

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion**  
to Suppress Statements

for Failure to Afford Miranda Rights

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 suppress the introduction of any interrogation reports or any interrogator testimony regarding the substance of statements Mr. Khadr may have made if the questioning was not preceded by an advisement of *Miranda* rights, or a valid waiver of any of those rights or conducted with the assistance of counsel.<sup>1</sup>

3. **Overview:** *Miranda*'s protection of the rights to remain silent and to the assistance of counsel during interrogations are a fundamental and near-universal aspect 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 Amendment due process standards, such as *Miranda*, to this military commission. The defense therefore supplements Defense Motion D063, asking that the military judge rule inadmissible any and all reports or testimony concerning statements Mr. Khadr is alleged to have made during custodial interrogations taken without a clear showing by the government that *Miranda* rights were offered and waived by Mr. Khadr.

4. **Burdens of Proof and Persuasion:** As the moving party, the defense bears the burden of establishing any factual issues necessary to resolve the motion by a preponderance of the evidence. R.M.C. 905(c)(2)(A).

5. **Facts:**

a. Mr. Khadr was detained by the United States government in Afghanistan on 27 July 2002 and transferred to the U.S. detention facility at Guantanamo Bay, Cuba, on 29 October 2002.

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<sup>1</sup> On 29 May 2008, Mr. Khadr moved this Commission to exclude out-of-court statements made by Mr. Khadr during his detention and the pendency of the criminal investigation into this case for the government's failure to afford Mr. Khadr a warning as to his rights to remain silent and against self-incrimination. (*See* D063.) Consistent with the controlling law in effect at the time, this motion was based exclusively upon the Military Commissions Act and Article 31 of the UCMJ, which applied at the time of the custodial interrogations. In light of the reversal of *Boumediene v. Gates*, 476 F.3d 981 (D.C. Cir. 2007), this motion is filed pursuant to the Fifth Amendment of the Constitution. Because D063 did not rely on the Fifth Amendment, this motion necessarily addresses the issues raised in D063 as well as additional issues.

b. The earliest record of a law enforcement interrogation produced to the defense is dated 16 September 2002. (See CITF Agent's Investigation Report, dated 16 September 2002, (attachment E to Def. Mot. to Compel Discovery, D027).) That interrogation was conducted by Criminal Investigation Task Force personnel in Bagram, Afghanistan. *Id.* He was interrogated numerous times by law enforcement and/or criminal investigators over the next year.<sup>2</sup> At no time during any of these interrogations is there any indication that interrogators informed of his right to counsel or a right to remain silent. By contrast, consistent with the Standard Operating Procedures in place at both Bagram and GTMO, Mr. Khadr's quality of life was wholly contingent upon his full and consistent cooperation with any and all interrogators. (See, e.g., Camp Delta Standard Operating Procedures, 28 March 2003, ¶¶ 4-20(a)-(b), 8-1, 8-7(a)(5), 8-9, 9-2 (attachment A to Def. Rep., D057).)<sup>3</sup>

c. On 6 November 2004, Mr. Khadr first met with counsel. Then from 7-8 December 2004, *in the absence of his counsel*, he was interrogated by CITF agents for three hours, specifically for the specific purpose of extracting self-incriminating statements that underlie the government's case. (See CITF Report of Investigative Activity, dated 8 December 2004, Bates No. 00766-000166-184 (attachment A).) At no point during these interrogations is there any indication that the interrogators informed Mr. Khadr of his rights to silence or counsel. *Id.* In fact, it is clear from the interrogation report that Mr. Khadr sought to recant earlier admissions he is alleged to have made and was coerced into reiterating inculpatory statements consistent with the government's theory of the case.

## 6. Argument:

### I. Pursuant to the Supreme Court's Ruling in *Boumediene v. Bush*, Fifth Amendment *Miranda* Rights Govern Military Commission Proceedings

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.)

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<sup>2</sup> Documents provided by the prosecution include summaries of interviews conducted by CITF or FBI agents on the following dates: 16, 17, 22 September 2002; 5, 28 October 2002; 5, 7, 20, 22, 23, 26, 27, 30 November 2002; 2-6, 9, 10, 16, 19, 20, 23 December 2002; 6, 16 January 2003; 3, 17, 20 February 2003; 12 March 2003; 11, 14, 19 August 2003.

<sup>3</sup> In addition, numerous documents in the CID report of investigation into detainee abuse at Bagram indicate that Military Intelligence personnel directed Military Police personnel (responsible for supervision of detainees outside the context of interrogation sessions) to take various actions with respect to detainees to further intelligence gathering objectives (e.g., deprive of sleep, play loud music, and employ barking dogs). (See, e.g., excerpt of statement of SGT H, (attachment F to Def. Mot. to Compel, D057).)

(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. *See 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" are the right to remain silent and the right to the assistance of counsel as set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). *See, e.g., Ayuyu v. Tagabuel*, 284 F.3d 1023 (9th Cir. 2002) (awarding damages under 28 U.S.C. 1983 for breach of *Miranda* rights in the Northern Mariana Islands); *United States v. Vasquez*, 857 F.2d 857 (1st Cir. 1988) (applying *Miranda* to custodial interrogations in Puerto Rico).

(B) Second, it is not "impractical or anomalous" to apply *Miranda* to military proceedings in the same manner that they have been for over forty years. In *United States v. Tempia*, 37 C.M.R. 249, 253 (C.M.A. 1967), the Court of Military Appeals held that simply because "military law exists and has developed separately from other Federal law does not mean that persons subject thereto are denied their constitutional rights." The military has therefore fully incorporated the Fifth Amendment guarantees protected by *Miranda* with what is routinely referred to as "Miranda-Tempia." Like in the civilian context, "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way" triggers the right to a rights warning, the right to the assistance of counsel, the right to remain silent and the right to halt the interrogation process "if the individual indicates in any manner that he does not wish to be interrogated." *Id.*, at 256 (quoting *Miranda*, 384 U.S., at 444). Evidentiary exclusion is therefore the routine and universal remedy when military law enforcement officials flout *Miranda-Tempia* in the conduct of their interrogations. *See, e.g., United States v. Gardinier*, 65 M.J. 60 (CAAF 2007); *United States v. Williams*, 23 M.J. 362 (C.M.A. 1987).

(C) With respect to both the extraterritorial application of *Miranda* and its application within the military justice context, there can be no doubt. The constitutional protections of the Fifth Amendment apply to safeguard the right to silence, the right to counsel and the integrity of the evidence admitted in this military commission proceeding. This does not mean that every combatant captured on the battlefield must be given a lawyer when interrogated for intelligence. It simply means that if the fruits of the interrogation are to be introduced as evidence at a criminal trial, that they bear all the *Miranda* hallmarks of reliability and voluntariness that due process requires. The only question that remains is whether the self-incriminating statements upon which the government seeks to rely in its case against Mr. Khadr were taken consistently with *Miranda*.

## II. Statements taken from Mr. Khadr in breach of his *Miranda* Rights are not Admissible as Evidence at Trial

a. In *Miranda v. Arizona*, the Supreme Court held that a defendant, as a prerequisite to custodial interrogation, must be warned and informed of certain rights. Once in the custody of the government and once an interrogation is about to begin, he must be advised that:

- (1) He has the right to remain silent;
- (2) Any statement he makes may be used against him;
- (3) He has a right to consult with an attorney or to have an attorney present during any questioning; and
- (4) If he cannot afford an attorney, one will be appointed to represent him.

*Miranda v. Arizona*, 384 U.S. 436 (1966). “This tenet, rooted squarely in the Constitution, has become embedded in routine police practice to the point where the warnings have become part of our national culture.” *United States v. Bin Laden*, 132 F.Supp.2d 168, 186 (S.D.N.Y. 2001) (quoting *Dickerson v. United States*, 530 U.S. 428 (2000)).

(1) *Miranda* warnings are an absolute prerequisite to interrogation and no amount of circumstantial evidence that a person may have been aware of his rights will suffice in place of the actual warnings. See *Dickerson*, 530 U.S. at 444; *Miranda*, 384 U.S. at 468-469. Statements obtained in the absence of a rights warning or a valid waiver are *per se* inadmissible as evidence against the suspect. *Dickerson*, 530 U.S. at 448; *Miranda*, 384 U.S. at 476.

(2) Statements obtained in violation of *Miranda* do not become admissible by Executive decree. The simple fact that interrogators were abiding by SOPs or other superior orders that permitted them to deviate from *Miranda* does not vitiate its substance and consequences.<sup>4</sup> *Missouri v. Seibert*, 542 U.S. 600 (2004) (“Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute.”).

(3) Nor is it of any moment that the interrogations were conducted overseas. The federal courts have unequivocally held that *Miranda* applies to the conduct of U.S. interrogators, regardless of where they may detain a suspect. See, e.g., *United States v. Yunis*, 859 F.2d 953, 971 (D.C. Cir. 1988) (Mikva, J. concurring) (“[T]he circumstances surrounding [the alien defendant’s] interrogation by FBI agents [abroad] should be subjected to fifth amendment scrutiny.”). The only relevant inquiry is whether statements or their substance, when taken in disregard of *Miranda*, will be admitted at a trial governed by constitutional due process.

(A) In *Bin Laden*, the federal courts were squarely faced with the question of whether statements taken without a *Miranda* warning become admissible if taken

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<sup>4</sup> While the Defense acknowledges that UCMJ art. 31 was repealed by MCA § 948b(d)(1)(B), it warrants the commission’s attention that it was in full force at the time of all of Mr. Khadr’s interrogations, providing more than sufficient notice to his interrogators of what law governed their actions. Prior to the enactment of the MCA, “the rules applicable in courts-martial must apply.” *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2792 (2006)

abroad. There, federal and New York City law enforcement agents in Kenya arrested an alien citizen with no substantial connections to the U.S. other than his suspected involvement in the 1998 embassy bombing. Upon his arrest, the New York City detective read the defendant a modified rights warning, that did not convey an absolute right to silence or counsel.<sup>5</sup> After recognizing the government's proffered concerns about hampering the criminal investigation of terrorist activity, the court held that "a defendant's statements, if extracted by U.S. agents acting abroad, should be admitted as evidence at trial only if the Government demonstrates that the defendant was first advised of his rights and that he validly waived those rights." *Bin Laden*, 132 F. Supp.2d at 187.

(B) This was not a "knee-jerk" application of procedural law. The court in *Bin Laden* fully recognized the decision's "inevitable impact on U.S. law enforcement officials who, in furtherance of their duties and with increasing regularity, are dispatched and stationed beyond our national borders." *Bin Laden*, 132 F. Supp.2d at 185. It nevertheless held that the "great wisdom of *Miranda*-that American law enforcement must do what it can at the start of interrogation to dissipate the taint of compulsion-is equally prescient, if not more so, when U.S. agents are conducting custodial interrogations in foreign lands, where certain factors impinging on voluntariness will simply be out of their control." *Id.* at 187.

(C) Moreover, the court relied upon the universal application of the "joint venture" exception to the general rule that interrogations by foreign entities need not comply with *Miranda* to be admissible. Even if conducted by foreign agents on foreign soil, "the lack of *Miranda* warnings will still lead to suppression if U.S. law enforcement themselves

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<sup>5</sup> The rights warning, in full read:

We are representatives of the United States Government. Under our laws, you have certain rights. Before we ask you any questions, we want to be sure that you understand those rights. You do not have to speak to us or answer any questions. Even if you have already spoken to the Kenyan authorities, you do not have to speak to us now. If you do speak with us, anything that you say may be used against you in a court in the United States or elsewhere. In the United States, you would have the right to talk to a lawyer to get advice before we ask you any questions and you could have a lawyer with you during questioning. In the United States, if you could not afford a lawyer, one would be appointed for you, if you wish, before any questioning. Because we are not in the United States, we cannot ensure that you will have a lawyer appointed for you before any questioning. If you decide to speak with us now, without a lawyer present, you will still have the right to stop answering questions at any time. You should also understand that if you decide not to speak with us, that fact cannot be used as evidence against you in a court in the United States. I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

*Bin Laden*, 132 F. Supp.2d at 173-74. The government has never contested the fact that Mr. Khadr was given *any* rights warning, and certainly not one as detailed as this.

actively participated in the questioning . . . or if U.S. personnel, despite asking no questions directly, used the foreign officials as their interrogational agents in order to circumvent the requirements of *Miranda*.” *Bin Laden*, 132 F. Supp.2d at 187 (citations omitted).<sup>6</sup>

### **III. The Government’s Failure to afford Mr. Khadr his *Miranda* Rights is Especially Significant in Light of Mr. Khadr’s Young Age**

a. What makes the failure to comply with *Miranda* in this case particularly egregious is the fact that Mr. Khadr was held and interrogated from the age of fifteen. At no time was he offered the assistance of a guardian ad litem or independent representative, let alone counsel, during the course of his interrogations.

(1) Over and above the warning itself, is the substance it describes. “[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . .” *Miranda*, 384 U. S. at 469. At no point during his interrogations was Mr. Khadr provided the assistance of counsel and there has never been the suggestion that he was even informed that he had such a right. In fact, the government reinitiated its aggressive interrogations of Mr. Khadr for the very purpose of this criminal investigation *after he had met with and retained counsel*. It did so while making no attempt to provide his counsel the opportunity to be present and there is no indication from the interrogation report that any of the criminal investigators even notified Mr. Khadr that his counsel could be present. Within military justice as much as the civilian world, any statement taken in such wanton disregard of a defendant’s counsel rights would be unequivocally inadmissible. *See United States v. Mitchell*, 51 M.J. 234 (C.A.A.F. 1999); *Minnick v. Mississippi*, 498 U.S. 146, 155 (1990) (“[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.”); *Smith v. Illinois*, 469 U.S. 91 95 (1984) (“[A] valid waiver [of counsel] ‘cannot be established by showing only that [the defendant] responded to further police initiated custodial interrogation.’”).

(2) This is especially so because, just as UCMJ Article 31 affords members of the United States armed forces heightened protection during questioning, federal law heightens the *Miranda* protections afforded juveniles while in federal custody. *See* 18 U.S.C. 5033.<sup>7</sup>

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<sup>6</sup> As is detailed in the Defense Response to Military Judge’s Oral Request for Supplemental Briefing (International Practice on the Exclusionary Rule) on Defense Motion D063, dated 2 July 2008, the *Miranda* warning, and suppression of statements taken in its absence, is nearly universal in both international forums and in foreign jurisdictions. Equally, the right to counsel is generally seen as inavoidable during interrogations and certain countries, such as Germany and Russia, do not even allow a criminal suspect to waive the presence of counsel.

<sup>7</sup> Federal law requires, in relevant part:

*Whenever* a juvenile is taken into custody for an alleged [violation of a law of the United States], the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile’s parents, guardian, or custodian of such custody.

(A) Not only must a juvenile be personally advised of his legal rights, but some parent, guardian or consular official must be immediately notified that the juvenile has been detained and of the basis of the detention. This is not simply a formality, but rooted in the fact that “courts have recognized that children need parental involvement during interrogation. For example, the Supreme Court has noted that unique concerns arise in the context of interrogating juveniles.” *United States v. Doe*, 170 F.3d 1162, 1167 (9th Cir. 1999) (citing *In re Gault*, 387 U.S. 1, 55 (1967)); *see also United States ex rel. Riley v. Franzen*, 653 F.2d 1153, 1160 (7th Cir.1981) (a parent or guardian must be notified prior to interrogation because they “may significantly aid a juvenile in asserting his Fifth Amendment privilege.”).

(B) Accordingly, suppression is appropriate if the government makes no attempt to reach out to consular or parental figures. *United States v. C.M.*, 485 F.3d 492, 503-04 (9th Cir. 2007) (suppressed statements taken from juvenile in the absence of consular notification); *United States v. Doe*, 219 F.3d 1009 (9th Cir. 2000) (suppressed statements taken from juvenile in the absence of parental notification).

(C) In fact, Mr. Khadr is reported as asking to see his brother, who was detained in GTMO at the time, before responding to further interrogation. *See, e.g.*, FBI, Dissemination to OMC-Request for Document Required in Support of Military Commission in the Case of US v. Omar Khadr, dated 22 February 2006, Bates No. 00766-000064-65 (attachment B) (“KHDAR stated that he is currently not cooperating because he has not seen his brother in approximately 2 years, and he wants to see his brother. ... Once he sees his brother, he will cooperate again.”) While it may have been impracticable to procure other members of Mr. Khadr’s family during his interrogations, there was no such obstacle in providing him either his brother or consular access. In fact, though the government continues to deny the Canadian government consular access, it did provide Canadian intelligence operatives an opportunity to interrogate Mr. Khadr. (*See, e.g.*, Report Investigative Activity, 24 February 2003, Bates No. 00766-000148-50 (attachment C).)

(3) The obvious propriety of putting some kind of guardian in place for a juvenile undergoing interrogation is not simply a nicety of civilian life, but was recognized as an important safeguard for juveniles’ mental health by JTF-GTMO. The Recommended Course of Action for Reception and Detention of Individuals Under 18 Years of Age, dated 14 January 2003 (Attachment D to Def. Mot. to Suppress, D062), sets forth that, at a minimum, the juvenile should be accompanied by medical personnel to “monitor the pediatric detainees’ psychological well-being.” *Id.* at 2. In fact, the original draft of the RCA went so far as to set forth that if “interrogation is attempted, a legal representative should be assigned to the detainee to act as counsel for the child’s emotional, psychological, medical and emotional protection.” *Id.* Needless to say, none of this was ever applied to Mr. Khadr.

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

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18 U.S.C. 5033 (emphasis added).

**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 C

CITF Agent's Investigation Report, dated 16 September 2002, (attachment E to Def. Mot. to Compel Discovery, D027)

Camp Delta Standard Operating Procedures, 28 March 2003, ¶¶ 4-20(a)-(b), 8-1, 8-7(a)(5), 8-9, 9-2 (attachment A to Def. Rep., D057)

**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. CITF Report of Investigative Activity, 8 December 2004
- B. FBI, Dissemination to OMC-Request for Document Required in Support of Military Commission in the Case of US v. Omar Khadr, 22 February 2006
- C. Report Investigative Activity, 24 February 2003

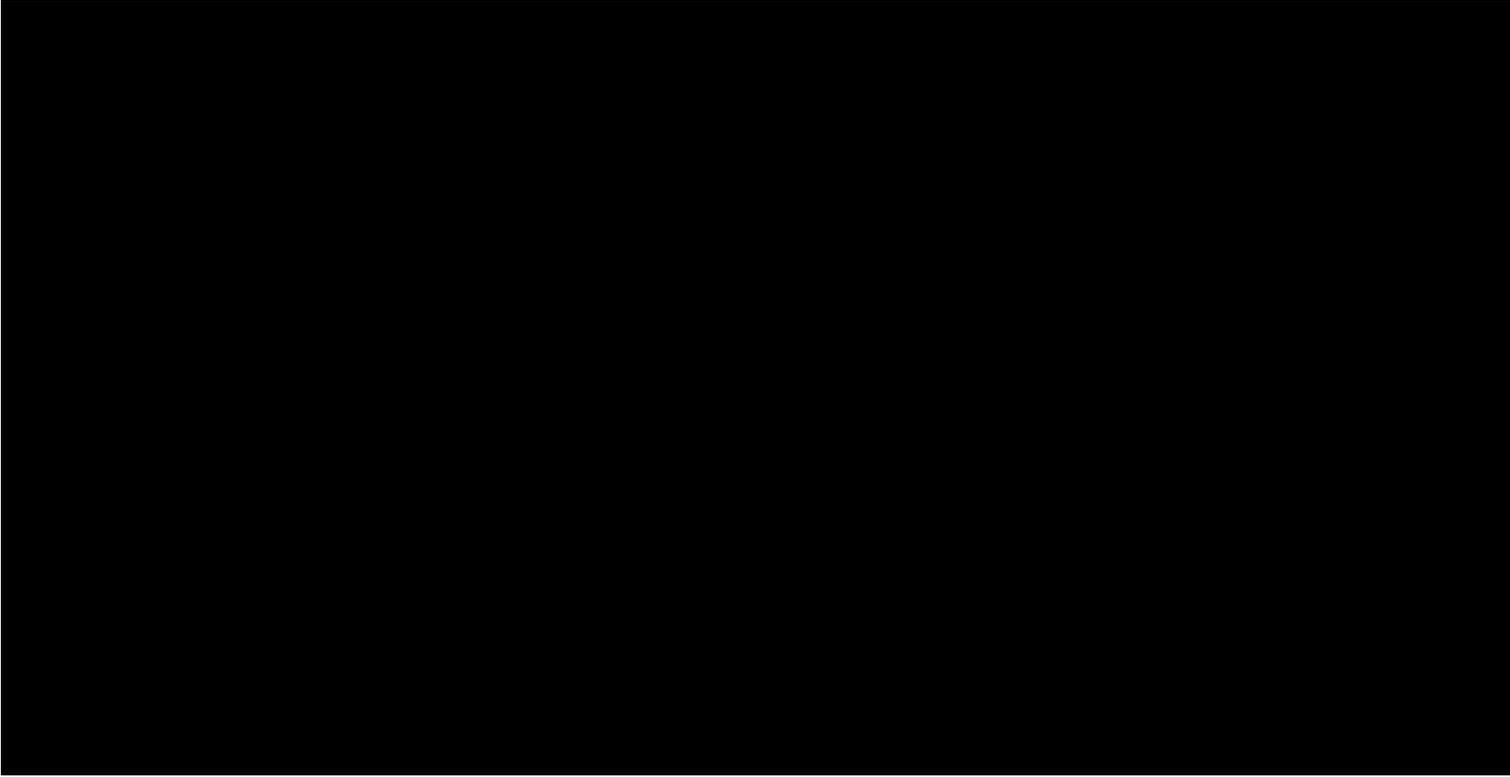


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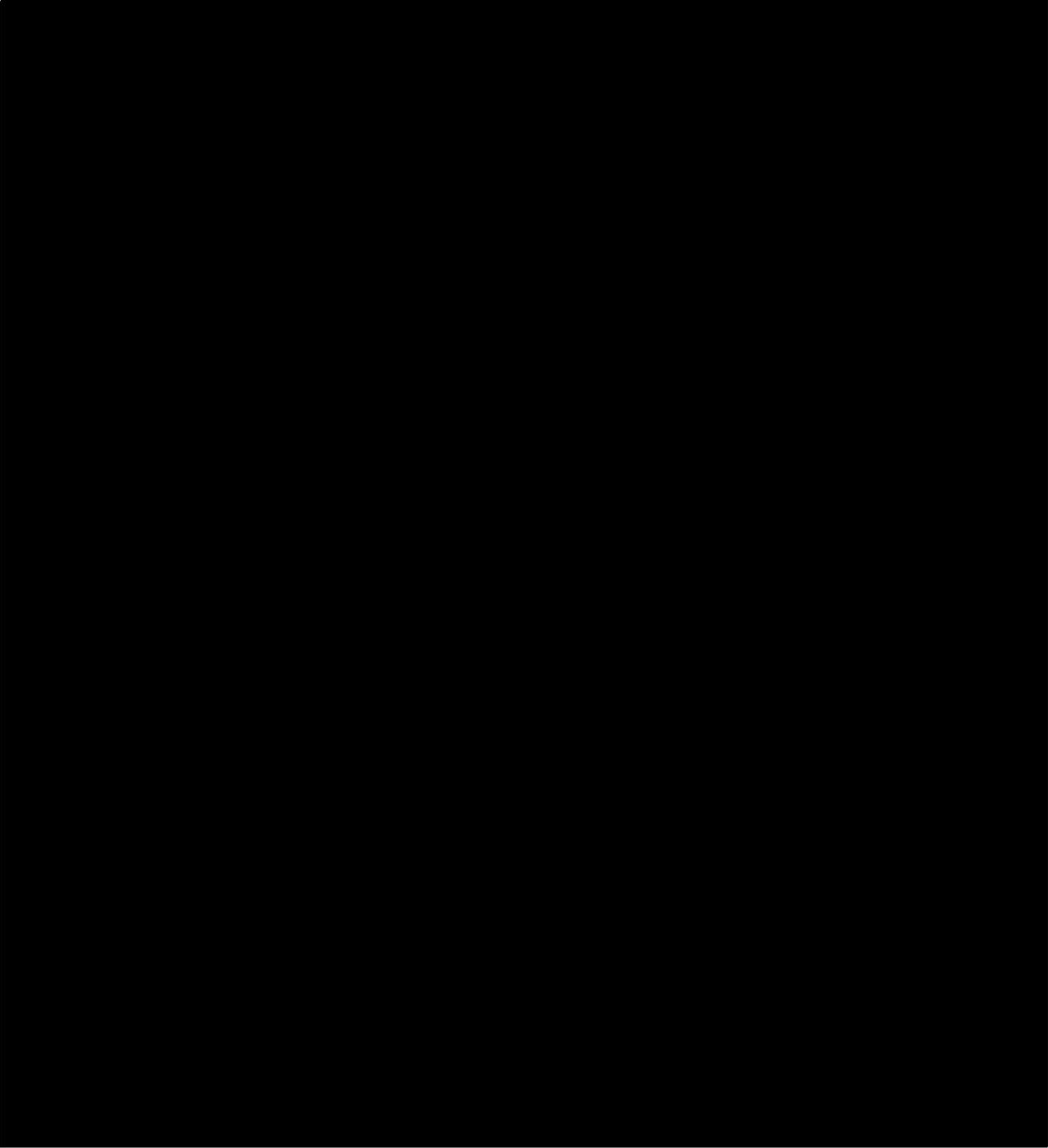




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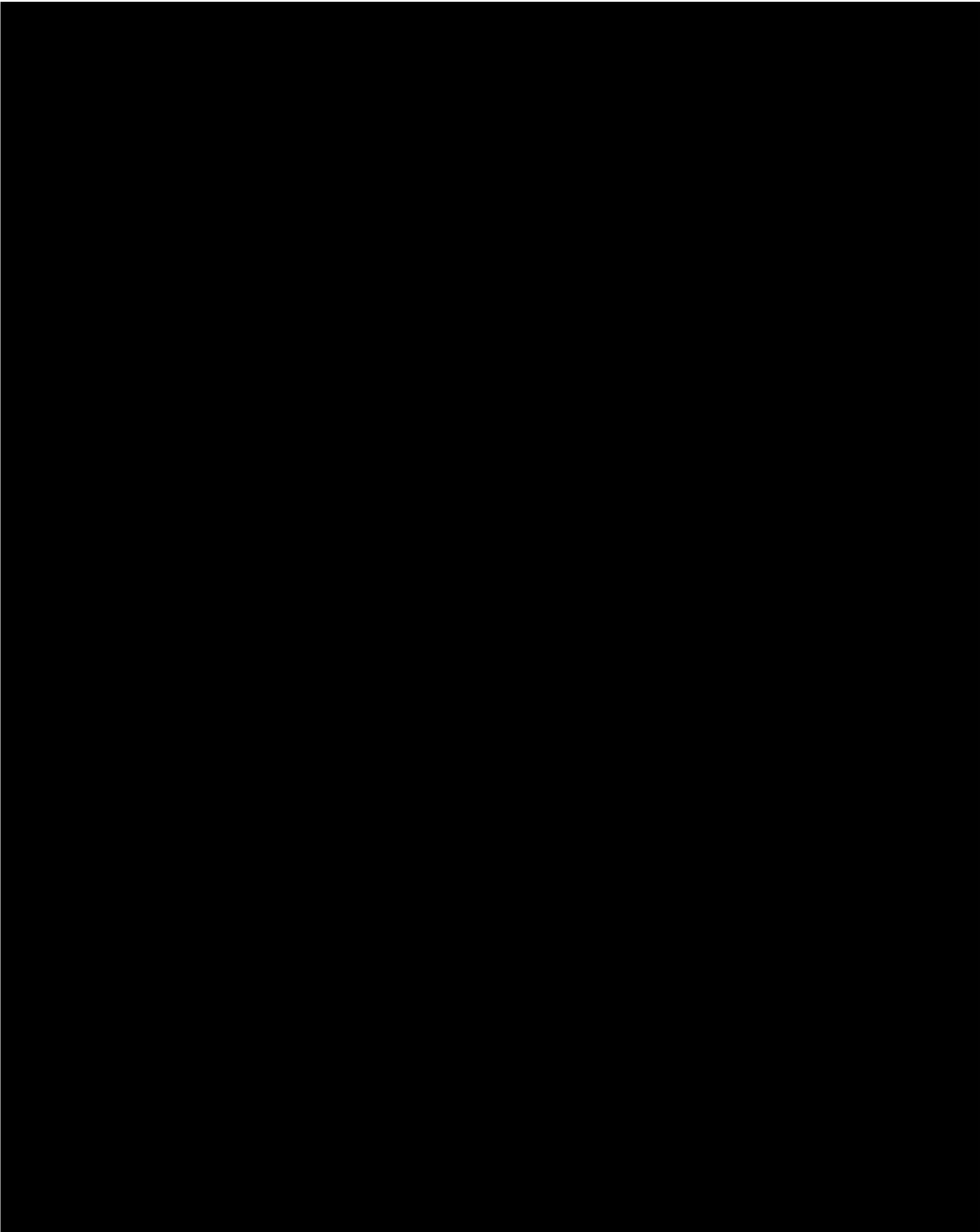


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UNITED STATES OF AMERICA

v.

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

D-070

GOVERNMENT'S RESPONSE

To the Defense Motion to Suppress  
Statements for Failure to Afford Miranda  
Rights

25 July 2008

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

2. **Relief Requested:** The Government respectfully submits that the Defense's motion to suppress the accused's statements must be denied.

3. **Overview:**

a. The Defense's Motion must be denied. Contrary to the Defense motion, the Supreme Court in *Boumediene* did not provide that alien enemy combatants detained at Guantanamo Bay, Cuba are entitled to Fifth Amendment *Miranda* rights. In drafting the MCA, Congress and the Executive recognized that application of the Fifth Amendment would be "impractical" in the course of this armed conflict and "anomalous" to other limitations placed on the protections afforded unlawful enemy combatants. Finally, the age of the accused does not alter the inapplicability of *Miranda* to an alien unlawful enemy combatant.

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

5. **Facts:** All of the facts necessary to decide this motion are contained in the discussion.

6. **Discussion:**

a. **An alien unlawful enemy combatant, such as the accused, who has been charged under the MCA, has no rights under the Fifth Amendment.**

i. The accused, an alien unlawful enemy combatant, argues that he is entitled to the due process protections of the Fifth Amendment. Included among those protections are the rights to remain silent and the assistance of counsel during interrogations. These rights, however, do not extend to alien enemy combatants, such as the accused, who are detained at Guantanamo Bay, Cuba, to be tried for war crimes and other offenses codified in the MCA. 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 id.* at 2244-51, and the “adequacy of the process” that the petitioners had received. 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 the detentions at Guantanamo Bay, in providing for the judicial review of the detention 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.”).

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. 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 Khadr 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. Khadr's status as an alien unlawful enemy combatant has not been challenged by the accused. *See United States v. Khadr*, Transcript of RMC 803 Session, 8 November 2007, at 81. According to the Commission, personal jurisdiction over the accused exists, meaning the accused is considered an alien unlawful enemy combatant until that status is challenged. *Id.* at 90; *see also United States v. Khadr*, USCMCR 07-001 (Sept. 24, 2007) ("We find that this facial compliance by the Government with all the pre-referral criteria contained in the Rules for Military Commissions, combined with an unambiguous allegation in the pleadings that Mr. Khadr is "a person subject to trial by military commission as an alien unlawful enemy combatant," entitled the military commission to initially and properly exercise *prima facie* personal jurisdiction over the accused."). *Id.* at 21. Moreover, the accused will have the opportunity to challenge his status – if he raises the issue – at trial. Thus, *Boumediene* does not even provide the accused with any rights under the Suspension Clause. It follows *a fortiori*, that he may not lay claim to any of the other individual rights secured by the Constitution.

ix. Indeed, even if the accused 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 holding, recognized previously by the Commission, 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. *See United States v. Khadr*, D-014, Ruling on Defense Motion to Dismiss for Lack of Jurisdiction (Equal Protection), at 2, para. 7-8 ("[M]ilitary commissions are not subject to the requirements of the Fifth Amendment."). 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”).

vi. 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 of unlawfully killing a U.S. Soldier in the course of unlawfully waging war against the nation and being detained at 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 discipline, including military trials for offenses against aliens or Americans.” *Id.*; *see also Davis v. United States*, 512 U.S. 452 (1994) (“We have never had occasion to consider whether the Fifth Amendment privilege against self incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military.”). *Id.* at 457 n.\*. As articulated by Judge Allred in *U.S. v. Hamdan*, D-029 Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices and D-044 Motion to Suppress Statements Based on Fifth Amendment (20 July 2008), “[I]t would be anomalous to provide Constitutional protections to unlawful combatants when their only connection or association with the United States is that they are being held here for having unlawfully opposed us on the field of battle. *Id.* at 13 (citing *Nicaragua v. United States*, 1986 I.C.J. 14, ¶ 218, 25 I.L.M. 1023, cited at *Hamdan v. Rumsfeld*, 548 U.S. 557, 776 n. 63 (2007)).

vii. As the Supreme Court explained in *Ex parte Quirin*, 317 U.S. 1 (1942), 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 conclude 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 Fifth Amendment protections embodied in *Miranda* accordingly do not apply to the accused.

viii. *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). Thus, the recognition that *Boumediene* did not overrule those cases is sufficient in and of itself to deny the accused's requested relief.

ix.. Contrary to *Agostini*, the accused would read *Boumediene* as, *sub silentio*, overruling the Court's existing precedents and providing a two-part test – found nowhere in *Boumediene* – 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 and narrow issue before it, and is therefore inapposite to the question of whether other portions of the Constitution apply to alien detainees at Guantanamo.

x. Even assuming that the functional analysis endorsed in *Boumediene* for purposes of the Suspension Clause could apply to other rights, the accused clearly can claim no entitlement to the protections of *Miranda*. In *Boumediene*, the Court held that a critical factor in determining the extraterritorial application of the Suspension Clause to alien enemy combatants was "the practical obstacles inherent in resolving the prisoner's entitlement to the writ." 128 S. Ct. at 2237. Applying the Supreme Court's holding in *Miranda* to alien unlawful enemy combatants suspected of war crimes raises considerable practical difficulties. Providing a captured enemy combatant with any "right to remain silent," however, would clearly interfere with vital efforts to obtain intelligence from captured enemy combatants, whether held near the battlefield or at Guantanamo Bay. The United States should not be forced to choose between conducting effective interrogations and risking that any information collected from such interrogations would forever be barred from use in a future military commission proceeding.

xi. The accused claims that information gleaned from intelligence interrogations can be separated from information to be used "at a criminal trial." The notion that the accused, and other enemy combatants, at any point prior to swearing charges were merely criminal suspects, and not a source of vital material intelligence about al Qaeda and the Taliban, borders on the absurd and neglects the reality of this armed conflict. Indeed, military intelligence efforts continue at Guantanamo Bay to this day, almost seven years after the September 11<sup>th</sup>, 2001 attacks. Apart from the swearing

of charges, there is simply no way to assign an arbitrary date determining when an enemy combatant is no longer an intelligence source, and instead, becomes the target of a criminal investigation. Taking actions that may result in a suspect's curtailing of communications with United States personnel before that point (e.g., by informing him that he has a "right to remain silent) may result in grave harm to the security of the United States. *Cf. New York v. Quarles*, 467 U.S. 649, 651 (1984) (holding that "overriding considerations of public safety" permitted officer to ask about the location of a weapon prior to reading suspect *Miranda* warnings, and that the statements thereby elicited could be introduced into evidence); *cf. also id.* at 657 ("In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding.").

xii. The practical necessities in this area were well-illustrated by the political branches in the discussion that led to the passage of the Military Commissions Act. In the deliberations over the MCA, both members of Congress and representatives of the Executive Branch emphasized that courts-martial were impracticable, and special commission rules necessary, so as to preserve the Government's ability to interrogate enemy combatants without any potential interference with future prosecutions. As Representative Duncan Hunter, Chairman of the House Armed Services Committee, explained, "[I]n this new war, where intelligence is more vital than ever, we want to interrogate the enemy...to save the lives of American troops, American civilians, and our allies. But it is not practical on the battlefield to read the enemy their *Miranda* warnings. On the battlefield we can't have battalion of lawyers." 152 Cong. Rec. H7925-02, H7937 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter). Senior Department of Defense officials likewise contended that providing detainees with a right to counsel, and notifying detainees of that right, in advance of charges would significantly hamper our Nation's intelligence gathering efforts:

It would greatly impede intelligence collection essential to the war effort to tell detainees before interrogation that they are entitled to legal counsel, that they need not answer questions, and that their answers may be used against them in a criminal trial.... Military necessity demands a better way.

Statement of Daniel Dell'Orto, Principal Deputy General Counsel, U.S. Department of Defense, Before the Senate Judiciary Committee, *Re: Military Commissions to Try Enemy Combatants* (July 11, 2006); *see also* Testimony of Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, Before the Senate Judiciary Committee, *Re: Military Commissions to Try Enemy Combatants* (July 11, 2006) ("Granting terrorists prophylactic *Miranda* warnings and extraordinary access to lawyers is inconsistent with security needs and with the need to question detainees for intelligence purposes."). Against this backdrop, Congress specifically provided that the broad *Miranda*-type protections of the Uniform Code of Military Justice not apply to military commissions. See 10 U.S.C. § 948b(d)(1)(B), (C). The legislative history of the MCA demonstrates well that the political branches recognize "the practical obstacles inherent in resolving the prisoner's entitlement" to *Miranda* warnings. *Boumediene*, 128 S. Ct. at 2237.

xiii. Granting the accused's requested relief in this case would be untenable for an additional reason. The governing law, up to and including the *Boumediene* decision, is that alien enemy combatants detained outside the United States have no entitlement to any individual rights protected by the Constitution. The *Boumediene* decision signaled no intention of extending the individual rights protections of the Constitution to alien enemy combatants tried by military commission. Any rights the accused has during trial by Military Commission are contained in the MCA. *See supra*. The Supreme Court decision in *Boumediene* did not discuss what rights apply to detainees at Guantanamo, other than the Suspension Clause. In the face of this uncertainty, to require Government agents to have informed the accused years before the Supreme Court's *Boumediene* decision that he might be entitled to some undefined degree of constitutional protections is unwarranted. It thus would wreck a serious injustice to conclude that any newfound constitutional rights should bar the admission of evidence obtained through government conduct predating such a declaration, and would not serve the prophylactic purposes that undergirded the *Miranda* decision.

xiv. The Military Commissions Act provides reasonable and just rules governing the admissibility of statements that protect the accused's right to be free from torture or cruel, inhuman, or degrading treatment, and ensures that the statements considered by the Commission will be reliable and in the interest of justice. There is no warrant, under the facts or law, from seeking to apply *Miranda* to the military commission context. Accordingly the motion to suppress should be denied.

**b. An alien enemy combatant, such as the accused, who has been charged under the MCA, has no rights under the Fifth Amendment irrespective of his age.**

i. The inapplicability of *Miranda* protections to the accused is not predicated by his age. The Military Commissions Act applies to alien unlawful enemy combatants without age restrictions. As this Commission has acknowledged, "There is no statutory age limitation within the [jurisdictional provisions of the MCA]." *See United States v. Khadr*, D-022 Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier at 2-3 (30 April 2008).

ii. Much like the jurisdictional provisions, Congress did not set age limits on the use of statements of the accused. *See* MCA § 948r. This section provides, "No person shall be required to testify against himself at a proceeding of a military commission under this chapter." *Id.* Congress has provided limited circumstances when statements of the accused may be excluded – none of which include age as a factor. *See* § 948r(b), (c). As such, the accused's age is irrelevant to the present suppression inquiry.

iii. The accused also argues that 18 U.S.C. § 5033, in addition to the Fifth Amendment, heightens his supposed protections under *Miranda*. *See* Def. Mot. at 7. While this provision undoubtedly serves to protect juveniles in federal custody, it has no effect whatsoever on alien unlawful enemy combatants to be tried before military commissions. As this Commission previously ruled, "[T]he provisions of the [Juvenile Delinquency Act] are not applicable to a military commission established under the MCA." *See United States v. Khadr*, D-022 Ruling on Defense Motion for Dismissal Due

to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier at 4 (30 April 2008). Thus, it is clear that the MCA sets out the rights of the accused at a military commission, and none of these rights are limited or expanded due to a person's age, and the present motion must be denied.

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

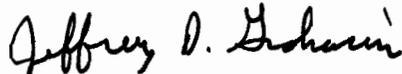
**8. Witnesses and Evidence:** The Government does not believe that witness testimony is necessary to deny the Defense's motion. To the extent, however, that this Court decides to hear evidence on this motion, the Government respectfully requests the opportunity to call witnesses.

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

**10. Attachments:**

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

**11. Submitted by:**



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