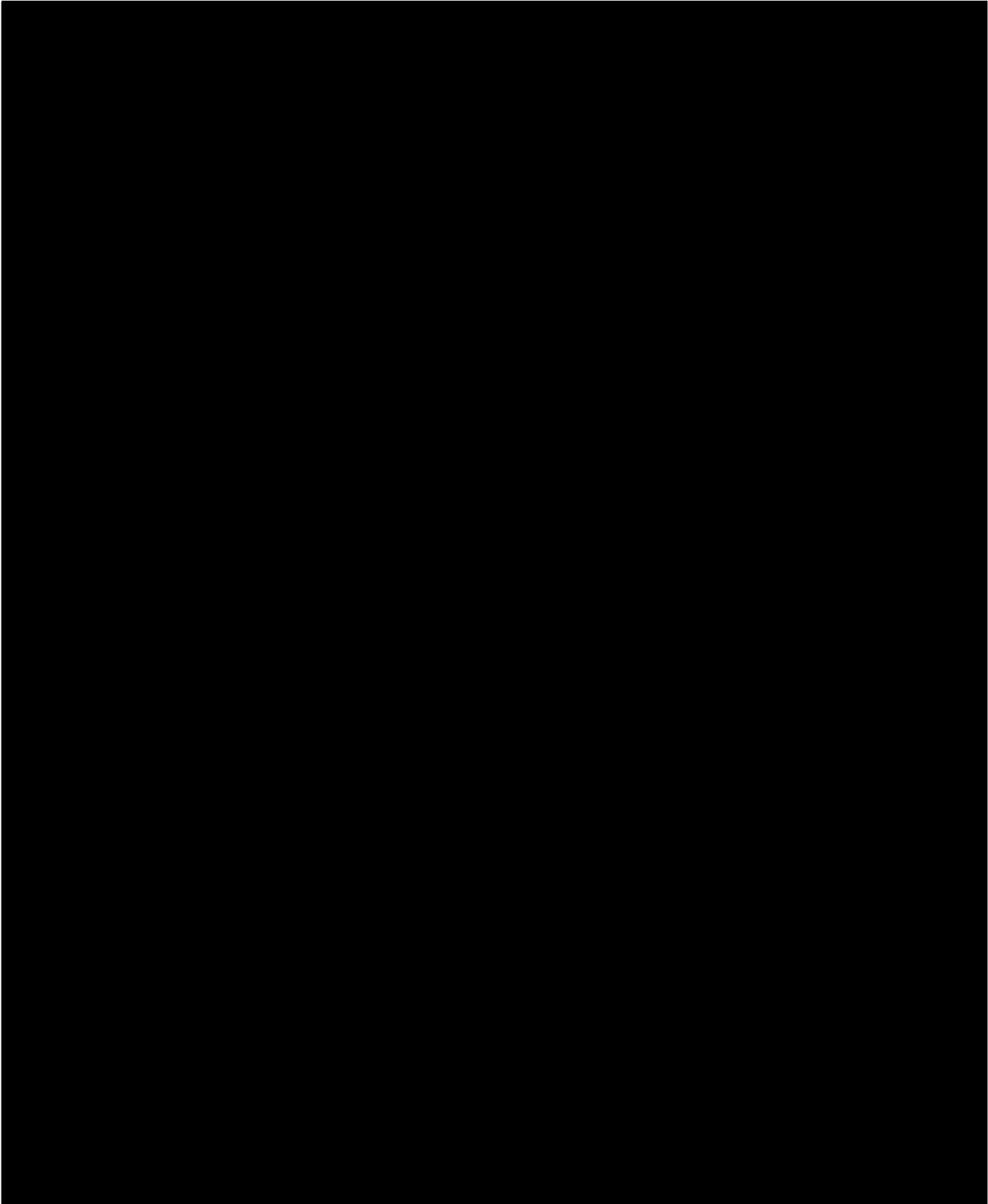
Armed Forces Regional Medical Examiner

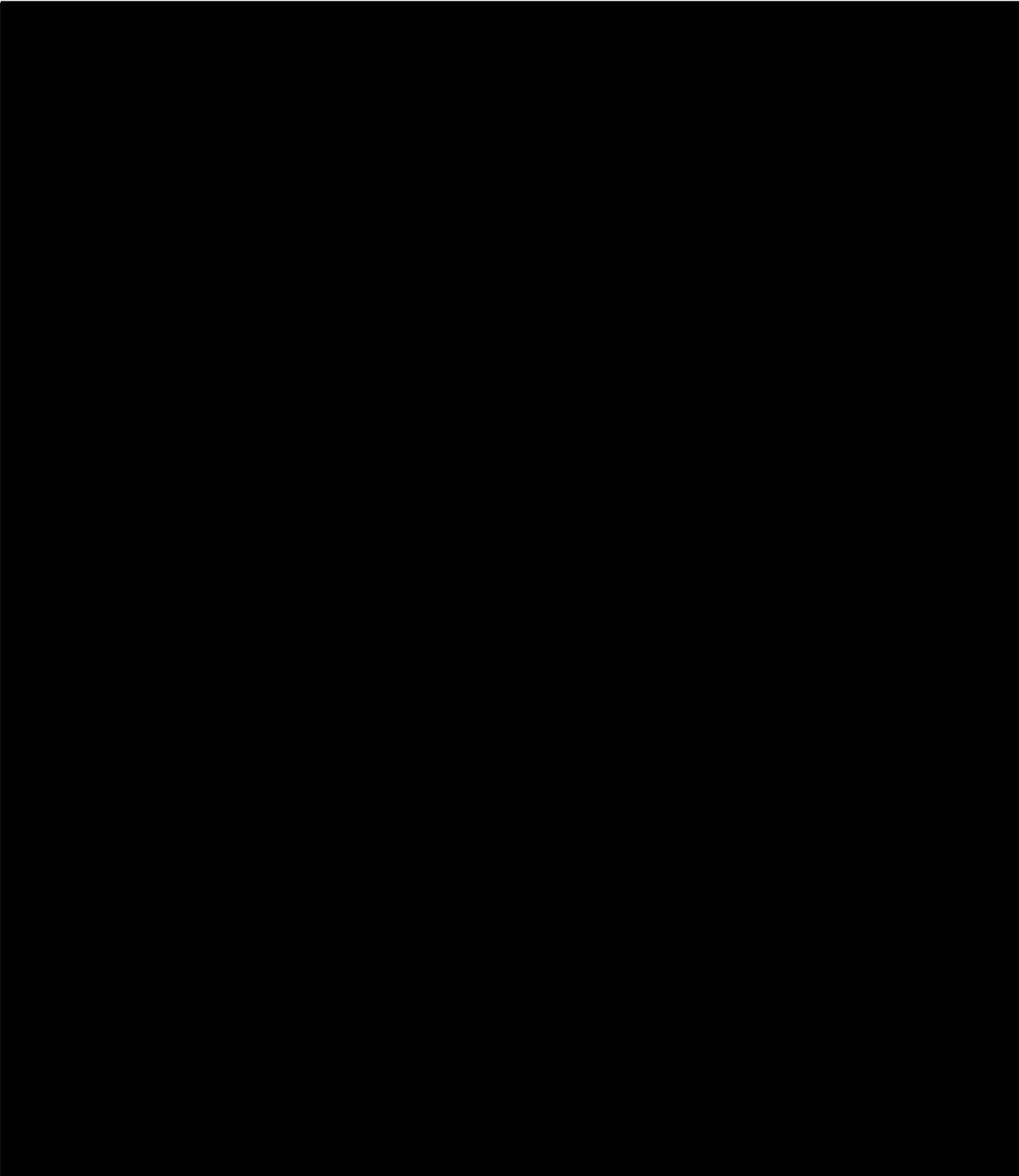
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| <input type="checkbox"/> HISTORY & PHYSICAL EXAMINATION <i>(SF 504, SF 505, & SF 506)</i> | <input type="checkbox"/> OPERATION REPORT <i>(SF 516)</i> | NAME SPEER, CHRISTOPHER JAMES | |
| <input type="checkbox"/> CONSULTATION SHEET <i>(SF 513)</i> | <input type="checkbox"/> NARRATIVE SUMMARY <i>(SF 502)</i> | REGISTER NO. AD U.S. ARMY, E7 | SSN 525-29-3131 |
| <input type="checkbox"/> CHRON RECORD OF MEDICAL CARE - <i>(SF 600)</i> | <input checked="" type="checkbox"/> AUTOPSY PROTOCOL <i>(SF 503)</i> | UNIT U.S. Army Special Operations Command | |
| <input type="checkbox"/> PROGRESS NOTE <i>(SF 509)</i> | <input type="checkbox"/> | DATE DICT 9 August 2002 | DATE TYPED 15 August 2002 |

MEDICAL RECORD REPORT

OPTIONAL FORM 275 (12-77)
 Prescribed by GSA and 1 CMR
 FIRM (41 CFR) 201-45.505







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-068

GOVERNMENT RESPONSE

To Defense Motion to Dismiss
(Speedy Trial)

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 dismiss all charges based on an alleged Sixth Amendment violation be denied. In reaching that conclusion, the Government respectfully requests that the Military Judge rule *both* that the Speedy Trial Clause does not apply to the accused, *and* that, even if it does, the accused's rights have not been violated by his detention.

3. Overview:

a. An alien unlawful enemy combatant, such as the accused, who has been charged under the Military Commissions Act of 2006 ("MCA"), has no rights under the Sixth Amendment's Speedy Trial 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 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 matters, with respect to the Sixth Amendment 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 Sixth Amendment.

b. Moreover, even if the Sixth Amendment's Speedy Trial Clause does apply to the accused in this case, such protections are inapplicable in the context of military commissions. Further, under the controlling speedy trial standard articulated by the Supreme Court, *see, e.g., Doggett v. United States*, 505 U.S. 647, 651 (1992); *Barker v. Wingo*, 407 U.S. 514, 530 (1972), even if the accused were to possess rights under the Speedy Trial Clause, those rights have not been violated because the accused has suffered no prejudice by his continued detention, since under the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the accused may be detained for the duration of hostilities, even in the absence of charges. Moreover, to the extent the delay in bringing this matter to trial impacts the parties' ability to present evidence, it is *the Government* that has been prejudiced by the conduct of the accused and his attorneys, since it is the

Government's burden to prove the accused's guilt beyond a reasonable doubt. *See* 10 U.S.C. § 949l(c)(4) (“[T]he burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.”). Finally, much of the “pretrial” delay in the present case is attributable to the apparent litigation strategy of the accused and his defense team, who seem intent on preventing this matter from ever being heard by the members. Weighing all these factors together, the accused falls woefully short of presenting a Sixth Amendment violation. Accordingly, the motion to dismiss 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).

5. Facts:

a. The accused was apprehended in Afghanistan on 27 July 2002 and held at the Bagram Collection Point until 28 October 2002, when he was transferred to Guantanamo Naval Station.

b. Charges were initially preferred against the accused on 4 November 2005 and were referred to trial by a military commission on 23 November 2005.

c. On 9 December 2005 the military judge set the case for arraignment during the week of 9 January 2005.

d. On 19 December 2005, the accused filed a motion in the United States District Court for the District of Columbia to enjoin the proceedings.

e. On 29 December, 2005, the accused moved the U.S. District Court for the District of Columbia to stay the military commission proceedings.

f. On 5 January 2006, the accused moved for a continuance. The request was denied.

g. On 11 January 2006, the accused was arraigned.

h. On 19 January 2006, the Military Judge issued the initial trial schedule.

i. On 23 January 2006, after the accused objected to the trial schedule, the Military Judge issued a revised trial schedule.

j. On 14 February 2006, the accused again moved for a continuance.

k. On 7 April 2006, the Military Judge further amended the trial schedule at the accused's request.

l. Following enactment of MCA on 17 October 2006, new charges were sworn against Khadr on 2 February 2007.

- m. The charges were resworn on 5 April 2007 and referred to trial on 24 April 2007.
- n. The Military Judge set the arraignment for 5 May 2007. The defense, however, obtained a continuance.
- o. On 4 June 2007, the Military Judge dismissed the charges for lack of jurisdiction.
- p. On 24 September 2007, the Court of Military Commission Review (“CMCR”) reversed the order of the Military Judge dismissing the charges.
- q. On 25 September 2007, the Military Judge ordered a resumption of the proceedings.
- r. On motion of the accused, the Military Judge continued the proceedings until 8 November 2007. The accused then sought to have the proceedings held in abeyance pending further review of his jurisdictional claims by the U.S. Court of Appeals for the District of Columbia Circuit. The Military Judge denied the motion on 15 October 2007.
- s. On 19 October 2007, the accused filed a petition for review in the D.C. Circuit and an Emergency Motion For a Stay of the military commission pending disposition of his petition for review.
- t. The D.C. Circuit denied the motion for a stay on 6 November 2007.
- u. On 8 November 2007, the military judge, who had previously dismissed the case on jurisdictional grounds convened a jurisdictional hearing. The defense, however, elected not to challenge jurisdiction. Thereafter, the Military Judge established a trial schedule which required submission of evidentiary motions no later than 27 November 2007.
- v. On 28 November 2007, after receiving input from both parties, the Military Judge extended the deadline for Defense pretrial motions until 28 February 2009.
- w. On 15 February 2008, the Defense requested yet another continuance for pretrial preparation. Over the Government’s objection, the Military Judge granted the request.
- x. On 20 June 2008, the D.C. Circuit issued dismissed the accused’s petition for review for want of jurisdiction. *Khadr v. United States*, 529 F.3d 1112 (D.C. Cir. 2008).

6. Discussion:

a. An alien unlawful enemy combatant, such as the accused, who has been charged under the MCA, has no rights under the Speedy Trial Clause of the Sixth Amendment.

i. The Speedy Trial Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.” This right, however, does not extend 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).

ii. In *Boumediene*, the Supreme 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 reach 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.

iii. 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 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.

iv. *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 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.

v. 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).

vi. 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).

vii. 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.

viii. 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”).

ix. 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.*

x. *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.

xi. 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.

xii. 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 Speedy Trial 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"). In this context, application of the Sixth Amendment to limit the political branches' treatment of aliens abroad would improperly interfere with those branches' implementation of our foreign policy and their ability to successfully prosecute a foreign war.

xiii. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Justice O'Connor, writing for a plurality of the Justices, determined that a U.S. citizen detained as an enemy combatant (to say nothing of an *alien* unlawful enemy combatant) could be detained, without charges, for the duration of hostilities, provided that he was afforded a process to challenge his detention before a neutral decisionmaker. See *id.* at 518 (plurality op.) ("We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."); *id.* at 519 (plurality op.) ("Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."); *id.* at 521 (plurality op.) ("The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'). The detention approved by the Court in *Hamdi* is not "pretrial detention." Rather, it is detention authorized by Article II of the Constitution and the congressionally passed Authorization for Use of Military Force, Pub L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) ("AUMF") ("[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of

international terrorism against the United States by such nations, organizations or persons.”).

xiv. Requiring the U.S. Government to “try or release” citizen detainees held within the territorial jurisdiction of the United States was the view advocated by two dissenting Justices in *Hamdi*. See *Hamdi*, 542 U.S. at 554-79 (Scalia, J., dissenting, joined by Stevens, J.). That, however, was a minority position. Moreover, Justice Scalia specifically cabined his dissent to the rights of *citizen* enemy combatants held within the territorial jurisdiction of a federal court, and suggested that *alien* enemy combatants or those held outside the United States would enjoy far less protection. See *id.* at 577 (Scalia, J., dissenting) (“Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. . . . Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different.”).

xv. The accused has been detained under procedures in effect approved by the Court in *Hamdi*. His detention is an incident to the United States’ war with al Qaeda, and that detention has prevented Khadr from returning to the battlefield on which he was captured after engaging in combat with the military forces of the United States that resulted in the death of SFC Christopher Speer. To require the United States to “charge or release” alien enemy combatants held outside the United States would be effectively to overrule the procedures approved in *Hamdi*, which permit the United States to hold enemy combatants for the duration of hostilities, insofar as an opportunity is afforded them to challenge the basis for their detention. By virtue of the Combatant Status Review Tribunal and the Administrative Review Board, as well as an opportunity before the Military Commission to present evidence regarding his status as an unlawful enemy combatant, Khadr has been afforded a process to challenge the basis for his detention, and his detention accordingly complies fully with the procedures approved in *Hamdi*.

xvi. Under the functional analysis employed in *Boumediene* to determine the application of the Suspension Clause, it is clear that the Sixth Amendment speedy trial right should not apply in military commission proceedings of alien enemy combatants at Guantanamo. The “practical obstacles inherent” in application of the Speedy Trial Clause in this context, see *Boumediene*, 128 S. Ct. at 2237, are evident. Requiring the United States Government to prosecute alien war criminals abroad within the stringent time limitations that apply to domestic criminal prosecutions, despite the military and practical exigencies that apply in this quite different context, would severely handicap the Executive’s ability to wage war and to bring to justice those who violate the law of war.

xvii. 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.). The Supreme Court has also 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). More directly on point—and highly persuasive for purposes of this case—the Supreme Court has recognized in the *Insular Cases* that not all constitutional trial rights apply even within U.S. sovereign territory where their application would be impracticable. See, e.g., *Balzac v. People of Porto Rico*, 258 U.S. 298, 311 (1922) (holding that jury trial right did not apply in sovereign U.S. territory of Puerto Rico, relying heavily on the practical difficulties of applying this right in a “distant ocean communit[y] of a different origin and language from those of” the continental United States); *Dorr v. United States*, 195 U.S. 138, 145 (1904) (noting that jury trial right was held not to apply in the Philippines on the basis that the territory was “wholly unfitted” for application of that constitutional provision and application of the right was, under the circumstances, both unnecessary and impracticable); *Ocampo v. United States*, 234 U.S. 91 (1914); *Hawaii v. Mankichi*, 190 U.S. 197 (1903). If practical considerations weighed against application of the jury trial right in Puerto Rico and the Philippines, then the even more significant practical impediments at issue in the context of this case surely preclude recognition of a Sixth Amendment speedy trial right on the part of an alien enemy combatant being tried abroad for war crimes. And even if this Court were to hold that alien enemy combatants possess speedy trial rights during a war, any deadlines imposed on the Government should properly take into account the exigencies of the war, as well as the delays created by the detainees’ own litigating strategies.

xviii. The underlying premise of Khadr’s speedy trial claim is that his detention is no different than that of an ordinary criminal for trial in U.S. District Court. As we explain below, however, the two situations are not analogous. The basis for detaining U.S. citizens prior to conviction for violations of the criminal code relates to the need to assure their presence at trial and the like. See, e.g., 18 U.S.C. § 3142 (Release or Detention of a Defendant Pending Trial). The paradigm in a time of war is different, however. Cf. *Doggett v. United States*, 505 U.S. 647, 655 (1992) (“[T]he Sixth Amendment right of the accused to a speedy trial has no application beyond the confines of a formal criminal prosecution.”). Enemy combatants are detained not only to permit their trial for war crimes, as the case may be, but to prevent their return to the fray. The accused is being detained as an enemy combatant. That he is also being tried for war crimes does not transmogrify his wartime detention into pretrial detention for an ordinary criminal matter. His detention is that which was approved by the Supreme Court in *Hamdi*, and the Speedy Trial Clause is accordingly inapplicable to it.

xix. Moreover, as the Court in *Ex parte Quirin*, 317 U.S. 1 (1942), explained, violations of the law of war do not constitute “crimes” or “criminal prosecutions” within the meaning of the Fifth and Sixth Amendments. See *id.* at 40 (“In the light of this long-continued and consistent interpretation we must concluded that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.”). The Sixth Amendment provides in pertinent part that “[i]n all *criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.*” (Emphasis added.) Thus, the Amendment’s

plain language makes clear that only an “accused” in a “criminal prosecution” has a right to a speedy trial under the Sixth Amendment. The Public Trial Clause is accordingly inapplicable, per *Quirin*, to this Military Commission.

b. Even if the accused was entitled to invoke the protections of the Speedy Trial Clause before this Commission, any delay in bringing the accused to trial meets the applicable constitutional standard.

i. In *United States v. Marion*, 404 U.S. 307 (1971), the Supreme Court explained that “the protection of the [Sixth] Amendment is activated *only when a criminal prosecution has begun* and extends only to those persons who have been ‘accused’ in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused.” *Id.* at 313 (emphasis added). “So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints *imposed by arrest and holding to answer a criminal charge* that engage the particular protections of the speedy trial provisions of the Sixth Amendment.” *Id.* at 320-21 (emphasis added); *see also United States v. Loud Hawk*, 474 U.S. 302, 310 (1986) (quoting *Marion* and reiterating that “when no indictment is outstanding only the ‘actual restraints imposed by holding to answer a criminal charge’ . . . engage the particular protections of the speedy trial provision of the Sixth Amendment”) (emphasis added); *United States v. MacDonald*, 456 U.S. 1, 6 (1982) (“A literal reading of the Amendment suggests that this right attaches only when a formal criminal charge is instituted and criminal prosecution begins.”).

ii. Applying these authorities, which make clear that the Sixth Amendment speedy trial right is only triggered by arrest and being held to answer for a criminal charge, the Courts of Appeals have repeatedly rejected arguments that detention for reasons that are not predicated upon a criminal accusation triggers constitutional speedy trial rights.¹ Perhaps most pertinent to Khadr’s contention, in *United States v. D’Aquino*, 192 F.2d 338 (9th Cir. 1951), the defendant, a United States national, worked as a propagandist for the Imperial Japanese Government, broadcasting programs specifically designed to cause disaffection by members of the armed forces of the United States and their allies. Following the surrender of Japan, she was interned in that nation by United States military authorities from October 17, 1945 until October 25, 1946 and then released. Thereafter, she was indicted for treason and taken into custody, pursuant to a warrant for her arrest on August 26, 1948. Prior to trial, D’Aquino claimed that her internment by U.S. military authorities triggered her Sixth Amendment right to a speedy trial.

iii. In summarily rejecting the claim, the court held that “wholly apart from whether [such] detention was or was not in accordance with law, it has no bearing whatever upon the question of her right to a speedy trial, which is one that arises after a

¹ The *Marion* Court left no doubt that the “detention” it contemplated as sufficient to trigger the Sixth Amendment speedy trial right was detention for a criminal accusation with a view to prosecution. It explained that such detention was that based upon the Government’s assertion that probable cause existed to believe the arrestee had committed a crime. *See* 404 U.S. at 320.

formal complaint is lodged against the defendant in a criminal case.” *Id.* at 350. Likewise, in *United States v. Duke*, 527 F.2d 386 (5th Cir. 1976), the court held that the placement of a federal prisoner in administrative segregation—which it described as “an internal disciplinary measure”—pending an investigation of prison misconduct, and prior to being charged with an offense, did *not* trigger his Sixth Amendment speedy trial right. *Id.* at 389-90.

iv. Similarly, in *United States v. Wallace*, 326 F.2d 881, 885-86 (7th Cir. 2003), the defendant was arrested by state authorities on 26 April 1999, but not charged with a federal offense resulting from the incident leading to the state arrest until almost two years later. Rejecting the defendant’s argument that the state arrest triggered his speedy trial rights under the Sixth Amendment with respect to the federal offense, the court reasoned that, because “it is well settled that the Sixth Amendment speedy trial right has no application prior to arrest or indictment,” the “arrest by state authorities on a state charge . . . does not start the Sixth Amendment speedy trial clock for purposes of the subsequent federal charge.” Consequently, the defendant’s right to a speedy trial on the federal charge did not arise until the return of the federal indictment. *Accord United States v. Walker*, 92 F.3d 714, 719 (8th Cir. 1996) (time spent in prison on state charges did not amount to prejudice for purposes of Sixth Amendment claim relating to federal charges); *United States v. Dickerson*, 975 F.2d 1245, 1252 (7th Cir. 1992) (state arrest did not trigger Sixth Amendment speedy trial right with respect to subsequent federal charges).

v. In *United States v. Sprouts*, 282 F.3d 1037 (8th Cir. 2002), the defendant, who was charged with escaping from a federal prison camp during November 1999 and thereafter voluntarily returning to the facility, was not indicted for that offense until August 2000. Prior to trial, he moved to dismiss the escape charge on speedy trial grounds, claiming that his continued detention triggered that right. In rejecting the claim, the Court of Appeals observed that “[the defendant] was not arrested for the escape because he was already incarcerated on another charge. Therefore, he did not become accused for purposes of the Sixth Amendment speedy trial provision until he was indicted on August 16, 2000.” *See also United States v. Jones*, 129 F.3d 718, 724 (2d Cir. 1997) (federal custody, pursuant to a writ of habeas corpus *ad testificandum*, does not constitute being “held for the purpose of answering federal charges,” so as to trigger the Sixth Amendment speedy trial right, “until the date of the federal indictment”); *United States v. Sorrentino*, 72 F.3d 294, 297 (2d Cir. 1995) (Sixth Amendment Speedy Trial right does not attach upon arrest unless accused is held for the purpose of answering criminal charges).

vi. By the same token, for the purpose of triggering any potential speedy trial right, the accused’s detention as an alien enemy combatant is indistinguishable from the defendants’ detentions in the above-cited cases, where the detention was distinct from the criminal charges whose dismissal was sought. Thus, similar to the defendant in *D’Aquino*, Khadr has been lawfully detained as an alien enemy combatant since his capture on the battlefield in Afghanistan on 27 July 2002. Consequently, for the period of time between the date of his capture and the initial preferral of charges on 4 November 2005, he was not even arguably subject to “actual restraints imposed by arrest and

holding to answer a criminal charge.” *Marion*, 404 U.S. at 320. Until the latter date, “the Government [neither] assert[ed] probable cause to believe [Khadr] [had] committed a crime,” nor obtained a “formal indictment or information.” *Id.* Instead, Khadr’s detention throughout that period was—and continues to be—predicated upon the entirely separate basis that the President, acting pursuant to authority granted by Congress under the AUMF, determined that he was an enemy combatant whose detention was necessary to prevent him from returning to the battlefield and aiding an enemy military force against which the United States was engaged in military operations. Accordingly, the period between Khadr’s initial detention as an enemy combatant and the initial preferral of charges could not have triggered any speedy trial right.

vii. Consequently, even if Khadr possessed a speedy trial right under the Sixth Amendment—which he does not—the right would not possibly have been triggered until 4 November 2005, when he was formally charged. In fact, however, *none* of the accused’s detention prior to the swearing of charges under the MCA could possibly count for purposes of any speedy trial challenge, since his continued detention was the product of his status as an alien enemy combatant and not a consequence of any pending charges. Even if Khadr had been tried by a military commission and acquitted of the charges, that status would not have changed and his detention as an alien enemy combatant could have continued. *Cf. United States v. Hamdan*, D-046 Ruling on Motion to Dismiss—Speedy Trial, at 3 (20 July 2008) (“Hamdan is being detained as a battlefield detainee in an ongoing conflict, and hence he will continue to be detained whether this prosecution proceeds or not.”).

viii. In *Barker v. Wingo*, 407 U.S. 514 (1972), the Supreme Court identified four factors which “courts should assess in determining whether a defendant has been deprived of his right [to a speedy trial].” *Id.* at 530. They include: “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” *Id.* The first of these factors—length of delay—“is to some extent a triggering mechanism. Unless there is some delay that is presumptively prejudicial, there is no necessity for inquiring into the other factors that go into the balance.” *Id.*

ix. Even accepting for the sake of argument that the lapse of time between the initial preferral of charges against Khadr on November, 4, 2005 and the present date was sufficient to trigger further analysis of a speedy trial right, the intervening delay was almost exclusively attributable to two factors: litigation concerning the constitutionality of the procedures issued by the President and the Secretary of Defense that governed the referral and trial of charges by a military commission, and repeated demands for continuances submitted by Defense counsel. Neither the length nor the reasons for delays weigh in the accused’s favor. *See Loud Hawk*, 474 U.S. at 316.

x. More specifically, on 7 November 2005—three days after Khadr was initially charged—the Supreme Court granted certiorari in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) to consider, *inter alia*, whether the President was authorized to convene military commissions under rules distinct from courts-martial. The *Hamdan* Court did not issue its decision 29 June 2006.

xi. Pending resolution of the questions presented by the *Hamdan* case, it was—to say the least—uncertain whether the government could proceed to trial with Khadr under the regime then in effect.² Thus, the length of the delay between referral of the charges against the accused and the present time is largely attributable to actions of all three branches of the federal Government in seeking to develop a constitutionally permissible regime for bringing to justice stateless enemies. Any delay predicated upon such efforts is not based on obstructionism or negligence of the Government.

xii. Moreover, even while *Hamdan* was pending before the Court, the Government made every effort to proceed with the trial. However, Defense counsel first sought to enjoin or stay those proceedings in the U.S. District Court for the District of Columbia, and then sought a continuance on 5 January 2006. Following the accused's arraignment on the initial charges, his counsel continued to object to the trial schedule and sought continuances, resulting in still further delay.

xiii. In the wake of the Court's *Hamdan* decision, the commission to which Khadr's case had been referred lost any authority it might have otherwise possessed to proceed. The *Hamdan* decision required the enactment of legislation adopting substantive offenses, procedural provisions, and express authorization to the President to enact implementing rules. Within approximately four months of the decision, Congress and the President jointly enacted the MCA. Ninety days after that, the Secretary of Defense promulgated the Manual for Military Commissions ("MMC"), which contained the necessary procedural regulations to implement the MCA. On 2 February 2007—less than one month after promulgation of the MMC, the accused was re-charged in conformity with the new legislation and the MMC.

xiv. The new charges were referred to a military commission on 24 April 2007 and an arraignment was set for 5 May 2007. The defense, however again engaged in dilatory tactics, requesting a continuance of the arraignment on the new charges until 4 June 2007. The consequent decision by the Military Judge on that date that the military commission lacked jurisdiction because the accused had never been deemed an *unlawful* enemy combatant necessitated an interlocutory appeal by the United States and an incidental delay until 24 September 2007 when the Court of Military Commission Review *reversed* the decision of the Military Judge, and ruled in favor of the Government. Of course, a delay resulting from a meritorious government appeal does not count against it in an assessment whether such delay was reasonable under *Barker*.

² Khadr maintains that the Government is responsible for the delay resulting from the *Hamdan* litigation by asserting that the government acted improperly in attempting to establish a military commission system that did not adopt the procedures of the Uniform Code of Military Justice. See Def. Mot. at 6-7. Yet, as Justice Thomas' dissent in *Hamdan* points out, see 126 S. Ct. at 2825 (Thomas, J., dissenting), prior to the majority's decision and, in the wake of the Court's prior decision in *Ex Parte Quirin*, 317 U.S. 1, 27 (1942), there were many reasons to believe that the President had acted properly in authorizing military commissions. Indeed, at the time of the initial preferral of charges against Khadr, the District of Columbia Circuit had held to that effect. See *United States v. Hamdan*, 415 F.3d 33, 38, 42-43 (D.C. Cir. 2004), *rev'd*, 126 S. Ct. 2749 (2006).

See *Loud Hawk*, 474 U.S. at 316 (“[r]eversals by the Court of Appeals are prima facie evidence of the reasonableness of the Government’s action” in pursuing the appeal).

xv. The ensuing lapses of time in bringing this case to trial are entirely attributable to the defense. The day after the CMCR issued its decision, the Military Judge ordered a resumption of the proceedings but the Defense moved for a continuance, which the Military Judge granted. The continuance delayed recommencement of proceedings until 8 November 2007. The accused then sought to have the proceedings held in abeyance pending appeal of the CMCR’s decision to the D.C. Circuit which, under the governing statutes, plainly lacked jurisdiction to review such decisions. After the Military Judge denied the motion, the accused filed a petition for review in the U.S. Court of Appeals on 19 October 2007, and moved for a stay pending disposition of the petition. The Stay Motion was denied on 6 November 2007. The following day, the Military Judge conducted a hearing on jurisdiction and established a schedule for the litigation of pretrial motions and proceeding to trial. Despite the Government’s ensuing demands to bring the case to trial, the defense repeatedly sought further continuances for pretrial preparation. The Military Judge granted the accused’s 15 February 2008 motion for a continuance. During subsequent motion hearings during March, April and May 2008, the Defense reiterated its opposition to going to trial.

xvi. Delays resulting from insistence by the defense for continuances “weigh[] overwhelming[ly] against [a defendant].” *United States v. Lam*, 251 F.3d 852, 857 (9th Cir. 2001); see also *United States v. Hopkins*, 310 F.3d 145, 150 (4th Cir. 2002). In this case, notwithstanding difficulties in proceeding to trial occasioned by the Supreme Court litigation in *Hamdan*, the reason for the delay here rests squarely on the shoulders of the Defense and its repeated efforts to obtain continuances.

xvii. “[P]erhaps most important [to a *Barker*-based speedy trial claim] is whether the defendant has actively asserted his right to a speedy trial. . . . The question [in this respect] is whether the defendant’s behavior during the course of the litigation evinces a desire to go to trial with dispatch.” *United States v. Batie*, 433 F.3d 1287, 1291 (10th Cir. 2006) (citing *Barker*, 407 U.S. at 536) (“[B]arring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied his constitutional right on a record that strongly indicates . . . that the defendant did not want a speedy trial”).

xviii. In this case, in light of the Defense’s repeated demands for stays and continuances—which proved highly successful in prolonging the commencement of trial—it is manifest that the last thing on earth that the accused wanted was to “go to trial with dispatch.” *Batie*, 433 F.3d at 1291. To the contrary, the accused’s instant claim that he wanted a speedy trial rivals in sheer audacity that of the proverbial parricide who, after murdering his parents, seeks the protection of the state on the ground that he is an orphan.³ See, e.g., *Lam*, 251 F.3d at 859 (defendant’s successive requests for continuances considerably diminished the weight of his assertions of a speedy trial right).

³ The accused’s sole basis for claiming that he demanded a prompt trial is that on 4 August 2003 he informed a FBI polygrapher that he would prefer to be taken to trial. Def. Mot. 8. Of course, at that time, no charge on which he could be taken to trial was even pending.

xix. As we explained in greater detail in our 21 February Response to a Defense Motion for a Continuance, it is apparent from the statements and press releases of the accused's attorney, that what the Defense really sought was not merely delay of the trial, but to entirely foreclose the possibility that such a proceeding would ever occur by generating sufficient pressure from the international community that the United States would be compelled to repatriate the accused to Canada. For example, on 24 April 2007, Defense counsel issued a press release asserting that:

[n]ow is the time for Canada and the United States to negotiate a political resolution because the commissions system is incapable of justice. Otherwise [Khadr] just barely twenty years of age and a minor at the time of the alleged crimes, is guaranteed to be convicted in one of the greatest show trials on earth. This should not be the legacy of America or Canada.

Gov't Response To Defense Motion For a Continuance, at 2 and Attachment 1 thereto.

xx. During ensuing trips to Canada, Defense counsel sought to lobby Canadian officials to demand Khadr's release and, while in London, he similarly lobbied British officials to pressure their Canadian counterparts to make such demands upon the United States. See Gov't Response to Motion for a Continuance, *supra*, at 3 (collecting authorities). And, during a 4 December 2007, interview with the *London Times*, the accused's attorney referred to the military commission as "an illegitimate process" and emphasized that the defense would "keep our sights focused on creating the circumstances for a political resolution of the case." *Id.* Such antics cannot possibly be squared with a genuine desire promptly to resolve the question of the accused's guilt or innocence by virtue of a trial. Accordingly, the third *Barker* factor strongly weighs against the accused's claim.

xxi. Finally, the accused has proffered no colorable claim of prejudice. First, as we have explained earlier, his threshold claim of "oppressive pretrial incarceration," Def. Mot. at 8, is the result of his detention as an alien enemy combatant and not the pendency of charges. That detention can continue without regard to whether he is convicted or acquitted of the pending charges.

xxii. Further, the accused maintains that witnesses' memories have faded thereby creating the possibility that the defense will be impaired by the loss of exculpatory information. Def. Mot. at 8-9. But, as the Supreme Court explained in *Loud Hawk*, in assessing a claim of prejudicial post-indictment delay, "[the] possibility of prejudice is not sufficient to support [a defendant's] position that [his] speedy trial rights were violated." 474 U.S. at 315 (emphasis added). Consequently, it is insufficient to merely claim that "[w]itnesses have disappeared; recollections are dim; and the investigation is impaired." *United States v. Williams*, 372 F.3d 96, 113 (2d Cir. 2004). Instead, such claims must "articulate prejudice with . . . specificity." *Id.*; see also *United States v. Schlei*, 122 F.3d 944, 988 (11th Cir. 1997) (holding that defendant failed to demonstrate prejudice by claiming death of potential defense witness absent a showing that witness's testimony would have been material to the defense); *United States v. Juarez-Fierro*, 935 F.2d 672, 676 (5th Cir. 1991) (conclusory statements about the

prejudice a defendant has suffered are insufficient to sustain a Sixth Amendment speedy trial challenge). The accused has not come close to satisfying the requirement of making a concrete, particularized claim of prejudice predicated upon memory loss. Moreover, to the extent the delay in bringing this matter to trial impacts the parties' ability to present evidence, it is *the Government* that has been prejudiced by the conduct of the accused and his attorneys, since it is the Government's burden to prove the accused's guilt beyond a reasonable doubt. See 10 U.S.C. § 949l(c)(4) ("[T]he burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.").

xxiii. The accused also observes that a potential Government witness has generated the false impression that the accused was the sole combatant in the compound where he was captured to have survived an aerial attack and therefore was the only person who could have killed a U.S. Army non-commissioned officer in that engagement. The accused maintains that such public assertions have created an aura of "harmful misinformation" that may taint the atmosphere of the trial. Def. Mot. at 8-9. But the accused has entirely failed to explain the relationship of this development to "post-indictment" delay. Moreover, the possibility that such statements may have "contaminated [the] memories" of witnesses is not only speculative, it is a matter that can amply be explored during cross-examination in the event that such "potentially contaminated" individuals are called to testify.⁴

xxiv. Many of the accused's other claims of prejudice, *see* Def. Mot. at 9, including the failure of government authorities to perform an autopsy on the body of his victim; the disruption of the crime scene; the accused's treatment upon capture; the accused's age at the time of his initial detention; his incarceration with older prisoners under conditions that he maintains were unsuitable for juvenile offenders; likewise, have nothing whatsoever to do with the delay following the preferral of charges. Instead, the bases for such complaints either long preceded the initiation of charges, or were occasioned by his detention as an enemy combatant.

xxv. To further support his claim of prejudice, the Defense also observes that it was "not provided physical evidence to make up for the fact that there were no witnesses to the crime." Def. Mot. at 9. Similarly, the Defense complains that it was not provided a mental health examination for over four years, particularly "in the weeks or months following his capture." As a consequence of the Government's alleged failure to afford him a prompt mental health evaluation, the Defense speculates that it may be difficult to establish the accused's mental state at the time of the offense. Once again, however, it is difficult to understand how any failure to provide the accused with physical evidence or a prompt mental health examination is a consequence of "post-indictment" delay. As to the first, the fact that "there were no witnesses to the crime" simply has no bearing upon such

⁴ The accused also advances the claim that many of the witnesses for his case who have been interviewed had their statements taken after the charges against him had been referred to trial. Therefore, he maintains, knowledge of publicly announced charges would tend to skew their recollections of events. Again, however, this prejudice claim rests upon pure speculation. Moreover, it is difficult to understand the bearing of "post-indictment" delay upon observations that may ensue whenever publicity attends the announcement of criminal charges.

delay. Further, if the accused perceives that the government failed to furnish him access to physical evidence in its custody to which he was entitled, the issue is properly the subject matter of a discovery motion and not a speedy trial claim. Likewise, the government's alleged failure to subject the accused to a psychological evaluation shortly after his capture in July 2002 has no bearing whatsoever upon pre-trial delays that may have occurred more than three years later when he was ultimately charged. And the accused has not even attempted to explain how any such mental condition could support a *mens rea*-based defense to any of the charges now pending against him. Consequently, the "prejudicial" impact upon the accused of the failure to conduct a timely psychological evaluation is just as speculative as his preceding claims.

xxvi. For all the foregoing reasons, the motion to dismiss for denial of a speedy trial should be denied.

c. Conclusion

i. Alien enemy combatants, such as the accused, held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no rights under the Sixth Amendment. Moreover, even if the accused were to possess rights under the Speedy Trial Clause, under the standard enunciated by the Supreme Court in *Doggett* and *Barker*, virtually all of the relevant delay is attributable to the accused and the accused has not been prejudiced thereby. Accordingly, the accused's speedy trial rights, to the extent he has any, have not been violated.

ii. The Government respectfully requests that the Military Judge rule *both* that the Speedy Trial Clause does not apply to the accused, *and* that, even if it does, the accused's rights have not been violated by his detention.

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.

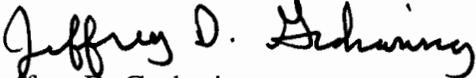
10. Additional Information: None.

11. Attachments:

- a. *United States v. Hamdan*, D-046 Ruling on Motion to Dismiss—Speedy Trial (20 July 2008).
- b. *Hamdan v. Gates*, Civil Action No. 04-1519, Memorandum Order (D.D.C. 18 July 2008).

- c. *United States v. Khadr*, D24 Government Response to the Defense's Motion for a Continuance and Appropriate Relief from Terms of this Commission's 28 November 2007 Schedule for Trial (21 Feb. 2008).

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