

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Motion
to Dismiss Charge I

For Failure to State an Element of the Offenses
in Violation of Due Process

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 Charge I, alleging "Murder in Violation of the Law of War."

3. **Overview:**

a. Due process requires that a criminal charge allege each element of the offense, so that the defendant has fair notice of what burden the government must meet at trial. In light of the Supreme Court's decision in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), there is no longer any doubt that such a basic Fifth Amendment due process requirement controls the conduct of this Military Commission. Indeed, the government has a heightened burden to specify charges with particularity when an element of the offense alleges a violation of some customary law. It is not sufficient for the government to allege that a custom was breached, but it must specify which custom and how.

b. The specification of Charge I against Mr. Khadr merely alleges that he took part in a conventional battle, during which he used a conventional weapon (a hand grenade) in response to a conventional assault by U.S. forces. It alleges that he did this unlawfully, by doing so without combatant immunity, and that he did this in violation of the law of war. While this does recite the elements provided in the MCA, that a killing be done both unlawfully and in violation of the law of war, it does not make clear how Mr. Khadr's conduct violated an extant law of war. In fact, in response to a motion to dismiss, trial counsel articulated two distinct theories on this element, by alleging that Mr. Khadr either committed the war crime of "Unprivileged Belligerency" and/or "Perfidy."

c. In its ruling on that motion, the military judge simply ruled that Murder in Violation of the Law of War is a triable offense under the MCA. It did not specify under which theory the government had demonstrated the necessary elements. Now that due process guarantees of fair notice unequivocally apply, defense counsel moves for the dismissal of Charge I because the specification does not apprise Mr. Khadr of the elements the government must prove at trial. Accordingly, Charge I should be dismissed. If the government wishes to prosecute Mr. Khadr for Murder in Violation of the Law of War, then it must prefer a new charge that clearly states how Mr. Khadr breached an existing law of war in satisfaction of all the necessary elements of the crime.

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

5. **Facts:**

a. According to a memorandum prepared by the on-scene commander, U.S. forces mounted a lawful assault on an approximately 37x27 meter enemy compound near Khost, Afghanistan, on or about 27 July 2002. (Memorandum for Commander, 28 Jul 02, at paras. 2(B)-C) (attachment B to D028).) Ground forces called in eight combat air support aircraft, which variously bombed and strafed the compound with high caliber cannon fire. (*Id.* at paras. 2(c), 2(G)). At least one 40mm round from an MK-19 grenade launcher was then fired on the target. (*Id.*) A fifteen-man ground assault element then penetrated the walls of the rubble in order to “clear the target,” during which time witness statements report U.S. forces tossing hand grenades around what remained of the compound. (*See, e.g.*, RIA, 7 Dec 05 Summary of Soldier #3 Interview (attachment A); RIA, 7 Dec 05 Summary of Soldier #4 Interview (attachment B); RIA, 7 Dec 05 Summary of Soldier #5 Interview (attachment C).)

b. In support of Charge I, Murder in Violation of the Law of War, the government alleges that Mr. Khadr did, “while in the context of and associated with armed conflict and without enjoying combatant immunity, unlawfully and intentionally murder U.S. Army Sergeant First Class Christopher Speer, in violation of the law of war, by throwing a hand grenade at U.S. forces resulting in the death of Sergeant First Class Speer.” (Charge Sheet at 1.)

c. In the Defense Motion to Dismiss Charge I for Failure to State an Offense and Lack of Subject Matter Jurisdiction, dated 7 December 2007, Defense counsel contended that Charge I did not state an offense triable by military commission because simple Murder is not a violation of the law of war. In its response, the Government alleged *two* theories of liability; that Mr. Khadr was guilty of “Murder by an Unprivileged Belligerent” and “Treacherous Killing,” or the war crime of perfidy. (Govt. Resp. to D008, 14 Dec 07, at para. 6(B)(3)). In its decision, the military judge ruled that there “was a reasonable basis for Congress, in 2006, to determine that the offense of murder in violation of the law of war was part of the common law of war.” (Ruling on D008, 21 Apr 08, at para. 7(1).) Without making clear what in the specification of Charge I demonstrated the elements of perfidy, or any other violation of the law of war, the military judge ruled that the “act alleged in the Specification, the killing of a lawful combatant by an unlawful combatant, is a violation of the law of war.” (Ruling D008, at para. 9.)

6. **Argument:**

I. The Fifth Amendment Due Process Right to Fair Notice of the Charges Specified Applies 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), D013, dated 14 December 2007, at para. 6(a)(i); Government

Response to the Defense Motion to Dismiss for Lack of Jurisdiction (Equal Protection), D014, dated 18 January 2008, at para. 6(a)(ix); Government Response to the Defense Motion to Dismiss for Lack of Personal Jurisdiction (Child Soldier), D022, 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 current status of GTMO and Puerto Rico. Whatever factors may have cautioned against the application of the Constitution soon after the government obtained possession over these territories, 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)). 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).

iii. Among the due process rights a defendant enjoys is the right to have the government specify in the indictment (or specification) each element of the alleged crime with a degree of clarity that provides fair notice of what the government’s burden at trial will be. *United States v. Cruikshank*, 92 U.S. 542, 558 (1875). “It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, -- it must descend to particulars.” *Id.* at 558; *see also Russell v. United States*, 369 U.S. 749 (1962) (due process requires that “the indictment contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet”); *United States v. Corpus*, 882 F.2d 546 (1st Cir. 1989) (applying *Russell* in Puerto Rico).

B. While trial counsel is correct that “charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment,” (Govt. Resp. to D088, at para. 6(B)(3)(f) (quoting *In re Yamashita*, 327 U.S. 1, 17 (1946))), “the allegations of the charge, tested by any reasonable standard, [must] adequately allege a violation of the law of war.” *Yamashita*, 327 U.S. at 17.

i. The military is no stranger to criminal charges that incorporate or otherwise invoke a violation of customary law as the basis for liability. *See Parker v. Levy*, 417 U.S. 733, 747 (1974) (“[T]he longstanding customs and usages of the services impart accepted meaning to the seemingly imprecise standards.”). UCMJ Articles 133 and 134 are routinely applied to criminally enforce the customs of the service, but charges pursuant to them cannot simply allege conduct without specifying which military custom was breached. Rather the specification must contain “the elements of the offense intended to be charged . . . , including words importing criminality or an allegation as to intent or state of mind where this is necessary.” *United States v. Brice*, 38 C.M.R. 134, 137 (C.M.A. 1967) (citations omitted); *accord United States v. Acosta*, 41 C.M.R. 341, 343 (C.M.A. 1970).

ii. Due process depends upon whether the specification “contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.” *United States v. Vaughn*, 58 M.J. 29, 35 (C.A.A.F. 2003); *United States v. Davis*, 26 M.J. 445, 448 (C.M.A.1988).

iii. This is especially true when a violation of service custom is alleged. *See, e.g., United States v. Johanns*, 20 M.J. 155, 160 (C.M.A. 1985) (“[C]onstitutionally more important—the existence of such a custom would provide notice to officers, so that they would have no reasonable doubt as to the legal requirements to which they are subject.”); *Vaughn*, 58 M.J. at 31 (“[A]s a matter of due process, a service member must have ‘fair notice’ that his conduct is punishable before he can be charged under [with violating a custom of the service].”). To satisfy due process, the CAAF and the Courts of Appeal for each of the services have recognized that the specification must specifically contain “words of criminality and provide an accused with notice as to the elements against which he or she must defend.” *Vaughn*, 58 M.J. at 36. *United States v. Peszynski*, 40 M.J. 874 (N.M.C.M.R. 1994) (“[S]pecifications drawn under Article 134 must allege conduct clearly defined and easily recognizable in the military context as criminal.”); *United States v. Kroop*, 34 M.J. 628 (A.F.C.M.R. 1992) (The specification failed to allege “the element of a violation of a custom of the service”); *United States v. Blake*, 35 M.J. 539 (A.C.M.R. 1991) (“The government also concedes that by excluding the custom of the Army language from the specification, it eliminated, either expressly or impliedly, an essential element of the offense. Therefore, the specification, as amended, does not allege an offense.”).

(4) It is therefore an established requirement of both military and civilian due process that the specification allege each element of the offense. If the government alleges a breach of customary law, the government must specify what custom was breached and how, since even Article 134 is not “such a catchall as to make every irregular, mischievous, or improper act a court-martial offense.” *United States v. Sadinsky*, 34 C.M.R. 343, 345 (C.M.A. 1964). The question therefore before the military judge is whether the specification of Charge I, Murder in Violation of the Law of War, adequately alleges all the elements of the offense so that Mr. Khadr can know what burden the government must meet, what elements it must prove and what jeopardy will attach.

II. The Government has Violated Due Process by Failing to Specify All the Elements of the Offense of Murder in Violation of the Law of War

a. The requirement that the specification describe how the alleged conduct meets the elements of the offense is especially acute when the crime alleged is a breach of customary law. Otherwise, the government could allege a vague breach of custom and proceed to trial, shifting its theory of the case as the evidence develops in the hopes that it could prove a violation along the way. This fundamentally warps the government’s burden of proof, since its task then becomes convicting the defendant, rather than proving the elements of a specified crime.

b. The Specification is Ambiguous as to the Government’s Burden of Proof on each of the Elements

(1) Here, the specification on Charge I contains the bald assertion that Mr. Khadr, by throwing a hand grenade in a firefight, violated the law of war. It alleges that he did this without “combatant immunity” and that he did it “in violation of the law of war.”

A. Only in response to a motion to dismiss, did trial counsel articulate its theory of how the killing violated the law of war. In doing so, trial counsel articulated two,

distinct theories of its case: that Mr. Khadr either committed the war crime of “Unprivileged Belligerency,” (Govt. Resp. to D008 at 4-7), and/or that he committed the war crime of “Perfidy” (Govt. Resp. to D008, at 7-8). Trial counsel, therefore, exacerbated the vagueness of Charge I by creating an ambiguity over whether proving that Mr. Khadr lacked combatant immunity was in itself sufficient to satisfy this element of the charge.

B. The military judge did not resolve this question, but simply ruled that by its own terms, the crime of Murder in Violation of the Law of War requires some violation of the extant laws of war, and that Congress was therefore reasonable in deciding it “was part of the common law of war.” (Ruling on D008, at para. 7(1).) The military judge did not articulate on which theory the acts alleged satisfied the statute. In fact, neither the phrase “unprivileged belligerency” nor “perfidious/traacherous killing” appear in the military judge’s decision.

C. At the time, trial counsel and the military judge understood the controlling law as placing no due process requirement on the government. (*See, e.g.*, Ruling on D014, at para. 4(c) (“there is no authority, binding on this commission, which holds that a person similarly situated to Mr. Khadr is entitled to all of the protections of the Constitution”). Now that the Supreme Court has reaffirmed that the Constitution remains supreme, however, it is incumbent upon the government to specify with particularity what violation of the law of war Mr. Khadr breached. It has asserted two theories – “Murder by an Unprivileged Belligerent” and “Perfidy.” The government must therefore demonstrate that either or both constitute violations of the laws of war *and* that the charge sheet adequately alleges their constituent elements.

c. The Government’s First Theory of Liability, that Murder by an Unprivileged Belligerent Satisfies all the Elements of the Offense, Violates Due Process by Collapsing Two Distinct Statutory Elements into One

(1) It is understandable that the government would seek to hedge its bets with respect to whether “Unprivileged Belligerency” is a war crime, since it does not feature as an offense in the Geneva or Hague Conventions—two treaties the Supreme Court has called “the major treaties on the law of war.” *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2781 (2006).

A. The greatest doubt over the status of “Unprivileged Belligerency” as a war crime arises not from any treaty or treatise, however, but from the government’s own enumeration of war crimes in the commission system that formed the model for the MCA.

i. Under the previous military commission system, Military Commission Instruction No. 2 enumerated the crimes triable and divided them into three classes. Department of Defense, Military Commission Instruction No. 2, Crimes and Elements for Trial by Military Commission, 30 Apr 03 (“MCI2”). Class A constituted “War Crimes,” MCI2 at para. 6(A), Class B constituted “Other Offenses Triable by Military Commission,” MCI2 at para. 6(B), and Class C constituted “Other Forms of Liability and Related Offenses,” MCI2 at para. 6(C). “Murder by an Unprivileged Belligerent” was enumerated, along with crimes such as “Perjury” and “Obstruction of Justice,” as a Class B crime. Its elements, as defined by MCI2, were:

- 1) The accused killed one or more persons;
- 2) The accused:
 - (a) intended to kill or inflict great bodily harm on such person or persons;
 or
 - (b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;
- 3) The accused did not enjoy combatant immunity; and
- 4) The killing took place in the context of and was associated with armed conflict.

MCI2, at para. 6(B)(3). Nowhere did its elements contain any requirement that the killing violate the law of war.

ii. Of the thirty crimes made punishable under the MCA, Congress incorporated all but two of the substantive offenses provided in MCI2. Those were “Murder by an Unprivileged Belligerent” and “Destruction of Property by an Unprivileged Belligerent.” MCI2, at paras. 6(B)(3)-(4). Congress declined to include these offenses, favoring instead a requirement that the unlawful killing (or destruction of property) also entail, as an element of the offense, a violation of the law of war.¹ MCA 950v(b)(15)-(16). Accordingly, the Manual for Military Commissions included two lawfulness elements, where MCI2 had only one. It required *both* that the killing be unlawful *and* that it was done in violation of the law of war:

- 1) One or more persons are dead;
- 2) The death of the persons resulted from the act or omission of the accused;
- 3) The killing was unlawful;
- 4) The accused intended to kill the person or persons;
- 5) The killing was in violation of the law of war; and
- 6) The killing took place in the context of and was associated with an armed conflict.

MMC, Part IV, para. 6(a)(15).

iii. In a “comment,” the MMC states in relevant part that “For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy.” MMC, Part IV, para. 6(a)(13)(c), Comment. This is the closest the MMC comes to defining the crime of “Murder by an Unprivileged Belligerent,” and it is not at all clear that is what this comment means to accomplish. It does not define “violation of the law of war,” but simply restates that the violation of the law of war must be perpetrated by someone who meets the definition of

¹ By way of analogy, Congress similarly added the element of “in breach of an allegiance or duty to the United States” to the elements of Aiding the Enemy. MCA 950v(b)(26). Under MCI2, this element was not present and, in fact, the government had alleged Aiding the Enemy in the first Charges referred against Mr. Khadr. (See Charge Sheet (Attachment B to Defense Motion to Dismiss for Violation of the Sixth Amendment Right to a Speedy Trial).) Congress knew how to add elements to offenses proscribed by MCI2, and did so pursuant to its desire to ensure that the MCA was “declarative of existing law,” so as to “not preclude trial for crimes that occurred before the date of the enactment.” MCA 950p.

“unlawful enemy combatant.”² Thus, this comment merely restates the MCA –that the crime could not be charged against a lawful enemy combatant, even if, without justification (i.e. unlawfully), he killed someone in a manner that violated the laws of war.

B. If Congress wanted to criminalize “Unprivileged Belligerency,” it had a clear model for how to do so in MCI2, from which it borrowed whole stock, even to the point of largely preserving MCI2’s ordering of the crimes.

i. If Congress had any doubt about the scope of “in Violation of the Law of War,” they had to look no further than MCI2. There they would have found a list of 18 violations of the laws of war, so identified, which did not include “Murder by an Unprivileged Belligerent,” nor the crimes of “Perjury” and “Obstruction of Justice.” MCI2 at para. 6(A).

ii. Since Congress specified that the very jurisdiction of this military commission turns on whether the accused had combatant immunity, Congress’ choice to specify that the killing must also entail some war crime demonstrates its clear intention not to conflate liability for murder (and attempted murder) with personal jurisdiction. *See* MCA § 948a(1)(i). If these were not distinct elements, *anyone* who “engaged in hostilities or ... has purposefully and materially supported hostilities against the United States or its co-belligerents [and] is not a lawful enemy Combatant,” would not only be an unlawful enemy combatant, but a murderer or attempted murderer.

² Even if Congress intended to legislate the crime of “Unprivileged Belligerency,” such an interpretive rule has no force of law and cannot substitute for the government’s duty to specify, with particularity, the conduct it believes violated a statutory element. *See United States v. Mead Corp.*, 533 U.S. 218, 232 (2001) (“interpretive rules ... enjoy no *Chevron* status as a class”); *Stinson v. United States*, 508 U.S. 36, 44 (1993) (“Commentary, unlike a legislative rule, is not the product of delegated authority for rulemaking, which of course must yield to the clear meaning of a statute.”); *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, n.9 (1984) (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”).

Whatever deference such interpretive commentary should be accorded is at a minimum outweighed by the rule of lenity. *Crandon v. United States*, 494 U.S. 152, 178 (1990) (“Scalia, J., concurring) (“[T]o give persuasive effect to the Government’s expansive [administrative interpretation] would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.”). The rule of lenity is rooted in the fundamental principle that “fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.” *McBoyle v. United States*, 283 U.S. 25, 27 (1931). The “law of war” has a common and understandable meaning in the world that is contained in many and diverse treaties, statutes and field manuals. Especially in light of the government’s expansive theory of principal liability, Mr. Khadr would have had no notice he might be violating the commentary of a regulation implementing a statute passed and promulgated more than four years after the alleged offense.

iii. Trial counsel cannot obtain from a clever litigation position or reliance upon vague interpretive rules, what it could not obtain from Congress. The military judge must “interpret the law as Congress has expressly stated it to be.” *United States v. Berg*, 30 M.J. 195 (CMA 1990). It must prove “the killing was unlawful” by showing the defendant did not enjoy “combatant immunity,” or any other privilege that would make a killing lawful, such as self-defense, *and* it must show that the killing was done in violation of the law of war.

C. Absent any contemporary legislative, customary or conventional authority, trial counsel cited mostly Civil War era treatises and an Attorney General opinion, which refer to the prosecution of, “bushwackers,” “jayhawkers,” “bandits,” “war rebels” and “assassins,” as support for the proposition that “Murder by an Unprivileged Belligerent” is a modern war crime in and of itself.³ (Govt. Resp. to D008 at 4-7.) The military judge did not incorporate any of these citations into his opinion. Although this may have at least provided clarity as to the elements the government must prove, there are a number of reasons why this would have been unwarranted.

i. Trial counsel’s characterization of the Civil War era precedents is selective and misleading.

(a) The “bushwackers” and “jayhawkers” were guerilla insurgents in the Union controlled areas of Kansas and Missouri. *See* THOMAS GOODRICH, *BLACK FLAG: GUERRILLA WARFARE ON THE WESTERN BORDER, 1861-1865* (Indiana University Press 1999). This is an important distinction because the authorities trial counsel relies upon were principally responding to the threat posed by the invisible domestic enemy that characterized much of the Civil War, particularly in boarder States.

(b) The primary authority Winthrop relies upon is the Lieber Code. *See* COL. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS*, 783, n.55 (1895, 2d ed. 1920) (“WINTHROP”). The Lieber Code in turn proscribed irregulars who conducted operations “without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers.” General Orders No. 100, Adjutant General’s Office, 1863, art. 82 (“Lieber Code”). These were not, according to the

³ Trial counsel does not even support its position by an honest quoting of the arcane precedent to which it resorts. The cut and paste from the opinion of Justice Iradell in *Talbot v. Jansen*, 3 U.S. 133 (1795) does not stand for the proposition that any and all “‘hostility committed without public authority’ is ‘not merely an offence against the nation of the individual committing the injury, *but also against the law of nations . . .*’” (Gov’t Resp. to D008, at para. 6(B)(ii).) Indeed, to make it appear that it did, trial counsel had to excise *four* words from the middle of its quotation, which in full reads “hostility committed without public authority *on the high seas*, is not merely an offence against the nation of the individual committing the injury, but also against the law of nations....” *Talbot*, 3 U.S. at 161. Defense counsel do not contest that the crime of piracy is perhaps one of the oldest violations of international law. The Charge Sheet, however, makes no allegation of piracy on the high seas and if trial counsel wishes to make an analogy, it should at the very least be forthright in doing so.

Lieber, “public enemies,” but insidious, often traitorous, bandits, spies and assassins, who took active steps to exploit the appearance of protected status.

(c) This contrasts with Winthrop’s treatment of “savage” forces, such as Indians. Indians were not lawful belligerents as recognized by the custom of the day. Nevertheless their belligerent acts were not generally seen as war crimes, both because they were a recognizable enemy on account of being foreign and perpetrated acts of violence “incidental to a state of war then pending.” WINTHROP at 778, 869.

ii. The fatal flaw of trial counsel’s argument, however, is not in its characterization of Civil War era history. It is that the demonstration of a military custom during the Civil War is not the demonstration of customary law today.⁴ “A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been long abandoned.” *United States v. Johanns*, 20 M.J. 155, 159 (C.M.A. 1985) (emphasis in original); see also *United States v. Wickersham*, 14 M.J. 404 (C.M.A. 1983) (“[I]n determining what offenses are actually prohibited by this statute, recourse must be had to authoritative interpretations of military law, existing service customs, and common usages.”) (emphasis added).

(a) Winthrop, the Lieber Code and the Articles of War that governed prior to the UCMJ tell us the state of the law of war in the Nineteenth Century. See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (“After the Second World War, the law of war was codified in the four Geneva Conventions, which have been ratified by more than 180 nations, including the United States.”). Lieber and Winthrop both wrote before the advent of mechanized warfare, two world wars, the Hague and Geneva Conventions, and the open and close of the Twentieth century, which not only saw dozens of treaties codify, refine and expand the laws of war, but the United States’ leadership in creating international criminal courts to prosecute offenders against it in Yugoslavia, Rwanda, Sierra Leone and elsewhere. Despite their jurisdiction over the most brutal guerilla wars in modern history, none of these international criminal courts has prosecuted “Murder by an Unprivileged Belligerent.”⁵

⁴ Indeed by 1901, a writer on international Public Law wrote that while the employment of “savages” had been universally condemned, “Whether guerrillas or partisans can be legitimately employed in war is less clear.” HARRIS TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW 476 (Callaghan & Co. 1901).

⁵ See *Prosecutor v. Tadic*, IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, at para. 94 (“The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. ... (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.”). In elaborating upon factor (i), the Appeals Chamber in *Tadic* described the customary laws of war at length and concluded, “These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians

(b) Winthrop no more writes about genocide than he does about blinding lasers. He condones the targeting of civilian infrastructure, WINTHROP at 779, but condemns the use of explosive projectiles, which would constitute most RPGs in use today. *Id.* at 785. He condones reprisals against POWs and collective punishments,⁶ *id.* at 797, as well as the imposition upon occupied civilians of forced labor camps⁷ and religious indoctrination,⁸ *id.* at 811-815, but condemns targeting government buildings. *Id.* at 780.

(c) The only contemporary authority trial counsel cited was the ARMY FIELD MANUAL ON THE LAW OF LAND WARFARE, FM 27-10, which *does not* list “Unprivileged Belligerency” as a war crime, but only provides (what defense counsel does not contest) that “guerrillas and partisans ... [are] not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.”⁹ In its comprehensive chapter on the conduct of hostilities, FM 27-10, at ch. 2, nowhere is “Unprivileged Belligerency” listed or even alluded to as among the war crimes. *Cf. United States v. Wales*, 31 M.J. 301, 309 (C.M.A. 1990) (“We also are troubled that a ‘custom’ which is the basis for trying appellant for a crime ... was to be proved at trial by nothing more than a general statement in a nonpunitive regulation.”).

(d) Accordingly, the government cannot point to one instance of a U.S. military court prosecuting “Murder by an Unprivileged Belligerent” in the post-Geneva Convention world. This is despite the U.S. having encountered guerilla forces in Korea and Vietnam, and the U.S. military’s routine support for guerillas as early as the Korean

from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.” Nowhere did the Appeals Chamber identify “Murder by an Unprivileged Belligerent,” or anything resembling it, as prohibited under the modern law of war.

⁶ *See contra* GCIII, at art. 87; GCIV, at art. 33.

⁷ *See contra* GCIV, at art. 51.

⁸ *See contra* GCIV, at arts. 31, 38(3); 58.

⁹ The government’s repeated reliance upon *Ex parte Quirin* for the proposition that any attacks launched by “unlawful enemy combatants” are *per se* violations of the law of war is wholly misplaced. (*See, e.g.*, Govt. Resp. to D008, at para. 6(B)(ii)(g).) The Court in *Quirin* meticulously established an uninterrupted line of authority for the law of war criminalization of “armed prowlers” crossing behind enemy lines, akin to saboteurs and spies. *Ex parte Quirin*, 317 U.S. 1, 31-36 (1942). It was this very specific and precisely defined crime that could be charged against “enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform -- an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.” *Quirin*, 317 U. S. at 46. Quite purposefully, the Court in *Quirin* reserved judgment on “the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war.” *Id.* Nowhere in the decision does the Court make a holding on or even consider whether mere participation in open combat on foreign soil is a violation of the law of war.

War. *See, e.g.*, Guerrilla Operations Outline, Far East Command Liaison Detachment (Korea), 8240th Army Unit Guerrilla Section, 11 April 1952.

(e) While Winthrop may be the “Blackstone of military law,” his MILITARY LAW AND PRECEDENTS is no more a definitive statement of the law of war in the Twenty-First Century, than Blackstone’s COMMENTARIES ON THE LAWEES OF ENGLAND is of the modern common law. Congress did not enact a statute criminalizing belligerency by “jayhawkers,” nor did it criminalize “Murder by an Unprivileged Belligerent.” Congress gave this military commission jurisdiction over Murder in Violation of the Law of War, and in 2008, Violations of the Law of War are readily ascertainable from numerous treaties, field manuals and the decisions of international criminal courts.¹⁰ None of these include “Murder by an Unprivileged Belligerent” and when the government originally sought to punish this crime in MCI2, it did not include it among the violations of the laws of war either.

iii. Had Congress enacted “Murder by an Unprivileged Belligerent” as a crime cognizable by the military commission, then the government would at least have an argument that it need assert nothing more than the fact that Mr. Khadr participated in combat without combatant immunity. Failure to have combatant immunity, however, satisfies only one element of the crime as set forth in the MMC – the element of unlawfulness, which no doubt could strip Mr. Khadr of POW status and subject him to the jurisdiction of the federal courts, *see, e.g.*, 18 U.S.C. § 2332a, or an occupation commission for his belligerent acts.¹¹ It

¹⁰ *See, e.g.*, 1 International Committee of the Red Cross, Customary International Humanitarian Law 569 (Jean Marie Henckaerts & Louise DoswaldBeck eds., 2005) (listing war crimes compiled from a variety of international legal sources); Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) (described by one federal judge as “signed by 139 countries and ratified by 105, including most of the mature democracies of the world. It may therefore be taken ‘by and large ... as constituting an authoritative expression of the legal views of a great number of States.’” *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 276 (2d. Cir. 2007) (Katzmann, J., concurring)); Major Richard Baxter, *So-Called Unprivileged and Belligerency: Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int’l L. 323, 326 (1951); Norman A. Goheer, *The Unilateral Creation of International Law During the “War on Terror”: Murder by an Unprivileged Belligerent is not a War Crime*, Bepress Legal Series Working Paper 1871, at 12 (Nov. 8, 2006), *available at* <http://law.bepress.com/expresso/eps/1871>.

¹¹ As the Supreme Court recognized in *Hamdan* and in *Madsen v. Kinsella*, 343 U.S. 341, 356 (1952), the military can convene military commissions in occupied territory such as those “established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II.” *Hamdan*, 126 S.Ct. at 2776. These commissions are always hybrid courts, applying an *ad hoc* mixture of local law and military law as it suits “the exigencies that necessitate their use.” *Hamdan*, 126 S.Ct. at n.26; *see also* Organization and Procedures of Civil Affairs Division: Military Government of Germany; United States Zone (1947); 12 Fed. Reg. 2191 § 3.6(b)(2) (“Military Government Courts shall have jurisdiction over: (i) All offences against the laws and usages of war; (ii) All offences under any Proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of

does not demonstrate, on its face, the necessary violation of the law of war that Congress required, and trial counsel cannot, consistent with due process, conflate two distinct elements of the offense. *See, e.g., United States v. NYNEX Corp.*, 8 F.3d 52, 55 (D.C. Cir. 1993) (“In other words, the District Court seemed to think that if NYNEX officials acted *willfully* they necessarily *violated a clear* order of the court. This reasoning improperly conflates the elements of criminal contempt, and it unacceptably alters the Government’s burden of proof.”) (emphasis in original); *see also United States v. Berg*, 30 M.J. 195 (C.M.A. 1990) (to conflate the elements of unpremeditated murder, Art. 118(2), UCMJ, with the elements of murder by an act inherently dangerous to others, Art. 118(3), UCMJ, would “deny the accused due process.”).

c. The Government’s Second Theory of Liability, that Mr. Khadr Committed Perfidy, is Unsupported by the Specification

(1) Apparently aware of this shortcoming, trial counsel created ambiguity by also alleging, again not in the specification but in its legal argument, that the violation of the law of war element is satisfied by Mr. Khadr’s alleged perfidy. (Govt. Resp. to D008, at 7-8.)

A. If the government specified this and could prove it, Mr. Khadr could be found guilty of Murder in Violation of the Law of War. He would have both acted unlawfully, as an unprivileged belligerent, and in violation of the law of war, by conducting a perfidious attack. The MCA is clearly motivated by a desire to stamp out the most insidious forms of guerilla warfare, where attacks are conducted by individuals who invite the belief that they are protected persons by “divesting themselves of the character or appearance of soldiers.”

B. In fact, this is precisely how the government alleged Murder in Violation of the Law of War in the military commission case of *United States v. Nashiri*:

[W]hile in the context of an associated with armed conflict, intentionally and unlawfully kill seventeen persons and members of the United States Armed Forces, in violation of the law of war, by causing two men dressed in civilian clothing and operating a civilian vessel lade with explosives and denoting said boat-bomb along side the United States Ship (U.S.S.) COLE

Nashiri Charge Sheet at 8 (attachment D). This specification makes plain on its face, both that the killing was unlawful, (i.e. was murder), *and* that it was in violation of the law of war (i.e. perfidious).

C. By contrast, all that Charge I alleges against Mr. Khadr is that during a conventional battle, while U.S. forces were throwing hand grenades around him, that he “violated the law of war, by throwing a hand grenade at U.S. Forces, resulting in the death of Sergeant First Class Speer.” (Charge Sheet at 1.) Nothing in this specification alleges the elements of perfidy. It is not alleged that he feigned protected status, *hors du combat*, or even that he skulked up to unsuspecting U.S. soldiers, exploiting his civilian appearance to ambush them. He was a clear and lawful target of attack, as evidenced by our own soldiers initiating

the Allied Forces; (iii) All offences under the laws of the occupied territory *or* of any part thereof.”).

combat air support and ultimately shooting him twice in the back. On its face, the allegation is that he participated in conventional combat. But this does not allege a murder done in violation of the law of war.

III. Dismissal of Charge I is Warranted for the Government's Failure to Provide Fair Notice of the Elements Mr. Khadr must Defend Against

a. Not all violent and illegal conduct is a war crime. The government cannot allege some violent act and leave to guess, speculation and strategic litigation what acts might satisfy the elements of an offense.

(1) The law of war means something definite in the modern world. It is not found in treatises from the Civil War anymore than it is found in the Knight's Code of Chivalry. It has been refined in modern treaties and applied by international criminal courts that the United States has principally sponsored and organized. None of these have made conventional combat a war crime, and would not do so.

(2) The urban nature of warfare in the Twenty-First Century, even more than in the Twentieth, and demonstrably more than in the Nineteenth, creates enormously perverse incentives for guerilla combatants to launch attacks from civilian areas against unsuspecting U.S. forces. This corrodes the trust of our forces, who respond by presuming that all apparent civilians are enemies. Accordingly, the modern laws of war do not prohibit conventional conflict, since to do so would make no distinction between the grenade thrown in an open and pitched battle, the grenade slipped into a truck riding down a civilian street and the grenade concealed in a bassinet. It would remove all incentive for guerillas to wage hostilities in the open at all.

(3) Dismissing Charge I does not prevent the government from alleging Murder in Violation of the Law of War in any other case or even this case, so long as the specification provides the fair notice that due process requires for each element of the offense. Nor does it prevent the government from proving the conduct alleged in Charge I as overt acts in support of Charges III and IV or as aggravating factors at sentencing. Dismissing Charge I merely requires trial counsel to meet a minimal burden of specificity in the charges it alleges and ensures that it is Congressional legislation, and not trial counsel's motions practice, that defines the laws of war.

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 Commission 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 D.

Memorandum for Commander, 28 July 2002 (Attachment B to D028)

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. Attachment:

- A. Report of Investigative Activity, Summary of Soldier #3 Interview, 7 December 2005
- B. Report of Investigative Activity, Summary of Soldier #4 Interview, 7 December 2005
- C. Report of Investigative Activity, Summary of Soldier #5 Interview, 7 December 2005
- D. Nashiri Charge Sheet



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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-071

GOVERNMENT’S RESPONSE

**To the Defense’s Motion to
Dismiss Charge I For Failure to
State an Element of the Offenses in
Violation of Due Process**

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’s motion to dismiss charge I, murder in violation of the laws of war under 10 U.S.C. § 950v(b)(15) (“Mot. to Dismiss I”), should be denied.
- 3. Overview:** The Defense, citing the recent Supreme Court decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), incorrectly argues that the accused, an alien unlawful enemy combatant, is entitled to the due process protections of the Fifth Amendment. In *Boumediene*, the Supreme Court addressed the narrow question of whether the Suspension Clause of the Constitution, art. I, § 9, cl. 2, applies to alien enemy combatants detained at Guantanamo Bay. The Supreme 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.

Even if the accused were to possess constitutional rights under the 5th Amendment, the charge sheet complies with any due process requirements. The accused has been provided with adequate notice of the charged misconduct under any applicable standard. Rule for Military Commission (RMC) 307, similar to its Rule for Court-Martial counterpart, provides that a specification is sufficient if “it alleges every element of the charged offense expressly or by necessary implication.” RMC 307(c)(3). Contrary to Defense claims, the charges more than adequately address notice requirements found in the MCA and MMC, or otherwise implicated by the 5th Amendment.

Despite a previously unsuccessful challenge of Charge I (See Ruling D008), the Defense seemingly attempts to re-litigate the issue in the instant motion. Unlawful or unprivileged combatants—such as Khadr—violate the laws of war when they commit war-like acts, such as murder. The CMCR emphasized that proposition by noting that unlawful combatants may be “treated as criminals under the domestic law of the capturing nation,” *including the Military Commissions Act*, “for any and all unlawful

combat actions.” *Khadr*, CMCR 07-001, at 6. Defense suggestions that the accused participated in “conventional combat” are similarly misplaced. To be clear – the Government does not allege that the accused “merely took part in a conventional battle, during which he used a conventional weapon (a hand grenade) in response to a conventional assault by U.S. forces.” Defense brief at 1. The firefight that precipitated the accused throwing a grenade resulting in the death of Sergeant First Class Speer began after Khadr and his co-conspirators opened fire at U.S. and coalition forces after coalition forces approached a compound where the accused and other unlawful combatants were making improvised explosive devices in order to target and kill U.S. forces while living amongst the civilian population, wearing civilian attire in order to conceal their participation in attacks against U.S. and coalition forces. The acts of the accused and his co-conspirators, including conducting surveillance in civilian attire, making and planting IEDs in civilian attire, and attacking U.S. forces, all violate the law of war and are properly before the military commission. Absent combatant immunity, which the accused surely cannot claim, the acts themselves committed by accused are in violation of the law of war.

4. Burden and Persuasion: To the extent the Defense attempts to equate Khadr’s murderous actions with those of a lawful combatant, the Defense bears the burden of proving that he is entitled to lawful combatant immunity. *See United States v. Khadr*, CMCR 07-001, at 7 (Sept. 24, 2007). Furthermore, and contrary to paragraph 4 of the Defense Motion, this issue is not “jurisdictional in nature.” In the present motion, the Defense does not allege that the Commission lacks jurisdiction to try this offense. Therefore, this is a question of law which the Defense must prove by a preponderance of the evidence. *See Rule for Military Commissions (“RMC”) 905(c)(2)(A).*

5. Facts:

a. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan. During this period, he paid numerous visits to and at times lived at Usama bin Laden’s compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and personally met many senior al Qaeda leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and Saif al Adel. The accused also visited various al Qaeda training camps and guest houses. *See AE 17, attachment 2.*

b. On 11 September 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy. *See The 9/11 Commission Report, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004).*

c. After al Qaeda’s terrorist attacks on 11 September 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. *See AE 17, attachment 3.*

- d. Following this training the accused received an additional month of training on landmines. Soon thereafter, he joined a group of al Qaeda operatives and converted landmines into improvised explosive devices (“IEDs”) capable of remote detonation.
- e. In or about June 2002, the accused conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
- f. In or about July 2002, the accused planted improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
- g. On or about 27 July 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan. *See* AE 17, attachment 4.
- h. Before the firefight had begun, U.S. forces approached the compound and asked the accused and the other occupants to surrender. *See id.*, attachment 5.
- i. The accused and three other individuals decided not to surrender and instead “vowed to die fighting.” *Id.*
- j. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. *Id.*
- k. Near the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer. *See id.*, attachment 6. American forces subsequently shot and wounded the accused. After his capture, American medics administered life-saving medical treatment to the accused.
- l. Approximately one month later, U.S. forces discovered a videotape at the compound where the accused was captured. The videotape shows the accused and other al Qaeda operatives constructing and planting improvised explosive devices while wearing civilian attire. *See id.*, attachment 4.
- m. During an interview on 5 November 2002, the accused described what he and the other al Qaeda operatives were doing in the video. *Id.*, attachment 1.
- n. When asked on 17 September 2002 why he helped the men construct the explosives, the accused responded “to kill U.S. forces.” *Id.*, attachment 6.
- o. The accused related during the same interview that he had been told the U.S. wanted to go to war against Islam. And for that reason he assisted in building and deploying the explosives, and later he threw a grenade at an American. *Id.*
- p. During an interrogation on 4 December 2002, the accused agreed that his use of land mines as roadside bombs against American forces was also of a terrorist nature and that he is a terrorist trained by al Qaeda. *Id.*, attachment 3.

q. The accused further related that he had been told about a \$1,500 reward being placed on the head of each American killed, and when asked how he felt about the reward system, he replied: “I wanted to kill a lot of American[s] to get lots of money.” *Id.*, attachment 8. During a 16 December 2002 interview, the accused stated that a “jihad” is occurring in Afghanistan, and if non-believers enter a Muslim country, then every Muslim in the world should fight the non-believers. *Id.*, attachment 9.

r. The accused was designated as an enemy combatant as a result of a Combatant Status Review Tribunal (“CSRT”) conducted on 7 September 2004. *See* AE 11. The CSRT also found that the accused was a member of, or affiliated with, al Qaeda. *Id.*

s. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. After receiving the Legal Adviser’s formal “Pretrial Advice” that Khadr is an “unlawful enemy combatant” and thus that the military commission had jurisdiction to try the accused, those charges were referred for trial by military commission on 24 April 2007.

6. Discussion:

a. **An alien enemy combatant, such as the accused, who has been charged under the MCA, has no rights under the Fair Notice provision of 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 is the right to fair notice of the offenses with which he is charged. This right, however, does 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.

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 reaches 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.” *Boumediene*, 128 S. Ct. at 2240; *see also 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 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 Boumediene*, 128 S. Ct. at 2259 (“[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”). 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 U.S. 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 U.S. 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 goes without saying that he may not lay claim to any of the other individual rights secured by the Constitution.

v. 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 U.S. 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.*

vii. *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.

viii. 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.

ix. Even so, under that functional analysis endorsed in *Boumediene* for purposes of the Suspension Clause, it is clear that enemy aliens abroad do not come within the protection of the Fifth Amendment. 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*, 454 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 relation 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 (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 Fifth 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.

b. Even if the accused were to possess constitutional rights under the Fifth Amendment, the charge sheet fully complies with any fair notice requirements.

i. The accused has been provided with adequate notice of the charged misconduct under any applicable standard. The standard for determining whether a specification states an offense is whether the specification alleges “every element . . . either expressly or by necessary implication, so as to give the accused notice and protect him against double jeopardy This is a three-prong test requiring (1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy.” *United States v. Dear*, 40 M.J. 196, 197 (1994) (quoting in part R.C.M. 307(c)(3)).

ii. Similar to the Rules for Courts-Martial, Rule for Military Commission 307 outlines the proper swearing of charges. R.M.C. 307(c)(3) requires that a specification be a “plain, concise, and definite statement of the essential facts constituting the offense

charged. **A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication.**” *Id.* (Emphasis added.) Here, the specification in Charge I includes the elements of Murder in violation of the law of war as provided in both the MCA and MMC.

iii. The MCA defines Murder in violation of the law of war as:

Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, *in violation of the law of war* shall be punished by death or such other punishment as a military commission under this chapter may direct.

§ 950v(b)(15) (emphasis added). The MMC provides the following elements for Murder in violation of the law of war:

- 1) One or more persons are dead;
- 2) The death of the persons resulted from the actor omission of the accused;
- 3) The killing was unlawful;
- 4) The accused intended to kill the person or persons;
- 5) The killing was *in violation of the law of war*; and
- 6) The killing took place in the context of and was associated with an armed conflict.

MMC, Part IV, para.6(a)(15) (emphasis added). The specification to Charge I includes each of these elements:

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

U.S. v. Khadr, Referred Charge Sheet, 24 April 2007, at 3 (“Charge Sheet”). On its face, the specification gives sufficient notice to the accused under the *Dears* test. First, every element of the offense in the MCA and MMC are present in the specification of Charge I, including “in violation of the law of war.” Second, the accused was provided notice of the charged offense when he was given a copy of the charge sheet shortly after the initial swearing of charges. Furthermore, that the accused is properly categorized as an alien unlawful enemy combatant without enjoying combatant immunity necessarily provided him notice that the killing of a lawful combatant would be in violation of the law of war. To the extent the third prong is relevant today, it has been satisfied through the record. *See Dear*, 40 M.J. 197.

iv. The accused’s comparison of customary law and the military customs enforceable under UCMJ articles 133 and 134 is misplaced. In fact, the cases cited by the accused support the Government position that the elements of Charge I give sufficient

notice of the criminality of the underlying conduct. For instance, in both *United State v. Brice*, 38 C.M.R. 134, 137 (C.M.A. 1967) and *United States v. Acosta*, 41 C.M.R. 341, 343 (C.M.A. 1970), the U.S. Court of Military Appeals required an element of criminality in the specification when “the act charged does not of itself constitute criminal conduct.” *Brice*, 38 C.M.R. at 340 (citing *United States v. Julius*, 25 C.M.R. 27 (C.M.A. 1957)).

v. Indeed, the language “in violation of the law of war” and “unlawfully” provide notice of the criminality of the accused’s charged misconduct. Charge Sheet at 3. As the accused recognizes, killing during a “conventional conflict” is not unlawful so long as it is between lawful combatants who are not *hors de combat*. Def. Motion at 14. But the accused is charged with the “unlawful” murder of SFC Christopher Speer as an “alien unlawful enemy combatant” who does not benefit from “combatant immunity.” See Charge Sheet at 3. That he did not enjoy the combatant’s privilege is sufficient notice that the killing was “in violation of the law of war.” The criminality of the alleged offense could not be more explicit. The Military Judge affirmed the criminality of this offense in the Commission’s ruling on D-008, which states in part: “There was a reasonable basis for Congress, in 2006, to determine that the offense of murder in violation of the law of war was punishable by military commissions, before, on, and after 11 September 2001.” See *U.S. v. Khadr*, D-008, Ruling on Defense Motion to Dismiss Charge One for Failure to State an Offense and for Lack of Subject Matter Jurisdiction, 21 April 2008, at 3, para. 7.

vi. Even so, there exists a significant distinction between violations of “military custom” as criminalized under UCMJ articles 133 and 134 and violations of the customary laws of war. As discussed in greater detail below, Congress and the Secretary of Defense were acting under their constitutional authority when defining what acts are “in violation of the law of war.” Even so, this offense has been a part of the customary laws of war for centuries.

c. Congress was acting within its constitutional authority when it included “in violation of the law of war” as a statutory element to Murder in violation of the law of war in the MCA.

i. The Commission need not reach the issue of customary international law since the MCA defines the offense Murder in violation of the law of war. The Constitution vests Congress with the exclusive authority “[t]o *define and punish . . . Offenses against the Law of Nations.*” U.S. Const. Art. I, § 8, cl. 10 (emphasis added). Exercising that authority in the Military Commissions Act of 2006 (“MCA”), Congress unequivocally declared murder in violation of the law of war to be a crime triable and punishable by military commissions.

ii. The MCA codifies “offenses that have traditionally been triable by military commissions.” 10 U.S.C. § 950p(a). One such offense, triable by a military commission, is murder committed in violation of the law of war. See *id.* § 950v(b)(15), 950t.

iii. The accused argues that the Government failed to give notice by including the element “in violation of the law of war” as provided in MCA § 950v(b)(15). Rather than attempt to criminalize unprivileged belligerency or collapse two elements, as the accused suggests, Congress placed this language squarely in the statutory elements. Congress did not criminalize “unprivileged belligerency” per se, but it certainly had the constitutional authority to define killing by an unlawful combatant as a violation of the law of war.

iv. As the accused concedes, Khadr has been properly charged (**and fair notice therefore exists**) under Part IV of the Manual for Military Commissions (“MMC”). See *U.S. v. Khadr*, D-008, Def. Mot. to Dismiss Charge I at 7. The MMC is entirely consistent with the MCA, and the accused’s motion therefore should be denied.

d. Killing by an unlawful combatant is a violation of the law of war.

i. The accused claims that he was denied fair notice that killing by an unlawful combatant is “in violation of the law of war.” The argument rests in part on the theory that this was not a customary international law violation. As previously indicated in the Commission’s ruling on D-063, “[b]y passing the MCA, Congress made the provisions of the MCA superior to prior statutes, treaties, and customary international law under the last in time rule.” See D-063, Ruling on Defense Motion to Suppress Out-of-Court Statements by the Accused due to Coercive Interrogation, at 2, para. 2d. Nevertheless, there can be little doubt that killing by an unlawful combatant is in fact a violation of the law of war.

ii. The MCA reflects Congress’s exercise of its authority to “define and punish” murder as one of the “Offenses against the Law of Nations.” U.S. Const. Art. I, § 8, cl. 10. Congress’s judgment is firmly rooted in U.S. law and international law and custom, both of which recognize that a combatant commits murder when he kills another person in a manner that is not sanctioned by the laws of war.

iii. The accused concedes, see D-008, Def. Mot. to Dismiss Charge I at 3-5, that killing through “prohibited means” constitutes a violation of the law of war. One of those “prohibited means”—which is as old as the law of war itself—is murder committed by a combatant who fails to fight as a lawful belligerent.¹ As Justice Iredell noted in 1795, “hostility committed without public authority” is “not merely an offence against the nation of the individual committing the injury, *but also against the law of*

¹ The accused has previously argued—notably, without citation—that the law of war does not recognize “status crimes.” D-008, Def. Mot. to Dismiss Charge I at 5. The Supreme Court, however, has held that the distinction between “lawful” and “unlawful” combatant status is founded in the “universal agreement of law and practice” under the law of war. *Ex parte Quirin*, 317 U.S. 1, 30 (1942). And unlawful combatants can be forced to stand trial before military commissions for *precisely* those “acts which render their belligerency unlawful.” *Id.* Moreover, the Government did not criminally charge Khadr simply on the basis of his “status”; rather, he is charged with *committing murder* while maintaining the status of an unlawful enemy combatant.

nations” *Talbot v. Janson*, 3 U.S. 133 (1795) (Iredell, J., concurring) (emphasis added).²

iv. Individuals “who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.” U.S. Army Field Manual No. 27-10, Article 80, 18 July 1956 (citation omitted). *See also id.*, Articles 81, 82. Historically, summary execution of those caught committing acts of unlawful belligerency, sometimes termed “unlawful combatants” or “unprivileged belligerents,” has not been uncommon. *See, e.g., United States v. List* (“Hostage Case”), 11 Trials of War Criminals 1223 (GPO 1950).

v. Colonel Winthrop, in a treatise that the Supreme Court has called the “the Blackstone of Military Law,” *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2777 (2006), noted:

Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death.

Winthrop, *Military Law and Precedents*, 783 (1895, 2d ed. 1920). During the Civil War, military commissions were used frequently to try and punish unlawful combatants “who engaged in the killing . . . of peaceable citizens or soldiers.” *Id.* at 784 (emphasis added). Critically for purposes of this motion, many were sentenced to death “for homicide.” *Id.* at 784 n.57. *See also id.* at 839 (emphasizing that murder was one of the crimes “most frequently brought to trial before military commissions” during the Civil War).

vi. The historical roots of this violation of the law of war are undeniable. Unlike lawful combatants, “[T]hose, on the contrary, who, not being so authorized, take upon them to attack the enemy, are treated by him as banditti; and even the state to which they belong ought to punish them as such.” Leslie C. Green, *The Contemporary Law of Armed Conflict* 2nd Edition 104 (Manchester University Press 2000) (citing 7 Von Martens, *A Compendium of the Law of Nations* 1788, ch. III, s. 2 (tr., Cobbett, 1802, 287)). Similarly, in a 142-year-old opinion, which remains binding on the Executive Branch, the Attorney General emphasized that “[a] bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war.” 11 Op. Atty. Gen. 297, 314 (1865).

vii. Lieber’s Code, General Order No. 100 War Department, April 24, 1863, recognized the distinction between lawful and unlawful combatants as well. Under

² Offenses committed by unprivileged – in essence, stateless – belligerents are undeniably the modern day analogy to piracy. The accused’s reference to the four words “on the high seas” omitted from the *Talbot* quote is inconsequential. *See* D-071, Def. Motion at 9 n. 3.

Article 57, “[s]o soon as a man is armed by a sovereign government, and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses.” By contrast, those who “commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army . . . shall be treated summarily as highway robbers or pirates.” Article 82.

viii. Given that unlawful belligerents historically could be summarily punished—and even executed—under the law of war, it follows *a fortiori* that they are on notice that killing in the context of an armed conflict is “in violation of the laws of war.” Thus, the Supreme Court has held:

By universal agreement and practice the law of war draws a distinction between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. *Unlawful combatants* are likewise subject to capture and detention, but in addition they are *subject to trial and punishment by military tribunals for acts which render their belligerency unlawful*.

Ex parte Quirin, 317 U.S. 1, 30 (1942) (emphasis added).

ix. Here, Khadr has been charged for committing murder without combatant immunity and in violation of the law of war. Specifically, Khadr unlawfully engaged in combat by fighting outside of responsible command, by fighting without wearing a distinctive emblem, by failing to carry his arms openly, and by flaunting the laws and customs of war by feigning to be a non-combatant. *Compare* Hague Regulations, Annex, Art. 1.

x. Under the law of armed conflict, only a lawful combatant enjoys “combatant immunity” or “belligerent privilege” for the lawful conduct of hostilities during armed conflict. *See, e.g., Padilla v. Bush*, 233 F.Supp.2d 564, 592 (S.D.N.Y. 2002), *rev’d on other grounds*, 542 U.S. 426 (2004). Those considered “lawful combatants” under the law cannot be prosecuted for belligerent acts—including the killing of an enemy soldier—if they abide by the law of armed conflict. *See id.* at 592 (*citing United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002)).

xi. Khadr bears the burden of proving that he is entitled to combatant immunity. *See U.S. v. Khadr*, CMCR 07-001, at 7 (Sept. 24, 2007) (“The burden of raising the special defense that one is entitled to lawful combatant immunity rests upon the individual asserting the claim.”). Here, Khadr has not challenged the *prima facie* evidence that he is an unlawful combatant, *see* D-008, Def. Mot. to Dismiss Charge I at 5 n.11, much less has he proven that he is entitled to combatant immunity. *See also U.S. v. Khadr*, Transcript of RMC 803 Session, 8 November 2007, at 81.

xii. Unlawful or unprivileged combatants—such as Khadr—violate the laws of

war when they commit war-like acts, such as murder. The CMCR emphasized that proposition by noting that unlawful combatants may be “treated as criminals under the domestic law of the capturing nation,” *including the Military Commissions Act*, “for any and all unlawful combat actions.” *Khadr*, CMCR 07-001, at 6. The CMCR reiterated the permissibility of Khadr’s trial before military commission by citing passages from *Lindh* and *Quirin*, both of which emphasize that “[u]nlawful combatants are . . . subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.” *Khadr*, CMCR 07-001, at 6 (quoting *Quirin*, 317 U.S. at 30, and citing *Lindh*, 212 F. Supp. 2d at 554, the latter of which block-quoted the same language from *Quirin*). See also *U.S. v. Khadr*, Ruling on D-008 (quoting *Quirin* throughout).

xiii. Even for otherwise lawful combatants (which Khadr is not), one example of murder in violation of the law of war is the “treacherous[]” killing of “individuals belonging to the hostile nation or army.” Annex to Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907, Art. 23, ¶ 3 (“Hague Regulations”). Such killings have long been held to violate the laws of war, including under the Fourth Hague Convention, and they have violated the War Crimes Act since 1997, see Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. 105-118, § 583, 111 Stat. 2386, 2436 (Nov. 26, 1997), long before Khadr treacherously killed Sergeant First Class Speer.

xiv. For example, Article 37(1)(c) of Additional Protocol I to the Geneva Conventions prohibits killing through “perfidy,” including the murder of an adversary by an individual “feigning . . . civilian, non-combatant status.” Although the United States has not ratified Protocol I, it views the perfidy provisions of Article 37 as reflecting customary international law. See *U.S. Army Operational Law Handbook* 15, 25 (J. Rawcliffe & J. Smith eds., 2006).

xv. The Army’s *Operational Law Handbook* similarly defines unlawful combatants to include “civilians who are participating in the hostilities or who otherwise engage in unauthorized attacks or other combatant acts.” *Id.* at 17.

xvi. The Judge Advocate General’s *Law of War Handbook* also emphasizes that attacking a soldier while feigning non-combatant status constitutes a war crime. See Int’l & Operational Law Department, *Law of War Handbook*, § 5(A)(2)(f), at 192 (Keith E. Puls et al. eds., 2005) (“Attacking enemy forces while posing as a [non-combatant] civilian puts all civilians at hazard.”) (internal quotation marks and citations omitted).

xvii. Similarly, U.S. Air Force Pamphlet 110-31 prohibits “[p]erfidy or treachery,” which includes murder by a combatant who “feign[s] . . . civilian, noncombatant status.” U.S. Air Force Pamphlet 110-31, at 5-12.

xviii. Building on these and other materials, Article 8(2)(b)(xi) of the Rome Statute of the International Criminal Court similarly prohibits “killing or wounding treacherously individuals belonging to the hostile nation or enemy.” See also Knut Dörmann, *Elements of War Crimes* 240-45 (2002).

xix. These sources establish an irrefutable consensus, as a matter of United States and international law, that murder committed by an individual—like Khadr—who takes up arms without satisfying the conditions for lawful combat is a violation of the law of war. He was therefore appropriately charged, and he had sufficient notice of the element, the “in violation of the law of war.”

e. Conclusion

i. The Defense motion should be denied. The accused is not entitled to the due process protections of the Fifth Amendment. The Supreme Court has made clear 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, such as Khadr.

ii. Even if the accused were to possess constitutional rights under the 5th Amendment, the charge sheet complies with any due process requirements. The accused has been provided with adequate notice of the charged misconduct under any applicable standard. Contrary to Defense claims, the charges more than adequately address notice requirements found in the MCA and MMC, or otherwise provided by the 5th Amendment.

iii. Finally, the Defense reiterates the same arguments that were rightly rejected by the Military Judge in his ruling on D008. The Defense argues that the essential requirements for lawful combat do nothing to alter the permissibility of a combatant’s hostile actions. Rather, in the Defense’s view, anyone can kill an American serviceman under any battlefield circumstances, so long as he does not use certain narrowly proscribed methods, which (conveniently enough for Khadr) do not include terrorism. Unlawful or unprivileged combatants—such as Khadr—violate the laws of war when they commit war-like acts, such as murder. Absent combatant immunity, which the accused surely cannot claim, the acts themselves committed by accused are in violation of the law of war. The Defense’s argument to the contrary relies upon egregious misunderstandings and misinterpretations, under which the law of war somehow protects killing by terrorists, like Khadr, who openly flaunt every convention, norm, custom, and rule that has ever governed the conduct of warfare in the history of the civilized world. The charge of murder as alleged against Khadr is a cognizable war crime, which is properly heard before this Court.

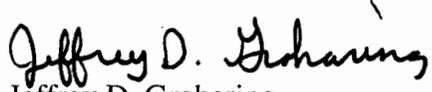
7. Oral Argument: The Government does not believe oral argument is necessary to deny the Defense motion. To the extent, however, that the Military Judge orders the parties to present oral argument, the Government will be prepared to do so.

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. **Submitted by:**



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UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

D-071

**Defense Reply
to Government Response to Motion to Dismiss
Charge I For Failure to State an Element of the
Offense in Violation of Due Process**

11 August 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. Reply: THE GOVERNMENT HAS VIOLATED DUE PROCESS BY FAILING TO SPECIFY ALL THE ELEMENTS OF THE OFFENSE OF MURDER IN VIOLATION OF THE LAW OF WAR

a. In response to the defense motion to dismiss for breaching Mr. Khadr's due process right to fair notice of the charges against him, the government proffers three arguments. The first is that Mr. Khadr has no due process rights. The second is that even if Charge I is impermissibly vague, trial counsel's motions practice has adequately clarified the approximate parameters of the elements it must prove at trial. The third is that Charge I adequately alleges at least one violation of the law of war (which the government contends is either "unprivileged belligerency" and/or perfidy). Each of these arguments fail.

b. The United States cannot conduct a trial that does not comply with Constitutional due process in an area where the United States is *de facto* sovereign.

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

(2) To evade *Boumediene*, trial counsel relies upon two cases that it claims are both controlling and undisturbed – *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). *Eisentrager* dealt with German prisoners who had been tried by military commission and held in a military prison in occupied Germany after WWII. *Verdugo* dealt with a warrantless search conducted by U.S. law enforcement in Mexico. In both of these cases, the Court held that what U.S. officials did in a foreign country implicated the relations between the United States and that foreign government. Accordingly, the U.S.

Constitution did not supplant that countries' local law unless the individuals involved had some other significant connection to the United States that would warrant it.¹

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

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

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

(3) While *Boumediene* reserved judgment on the full breadth of the Constitution’s application in GTMO, there can be no question that its territorial status and the alienage of the individuals held there are not dispositive or even compelling factors. *Boumediene*, 128 S.Ct. at 2256. And the government’s argument that voluntary contacts with the United States are a prerequisite for application of the Constitution, (Govt. Br. at para. 6(a)(v)-(vi)), is contradicted by *Boumediene*’s application of the Great Writ to Guantanamo detainees. *Boumediene*, 128 S.Ct. at 2262 (“We hold that Art. I, § 9, Cl. 2, of the Constitution has full effect at Guantanamo Bay.) As with any of the other unincorporated territories, the scope of the Constitution’s application is a function of practicality and given that GTMO is both closer to CONUS and less politically fraught, the government must meet a high burden in demonstrating why GTMO is any less subject to the Constitution than Puerto Rico. *Id.* at 2258. While the defense concedes that there is room for debate at the margins, *Boumediene* presumes the

¹ *See Verdugo*, 494 U.S. at 274-75. (“At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application. For better or for worse, we live in a world of nation-states in which our Government must be able to ‘functio[n] effectively in the company of sovereign nations.’ *Perez v. Brownell*, 356 U.S. 44, 57 (1958). Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country.”).

application of due process, as does a long series of Supreme Court precedent beginning with the Insular Cases.² In articulating its central holding on whether CSRT proceedings substituted for habeas corpus, *Boumediene* reasoned that, “Even if we were to assume that the CSRTs satisfy due process standards, it would not end our inquiry.” *Boumediene*, 128 S.Ct. at 2270. Any argument, therefore, that the United States can conduct a criminal trial that does not comply with the due process standards of the Constitution is baseless and an embarrassment. The political branches have no power “to switch the Constitution on or off at will.” *Id.* at 2259.

c. Due process and the MCA require that the specification put the accused on notice of the elements of the offense charged.

(1) As is laid out in detail in the principal brief, due process requires that the specification “allege conduct clearly defined and easily recognizable in the military context as criminal.” *United States v. Peszynski*, 40 M.J. 874 (N.M.C.M.R. 1994). In light of *Boumediene*, this basic due process standard is at least incorporated through MCA § 948q(b) and R.M.C. 307(c)(3), which requires the specification to allege “every element of the charged offense expressly or by necessary implication.”

(2) Trial counsel take the position that the mere recitation of “the language ‘in violation of the law of war’ and ‘unlawfully’ provide notice of the criminality of the accused’s charged misconduct.” (Govt. Br. at para. 6(b)(5).) Mere recitation of the statutory elements, without their being supported by alleged conduct that satisfies them on the face of the specification, is not sufficient to provide the defendant notice of what charges he must defend against. “It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, – it must descend to particulars.” *United States v. Cruikshank*, 92 U.S. 542, 558 (1875).

(3) There is no dispute that, unlike the elements of Murder by an Unprivileged Belligerent provided in Military Commission Instruction No. 2 (MCI2), the crime of Murder in Violation of the Law of War, as enacted by the MCA, includes the additional element of a violation of the law of war.

(i) The specification of Charge I, however, merely states that Mr. Khadr “violated the law of war, by throwing a hand grenade at U.S. Forces, resulting in the death of Sergeant First Class Speer.” (Charge Sheet at 1.) Grenades are not prohibited weapons under the extant laws of war and Special Forces soldiers are not prohibited targets. “[T]he act charged does not of itself constitute criminal conduct.” Gov’t Resp at 6(b)(iv) (quoting *United States v. Brice*, 38 C.M.R. 134, 137 (C.M.A. 1967)).

² See, e.g., *Balzac v. Porto Rico*, 258 U. S. 298, 313 (1922) (“The guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application” in the unincorporated territories.) (emphasis added).

(ii) To make matters worse, despite two opportunities to clarify the specification, trial counsel refuses to articulate what specific law of war violation it is alleging. Instead, it alleges either “unprivileged belligerency,” meaning the “violation of the law of war” element is mere surplusage so long as it can prove “unlawfulness,” or in the alternative that Mr. Khadr committed perfidy. These efforts “to fill in the gaps of proof by surmise or conjecture” do not afford fair notice. *Russell v. United States*, 369 U.S. 749, 766 (1962). Specificity is necessary “to enable the court to decide whether the facts alleged are sufficient in law to withstand a motion to dismiss the indictment or to support a conviction in the event that one should be had.” *Id.* at n.15.

(iii) The government cannot make vague allegations in the specification and proceed on an “in the alternative” basis. If it desires to have alternative theories of liability, it must specify those expressly and individually in the Charge Sheet, and not exploit the customary nature of one of the elements as an opportunity to experiment as the evidence is presented at trial. *See, e.g., Sanabria v. United States*, 437 U.S. 54, 66 (1978); *The Confiscation Cases*, 87 U.S. 92, 104 (1873).

d. Charge I fails to specify a necessary element of the offense.

(1) With respect to the adequacy of the specification of Charge I itself, trial counsel copies nearly verbatim its brief in response to D-008. Again trial counsel reiterates, what the instant motion does not contest, that “Congress was acting within its constitutional authority when it included ‘in violation of the law of war’ as a statutory element to Murder in violation of the law of war in the MCA.” (Govt. Br. at para. 6(c).) What trial does not clarify is what in the specification of Charge I satisfies the war crime element.

(2) “Unprivileged Belligerency” does not satisfy the war crime element of Murder in Violation of the Law of War.

(i) While the general thrust of trial counsel’s brief appears to argue that the war crime element is redundant of the “unlawfulness” element,³ its need to fall back on unsubstantiated allegations of perfidy belies the fact that there is no clear Congressional designation of “unprivileged belligerency” as a war crime – not in the War Crimes Act, 18 U.S.C. 2441, or in the MCA. As stated in the defense’s motion, the government did not even define “Murder by an Unprivileged Belligerent” as a violation of the law of war in MCI2, but rather put it in a catchall class of offenses that included perjury and obstruction of justice. Trial counsel variously accuses Mr. Khadr of simple “murder” and “homicide,” (Govt. Br. at paras. 6(d)(ii), 6(d)(v)), but that is not a crime over which this military commission has jurisdiction. And trial counsel can still point to no prosecution of “unprivileged belligerency” in the post-Geneva Convention world.

(ii) Trial counsel correctly cites the decision of the CMCR for the proposition that “unlawful combatants may be ‘treated as criminals under the domestic law of the

³ (*See* Govt. Br. at para. 6(b)(v) (“That he did not enjoy the combatant’s privilege is sufficient notice that the killing was ‘in violation of the law of war.’”))

capturing nation.” (Govt. Br. at para. 6(d)(12) (quoting *United States v. Khadr*, CMCR 07-001, 6 (2007)).)

(A) Congress could have, but did not, give the military commission plenary jurisdiction over Title 18. Had it done so, trial counsel could have charged Mr. Khadr with a violation of 18 U.S.C. 1114, alleging nothing other than the “unlawful murder of SFC Christopher Speer as an ‘alien unlawful enemy combatant’ who does not benefit from ‘combatant immunity.’” (Govt. Br. at para. 6(b)(5).)

(B) Instead, Congress gave these commissions limited subject matter jurisdiction over enumerated crimes widely recognized as governing the modern conduct of hostilities. As with Aiding the Enemy and Conspiracy,⁴ Congress did not enact MCI2 verbatim into law, but revised the constituent elements of a number of the offenses to ensure that they would “not establish new crimes that did not exist before its enactment.” MCA 950p(a). These legislative choices are made most apparent by the fact that Congress did not enact “Murder by an Unprivileged Belligerent,” or any close variation such as “Murder of U.S. Personnel.” It gave this military commission jurisdiction over Murder in Violation of the Law of War, which for the purposes of the MCA entails that a killing be *both* “unlawful” and done in “violation of the law of war.” See R.M.C., Part IV, at para. 6(15).

(C) Trial counsel consistently attempts to conflate these two elements and on at least three occasions, repeats words to the effect of “there can be little doubt that killing by an unlawful combatant is in fact a violation of the law of war.” (Govt. Br. at 6(d)(i).)⁵ Not once, however, is this mantra followed by any authority. “[T]he fact that the government has ‘said it thrice’ does not make an allegation true.” *Parhat v. Gates*, 2008 WL 2576977 at *13 (D.C. Cir. 2008). Nor does a “142-year-old opinion, which remains binding on the Executive branch,” control the findings of law made by the military judge. (Govt. Br. at para. 6(d)(vi)). Unlike the previous military commission system, the military judge is not sitting as a presiding officer, but as a judge, with an independent duty to apply congressional law.

(iii) Trial counsel concedes that “Congress did not criminalize ‘unprivileged belligerency’ per se, but it certainly had the constitutional authority to define killing by an unlawful combatant as a violation of the law of war.” (Govt. Br. at para. 6(c)(iii).)

(A) The defense is willing to concede that Congress’ authority to “define and punish offenses against the law of nations” could prospectively extend to defining

⁴ MCI2 defined the elements of Conspiracy to include the joining of a criminal “enterprise,” a theory of liability that was not adopted by Congress in enacting the MCA. MCA 950v(28). The previous military judge in this case struck the criminal enterprise language from Charge III on the grounds that the MCA did not legislate Conspiracy as it had been defined in MCI2. Ruling on Defense Motion to Strike Surplus Language from Charge III, D-019, dated 4 April 2008.

⁵ See also Govt. Br. at 6(d)(xii) (“Unlawful or unprivileged combatants – such as Khadr – violate the laws of war when they commit war-like acts, such as murder.”); see also *id.*, at 6(d)(xix) (“These sources establish an irrefutable consensus, as a matter of United States and international law, that murder committed by an individual – like Khadr – who takes up arms without satisfying the conditions for lawful combat is a violation of the law of war.”).

“unprivileged belligerency” as a war crime. The problem is that Congress has not yet defined such a crime either in the MCA or elsewhere. In fact, the MCA did not define “violation of the law of war” at all, let alone as trial counsel wishes it had.

(B) Congress instead incorporated by reference a recognizable collection of norms that govern modern, urban warfare. These norms are not only contained in treaties and treatises, but in Title 18. The War Crimes Act (WCA), passed in 1996, enacts violations of the law of war into federal law by reference to the Hague and Geneva Conventions and by express enumeration. *See* 18 U.S.C. § 2441. Among those expressly enumerated is “Murder” in violation of the law of war. The WCA defines “Murder” as “The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.” 18 U.S.C. § 2441(d)(1)(D). Nowhere does the WCA make any mention of “unprivileged belligerency,” and there was no treaty or statute in the decade between the enactment of the WCA and MCA that would otherwise expand the scope of which murders are war crimes.

(C) Most telling of this fact, the only definition of Murder in Violation of the Law of War thus far used in the military commissions is substantively identical to how it is defined in the War Crimes Act:

Definitions:

A killing violates the law of war where a combatant (*whether lawful or unlawful*) intentionally and without justification kills:

- (i) civilians not taking an active part in hostilities;
- (ii) military personnel placed *hors de combat* by sickness, wounds, or detention; or
- (iii) military medical or religious personnel.

United States v. Hamdan, Prefatory Instructions on Findings, dated 4 August 2008, at 4. (emphasis added).⁶

⁶ *See also* instruction on Conspiracy to Destroy Property in Violation of the Law of War:

In order to find Mr. Hamdan guilty of Conspiracy to Destroy Property in Violation of the Law of War, you must find beyond a reasonable doubt that Mr. Hamdan:

- (1) entered into an agreement;
- (2) to intentionally and without consent destroy property of another which is not a military objective;
- (3) that Mr. Hamdan knew the unlawful purpose of the agreement and joined willingly, with the intent to further the unlawful purpose;
- (4) that Mr. Hamdan committed an overt act in furtherance of the agreement; and
- (5) that the agreement and the intended destruction of property took place in the context of and was associated with an armed conflict.

Definitions:

Military objectives are combatants, and those objects during an armed conflict:

(3) Nothing in the specification of Charge I alleges the elements of perfidy.

(i) Trial counsel attempts to salvage Charge I by alleging that Mr. Khadr murdered SSG Speer through means of perfidy. “Even for otherwise lawful combatants (which Khadr is not), one example of murder in violation of the law of war is the ‘treacherous[]’ killing of ‘individuals belonging to the hostile nation or army.’” (Govt. Br. at para. 6(d)(xiii).) As stated in the defense motion, the defense does not contest that if the specification alleged perfidious killing, then that would articulate both a killing that was unlawful (if perpetrated by someone without combatant privilege) and in violation of the law of war (if perfidious).

(ii) Contrary to trial counsels’ assertions, however, there is no indication in the specification or even in trial counsel’s statement of “facts” that Mr. Khadr “feign[ed] to be a non-combatant.” (Govt. Br. at para. 6(d)(xi).) Rather, the supporting evidence for both describes a conventional battle that could be taken out of a textbook on U.S. war fighting doctrine. In a “pre-planned operation,” fifty-five personnel took up positions at the “location and established a cordon.” (Memorandum for Commander, 28 Jul 02, at paras. 2(A)-(B) (Attachment B to D028).) Once the engagement began, U.S. forces initiated a significant bombardment of the compound by combat air support. (*Id.*) Wholly aware of the enemy fighters inside, the on-scene commander ordered the penetration of the compound by “an assault element to clear the target.” (*Id.* at para. 2(C).) While entering and once inside, U.S. Forces threw hand grenades throughout the compound to ensure the target was cleared. (*See, e.g.*, RIA, 7 Dec 05 Summary of Soldier #3 Interview (Attachment A to D-071); RIA, 7 Dec 05 Summary of Soldier #4 Interview (Attachment B to D-071); RIA, 7 Dec 05 Summary of Soldier #5 Interview (Attachment C to D-071)); *cf.* FM 3-06.11, Combined Arms Operations in Urban Areas, 28 February 2002, at para. 3-22(c).

(iii) Never has it been alleged that Mr. Khadr “invited the confidence or belief of one or more persons that they were entitled, or obliged to accord, protection under the law of war.” R.M.C., Part IV, at para. 17(b)(1). From the moment fifty-five personnel established a cordon around the compound pursuant to their “pre-planned operation,” Mr. Khadr was understood to be an obvious and lawful target of attack. Nothing in the specification or trial counsel’s motion indicated that Mr. Khadr feigned protected status in order to ambush SSG Speer. Trial counsel’s effort to allege perfidy via its motions practice is therefore both untimely and without support in the specification. *United States v. Fabrizio*, 385 U.S. 263, 275 (1965) (The court “cannot remedy the deficiencies in the indictment by retroactively reading the Government’s new charges into it.”).

e. Conclusion

(1) The clearest evidence that Charge I is facially deficient is trial counsels’ inability to identify and support a coherent legal theory under which Charge I specifies the war

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- (i) which by their nature, location, purpose, or use, effectively contribute to the opposing force’s war-fighting or war-sustaining capability, and
 - (ii) the total or partial destruction, capture or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

Civilian objects are all objects that do not qualify as military objectives.

crime element of Murder in Violation of the Law of War. Instead, trial counsel offers a scatter shot approach, alleging in its briefing that Charge I specifies either “unprivileged belligerency” or perfidy.

(2) The former theory fails because “unprivileged belligerency” has not been a recognized war crime since at least the ratification of the Geneva Conventions, and given the age of the authority upon which trial counsel relies in this case, possibly since the Civil War.⁷ If the latter, the specification fails because it makes no allegation that Mr. Khadr was anything other than an obvious and lawful target of attack. Under either theory, the specification is facially insufficient and deprives Mr. Khadr of any notice of what war crime he is alleged to have committed and what trial counsel’s burden will be at trial.

(3) Trial counsel’s insistence that it is under no obligation to specify the war crime element of Charge I with particularity is to insist that Congress sought to accomplish nothing by enumerating a limited class of offenses in the MCA. Trial counsel’s apparent objective is to take the more serious overt acts alleged in support of Charges III and IV and transform them via artful pleading into the more sensational, but unsupportable, Charge I. The military judge is not sitting as a presiding officer and the crimes over which this commission has jurisdiction are not found in the Executive order MCI2 but in the Congressional enactment of the MCA. Congress intended Murder in Violation of the Law of War to convict terrorists for war crimes, not to convict every unlawful enemy combatant as a murderer. Charge I fails to state this central element of the offense with the necessary specificity and therefore should be dismissed.

⁷ Insofar as trial counsel would like to rest this commissions’ decision on the Supreme Court sittings of the 1790s, Mr. Khadr would point to the opinion of Justice Patterson in the case of *Ware v. Hylton*, 3 U.S. 199 (1796). In rejecting the continued legal validity of debt confiscation under the customary laws of war, he wrote in relevant part that it “is considered a disreputable thing among civilized nations of the present day, and indeed nothing is more strongly evincive of this truth than that it has gone into general desuetude.” *Id.* at 255. Whatever customary law may have prevailed during the Civil War, the failure to prosecute *anyone* in the intervening 150 years shows that the war crime of “unprivileged belligerency,” to the extent it ever existed, is desuetude. See also *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (“The undeviating policy of nullification [of the laws] throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. ‘Deeply embedded traditional ways of carrying out state policy . . .’ -- or not carrying it out -- ‘are often tougher and truer law than the dead words of the written text.’”) (quoting *Nashville v. Browning*, 310 U.S. 362 (1940)).

3. Evidence:

Memorandum for Commander, 28 Jul 02, Attachment B to D028

RIA, 7 Dec 05 Summary of Soldier #3 Interview, Attachment A to D-071

RIA, 7 Dec 05 Summary of Soldier #4 Interview, Attachment B to D-071

RIA, 7 Dec 05 Summary of Soldier #5 Interview, Attachment C to D-071

/s/

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Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

D-071

**Defense Supplement
to Government Response to Motion to Dismiss
Charge I For Failure to State an Element of the
Offense in Violation of Due Process**

15 August 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. Argument

a. Defense would like to direct the military commission's attention to supplemental evidence relevant to the disposition of D-071. These include two documents – the draft of the MCA submitted to Congress by the White House in the Summer of 2006, entitled "Enemy Combatant Military Commissions Act of 2006" (Attachment A) ("Draft MCA") and the transcript of the 2 August 2006 hearing of the Senate Armed Services Committee entitled "The Future of the Military Commissions" (Attachment B) ("MCA Hearing"), where the Draft MCA was considered by the Senate.

b. Draft MCA § 247 enumerates the substantive offenses over which the military commissions will have jurisdiction in largely identical terms as Military Commission Instruction No. 2 ("MCI2"). The Draft MCA divided the triable offenses into two classes. The first class comprised "Offenses in Violation of the Laws of War." Draft MCA § 247(b). The second class comprised "Other Offenses Triable by Military Commission." Draft MCA § 247(c). Like MCI2, Draft MCA § 247(c)(3) criminalized the offense of "Murder by an Unprivileged Belligerent," and also like MCI2, this offense was not listed among the "Offenses in Violation of the Laws of War," but in the catchall category of "Other Offenses Triable by Military Commission."

c. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987). Congress was not only aware of "Unprivileged Belligerency" from the old military commission system, but expressly rejected a draft of the MCA that included it. The enumeration of nineteen "Violations of the Laws of War" in the Draft MCA makes abundantly clear what acts Congress intended to cover with the "in violation of the law of war" element of "Murder in Violation of the Law of War," and "Unprivileged Belligerency" is not one of them. The Charge Sheet, on its face, fails to specify conduct that satisfies a necessary element of the offense and should therefore be dismissed.

3. Evidence:

- A. Draft of the MCA submitted to Congress by the White House in the Summer of 2006, entitled "Enemy Combatant Military Commissions Act of 2006"
- B. Transcript of the 2 August 2006 hearing of the Senate Armed Services Committee entitled "The Future of the Military Commissions"

/s/

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6. The specification of Charge I and the entire record of trial are clearly sufficient for the accused to use in raising any potential future double jeopardy protection. See *Dear*, at 197.

7. Accordingly, the motion is DENIED.

So Ordered this 6th day of October 2008.


Patrick J. Parrish
COL, JA
Military Judge

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