ORIGINAL

RECORD OF TRIAL

(and accompanying papers)

of

OMAR AHMED KHADR
also known as AKHBAR FARHAD,
AKHBAR FARNAD,
and AHMED MUHAMMED KHALI

Name and any aliases charged

0766

Identification Number

By

MILITARY COMMISSION

Convened by the Convening Authority under 10 USC §948h

Office Military Commissions
(Name of Convening Authority)

Tried at

Guantanamo Bay, Cuba on 13 March 2008 Session

(place or Places of Trial) *(Date or Dates of Trial)*

Companion cases:
None.

Edmonds, Matthew, SSG, DoD OGC

[redacted]

Subject: FW: Summary - RMC 802 Conference - 9 November 2007

COL Brownback has directed that I send the email below to the parties.

v/r,

[redacted]

LTC Chappell,

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

Please make this email and the chain below the next appellate exhibit in order.

COL Brownback

Counsel in the case of US v. Khadr,

1. Neither party furnished the military judge any corrections, comments, or supplements to the Summary of the RMC 802 Conference held at Guantanamo on 9 November 2007. The military judge's email account on Gitmo was open until 1130 hours, 10 November 2007, and the military judge saw six of the participants at the air terminal on 10 November.

2. The Summary below will be placed in the record as the summary.

Peter E. Brownback III
COL, JA, USA
Military Judge

----- Original Message -----

ce - 9 November 2007

COL Brownback has directed that I send the email below to the parties.

V/r,

RMC 802 Conference Summary - 9 November 2007

1. An RMC 802 Conference was held at 1500 hours, 9 November 2007. Present were:

COL Brownback - Military Judge

LTC Sowder - MCTJ Staff

MAJ Groharing - Prosecution

CPT Petty

Mr. Murphy

LCDR Kuebler - Defense

Ms. Petty

Mr. Whitling

Mr. Berrigan

2. The conference was scheduled to discuss a proposed trial schedule. It had been set on 7 November and was mentioned on the record on 8 November.

3. Before any substantive matter was discussed, MAJ Groharing brought to the military judge's attention:

a. The fact that the defense (LCDR Keubler/Mr. Berrigan) held a press conference on 8 November.

b. MAJ Groharing's understanding of defense statements at the press conference, based on his reading of various press reports.

c. MAJ Groharing's concern about certain statements which he believed had been made.

4. The defense (LCDR Keubler at first joined and then supplanted by Mr. Berrigan.) brought the following matters to the military judge's attention:

a. The fact that prior to the press conference, Mr. Berrigan and COL David had a meeting with Mr. James Powell concerning what could and could not be said.

b. The fact that in their belief nothing said exceeded what was agreed upon with Mr. Powell.

c. LCDR Kuebler's reaction to comments by MAJ Groharing on what might have

been said.

5. Mr. Berrigan then stated that there was an audio tape or other recording of the press conference. The military judge commented that the defense should share the audio tape with the prosecution and it could be given to Mr. Powell for review.

6. MAJ Groharing stated that he did not believe any further discussion of the trial schedule would be productive, based on his understanding of the defense strategy in the case.

7. The military judge stated that he was not going to force anyone to stay in this conference.

8. Mr. Berrigan stated that BG Hartman had called Mr. Berrigan at 2330 hours, 8 November; the reason for the call was that BG Hartman wanted COL David's phone number. The military judge noted that that matter did not involve the military judge.

9. The military judge distributed copies of his proposed trial schedule of 9 November 2007 and said that comments would be due NLT 21 November 2007.

10. The military judge forwarded copies of this summary to counsel at 1635 hours, 9 November 2007. Counsel may provide the military judge supplements or corrections by 1835 hours, 9 November 2007.

Peter E. Brownback III

COL, JA, USA

Military Judge

Edmonds, Matthew, SSG, DoD OGC

[redacted]

Follow Up Flag: Follow up
Flag Status: Red

Counsel in the case of United States v. Khadr,

The defense request to withdraw its special request for a deposition of SA Girod is granted.

Peter E. Brownback III
COL, JA, USA
Military Judge

[redacted]

Subject: RE: U.S. v. Khadr -- Special Request for Deposition of Special Agent Larry D. Girod

Sir,

1. The defense respectfully requests to withdraw its special request for a deposition of SA Girod, without prejudice to renewing the request at a later date.

2. As we indicated in the course of the RMC 802 conferences in which this matter was addressed, the defense expects this to be a recurrent issue in light of prosecution

comments about possible refusal of numerous witnesses to be interviewed by the defense. The defense is prepared to sit down with the government again and try to work through these matters. If and when we are forced to start litigating these issues, the military judge should have the benefit of more comprehensive briefing than has been presented in the instant request and response.

VR,

LCDR Kuebler

[redacted]t Col

Subject: FW: U.S. v. Khadr -- Special Request for Deposition of Special Agent Larry D. Girod

Per COL Brownback, does the defense intend to reply?

V/r,

[redacted]

Subject: RE: U.S. v. Khadr -- Special Request for Deposition of Special Agent Larry D. Girod

Sir,

1. The Prosecution opposes the Defense request for deposition.

2. RMC 702(a) provides that "a deposition may be ordered whenever, after swearing of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective
witness be taken and preserved for use at a military commission."

3. The discussion to RMC 702 provides "the fact that a witness will be available for

trial is good cause for the denial in the absence of unusual circumstances..."

4. The Defense has failed to demonstrate any exceptional or unusual circumstances that would warrant ordering a deposition.

5. SA Larry Girod was advised several times regarding Defense request(s) to speak to him and elected not to make himself available for interview, which is well within his rights.

6. SA Girod's testimony need not be preserved in this case. He will be present at Guantanamo Bay for trial and the Defense will have the opportunity to cross-examine him while under oath if they so choose.

7. Accordingly, the Defense request for deposition should be denied.

V/R,

Major Groharing

Subject: U.S. v. Khadr -- Special Request for Deposition of Special Agent Larry D. Girod

Sir,

1. The defense respectfully requests the military judge to order the deposition of Special Agent Larry D. Girod of the Federal Bureau of Investigation (FBI), pursuant to RMC 702.

2. The following information is provided pursuant to RMC 702(c)(2):

a. Name and address: Larry D. Girod, Special Agent, Federal Bureau of

Investigation; address unknown, but for the purposes of this request, Special Agent Girod is onboard Naval Station Guantanamo Bay.

b. The defense desires to examine Special Agent Girod on matters relating to his participation in the investigation of offenses alleged to have been committed by the accused. Special Agent Girod participated in numerous interrogations of the accused. The defense desires to inquire into not only into the circumstances and substance of these interrogations, but into Special Agent Girod's knowledge of other matters relating to the charges, including, without limitation, his knowledge of other evidence relating to the charges, and knowledge of other matters that will facilitate the defense's ability to conduct meaningful discovery in this case (e.g., knowledge of FBI file system, case management systems, etc.).

c. The defense is requesting the military judge to order this deposition because the FBI has declined to make Special Agent Girod available for interview. The prosecution notified the defense last week that it intended to bring Special Agent Girod to Guantanamo Bay in connection with the 8 November hearing in this case and that Special Agent Girod would, if deemed necessary by the military judge, be testifying on behalf of the government (i.e., it is not clear whether he will be testifying). The prosecution had suggested that Special Agent Girod would be available Tuesday afternoon for an interview. However, late last night, the defense was directed to the FBI in order to seek permission to interview Special Agent Girod. The defense complied and permission has now been denied. Regardless of whether Special Agent Girod takes the stand on Thursday, the "interests of justice" are best served by allowing the defense to examine Special Agent Girod on the matters referenced in para. 2b hereof (the defense does not wish to take the time of the commission to call or cross examine Special Agent Girod to conduct discovery on the stand). The defense notes with great concern that the prosecution has suggested that a number of witnesses (including FBI agents) may decline to be interviewed by the defense.
This will leave the defense with no choice but to seek deposition orders in such instances. This can only frustrate the process of discovery, lead to unnecessary delay, and thwart the ability of the defense to adequately investigate the case and prepare a defense for the accused.

d. The defense requests an oral deposition at the earliest possible opportunity.

VR,

LCDR Kuebler

[redacted]

[redacted]

Subject: FW: Continuance - US v. Khadr - 11 January 2008 to 4 February 2008
Follow Up Flag: Follow up
Flag Status: Red

COL Brownback has directed that I forward the email below to counsel and other interested persons.

v/r,

LTC Mike Chappell, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

[redacted]

LTC Chappell,

Please forward the email below to the parties in the case of the United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

Counsel in the case of US v. Khadr,

1. Reference is made to email, LTC Chappell, 9 November 2007, 5:15 PM, Subject: FW: Continuance - US v. Khadr - 20 November 2007 to 11 January 2008 - Submission of all law motions.

2. The military judge has considered the defense request for delay provided both in its proposed trial schedule of 29 October 2007 and in the RMC 802 session of 7 November 2007. The military judge has also considered the government proposed trial schedule of 30 October 2007 and its comments during RMC 802 sessions. The military judge has also considered the matters set forth on the record of trial on

8 November 2007,the delays and continuances previously granted in this case, and the commission's proposed trial schedule of 7 November 2007.

3. The military judge herewith delays the date for the hearing on law motions from 11 December 2007 to 4 February 2008. Under the provisions of RMC 707, the defense is responsible for this delay.

4. The military judge finds that granting the continuance based on the defense request for delay is required to insure that the defense has sufficient time to research and prepare the law motions in this case. The military judge specifically finds that the interests of justice served by granting the continuance outweigh the best interests of the public and the accused in a prompt trial of the accused.

Peter E. Brownback III
COL, JA, USA
Military Judge

[redacted]

[redacted]

Subject: FW: Continuance - US v. Khadr - 20 November 2007 to 11 January 2008 - Submission of all law motions

Follow Up Flag: Follow up
Flag Status: Red

COL Brownback has directed that I send the email below to the parties.

V/r,

[redacted]

LTC Chappell,

Please forward the email below to the parties in the case of the United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

Counsel in the case of US v. Khadr,

1. The military judge has considered the defense request for delay provided both in its proposed trial schedule of 29 October 2007 and in the RMC 802 session of 7 November 2007. The military judge has also considered the government proposed trial schedule of 30 October 2007 and its comments during RMC 802 sessions. The military judge has also considered the matters set forth on the record of trial on 8 November 2007.

2. The military judge herewith delays the date for the completion of submission of all law motions from 20 November 2007 to 11 January 2008. Under the provisions of RMC 707, the defense is responsible for this delay.

3. The military judge finds that granting the continuance based on the defense request for delay is required to insure that the defense has sufficient time to research and prepare the law motions in this case.
The military judge specifically finds that the interests of justice served by granting the continuance outweigh the best interests of the public and the accused in a prompt trial of the accused.

Peter E. Brownback III

COL, JA, USA

Military Judge

Defense Proposed Trial Schedule, 29 October 2007
United States v. Khadr

*The Defense is providing this proposed motion and trial schedule pursuant to COL Brownback's e-mail, sent at 1556hrs on 25 September 2007, as amended by the e-mail sent at 1351hrs, 28 September 2007. To the extent the proposed trial schedule contemplates assembly of the military commission more than 120 days after service of charges, the proposed trial schedule may be considered a request for a continuance in the interests of justice under R.M.C. 707(b)(4)(E).

#	**Event**	**Date**
1	Arraignment	8 Nov 07
2	First Discovery Motions: *motion*	11 Jan 08
3	First Discovery Motions: *response*	18 Jan 08
4	First Discovery Motions: *reply*	25 Jan 08
5	Hearing	30 Jan 08
6	Second Discovery Motions: *motion*	29 Feb 08
7	Second Discovery Motions: *response*	7 Mar 08
8	Second Discovery Motions: *reply*	14 Mar 08
9	Hearing	19 Mar 08
10	Dispositive/Evidentiary Motions/Witness request: *motion and request*	18 Apr 08
11	Dispositive/Evidentiary Motions: *response and response to request*	2 May 08
12	Dispositive/Evidentiary Motions: *reply*	9 May 08
13	Hearing on production of witnesses	14 May 08
14	Hearing on motions	21 May 08
15	Defense Trial Witness Requests	28 May 08
16	Prosecution Response to Witness Requests	4 Jun 08
17	Defense Motion to Produce Witnesses for trial and sentencing	11 Jun 08
18	Prosecution Response to Defense Motion to Produce Witnesses for trial and sentencing	18 Jun 08
19	Hearing	23 Jun 08
20	Voir dire of members and trial	30 Jun 08

Prosecution Proposed Trial Schedule, 30 October 2007
United States v. Khadr

*The Government is providing this proposal for motion and trial schedule pursuant to COL Brownback's e-mail sent at 1556hrs on 25 September 2007, as amended by the e-mail sent at 1351hrs, 28 September 2007.

#	Event	Date	
1.	Arraignment	8 Nov 07	
2.	"Law" Motions: *Motion*[1]	16 Nov 07	
3.	"Law" Motions: *Response*	30 Nov 07	
4.	"Law" Motions: *Reply*	7 Dec 07	
5.	Evidentiary motions: *Motion*	30 Nov 07	
6.	Evidentiary motions: *Response*	14 Dec 07	
7.	Evidentiary motions: *Reply*	21 Dec 07	
8.	Defense Witness requests for evidentiary motions, trial, and sentencing[2]	30 Nov 07	
9.	Prosecution Response to Witness Requests	7 Dec 07	
10.	Defense Motion to Produce Witness for Evidentiary Motions, trial, and sentencing	14 Dec 07	
11.	Prosecution Response to Defense Motion to Produce Witness for Evid. Motion	21 Dec 07	
12.	Motions Hearings: "Law Motions" &"Evidentiary motions"	14 Jan 08	
13.			
14.	Voir dire of members	28 Jan 08	
15.	Trial	29 Jan 08	

[1] A "law motion" is any motion except that to suppress evidence or address another evidentiary matter.

[2] Defense must concurrently notify the Office of the Convening Authority sufficiently in advance and provide all required information to enable the Office of the Convening Authority to arrange for transportation of the requested witnesses to Guantanamo Bay.

Edmonds, Matthew, SSG, DoD OGC

[redacted]

Subject: FW: Determination - Motion by Press Petitioners for Public Access to Proceedings and Records - US v. Khadr

Follow Up Flag: Follow up

Flag Status: Red

As directed by COL Brownback in the email below, I am forwarding the Determination to counsel (Cc to other interested persons), and to Mr. Berrigan for transmittal to Mr. Schultz and Mr. Zansberg.

v/r,

LTC Mike Chappell, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

[redacted]

Subject: Determination - Motion by Press Petitioners for Public Access to Proceedings and Records

LTC Chappell,

Please forward the email below to counsel in the case of United States v. Khadr. Please forward it also to Mr. Berrigan for transmittal to Mr. Schultz and Mr. Zansberg. Please distribute it to other interested persons.

COL Brownback

Counsel in the case of US v. Khadr,

1. References:

   a. "Notice of Appearance", David A. Schultz, 20 November 2007 (AE 053).
   b. "Notice of Appearance", Steven D. Zansberg, 20 November 2007 (AE 053).

c. "Motion by Press Petitioners for Public Access to Proceedings and Records", 21 November 2007 (AE 053) with "Attachments A and B" (AE 053).

d. Email, LTC Chappell, 21 November 2007 4:31 PM, Subject: FW:US v Khadr Motion by Press Petitioners (21 Nov 07) (With Attachments) and Notices of Appearance (21 Nov 07) FW:US v Khadr Motion by Press Petitioners (21 Nov 07) (With Attachments) and Notices of Appearance (21 Nov 07) (AE 053).

e. Email, LCDR Kuebler, November 28, 2007 5:26 AM, Subject: Re: US v Khadr Motion by Press Petitioners (21 Nov 07) (With Attachments) and Notices of Appearance (21 Nov 07) (AE 053).

f. Email, MAJ Groharing, November 28, 2007 8:33 AM, Subject: Re: US v Khadr Motion by Press Petitioners (21 Nov 07) (With Attachments) and Notices of Appearance (21 Nov 07) (AE 053).

g. Military Commissions Rules of Court, Change 2, 2 November 2007.

h. Department of Defense Regulation for Trial by Military Commissions, 27 April 2007.

i. Manual for Military Commissions.

j. Military Commissions Act of 2006.

2. References 1a and 1b both purport to be provided "(p)ursuant to procedures of court/instruction for counsel." The "procedures of court/instruction for counsel" in the Military Commission of United States v. Khadr are contained in references 1g through 1j, as supplemented by case-specific directions from the Military Judge. Nothing in the references (or in the case-specific directions) authorizes the appearance of counsel for a non-party in a case before the Military Commission.

3. The purported "Press Petitioners" have, in effect, attempted to intervene in this case as parties. "Press Petitioners" have offered no valid statutory support for any right to intervene and have failed to demonstrate that authority exists under references 1g through 1j for any party, other than the accused and the government, to take part in or intervene in a case before a Military Commission. Accordingly, "Press Petitioners" have no standing to request any relief from this Military Commission and references 1a through 1c are not properly before this Military Commission for decision.

3. A Military Commission is a court of limited jurisdiction and it may issue rulings only on such matters as are within the jurisdiction established by reference 1j. This determination does not address other methods by which the "Press Petitioners" might seek the relief requested.

4. Even if the "Press Petitioners" had standing, the Military Commission would return reference 1c without action. "Press Petitioners" have failed to demonstrate that they have taken such normal administrative actions as might garner them the relief sought. For example, Attachment A (reference 1c) is dated 20 November 2007. The declarant, William Glaberson, states that he was present for the Military Commission session in United States v. Khadr on 8 November 2007. During this session, the Military Judge stated on the record in open proceedings:

MJ: Okay, going right on for Lieutenant Commander Kuebler, another preliminary matter involves a release of exhibits and other materials. In a recent e-mail, this is at page 11 of AE 33, counsel expressed concern that e-mails among counsel and the commission were somehow kept off the record and the matters therein were not open to the public. Additionally, the Office of Military Commissions has forwarded press requests for information to the commission for reply.

E-mails and other matters pertinent to decisions are made part of the record of trial. For instance, you can look at the record of trial that was authenticated on the 29th of June and see AE 006.

Once the record of trial is authenticated, the military judge has no further role concerning the release of matters from that record. The record of trial after authentication belongs to the convening authority who determines when and what matters to release from it.

As for matters that are currently before this commission, the Military Commissions Trial Judiciary Rule of Court 3.9 explains the judiciary's policy on release prior to authentication.

As a general rule, once a decision has been reached on a given issue the trial judiciary will release appellate exhibits to the office of military commissions for redaction of public matters and other required screening, coordination with the Assistant Secretary of Defense for Public Affairs, and release to the general public.

Specifically focusing on counsel's concerns, AE 25 through 34 which includes 33 and AE 37 through 39 have been forwarded to OMC in accordance with R.C. 3.9. Any concerns that counsel have about the posting of any such matters to the DOD website or the release of any such matters to the general public should be directed to OMC, as should any inquiries from the press about such matters.

Prior to the start of today's session, the commission has authorized release of and furnished a copy of the current appellate exhibit list and the filings inventory to OMC. Concerns or inquires about those items should be directed to OMC. *(Khadr ROT, pp. 28-30)*

Yet, in Attachment A, the declarant does not state that he attempted to obtain any of the materials which the Military Judge had released to the Office of Military Commissions. Specifically, the declarant, based on his declaration, did not even attempt to obtain a copy of the Filings Inventory or the Appellate Exhibit listing while he was at Guantanamo Bay, Cuba, despite the specific statement of the Military Judge.

5. Indeed, nothing in reference 1c indicates that any action has been taken by the "Press Petitioners" to request any materials from the Office of Military Commissions after 2 November 2007, the date on which the Chief Trial Judge issued reference 1g.

6. Since references 1a through 1c are not properly before the Military Commission in the case of United States v. Khadr, the Military Judge takes no action on them. This determination shall be transmitted to Mr. Berrigan, Deputy Chief Defense Counsel, for further transmittal to the "Press Petitioners." Government counsel shall deliver a copy to the Convening Authority and to the Clerk of Court. Government counsel shall also deliver a copy to the Office of the Assistant Secretary of Defense - Public Affairs.

Peter E. Brownback III

COL, JA, USA
Military Judge

Edmonds, Matthew, SSG, DoD OGC

From: Edmonds, Matthew, SSG, DoD OGC
Sent: Friday, November 30, 2007 3:39 PM
To: Edmonds, Matthew, SSG, DoD OGC
Subject: FW: US v Khadr Motion by Press Petitioners (21 Nov 07) (With Attachments) and Notices of Appearance (21 Nov 07)

From: Groharing, Jeff, Maj, DoD OGC
Sent: Wednesday, November 28, 2007 8:34 AM
To: Chappell, Danny, LTC, DoD OGC; Kuebler, William, LCDR, DoD OGC; Petty, Keith, CPT, DoD OGC; Snyder, Rebecca, Ms, DoD OGC

[redacted]

Subject: RE: US v Khadr Motion by Press Petitioners (21 Nov 07) (With Attachments) and Notices of Appearance (21 Nov 07)

Sir,

1. The Prosecution believes the Regulation for Trial by Military Commission (para. 17-19) and the Military Commissions Trial Judiciary Rules of Court (para 2-3) adequately address the concerns raised in the filing. Those rules allow for timely dissemination of all filings and orders in this case.

2. The Prosecution will provide the court with filings excluding or redacting classified and protected infromation suitable for public release, as required by RC 2.2c and RC 3.9.

V/R,

Major Groharing

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
(703) 602-4215, ext 142
Fax (703) 602-4574
Email: groharij@dodgc.osd.mil
SIPR: jeff.groharing@osd.smil.mil

-----Original Message-----

From: Kuebler, William, LCDR, DoD OGC

Sent: Wednesday, November 28, 2007 5:27 AM

To: Chappell, Danny, LTC, DoD OGC; Groharing, Jeff, Maj, DoD OGC; Petty, Keith, CPT, DoD OGC; Snyder, Rebecca, Ms, DoD OGC

[redacted]

Subject: Re: US v Khadr Motion by Press Petitioners (21 Nov 07) (With Attachments) and Notices of Appearance (21 Nov 07)

Sir,

1. The defense takes no position with respect to petitioners' standing or the military judge's authority to order the relief requested except as provided in paragraph 2 below. The defense reserves the right to make its own request(s) for relief on the grounds presented in petitioners' motion (or related grounds) at the appropriate time.

2. The defense believes that compulsory resolution of substantive matters, via e-mail, by "special request" (as contemplated by the MCTJ Rules of Court) or otherwise is inconsistent with 10 USC section 949a(b)(B), as well as RMC 802, 803, 804, and 905(h). The defense believes that the military judge should discontinue this practice and has the authority to do so, sua sponte, absent motion by a party or otherwise.

Vr,

LCDR Kuebler

CAUTION: Information contained in this message may be protected by the attorney/client, attorney work product, deliberative process or other privileges. Do not disseminate further without approval from the Office of the DoD General Counsel.

Sent from my BlackBerry Wireless Handheld

From: Chappell, Danny, LTC, DoD OGC
Sent: Wednesday, November 21, 2007 4:32 PM
To: Kuebler, William, LCDR, DoD OGC; Groharing, Jeff, Maj, DoD OGC; Petty, Keith, CPT, DoD OGC; Snyder, [redacted]
Subject: FW:US v Khadr Motion by Press Petitioners (21 Nov 07) (With Attachments) and Notices of Appearance (21 Nov 07)

COL Brownback has directed that I send the email below to the parties.

v/r,

LTC Mike Chappell, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From: Pete Brownback [mailto:abnmj@cfl.rr.com]
Sent: Wednesday, November 21, 2007 16:03
To: Chappell, Danny, LTC, DoD OGC
Cc: Bley, Natalie, Ms, DoD OGC
Subject: Motion by Press Petitioners (21 Nov 07) (With Attachments) and Notices of Appearance (21 Nov 07)

LTC Chappell,

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

Counsel in the case of US v. Khadr,

1. The Military Commissions Trial Judiciary received, this afternoon, documents which were styled as Notices of Appearance for a Mr. Schultz and a Mr. Zansberg. Following receipt of those documents, MCTJ received documents which were styled as a Motion by Press Petitioners for Public Access to Proceedings and Records and Attachments to the Motion. All of these documents were forwarded to MCTJ by Mr. Berrigan, the Deputy Chief Defense Counsel.

2. If any party to the case has not received the documents noted in paragraph 1 above, MCTJ will provide a copy.

3. Counsel for each party will provide the Commission, NLT 1200 hours, 28 November 2007, the party's position on how the documents noted in paragraph 1 above should be considered by the Commission. The parties may also provide, at their discretion, any further matters concerning the documents which they believe may be of assistance.

Peter E. Brownback III
COL, JA, USA
Military Judge

Edmonds, Matthew, SSG, DoD OGC

From: Berrigan, Michael, Mr, DoD OGC
Sent: Wednesday, November 21, 2007 3:40 PM
To: Chappell, Danny, LTC, DoD OGC; Wilkins, Donna, Ms, DoD OGC
Cc: [redacted]
Subject: FW: United States v. Khadr -- Motion by Press Petitioners
Follow Up Flag: Follow up
Flag Status: Red
Attachments: US v. Khadr - Attachments to Motion by Press Petitioners.pdf; US v. Khadr - Motion by Press Petitioners.pdf

LTC Chappell
Here is the Motion and Attachments for *Khadr*.

[redacted]

[redacted]
Sent: Wednesday, November 21, 2007 2:43 PM
To: Berrigan, Michael, Mr, DoD OGC
Cc: David Schulz; Steve Zansberg
Subject: United States v. Khadr -- Motion by Press Petitioners

Dear Mr. Berrigan:

1. Thank you for agreeing to forward these papers for service and filing in the above-referenced commission. I understand that you will be forwarding these papers to the necessary parties and officials today.

2. Attached please find:

   a. Motion by Press Petitioners for Public Access to Proceedings and Records
   b. Attachments to Motion by Press Petitioners, including:
      i. Declaration of William Glaberson
      ii. Declaration of David Schulz

Sincerely,

Jacob Goldstein

_____

Jacob P. Goldstein

[redacted]

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a/ "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	))))))))))	**MOTION BY PRESS PETITIONERS** FOR PUBLIC ACCESS TO PROCEEDINGS AND RECORDS November 21, 2007

1. Timing.

There is no established time frame in the Rules of Court for the filing of this motion.

2. Relief Sought.

The Associated Press, Dow Jones & Company, Inc., The Hearst Corporation, The McClatchy Company, and The New York Times Company (collectively the "Press Petitioners"), respectfully request this Military Commission to grant the press and public meaningful access to its proceedings, including specifically timely access to (a) the Filings Inventory or other docketing information, (b) motions and related filings by the parties, (c) transcripts and (d) orders entered in this case, including rulings issued by email communication. Because this motion seeks access to information required to be made available both by federal statute and the United States Constitution, Petitioners respectfully request prompt consideration and resolution.

3. Overview.

This criminal prosecution by the United States Government is being closely watched by both the interested citizens of this Nation and concerned individuals around the world. The Government has recognized by opening the hearings to the public, inviting international observers and permitting press access, that transparency helps assure both U.S. citizens and the world community that fair procedures are in place, while at the same time properly protecting

national security. Petitioners are five news organizations that seek nothing more than an extension of this transparency principle—making filings and written records available in the same manner as in a civilian court, so that the public can better understand events occurring in this tribunal.

Reporting on this prosecution is currently hampered by a lack of contemporaneous access to docketing information, motions and other filings with the tribunal, transcripts and orders entered in this case. Actions taken in private sessions and via undisclosed electronic mail communications further serve to shield developments in the case from public view. Such lack of transparency by a tribunal charged with determining the criminal culpability of a prisoner being held by the U.S. Government is contrary to both the letter and the spirit of the Military Commissions Act of 2006, 10 U.S.C. § 948a, *et seq.* ("MCA"). It also defeats interests of the press and public that are protected by the First Amendment of the United States Constitution due to the deep conviction of our Founding Fathers that official actions taken by the government must be subject to scrutiny and oversight by the People.

4. Burden of Proof.

A party advocating a restriction on the public right of access bears the burden of showing that access poses a direct threat to a compelling governmental interest. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 15 (1986) ("*Press-Enterprise II*"); *Lugosch v. Pyramid Co. of Onodaga*, 435 F.3d 110, 123-24 (2d Cir. 2006); *ABC, Inc. v. Stewart*, 360 F.3d 90, 106 (2d Cir. 2004); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991).

5. Statement of Facts.

a. The military commissions at Guantanamo are the first to be conducted by the United States since World War II, and they have been the subject of intense, international

scrutiny and debate. To take just one example, when the commission held that it lacked jurisdiction because Omar Ahmed Khadr ("Khadr") had not been found to be an "*unlawful* enemy combatant," it prompted more than four hundred news reports about the ruling around the world. *See* Lexis search of Mega News, All (English, Full Text) database for (khadr & guantanamo and date (geq (06/04/07) and leq (06/06/07))), 433 results. The commission's ruling was instantly reported by the press in, among other places, Australia,[1] Ireland,[2] Singapore,[3] China,[4] Turkey,[5] Britain,[6] and Canada.[7] The Canadian press, in particular, has been diligently covering this commission, since Khadr is a Canadian national.[8] News organizations in Russia[9] and Britain[10] and elsewhere are also regularly covering the proceedings. Given this intense scrutiny, it is important that the proceeding not only be fair, but that it be perceived as fair—

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[1] *See, e.g.*, Geoff Elliott, *Blow for US as Terror Cases Collapse*, The Australian, June 6, 2007, at 10.

[2] *See, e.g.*, Denis Staunton, *White House to Decide Whether to Appeal Guantánamo Ruling*, The Irish Times, June 6, 2007, at 11.

[3] *See, e.g.*, *Guantanamo Justice Th[r]own into Chaos*, TODAY (Singapore), June 6, 2007, at 12.

[4] *War Crime Charges Against Canadian Guantanamo Detainee Dismissed*, Xinhua General News Service June 4, 2007, Monday, 6:30 PM.

[5] *Guantanamo Trials Screech To Halt*, Turkish Daily News, June 6, 2007.

[6] *See, e.g.*, Tom Baldwin, *Guantanamo Ruling Puts Trials in Doubt*, The Times (London), June 5, 2007, at 35.

[7] *See, e.g.*, *U.S. Drops Charges Against Omar Khadr*, Sudbury Star (Ontario), June 5, 2007, at A12; Sheldon Alberts, *Khadr's Charges Dropped; Fate in Limbo*, The Star Phoenix (Saskatoon, Saskatchewan), June 5, 2007, at D8.

[8] *See, e.g.*, Sheldon Alberts, *U.S. Military Concealing Evidence That Could Clear Khadr, Lawyers Say*, CanWest News Service, Nov. 9, 2007, *available at* http://www.canada.com/topics/news/story.html?id=536ab6e0-aee8-4dfe-8c0d-48a1e6679110&k=32427; Michelle Shephard, *New Khadr Witness Discovered*, The Star, Nov. 9, 2007, *available at* http://www.thestar.com/News/article/275026.

[9] *See, e.g.*, *"Teenage Terrorist" Will Stand Trial*, Russia Today, Nov. 9, 2007, *available at* http://www.russiatoday.ru/news/news/16700.

[10] *See, e.g.*, *Guantanamo Detainee Loses Appeal*, BBC, Sept. 25, 2007, *available at* http://news.bbc.co.uk/1/hi/world/americas/7011622.stm.

something that cannot happen if the public is not able to follow and understand the events as they transpire.

b. As described in greater detail in the accompanying declaration of William Glaberson, public access to these proceedings is being denied in several important respects, primarily including that:

i) The public is not permitted access to the "Filings Inventory" of motions, requests for relief, and other written records filed with the tribunal, and there is no other place where it can obtain docketing information to learn about the issues being raised by the parties;

ii) The public is not provided access to the actual motions and related filings by the parties—even the existence of a motion is not currently disclosed in any publicly accessible way—nor to orders and rulings by the military judge;

iii) Various applications and arguments are apparently being made through email communications to which the public has no access and no public record is available disclosing actions taken through electronic communications;

iv) Substantive issues apparently are being raised and addressed in closed Rule 802 conferences for which no transcripts or summaries are publicly available.

The fact that this information may be made available *after* the conclusion of this prosecution does not cure the harm done to the public's right of contemporaneous access to the proceedings in this case. The cumulative effect of the failure to provide access to a docket and the written material filed in the case is to deprive the press and public of the means to meaningfully monitor and understand events occurring in this proceeding.

6. <u>Legal Basis for Relief Requested</u>.

A qualified right of access to the proceedings of this tribunal—including the written proceedings and records—is expressly granted by the Military Commissions Act and independently mandated by the Constitution of the United States. The Press Petitioners recognize the potential for national security issues and questions of personal safety to arise in the conduct of this criminal prosecution in a military tribunal, but there have been no findings that

these concerns require the wholesale denial of access to the pre-trial proceedings in this case. The discussion that follows explains the statutory and constitutional grounds for the access sought by the Press Petitioners, and the narrow relief they now request. Military tribunals have recognized the right of the press to be heard on such an application to enforce the public right of access. *See, e.g., ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997) ("[W]hen an accused is entitled to a public hearing, the press enjoys the same right and *has standing to complain if access is denied.*" (emphasis added)); *Denver Post Corp. v. United States*, Army Misc. 2004 1215 (A. Ct. Crim. App. Feb. 23, 2005) (noting "obvious" "procedural error" in closing proceedings before allowing newspaper's counsel to address the issue).[11]

A. The Military Commissions Act of 2006 and its Implementing Regulations Require Open Proceedings and Records

In adopting the Military Commissions Act of 2006, Congress recognized the critical importance that these criminal proceedings be conducted in the open so the watching world would accept their validity. The MCA thus expressly mandates access by "the public" to all "proceedings" of any military commission, unless specifically delineated exceptions are found to apply. 10 U.S.C. § 949d(d)(1). The MCA permits a denial of access "*only* upon making *a specific finding* that such closure is *necessary* to — (A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including

[11] It is widely recognized that the Press Petitioners have standing to enforce the access rights they assert here. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573-74 (1980); *Globe Newspaper v. Superior Court*, 457 U.S. 596, 609 n.25 (1982); *United States v. Valenti*, 987 F.2d 708, 711 (11th Cir. 1993) (Press has "standing to intervene for purposes of challenging its denial of access to the underlying litigation, even though it is otherwise not a party."); *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998); *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987); *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985). Even in criminal cases, where the rules of procedure do not contemplate intervention by a non-party, the press has been held to be entitled to intervene for the limited purpose of challenging the denial of access. *See, e.g., In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998) ("[T]hose who seek access to such material have a right to be heard in a manner that gives full protection of the asserted right.").

intelligence or law enforcement sources, methods, or activities; or (B) ensure the physical safety of individuals." 10 U.S.C. § 949d(d)(2) (emphasis added).

The statutory right of access is recognized and implemented in both the Regulation for Trial by Military Commissions ("Reg. MC" or the "Regulation") and the Manual for Military Commissions ("Manual") containing the Rules for Military Commissions ("RMC"). *See* Reg. MC 19-7(a) ("The sessions of military commissions shall be public to the maximum extent practicable."); RMC 806(a) ("[M]ilitary commissions *shall* be publicly held." (emphasis added)).[12] Rule 806(b)(2) authorizes a military judge to close a "session of a military commission" only for limited purposes and only after making "essential findings of fact, appended to the record of trial."

The MCA and its implementing regulations make clear that the public's right of access extends beyond the "trial" to all aspects of the "proceeding" against an enemy combatant. The MCA at various times differentiates between "trial," "pre-trial" and "post-trial" procedures, *e.g.* § 949a(a), but extends the public right of access in § 949d(d) more broadly to all "proceedings." The Regulation and Manual similarly make plain that the "proceedings" open for public inspection include motion papers, rulings, and conference summaries that form the record. Under the Regulation, the right of access applies "from the swearing of charges, until the completion of trial or disposition of the case without trial," Reg. MC 19-2, and extends specifically to all "[i]nformation that has become part of the record of proceedings of the military commission in open session," and "[t]he scheduling or result of any stage in the judicial process." Reg. MC 19-4(a)(3)-(4). Motions, rulings, and summaries of Rule 802 conferences

[12] This Rule defines "public" to include "representatives of the press, representatives of national and international organizations, … and certain members of both the military and civilian communities." RMC 806(a).

are all required to be part of the Record of Trial, and hence expressly subject to the right of access.[13] The Manual reflects this same understanding. It empowers the military judge to "exercise reasonable control over the proceedings," RMC 801(a)(3), and then identifies pre-trial motions as being among the "proceedings" a judge controls. *See also* RMC 908(b)(8)(A) (motions not affected by order on appeal "may be litigated, in the discretion of the military judge, at any point in the proceedings"). The Rules of Court for Military Commissions were recently amended to also acknowledge a right of public access to the pleadings in this matter. *See* RC 3.9 (amended Nov. 2, 2007).

These statutory and administrative provisions plainly establish that the public right of access to proceedings of this tribunal extends to motions and other written records, from the filing of charges to the conclusion of the case. While not an absolute right, this statutory right can be overcome only upon specific judicial determination that information must be withheld for reasons of national security or personal safety.

B. The First Amendment Independently Protects the Public's Right of Access to Proceedings and Records of Adjudicative Military Tribunals

1. The First Amendment Right of Access Extends to Military Commissions

The First Amendment independently "protects the public and the press from abridgement of their rights of access to information about the operation of their government." *Richmond*

[13] *See* Reg. MC 22-5(a)(5) ("All accompanying papers, to include stipulations, motions, briefs, appellate exhibits and copies, should, to the maximum extent practicable, be prepared in accordance with the standards noted above" for preparation of the record of trial for appellate review.); Reg. MC 17-4(e) ("A summary of the conference, including any matter resolved or agreed upon, will be entered into the record of proceedings by the military judge, either orally or in writing at the military judge's discretion, at or before the next commission session in the case."); RC 6.7b (Appellate exhibits, which include "[m]otions, briefs, responses, replies, checklists, written instructions by the Military Judge for the Commission members, findings and sentencing worksheets, and other writings used during motions practice," RC 6.2d(1), "become part of the record once the Military Judge has directed that they be marked.").

Newspapers, 448 U.S. at 584 (Stevens, J., concurring) (recognizing First Amendment right of public access to criminal trials); *Globe Newspaper*, 457 U.S. at 604-06 (same); *Press-Enterprise I*, 464 U.S. at 508-10, 513 (recognizing First Amendment right of public access to *voir dire* proceedings); *Press- Enterprise II*, 478 U.S. at 10 (same as to preliminary hearings in a criminal prosecution). The scope of this qualified constitutional right was first defined by the U.S. Supreme Court in *Richmond Newspapers*, a case involving access to a criminal trial that the State of Virginia had conducted entirely in secret. A Virginia statute specifically granted the trial judge discretion to conduct a secret trial, but the Supreme Court held that the First Amendment created an affirmative, enforceable constitutional right of access to certain government proceedings, such as a criminal trial.

The Court found this qualified First Amendment right to be implicit in the guarantees of free speech and press, just as the right of association, right of privacy, right to travel and the right to be presumed innocent are implicit in other provisions of the Bill of Rights.[14] As the Court later put it in *Globe Newspaper Co. v. Superior Court*, the First Amendment right of access is based upon,

> the common understanding that a "major purpose of that Amendment was to protect free discussion of governmental affairs." By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

457 U.S. at 604 (citation omitted). *Richmond Newspapers* "unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment." 448 U.S. at 583 (Stevens, J. concurring).

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[14] *See Richmond Newspapers*, 448 U.S. at 577 (Burger, J.) (the right of access is "assured by the amalgam of the First Amendment guarantees of speech and press" and their "affinity to the right of assembly"); *Id.* at 585 (Brennan, J., concurring) ("[T]he First Amendment – of itself and as applied to the States through the Fourteenth Amendment – secures such a public right of access.").

Under *Richmond Newspapers* and its progeny, this right of access exists where government proceedings and information historically have been available to the public, and public access plays a "significant positive role" in the functioning of government. *E.g., Globe Newspaper*, 457 U.S. at 605-07; *Press-Enterprise II*, 478 U.S. at 8-9; *Washington Post*, 935 F.2d at 287-92. Under the "experience" and "logic" analysis applied by the Supreme Court, the right of access "has special force" when it carries the "favorable judgment of experience," but what is "crucial" in deciding where an access right exists "is whether access to a particular government process is important in terms of that very process." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). *See also Globe Newspaper*, 457 U.S. at 605-06; *Press-Enterprise II*, 478 U.S. at 8-9; *United States v. Simone*, 14 F.3d 833, 837 (3d Cir. 1994); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1173 (3d Cir. 1986).

While this right has most frequently been asserted to compel access to judicial proceedings and documents, the right also applies to proceedings and information in the executive and legislative branches. *E.g., Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695-96, 700 (6th Cir. 2002) (right of access to executive branch deportation proceedings); *Whiteland Woods, L.P. v. Twp. of West Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (municipal planning meeting); *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 960 F.2d 105, 108-10 (9th Cir. 1992) (Agriculture department voters list); *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 574-75 (D. Utah 1985) (administrative hearing), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987).

Under the same experience and logic tests, a First Amendment right of public access attaches to proceedings of adjudicative military tribunals, including military commissions. *See, e.g.*, *United States v. Anderson*, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997) (per curiam) (absent

adequate justification clearly set forth on the record, "trials in the United States military justice system are to be open to the public"); *see also ABC, Inc. v. Powell*, 47 M.J. at 366 (First Amendment right of public access applies to investigations under Article 32); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (First Amendment right of public access extends to courts-martial); *United States v. Hershey*, 20 M.J. 433, 436 & 438 n.6 (C.M.A. 1985) (finding First Amendment right of public access to a court-martial proceeding); *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (same); *United States v. Story*, 35 M.J. 677, 677 (A. Ct. Crim. App. 1992) (per curiam) (same).

Historical Experience.[15] Our country has a tradition of public access to adjudicative military tribunals. William Winthrop, known as the "Blackstone of Military Law" (*Reid v. Covert,* 354 U.S. 1, 19 n. 38 (1957) (plurality opinion)), described in his classic opus on military law a history of open proceedings that dates back centuries:

> Originally, (under the Carlovingian Kings,) courts-martial ... were held *in the open air*, and in the Code of Gustavus Adolphus ... criminal cases before such courts were required to be tried "*under the blue skies*." The modern practice has inherited a similar publicity. With us, when once opened, the court-martial room—though at any stage of the trial it may be permanently closed at the discretion of the court—is, in general, continued open throughout the investigation, (except when the doors are closed for deliberation on interlocutory matters,) and also during the closing arguments of the counsel, or till the final clearing for judgment. While thus open the public is allowed to come and go much as in the civil courts. ... In general, ... reporters are freely admitted, and sometimes even special accommodation is provided for them.

[15] While history and policy are interrelated in the Supreme Court's definition of the right of access, the absence of historical evidence would not defeat the right. In *Press Enterprise II*, the Court noted that the First Amendment right attached to pretrial proceedings even when they had "no historical counterpart," but the "importance of the . . . proceeding" was clear. 478 U.S. at 10 n.3. *See also United States v. Criden*, 675 F.2d 550, 555 (3d Cir. 1982) (right of access applies to pretrial proceedings even where public had no common law right to attend); *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) (lack of historic record of access to bail proceedings does not bar recognition of a First Amendment right of access).

William Winthrop, MILITARY LAW AND PRECEDENTS 161-62 (rev. 2d ed. 1920) ("Winthrop"). Based on this long tradition of access, military courts have recognized that "the right to a public trial includes the right of representatives of the press to be in attendance," even before the Supreme Court recognized the First Amendment right of public access to criminal proceedings in *Richmond Newspapers*. *United States v. Brown*, 22 C.M.R. 41, 48 (C.M.A. 1956), *overruled, in part, on other grounds by United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977).

This tradition of public access to courts-martial also runs through the history of military commissions specifically. Commissions, after all, historically have "differed from the court-martial only in terms of jurisdiction." David Glazier, Notes, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005, 2092 (2003). As the Supreme Court explained:

> [T]he procedures governing trials by military commission historically have been the same as those governing courts-martial. ... The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. *See* Winthrop 831. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission's procedures typically have been the ones used by courts-martial.

Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2788, 2792 (2006).[16]

While there have been some notable exceptions, there have been military commissions throughout our nation's history conducted publicly:

[16] The United States Court of Military Commission Review just recently recognized that Congress intended the procedures and practices of military commissions to "mirror" those of courts-martial, and that the procedures herein "are based upon the procedures for trial be general courts-martial." *United States v. Khadr*, CMCR 07-001 at 23 & n. 35 (Sept. 24, 2007) (quoting M.C.A.§§ 949a(a) & 948b(c)).

- During the Civil War, for example, the members of the 1864 military commission of Lambdin P. Milligan and others retired from the room to deliberate in order "to avoid the inconvenience of dismissing *the audience assembled to listen to the proceedings*." Winthrop, 289 (emphasis added and internal quotation marks omitted).

- The military commission established to try John Wilkes Booth's co-conspirators in Lincoln's assassination was opened to the public after reporters complained and Gen. Ulysses S. Grant "led them to the White House to talk to the president." *See* James Johnston, *Swift and Terrible: A Military Tribunal Rushed to Convict After Lincoln's Murder*, Wash. Post, Dec. 9, 2001, at F1.[17]

- The military commission to try General Tomoyuki Yamashita in 1945 was also open to the press and public. *See* The Comm. on Commc'ns & Media Law of the Ass'n of Bar of City of New York, *The Press & the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 22 Cardozo Arts & Ent. L.J. 767, 790 (2005).

- The military commissions established by the U.S. at Dachau were, like the international tribunal at Nuremberg, open to the press and public, with "more than four hundred spectators crowd[ing] into the courtroom on" the opening day. *See* Joshua M. Greene, JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR 39 (2003); *id.* at 245 (noting that judge denied defense request to prohibit press from photographing the accused).

While a 1942 trial of Nazi saboteurs found in the United States was famously conducted in secret, that precedent shows how secrecy can be counterproductive in the long run. It is now widely believed that the "real reason President Roosevelt authorized these military tribunals was to keep evidence of the FBI's bungling of the case secret."[18]

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[17] The openness of these Civil War era commissions is particularly significant in light of the rampant suppression of the freedom of the press and "gross violations of the First Amendment" that otherwise occurred during the Civil War era. *See* William H. Rehnquist, ALL THE LAWS BUT ONE 221 (1998) ("Rehnquist").

[18] Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the Senate Comm. on the Judiciary, 107th Cong. 377 (Nov. 28, 2001) (statement of Neal Katyal, Visiting Professor, Yale Law School, and Professor of Law, Georgetown University), *available at* http://judiciary.senate.gov/testimony.cfm?id=126&wit_id=72 (last visited Nov. 20, 2007).

Despite this episode, the historical trend in both the civilian and military justice systems has been towards increasing sensitivity to civil liberties.[19] *See, e.g.*, *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history ...."). Chief Justice Rehnquist also noted the "'generally ameliorative trend' in civil liberties during wartime." Jack Goldsmith, Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 Const. Comment. 261, 286 (2002) (quoting Rehnquist, 219-221). In light of this trend, as one scholar put it: "Conducting military commission trials today that fall short of both their historic purposes and contemporary standards of justice is likely to stain the reputation of both the American military and the American justice system as a whole." Glazier, 89 Va. L. Rev. at 2093.

Policies Advanced by Public Access. The logic prong of the Supreme Court's test for access is readily met. In recognizing the constitutional right to attend criminal proceedings, the Supreme Court identified at least five distinct interests advanced by open adjudicatory proceedings each of which applies to criminal proceedings in this forum as well: (1) ensuring that proper procedures are being followed; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing an outlet for community hostility and emotion; (4) ensuring public confidence in a trial's results through the appearance of fairness; and (5) inspiring

[19] The U.S. State Department repeatedly has criticized the use of secret military tribunals by other countries. *See* Press Release, Human Rights Watch, *Fact Sheet: Past U.S. Criticism of Military Tribunals* (Nov. 28, 2001), *available at* http://www.hrw.org/press/2001/11/tribunals1128.htm (last visited Nov. 20, 2007). For example, the State Department has criticized Burma, "where trials are not open to the public and military authorities dictate the verdicts"; China, where trials are often conducted in secret; Kyrgyzstan, where "[o]pposition leaders have been tried in closed military courts"; Peru, where secret military trials have been held, including the 1996 prosecution of Lori Berenson; Russia, where Edmond Pope's "trial took place behind closed doors"; Sudan, where military trials are sometimes secret and brief; and Turkey, where the State Security Courts hold closed hearings. *Id.*

confidence in government through public education regarding the methods followed and remedies granted by government. *See Richmond Newspapers*, 448 U.S. at 569-71.

Concurring in *Richmond Newspapers*, Justice Brennan explained, eloquently, the crucial structural role that public access plays in the proper functioning of our nation's criminal justice system: "Open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'" *Id.*, at 592 (Brennan, J., concurring) (quoting *In re Oliver*, 333 U.S. 257, 271 (1948)).

The very same policy arguments that mandated the constitutional right of access to criminal trials in the civilian court system apply to criminal trials conducted by the Department of Defense. Any "adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny." *Lugosch*, 435 F.3d at 124 (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)). Like other adjudicatory proceedings, military commissions are presided over by an impartial arbiter, judgment is based on a record created by the tribunal through an adversarial process that involves the presentation of evidence and the opportunity to cross-examine witnesses. In this setting, public access improves the performance of all involved, protects judges and prosecutors from claims of dishonesty, and provides a forum for the education of the public. *See* The Comm. On Commc'ns & Media Law of the Ass'n of the Bar of the City of New York, *"If it Walks, Talks and Squawks . . . "The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 23 Cardozo Arts & Ent. L.J. 21, 25 (2005). Just as with other types of military tribunals, an open proceeding "reduces the chance of arbitrary or capricious decisions and enhances public confidence," which would "quickly erode"

if proceedings are arbitrarily closed. *Scott*, 48 M.J. at 665 (citations and internal quotation marks omitted); *see also Anderson*, 46 M.J. at 731 (same).

Indeed, judges within the military justice system have long recognized that openness significantly assists the functioning of the adjudicative process. "A public trial is believed to effect a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury." *Hershey*, 20 M.J. at 436. Even before the Supreme Court recognized the right of access to criminal proceedings in *Richmond Newspapers*, the Court of Military Appeals had identified the functional benefits of public proceedings: (1) improving the quality of testimony; (2) curbing abuses of authority; and (3) fostering greater public confidence in the proceedings. *See Brown*, 22 C.M.R. at 45-48. As explained by Professor Wigmore in his seminal treatise quoted in *Brown*, "[n]ot only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." Wigmore, Evidence § 1834 (3d ed.), *quoted in Brown*, 22 C.M.R. at 45; *see also United States v. Hood*, 46 M.J. 728, 731 n.2 (A. Ct. Crim. App. 1996).

The vital role that openness plays in ensuring public respect for the results produced by an adjudicative process is perhaps best demonstrated by considering the converse:

> Secret hearings – though they be scrupulously fair in reality – are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.

Gannett Co. v. DePasquale, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part and dissenting in part).[20]

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[20] *See also Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 587 (1976) (Brennan, J., concurring):

For all the reasons cited in *Brown*, and in the unbroken chain of precedents issued by United States military tribunals since *Brown*, openness of adjudicative military bodies, including the military commissions, promotes the functioning of those bodies, thereby satisfying the logic prong of the *Press Enterprise II* analysis.

2. The First Amendment right of access extends to the written records of this proceeding including docketing information, motions, transcripts and orders.

Although the United States Supreme Court has never expressly discussed the application of the First Amendment right of access to the *records* of criminal proceedings, *but see Press-Enterprise I*, 464 U.S. at 512-13 (holding that First Amendment right applies to written transcript of closed proceeding), federal and state courts have widely concluded that the First Amendment right extends to court records in criminal cases. *See, e.g., Washington Post,* 935 F.2d at 287-88 (holding that First Amendment right of access attaches to plea agreement); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502-04 (1st Cir. 1989) (same for sealed criminal court files); *Seattle Times Co. v. U.S. Dist. Court*, 845 F.2d 1513, 1515-17 (9th Cir. 1988) (documents relating to pretrial release hearing); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (search warrant affidavits); *United States v. Haller,* 837 F.2d 84, 87 (2d Cir. 1988) (plea agreement); *In re Storer Commc'ns, Inc.*, 828 F.2d 330, 336 (6th Cir. 1987) (motion to recuse judge); *In re New York Times Co.*, 828 F.2d at 114 (pre-trial suppression motion); *In re Washington Post Co.*, 807 F.2d 383, 389-90 (4th Cir. 1986) (plea and sentencing materials); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (all pretrial

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> Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and open reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

court filings). The same policies advanced by access to records in these cases apply fully to the records of military commissions. The Rules of Court provide that records are not sealed unless the military judge orders that they "should not be released in the interests of ensuring the parties receive a fair trial or for other reasons." RC 8.3.[21]

Indeed, some courts have held, as a matter of logic, that the First Amendment right of access necessarily embraces all judicial records that serve as the basis for, or lie at the heart of, a judicial *proceeding* that is itself subject to a First Amendment right of access, without applying the "experience and logic" test separately to document access. The Ninth Circuit adopted this approach in *Associated Press v. United States District Court*: "*There is no reason to distinguish between pretrial proceedings and the documents filed in regard to them.* Indeed, the two principal justifications for the first amendment right of access to criminal proceedings apply, in general, to pretrial documents." 705 F.2d 1143, 1145 (9th Cir. 1983) (emphasis added). *See also, e.g., In re New York Times Co.*, 828 F.2d at 113-16 (constitutional right of access extends to written motions relating to any proceedings that are themselves subject to the constitutional right); *Lugosch*, 435 F.3d at 124 (same).

After all, "[a]n adjudication is a formal act of government, *the basis of which* should, absent exceptional circumstances, be subject to public scrutiny." *Joy*, 692 F.2d at 893 (emphasis added).[22] In many instances, access to the records that frame an issue for judicial resolution

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[21] Indeed, the Court of Military Commission Review assumes that the military commissions are providing contemporaneous access to documents in the proceedings. *See* CMCR Rule of Practice 30 n.30 ("This Rule is designed to disclose to the public how filings made to the CMCR and the CMCR's decision will be released or not released to the public. *Materials from the Commission hearings are being released by the Clerk of Court for Commissions.*" (emphasis added)).

[22] *Joy v. North* addressed the scope of a common law right of access to court documents, which would also apply to the record of military tribunals given the historical tradition of access. *See, e.g., Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978) (common law right of access to records in criminal cases); *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997) (common law right of access to

provides the only means by which the public can monitor the operations of government: "Access to written documents filed in connection with pretrial motions is particularly important in the situation . . . where no hearing is held and the court's ruling is based solely on the motion papers." *In re New York Times Co.*, 828 F.2d at 114. Indeed, the Rules of Court for Military Commissions contemplate that motions will typically be decided on papers, with no public hearing. *See* RC 3.8(a) (unless evidentiary hearing otherwise required, *all* motions are to be decided by the military judge "based upon the written filings of the parties").

Courts have thus recognized a right of access to the same type of docketing information, filed materials and court rulings to which access is sought in this case:

Docketing information. Courts have expressly concluded that refusing to provide docketing information constitutes a violation of the constitutional right of access. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) ("[T]he ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible."); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1029-30 (11th Cir. 2005) ("[P]ublic docket sheets are essential to provide meaningful access to criminal proceedings." (internal quotation marks omitted)); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897-98 (7th Cir. 1994) (holding that the district court erred in sealing, *inter alia*, the civil docket for a case); *Washington Post*, 935 F.2d at 289 (striking down a trial court's practice of failing to publicly docket certain filings in criminal cases); *In re State-Record Co.*, 917 F.2d 124, 128-29 (4th Cir. 1990) (requiring public docketing of a criminal case because of the constitutional right of access); *In re Search Warrant for Secretarial Area Outside Offices of Gunn*, 855 F.2d at 575 (reversing order sealing docket entries). As the Second Circuit observed

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judicial records antedates the constitutional right); *Stone v. Univ. of Maryland Med. Sys. Corp*, 855 F.2d 178, 181 (4th Cir. 1988) (requiring public docket based on common law right of access to proceedings).

in *Pellegrino*, "[p]recisely because docket sheets provide a map of the proceedings in the underlying cases, their availability greatly enhances the appearance of fairness." 380 F.3d at 95. In this case, there is no basis for withholding access to the Filings Inventory, which is neither classified nor otherwise protected. *See* RC 5.3c ("The names given to matters that may appear on the Filings Inventory - such as the subject of a motion - will not be classified or otherwise protected as the Filings Inventory is intended to be transmitted through unsecured networks.").

Motions and Related Filings. The First Amendment affords the public a right to access the memoranda of law that attorneys must file in support of their substantive motions. *In re Providence Journal Co.*, 293 F.3d 1, 10-13 (1st Cir. 2002). Courts have widely recognized a constitutional right of public access to motions, and accompanying exhibits, in criminal cases. *See In re New York Times Co.*, 828 F.2d at 114 (First Amendment right of access attaches to pre-trial motions and exhibits in criminal case); *In re Storer Commc'ns*, 828 F.2d at 336 (First Amendment right of access attaches to motions seeking recusal of judge); *In re Knight Publ'g Co.*, 743 F.2d 231, 235-36 (4th Cir. 1984) (reversing order sealing motions and affidavits filed in criminal trial).

Transcripts. The public's constitutional right to attend judicial proceedings guarantees a concomitant right to obtain transcripts of those proceedings. *See, e.g., Press Enterprise I,* 464 U.S. at 512-13 (holding that judge's order denying access to a transcript of the *voir dire* was a violation of the First Amendment right to attend judicial proceedings); *United States v. Brooklier*, 685 F.2d 1162, 1172 (9th Cir. 1982) (same with respect to transcript of suppression hearing; "the denial of the motion to release the transcripts was itself a denial of the right of access protected by the first amendment.").

Orders. The constitutional right has also specifically been held to apply to orders entered in connection with public proceedings. *E.g., Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663-64 (3d Cir. 1991); *In re Continental Illinois Secs. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984).

C. The Public Right of Access Is Improperly Infringed by Procedures Currently Being Followed By This Tribunal.

The First Amendment right of access is a qualified, not an absolute, right. The qualified right can be overcome where there exists a countervailing interest of "transcendent" importance that requires a restriction of the access right. *E.g. Richmond Newspapers*, 448 U.S. at 581; *Globe Newspaper*, 457 U.S. at 606-07. To justify closure or sealing, a court must make *specific factual findings*, on the record, that closure or sealing "is essential to preserve higher values and is narrowly tailored to serve that interest." *E.g., Press-Enterprise II*, 478 U.S. at 13-14 (internal quotation marks omitted). Petitioners do not dispute that issues of national security or personal safety can constitute higher values that may warrant restrictions on access in appropriate circumstances. However, if access is to be denied, judicial findings on the need for closure must be entered as written findings of fact, made with sufficient specificity to allow appellate review. *Id.* at 9-10, 14; *In re Time, Inc.* 182 F.3d 270, 271 (4th Cir. 1999).

The adjudicatory tribunals of the military branches have applied this same standard. As explained in *Hershey*, "the party seeking closure must advance an overriding interest that is likely to be prejudiced [by openness]; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review." 20 M.J. at 436; *see also Anderson*, 46 M.J. at 729 ("[T]he military judge placed no justification on the record for her actions. Consequently, she abused her discretion in closing the court-martial."). The Army Court of

Military Appeals has also applied this standard as the substantive prerequisite for a court to enter a "protective order" limiting public access to documents admitted into evidence in a court martial proceeding. *See Scott*, 48 M.J. at 665.

Given the statutory and constitutional access rights pertaining to this tribunal, Petitioners respectfully submit that they should be granted timely access to docketing information such as maintained on the non-classified Filings Inventory, motions and related filings by the parties, transcripts of proceedings and rulings in this case. The possibility that this information may be disclosed months—or years—in the future, after the conclusion of the proceeding, is insufficient. The right of access conveys a right of *contemporaneous* access. *See, e.g., Lugosch*, 435 F.3d at 126-27 ("Our public access cases and those in other circuits emphasize the importance of *immediate* access when a right of access is found." (emphasis added)); *Grove Fresh Distribs., Inc.,* 24 F.3d at 897 (access to court documents "should be immediate and contemporaneous"); *Republic of the Philippines,* 949 F.2d at 664 ("[T]he public interest encompasses the public's ability to make a *contemporaneous* review of the basis of an important decision of the district court." (emphasis added)); *Washington Post,* 935 F.2d at 287 (recognizing "the critical importance of contemporaneous access . . . to the public's role as overseer of the criminal justice process"); *Valley Broad. Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1292 (9th Cir. 1986) (noting that because the Press "seeks to obtain the tapes for contemporaneous broadcast when presumably they will pack the greatest punch, delay will prejudice its application in a way not correctable on appeal" (internal quotation marks omitted)); *Continental Illinois Secs. Litig.*, 732 F.2d at 1310 ("[T]he presumption of access [to court records] normally involves *contemporaneous* access."); *In re Application of National Broadcasting Co.,* 635 F.2d 945, 952 (2d Cir. 1980) ("[T]here is

significant public interest in affording [opportunity to scrutinize evidence] contemporaneously . . . when public attention is alerted to the ongoing trial.").

Courts have thus repeatedly upheld claims of an access right to pre-trial proceedings and court filings over the objections of a defendant that jury prejudice may result. *E.g.*, *Associated Press v. U.S. Dist. Court*, 705 F.2d at 1147 (delay of release of filed documents for 48 hours violates right of access); *Brooklier*, 685 F.2d at 1172-73 (holding that delay in release of transcript of closed suppression hearing until end of trial violated right of access to attend judicial proceedings); *see also Simone*, 14 F.3d at 842 (holding that ten-day delay in release of transcript of closed hearing violates the press' right of contemporaneous access). These courts apply the stringent test required to overcome the right of access—a test that would not need to be applied if a promise of *future* access resolved the constitutional concern. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1072 (3d Cir. 1984) ("[A] district court . . . must not relax the standard necessary to close a proceeding simply because a transcript of that closed proceeding can be made available at a later date.") The suggestion that a complete record may ultimately be provided is simply no answer at all to the public's right of contemporaneous access to docketing information and written materials filed in this proceeding.

The Rules of Court for these proceedings were amended this month, in recognition of the right of access, to state that "the Military Commissions Trial Judiciary ["MCTJ"] will facilitate release of materials included in the record of trial through appropriate channels, and in accordance with applicable regulations, *at the earliest appropriate time*." RC 3.9a (emphasis added). The Rule recognizes the military judge's "*sole* authority to determine whether or not any given matter shall be released," RC 3.9c (citing RMC 801; Reg. MC 19-5, 19-6) (emphasis added), and establishes a procedure for the judge to forward suitable portions of the record to

OMC "for appropriate redaction, coordination with the Assistant Secretary of Defense for Public Affairs, and release to the general public." RC 3.9b.

Notably, the Rule is limited in scope and does not mandate contemporaneous or timely release. The Rules do not provide for mandatory release of the Filings Inventory, nor do they address the release of transcripts of the proceedings. With respect to motions and orders, the Rule states that the judge "*may* authorize forwarding of [related] pleadings" but only "*[a]fter* an order or ruling has been issued on a pending matter," and all attachments (exhibits) to the pleadings are excluded. *See* RC 3.9c. Other information and documents, including "email threads, Appellate Exhibits, and Filings Inventories," may similarly be forwarded when the judge so authorizes. RC 3.9c. As the Declarations tendered along with this Petition demonstrate, in practice this new rule has not yet proved successful in providing the public and the press with contemporaneous access to the court records of this Military Commission.

In resolving the scope of the public access right, Petitioners also request that steps be taken to ensure that substantive issues are not presented or resolved through email communications or closed-door sessions that would effectively circumvent the public's right of access. The parties in this case have filed motions by e-mail in the past, that are unavailable for public inspection. *See* Glaberson Decl. ¶¶ 17-20.

Petitioners are also concerned that Rule 802 conferences not be used to resolve substantive matters in a manner that defeats the right of access. As courts have recognized, holding "significant criminal proceedings behind closed doors—without notice to the public or any statement of reasons for the closure—is inconsistent with our open system of justice." *United States v. Alcantara*, 396 F.3d 189, 203 (2d Cir. 2005) (conducting plea and sentencing proceedings in judges' robing room held improper). *See also Capital Newspapers Div. v. Clyne*,

438 N.E.2d 1111, 1112 (N.Y. 1982) (reversing trial court's order closing hearing conducted outside jury's presence to consider admissibility of prior criminal acts).

Rule 802 allows conferences to be done off the record only if they are limited to "routine or administrative matters." *See* RMC 802(a) (discussion). The Manual and the Regulation make clear that Rule 802 conferences are not to be used "to litigate or decide contested issues." RMC 802(a) (discussion); *see also* Reg. MC 17-4(c) ("No legal issues will be litigated at an RMC 802 conference ...."). The Regulation further requires that the military judge enter a summary of the Rule 802 conference into the record "at or before the next commission session in the case." Reg. MC 17-4(e). *See, e.g.*, *United States v. Thomas*, 32 M.J. 1024, 1026 (A.F.C.M.R. 1991) ("Conferences may be held 'to consider such matters as will promote a fair and expeditious trial,' RCM 802(a), but they are no substitute for litigation or inquiry on the record."); *see also United States v. Sadler*, 29 M.J. 370, 373 n.3 (C.M.A. 1990) ("Discussion of instructions should be conducted on the record, rather than in a conference under RCM 802 ...."). [23]

D. This Petition Should be Resolved *Forthwith*, To Avoid Further Deprivation of The Right of Public Access

As the Supreme Court observed in *Nebraska Press Association*, "[d]elays imposed by the governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly." 427 U.S. at 560-61. Because of the time sensitive nature of access to these proceedings, the Military commission should forthwith grant the relief sought in this Petition. Until the closure practices being challenged herein are rescinded, "each passing day may constitute a separate and cognizable infringement of the First Amendment." *CBS, Inc. v.*

[23] Although the court in *United States v. McQuinn* stated, "[N]either this court nor our superior court have considered any given topic 'off limits' in an RCM 802 conference setting," the court there held that the relevant inquiry is the sufficiency of the inquiry conducted on the record and did not address the possibility of a denial of public access. 47 M.J. 736, 738 (N-M.Ct. Crim. App. 1997).

Davis, 510 U.S. 1315, 1317 (1979) (Blackmun, J., in chambers) (quoting *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319, 1329 (1975) (Blackmun, J., in chambers)); *Lugosch*, 435 F.3d at 126-27 (noting, in context of action by news media seeking access to judicial records, that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" (internal quotation marks omitted)). Indeed, military courts have stayed Article 32 proceedings that have been closed and expedited review of the closure orders precisely because "awaiting relief in the ordinary course of appellate review would be an inadequate remedy to preserve the public interest . . . ." *Denver Post Corp.*, Army Misc. 2004 1215 at 6 (lifting stay of Art. 32 proceeding only upon release of redacted transcript of improperly closed portion); *see ABC, Inc. v. Powell*, 47 M.J. at 364 (granting immediate Writ of Mandamus directing Art. 32 proceedings to be opened even before issuance of written decision).

7. Oral Argument.

Petitioners believe this motion can most promptly be resolved on papers.

8. Witnesses.

Not applicable.

9. Conference.

Petitioners certify that they have conferred with counsel for the parties concerning the relief requested herein. Counsel for the United States, Jeffrey D. Groharing, Major, U.S. Marine Corps, indicated that the prosecution believes OMC is releasing records in accordance with the rules and regulations and the prosecution will attempt to minimize as much as possible the delay involved in the review of matters implicating national security; counsel for defendant, Rebecca Snyder, indicated that the defense has no issues with the petition.

10. Additional Information.

None.

11. Attachments.

a) Declaration of William Glaberson

b) Declaration of David Schulz

WHEREFORE, the Press Petitioners respectfully ask this honorable tribunal to forthwith grant their Petition and to order public access to the Filings Inventory, together with all motions, exhibits and orders filed in this proceeding, and to enter an Order clarifying that all proceedings herein shall be open to the public and press unless specific findings are entered on the record that satisfy the statutory and constitutional standards for denying such public access.

Dated: November 21, 2007
New York, New York

LEVINE SULLIVAN KOCH & SCHULZ LLP

By: David A. Schulz (JG)

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Attorneys for Press Petitioners

ATTACHMENT A

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a/ "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	)))))))))	DECLARATION OF WILLIAM GLABERSON In Support Of MOTION BY PRESS PETITIONERS FOR PUBLIC ACCESS TO PROCEEDINGS AND RECORDS November 20, 2007

I, WILLIAM GLABERSON, pursuant to 28 U.S.C. § 1746, do hereby declare:

1. I am a reporter for the *New York Times,* and I respectfully submit this declaration in support of the motion by the Press Petitioners for meaningful public access to the proceedings of this Military Commission.

2. In my work for the *New York Times*, I have reported on issues relating to the detention and prosecution of those held at the U.S. Naval Base in Guantanamo Bay, Cuba ("Guantanamo"), including the proceedings of various military commissions. I have reported on developments in the proceedings against Omar Ahmed Khadr, Salim Ahmed Hamdan, David M. Hicks, and Mohammed Jawad. My statements in this declaration are based on my own personal knowledge.

3. As described below, it is difficult for reporters to obtain timely access to developments in this case or in the other military commissions at Guantanamo generally. These limitations on access have hindered our ability to provide timely information to the public about positions being advanced by either the prosecutor or the defense through their written motions and correspondence with the tribunal, or about the arguments presented in sessions that are either conducted electronically, closed to the public or conducted in sessions where reporters are not present at the Guantanamo facilities.

ACCESS PROVIDED BY THE OFFICE OF MILITARY COMMISSIONS

4. Since Congress passed the Military Commissions Act of 2006, military commissions have been convened to hear charges against three individuals: Omar Ahmed Khadr, Salim Ahmed Hamdan and David M. Hicks. Charges have been sworn against a fourth individual, Mohammed Jawad. The Office of Military Commissions ("OMC") has provided the public and press only limited access to the records of these proceedings through a Department of Defense website. (The website may be viewed at http://www.defenselink.mil/news/commissions.html.)

5. The DOD website does not provide timely information and does not permit a reporter to follow or understand developments on a prosecution. For example, as of November 19, 2007, the most recent entry under "Commission Cases" for both Omar Ahmed Kadr and Salim Ahmed Hamdan is the referral of charges on 04/24/07 and 05/10/07 respectively. No subsequent activity appears on the DOD website in either case. (A true and correct copy of the entries on the DOD website for the Khadr and Hamdan commissions are attached hereto as Exhibit A.)

6. The DOD press office separately has released motions and rulings on occasion, but none of the motion activity is reflected on the website for the commission, and the motion papers submitted to this tribunal by the parties are not being made publicly available by OMC on a regular basis. (A true and correct copy of the Press Materials website is attached hereto as Exhibit B.)

LACK OF ACCESS TO THE FILINGS INVENTORY

7. There is currently no publicly available inventory of motions and rulings filed with this tribunal. I understand that a non-classified "filings inventory" is

maintained for the use of the parties and the tribunal, setting forth all motions and other filings before the military judge. Neither this filings inventory nor any other docket of the proceedings is made publicly available during the pendency of the commission proceedings.

8. The DOD websites for materials related to the commissions are no substitute for access to the filings inventory. Information is not posted in a timely manner and it has been several weeks since any materials were added to these websites. For example, on October 17, 2007, Capt. Keith J. Allred, the military judge presiding over the *Hamdan* commission, granted in part and denied in part the prosecution's motion for reconsideration, but there is still no DOD announcement or publication of this ruling.

LACK OF ACCESS TO MOTIONS AND RELATED FILINGS

9. There currently is no place for the press or public to obtain copies of motions, requests for relief, and other material filed with the tribunal. At the military commission trial level, reporters are not advised of the presence of a court clerk or chambers staff available to provide copies of filings. As a result, requests for information by reporters are made to public affairs officials for the DOD, the OMC, or the Joint Task Force ("JTF"). These officials apparently have no authority to provide copies of filed material, and I have no way of knowing if my requests for documents ever reach judges.

10. Although counsel in the case are sometimes willing to provide a copy of filed motion papers to a reporter, reporters cannot know what materials exist and could be requested because of the absence of a public docket.

11. In June 2007, for example, the military judges in both the Kahdr and Hamdan proceedings concluded that they had no jurisdiction to proceed because neither

detainee had been held to be an unlawful enemy combatant. The press and public had no advance notice that this jurisdictional issue had even been raised and no ability to review the positions taken by the parties.

12. In the weeks leading up to the November 8, 2007 session in the Khadr proceeding both I and my attorney requested access to the pending motions and court rulings without any success. On October 12, 2007, I made such a request to Lt. Catheryne Pully, public affairs officer for OMC, both orally and by email. (A true and correct copy of my email to Lt. Pully is attached hereto as Exhibit C.) Lt. Pully told me that these materials were in the control of the military judge. This is the same response my attorney was separately given. I asked Lt. Pully that my request be forwarded to the judge, but received no response. On the eve of the hearing I wrote a new request explaining that I had received no response and requesting one. (A true and correct copy of this request is attached hereto as Exhibit D.) This second request has also gone unanswered.

13. During the session in the Khadr case on November 8, 2007, the military judge, Col. Peter E. Brownback III, indicated that the record would be made available once it is authenticated, but gave no time frame for this to occur. I have been told the record will not be authenticated until after the final verdict is rendered and sentencing has occurred. If this is so, the public will have no access to motions, and other filings until long after the case is over.

14. The now-concluded prosecution of Australian David Hicks before another military commission demonstrated how the lack of effective access makes it difficult for the press or public to follow developments before military commission. On March 26,

2007, the day before his trial was to begin, Hicks agreed to a plea arrangement and entered a guilty plea. On March 30, 2007, Hicks was sentenced to a term of additional confinement in Australia and precluded from any communication with the press during his continuing confinement. Only later, after Hicks was gone from Guantanamo, was a redacted copy of the Record of Trial of the *Hicks* commission posted to the DOD website. (A copy of this Record can be viewed at http://www.defenselink.mil/news/Mar2007/US%20v%20David%20Hicks%20ROT%20(Redacted).pdf.)

15. Moreover, it was only at this late date that the public and press were provided access to the accusations of misconduct Hicks had leveled before trial against the prosecutor in charge of his case. Until then there was no way to learn from the tribunal that on March 19, 2007 Hicks had moved to disqualify the chief prosecutor, Col. Morris D. Davis. Because I was covering the Hicks prosecution, I learned at the time that such a motion had been made, but when I requested a copy of the motion from OMC public affairs officials, I was told that the motion was "private between the judge and the lawyers."

16. The redacted version of the *Hicks* Record of Trial contains several other requests for relief, and objections by the parties and rulings by the military judge, Col. Ralph H. Kohlmann. (A true and correct copy of the Filings Inventory in Hicks, released after the conclusion of the proceedings, is annexed as Exhibit E.) None of these documents was publicly released during the pendency of the proceedings.

PROCEDURES THAT FURTHER RESTRICT ACCESS

17. Beyond the absence of timely public access to written submissions and rulings, I understand that the parties and judges involved in the on-going military commissions communicate with one another via email correspondence that includes various applications and legal arguments by the parties and rulings by the judges. These emails are not made available to the public, except by chance. A few emails have become public only because they happened to be attached to briefs filed with the Court of Military Commission Review ("CMCR").

18. For example, on September 25, 2007 an order scheduling Khadr's arraignment and setting a timetable for the submission of evidence on the critical issue of Khadr's status as an Unlawful Enemy Combatant was issued by email, and two days later an email order was issued granting a defense motion for a continuance. (A true and correct copy of these email rulings are attached hereto as Exhibit F.) The press and public can not possibly have an informed understanding of developments in the proceedings before the military commissions without contemporaneous access to such developments in the case.

19. We know from the now released Record of Trial in *Hicks* that motions, objections and rulings were made by email in that case, too. For example, on March 20, 2007 the prosecution objected to the presence of the accused at a Rule 802 conference. On March 21, 2007, the judge resolved various scheduling rulings, and ordered that the accused not be present at the Rule 802 conference. Later that day, the defense objected to any Rule 802 conference outside the presence of the accused. (A true and correct copy of these emails is attached hereto as Exhibit G.) All of these issues were communicated and

resolved via email. None of the emails was made publicly available during the pendency of the commission proceedings.

20. The issues being raised and resolved by email are the very issues that civilian courts routinely handle through publicly filed motions. As far as I am aware, these rulings issued by email in the commissions are not reduced to a form made contemporaneously available to the public, so there is no way for a reporter to track developments in the case. Without access to such information a reporter can not fully understand the status of a proceeding, the issues being raised and the positions being taken by the parties.

SESSIONS CONDUCTED IN PRIVATE

21. Closed-door Rule 802 conferences are also apparently being used to litigate substantive issues, such as jurisdictional questions and the scope of protective orders. In many instances, it is difficult to follow what is occurring in an open session because there are so many mentions of previous closed-door discussions and previously exchanged motions, rulings and other material that are not made public.

22. In particular, it appears from the presentations in open commission sessions that arguments have previously been made during private conferences, which apparently have been used to address substantive issues broader than scheduling or other routine, administrative matters.

23. For example, during the November 8, 2007 public session arguments were made on whether there would be a hearing on the key jurisdictional issue of whether Khadr is an "unlawful" enemy combatant. It was evident from the session that the prosecution had made an earlier proffer of what evidence it might present, but few of the

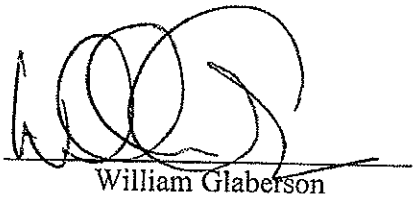
details of that proffer are known. The prosecutor was stopped from indicating the details about what evidence he was prepared to present in public session because of rulings that apparently had been made in the closed sessions. It is also known that on the eve of the November 8 hearing, in closed-door meetings, the prosecutors informed defense counsel of a witness with exculpatory information, but little has been disclosed about the nature of this information.

24. Finally, neither the transcripts of the open sessions nor written summaries of the Rule 802 conferences are publicly released in a timely fashion. It is my understanding that an oral or written summary of each Rule 802 conference is required to be entered into the record at the next commission session. While the judge delivers oral summaries, they are not adequately detailed to allow an observer to fully understand what transpired.

25. Transcripts are important for two reasons. First, conferences are held between the judge and the attorneys by phone or email, and reporters are not present. Second, at public hearings references are often made to matters resolved in non-public sessions. Without a transcript of what transpired it is often not possible to understand the comments or references made in the public session.

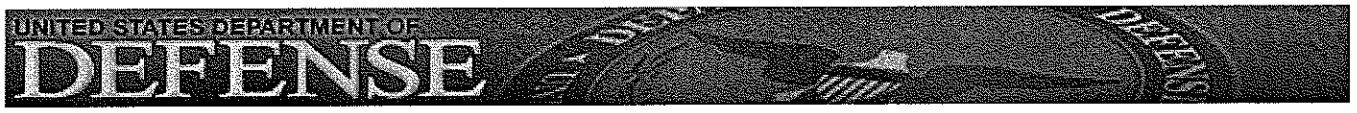
I declare under penalty of perjury that the foregoing is true and correct.

Executed: New York, New York
November 20, 2007



William Glaberson

EXHIBIT A



United States Department of Defense
Military Commissions
On the web: http://www.defenselink.mil/news/commissionsKhadr.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

Home
Military Commissions Act
Military Commissions Manual
Press Materials
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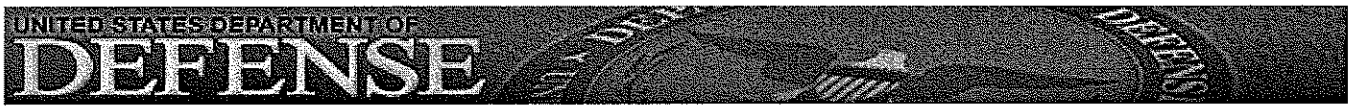
Omar Ahmed Khadr

04/24/2007 - Referred Charges

02/02/2007 - Sworn Charges



United States Department of Defense
Military Commissions
On the web: http://www.defenselink.mil/news/commissionsHamdan.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

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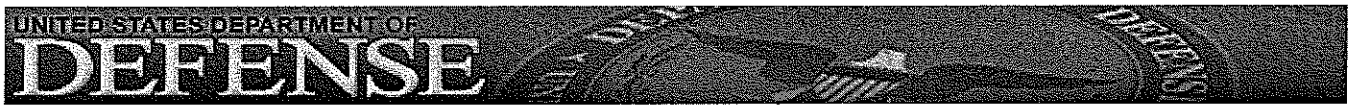
Web Archives

Salim Ahmed Hamdan

05/10/2007 - Military Commission Charges Referred

02/02/2007 - Sworn Charges

EXHIBIT B



United States Department of Defense
Military Commissions
On the web: http://www.defenselink.mil/news/commissionspress.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

Home
Military Commissions Act
Military Commissions Manual
Press Materials *New Items*
Web Archives

Press Materials

* 10/10/2007 - [Biography] Legal Advisor to the Convening Authority, Brig. Gen. Thomas W. Hartmann

* 09/17/2007 - [OMC Report] Role of the Legal Advisor to the Convening Authority of Military Commissions (OMC)

04/24/2007 - Referred Charges - Omar Ahmed Khadr

04/24/2007 - [News Release - Khadr] Military Commission Charges Referred

03/30/2007 - [News Release] Detainee Convicted of Terrorism Charge at Guantanamo Trial

03/01/2007 - Referred Charges - David M. Hicks

03/01/2007 - [News Release - Hicks] Military Commission Charges Referred

02/08/2007 - OMC Fact Sheet

02/07/2007 - [News Release] Seasoned Judge Tapped to Head Detainee Trials

02/07/2007 - [Biography] Convening Authority, Susan J. Crawford

02/02/2007 - Sworn Charges - Salim Ahmed Hamdan

02/02/2007 - Sworn Charges - David M. Hicks

02/02/2007 - Sworn Charges - Omar Ahmed Khadr

EXHIBIT C

From: William Glaberson [mailto:glabe@nytimes.com]
Sent: Friday, October 12, 2007 2:12 PM
To: Pully, Catheryne, LT, DoD OGC
Subject: Khadr filing request/NYTimes

Lt. Catheryne Pully
DoD OMC

Dear Lt. Pully:

As we discussed, this is a written request for filings in the Khadr case.

As I mentioned, in an e-mail correspondence with the lawyers Judge Brownback directed the prosecution and defense in the Khadr case to file materials with the commission outlining their positions on the central jurisdictional question in the case, whether Mr. Khadr is an "alien unlawful enemy combatant.''

Because these materials are effectively motions rather than private correspondence, I am requesting that they be released publicly. If necessary, please consider this a request under the Freedom of Information Law and/or Pentagon policies regarding the transparency of the commission process.

As representatives of The New York Times have expressed to your office on several occasions previously, we continue to request that motions, orders and decisions of the commissions and the commission appeals court be made public on a timely basis.

Thank you for your consideration of this issue.

Bill Glaberson
212-556-4648

EXHIBIT D

Date: Wed, 07 Nov 2007 15:43:55 -0500
To: [redacted]
From: William Glaberson <glabe@nytimes.com>
Subject: motions/filings NYT request

To OMC Public Afffairs:
Re: Khadr case

As you may recall, I made a request some time ago for access to pretrial motions and filings including e-mail correspondence between the parties and the judge that are effectively motions and legal decisions affecting the scope of the proceedings tomorrow. I have not received any response and note that there have been no documents filed publicly on the OSD web site concerning this case for many weeks.

Can you fill me in on the progress on this issue? What is the authority for keeping all documents from being posted publicly? As you know in civilian courts it is routine for filings to be part of the public record.

Thanks, Bill Glaberson

EXHIBIT E

Filings Inventory – US v. Hicks
(Version 2)

As of 2100 hours, 30 March 2007

This Filings Inventory includes only those matters filed since 1 March 2007.

Dates in red indicate due dates

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	AE
P 001: Special Request for Relief to permit the absence of	14 Mar 07			• request filed • granted by MJ 14 Mar 07	OR - 009 A - 009
P 002:					

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 001: Motion for Appropriate Relief - Prosecutorial Misconduct	19 Mar 07	26 Mar 07		• motion filed • A. Pros response 26 Mar 07 (at GTMO)	OR - 015
D 002: Special Request for Relief to permit telephonic testimony for Motion D001	20 Mar 07			• request filed •	OR - 017
				•	
				•	
				•	
				•	
				•	

MJ Designations

Designation Name (MJ)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
MJ 001: Detail of Military Judge, and Scheduling of First Session	• sent to all parties 6 Mar 07 w/arraignment date of 20 Mar • A. DC request continuance on 8 Mar to 27 Mar • B. Pros request on 9 Mar for 26 Mar date • C. MJ ruling on 9 Mar - arraignment on 26 Mar	OR - 003 A - 005 B - 005 C - 005
MJ 002: Preliminary Procedural Instructions	• sent to all parties 9 Mar 07	007
MJ 003 – Voir Dire	• MJ bio sent 6 Mar 07 • A. voir dire submitted by defense • B. voir dire submitted by prosecution • C. MJ responses to voir dire submitted by prosecution and defense	OR -006 A - 010 B - 012 C - 013
MJ 004: Notice of RMC 802 Hearing	• sent to all parties 20 Mar 07 w/hearing date of 25 Mar (follow-on email included)	016
	•	

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	Signed Pages	Date	Topic	AE
	Protective Order	1	29 Mar 07	• Protection of Military Commission Members (ID of panel members)	032

Inactive Section

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
				•	

Inactive Section

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
				•	
				•	
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				•	

Inactive Section

MJ Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE

EXHIBIT F

-----Original Message-----
From: [redacted]
To: [redacted]

Sent: Tue Sep 25 16:11:31 2007
Subject: FW: Initial Notice - US v. Khadr Trial Proceedings Following CMCR Ruling

COL Brownback has directed that I send the email below to the parties.

v/r,

LTC Mike Chappell, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]
FAX: [redacted]

From: Pete Brownback [redacted]
Sent: Tuesday, September 25, 2007 15:56
To: Chappell, Danny, LTC, DoD OGC
Cc: [redacted]
Subject: Initial Notice - US v. Khadr Trial Proceedings Following CMCR Ruling

LTC Chappell,

Please forward the email below to the parties in US v. Khadr. Please furnish a copy of it to other interested personnel.

COL Brownback

Exhibit A

Counsel in the case of United States v. Khadr,

1. Chronology:

a. 4 June 2007 - Dismissal of charges - see AE 15.

b. 8 June 2007 - Government request for reconsideration - see AE 17.

c. 29 June 2007 - Disposition of request for reconsideration - see AE 23.

d. 3 July 2007 - Government notice of appeal - see AE 25.

e. 24 September 2007 - Court of Military Commission Review opinion - see AE 26.

f.. 24 September 2007 - MJ notified of CMCR opinion - see AE 27.

g. 25 September 2007 - Notification of CMCR opinion served on accused - see AE 28.

2. Under the provisions of RMC 707b(4)(B), the RMC 707 30-day and 120-day clocks start on 25 September 2007, the date of service of the opinion on the accused.

3. If either party disagrees with the legal conclusion stated in paragraph 2 above, that party shall file a motion for appropriate relief NLT one week from the date of this email. The opposing party may respond within one day of receipt of the motion. However, if the opposing party agrees that the legal conclusion is incorrect, the opposing party may join in the motion or present a separate motion.

4. The accused will be arraigned at 1100 hours, 11 October 2007, in the courtroom at GTMO, Cuba. Counsel may request a delay in the arraignment within 48 hours of the date/time of this email.

5. At the 4 June 2007 session, defense counsel agreed that he would prepare a brief concerning how the Foreign Attorney Consultants could be integrated into the trial without violating the provisions of the MCA (See ROT, p. 6.). This brief shall be provided to the government and the military judge by 1600 hours, 1 October 2007. The government will have until 1600 hours, 4 October 2007 to respond.

6. Counsel will be prepared to establish the motions and trial schedule after arraignment. Counsel will provide the commission and the opposing party a proposed motion and trial schedule NLT 1600 hours, 2 October 2007.

7. A modified trial script will be provided to counsel.

8. NLT 1600 hours, 2 October 2007, the government will provide the commission and the defense the materials upon which it intends to rely to establish that the accused is an Unlawful Enemy Combatant (UEC). Matters previously provided to the commission (e.g., AE 011, AE 013, AE 014, AE 021) are already in the record and may be referenced by either party. By the same date/time, the defense will provide the commission and the government

Exhibit A

any materials upon which it intends to rely to refute a designation as an UEC.

9 . The parties are advised that matters presented, both factual and legal, concerning the issue of designation as an UEC, must be focused specifically on whether or not the accused meets the definition of UEC as established by the MCA (10 USC 948a(1)). This threshold or initial determination is solely for the commission to decide whether or not there is MCA-jurisdiction over the accused. Other matters which might affect jurisdiction (i.e., international law, constitutional law, criminal law) will not be heard in conjunction with this threshold or initial determination of jurisdiction.

Peter E. Brownback III

COL, JA, USA

Military Judge

Exhibit A

-----Original Message-----
From: [redacted]
To: [redacted]

Sent: Thu Sep 27 18:15:58 2007
Subject: FW: Ruling - Defense Motion to Vacate or Request a Continuance - United States v. Khadr

COL Brownback has directed that I send the email below to the parties.

v/r,

LTC Mike Chappell, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]
FAX: [redacted]

From: Pete Brownback [redacted]
Sent: Thursday, September 27, 2007 17:31
To: Chappell, Danny, LTC, DoD OGC
Cc: [redacted]
Subject: Ruling - Defense Motion to Vacate or Request a Continuance - United States v. Khadr

LTC Chappell,

Please forward the email below to the parties in the case of United States v. Khadr.

Please distribute it to other interested persons.

COL Brownback

Exhibit B

Counsel in the case of United States v. Khadr,

1. The Commission has considered the Defense Motion to Vacate, or, Alternatively, to Request a Continuance filed at 2308 hours, 25 September 2007. The Commission has also considered the defense supplement filed at 1015 hours, 27 September 2007. The Commission has also considered the government response of 1608 hours, 27 September 2007.

2. Under RMC 707, the accused must be arraigned within 30 days of the service of charges. The Commission has a duty to meet this requirement, unless the interests of justice require a delay. In the instant case, RMC 707b(4)(B) provides that the start of the 30 day period is 25 September 2007, the date on which the accused was served a copy of the opinion of the Court of Military Commission Review (CMCR). Under RMC 707 (b)(1), day 1 of the 30-day period is 26 September 2007.

3. In its motion, the defense discusses the possibility of filing a motion for reconsideration with the CMCR or filing an appeal of the CMCR decision with the U.S. Court of Appeals for the District of Columbia Circuit. At this time, however, it has done neither. The 24 September 2007 ruling of the CMCR must currently be treated as a final ruling by that court.

4. The matters presented by the defense in the 2308 hours, 25 September 2007 motion did not rise to the level required to grant a delay. The only grounds for a continuance contained in the motion were the possibilities of filing a motion or an appeal with another court.

5. In the 1015 hours, 27 September 2007 supplement, the defense did present matters which materially affect the ability of the defense to appear in Guantanamo Bay, Cuba on 11 October 2007 and represent Mr. Khadr in a competent manner. [In connection with the supplement, the Commission refers defense counsel to the ROC 2.f requirement to use numbered paragraphs in all emails.]

a. In making its ruling on the defense request, the Commission is giving no weight to the supplement paragraph starting "With respect to the legal component, the defense...." The Commission will determine the scope of the proceeding following the arraignment. Any limitation will not affect the ability of the defense to present matters in conjunction with an ordered motion schedule.

b. In making its ruling on the defense request, the Commission is giving no weight to the last sentence of the paragraph starting "In short, the defense is not prepared...."

6. The government response did not address the matters contained in the defense supplement which materially affect the ability of the defense to appear in Guantanamo Bay, Cuba on 11 October 2007 and represent Mr. Khadr in a competent manner. Instead, the government focused on the existence or non-existence of a right to appeal the ruling by the CMCR (See paragraph 4A) and the question as to which court has the authority to stay proceedings pending an appeal (See paragraph 4B).

7. Having considered the matters above and the provisions of RMC 707, I find:

a. The requested delay (from 11 October 2007 to the week of 5 November 2007) is for a period of 25-29 days.

b. There have been no previous requests for delay from the current defense team in this proceeding (But see AE 006).

c. On its face, as established by the matters contained in the supplement rather than the original motion, the request is reasonable.

d. The matters set forth by the government in its response do not address the matters contained in the supplement.

e. The prosecution sets forth no specific harm which would result to its case or to the public

Exhibit B

interest from the requested delay.

f. The public interest in a speedy trial will not be harmed by a delay in the arraignment in this case.

g. With regard to the provisions of RMC 707(b)(4)(E)(ii)(A), I specifically find that the interests of justice are served by granting a continuance and those interests outweigh the best interests of the public and the accused in a prompt trial.

h. I specifically do not find that arraignment within 40 days of service of the opinion of the Court of Military Commissions Review on the accused is not prompt.

i. With regard to the provisions of RMC 707(b)(4)(E)(ii)(B), the defense is the party responsible for the delay occasioned by this continuance.

8. The defense request for a continuance is granted insofar as it extends until 1100 hours, 8 November 2007.

9. The government will insure that all materials previously provided to LtCol Vokey are provided to LCDR Kuebler as soon as possible.

10. The government will draft and forward to the defense and the military judge a proposed protective order. The order will be fair to both sides.

Peter E. Brownback III

COL, JA, USA

Military Judge

Exhibit B

EXHIBIT G

From: Mori, Michael, MAJ, DoD OGC
Sent: Wednesday, March 21, 2007 6:53 PM
To:

Cc:

Subject: RE: HICKS RESPONSE TO MJ EMAIL OF R.M.C. 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Sir,

1. The defense objects to any 802 conference where Mr. Hicks is prohibited from being present. R.M.C. 802(d) provides that the accused's presence at an 802 conference is not prohibited. The defense objects to the SJA's decision and the Military Judge's apparent ruling that Mr. Hicks will not be present at the 802 conference. This prohibits Mr. Hicks' appearance at an 802 conference in violation of R.M.C. 802(d).

2. Prohibiting Mr. Hicks from attending 802 conferences deprives him of the right to be present for his commission as guaranteed by the MCA and to materially participate in his defense. See 10 U.S.C. § 949a(b)(1)(B) ("The accused shall be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.").

3. The defense also objects to the 802 on the basis that it has been scheduled when lead counsel for Mr. Hicks cannot attend.

4. Maj Mori and Ms. Snyder will attend the conference. Please be advised that we will not be in a position to speak. See R.M.C. 802, Discussion ("Normally, the defense counsel may be presumed to speak for the accused".).

5. Finally, please be advised the defense intends to tape record the conference.

v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
morim@dodgc.osd.mil

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-----Original Message-----
From: LTC, DoD OGC
Sent: Wednesday, March 21, 2007 17:58
To:

Subject: FW: HICKS RESPONSE TO MJ EMAIL OF R.M.C. 802 Conference and Initial Session Trial Guide: U.S. v Hicks

has directed that I send the email below to the parties.

v/r,

USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----
From:
Sent: Wednesday, March 21, 2007 14:22
To: DoD OGC
Subject: FW: HICKS RESPONSE TO MJ EMAIL OF R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Please forward this message to the counsel in subject case.

Counsel:

1. The R.M.C. 802 conference will go @ 1400 on 25 March 2007 as previously ordered. The time was not chosen at random and I am not seeking to frustrate anyone.The conference is intended to enable me to ensure that the arraignment hearing is conducted in as efficient and professional a fashion as possible. The requested change in the meeting time does not further my intentions in that regard.

2. I previously asked that counsel from both sides work together to develop a recommended litigation schedule that works as well as possible for both sides. Hopefully you have been doing this, and hopefully the defense has already taken Mr. Dratel's concerns into account. In any event, I expect that Maj Mori will be able to provide scheduling input from the defense side at the 802 conference.

3. No disputed matters will be resolved at the 802 conference.

4. With regard to Mr. Dratel, I would also note that this court has not yet received his notice of appearance and agreement as required by the preliminary procedural instructions. A signed copy of enclosure 4 to the preliminary procedural instructions must be submitted to the court prior to his participation in this case.

5. Mr. Hicks will not be present at the 802 conference on 25 March 2007.

6. Arrangements with regard to any visit with or movement of Mr. Hicks should be coordinated with appropriate personnel on the JTF-GTMO staff.

V/R,

Colonel, U.S. Marine Corps

-----Original Message-----
From: LtCol, DoD OGC
Sent: Tuesday, March 20, 2007 16:35
To:

Subject: RE: HICKS RESPONSE TO MJ EMAIL OF R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

-- sir:

1. Per my phoncon today o/a 1530 with the SJA, JTF-GTMO (CAPT ; copied in this e-mail chain), the Prosecution objects to the presence of the accused at the 802 conference -- to include the accused being moved to any location other than to the courtroom for a session on the record.

2. For security and related logistical reasons, JTF-GTMO is prepared to move the accused only for purposes of the military commission session on the record and in the courtroom.

3. Defense will be provided adequate access to consult with their client throughout the day, to include after 1800 upon good cause being shown (e.g., to discuss the results of the 802 conference).

V/r-- LtCol

, LtCol, USMC
Prosecutor, Office of Military Commissions

-----Original Message-----
From: Mori, Michael, MAJ, DoD OGC
Sent: Tuesday, March 20, 2007 15:19
To:

Subject: HICKS RESPONSE TO MJ EMAIL OF R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Sir,

Mr. Dratel is not due to arrive until approx. 1630. As Mr. Dratel is lead counsel for Mr. Hicks, it is requested that the RMC 802 conference be scheduled after 1800. This will provide sufficient time for Mr. Dratel to get over from Leeward.

Ms. Snyder and I can work on getting the AEs formalized outside of an 802 conference but any discussion on the listed items will require Mr. Dratel's presence.

Additionally, pursuant to RMC 802(d), the defense would request that Mr. Hicks be made available at the Commission building at 0900 until the conclusion of any 802 conference on 25 March.

Mr. Hicks' presence will permit him to participate in the 802 conference, should he choose to as well as permit counsel to consult with Mr. Hicks in a timely manner. Additionally, Mr. Hicks' presence at the commission building will permit adequate time for preparation between Mr. Hicks and his counsel for the arraignment session scheduled on the 26th while facilitating counsel availability for the scheduled 802 conference or any subsequent conference that day.

v/r
Maj Mori

Major Michael D. Mori
United States Marine Corps
Defense Counsel
Office of the Chief Defense Counsel, Office of the Military Commissions
morim@dodgc.osd.mil

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-----Original Message-----
From: LTC, DoD OGC
Sent: Tuesday, March 20, 2007 15:00
To:

Subject: FW: R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

has directed that I send the email below to the parties.

v/r,

, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

-----Original Message-----
From:
Sent: Tuesday, March 20, 2007 12:11
To: LTC, DoD OGC
Subject: R.C.M 802 Conference and Initial Session Trial Guide: U.S. v Hicks

Please send this message and the initial session trial guide to the counsel in subject case.

Counsel,

1. Attached is the trial guide we will use for the arraignment session. Please note the items referred to therein that you should be providing to for marking as AEs.

2. I am hereby directing a R.M.C. 802 conference re this case to be held in the conference room next to the GTMO court room @ 1400 on 25 March 2007. All counsel assigned to this case are directed to attend. (has been pr eviously excused from the arraignment session by me. I also understand that Mr. Dratel's travel schedule may not be able to facilitate his attendance.)

3. At this 802 session we will:

a. Ensure we have all items to be referenced in court marked as AEs.
b. Provide me an opportunity to receive input from both sides on the litigation schedule.
c. Have a preliminary discussion re Ms. Snyder's status as a civilian counsel in this case vis a vis the provisions of the M.C.A. and the M.M.C.

V/R,

Colonel, U.S. Marine Corps

ATTACHMENT B

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a/ "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	))))))))))	DECLARATION OF DAVID SCHULZ In Support Of MOTION BY PRESS PETITIONERS FOR PUBLIC ACCESS TO PROCEEDINGS AND RECORDS November 20, 2007

I, DAVID A. SCHULZ, pursuant to 28 U.S.C. § 1746, do hereby declare:

1. I am an attorney duly admitted to the Bars of the State of New York and the District of Columbia, and I am a member of Levine Sullivan Koch & Schulz, L.L.P., counsel to The Associated Press, Dow Jones & Company, Hearst Corporation, The McClatchy Company, and The New York Times Company (collectively the "Press Petitioners"). I respectfully submit this affirmation in support of the Press Petitioners' motion for contemporaneous access to the proceedings of this Military Commission.

2. Over the past several months, Petitioners have tried to obtain access by making repeated requests to various officials at the Department of Defense.

3. In May 2007, David McCraw, Vice President and Assistant General Counsel of The New York Times, wrote to Michael C. Chapman, Deputy Legal Advisor, Office of Military Commissions, to request a clarification of the standards by which filings are declared confidential and a procedure to allow news organizations to challenge any decision to seal nonclassified legal filings. (A true and correct copy of Mr. McCraw's letter is attached hereto as Exhibit A.)

4. On June 15, 2007, Mr. Chapman replied to Mr. McCraw, stating that the statute, rules, and regulations governing military commissions "clearly contemplate

public access to open sessions of military commission proceedings." Mr. Chapman further stated that in order to avoid invading the authority "of the military judge after the Convening Authority has referred a case to trial," it is within the power of the judge to direct or prevent the release of any filings:

> Because motions are filed with the military judge, rather than with the Convening Authority, it is within the broad discretion of each military judge to direct motions practice and to provide for or restrict release of any particular document filed or submitted in the case. The Office of Military Commissions Public Affairs Officer, Major Beth Kubala, will effect release of commission documents consistent with the rulings and orders of each military judge.

Mr. Chapman went on to state that "[o]nce the trial is completed and the record authenticated by the military judge, the record of trial will be sent to the Convening Authority." (A true and correct copy of Mr. Chapman's letter is attached hereto as Exhibit B.)

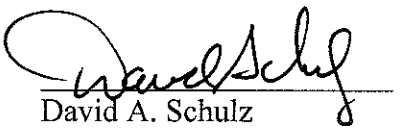
5. On September 14, 2007, on behalf of The New York Times and The Associated Press, I wrote to the Clerk of the Court for Military Commissions, Dorrance Smith, Assistant Secretary of Defense, Public Affairs, and LTC Mike Chappell, Senior Attorney Advisor, Military Commissions Trial Judiciary. I requested access to the dockets of proceedings before the Military Commissions and copies of any motions, answering papers, and orders in those proceedings. (A true and correct copy of my September 14, 2007 letter is attached hereto as Exhibit C.)

6. On September 24, 2007, Dorrance Smith replied to state that my letter had been forwarded to the Office of General Counsel for the Department of Defense. (A true and correct copy of Mr. Smith's letter is attached hereto as Exhibit D.)

7. On October 17, 2007, on behalf of The New York Times and The Associated Press, I wrote to William J. Haynes II, General Counsel, Department of Defense, stating that recent activity in the Military Commissions underscored "the urgency of the request by the Times and AP for effective access to the docket of proceedings before the Military Commissions as well as the motion papers and orders entered in the proceedings." (A true and correct copy of my October 17, 2007 letter is attached hereto as Exhibit E.) To date, we have received no response from Mr. Haynes.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: New York, NY
November 20, 2007



David A. Schulz

EXHIBIT A

The New York Times Company

David McCraw
Vice President and
Assistant General Counsel

229 West 43rd Street
New York, NY 10036

tel 212.556-4031
fax 212.556-4634

May 3, 2007

Maj. Michael Chappman
Deputy Legal Adviser
Office of Military Commissions
Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Re: Press Access to Judicial Documents

Dear Maj. Chappman:

I write on behalf of The New York Times to seek clarification of the procedures that will be employed by the Convening Authority and Military Commissions in handling requests from press representatives for copies of nonclassified motions and similar papers filed as part of Commission proceedings. While we understand that certain materials will be deemed classified for reasons of national security, our present concern is not with such items but instead with press access to motions and other filings that do not raise any national security issues but are not made available to the press.

This issue arose in March during the prosecution of David Hicks. Defense lawyers for Mr. Hicks made a motion to disqualify the chief prosecutor in the case, Col. Morris D. Davis. The motion was not premised on any classified evidence or information but instead was addressed to Col. Davis's public comments about one of Mr. Hicks's defense lawyers. New York Times reporter William Glaberson, who was present at Guantanamo to cover the Hicks trial, requested a copy of the defense motion through the Commission's Public Affairs staff. He was informed that the motions would not be made public.

We believe that such secrecy is inconsistent with the fair trial and due process guarantees implemented by the Military Commissions Act of 2006 and contrary to the law of access that has developed as a matter of federal common law and the First Amendment and been applied to court-martials, judicial prosecutions of terrorism suspects, and a range of other adjudicatory proceedings. Reporters were present in the courtroom to cover the Hicks proceedings, and there would appear to be no basis in law or in logic to deny them access to a motion that was filed in those proceedings and

raised only issues of law and facts unrelated to any evidence in the case. We believe that the standards used in other adjudicatory bodies apply here as well: specifically, that the party seeking to seal nonclassified filings should have to demonstrate on the record that there is a compelling interest to be served by confidentiality, that no alternative to sealing is available, and that the sealing is as narrow as possible.

We are not seeking by this letter access to the Hicks motion papers. Instead, we are asking that the Convening Authority do two things: first, clarify the standards by which the Commissions may declare all or parts of nonclassified motions or similar filings to be confidential and, second, set forth a procedure by which news organizations can challenge before the Convening Authority any decision by a Commission to seal nonclassified legal filings. It seems inevitable that this issue of access will recur as the Commissions go forward. We believe that both the Commissions and the press would be well served by having a simple and expedited procedure under which a news organization could be heard through a letter brief submitted to the Convening Authority setting forth its argument for access to any nonclassified materials that have been sealed.

Such an expedited procedure, leading to a timely decision on access, would appropriately safeguard the public's interest in monitoring Commission proceedings and assure that sealing decisions are being made in accordance with established law and policy. It is particularly important to the press and to the public that decisions about access be made at the time of the proceedings. While we know that the Convening Authority has posted papers from these proceedings on a public website, that material is not current. The public's ability to monitor the work of a Commission in a particular case depends on having access to relevant information at the time of the proceeding, not merely access to the historical record at some later date.

Thank you for your attention to this issue. I look forward to your response and would welcome the opportunity to discuss the issues further with you and others on your staff.

Sincerely,

David E. McCraw

EXHIBIT B

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

CONVENING AUTHORITY

June 15, 2007

Mr. David McCraw
Vice President and General Counsel
The New York Times Company
229 West 43d Street
New York, New York 10036

Dear Mr. McCraw,

Thank you for your inquiry and for the efforts of your publication to make the military commissions process as transparent as possible for your readership.

The Military Commissions Act, the Rules for Military Commissions, and the Regulation for Trial by Military Commissions clearly contemplate public access to open sessions of military commission proceedings. The Office of Military Commissions has made, and will continue to make, every effort to support access by members of the press to commission proceedings consistent with the Act, the Rules, and the Regulation.

As is normally the practice in military trials, once charges have been referred to trial by the Convening Authority, control of the proceedings vests in the military judge detailed to the case by the Chief Trial Judge. To protect the integrity of the proceedings, the Convening Authority will avoid any action that could be viewed as usurping the authority, or invading the province, of the military judge after the Convening Authority has referred a case to trial. Because motions are filed with the military judge, rather than with the Convening Authority, it is within the broad discretion of each military judge to direct motions practice and to provide for or restrict release of any particular document filed or submitted in the case.

The Office of Military Commissions Public Affairs Officer, Major Beth Kubala, will effect release of commission documents consistent with the rulings and orders of each military judge.

Once the trial is completed and the record authenticated by the military judge, the record of trial will be sent to the Convening Authority. At that time, any portion of the record that has not been sealed by the military judge will be made public, including all previously undisclosed motions, exhibits, and allied papers, after redaction in accordance with the Freedom of Information Act.

Sincerely,

Michael C. Chapman

Michael C. Chapman
Deputy Legal Advisor
Office of Military Commissions

Printed on Recycled Paper

EXHIBIT C

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

321 WEST 44TH STREET, SUITE 510
NEW YORK, NEW YORK 10036

(212) 850-6100
FACSIMILE (212) 850-6299

1050 17TH STREET, N.W., SUITE 800, WASHINGTON, D.C. 20036-5514
(202) 508-1100 FACSIMILE (202) 861-9888

2112 WALNUT STREET, THIRD FLOOR, PHILADELPHIA, PA 19103
(215) 988-9778 FACSIMILE (215) 988-9750

JEANETTE MELENDEZ BEAD*
SETH D. BERLIN
JAMES E. GROSSBERG*
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ELIZABETH C. KOCH*
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NICOLE A. AUERBACH
MICHAEL BERRY*
CHAD R. BOWMAN*
THOMAS CURLEY*
AMANDA M. LEITH*
JOHN B. O'KEEFE*
ADAM J. RAPPAPORT*
ALIA L. SMITH
*NOT ADMITTED IN NEW YORK

WRITER'S DIRECT DIAL
(212) 850-6103

September 14, 2007

VIA OVERNIGHT MAIL
Clerk of the Court
Office of Military Commissions
Office of Convening Authority
1600 Defense Pentagon
Washington, DC 20301

Dorrance Smith
Assistant Secretary of Defense for Public Affairs
Department of Defense
1400 Defense Pentagon
Room 2E565
Washington, DC 20301

LTC Mike Chappell, JA, USAR
Department of Defense
Office of General Counsel
Senior Attorney Advisor
Military Commissions Trial Judiciary
1600 Defense Pentagon
Washington, DC 20301

Re: Public Access to Military Commission Records

Dear Clerk, Ms. Smith and LTC Chappell:

I write on behalf of The New York Times and the Associated Press to request access to (a) the dockets of proceedings before the Military Commissions at Guantanamo Bay and (b) copies of any motions, answering papers and orders in these proceedings. It is my understanding that a website is maintained that is accessible by all parties and contains this material in the form of a "filings inventory." As set forth below, the public and press have both a statutory and a

constitutional right of access to the proceedings of the Military Commissions, and this right extends to the docket of the proceedings as well as the motion papers and orders in the proceedings the disclosure of which does not raise national security or personal safety issues.

Statutory Access Rights

The public's right of access to Military Commissions is mandated by the Military Commissions Act of 2006, 10 U.S.C. § 948a, *et seq.* (the "MCA"), and recognized in both the Manual for Military Commissions ("MMC") and Regulation for Trial by Military Commissions ("RMC") issued by the Department of Defense. The MCA expresses Congress' clear intent that the public know and observe the conduct of Commissions. Proceedings may be closed only where the presiding judge makes specific findings that closure is "necessary" to protect national security information or to ensure the physical safety of individuals. 10 U.S.C. §949d(d)(2), This right of access extends not just to trials, but expressly encompasses all "proceedings," 10 U.S.C. § 949d(d)(1), which necessarily extends to oral argument and hearings as well as to the motion papers and written submissions.

The Manual and Regulations for Military Commissions both elaborate on the nature of the statutory right, confirming that the work of the Commissions is to be public except in those narrow circumstances where confidentiality is explicitly authorized. *See* MMC Rule 806(a) ("military commissions shall be publicly held"); RMC § 19-7(a) (sessions of commissions "shall be public to the maximum extent practicable"). The public access right extends specifically to all information "that has become part of the record of proceedings of military commissions in open session," and the "scheduling or result of any stage in the judicial process." RMC § 19-4(a)(3)-(4). Again, the right of access may be limited only where closure is "supported by essential findings of fact." MMC Rule 806(b). These provisions collectively afford the public a right of access to the docket detailing the motions and orders filed with a Commission together with the underlying records themselves, unless a specific determination is made that information must be withheld for national security or personal safety reasons.

First Amendment Access Right

Such a construction of the statutory and administrative provisions is necessary to avoid transgressing the public's First Amendment right of access to government proceedings. The Supreme Court has recognized the existence of a qualified, enforceable constitutional right of public access to certain government proceedings. *E.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). The Supreme Court's precedent deals with access to various criminal proceedings, but the constitutional right has been held to extend to non-judicial branch proceedings generally. *See, e.g.*, *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (constitutional right of access extends to INS deportation

hearings conducted by the Department of Justice); *Baltimore Sun Co. v. Astri Inv. Mgmt. & Secs. Corp.*, 88 B.R. 730 (Bankr. D. Md. 1988) (constitutional right of access extends to creditors committee meeting in a bankruptcy proceeding). And, the constitutional right specifically extends to military proceedings conducted in the nature of criminal trials. *E.g., United States v. Hershey*, 20 M.J. 433 (C.MA. 1985) (finding First Amendment right of public access to a court martial proceeding).

So also here, the constitutional right of access extends to proceedings of the Military Commissions, and necessarily encompasses the dockets of proceedings before a Commission, motions papers filed with a Commissions, and orders entered in the proceeding. As the United States Court of Appeals for the Second Circuit has explained, the constitutional right of access extends to the written motions and documents relating to any proceedings that are themselves subject to the constitutional right of access. *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987). The constitutional right has thus been held to apply to motion papers and documents filed in connection with an open proceeding. *E.g., Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252-253 (4th Cir. 1988); *In re Providence Journal Co.*, 293 F.3d 1, 10-13 (1st Cir. 2002); *Grove Fresh Disribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994). The constitutional right has been held specifically to apply to orders entered in connection with open proceedings. *E.g., Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663-64 (3d Cir. 1991); *In re Continental Illinois Secs. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984). And, the constitutional right has been held to apply to dockets of open proceedings. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93-94 (2d Cir. 2004); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993). Indeed, the ability to attend open proceedings is "merely theoretical" if information provided in the docket, and motion papers is not accessible to the public. *Hartford Courant*, 380 F.3d at 93.

While the constitutional right is qualified, not absolute, it can only be defeated by findings made on the record that sealing of certain items is "essential" to serve some "transcendent" value. *See Richmond Newspapers*, 448 U.S. at 580-81.

Request for Access

Given the statutory mandate and constitutional imperative that the Military Commissions be open to public scrutiny to the greatest extent possible, The Times and AP request access to the electronic website that contains all filings and orders relating to the Military Commissions, or to such other websites or files that will afford contemporaneous access to the docket, motions and orders relating to all Military Commissions, except where proper findings have been made that specific information must be withheld to protect national security or personal safety.

Thank you for your attention to this request. I look forward to your response and would welcome the opportunity to discuss with you the methods by which the access we are seeking may be provided.

Very truly yours,

David A. Schulz

cc: David E. McCraw
David H. Tomlin

EXHIBIT D

ASSISTANT SECRETARY OF DEFENSE
1400 DEFENSE PENTAGON
WASHINGTON, DC 20301-1400

PUBLIC AFFAIRS

September 24, 2007

Mr. David A. Schulz
Levine, Sullivan, Koch & Schulz, L.L.P
321 West 44th Street, Suite 510
New York, NY 10036

Dear Mr. Schulz:

I have received your letter dated September 14, 2007 regarding public access to military commission records.

I forwarded your letter to the Office of General Counsel for the Department of Defense so that they may follow-up appropriately.

Regards,

Dorrance Smith

EXHIBIT E

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.
WASHINGTON, D.C. NEW YORK PHILADELPHIA DENVER

321 WEST 44TH STREET
SUITE 510
NEW YORK, NY 10036
(212) 850-6100 PHONE
(212) 850-6199 FAX
www.lskslaw.com

WRITER'S DIRECT DIAL
(212) 850-6103
dschulz@lskslaw.com

October 17, 2007

VIA FEDERAL EXPRESS

William J. Haynes II
General Counsel
Office of General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Re: Public Access to Military Commission Records

Dear Mr. Haynes:

I am writing on behalf of The New York Times and The Associated Press to follow up on my letter of September 14, 2007 (attached hereto) that I understand has been forwarded to you for a response. There have been several indications that activity by the Military Commissions is continuing and that one or more trials may be getting underway in earnest in the near future. For example, news reports suggest that charges against several detainees, possibly including Khalid Sheikh Mohammed, will soon be referred for trial and that Brig. Gen. Thomas W. Hartmann, the Legal Advisor to the Convening Authority in the Department of Defense Office of Military Commissions, is pushing for "quicker indictments" of the detainees. It has been reported that military prosecutors intend to file charges against as many as 80 detainees.

These developments underscore the urgency of the request by the Times and AP for effective access to the docket of proceedings before the Military Commissions as well as the motion papers and orders entered in the proceedings. Please let me know if there is any further information we can provide that might facilitate your prompt consideration of the request for access.

Thank you for your attention to this request. I look forward to your response.

Very truly yours,

David A. Schulz

Enclosure

cc: David E. McCraw
David H. Tomlin

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

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ALIA L. SMITH
*NOT ADMITTED IN NEW YORK

WRITER'S DIRECT DIAL
(212) 850-6103

September 14, 2007

VIA OVERNIGHT MAIL
Clerk of the Court
Office of Military Commissions
Office of Convening Authority
1600 Defense Pentagon
Washington, DC 20301

Dorrance Smith
Assistant Secretary of Defense for Public Affairs
Department of Defense
1400 Defense Pentagon
Room 2E565
Washington, DC 20301

LTC Mike Chappell, JA, USAR
Department of Defense
Office of General Counsel
Senior Attorney Advisor
Military Commissions Trial Judiciary
1600 Defense Pentagon
Washington, DC 20301

Re: Public Access to Military Commission Records

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Request for Access

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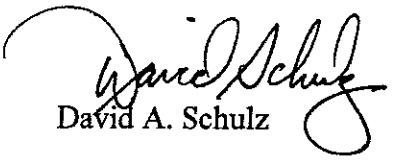
Thank you for your attention to this request. I look forward to your response and would welcome the opportunity to discuss with you the methods by which the access we are seeking may be provided.

Very truly yours,



David A. Schulz

cc: David E. McCraw
David H. Tomlin

Edmonds, Matthew, SSG, DoD OGC

From: Berrigan, Michael, Mr, DoD OGC
Sent: Wednesday, November 21, 2007 3:28 PM
To: Chappell, Danny, LTC, DoD OGC; Wilkins, Donna, Ms, DoD OGC
Cc: [redacted]
Subject: FW: United States v. Khadr - Notice of Appearance for Counsel for Press Petitioners
Follow Up Flag: Follow up
Flag Status: Red
Attachments: Notice of Appearance in Khadr for Schulz.pdf; Notice of Appearance in Khadr for Zansberg.pdf

LTC Chappell,
I am forwarding, for appropriate disposition, Notices of Appearance and a Motion with attachments (to follow) at the request of counsel for various press entities. As indicated in the motion, defense counsel from this office and prosecution attorneys have been consulted on the motion.

Michael J. Berrigan
Deputy Chief Defense Counsel
Office of Military Commissions
Franklin Court Building, Suite 2000E
1099 14th St., NW
Washington, DC 20005
[redacted]

From: [redacted]
Sent: Wednesday, November 21, 2007 2:33 PM
To: Berrigan, Michael, Mr, DoD OGC
Cc: David Schulz; Steve Zansberg
Subject: United States v. Khadr - Notice of Appearance for Counsel for Press Petitioners

Dear Mr. Berrigan:

1. Thank you for agreeing to forward these papers for filing in the above-referenced commission. I understand that you will be forwarding these papers to the necessary parties and officials today.

2. Please enter an appearance with the United States v. Khadr commission for David A. Schulz and Steven D. Zansberg on behalf of The Associated Press, Dow Jones & Company, Inc., The Hearst Corporation, The McClatchy Company, and The New York Times Company (collectively the "Press Petitioners"). Attached please find a Notice of Appearance form executed by David A. Schulz and a Notice of Appearance form executed by Steven D. Zansberg.

Sincerely,

Jacob Goldstein

Jacob P. Goldstein

Levine Sullivan Koch & Schulz

321 W. 44th Street, Suite 510

New York, NY 10036

2007

UNITED STATES OF AMERICA	)	
	)	NOTICE OF APPEARANCE
v.	)	
	)	
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a/ "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	)	November 20, 2007

1. Pursuant to procedures of court/instruction for counsel, I, DAVID A. SCHULZ, hereby provide notice to the Military Judge of my appearance on behalf of The New York Times Company, The Associated Press, Dow Jones & Company, Inc., The Hearst Corporation, and The McClatchy Company (collectively the "Press Petitioners"). My office address, phone numbers, and email address are:

I am an active member in good standing licensed to practice in the following jurisdictions:

New York
District of Columbia

David A. Schulz

UNITED STATES OF AMERICA	)	
	)	NOTICE OF APPEARANCE
v.	)	
	)	
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a/ "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	)	November 20, 2007

1. Pursuant to procedures of court/instruction for counsel, I, STEVEN D. ZANSBERG, hereby provide notice to the Military Judge of my appearance on behalf of The New York Times Company, The Associated Press, Dow Jones & Company, Inc., The Hearst Corporation, and The McClatchy Company (collectively the "Press Petitioners"). My office address, phone numbers, and email address are:

I am an active member in good standing licensed to practice in the following jurisdictions:

California
Colorado

Steven D. Zansberg

Steven D. Zansberg

Edmonds, Matthew, SSG, DoD OGC

From: Chappell, Danny M LTC USSOUTHCOM JTFGTMO

[redacted]

Subject: FW: MCRE 505 Review - 6 Dec 07 US v Khadr

COL Brownback has directed that I send the email below to the parties.

V/r,

LTC Mike Chappell, USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

-----Original Message-----
From: Brownback, Peter E. COL USSOUTHCOM JTFGTMO
Sent [redacted] 07

LTC Chappell,

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

Counsel in the case of US v. Khadr,

1. From 1300 until 1333, 6 December 2007, the military judge conducted the review requested by the government in its email of 6:21 PM, 1 December 2007.

2. The matters were delivered to and retrieved from the military judge by the Court Security Officer.

3. Following the review, the military judge did not sign an order UP MCRE 505(e).

Peter E. Brownback III

COL, JA, USA

Military Judge

Edmonds, Matthew, SSG, DoD OGC

From: Chappell, Danny M LTC USSOUTHCOM JTFGTMO
Sent: Wednesday, December 05, 2007 10:26 AM
To: [redacted]

Subject: FW:Ruling – Government Request for an Ex Parte In Camera MCRE 505(e)(3) Review and Defense Request for Briefing and Oral Argument - US v Khadr

COL Brownback has directed that I send the email below to counsel and other interested parties.

LTC Mike Chappell, USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

[redacted]
Subject: Ruling – Government Request for an Ex Parte In Camera MCRE 505(e)(3) Review and Defense Request for Briefing and Oral Argument

LTC Chappell,

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

Counsel in the case of United States v. Khadr,

1. References:

a. Email, LTC Chappell, 30 November 2007, 6:25 PM, Subject: FW: MCRE 505/506 Matters US v. Khadr.

b. Email, MAJ Groharing, 1 December 2007, 6:21 PM, Subject: RE: MCRE 505/506 Matters US v. Khadr.

c. Email, LTC Chappell, 2 December 2007, 3:12 PM, Subject: Fwd: MCRE 505/506 Matters US v. Khadr.

d. Email, LCDR Kuebler, 3 December 2007, 12:58 PM, Subject: RE: RE: MCRE 505/506 Matters US v. Khadr.

e. Email, Ms. Bley, 3 December 2007, 1:41 PM, Subject: FW: RE: MCRE 505/506 Matters US v. Khadr.

f. Email, MAJ Groharing, 4 December 2007, 3:31 PM, Subject: RE: RE: MCRE 505/506 Matters US v. Khadr.

g. Email, LCDR Kuebler, 4 December 2007, 4:46 PM, Subject: RE: RE: MCRE 505/506 Matters US v. Khadr.

h. Email, LCDR Kuebler, 4 December 2007, 8:00 PM, Subject: RE: RE: MCRE 505/506 Matters US v. Khadr.

2. By reference 1b, the government requested that the military judge allow the government to file matters in camera and ex parte under the provisions of RMC 701(f) and MCRE 505(e). Notice of this request was given to the defense as required by reference 1a. The defense asserts, inter alia, in references 1d, 1g, and 1h that

a. MCRE 505(e) can not be read to authorize such a filing, and/or,

b. If MCRE 505(e) can be read to authorize such a filing, such filing is prohibited by the MCA.

Further, in reference 1h, defense requests additional briefing on the matter and oral argument (See paragraphs 8-9 below, for the commission's ruling on that request.).

3. The commission has reviewed Section 949d of the MCA, RMC 701, and MCRE 505.

4. The commission does not find that the provisions of MCRE 505(e) are facially invalid.

5. The government shall coordinate with the Court Security Officer. The Court Security Officer will advise the military judge when there is a secure location in which the military judge can review the matters (that is, the government's motion and any other matters submitted in support thereof IAW MCRE 505(e)(3)) which the government wishes the military judge to review. The government will hand the matters to the military judge and there will be no words exchanged. The military judge will conduct his review of the matters and make his determination IAW MCRE 505(e)(3). The determination will be marked by a court reporter and the court reporter will seal the determination and the matters considered by the military judge and arrange for storage. The government will be authorized to read the determination prior to it being sealed. The government may also make a copy of the determination, if necessary to enhance coordination with the agency from whom the information was received. The military judge will then prepare an unclassified version of the ruling. The unclassified version of the ruling will be examined by the Court Security Officer. He may determine that it is in fact unclassified and authorize distribution. If he determines that there is a question as to

classification, he will take whatever measures necessary to ensure the ruling can be properly released, either through coordination with the appropriate agency or redaction of the ruling. After such measures are taken, he will deliver either the original unclassified ruling to the military judge or a redacted version. The military judge will then deliver the final unclassified ruling to both parties.

6. The Appellate Exhibit in this matter will consist of:

a. the original government request for review with responses and replies and other matters as noted in paragraph 1 above. Unsealed.

b. all materials furnished to the military judge by the government as noted in paragraph 6 above. Sealed.

c. the military judge's classified ruling, if one is made. Sealed.

d. the military judge's initial unclassified ruling. Unsealed, unless redaction is required, in which case it will be Sealed.

e. the redacted version of the military judge's unclassified ruling, if one is made. Unsealed.

f. this ruling. Unsealed.

7. Counsel are invited to propose changes to the procedure delineated in paragraph 5 above. Proposals received after the process has started will be considered in the event of future similar reviews.

8. In connection with the defense request for further briefing and oral argument, the commission determines the following matters.

a. By reference 1b, the government asked the military judge to comply with a specific provision of the MCRE.

b. Prior to this request, the legality or propriety of MCRE 505(e) had not been raised in the commission.

c. The provision is not facially invalid.

d. By references 1d, 1g, and 1h, the defense propounds a systematic attack upon the provisions of MCRE 505(e).

e. The defense requests the opportunity to fully brief the issue and oral argument on the issue.

That request is granted. The defense motion in connection with the ex parte in camera provisions of MCRE 505 is due no later than 1200 hours, 11 January 2008. The response and reply will follow IAW the Rules of Court.

9. While the defense request to brief and argue the MCRE 505(e) issue is granted, the commission sees no reason to delay the current review. The commission finds that

compliance with the provision can cause no harm to the defense – the only possible result is that one person, the military judge, will be aware of matters of which he was not previously aware. Further, noting that MCRE 505(e) deals with provision of discovery to the defense, the commission finds that continuing with the discovery process will help the defense in its goal of preparing for trial.

Peter E. Brownback III

COL, JA, USA

Military Judge

Edmonds, Matthew, SSG, DoD OGC

[redacted]

Subject: MCRE 505/506 Matters US v. Khadr 6 Dec 07

[redacted]

Subject: RE: RE: MCRE 505/506 Matters US v. Khadr

Sir,

1. While the general substance of the defense's legal position is set forth in my e-mails of yesterday and today, the defense respectfully requests the opportunity to fully brief and argue the question of whether MCRE 505(e), as construed by the government, is consistent with relevant provisions of the MCA. This is a pivotal issue, which it seems will affect the conduct of proceedings in this case henceforth. The defense believes that the military judge should have the benefit of full briefing and argument on the matter before proceeding.

2. The defense is currently working to meet the 7 Dec 07 deadline for the submission of "law" motions. The defense can turn its attention to this issue immediately thereafter and would propose to have its brief filed by Tuesday of next week. Also, the defense would respectfully request the opportunity for oral argument at the earliest opportunity (and hereby invokes its right to such under RMC 905(h)). Even allowing the government 7 days to respond, there would appear to be no reason why the matter could not be argued late in the week of 17 Dec 07. Shortening the time would permit an earlier hearing.

3. In the event the military judge believes it is incumbent upon the government to raise the issue through noticed motion of its desire to submit matters pursuant to MCRE 505(e), the defense believes it can present the defense position on this matter by way of response to the government's motion. In any event, the defense requests oral argument on the matter (and hereby invokes its right to such under RMC 905(h)) prior to disposition by the military judge.

4. To the extent the military judge believes the matter has already been raised by motion, the defense requests oral argument pursuant to RMC 905(h).

VR,

LCDR Kuebler

[redacted]

Sir,

1. To briefly reiterate the defense position: 10 USC 949d(b)(1) requires that proceedings of the commission be conducted in the presence of the accused. The MCA's only provision allowing for ex parte communications (i.e., the only statutory exception to the general rule) applies in the limited circumstances noted in paragraph 3 of my e-mail of 3 Dec 07. While the Secretary of Defense has the authority to issues rules of evidence and procedure under 10 USC 949a(a), "such procedures and rules of evidence may not be contrary to or inconsistent with this chapter." To the extent provisions of the MMC contemplate or authorize ex parte proceedings outside the narrow circumstances contemplated in 10 USC 949d(f)(2)(C), they are plainly inconsistent with the statute and therefore invalid.

2. While the government now argues for an expansive view of Secretarial rule-making authority (contrast its recent position on the validity of RMC 908(c)(3)), it is difficult to see how an argument consistent with the plain language of the statute and one that would preclude the kind of no-notice, secret proceedings the government appears to want to conduct in Gitmo this week would "border on the frivolous." However, "robust" the provisions of the MCA for protection of classified information might be, it will ultimately be up to this commission to decide how to construe those provisions in such a way as the balance the government's interest in protecting classified information against the accused's interest in a fair trial.

3. With respect to the comments in paragraph 6 of the prosecution e-mail, let me state that the defense has made no "motion." We were alerted to an apparently unauthorized ex parte communication (or effort at one) between the prosecution and the commission and (not being at Gitmo this week) registered an objection through the means available. The defense is happy to discuss this matter, on the record, at the earliest opportunity.

VR,

LCDR Kuebler

-----Original Message-----

Sir,

1. The Government respectfully submits that the Defense arguments border on the frivolous. Section 949d(f)(2)(C) of title 10 is inapplicable for precisely the reason the Defense itself recognizes-namely, it applies to the "assertion of [the] national security privilege at trial." Section 949d(f)(4), by contrast, expressly delegates to the Secretary of Defense the power to promulgate rules to protect classified information, and those protections "appl[y] to all stages of the proceedings of military commissions under

this chapter," 10 U.S.C. § 949d(f)(1)(A) (emphasis added).

2. Acting pursuant to 949d(f)(1)(A) and (4), the Secretary of Defense promulgated MCRE 505(e)(3), which expressly authorizes in camera and ex parte proceedings. Rule 505(e)(3) is the only applicable one here, and it is the only one the Government has invoked. Rule 505(h) is inapposite, again, for precisely the reasons that the Defense recognizes-namely, it applies to the "use of classified information at trial."

3. Under the Defense's interpretation of the statute and the Manual, the Government must wait until trial to move for in camera and ex parte proceedings to protect classified information. To state that position is to demonstrate its absurdity. The entire point of the MCA and the Manual's protections for classified information is to protect it at "all stages of the proceedings of military commissions under this chapter." 10 U.S.C. § 949d(f)(1)(A) (emphasis added). If it were otherwise, classified information would be subject to disclosure prior to trial, at which time there would nothing left to protect. The Secretary of Defense recognized the obviousness of that fact and promulgated MCRE 505(e)(3), in accordance with the authority delegated to him by the MCA, to authorize in camera and ex parte proceedings to protect classified information at all stages of the proceedings.

4. In addition to running afoul of the plain text of both the MCA and Rule 505, the Defense's argument defies common sense. Section 4 of the Classified Information Procedures Act (CIPA) affords the Government the right to protect classified information, before trial, through in camera and ex parte proceedings in federal court. Whatever other arguments the Defense may urge upon this Court, there can be no question that the MCA's protections for classified information are at least as robust-and in many cases, more so-than those provided in CIPA.

5. Notwithstanding the Defense's "concern" over the Prosecution's invocation of a duly promulgated procedure for handling classified information, the Prosecution has complied with the law. Under the Manual, the Prosecution has no obligation to notify the Defense when requesting protection of classified information under MCRE 505(e)(2) or (3), let alone provide the Defense with the Government's motion and materials supporting its assertion of the national security privilege to protect classified information. To the contrary, "the Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge in camera and ex parte." MCRE 505(e)(3) (emphasis added). Whatever other provisions and notice requirements may apply where the Government intends to use classified information, see MCRE 505(h), those rules indisputably do not apply where the Government intends to exclude such information.

6. Finally, the Government objects to the Defense's continued use of emails as substitutes for motions. If the Defense has an issue to raise, the Government respectfully requests that the Military Judge order the Defense to raise it in a motion, filed in accordance with the Manual for Military Commissions, the Military Commission Trial Judiciary Rules of Court, and the scheduling order issued by the Military Judge. The Prosecution respectfully files this response via email only in response to the Defense's use of that medium.

V/R,

Major Groharing

[redacted]

Subject: FW: RE: MCRE 505/506 Matters US v. Khadr

COL Brownback has directed that I send the following email to counsel and other interested parties.

v/r
Natalie Lewis Bley
Attorney Advisor
s Trial Judiciary

Subject: FW: RE: MCRE 505/506 Matters US v. Khadr

Ms. Bley,

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

Counsel in the case of US v. Khadr,

1. The Commission has reviewed the email from LCDR Kuebler, Dtg 12:58 PM, December 03, 2007.

2. The Commission is aware that various individuals assigned to the Office of Military Commissions are currently (or should shortly be) en route to Guantanamo.

3. The Commission will take no action regarding LCDR Kuebler's request until the government has an opportunity to respond to the defense submission.

4. The Commission offers the defense an opportunity for a telephonic RMC 802 conference on this matter, if it so desires, once the government is available for such a conference.

Peter E. Brownback III
COL, JA, USA
Military Judge

-----Original Message-----
ailto:kueblerw@dodgc.osd.mil]
;

Subject: RE: RE: MCRE 505/506 Matters US v. Khadr

Sir,

1. The defense objects to any ex parte communications between government counsel and the military commission, to include the MCTJ staff, concerning this matter.

2. The overarching principle for the protection of classified information in these proceedings is contained in both 10 USC 949d(f)(1) and MCRE 505(a) -- that is, that classified information is protected from disclosure only "if disclosure would be detrimental to national security." The prosecution has made no showing in this instance of how disclosure of information to detailed defense counsel, with the requisite security clearance, would be "detrimental to national security."

3. The prosecution has made no showing that it is entitled to in camera review of any classified matter as required by MCRE 505(h), let alone a showing sufficient to justify an ex parte discussion with the military judge. The Military Commissions Act (MCA) provides for the extraordinary process of an "ex parte" conference only in the very limited circumstances specified in 10 USC 949(f)(2)(C) -- i.e., "at trial," following an objection by trial counsel to a "question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information." To the extent provisions of the Manual for Military Commissions contemplate or authorize ex parte discussions beyond these very limited circumstances, these provisions conflict with the MCA and are therefore invalid.

4. The defense notes with concern that Major Groharing initiated contact with the military judge regarding this matter without notice to the defense. As the military judge correctly points out, there is no provision for such communications. Assuming, arguendo, that ex parte proceedings would, at some point, be permissible, there is absolutely no reason why the defense should not be informed of the fact and general nature of the communications.

5. The defense respectfully requests the military judge to refuse acceptance of any filing not served, in its entirety, on the defense relating to this matter. Once the government files a motion (and serves it on the defense), the defense can more fully brief the positions set forth in summary fashion in paragraphs 2 and 3 above. The defense also requests an evidentiary hearing and oral argument, pursuant to RMC 905(h), prior to any ruling on any prosecution motion for relief regarding this matter.

VR,

LCDR Kuebler

-----Original Message-----
From: Chappell, Danny M LTC RES USAR USARC [mailto:mike.chappell@us.army.mil]
Sent: Sunday, December 02, 2007 3:12 PM
To: Kuebler, William, LCDR, DoD OGC; Snyder, Rebecca, Ms, DoD OGC; Murphy, John, Mr, DoD OGC; Groharing, Jeff, Maj, DoD OGC; Petty, Keith, CPT, DoD OGC
Cc: Brownback, Peter E. COL USSOUTHCOM JTFGTMO; Petty, Keith A CPT USSOUTHCOM JTFGTMO; Snyder, Rebecca CIV USSOUTHCOM JTFGTMO; Chappell, Danny M LTC USSOUTHCOM JTFGTMO; Kuebler, William LCDR USSOUTHCOM JTFGTMO; Groharing, Jeff D MAJ USSOUTHCOM JTFGTMO; Britt, William, LTC, DoD OGC; David, Steven, COL, DoD OGC; dedney@shaw.ca; nwhitling@parlee.com; Pete Brownback; Jeff Groharing; John Murphy; Morris, Lawrence, COL, DoD OGC; Danny.M.Chappell@jtfgtmo.southcom.mil;
Trivett, Clayton, Mr, DoD OGC; Edmonds, Matthew, SSG, DoD OGC; Bley, Natalie, Ms, DoD OGC; Berrigan, Michael, Mr, DoD OGC
Subject: Fwd: RE: MCRE 505/506 Matters US v. Khadr

COL Brownback has directed that I forward the email below to counsel.
(COL Brownback is in GTMO until 8 DEC.)

v/r,

LTC Mike Chappell, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

Classification: UNCLASSIFIED

Caveats: NONE

[redacted]

> Received.
>
> Answer forthcoming.
>
> COL Brownback
>
> -----Original Message-----
> [redacted] OGC [redacted]
>
> Sir,
>
> 1. Please see the emails below. I got an out of office response from

> LtCol Chappell's email and an "unable to deliver response in my first
> attempt to forward to your GTMO email.
>
> 2. Please confirm receipt.
>
> V/R,
>
>
> Jeff Groharing
> Major, U.S. Marine Corps
> Prosecutor
> [redacted] issions [redacted] .mil [redacted]
>
>
>
> _____
>
> From: Groharing, Jeff, Maj, DoD OGC
> [redacted] 6:21 PM [redacted] dr
>
>
> Sir,
>
> 1. The Prosecution intends to file matters in camera; ex parte under
> R.C.M. 701(f) and M.C.R.E. 505(e).
>
> 2. The Prosecution motion and supporting documents contain materials

> classified at the SECRET//SCI level. The Prosecution will travel to
> Guantanamo Bay on Monday, 3 December and materials will be submitted
> to and filed under seal with the Court at an appropriate location upon

> the Prosecution's arrival at Guantanamo Bay, Cuba.
>
> 3. The Prosecution does not believe notice is required under M.C.R.E.
> 505(e). In the event the military judge believes such notice is
> required, this filing can be forwarded to the Defense notifying them
> of the Prosecution filing.
>
> 4. Please confirm Colonel Brownback will be available at Guantanamo
> Bay the week of 3 December.
>
>
> V/R,
>
> Jeff Groharing
> Major, U.S. Marine Corps
>
>
> _____
>
ers US v. Khadr
>
>
> COL Brownback has directed that I forward the email below to counsel
> and other interested persons.
>
> v/r,
>
> LTC Mike Chappell, USAR
> Senior Attorney Advisor
> Military Commissions Trial Judiciary
> Department of Defense
>
> _____
>
> From: Pete Brownback [mailto:abnmj@cfl.rr.com]

> Sent: Friday, November 30, 2007 17:56
> To: Chappell, Danny, LTC, DoD OGC
> Subject: MCRE 505/506 Matters
>
>
> LTC Chappell,
>
> Please forward the email below to counsel in the case of United
> States v. Khadr. Please distribute a copy to other interested
> persons.
> COL Brownback
>
>
>
> Counsel in the case of US v. Khadr,
>
>
> 1. MCRE 505 and 506 discuss methods of handling the disclosure of
> classified and other government information.
>
> 2. Both MCRE 505 and 506 discuss the availability of in camera
> proceedings. MCRE 505 also discusses the availability of review of
> certain materials by the military judge in camera and ex parte.
>
> 3. The commission is not aware that either MCRE 505 or 506
> authorize an ex parte approach to the military judge concerning
> classified or government information. Both MCRE 505 and 506 refer to
> the filing of a motion by the prosecution in connection with the
> protection of classified or government information. While MCRE
> 505e(3)states, in pertinent part:
>
>
> (3) Alternatives to discovery of classified information. The military
> judge, upon motion of the Government, ... The Government's motion
> and any materials submitted in support thereof shall, upon request of
> the Government, be considered by the military judge in camera and ex
> parte.
>
> it does not state that the government shall not advise the defense
> thata 505 motion is being made.
>
> 4. Counsel for either side may feel free to present to opposing
> counsel and the commission their views of the notice requirement, if
> any, connected with MCRE 505/506 matters. Until the commission has
> heard the views of both sides, the commission will require the
> government to advise the defense that a MCRE 505 motion is being made.
>
>
>
> Peter E. Brownback III
> COL, JA, USA
> Military Judge
>

Edmonds, Matthew, SSG, DoD OGC

From: Chappell, Danny, LTC, DoD OGC
Sent: Wednesday, December 12, 2007 4:46 PM
To: [redacted]

Kahdr

COL Brownback has directed that I forward the email below to counsel and other interested persons.

v/r,

LTC Mike Chappell, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

-----O [redacted]

LTC Chappell,

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

Counsel in the case of US v. Khadr,

1. Reference:

a. Email, Ms. Snyder, November 15, 2007, 10:29 AM, Subject: Khadr - Trial Schedule and Dec 7 & Jan 11 Motions.
b. Email, MAJ Groharing, December 12, 2007 3:30 PM, Subject: Re: FW: Counsel Visits With Clients on Weekends Preceeding Commission Session - US v. Khadr.
c. GTMO Summary of Access Procedures to Assist Commissions Counsel with Detainee Visitation" (SAPACCDV), undated, attached to reference 1b.

2. Reference 1b and reference 1c appear to answer the concerns raised by Ms. Snyder in paragraph 2 of reference 1a.

3. Further, the commission is also aware that an unscheduled evening-hours visit to a

detainee by a counsel for another detainee was authorized with less than six hours notice on 5 December 2007.

4. The commission is also aware that procedures and good will can sometimes fail to get the mission accomplished. The commission will do what is necessary to insure that counsel have all necessary opportunities to prepare for any session of the commission.

5. The defense request for a delay in the start of the session - based upon the matters asserted in paragraph 2 of reference 1a - is denied.

Peter E. Brownback III
COL, JA, USA
Military Judge

----- Original Message -----

[redacted]

Subject: Re: FW: Counsel Visits With Clients on Weekends Preceeding Commission Sessions - US v. Kahdr

> Sir,
>
> 1. Paragraph (3) in Colonel Brownback's email directs trial counsel to
> determine:
>
> a. Is there a policy which states that defense counsel may not see
> clients on weekends?
> b. If so, who is responsible for making exceptions to the policy?
> c. If so, does the policy apply to defense counsel whose clients are
> scheduled for commission proceedings the following week?
> d. If so and if there is no provision for exceptions to the policy, who
> authorized the policy and to whom does the person authorizing the policy
> report?
>
> 2. In response to the Military Judge's direction, I met with Captain
> McCarthy (USN), Staff Judge Advocate, Joint Task Force Guantanamo, U.S.

> Naval Station, Guantanamo Bay, Cuba. As the JTF-GTMO SJA, Captain
> McCarthy and his staff are responsible for implementing JTF-GTMO policy
> and coordinating counsel visits with detainees. We spoke at length
> regarding this issue and Captain McCarthy provided the attached document
> titled "Summary of Access Procedures to Assist Commissions Counsel with
> Detainee Visitation" (SAPACCDV). The SAPACCDV reflects the visitation
> policy authorized by the Commander, JTF-GTMO.
>
> 3. Paragraph 6 of the SAPACCDV provides guidance regarding counsel
> visits to detainees. Normal hours for visitation are 0900 to 1130 and
> 1300 to 1700, Monday through Friday; however "emergency meetings" can be
> approved for good cause. See para 6b. Captain McCarthy noted that
> timely requests for meetings outside of normal visitation hours have
> generally been approved when defense counsel demonstrate good cause.
>
> 4. Captain McCarthy expressed JTF-GTMO's continued desire to accomodate
> all reasonable requests from the Defense and stated that weekend visits
> for counsel preparing for proceedings the following week would likely be
> approved if timely submitted, subject to operational limitations.
>
> 5. The Prosecution will continue to support Defense requests to meet
> with the accused and requests the Defense notify the Prosecution
> immediately if a request has been denied.
>
> V/R,
>
> Major Groharing
>
> Chappell, Danny, LTC, DoD OGC wrote:
>
>> COL Brownback has directed that I forward the email below to counsel and
>> other interested persons.
>>
>> v/r,
>>
>> LTC Mike Chappell, USAR
>> Senior Attorney Advisor
>> Military Commissions Trial Judiciary
>> Department of Defense
>>
>> ----------
[redacted]

>> Subject: Counsel Visits With Clients on Weekends Preceeding Commission
>> Sessions
>>
>> LTC Chappell,
>>
>> Please forward the email below to the counsel in the case of United
>> States v. Khadr. Please distribute it to other interested persons.
>>
>> COL Brownback
>>
>>
>>
>> Counsel in the case of United States v. Khadr,
>>
>> 1. Reference is made to Ms. Snyder's email of November 15, 2007
>> 10:29 AM, Subject: Khadr - Trial Schedule and Dec 7 &
>> Jan 11 Motions.
>>
>> 2. Paragraph 2 of the reference contains the statement below:
>>
>>
>> The defense requests that the 4 February (Monday) motions hearing be

>>
>> moved to 6 February (Wednesday) to allow the defense time to meet with
>>
>> Mr. Khadr as the JTF does not allow attorneys to meet with clients on
>>
>> the weekend.
>>
>> 3. Trial counsel will, in coordination with defense counsel,
>> determine:
>>
>> a. Is there a policy which states that defense counsel may
>> not see clients on weekends?
>> b. If so, who is responsible for making exceptions to the
>> policy?
>> c. If so, does the policy apply to defense counsel whose
>> clients are scheduled for commission proceedings the following week?
>> d. If so and if there is no provision for exceptions to the
>> policy, who authorized the policy and to whom does the person
>> authorizing the policy report?
>>
>> 4. The issues raised in paragraph 3 above are not limitations on
>> what the commission expects the trial counsel to determine. Put simply,
>> the commission wants to be assured that defense counsel may see clients
>> on weekends when commission proceedings are scheduled for the clients
>> during the following week.
>>
>> 5. The commission suggests that any such policy be discussed with
>> persons who can change the policy if there is one.
>>
>> 6. Trial counsel will advise the commission concerning what was
>> determined NLT 1630 hours, 12 December 2007.
>>
>>
>>
>> Peter E. Brownback III
>> COL, JA, USA
>> Military Judge
>

>

Edmonds, Matthew, SSG, DoD OGC

From: Snyder, Rebecca, Ms, DoD OGC
Sent: Thursday, November 15, 2007 10:29 AM
To: [redacted]
DoD OGC
Subject: Khadr - Trial schedule and Dec 7 & Jan 11 Motions

Follow Up Flag: Follow up
Flag Status: Purple

LtCol Chappell,

1. Pursuant to paragraph 1 a of Col Brownback's proposed trial schedule, the defense advises the commission that it intends to file fifteen "law" or dispositive motions. We intend to file 7 motions on December 7 and 7 motions on January 11. We propose that the 15th motion be filed on 18 January.

a. The defense wishes to clarify whether motions relating to sentencing must be filed in this first round of motions. If so, we intend to file an additional one to three motions, which could be filed on 18 January. This would bring the total number of motions for the first hearing to 18 motions at the most.

b. The defense reserves the right to file additional "law" motions should the Supreme Court reverse the ruling of the Court of Appeals in Boumediene v. Bush.

2. Paragraph 4 of Col Brownback's email of 9 Nov 07 sent at 4:20 pm invited the parties to provide comments on his proposed trial schedule. The defense requests that the 4 February (Monday) motions hearing be moved to 6 February (Wednesday) to allow the defense time to meet with Mr. Khadr as the JTF does not allow attorneys to meet with clients on the weekend.

V/r
Ms. Snyder

SUMMARY OF ACCESS PROCEDURES TO ASSIST COMMISSIONS COUNSEL WITH DETAINEE VISITATION (SAPACCDV)

1. **Background**. Under DoD policy, directive, and instruction, JTF-GTMO is responsible for maintaining safety and security, as well as good order and discipline within GTMO detention facilities and facilitating legal processes associated with JTF-GTMO detainees. To this end, JTF-GTMO has adopted security practices consistent with its obligations. Specifically, the Office of the Staff Judge interacts with staff and detainees in compliance with DoDD 2310.01E, DoDD 2311.01E, and DODD 3115.09. The SJA coordinates a myriad of matters with regard to attorney visits, legal mail, non-legal mail, attorney-client meetings, attorney ingress into and egress from the detention facilities, and similar matters. JTF-GTMO's practices are comparable to the rules and regulations governing other similarly secure federal facilities such as those operated by the Federal Bureau of Prisons. See, *inter alia*, 28 C.F.R. § 540.71(b), 28 CFR 543.13(f), Bureau of Prisons Program Statement 5800.10 (Mail Management Manual). The procedures listed below are intended to provide Commissions Counsel with guidance to facilitate visitation with detainee clients and do not confer any substantive rights to detainees or create any legal obligation for Commander, JTF-GTMO.

2. **Definitions**. JTF-GTMO relies on the following general definitions:

a. Defense Counsel: An attorney who is detailed by the OMC Chief Defense Counsel or retained by or on behalf of the detainee for purposes of representing the detainee before a Military Commission. Unless otherwise stated, the term "defense counsel," hereinafter referred to as "counsel," also includes co-counsel, interpreters, translators, paralegals, investigators, and all other personnel or support staff authorized and engaged in, or employed to, assist in a detainee-client's defense. It does not include civilian attorneys who have been approved by the OMC Chief Defense Counsel and placed in a pool of available attorneys who have not been retained by or appointed on behalf of a detainee.

b. Detainee: An enemy combatant detained by the Department of Defense at U.S. Naval Station, Guantanamo Bay, Cuba.

c. Legal Mail/Materials: Correspondence between counsel and a detainee that is directly related to counsel's representation of the detainee, as well as other notes, memoranda, and publicly-filed pleading, motions and similar court documents that directly relate to counsel's representation of his detainee-client and the detainee-client's defense, including attorney-client privileged material. All other documents, including any exhibits or other attachments to court documents and electronic media of any kind are considered non-legal mail/materials.

d. Non-legal Mail/Materials: All correspondence, documents, electronic media, or similar materials that are not directly related to counsel's representation of the detainee-client. Non-legal mail includes, but is not limited to, letters from persons other than counsel, including family and friends of the detainee, photographs, and similar media,

books, magazines, newspapers, and non-governmental organization publications and reports, and similar materials.

e. Contraband: Any physical item or prohibited information that Commander, JTF-GTMO, or his designee, has deemed to be impermissible or inappropriate for a detainee to possess, be informed of (orally or in writing), or view or any physical item or prohibited information received by a detainee without prior authorization by Commander, JTF-GTMO, or his designee. In addition to physical items such as weapons, drugs, or items of value, "contraband" includes anything that could be considered detrimental to the security, good order, and discipline of the Camps, including correspondence, documents, electronic media, or similar materials; information such as that relating to any ongoing or completed military, intelligence, security or law enforcement operations, investigations or arrests or the results of such activities by any nation or agency; current political or military events in any country; historical perspectives or discussions on jihadist activities, security procedures at Guantanamo (including names of US personnel and the layout of Camp facilities); information pertaining to assignment or reassignment of present and former detention personnel; information regarding the status of other detainees (including former detainees) at Guantanamo and information regarding any detention of detainees; changes to detention facilities; the operation of the detention facility or changes to security procedures at Guantanamo, unless such information is directly related to counsel's representation of his detainee-client or has been specifically authorized by Commander, JTF-GTMO or his designee. Commander, JTF-GTMO has specifically authorized Legal Mail/Materials into Camp facilities.

3. **Mail from Counsel to Detainee ("Incoming Mail")**:

a. Counsel shall send incoming legal mail/materials addressed to a detainee-client to the following address:

Staff Judge Advocate Office
JTF- GTMO
APO AE 09360

b. All legal mail shall be sent in properly and completely sealed envelopes to the SJA, JTF-GTMO, for delivery to the detainee-client.

c. Counsel shall clearly mark the outside of all envelopes containing legal mail with the following annotation: "ATTORNEY-DETAINEE MATERIALS-FOR DELIVERY TO DETAINEE. ATTORNEY-CLIENT PRIVILEGE."

d. Each document or unbound page inside of the envelope containing legal mail shall contain counsel's initials or signature on the top right corner.

e. Envelopes may not contain paper fasteners (including staples, paperclips, and binder clips) or other contraband.

f. All materials received by the Office of the SJA shall be externally inspected to determine the presence of physical contraband, including but not limited to paper fasteners, in the envelopes.

(1) Envelopes not suspected of containing physical contraband shall be delivered to the intended detainee within three business days of receipt.

(2) Envelopes suspected of containing physical contraband shall be returned to counsel unopened.

g. All legal mail is subject to being opened in the presence of the detainee by JTF-GTMO staff, prior to delivery, and subjected to a cursory review by JTF-GTMO staff and linguist support, as appropriate to ensure that contraband material is not present.

h. Mail received by the Office of the SJA that is not properly marked as described above will be returned to counsel unopened.

i. Should a Privilege Team be created to screen legal mail, these procedures will be modified accordingly.

j. Non-Legal mail/materials Non legal mail/materials shall be sent through regular mail channels to the detainee, and shall be subject to JTF-GTMO mail screening procedures. All non-legal mail shall be subject to scanning, review, translation, redaction, and possible exclusion, in accordance with JTF-GTMO SOPs. Non-legal mail/materials will not be sent to the Office of the SJA, JTF-GTMO.

4. **Mail Sent from Detainee to Counsel ("Outgoing Mail")**:

a. Legal mail: Detainees will be provided with paper and pens to prepare written communications to counsel. Access to such items may be limited or restricted because of the detainee's disciplinary and/or medical status, although a detainee's disciplinary status shall not be a basis for denying all access to such items. In the presence of JTF-GTMO staff, the detainee will seal the written communication into an envelope that will be annotated as "ATTORNEY-DETAINEE MATERIALS – FOR MAIL DELIVERY TO COUNSEL." Each envelope shall be labeled with the name and ISN of the detainee and the name of counsel. After the outgoing legal mail is collected from the detainee, the envelope will be mailed to the appropriate address provided by counsel. Outgoing legal mail shall be collected by JTF-GTMO staff within 3 business days of being notified that legal mail is ready for pickup. Such mail will be posted by the Office of the Staff Judge Advocate to the intended counsel within 3 business days of receiving the mail.

b. Non-legal mail: All non-legal mail, as defined in paragraph 2(d), shall be processed according to the JTF-GTMO SOPs for detainee non-legal mail.

6. **Counsel/Detainee Visits**:

a. Routine Detainee/Counsel Meetings. Counsel shall coordinate visits with JTF-GTMO Office of the SJA at least 14 days in advance of arrival at Guantanamo Bay, Cuba. Due to the limited number of security personnel and force protection concerns, the time, date, and/or location of a visit are subject to change by JTF-GTMO. Notice will be provided when practicable; however, meetings may be cancelled without notice when operational, security or other exigent circumstances exist.

b. Emergency Meetings. Counsel may submit a written request for an emergency detainee-client meeting with less than 14 days advance notice. Counsel shall include justification in the request. For good cause shown, JTF-GTMO will attempt to arrange such a meeting, subject to operational limitations.

c. Counsel shall provide 24 hour advance notice in the event they are unable or unwilling to travel to GTMO for a scheduled detainee-client meeting. All cancellations must be in writing

d. Counsel/detainee meetings will take place in locations designated by JTF-GTMO. Due to the size of meetings rooms, counsel are limited to bringing no more than three members of their team to visit with a detainee at one time, unless approved in advance by the Commander, JTF-GTMO. Normal visitation hours are daily from 0900 to 1130 and 1300 to 1700, Monday through Friday. Client meetings will normally not occur on Saturday, Sunday, or federal holidays. Changes to normal visitation hours must be submitted in writing (including requests to work through the 1130 – 1300 lunch period) and may be permitted, in the sole discretion of the Commander, JTF-GTMO, or his designee.

e. Counsel must be escorted to the Camps by a member of the JTF-GTMO SJA Office for every visit. Counsel shall arrive to the IOF building at least 15 minutes prior to their scheduled visit start time to obtain an escort. The escort will remain at the sally port until counsel clears security screening and is taken to the designated meeting location. Counsel will not be escorted out from the Camp.

f. Should counsel arrive at the IOF building more than 30 minutes after the scheduled start of a requested visit, the visit is subject to cancellation. Failure to arrive at the IOF within 45 minutes of the scheduled start of a requested meeting will result in cancellation of the requested meeting.

g. Meetings shall be subject to visual monitoring by security personnel for safety and security purposes. All persons entering and exiting the detention camps are subject to security screening, including the use of metal detectors and physical inspections, for unauthorized or unapproved items. All persons must submit **all** books, briefcases, folders, files, papers or other containers and possessions for a cursory scan for contraband by JTF-GTMO staff. Written materials not in English shall be subject to a cursory scan by linguist support personnel.

h. Refusal. If a detainee refuses to meet with counsel on the scheduled day of a visit, counsel may submit a non-privileged written request to the Office of the SJA to deliver a letter to the detainee-client seeking a meeting. The Office of the SJA, at its sole discretion may agree to deliver the letter to the detainee client on behalf of counsel. If the detainee-client agrees to the meeting, he will be moved as soon as practicable. If the detainee-client refuses to meet with counsel, counsel will be advised accordingly and the meeting will be cancelled for that day.

i. Electronic devices including telephones, personal digital assistant devices, computers, cameras, and similar items are prohibited from the detention facilities, unless authorized in writing by Commander, JTF-GTMO or his designee or his designee, through the Office of the SJA.

j. Counsel will follow instructions and directions of the JTF-GTMO staff. Failure to follow JTF-GTMO staff instructions and directions may result in counsel being barred from the detention facilities.

7. **Materials Brought into a Meeting between Detainee-Client and Counsel**:

a. Counsel may bring legal mail/materials, writing utensils, and blank paper into any meeting with a detainee. All such legal mail, writing utensils, and paper are subject to inspection and a cursory review by JTF-GTMO staff, assisted by linguist support personnel as appropriate, for the presence of contraband.

b. Counsel may bring food items into meetings with detainees. All such food items are subject to being inspected for the presence of contraband. Detainees will not be permitted to retain possession of food items after the conclusion of the meeting. JTF-GTMO staff may refuse to allow any specific food item or packaging into the meeting area. Counsel may bring plastic spoons or sporks to use to consume food items, but knives and forks are not permitted.

c. Written and oral communications with a detainee-client during a meeting between detainee and counsel shall not include reference to contraband matters, as defined above.

d. ***Prohibited items.*** Counsel are prohibited from providing detainees-clients gifts, religious materials, recreational items, medical supplies, clothing, shoes/sandals, hygiene items/toiletries, tobacco, flowers, balloons, or any other item contrary to security, good order, and discipline of the detention facilities.

8. **Materials Brought out of a Meeting between Detainee and Counsel**:

a. At the completion of each meeting with a detainee-client, the detainee-client will be allowed to retain any written notes made during the meetings. However, all such materials shall be subject to a cursory review by JTF-GTMO staff to ensure that no

contraband is present. To ensure that the notes are not misidentified as prohibited materials, counsel may request that the JTF-GTMO SJA Office stamp the back of the documents to indicate that they are cleared. To assist the JTF-GTMO staff in identifying legal mail/documents, the outside of envelopes retained by detainees that contain attorney-client privileged materials should be marked clearly with the following annotation: "ATTORNEY-DETAINEE MATERIALS-FOR DELIVERY TO DETAINEE. ATTORNEY-CLIENT PRIVILEGED MATERIALS". Under no circumstance should a detainee or counsel commingle legal and non-legal materials.

10. **Storage of and Access to Legal Materials**:

Detainee storage of and access to legal materials by detainee-clients shall be in accordance with the JTF-GTMO SOPs.

11. **Storage of and Access to Non- Legal Materials.**

Detainee storage of and access to non-legal materials shall be in accordance with JTF-GTMO SOPs.

Filings Inventory – US v. Khadr

As of 1200, 3 February 2008

This Filings Inventory includes only those matters filed since 1 March 2007.

Prosecution (P Designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	AE
P 001: Motion to Reconsider (Dismissal Order)				• See Inactive Section	
P 002: MCRE 505 Review Request				• See Inactive Section	
				•	
				•	

Defense (D Designations)

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 001: Motion to Vacate, or Alternately , for Continuance				• See Inactive Section	
D 002: Motion for Abeyance of Proceedings				• See Inactive Section	
D 003: Motion for Continuance				• See Inactive Section	
D 004: Motion for Proper Status Determination				• See Inactive Section	
D 005: Motion for Continuance				• See Inactive Section	
D 006: Defense Special Request for Deposition of FBI Witness				• See Inactive Section	
D 007: Defense Request for Continuance for Submission of All Law Motions				• See Inactive Section	
D 008: Defense Motion to Dismiss Charge I	7 Dec 07	14 Dec 07	19Dec 07	• Motion Filed • A. Pros Response • B. Def Reply	
D 009: Defense Motion to Dismiss Charge II	7 Dec 07	14 Dec 07	19 Dec 07	• Motion Filed • A. Pros Response • B. Def Reply	
D 010: Defense Motion to Dismiss Charge III	7 Dec 07	14 Dec 07	19 Dec 07	• Motion Filed • A. Prose Response • B. Def Reply	

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 011: Defense Motion to Dismiss Charge IV	7 Dec 07	14 Dec 07	4 Jan 07	• Motion Filed • A. Prosecution Response • B. Defense email dtd 18 Dec 07 requesting additional time to reply • C. MJ email dtd 19 Dec 08 granting Resp delay until 4 Jan 08 • D. Pros email dtd 19 Dec 08 objecting to delay • E. Defense Reply	
D 012: Defense Motion to Dismiss Charge V	7 Dec 07	14 Dec 07	4 Jan 07	• Motion Filed • A. Prosecution Response • B. Defense email dtd 18 Dec 07 requesting additional time to reply • C. MJ email dtd 19 Dec 08 granting Resp delay until 4 Jan 08 • D. Pros email dtd 19 Dec 08 objecting to delay • E. Defense Reply	
D 013: Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder)	7 Dec 07	14 Dec 07	4 Jan 07	• Motion Filed • A. Prosecution Response • B. Defense email dtd 18 Dec 07 requesting additional time to reply • C. MJ email dtd 19 Dec 08 granting Resp delay until 4 Jan 08 • D. Pros email dtd 19 Dec 08 objecting to delay E. Defense Reply	

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 014: Defense Motion to Dismiss Charges for Lack of Jurisdiction (Equal Protection)	11 Jan 08	18 Jan 08	24 Jan 08	• Motion Filed • A. Prosecution Response • B. Defense Reply	
D 015: Defense Motion to Preclude Further Ex Parte Proceedings Under Color of MCRE 505(e)(3)	11 Jan 08	18 Jan 08	24 Jan 08	• Motion Filed • A. Prosecution Response • B. Defense Reply	
D 016: Defense Motion to Dismiss Spec 2 of Chg IV on grounds of Multiplicity & UMC	11 Jan 08	18 Jan 08	N/A	• Motion Filed • A. Prosecution Response • B. Email dtd 24 Jan 08, LCDR Kuebler stating no reply will be filed	
D 017: Motion for Appropriate Relief (Bill of Particulars)	11 Jan 08	18 Jan 08	N/A	• Motion Filed • A. Prosecution Response • B. Email dtd 24 Jan 08, LCDR Kuebler stating no reply will be filed	
D 018: Motion to Strike Terrorism in Chg III	11 Jan 08	22 Jan 08	28 Jan 08	• Motion Filed • A. Prosecution Response, 1636 hrs, 18 Jan 08 • B. Prosecution request to withdraw response, 2018 hrs, 18 Jan 08 • C. Original Response vacated by MJ, 2115 hrs, 18 Jan 08 • D. Prosecution Response, dtd 22 Jan 08 • E. Defense email dtd 25 Jan 08 requesting additional 24 hours to reply due to redaction issue • F. MJ email dtd 25 Jan 08 granting delay to reply NLT 1630 hours, 28 Jan 08 • G. Defense reply	

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 019: Motion to Strike Surplus Language (Charge III)	11 Jan 08	18 Jan 08	N/A	• Motion Filed • A. Prosecution Response • B. Email dtd 24 Jan 08, LCDR Kuebler stating no reply will be filed	
D 020: Special Request for Relief from Terms of Protective Order No. 001	16 Jan 08	23 Jan 08	27 Jan 08	• Motion Filed • A. Prosecution Response • B. Defense Reply	
D 021: Defense Motion to Dismiss for Lack of Jurisdiction (Common Article 3)	17 Jan 08	24 Jan 08	29 Jan 08	• Motion Filed • A. Prosecution Response • B. Defense Reply	
D 022: Defense Motion to Dismiss Charges for Lack of Jurisdiction (Child Soldier)	18 Jan 08	25 Jan 08	31 Jan 08	• Motion Filed • A. Amicus Brief dtd 18 Jan 08 filed with Clerk of Court on behalf of Sen Robert Badinter ISO Motion to Dismiss • B. Amicus Brief dtd 18 Jan 08 filed with Clerk of Court on behalf of Canadian parliamentarians and law professors • C. Amicus Brief dtd 18 Jan 08 filed by Clerk of Court on behalf of Juvenile Law Center ISO Motion to Dismiss • D. Prosecution Response	
D 023: Defense Motion for Appropriate Relief (Strike Murder from Chg III)	18 Jan 08	25 Jan 08	N/A	• Motion Filed • A. Prosecution Response • B. Email dtd 3 Feb 08, LCDR Kuebler stating no reply will be filed	

MJ Designations

Designation Name (MJ)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
MJ 001: Detail of Military Judge, and Scheduling of First Session	• See Inactive Section	
MJ 002: Voir Dire	• See Inactive Section	
MJ 003: Rules of Court	• See Inactive Section	
MJ 004: Initial Notice of Trial Proceedings following CMCR Ruling	• See Inactive Section	
MJ 005: Special Instructions to Parties re 8 Nov 07 Hearing to determine Initial Threshold Status	• See Inactive Section	
MJ 006: Motion by Press Petitioners for Public Access to Proceedings and Records	• See Inactive Section	
MJ 007: Special Instructions to Parties re Submitting Documents Requiring Redaction	• See Inactive Section	
MJ 008: Emergency Weekend GTMO Visitation	• See Inactive Section	
MJ 009: Trial Schedule	• Sent to all parties 28 Nov 07 • A. Defense email dtd 18 Jan 08 reserving right to file additional law motions	

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	# of Pages in Order	Date Signed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	AE
1	Protective Order # 1	3	9 Oct 07	• Prosecution Motion to Request Issuance of Protective Order for Classified, FOUO or LES, and other markings • A. Prosecution email on 28 Sep 07 requesting Issuance of 29 May 07 Proposed Protective Orders • B. MJ email on 28 Sep 07 urging parties to confer and re-submit Requests for Protective Orders • C. Prosecution email 9 Oct 07 confirming agreement on FOUO and Classified Information Protective Order • D. MJ email containing FOUO and Classified Information Protective Order dtd 9 Oct 07	OR - 035 A – 031 B – 031 C – 031 D - 031
2	Protective Order # 2	2	12 Oct 07	• Prosecution Motion to Request Issuance of Protective Order for ID of Intelligence Personnel • A. Prosecution email on 28 Sep 07 requesting Issuance of 29 May 07 Proposed Protective Orders • B. MJ email on 28 Sep 07 urging parties to confer and re-submit Requests for Protective Orders • C. Prosecution email 9 Oct 07 confirming agreement on FOUO and Classified Information Protective Order • D. MJ Email 9 Oct 07 requesting Defense objections to Witness and Intelligence Personnel Proposed Protective Orders • E. Defense email response 9 Oct 07 outlining objections to Witness and Intelligence Personnel Proposed Protective Orders • F. MJ email 9 Oct 07 directing Prosecution to summarize necessity of proposed Witness and Intelligence Personnel Protective Orders • G. Prosecution email 9 Oct 07 summary of necessity of Witness and Intelligence Personnel Protective Orders •	OR – 035 A – 032 B - 032 C – 032 D – 032 E – 032 F – 032 G - 032

Pro Ord #	Designation when signed	# of Pages in Order	Date Signed	• Status /Disposition/Notes • 0R = First (original) filing in series • Letter indicates filings submitted after initial filing in the series. • R=Reference	AE
2 (Cont)	Protective Order # 2	2	12 Oct 07	• H. Defense objections to Prosecution's arguments of necessity for Witness and Intelligence Personnel Protective Orders • I. MJ email 12 Oct 07 containing Protective Order # 2 Intelligence Personnel	H – 032 I - 032
3	Protective Order # 3	2	15 Oct 07	• Prosecution Motion to Request Issuance of Protective Order for ID of Witnesses • A. Prosecution email on 28 Sep 07 requesting Issuance of 29 May 07 Proposed Protective Orders • B. MJ email on 28 Sep 07 urging parties to confer and re-submit Requests for Protective Orders • C. Prosecution email 9 Oct 07 confirming agreement on FOUO and Classified Information Protective Order • D. MJ Email 9 Oct 07 requesting Defense objections to Witness and Intelligence Personnel Proposed Protective Orders • E. Defense email response 9 Oct 07 outlining objections to Witness and Intelligence Personnel Proposed Protective Orders • F. MJ email 9 Oct 07 directing Prosecution to summarize necessity of proposed Witness and Intelligence Personnel Protective Orders • G. Prosecution email 9 Oct 07 summary of necessity of Witness and Intelligence Personnel Protective Orders • H. Defense objections to Prosecution's arguments of necessity for Witness and Intelligence Personnel Protective Orders • I. MJ email 12 Oct 07 with Proposed Protective Order # 3 Witnesses directing parties to comment by 1600 12 Oct 07 • J. Defense email 1421 12 Oct 07 commenting on Proposed Protective Order # 3 Witnesses • K. Prosecution email 1426 12 Oct 07 commenting on Proposed Protective Order # 3 Witnesses	OR – 035 A – 033 B – 033 C – 033 D – 033 E – 033 F - 033 G - 033 H - 033 I - 033 J – 033 K - 033

Pro Ord #	Designation when signed	# of Pages in Order	Date Signed	• Status /Disposition/Notes • 0R = First (original) filing in series • Letter indicates filings submitted after initial filing in the series. • R=Reference	AE
3 (Cont)	Protective Order # 3	2	15 Oct 07	• L. Defense email 1457 12 Oct 07 reply to Prosecution comments on Proposed Protective Order # 3 Witnesses • M. MJ email containing Protective Order # 3 Witnesses	L – 033 M - 033
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Inactive Section

Prosecution (P Designations)

Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
P 001: Motion to Reconsider (Dismissal Order)	1700hr 08 June 07	20 June 07		• Prosecution Motion to Reconsider (Dismissal Order) • A. MJ email on 08 June 07 denying prosecution requested relief (to extend appeal deadline) • B. Defense email declining to respond to Motion to Reconsider • C. MJ ruling on 29 June 07 denying Motion to Reconsider	OR - 017 A - 018 B - 022 C – 023
P 002: MCRE 505 Review Request				MJ email dtd 30 Nov 07 concerning methods of handling the disclosure of classified and other government information – in response to Prosecution ex parte request • A. Pros email dtd 1 Dec 07 notifying MJ of intent to file matters in camera and ex parte under R.M.C. 505e • B. MJ email dtd 2 Dec 07 confirming receipt of pros notification • C. Def email dtd 3 Dec 07 objecting to ex parte communications • D. MJ email dtd 3 Dec 07 offering R.M.C. 802 or delay on ruling until pros reply • E. Pros email dtd 4 Dec 07 replying to Def objections • F. Def email dtd 4 Dec 07 reaffirming objections to ex parte communication on R.M.C. 505e matter	OR -054 A – 054 B – 054 C – 054 D – 054 E – 054 F – 054

Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
P 002: MCRE 505 Review Request **(Continued)**				• G. Def email dtd 4 Dec 07, 8:00 pm, requesting oral argument • H. MJ ruling dtd 5 Dec on procedures for R.M.C. 505/506 matters • I. MJ email and ruling dtd 7 Dec 07 on Pros R.M.C. 505e en camera and ex parte matter raised 1 Dec 07	G – 054 H – 054 I - 054
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Inactive Section

Defense (D Designations)

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 001: Motion to Vacate, or Alternately , for Continuance	25 Sep 07	27 Sep 07		• Defense Motion to Vacate, or Alternately, for a Continuance • A. Prosecution email 26 Sep 07 (opposing motion to vacate or continue) requesting deadline of COB 27 Sep 07 to file response • B. MJ email 26 Sep 07 directing Prosecution to file response by 1612 27 Sep 07 • C. Defense email 27 Sep 07 containing additional matters to consider re: Motion to Vacate, or Alternately, for a Continuance • D. MJ email 26 Sep 07 indicating MJ will consider Defense additional matters • E. Prosecution official response to Motion to Vacate, or Alternately, for Continuance 27 Sep 07 • F. MJ ruling on 27 Sep 07 granting a continuance to week of 5 Nov 07.	OR – 030 A – 030 B – 030 C – 030 D – 030 E – 030 F - 030
D 002: Motion for Abeyance of Proceedings	10 Oct 07	12 Oct 07	12 Oct 07	• Defense Motion to Abate 10 Oct 07 • A. MJ email 10 Oct 07 to Prosecution to advise commission on the government's position re Motion to Abate NLT 100 12 Oct 07 • B. Defense email 10 Oct 07containing additional matters re Motion to Abate	OR – 034 A - 034 B – 034

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 002: Motion for Abeyance of Proceedings **(Continued)**	10 Oct 07	12 Oct 07	12 Oct 07	• C. MJ email 10 Oct 07 instructing prosecution to consider additional matters • D. Government Response to Defense Motion to Abate 12 Oct 07 • E Defense reply to Government Response 12 Oct 07 • F. MJ ruling on 15 Oct 07 denying abeyance	C – 034 D – 034 E – 034 F - 034
D 003: Motion for Continuance				• Defense Motion for Continuance until on or about 6 Dec 07 • A. Summary of 24 Oct 07 R.M.C. 802 Hearing • B. Prosecution email dtd 25 Oct 07 requesting extension to 1600 hrs 25 Oct 07 to file response • C. MJ email 25 Oct 07 granting extension of Prosecution deadline for response until 1630 hrs 25 Oct 07 • D. MJ email 25 Oct 07 denying Motion for Continuance	OR - 041 A - 041 B - 041 C - 041 D - 041
D 004: Motion for Proper Status Determination	1 Nov 07	7 Nov 07		• Defense Motion for Proper Status Determination • A. Government Response to Defense Motion for Proper Status Determination, 7 Nov 07 • B. Government Email addressing Unresolved Issue 7 Nov 07 • C. MJ Ruling on Defense Motion for Proper Status Determination Hearing 7 Nov 07	OR – 042 A – 042 B – 042 C - 042
D 005: Motion for Continuance	2 Nov 07, 1111 hrs	2 Nov 07, 1701 hrs	2 Nov 07, 1854 hrs	• Defense Motion for Continuance • A. MJ Email directing government to respond NLT 1700 hrs 2 Nov 07	OR – 045 A – 045

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 005: Motion for Continuance **(Continued)**	2 Nov 07, 1111 hrs	2 Nov 07, 1701 hrs	2 Nov 07, 1854 hrs	• B. Government email response to Defense Motion to Continue 2 Nov 07, 1701 hrs • C. MJ Email 2 Nov 07, 1855 hrs denying Motion for Continuance • D. Defense email reply to Government response 2 Nov 07, 1854 hrs • E. MJ Email Affirming Denial of Motion to Continue 2 Nov 07, 2023 hrs	B – 045 C – 045 D – 045 E - 045
D 006: Defense Special Request for Deposition of FBI Witness	6 Nov 07	9 Nov 07	10 Nov 07	• Defense Special Request for Deposition of FBI Witness • A. MJ email dtd 6 Nov 07 urging Government Response to Defense Special Request for Deposition of FBI Witness • B. Government email response to Defense Special Request for Deposition of FBI Witness • C. MJ email dtd 10 Nov 07 asking if Defense Intended to Reply to Government Response to Defense Special Request for Deposition of FBI Witness • D. Defense email reply requesting leave to withdraw Special Request for Deposition of FBI Witness • E. NJ email dtd 10 Nov 07 granting withdrawal of Request for Deposition of FBI Witness	OR – 051 A - 051 B – 051 C – 051 D – 051 E - 051
D 007: Defense Request for Continuance for Submission of All Law Motions				• Defense Request for Continuance for Submission of All Law Motions • A. Defense proposed trial schedule dtd 29 Oct 07	OR – 052 A – 052

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 007: Defense Request for Continuance for Submission of All Law Motions **(Continued)**				• B. Government proposed trial schedule dtd 30 Oct 07 • C. R.M.C. 802 Hearing dtd 7 Nov 07 • D. MJ email dtd 9 Nov 07 granting Continuance for Submission of All Law Motions • E. MJ email dtd 11 Jan 08 clarifying Trial Clock and charging the Def with delay	B – 052 C – 049 D – 052 E - 052

Inactive Section

MJ Designations

Designation Name (MJ)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
MJ 001: Detail of Military Judge, and Scheduling of First Session	• Sent to all parties 25 Apr 07 w/arraignment date of 7 May • A. DC request continuance on 26 Apr to 6 Jun • B. TC opposition on 27 Apr • C. MJ ruling on 27 Apr - arraignment on 4 Jun • Email instructions to parties setting 802 session for 3 Jun 07 and arraignment for 0900, 4 Jun 07	OR - 005 A - 006 B - 006 C – 006 (none)
MJ 002: Voir Dire	• MJ sent bio and Matters re Voir Dire 25 Apr 07 directing questions be submitted 4 May 07 • A. MJ sent addendum to Voir Dire 15 Oct 07 addressing appointment of new Chief Prosecutor • B. Defense Email 1 Nov 07 with written voir dire questions • C. MJ Email 2 Nov 07 with responses to written voir dire	OR -005 A – 036 B – 036 C - 036
MJ 003: Rules of Court	• Sent to all parties 25 Apr 07 • A. Rules of Court (Change 1) sent to all parties 11 Oct 07 • B. Rules of Court (Change 2) sent to all parties 2 Nov 07	005 A – 037 B - 043
MJ 004: Initial Notice of Trial Proceedings following CMCR Ruling	• Sent to all Parties 25 Sep 07 • A. Defense Motion to Vacate, or Alternately, for Continuance **(SEE D 001)** • B. MJ ruling on 27 Sep 07 granting a continuance to week of 5 Nov 07. **(SEE D 001)** • C. Defense email 28 Sep 07 requesting relief for deadlines on submissions for 8 Nov 07 hearing • D. MJ email adjusting deadlines for submissions to reflect 8 Nov 07 hearing date	OR - 030 A - 030 B - 030 C - 030 D - 030

Designation Name (MJ)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
MJ 005: Special Instructions to Parties re 8 Nov 07 Hearing to determine Initial Threshold Status	• Sent to all parties 10 Oct 07 A. Prosecution email concerning discovery releases to Defense B. Prosecution Email 2 Nov 07 suggesting procedural and evidentiary guidelines for 8 Nov 07 Hearing	OR 036 A – 036 None
MJ 006: Motion by Press Petitioners for Public Access to Proceedings and Records	• Motion by Press Petitioners for Public Access to Proceedings and Records dtd 21 Nov 07 • A. MJ email dtd 21 Jun 07 directing parties to provide their positions on how the Commission should treat and respond to the Motion by Press Petitioners • B. Government Response to Motion by Press Petitioners for Public Access to Proceedings and Records dtd 28 Nov 07 • C. Defense Response to Motion by Press Petitioners for Public Access to Proceedings and Records dtd 28 Nov 07 • D. MJ Ruling on Motion by Press Petitioners for Public Access to Proceedings and Records dtd 28 Nov 07	OR – 053 A – 053 B – 053 C – 053 D - 053
MJ 007: Special Instructions to Parties re Submitting Documents Requiring Redaction	• MJ email dtd 30 Nov 07 instructing parties to ensure proper redaction takes place before submission of documents	(None)
MJ 008: Emergency Weekend GTMO Visitation	• MJ email dtd 28 Nov 07 instructing Trial Counsel to provide information on the weekend visitation policy at the GTMO detention facility • A. Pros email dtd 12 Dec 07 providing MJ information requested • B. MJ email dtd 12 Dec 07 denying Def request to delay start of 4 Feb 08 motions hearing to 6 Feb 07 (See MJ 009 – Trial Schedule)	OR – 055 A – 055 B - 055

Edmonds, Matthew SSG USSOUTHCOM JTFGTMO

From: Jeff Groharing [jeffredg@ptf.gov]
Sent: Friday, February 01, 2008 6:20 PM
To: Chappell, Danny, LTC, DoD OGC
Cc: [redacted]

Subject: Re: US v. Khadr - Start time for 4 February 2008 hearing - 0900 hours

Attachments: U.S. v. Khadr - Detailing memo - 1 February.pdf

U.S. v. Khadr - Detailing memo...

Sir,

1. Pursuant to RC 4.3b, I hereby waive Mr. Trivett's presence for next week's session.

2. Additionally, please find the attached memo detailing counsel in U.S. v. Khadr.

V/R,

Major Groharing

Chappell, Danny, LTC, DoD OGC wrote:

> Per COL Brownback, the 4 February 2008 hearing in US v Khadr will
> start at 0900 hours in the GTMO Courtroom.
>
> v/r,
>
> LTC Mike Chappell, USAR
> Senior Attorney Advisor
> Military Commissions Trial Judiciary
> Department of Defense
>
>

--
Jeff Groharing
Major, U.S. Marine Corps
[redacted]ce of Military Commissions
[redacted]

OMC-CP

January 31, 2008

MEMORANDUM FOR TRIAL JUDGE, UNITED STATES v. KHADR

SUBJECT: Detailing of Mr. Jordan Goldstein and Mr. Andrew Oldham as Appellate Counsel/Assistant Prosecutors

Consistent with my authority as Chief Prosecutor and the provisions of Rule 501(b), Manual for Military Commissions, dated January 18, 2007, the above named counsel are detailed for the case of *United States v. Omar Ahmed Khadr*.

LAWRENCE J. MORRIS
Colonel, JA, USA
Chief Prosecutor
Office of Military Commissions

cf: Mr. Jordan Goldstein
Mr. Andrew Oldham
Trial Counsel

Edmonds, Matthew SSG USSOUTHCOM JTFGTMO

From: Chappell, Danny M LTC USSOUTHCOM JTFGTMO
Sent: Tuesday, February 05, 2008 10:24 AM
To: [redacted]

Subject: Summary - RMC 802 Conference - 1500 hours, 4 February 2008 - United States v. Khadr

COL Brownback has directed that I send the email below to counsel and other interested persons.

v/r,

LTC Mike Chappell, USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

-----Original Message-----
From: Brownback, Peter E. COL USSOUTHCOM JTFGTMO

[redacted] hours, 4 February 2008 - United States v. Khadr

LTC Chappell,

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

Counsel in the Case of United States v. Khadr,

The following is a summary of the RMC 802 conference held at 1500 hours, 4 February 2008, at Guantanamo Bay, Cuba.

1. The following were present:

a. COL Brownback

b. Government Counsel, MAJ Groharing, CPT Petty, Mr. John Murphy, SSG Ona

c. Defense Counsel, LCDR Kuebler, Ms. Rebecca Snyder, SSG Stuyvesant

2. An issue had arisen concerning the release by PAO of an FOUO/LES document. Counsel for both sides researched the release and determined that the release was inadvertent. The military judge stated that any further actions were not within his province.

3. Evidentiary motions are due under the trial schedule by 28 February 2008. The time set to request an extension or continuance of that date is 8 February 2008. LCDR Kuebler requested an extension of the 8 February date to 15 February. MAJ Groharing did not object to the extension until 15 February, but he did object to any continuance in the provision of the evidentiary motions. The military judge will issue a decision separately.

4. The parties discussed among themselves and with the military judge some issues concerning discovery. One of them involves a counsel TDY OCONUS. The parties agreed to continue discussing discovery issues and will present the military judge any issues which they can not resolve. No decisions made.

5. The parties are continuing to work on a resolution to D-020. They will advise the military judge when and if a resolution is reached. No decision made.

6. MAJ Groharing is uncertain whether Mr. Goldstein or Mr. Oldham will be making another appearance before the Commission in this case.

7. Neither party had anything further.

8. This summary was agreed to by defense counsel and government counsel before it was approved by the military judge.

Peter E. Brownback III

COL, JA, USA

Military Judge

Edmonds, Matthew SSG USSOUTHCOM JTFGTMO

From: Chappell, Danny, LTC, DoD OGC
Sent: Friday, November 30, 2007 3:10 PM
To: [redacted]

Subject: FW: Modification of the Application of RC 2.2 and 3.9 for the Case of United States v. Khadr

COL Brownback has directed that I forward the email below to counsel and other interested persons.

v/r,

LTC Mike Chappell, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From: [redacted]
Sent:
To: Chappell, Danny, LTC, DoD OGC
Subject: Modification of the Application of RC 2.2 and 3.9 for the Case of United States v. Khadr

LTC Chappell,

Please forward the email below to the counsel in the case of United States v. Khadr. Please provide a copy to other interested persons.

COL Brownback

Counsel in the case of US v. Khadr,

1. References:

a. Military Commissions Rules of Court, Change 2, 2 November 2007.

b. Memorandum, Convening Authority, Office of Military Commissions, Subject: Preparation of Trial Documents and Pleadings for Public Release, 28 November 2007.

2. RC 3.9 establishes the Trial Judiciary's policy and procedure for release of commission materials to the Office of Military Commission for public release. RC 2.2.c provides general guidance for preparation of materials for filing and transmission.

3. The following procedures will be used in the case of United States v. Khadr to insure that redacted copies of possible protected and classified material are provided by counsel to OMC for release to the general public, in addition to the original Appellate Exhibits and other material.

a. If a filing or attachment contains any information that could be considered classified information or protected information, then a redacted version, suitable for disclosure to the public, shall be prepared by the party creating the filing or attachment, provided to opposing counsel, and retained by the preparing party.

b. When the military judge determines that an Appellate Exhibit or other matter may be forwarded to OMC for public release, MCTJ Staff will forward the Appellate Exhibit to the Clerk of Court and copy counsel on the forwarding email. Counsel will review each Appellate Exhibit forwarded.

1. If the Appellate Exhibit contains a filing described in paragraph 3a above, the preparing party will provide the Clerk of Court the redacted version for use in release to the public.

2. If the Appellate Exhibit does not contain a filing described in paragraph 3a above, counsel will so advise the Clerk of Court by email.

4. MCTJ will not accept or retain redacted filings in the case of US v. Khadr. Counsel have the responsibility to insure that any Appellate Exhibit released to OMC for general release is immediately reviewed and proper notification made to the Clerk of Court.

Peter E. Brownback III

COL, JA, USA

Military Judge

UNITED STATES OF AMERICA	}	**D-013** **Ruling on Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder)**
		20 February 2008
v	}	
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khahi"	}	

1. The commission has considered the defense motion, the government response, and the defense reply.

2. The defense requests dismissal of all charges and specifications due to lack of jurisdiction because the Military Commissions Act of 2006 (MCA) is a Bill of Attainder.

3. In United States v. Lovett, 328 U.S. 303 (1946) the Supreme Court wrote: "In *Cummings v. State of Missouri*, 4 Wall. 277, 323, this Court said, 'A bill of attainder is a legislative act which inflicts punishment without a judicial trial.'" Such bills and acts are prohibited by the Bill of Attainder Clause.

4. For purposes of this ruling on this motion, the commission shall not and does not address the issue of whether or not Mr. Khadr may avail himself of the protections of the United States Constitution.

5. The defense characterization of the effect of the MCA on Mr. Khadr as "legislative punishment" is not supported by case law; nor by any logical interpretation of the historical reasons for the Bill of Attainder Clause.

a. The cases cited by the defense for the propositions which it asserts do not support characterization of a trial by military commission as punishment.

b. Insofar as the defense claims are based upon those portions of the MCA which regulate the access to civilian courts for purposes of *habeas corpus*, those portions are independent of those sections establishing the jurisdiction of and procedures for military commissions.

c. Insofar as the defense claims are based on procedures established by the MCA which differ from procedures in federal courts and military courts-martial, such variations

are not grounds for determining that punishment has been legislated before a trial. The commission notes that the Uniform Code of Military Justice has not been held to be a Bill of Attainder, even though certain provisions of military practice appear to be at variance with Constitutional requirements - compare place of trial under the Uniform Code with the 6th Amendment's venue rule and Clause 2 of Section III.

6. Nothing in the MCA directs that any person or any subset of persons be punished without a trial. Nothing in the trial procedures established by the MCA can be properly viewed as "punishment," as that term is used in the cases cited by the defense.

7. The defense motion to dismiss for lack of jurisdiction because the MCA is a Bill of Attainder is DENIED.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**D-013** **Defense Reply to Government Response to Defense Motion** to Dismiss for Lack of Subject Matter Jurisdiction (Bill of Attainder) 4 January 2007

1. **Timeliness:** This reply is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge's 19 December e-mail order.

2. **Overview:**

a. The government seeks to avoid the conclusion that the Military Commissions Act of 2006 (MCA) as applied to Mr. Khadr is an unconstitutional bill of attainder by arguing (1) that he may not invoke the "protection" of the Bill of Attainder Clause; and (2) that if he can, the MCA does not constitute legislative punishment in violation of the Clause. Both contentions are without merit.

b. The U.S. Constitution's prohibition against bills of attainder is a structural limitation on the power of Congress. Its application is not a function of the place where Mr. Khadr is detained and the government's reliance on *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S.Ct. 3078 (2007), to claim otherwise is sorely misplaced.

c. Moreover, nothing in the government's response alters the inescapable fact that the MCA constitutes legislative punishment by depriving Mr. Khadr of the right to a fair and regular trial, as well as other important civil and political rights. Significantly, the government does not contend that the MCA is intended to facilitate the "trial" of anyone other than detainees at Guantanamo Bay based on their irreversible past conduct. Thus, the only remaining issue is whether Congress' creation of a trial system, long after Mr. Khadr's alleged conduct, employing specially-tailored rules of evidence and procedure designed to ensure his conviction is "punishment." It most certainly is.

3. **Reply: This Military Commission is Without Jurisdiction to Proceed Because the Sole Basis for its Authority, the MCA, is an Unconstitutional Bill of Attainder**

a. The Bill of Attainder Clause is a Structural Limitation on the Power of Congress Which Applies Regardless of Where Mr. Khadr is Detained

(1) The government seeks to avoid the obvious conclusion that the MCA is an unconstitutional bill of attainder by arguing that the "protection" of the Bill of Attainder Clause (as well as "structural or other protections of the Constitution") does not apply to Mr.

Khadr. (Govt. Resp. at 4.) For this outlandish proposition, the government relies principally on the decision of the D.C. Circuit Court of Appeals in *Boumediene*. This reliance is sorely misplaced. The Bill of Attainder Clause is a structural limitation on congressional power. It governs Congress's conduct regardless of whether the individuals adversely affected have independent legal rights under the Constitution. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description."); *see also Weaver*, 450 U.S. at 29-30 ("The presence or absence of an affirmative, enforceable right is not relevant . . . to the *ex post facto* prohibition."). Accordingly, the Bill of Attainder Clause (like the *Ex Post Facto* Clause) prohibits legislative punishment regardless of where the individuals affected by it are detained.

(2) *Boumediene v. Bush*, 476 F.3d 981 (2007), currently on review at the Supreme Court, does not hold otherwise. While the prosecution argues that *Boumediene* held that the "Constitution does not apply" to alien enemy combatants held at Guantanamo, (Govt. Resp. at 4), *Boumediene* did no such thing. *Boumediene* was concerned solely with the Suspension Clause of the Constitution, and did *not* address the applicability of the Bill of Attainder Clause to Guantanamo detainees. To the extent *Boumediene* may have suggested that other constitutional provisions do not apply at Guantanamo, it did so only by dismissing the significance of the Supreme Court's recent precedent in *Rasul*. *See Boumediene*, 476 F.3d at 991 n.10 (concluding that *Rasul*, "resting as it did on statutory interpretation, . . . could not possibly have affected the constitutional holding of" *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950), which held that constitutional protections extend to aliens "within [the courts'] territorial jurisdiction"). In rejecting the Supreme Court's conclusion that aliens at Guantanamo are within the "territorial jurisdiction" of the United States, the D.C. Circuit unnecessarily manufactured a tension between *Eisentrager* and *Rasul*. It is far more natural to read *Eisentrager* as setting out the standard for the extraterritorial application of constitutional rights and *Rasul* as recognizing that Guantanamo satisfies that standard.

(3) Moreover, the holding of *Boumediene* has already been called into question—first by the Supreme Court's grant of certiorari and second by the D.C. Circuit's own decision to recall the mandate it had previously issued. Under the Federal Rules of Appellate Procedure, an appellate decision "is not final until issuance of the mandate." Advisory Committee Notes, subdivision (c), Fed. R. App. P. 41. Numerous judges have recognized that "the Court of Appeals' withdrawal of the mandate in *Boumediene*," when considered along with "the Supreme Court's highly unusual grant of certiorari on rehearing," casts "a deep shadow of uncertainty over the jurisdictional ruling of that decision." *Alhami v. Bush*, No. 05-359, at 6 (GK) (D.D.C. Oct. 2, 2007); *see also Al-Oshan v. Bush*, No. 05-0520, at 6 n.2 (RMU) (D.D.C. Oct. 5, 3007) (noting that "the extraordinary procedural dispositions in *Boumediene* 'cast a deep shadow of uncertainty'" over the D.C. Circuit's jurisdictional ruling).

(4) Given the considerable uncertainty surrounding *Boumediene*, if this Commission were to find that the D.C. Circuit's opinion necessary to the resolution of this case, it should stay these proceedings until the Supreme Court reaches a decision. Several D.C. district court judges have stayed their proceedings and refused to rule on Government motions to dismiss detainee habeas petitions in light of the considerable uncertainty surrounding *Boumediene*. *See*

Maqaleh v. Gates, No. 06-1669 (JDB) (D.D.C. July 18, 2007); *Al-Oshan v. Bush*, No. 05-0520 (RMU) (D.D.C. Oct. 5, 3007); *cf. Alhami v. Bush*, No. 05-359 (GK) (D.D.C. Oct. 2, 2007).

(5) But even assuming, *arguendo*, that the Bill of Attainder Clause only applies to those persons detained within the territorial jurisdiction of the United States, it would still apply in this case because the Supreme Court has recognized that Guantanamo Bay is within the "territorial jurisdiction" of the United States. *See Rasul v. Bush*, 542 U.S. 466, 480 (2004) (interpreting habeas statute); *see also id.* ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base." (citing the terms of the 1903 lease agreement)); *id.* at 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . ."); *id.* ("From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it.") (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950).

b. The MCA Constitutes Legislative Punishment

(1) As noted above, the government does not contend that the MCA is anything other than an act aimed at an identifiable class of persons based on irreversible past conduct.[1] Instead, the government bases its argument on the claim that the MCA is not "punishment" because any punishment imposed on Mr. Khadr will only follow trial with "robust" procedures. (Govt. Resp. at 6.) The government's argument entirely misses the point. It does not matter how "robust" the procedures authorized by the MCA may be, they are less protective of Mr. Khadr than the procedures for trial by court-martial or by a federal court and are designed to facilitate his conviction using evidence that does not meet conventional standards of reliability.

(2) There can be little doubt that deprivation of the right to a fair trial itself constitutes punishment. The government does not contend otherwise, arguing instead that Mr. Khadr will receive a fair trial under the "robust" procedures for trial by military commission. The Government lists in its response a number of purported rights available to Mr. Khadr under the military commission system,[2] but the relevant question is not what rights the MCA provides,

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[1] The government cites *Hamdan* for the dubious proposition that the Court "invited the politically accountable branches" to pass a bill of attainder. In support of this notion, the prosecution selectively cites Justice Breyer's statement that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary," *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring), emphasizing the word "[n]othing." (Govt. Resp. at 10.) But, of course, Justice Breyer did not give Congress or the Executive authority to disregard the Constitution. The prosecution omits Justice Breyer's complete statement of his views: "If Congress, after due consideration, deems it appropriate to change the controlling statutes, *in conformance with the Constitution and other laws*, it has the power and prerogative to do so." *Hamdan*, 126 S. Ct. at 2800 (Breyer, J., concurring) (emphasis added). The President is free to "seek"—and Congress is free to grant—the authority the President believes is necessary, but only within the bounds of the Constitution.

[2] It is worth noting that some of the "rights" the Government identifies exist more in theory than they do

rather it is what rights it takes away.[3] The government contends that the MCA is "modeled after" courts-martial, however, the MCA *explicitly* breaks from *court-martial* procedures in key respects. In Section 948b(d) ("Inapplicability of Certain Provisions"), the MCA identifies three crucial UCMJ protections that do *not* apply, including "any rule of courts-martial relating to speedy trial," 10 U.S.C. § 948b(d)(1)(A), the rules "relating to compulsory self-incrimination," *id.* § 948b(d)(1)(B), and those relating to pretrial investigation, *id.* § 948b(d)(1)(C). The other rules "shall apply to trial by military commission *only to the extent provided by this chapter*." *Id.* § 948b(d)(2) (emphasis added). This is little comfort, since the MCA provides, among other things, that *court-martial* principles of law and rules of evidence shall apply only insofar "as the Secretary [of Defense] considers practicable or consistent with military or intelligence activities." *Id.* § 949a(a). The very same section of the MCA notes that the Secretary may prescribe that under certain circumstances the "hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission." *Id.* § 949a(b)(2)(E). This includes, notably, the admission in certain circumstances of coerced testimony. *Id.* § 948r. Thus, application of the MCA to Mr. Khadr's case deprives him of many rights which are routinely provided in courts-martial. In does so notwithstanding the fact that the rules and procedures for courts-martial are flexible and designed to accommodate the needs of military operations. *See, e.g.*, M.R.E. 505 (governing discovery and use of classified information), 803, 804, and 807 (relating to hearsay).

(3) The government attempts to defend these irregularities on the basis of necessity, claiming that the "limited differences between court-martial rules and those under the MCA merely reflect military and intelligence realities." (Govt. Resp. at 9.) This is nonsense. The only "reality" the MCA is designed to account for is the fact that the United States Government has relied on absurd and outdated legal positions to indefinitely detain and mistreat numerous suspected "terrorists" in the so-called "Global War on Terror"[4] (such as Mr. Khadr) and now finds itself in the position of having to create a justice system from whole cloth to facilitate convictions of select detainees using unreliable evidence. *See* MCA § 948r (providing for use of evidence obtained through coercion).

(4) The government's reference to evidence collected in "the midst of battle" as a justification for disregarding traditional restrictions on hearsay is a complete red-herring. Well-developed rules of evidence exist providing for the use of hearsay under exigent

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in practice. For example, the Government states the accused has the right to cross-examine witnesses who testify against him, but because the Government can base its case exclusively on documentary and hearsay evidence, the accused may have no witnesses and/or no witnesses with personal knowledge to cross-examine. *See* 10 U.S.C. § 949a(b)(2). The Government also claims that the accused has the right to present evidence in his defense, but the accused cannot compel the attendance of witnesses at a commission in Guantanamo Bay.

[4] *See, e.g.*, the authorities cited at p. 10 of the government's response (and elsewhere in the government response briefs) to support the proposition that "unlawful combatants" lack enforceable rights and can be "shot on sight" or summarily executed under the law of war. The position, of course, ignores a century and a half of evolution of the law of armed conflict and was definitively rejected by the Supreme Court in *Hamdan*.

circumstances, providing that the evidence can be shown to be reliable. *See, e.g.*, M.R.E. 803, 804, and 807. Moreover, interrogations conducted for operational or intelligence purposes have been specifically exempted from requirements to comply with Article 31b of the UCMJ (10 U.S.C. § 831). *See, e.g. United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990); *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). It is only because the government seeks to convict on the basis of statements and other evidence taken for law enforcement purposes that is *unreliable* that the special evidentiary rules of the MCA are necessary. Likewise, the government's invocation of the need to shield "classified information" is unpersuasive. Again, a well-developed body of law exists to deal with classified information in courts-martial. *See, e.g.*, M.R.E. 505. The only "necessity" justifying military commissions' extraordinary departures from court-martial practice is the "necessity" to ensure convictions.

(5) The MCA deprives Mr. Khadr of other important rights, including his rights under the Geneva Conventions.[5] The government argues that the only right Mr. Khadr has under the Geneva Conventions is his right to be tried by a "regularly constituted court" affording indispensable judicial guarantees under Common Article 3 thereof.[6] Because Congress has declared military commissions to comply therewith, the government argues, there is no deprivation. (Govt. Resp. at 8.) The argument is fallacious for at least two reasons.

(i) First, the right to a fair trial is not the only right guaranteed under Common Article 3. Common Article also protects Mr. Khadr's right to be free from "outrages upon person dignity, in particular humiliating and degrading treatment[.]"[7] The MCA deprives Mr. Khadr of his right to access the courts to seek redress for violations of this right under Common Article 3, and provides for the use of evidence obtained in violation of this right against Mr. Khadr at trial.

(ii) Second, the military commission by which Mr. Khadr will be tried under the MCA is not a "regularly constituted court" affording all indispensable judicial guarantees. Congress' declaration to the contrary is of no avail because Congress has no power to declare the MCA compliant with Common Article 3. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") In *Hamdan*, a majority of the Supreme Court defined a "regularly constituted court" for purposes of Common Article 3 as one "established and organized in

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[5] In support of its contention that Mr. Khadr has been deprived of no rights under the Geneva Conventions, the government argues that Mr. Khadr "has presented no plausible argument that he qualifies for prisoner of war status under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War[.]" (Govt. Resp. at 8.) The defense notes that the question of whether Mr. Khadr may have a basis on which to claim entitlement to POW status is dependent upon factual discovery yet to be conducted in this case. Moreover, regardless of the precise theory on which Mr. Khadr might claim POW status, it is abundantly clear that he is presumptively entitled to such status until the "competent tribunal" contemplated by Article 5 of GPW determines otherwise. To the extent the MCA purports to divest Mr. Khadr of this right, it constitutes a further deprivation of his rights under the Geneva Conventions.

[6] The defense expects to further brief the issue of whether the military commission convened to try Mr. Khadr complies with Common Article 3 of the Geneva Conventions.

[7] *See, e.g.*, GPW, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135.

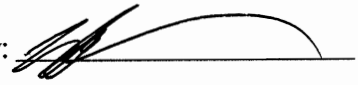
accordance with the laws and procedures already in force in a country." *Hamdan*, 126 S.Ct. at 2797. Thus, the Supreme Court concluded that Mr. Hamdan was entitled under Common Article 3 to be tried by a tribunal employing the rules and procedures applicable in trial by courts-martial absent some "practical need" justifying deviation from court-martial practice. *Id.* Because the government had not shown any practical need justifying deviation from court-martial practice, Mr. Hamdan's military commission was deemed "illegal."

(iii) Nothing has changed. As shown above, the rules and procedures for courts-martial are designed to be flexible and to accommodate exigencies associated with military operations. The only "practical need" justifying the procedures for military commissions under the MCA is the "need" to secure convictions using tainted evidence. As a result, the military commission that will try Mr. Khadr is not a regularly constituted court affording indispensable judicial guarantees and the MCA constitutes punishment because it seeks to strip him of this right as well.

(8) Finally, the government argues that the deprivation of Mr. Khadr's right to access the federal courts via habeas corpus is not punishment because he has no "constitutional right to bring a habeas challenge to the conditions of his confinement or otherwise." (Govt. Resp. at 10.) This is again beside the point. Whether Mr. Khadr's rights arise by statute or otherwise, the MCA is an unconstitutional bill of attainder if it deprives him of those rights as legislative punishment. As shown herein, it most certainly does.

4. Conclusion

a. The MCA is intended to deprive Mr. Khadr (and other detainees at Guantanamo Bay) of the right to a fair and regular trial and other important civil and political rights. It singles them out specifically and on the basis of past conduct. It is therefore an unconstitutional bill of attainder. As the MCA is the sole basis for the Commission's jurisdiction, all charges and specifications should be dismissed and proceedings against Mr. Khadr terminated.

By: 

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	**GOVERNMENT'S RESPONSE** **To the Defense's Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder)** 14 December 2007

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 28 November 2007.

2. Relief Requested: The Government respectfully submits that the Defense's motion to dismiss all charges and specifications for lack of jurisdiction ("Mot. to Dismiss (Bill of Attainder)"), should be denied.

3. Overview:

a. Under the Supreme Court's opinion in *Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950), and the Court of Appeals' decision in *Boumediene v. Bush*, 476 F.3d 981, 992 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007), the constitutional limitations on bills of attainder do not apply *vis-à-vis* Khadr—an "alien[] without property or presence within the United States," *id.* at 992-93—and he is not entitled to the protections of the Bill of Attainder Clause. Moreover, even if the Bill of Attainder Clause were generally to apply to Khadr, nothing in the MCA would even approach a violation of it. The MCA provides robust trial procedures that protect the rights of unlawful enemy combatants to a degree unprecedented in the history of warfare, and any punishment under it would be imposed only *after* a full and fair trial. The MCA is therefore not "a legislative act which inflicts punishment without a judicial trial," *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866), and accordingly is not an unconstitutional bill of attainder.

b. The Defense's alternative argument that the MCA can plausibly be interpreted as prospective only is refuted by both the text and legislative history of the Act—a point made clear in the Defense's own brief. *See* Mot. To Dismiss (Bill of Attainder) at 6-7.

c. Accordingly, nothing in the Bill of Attainder Clause remotely suggests that Khadr cannot be tried under the MCA for conduct that predates enactment of the Act. The motion to dismiss should be denied.

4. Burden and Persuasion: The Prosecution bears the burden of demonstrating the factual basis for jurisdiction by a preponderance of the evidence. *See* Rule for Military Commissions ("RMC") 905(c)(2)(B).

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. Under the Supreme Court's opinion in *Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950), and the Court of Appeals' decision in *Boumediene v. Bush*, 476

F.3d 981, 992 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007), the constitutional limitations on bills of attainder do not apply to Khadr, an alien outside the sovereign borders of this country.

i. Although the Constitution provides that "[n]o Bill of Attainder . . . shall be passed," U.S. Const. art. I, § 9, cl. 3, it does not ensure the legal rights of alien enemy combatants detained in foreign territory. *See Eisentrager*, 339 U.S. at 783-85. Pursuant to this principle, the U.S. Court of Appeals for the D.C. Circuit has held that the Constitution does not apply to alien enemy combatants held outside United States territory, including those held at Guantanamo Bay, such as Khadr. *See Boumediene*, 476 F.3d at 992; *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). The D.C. Circuit has direct review over this court, *see* 10 U.S.C. § 950g, and its decisions are binding. *Cf. Agostini v. Felton*, 521 U.S. 203, 237-38 (1997). This court need proceed no further to reject Khadr's claim that the charges against him violate the Bill of Attainder Clause.

ii. *Eisentrager*'s holding that alien enemy combatants detained in foreign territory do not enjoy constitutional protections is not confined to particular clauses of the Constitution, such as the Fifth Amendment. *See* 339 U.S. at 783-85. Rather, as the Court of Appeals recognized in *Boumediene*, *Eisentrager* stands for the broader proposition that the limitations on Congress set forth elsewhere in the Constitution do not apply *vis-à-vis* alien enemy combatants detained outside the United States.

iii. Accordingly, the Court of Appeals in *Boumediene* rejected the argument that an alien enemy combatant like Khadr could invoke purported "limitation[s] on congressional power," even if he could not assert individual "constitutional right[s]." 476 F.3d at 993. As the *Boumediene* court correctly explained, "this is no distinction at all. Constitutional rights are rights against the government and, as such, *are* restrictions on governmental power." *Id.* The court added that, "[o]n [a contrary] theory . . . aliens outside the United States [would be] entitled to the protection of the Separation of Powers because they have no individual rights under the Separation of Powers." *Id.* at 994.

iv. The court in *Boumediene* correctly rejected any distinction between restrictions on congressional power and individual rights. *Id.* at 993-94. It held instead that the Bill of Attainder and Suspension Clauses, like other constitutional provisions such as the Fifth Amendment, do not apply to detainees such as Khadr, notwithstanding that the former clauses do not expressly reference "individuals" or "rights." *Id.* Accordingly, under the binding precedent of *Eisentrager* and *Boumediene,* Khadr cannot claim the protection of the Bill of Attainder Clause.[1]

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[1] In *Downes v. Bidwell*, 182 U.S. 244 (1901), which predates both *Eisentrager* and *Boumediene*, the Supreme Court held that "when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description*." *Id.* at 277. However, *Downes* concerned only the applicability of "the revenue clauses of the Constitution . . . to our newly acquired territories." *Id.* at 249. *Downes* has no relevance with respect to the constitutional rights enjoyed by alien enemy combatants held outside the territorial sovereignty of the United States in Guantanamo Bay, Cuba. The controlling

b. Even if the Bill of Attainder Clause does apply *vis-à-vis* Khadr, nothing in the MCA violates that clause.

i. The Bill of Attainder Clause prohibits the imposition of "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them *without a judicial trial*." *United States v. Lovett*, 328 U.S. 303, 315 (1946) (emphasis added); *see also Cummings*, 71 U.S. (4 Wall.) at 323 ("A bill of attainder is a legislative act which inflicts punishment without a judicial trial."). It defies logic to argue that the creation of a trial process, particularly one that ensures the presumption of innocence, *see* 10 U.S.C. § 949*l*(c)(1), constitutes the "inflict[ion of] punishment without a judicial trial."

ii. The bill of attainder provision at issue in *Lovett* denied compensation to three Executive Branch employees who were named in the legislation. *See* 328 U.S. at 314 ("What is involved here is a congressional proscription of Lovett, Watson, and Dodd, prohibiting their ever holding a government job."). The forbidden "punishment" in *Lovett* was the denial of Government compensation, and, because the penalty was automatic and did not permit any sort of court review, it was necessarily imposed "without a judicial trial," and therefore in violation of the Bill of Attainder Clause.

iii. Similarly, in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), the Supreme Court invalidated a provision of the Missouri constitution that penalized anyone who failed to take a loyalty oath. The following penalty was imposed by Missouri on all those who refused to take the oath:

> Every person who is unable to take this oath is declared incapable of holding, in the State, "any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority, or of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation."

Id. at 317. The Supreme Court regarded these "disabilities created by the constitution of Missouri" as "penalties—they constitute punishment." *Id.* at 320; *see also Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (holding that a federal loyalty oath required of attorneys with respect to certain past acts was an unconstitutional bill of attainder). As Justice Frankfurter explained in *Lovett*, "the provisions involved in [*Cummings* and *Garland*] did not condemn or punish specific persons by name, they proscribed all guilty of designated offenses. Refusal to take a prescribed oath operated as an admission of guilt, and automatically resulted in the disqualifying punishment." *Lovett*, 328 U.S. at

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cases on that point are *Boumediene* and *Eisentrager*, which held that alien enemy combatants detained outside the United States do not enjoy the structural or other protections of the Constitution.

327 (Frankfurter, J., concurring). That is a far cry from what has occurred under the MCA.

iv. The Military Commissions Act asserts jurisdiction over alien unlawful enemy combatants. *See* 10 U.S.C. § 948c. The term "unlawful enemy combatant" means:

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
>
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

Id. § 948a(1)(A). To the extent Khadr is an alien who comes within either of the above classes of persons, he may be tried under the MCA. It is the *result* of that trial that will determine whether Khadr is punished, and, if so, to what degree.

v. The procedures under which Khadr will be tried are robust, permitting him the assistance of defense counsel, *see* RMC 502(d)(6), 506; a right to discovery, including a right to exculpatory evidence or an adequate substitute if such evidence is classified, *see* RMC 701; the right to take depositions, *see* RMC 702; the right to call witnesses, *see* RMC 703; and many other rights that are carefully described in the Rules for Military Commissions and the MCA. In addition, Khadr will have his case heard before an impartial judge, *see* RMC 902, and will have the right to challenge the impartiality of the members who will decide his guilt, *see* RMC 902. Should Khadr be convicted, the convening authority will be authorized to set aside a finding of guilty or to reduce the severity of the offense or punishment; the convening authority may *never* increase the severity of the offense or punishment. *See* RMC 1107. If Khadr is convicted, he has the right to have his case reviewed by the Court of Military Commission Review. *See* RMC 1201. Beyond that, the Rules for Military Commissions provide that Khadr may petition for his case to be reviewed by the U.S. Court of Appeals for the D.C. Circuit, and even by the U.S. Supreme Court. *See* RMC 1205.

vi. This is more process than has ever been guaranteed to enemy combatants in any war ever fought, and cannot possibly be described as "a legislative act which inflicts punishment without a judicial trial." *Cummings*, 71 U.S. (4 Wall.) at 323. Because any punishment that is imposed on Khadr will only take effect after a "judicial trial" containing an unprecedented panoply of procedural protections for him, including the opportunity for judicial review before an Article III tribunal, the Bill of Attainder Clause has no applicability to the present case.

vii. The Defense attempts to avoid this conclusion by arguing that it is not the result of trial by military commission (with the various procedural and appellate safeguards already described) that constitutes punishment, but the trial itself. However, this reading of the Bill of Attainder Clause turns Supreme Court precedent on its head. The Government is aware of no case holding that merely trying a defendant before an Article I judge *itself* counts as punishment.

viii. Nothing in the Bill of Attainder Clause forbids Congress from prescribing the procedures to be used in military commissions involving a finite class of individuals. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court rejected the President's attempt to set up a system of military commissions without prior express authorization from Congress. *See id.* at 2786. Even among the Justices who voted to strike down the pre-MCA military commissions system, virtually all appeared to agree that it would be appropriate for Congress and the President jointly to enact a system of military commissions. *See, e.g.*, *id.* at 2799 (Breyer, J., concurring, joined by Kennedy, Souter and Ginsburg, JJ.) ("Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary."). Here, Congress and the President have done precisely that and carefully specified the persons subject to the jurisdiction of the military commissions. These limitations on the jurisdiction of the military commissions, which cabin the jurisdiction of the commissions to unlawful enemy combatants, were required by the plurality in *Hamdan*, *see id.* at 2776 (plurality op.) (describing the jurisdiction of those military commissions "convened as an 'incident to the conduct of war'" as being "limited to offenses cognizable during time of war"), and necessarily apply to a finite group of persons concerning a finite group of offenses. Accordingly, they do not remotely pose constitutional problems.

ix. Nor is the extension of the court's jurisdiction to a finite group of persons a "punishment" that could not be accomplished without a trial; rather, it is the prescription of a *process* by which those persons will be tried. This cannot conceivably conflict with the Bill of Attainder Clause. After all, the purpose of the Bill of Attainder Clause is to ensure that a penalty is not imposed until after a fair trial has occurred. It would be perverse, and ultimately self-defeating, if the very act of subjecting a person to the trial itself *violates* the Clause. Nothing in the Constitution compels such an absurd result.

x. The Defense's argument that other provisions of the MCA violate the Bill of Attainder Clause is likewise specious. The Defense argues that the MCA violates the Bill of Attainder Clause by (1) "depriving" Khadr of his rights under the Geneva Conventions; (2) permitting him "to be charged with crimes never before recognized under the law of war"; (3) depriving him of his "right" to a fair trial "either from a court-martial . . . or regular civilian court"; (4) altering hearsay rules; (5) permitting the admission of coerced statement that are reliable, probative and whose admission would serve the interests of justice; (6) altering his ability to call witnesses, as apparently compared to the court-martial procedure; (7) permitting him to be tried before a non-Article III court; (8) limiting his ability to bring actions over detainment conditions; and

(9) "depriving" him of his right to challenge his detention through a writ of habeas corpus. Mot. to Dismiss (Bill of Attainder) at 3-4.

xi. Each of these various claims is easily refuted.

1) *Geneva Conventions:* The Defense claims that the MCA "depriv[es] targeted individuals [sic] all rights under the Geneva Conventions." Mot. to Dismiss (Bill of Attainder) at 3. The only "right" under the Geneva Conventions that arguably applies to Khadr is Common Article 3, which requires that he be tried before "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See Hamdan*, 126 S. Ct. at 2796. Congress has reasonably determined that the MCA affords Khadr such a forum. *See* 10 U.S.C. § 948b(f) ("A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions."). This determination is unquestionably correct, as the MCA and RMC afford Khadr a panoply of procedural protections that far exceed any granted to an unlawful enemy combatant in the history of warfare. Accordingly, the MCA easily meets the requirements of Common Article 3, and Khadr has therefore not been deprived of any rights thereunder.[2]

2) *Charging Khadr with conspiracy, material support for terrorism and spying:* As explained in the Government's other responsive motions filed today, each of the offenses of conspiracy, material support for terrorism and spying is, and was at the time of Khadr's conduct, a violation of the law of war. But even if that were not so, that would mean, at most, that this court might lack jurisdiction over particular charges, and *not* that this court is anything other than a proper judicial forum for purposes of the Bill of Attainder Clause. *See Cummings*, 71 U.S. (4 Wall.) at 323 ("A bill of attainder is a legislative act which inflicts punishment without a judicial trial.").

3) *Right to a fair trial before either a court-martial or regular civilian court:* As described above, the MCA and RMC provide robust procedural protections for Khadr and are modeled after the court-martial rules, which Khadr appears to concede are fair. *See* 10 U.S.C. § 949(a). To the extent the military commission procedures differ from those governing courts-martial, the differences reflect the unique needs of military and intelligence activities implicated by military commissions. Those differences between the MCA and the Uniform Code of Military Justice are limited in scope and do not render a trial under the MCA unfair.

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[2] Khadr does not say of what, if any, other rights under the Geneva Conventions he believes himself to have been "depriv[ed]." Given that Khadr has presented no plausible argument that he qualifies for prisoner of war status under article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135, we are not aware of any rights under the Geneva Conventions of which he may have been "depriv[ed]."

4) *Adapting the Military Rules of Evidence to account for military and intelligence realities:*

(a) The Defense makes much of the fact that the hearsay and other evidentiary rules in military commissions differ from those in civilian courts or courts-martial. However, the limited differences between court-martial rules and those under the MCA merely reflect military and intelligence realities. Unyielding rules of hearsay and discovery are simply impractical when evidence or statements may be sought that were collected half-a-world away in the midst of a battle, as well as in light of the significant amount of classified information likely to be at issue in military commissions. Moreover, nothing in the Constitution prevents Congress from modifying procedural protections, including those governing the admission of hearsay. The Supreme Court has repeatedly upheld Congress's authority to modify procedural and evidentiary trial rules and to make such modifications retroactive. *See, e.g.*, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994) ("Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity."); *see also id.* at 275 n.26 ("While we have strictly construed the Ex Post Facto Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case.") (citing cases); *see also Hopt v. Utah*, 110 U.S. 574, 589 (1884) ("Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.").

(b) We also note that the more liberal evidentiary rules in the MCA (such as the greater admissability of hearsay) do not necessarily work to the accused's disadvantage, since he may rely on such rules to introduce evidence in his own defense. In that sense, the liberalized hearsay rules under the MCA are closely akin to retroactive procedural changes that the Supreme Court has approved in the past. *See, e.g.*, *Carmell v. Texas*, 529 U.S. 513, 546 (2000) (holding that a statute that retroactively lowered the quantum of evidence required to convict violated the Ex Post Facto Clause, but noting that rules liberalizing the *admissibility* of evidence would not: "The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant.").

5) *Trial before a non-Article III court:* The Defense argues that Khadr is being "punished" because he is being tried before an Article I court, rather than an Article III court. *See* Mot. to Dismiss (Bill of Attainder) at 4. This argument fails because Khadr was not subject to trial in an Article III court even before the enactment of the MCA. Rather, under 10 U.S.C. §§ 821, 836 (1998), Khadr was liable to be tried before a military commission authorized under Article I, and not in an Article III court.

(Ironically, even the alternative the Defense favors—court-martial—is an Article I court.) That Khadr will still be tried in an Article I court under the MCA indicates that he is not being retroactively "punished" by the MCA's requirement that he be tried before a military judge.

6) *Actions to challenge detainment and habeas challenges:* Limitations on Khadr's ability to challenge his detention through a habeas petition or otherwise do not violate the Constitution. As the Supreme Court held in *Eisentrager*, and as the Court of Appeals affirmed in *Boumediene*, Khadr enjoys no constitutional right to bring a habeas challenge to the conditions of his confinement or otherwise. Both decisions are binding on this court. In addition, Congress's authority retroactively to limit defendants' ability to bring habeas challenges to their confinement has been repeatedly upheld. *See, e.g.*, *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (retroactive change to habeas statute constitutional). Accordingly, none of the procedural or other provisions of the MCA constitutes "punishment" in violation of the Bill of Attainder Clause.

xii. Given the offenses with which Khadr has been charged, the claim that his trial before this military commission is itself punishment is without merit. In a 142-year-old opinion by the Attorney General, which remains binding on the Executive Branch,

> to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war.

11 Op. Atty. Gen. 297, 312 (1865). In other words, an unlawful combatant, such as Khadr, violates the law of war merely by providing personnel—including himself—to an organization, such as al Qaeda, whose principal purpose is the "killing [and] disabling . . . of peaceable citizens or soldiers." Winthrop, Military Law and Precedents, 784 (1895, 2d ed. 1920). Colonel Winthrop notes that during the Civil War, numerous individuals were charged—and were "liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by a military commission"—based upon their material support for groups of unlawful combatants. *Id.* (emphasis added). *See also* 11 Op. Atty. Gen. at 314 ("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"). Here, Khadr is not being shot on sight or anything of the sort. He is being humanely detained and will be tried before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Nothing more is required.

xiii. Finally, the Defense's selective quoting from the legislative record to support its argument that the Military Commissions Act was intended to guarantee convictions is highly misleading. In support of its argument, the Defense relies on a statement from Senator Levin that the purpose of the Act was "to ensure criminal

convictions." Senator Levin, of course, was an *opponent* of the Act and voted against it, *see* 152 Cong. Rec. S10354-02, S10420 (daily ed. Sept. 28, 2006) (Roll Call Vote No. 259), and his condemnation and critical description of it is therefore, at the very least, suspect. In any event, as described above, the MCA accords the accused an unprecedented level of process in time of war.

c. The Defense's alternative argument that the MCA should be interpreted prospectively is belied by its text and legislative history.

i. The Defense argues that the MCA could plausibly be interpreted to apply prospectively only, and that it should therefore be construed as such under the canon of constitutional avoidance. *See* Mot. to Dismiss (Bill of Attainder) at 8; *see also Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 465-66 (1989) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)) (internal quotation marks omitted).

ii. The basis for this alternative reading, according to the Defense, is that the first definition of unlawful enemy combatants in the MCA, *see* 10 U.S.C. § 948a(1)(A)(i) ("a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)"), lacks the expressly retroactive language found in the second definition for unlawful enemy combatants, *see id.* § 948a(1)(A)(ii) ("a person who, *before, on, or after* the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.") (emphasis added). This slight linguistic discrepancy, read in context, cannot possibly support the interpretation that the statute was intended to apply only prospectively.

iii. First, as explained by the Defense, "the committee hearings and floor debates of the MCA indicate that Congress intended for the Act to apply to those already in U.S. custody at Guantanamo Bay and elsewhere." Def. Mot. to Dismiss (Bill of Attainder) at 6 (citing sources). This is the only plausible reading of the Act, given its opening statement that "[a] military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant *before, on, or after September 11, 2001*." 10 U.S.C. § 948d(a) (emphasis added).

iv. The MCA's retroactive application is confirmed by the opening provisions of its Punitive Matters section, which provides that "[b]ecause the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, *they do not preclude trial for crimes that occurred before the date of the enactment of this chapter*." *Id.* § 950p(b) (emphasis added). The final

italicized clause has no plausible interpretation *other than* that the MCA was fully intended to apply to conduct that predates its enactment. Accordingly, the canon of constitutional avoidance cited by the Defense has no applicability here, since there is no plausible interpretation of the MCA that is faithful both to its text and congressional intent whereby it could be read to apply only prospectively.

d. Conclusion

i. Under binding precedent, the constitutional limitations on bills of attainder do not apply to enemy alien combatants outside the country, like Khadr. Even if they did, however, nothing in the MCA approaches a violation of the Bill of Attainder Clause. Moreover, the Defense's alternative argument that a plausible reading exists whereby the MCA could be interpreted only prospectively is conclusively refuted by the text and legislative history of the Act. Accordingly, the motion to dismiss should be denied.

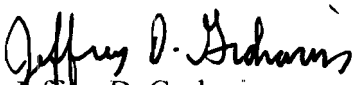
7. Oral Argument: The Prosecution disagrees that the issues presented by the Defense's motion are "complex." Mot. to Dismiss (Bill of Attainder) at 9. In view of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motion should be readily denied. 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:



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

Clayton Trivett, Jr
Lieutenant, U.S. Navy
Assistant Prosecutor

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Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant Prosecutor
Assistant United States Attorney

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** to Dismiss for Lack of Jurisdiction (Bill of Attainder) 7 December 2007

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge's 28 November 2007 scheduling order.

2. **Relief Sought:** The Defendant seeks dismissal of all charges and specifications for lack of jurisdiction.

3. **Overview:**

(1) The Military Commissions Act of 2006 ("MCA" or "Act"), the sole source of this Commission's jurisdiction, is an unconstitutional bill of attainder as applied to Mr. Khadr, who was detained as an alleged unlawful enemy combatant prior to the MCA's enactment. The MCA is a bill of attainder because it singles out a particular class of individuals for a legislative punishment based on past conduct and imposed without judicial trial. The MCA punishes a known group of individuals being detained in U.S. custody as suspected unlawful enemy combatants. It does so by altering the rules of evidence and procedure that applied before, during and after their alleged conduct (until 17 October 2006); depriving them of civil and political rights and privileges, including the right to a fair trial; and depriving them of the right to access the courts. Because the Constitution expressly withholds from Congress the power to enact bills of attainder, the MCA is without effect. This Commission is thus without authority to hear this case.

(2) In the alternative, and in order to avoid constitutional difficulties, the MCA must be interpreted to apply only prospectively to those who have allegedly engaged in or supported hostilities against the United States *after* the enactment of the MCA. This prospective interpretation of the MCA clearly excludes Mr. Khadr, who is therefore not subject to this Commission's jurisdiction.

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

5. **Facts:**

a. The government alleges that Mr. Khadr, a Canadian citizen, was captured by U.S. forces in Afghanistan on July 27, 2002, when he was 15 years of age. Sworn Charges ¶ 12 (2 Feb 07).

b. In June 2006, the Supreme Court held in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that the President did not have the authority to create the military commissions as constituted, that the commissions were "illegal" and violated U.S. and international law, including Common Article 3 of the Geneva Conventions.

c. In September 2006, both houses of Congress passed the Military Commissions Act of 2006, and the President signed it into law on October 17, 2006. *See* P.L. 109-366, 120 Stat. 2600. The MCA was enacted in part as a response to *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). *See infra* note 10 at 8.

d. All the charges against Mr. Khadr relate to conduct that is alleged to have occurred on or before the date of his capture in July 2002, well before the passage of the MCA. *See* Charge Sheet (24 Apr 2007).

6. Argument:

1. This Commission Lacks Jurisdiction Over Mr. Khadr Because The Act That Grants This Commission Jurisdiction Is An Unconstitutional Bill Of Attainder

a. The Constitution Divests Congress Of Authority To Enact Bills Of Attainder

(1) The Military Commissions Act (MCA), the source of this Commission's authority to hear the present case, is an unconstitutional bill of attainder, at least as applied to Mr. Khadr and others held in custody as alleged unlawful enemy combatants prior to the MCA's enactment. The Constitution prohibits the enactment of bills of attainder, U.S. CONST. art. I, § 9, cl. 3, which consist of "[t]he singling out of an individual for legislatively prescribed punishment . . . whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Selective Serv. Sys. v. Minn. Pub. Interest Rsch. Group*, 468 U.S. 841, 847 (1984) (internal quotation and citation omitted). Thus, under the U.S. Constitution, for an improper bill of attainder to exist, there must be: (a) an individual or group singled out; (b) for a legislative punishment imposed without judicial trial; (c) where the punishment was imposed based on irreversible past conduct. *Selective Serv. Sys.*, 468 U.S. at 847.

(2) The individual or group of people singled out by the MCA for legislative punishment are the class of individuals detained at Guantanamo Bay and elsewhere *before* the MCA was enacted. The "legislative punishment" in the case at bar is a federal statute (the MCA) that subjects targeted individuals to imprisonment and possible execution without a fair trial that fully affords them their legal rights. The MCA punishes this group for alleged conduct that occurred *before* the MCA was passed. The MCA, therefore, operates as a bill of attainder when applied to Mr. Khadr and others who were already in U.S. custody before the MCA's enactment.

(3) The Constitution denies Congress the power to enact bills of attainder, and any bill of attainder enacted is of no force and effect. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901). This conclusion does not depend on what rights, if any, Mr. Khadr retains under the

Constitution because the prohibition on bills of attainder is a structural limitation on Congress' legislative power. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder . . . shall be passed,' . . . it goes to the competency of Congress to pass a bill of *that description*.") (emphasis in original). Because the MCA is a bill of attainder, it is of no force and effect. Lacking any other basis for its jurisdiction, the Commission must dismiss Mr. Khadr's case in its entirety.

b. The Military Commissions Act Imposes Legislative Punishment Without Judicial Trial

(1) The Supreme Court has held that the prohibition on bills of attainder is "to be read in light of the evil the Framers had sought to bar: *legislative punishment, of any form or severity*, of specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965) (emphasis added). The MCA imposes two such legislative punishments, both of which have been held by the Court to constitute attainder. The MCA imposes the punishment of "deprivation or suspension of political or civil rights," including the right to a fair trial, and "disqualification . . . from the privilege of appearing in the courts." *Cummings v. Missouri*, 71 U.S. 277, 322, 320 (1867). These legislative punishments are imposed without a prior judicial trial by a "duly constituted court." *Lovett*, 328 U.S. at 317.

(a) <u>Altering The Rules Of Evidence And Procedure That Applied Before, During And After The Alleged Conduct Until 17 October 2006 And Depriving Targeted Individuals Of Civil And Political Rights And Privileges, Including The Right To A Fair Trial And The Right To Access To Courts Is Legislative Punishment</u>

(i) The MCA deprives targets of the Act their civil and political rights and privileges, including the right to a fair trial and the right to access to courts. These rights' deprivations, which violate U.S. domestic and international law, impermissibly punish Mr. Khadr. The impermissible punishment includes:

- depriving targeted individuals all rights under the Geneva Conventions, 10 U.S.C. § 948b(g);[1]

[1] Common Article 3(d) of the four Geneva Conventions of 1949 provides that "the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons. . . ."(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

While, MCA § 948b(f) states that the Act complies with the Common Article 3 of the Geneva Conventions, "[i]t is emphatically the province and duty of the *judicial department* to say what the law is." *Id.* (emphasis added). Thus, Congress's attempt in the MCA to "say what the law is" violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.").

- permitting targeted individuals to be charged with crimes never before recognized under the laws of war (e.g., conspiracy, "providing material support for terrorism," and spying as defined in 10 U.S.C. § 950v(b)(27));
- depriving targeted individuals of their right to a fair trial, either from a court-martial (for alleged violations of the law of war) or a regular civilian court;
- suspending rules that bar hearsay evidence, § 949a(b)(2);[2]
- The MCA permits coerced evidence to be admitted even if the evidence is obtained as a result of cruel, inhuman, or degrading treatment (if the 'degree of coercion' involved is disputed), § 948r;
- severely limiting a targeted individual's ability to call witnesses in his defense, § 949j; RMC 703(c)(2);
- subjecting targeted individuals to trials presided over by a judge and military commissioners (rather than a civilian judge and jury)[3] who are not sufficiently independent and who are not immune from political pressure, §§ 948i and 948j;
- depriving targeted individuals of the right to bring an action addressing or redressing egregious treatment at the hands of one's jailers, which the targeted individuals had before 17 October 2006, MCA § 7(a);
- depriving targeted individuals of the right to challenge one's detention under the Great Writ of *habeas corpus*, MCA § 7(a).[4]

(ii) All of these restrictions constitute impermissible legislative punishment. The Supreme Court has long held that the types of punishment forbidden by prohibition on attainder are "not . . . restricted . . . to the deprivation of life, liberty, or property, but also embrac[e] deprivation or suspension of political or civil rights." *Cummings*, 71 U.S. at 322. In *Cummings*, the Court held provisions of the Missouri Constitution to operate as a bill of attainder because "[t]he clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable." *Id.* at 328. The MCA's unfair trial provisions constitute this same sort of impermissible punishment. The legislative history of the MCA suggests that the central purpose of the MCA provisions establishing military commissions was "to ensure criminal convictions" and thereby to impose criminal sentences. *See* 152 Cong. Rec. S10,244 (daily ed. Sep. 27, 2006) (statement of Sen. Levin). The fact that the MCA provides for the illusion of a fair trial as a way point on the road to conviction does not alter the conclusion that it constitutes legislative punishment. In addition, the *habeas*- and other court-stripping provisions constitute that sort of "disqualification . . . from the privilege of appearing in

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[2] Military Rules of Evidence 801-07 applied to military commissions at the time of the alleged conduct and prior to 17 October 2006. *See* 10 U.S.C. §§ 821, 836 (1998); *Hamdan*, 126 S.Ct. at 2792-93.

[3] Certainly applicable to those detainees alleged to have engaged in conduct only in violation of federal terrorism statutes applicable at the time of their actions.

[4] *But see Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (June 29, 2007) (No. 06-1195).

courts" that was also held by the *Cummings* Court to be an impermissible legislative punishment. *Id.* at 320; *see also Rasul v. Bush*, 542 U.S. 466 (2004).

(iii) Furthermore, these punishments are imposed without any antecedent judicial trial. In a case such as this one, where the unfair trial procedures are themselves part of the legislative punishment being imposed, such unfair proceedings cannot render the punishment lawful. In this case, Mr. Khadr will have no recourse to any fair judicial process before being subjected to the Commission's punitive proceeding. *See United States v. Khadr*, No. 07-001 (Ct. Mil. Comm'n Rev. Sep. 24, 2007) (holding that, if personal jurisdiction is challenged by the accused, the Commission itself must determine whether Mr. Khadr is an unlawful enemy combatant properly subject to its jurisdiction).

(iv) The fact that Congress could have achieved legitimate nonpunitive goals in a less burdensome manner but chose the more restrictive route, is evidence that the MCA restrictions constitute impermissible legislative punishment. *See Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 482 (1977) (noting "the existence of less burdensome alternatives by which [the] legislature . . . could have achieved its legitimate nonpunitive objectives."). Congress could have opted to permit enemy combatants to be tried in regularly constituted courts of the military justice system as it required before the MCA was enacted. *See* 10 U.S.C. §§ 821, 836 (1998); *Hamdan*, 126 S.Ct. at 2792-93. However, Congress chose instead to craft a *sui generis* commission system that imposes the punitive and unprecedented deprivations of rights listed above to a targeted group of individuals for past conduct. Congress considered and rejected a version of the bill that would have tracked the courts-martial procedures much more closely and thereby eliminated many of the punitive aspects of the Commissions process. *See* 152 Cong. Rec. S10,263 (daily ed. Sep. 27, 2006) (rejecting the substitute bill written by the Senate Armed Services Committee and proposed as an amendment by Senator Levin).[5] Furthermore, with respect to the *habeas*-stripping provisions of the MCA, Congress could simply have refrained from enacting this punitive provision, as it came within two votes of doing. *See* 152 Cong. Rec. S10,369 (2006) (rejecting by a vote of 51-48 Senator Specter's amendment, which would have eliminated the *habeas*-stripping provision). Instead, it chose to authorize a system employing rules of evidence and procedure tailored to fit an existing group of cases, depriving detainees of key legal protections in order to facilitate "convictions."

(v) By subjecting targeted individuals to an unfair trial and depriving them of their legal rights and access to courts, the Congress has imposed an impermissible legislative punishment. Because no proper judicial tribunal will determine whether targeted individuals are subject to the punitive jurisdiction of the military commission—the unfair procedures of the

[5] In urging his fellow Senators to vote for his amendment Senator Levin described the bill that was ultimately passed as "the product of negotiations" "with an administration that has been relentless in its determination to legitimize the abuse of detainees *and to distort the military commission procedures to ensure criminal convictions*." 152 Cong. Rec. S10,244 (daily ed. Sep. 27, 2006) (statement of Sen. Levin) (emphasis added). Senator Reed noted that, unlike the rejected version of the bill, which "start[ed] with the rules applicable in trials by courts-martial as the governing provision, and then establish[ed] exceptions," in the enacted version "the Secretary of Defense is required to make trials by commission consistent with those rules only when he considers it is practical. The exception has swallowed up the rule." 152 Cong. Rec. S10,259 (statement of Sen. Reed).

Commission itself govern such determinations—the MCA clearly imposes these punishments without judicial trial and is thus a bill of attainder.

c. The Military Commissions Act Impermissibly Punishes Members Of A Readily Identifiable Class Based On Their Irreversible Past Conduct

(1) Unconstitutional bills of attainder single out classes of individuals in "terms of conduct which, because it is past conduct, operates only as a designation of particular persons," *United States v. Lovett*, 328 U.S. 303, 315 (1946), particularly where the past conduct at issue consists of "irreversible acts." *Selective Serv. Sys.*, 468 U.S. at 848. The MCA clearly singles out those who were being detained in U.S. custody as suspected unlawful enemy combatants because of alleged past conduct on the battlefield or elsewhere. The plain text of the MCA indicates that the commissions apply only to alien unlawful enemy combatants, defined in part as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States." 10 U.S.C. § 948a(1)(A)(i) (emphasis added).[6] This definition encompasses those who were already in custody when the MCA was enacted and targets such individuals for their past conduct, that is, for having allegedly engaged in or supported hostilities against the United States before the date of the MCA's enactment.[7]

(2) That the definition above is intended to be retrospective is made clear by surrounding provisions of the Act. The second part of the definition of unlawful enemy combatant includes those determined by a CSRT to be an unlawful enemy combatant "*before* . . . the date of enactment" of the MCA. § 948a(1)(A)(ii) (emphasis added). And the habeas-stripping provisions of the MCA also apply retrospectively to those already in U.S. custody at the time of enactment. *See* MCA, Pub. L. No. 109-366 § 7(b), 120 Stat. 2600, 2635-36 (2006) (to be codified at 28 U.S.C. § 2241(e)). Most tellingly of all, the MCA states that "[a] military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant *before, on, or after September 11, 2001*." § 948d(a) (emphasis added). These provisions make it unmistakably clear that the definition of an unlawful enemy combatant – the only class of individuals subject to trial by military commission, *see* § 948c – is intended to target individuals for conduct occurring well before the act's passage.

(3) Furthermore, the committee hearings and floor debates on the MCA indicate that Congress intended for the Act to apply to those already in U.S. custody at Guantanamo Bay and elsewhere. *See, e.g.*, 152 Cong. Rec. S10,243 (daily ed. Sep. 27, 2007) (statement of Sen. Frist) (contending that "[u]ntil Congress passes this legislation, terrorists such as Khalid Shaikh

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[6] Under the Court of Military Commission Review opinion of September 24, 2007, this Commission's jurisdiction over Mr. Khadr must be predicated on this part of the definition of an unlawful enemy combatant and not on any CSRT determination per 10 U.S.C. § 948a(1)(A)(ii). *United States v. Khadr*, No. 07-001 (Ct. Mil. Comm'n Rev. Sep. 24, 2007).

[7] To be sure, the definition also encompasses individuals who are in custody for engaging in or supporting hostilities *after* the MCA's enactment. The MCA would not constitute a bill of attainder as applied to such individuals. However, all of the individuals so far charged in the military commissions are being prosecuted for conduct that occurred well before the MCA's enactment.

Mohammed [who was already in U.S. custody at the time] cannot be tried for war crimes," and thus clearly contemplating retrospective application of the Act); *id.* at S10,259 (statement of Sen. Reed) (pointing out that the military commissions will apply to "all of the individuals we are talking about today—the 14 [high-value] detainees at Guantanamo Bay and others—[who] are [all] enemy combatants"). There are in fact at least two references in the record to the specific case of Mr. Khadr. *See id*. at S10,273 (statement of Sen. Cornyn) (describing Mr. Khadr's particular case as a reason to support the habeas-stripping provisions); *id.* at S10,368 (daily ed. Sep. 28, 2006) (statement of Sen. Graham) (same).

(4) In any case, the context of the MCA's passage makes it unmistakably clear that it was intended to create a Commissions system that would apply retroactively to individuals like Mr. Khadr. The Administration freely concedes that the MCA was a direct response to the Supreme Court's decision in *Hamdan*, in which it ruled, *inter alia*, that the commissions as then constituted were beyond the President's authority without additional congressional authorization.[8] Mr. Khadr was among the individuals charged under the old commissions system and it is clear that the Congress and Administration intended for the MCA simply to provide statutory authorization necessary to establish new commissions to replace the old. *See* H. Doc. 109-133 (Sep. 17, 2006) (message from the President accompanying draft proposed MCA, noting that "[t]his draft legislation responds to . . . *Hamdan v. Rumsfeld* by establishing for the first time in our Nation's history a comprehensive statutory structure for military commissions that would allow for the fair and effective prosecution of captured members of al Qaeda and other unlawful enemy combatants") (citation omitted).

(5) The historical context, legislative history, and statutory text together make it unmistakably clear and very "easily ascertainable," *Lovett*, 328 U.S. at 315, that the MCA was specifically intended to encompass suspected unlawful enemy combatants already in U.S. custody and to subject them to its punitive provisions.

(6) Put simply, Congress, by enacting the MCA, has targeted Mr. Khadr for acts allegedly occurring *before* passage of the act, allowing him no way to escape the punitive deprivation of legal rights and the threat of punishment that the MCA imposes. This sort of "singling out of an individual for legislatively prescribed punishment" due to "past conduct" is precisely what the prohibition on attainder was directed against. *Selective Serv. Sys.*, 468 U.S. at 847. Indeed, the Supreme Court has noted that retrospective punishment—as opposed to prospective regulation—is one of the hallmarks of bills of attainder. *See Flemming v. Nestor*, 363 U.S. 603, 614 (1960) ("The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation . . . .") (quoting *De Veau v. Braisted*, 363

[8] In a speech given on the occasion of the administration submitting draft military commission legislation to Congress, the President described the immediate impetus for the legislation as follows: "The Supreme Court determined that military commissions are an appropriate venue for trying terrorists, but ruled that military commissions needed to be explicitly authorized by the United States Congress. So today, I'm sending Congress legislation to specifically authorize the creation of military commissions to try terrorists for war crimes." Address of President George W. Bush at the White House, Sep. 6, 2006, *available at* http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.

U.S. 144, 160 (1960) (plurality opinion)); *accord United States v. Brown*, 381 U.S. 437, 462 (1965) (White, J., dissenting); *see also supra* note 8 at 6 (explaining that the purpose of the imposition of punishment is irrelevant). Because The MCA cannot be understood as a prospective regulation, at least as applied to Mr. Khadr and others held in custody as alleged unlawful enemy combatants prior to the MCA's enactment, it must be regarded as just the sort of retrospective punishment that Congress is forbidden from imposing.

(7) Under the U.S. Constitution, for an improper bill of attainder to exist, there must be: (a) an individual or group singled out; (b) for a legislative punishment imposed without judicial trial; (c) where the punishment was imposed based on irreversible past conduct. It is axiomatic that a court must dismiss an action if the statute that purports to grant jurisdiction is unconstitutional. *Marbury v. Madison*, 5 U.S. 137 (1803). Accordingly, this Commission must dismiss this case against Mr. Khadr.

d. In The Alternative, In Order To Avoid Constitutional Difficulties, This Commission Should Interpret The Military Commissions Act To Apply Only Prospectively

(1) As shown above, if interpreted to apply retrospectively, the unlawful enemy combatant definition impermissibly and unconstitutionally subjects targeted individuals to legislative punishment based on irreversible past conduct. This Commission should therefore find the Military Commissions Act invalid and unconstitutional as applied to Mr. Khadr. However, the Supreme Court has stated that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 465-66 (1989). Thus, in the alternative, we ask this Commission to construe the Military Commissions Act so as to avoid rendering it an unconstitutional bill of attainder as applied to Mr. Khadr. Specifically, this Commission should not read the words of the crucial unlawful enemy combatant definition to apply retrospectively. "[I]f such a construction is fairly possible" this Commission should adopt it in order to "avoid raising doubts of [the Act's] constitutionality." *St. Martin Lutheran Evangelical Church v. South Dakota*, 451 U.S. 772, 780 (1981).

(2) The MCA defines an unlawful enemy combatant, in relevant part, as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States." 10 U.S.C. § 948a(1)(A)(i). This definition does not itself explicitly state that such hostilities must have occurred *before* the passage of the MCA (unlike the second part of the definition, which explicitly states that it applies to any person determined to be a unlawful enemy combatant by a CSRT "before, on, or after" the date of enactment, §948a(1)(A)(ii)). This provision of the Act does not apply to Mr. Khadr as this Commission and the Military Commission Court of Review have already found since no CSRT has determined that Mr. Khadr is an unlawful enemy combatant. It thus could be argued that it is "fairly possible," to construe the statute so that the unlawful enemy combatant definition applies only *prospectively*, and includes only those individuals who have "engaged in . . . or . . . supported hostilities" *after* the passage of the Act. *St. Martin Lutheran*, 451 U.S. at 780; 10 U.S.C. § 948a(1)(A)(i).

(3) By construing the definition prospectively, the Act would no longer plausibly be a bill of attainder, because it would no longer target individuals for past conduct and would function as a regulation of future behavior rather than a punishment for irreversible past acts. Such a definition would exclude Mr. Khadr, who was captured on the battlefield in 2002, has been in U.S. custody since then, and has not "engaged in . . . or supported hostilities" after the MCA's passage in 2006. On this alternative interpretation, this Commission must dismiss for lack of jurisdiction because Mr. Khadr cannot come within the MCA definition of an unlawful enemy combatant subject to trial by military commission.

e. Conclusion

(1) The Military Commission Act constitutes a bill of attainder when applied to Mr. Khadr. Because congress is without the power to enact bills of attainder, the MCA is of no effect in this case. Accordingly, the charges must be dismissed.

(2) In the alternative, in order to avoid ruling on a constitutional question, this Commission should construe the unlawful enemy combatant definition, 10 U.S.C. § 948a(1)(A)(i), to apply only prospectively to those who have engaged in or supported hostilities against the United States *after* the passage of the MCA. As all of Mr. Khadr's alleged hostile conduct occurred well before the MCA's passage, the Commission must dismiss the case because he does not come within this interpretation of the MCA's definition of an unlawful enemy combatant subject to trial by military commission.

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

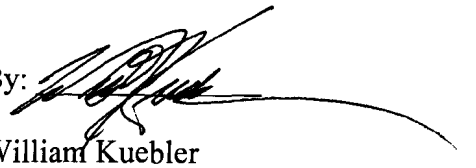
8. **Witnesses and Evidence:** None.

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. **List of attachments:**

A. Sworn Charges (2 Feb 07)

By: 

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
OFFICE OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

_____
(day) (month) (year)

MEMORANDUM FOR Detainee Omar Ahmed Khadr 0766, Guantanamo Bay, Cuba

SUBJECT: Notification of the Swearing of Charges

1. You are hereby notified that criminal charges were sworn against you on the ____ day of _____, 2007, pursuant to the Military Commissions Act of 2006 (MCA) and the Manual for Military Commissions (MMC). A copy of this notice is being provided to you and to your detailed defense counsel.

2. Specifically, you are charged with the following offenses:

MURDER IN VIOLATION OF THE LAW OF WAR

ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

CONSPIRACY

PROVIDING MATERIAL SUPPORT FOR TERRORISM

SPYING

(Read the charges and specifications to the accused. If necessary, an interpreter may read the charges in a language, other than English, that the accused understands.)

AFFIDAVIT OF NOTIFICATION

I hereby certify that a copy of this document was provided to the named detainee this ____ day of _____, 2007.

Signature	Organization
Typed or Printed Name and Grade	Address of Organization

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

2. ALIASES OF ACCUSED:
Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0766

II. CHARGES AND SPECIFICATIONS

4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC
5d. SIGNATURE OF ACCUSER		**5e. DATE (YYYYMMDD)**
		20070202

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 2nd day of February, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

Commissioned Officer, U.S. Marine Corps
Official Capacity to Administer Oath
(See R.M.C. 307(b) must be commissioned officer)

Jeffrey D. Groharing
Signature

MC FORM 458 JAN 2007

IV. NOTICE TO THE ACCUSED

6. On February 2, 2007 the accused was notified of the charges against him/her (See R.M.C. 308).

Jeff Groharing, Major, U.S. Marine Corps
Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges

Office of the Chief Prosecutor, OMC
Organization of the Person Who Caused Accused to Be Notified of Charges

_____
Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at _____ hours, on _____, at _____

_____.
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

_____
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

Referred for trial to the (non)capital military commission convened by military commission convening order _____

_____.

_____ subject to the following instructions[1]: _____

_____

By _____ of _____.
Command, Order, or Direction

_____
Typed Name and Grade of Officer

_____
Official Capacity of Officer Signing

_____
Signature

VII. SERVICE OF CHARGES

9. On _____, _____ I (caused to be) served a copy these charges on the above named accused.

_____
Typed Name of Trial Counsel

_____
Grade of Trial Counsel

_____
Signature of Trial Counsel

FOOTNOTES

[1]See R.M.C. 601 concerning instructions. If none, so state.

MC FORM 458 JAN 2007

UNITED STATES OF AMERICA	)	**CHARGES**
	)	
	)	**Murder in Violation of the Law of War**
	)	
	)	**Attempted Murder in Violation of the Law of War**
v.	)	
	)	
	)	**Conspiracy**
	)	
OMAR AHMED KHADR	)	**Providing Material Support for Terrorism**
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	**Spying**
a/k/a "Ahmed Muhammed Khali"	)	

INTRODUCTION

1. The accused, Omar Ahmed Khadr (a/k/a Akhbar Farhad, a/k/a Akhbar Farnad, a/k/a Ahmed Muhammed Khali, hereinafter "Khadr"), is a person subject to trial by military commission for violations of the law of war and other offenses triable by military commission, as an alien unlawful enemy combatant. At all times material to the charges:

JURISDICTION

2. Jurisdiction for this Military Commission is based on Title 10 U.S.C. Sec. 948d, the Military Commissions Act of 2006, hereinafter "MCA;" its implementation by the Manual for Military Commissions (MMC), Chapter II, Rules for Military Commissions (RMC) 202 and 203; and the final determination of the Combatant Status Review Tribunal of September 7, 2004, that Khadr is an unlawful enemy combatant as a member of, or affiliated with, al Qaeda.

3. The accused's charged conduct is triable by a military commission.

BACKGROUND

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

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

6. In late 1994, Ahmad Khadr was arrested by Pakistani authorities for providing money to support the bombing of the Egyptian Embassy in Pakistan. While Ahmad Khadr was incarcerated, Omar Khadr returned with his siblings to Canada to stay with their grandparents.

Khadr attended school in Canada for one year while his father was imprisoned in Pakistan before returning to Pakistan in 1995.

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

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

9. After al Qaeda's terrorist attacks against the United States on September 11, 2001, the Khadr family moved repeatedly throughout Afghanistan.

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

11. After completing his training, Khadr joined a team of other al Qaeda operatives and converted landmines into remotely-detonated improvised explosive devices, ultimately planting these explosive devices to target U.S. and coalition forces at a point where they were known to travel.

12. U.S. Forces captured Khadr on July 27, 2002, after a firefight resulting in the death of three members of the U.S. led coalition and injuries to several other U.S. service members.

GENERAL ALLEGATIONS

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

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

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

16. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

17. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and

supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

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

19. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

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

21. In or about 2001, al Qaeda's media committee created As Sahab ("The Clouds") Media Foundation, which has orchestrated and distributed multi-media propaganda detailing al-Qaeda's training efforts and its reasons for its declared war against the United States.

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

23. Following al Qaeda's attacks on September 11, 2001, and in furtherance of its goals, members and associates of al Qaeda have violently opposed and attacked the United States or its Coalition forces, United States Government and civilian employees, and citizens of various countries in locations throughout the world, including, but not limited to Afghanistan.

24. On or about October 8, 1999, the United States designated al Qaeda a foreign terrorist organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

CHARGE 1: VIOLATION OF PART IV, M.M.C. SECTION 950v(15), MURDER IN VIOLATION OF THE LAW OF WAR

25. Specification: 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.

CHARGE II: VIOLATION OF PART IV, M.M.C., SECTION 950t, ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

26. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, between, on, or about June 1, 2002, and July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, attempt to commit murder in violation of the law of war, by converting land mines into improvised explosive devices and planting said improvised explosive devices in the ground with the intent to kill U.S. or coalition forces.

CHARGE III: VIOLATION OF PART IV, M.M.C., SECTION 950v(28), CONSPIRACY

27. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from on or about June 1, 2002 to on or about July 27, 2002, willfully join an enterprise of persons who shared a common criminal purpose, said purpose known to the accused, and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al adel, Ahmad Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, to commit the following offenses triable by military commission to include: attacking protected property; attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; hijacking or hazarding a vessel or aircraft; and terrorism.

28. In addition to paragraph 27, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet.

29. Additionally, in furtherance of this enterprise and conspiracy, Khadr and other members of al Qaeda performed overt acts, including, but not limited to the following:

a. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmad Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

b. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

c. In or about July 2002, Khadr attended one month of land mine training.

d. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

e. On or about July 27, 2002, near the village of Ayub Kheil, Afghanistan, U.S. forces surrounded a compound housing suspected al Qaeda members. Khadr and/or other suspected al Qaeda members engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members. Khadr and/or the other suspected al Qaeda members also threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

f. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

CHARGE IV: VIOLATION OF PART IV, M.M.C., SECTION 950v(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM

30. Specification I: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such organization that engaged, or engages, in terrorism, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

31. In addition to paragraph 30, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

32. Specification II: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to be used in preparation for, or carrying out an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, and that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

33. In addition to paragraph 32, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

CHARGE V: VIOLATION OF PART IV, M.M.C., SECTION 950v(27), SPYING

34. Specification. In that Omar Ahmed Khadr, a person subject to military commission as an alien unlawful enemy combatant, did in Afghanistan, in or about June 2002, collect certain information by clandestine means or while acting under false pretenses, information that he intended or had reason to believe would be used to injure the United States or provide an advantage to a foreign power; that the accused intended to convey such information to an enemy of the United States, namely al Qaeda or its associated forces; that the conduct of the accused took place in the context of and was associated with an armed conflict; and that the accused committed any or all of the following acts: on at least one occasion, at the direction of a known al Qaeda member or associate, and in preparation for operations targeting U.S. forces, the accused conducted surveillance of U.S. forces and made notations as to the number and types of vehicles, distances between the vehicles, approximate speed of the convoy, time, and direction of the convoys.

[redacted], SSG, DoD OGC

[redacted]

Subject: Ruling - D-013 - Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder) - US v. Khadr

Attachments: D-013 - Ruling - Final.pdf

COL Brownback has directed that I forward the attached ruling to counsel and other interested persons.

v/r,

LTC [redacted] USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

[redacted]

Subject: Ruling - D-013 - Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder) - US v. Khadr

LTC [redacted],

Attached is the commission's ruling on D-013, the defense motion to dismiss for lack of jurisdiction (Bill of Attainder). Please forward it to counsel in the case of United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

[redacted], SSG, DoD OGC

[redacted]

Subject: U.S. v. Khadr -- D-013

Attachments: 2008-01-04 Defense Reply re MTD Bill Attainder - D-013.pdf

Sir,

Please find attached for filing the Defense Reply to the Government Response to the Defense Motion to Dismiss (Bill of Attainder).

VR,

LCDR Kuebler

SSG, DoD OGC

Subject: FW: FW: Delay in Filing Reply - D - 013 US v Khadr

: Re: FW: Delay in Filing Reply - D - 013 US v Khadr

Sir,

Please forward the following email to Colonel Brownback:

1. Clearly the request by the Defense should have been considered a special request for relief under the Military Commissions Rules of Court, Rule 3.4. Under RC 3.4, special requests for relief must include a certificate of conference indicating that the moving party has conferred with the opposing party and whether the opposing party concurs or objects with the requested relief. RC 3.4 further provides, that if the moving party has made a best effort to confer with the opposing party and has not been able to do so, through no fault of their own, the efforts made shall be listed.

2. In the present case, the Defense did not confer with the Prosecution prior to filing the request, nor did the request note any efforts that were made in attempting to do so.

3. Although the opposing party is not required to respond, the rules of court provide for an opportunity for the opposing party to respond as soon as possible, if it so desires.

4. The Defense sent the subject request after the close of business on Tuesday, 18 December, filing at 1803. Upon reviewing the request this morning, the Government was preparing a response despite the fact that the Military Judge had not yet solicited whether we were going to respond. The Government received the Military Judge's decision before we were able to file our response.

5. Based on the fact that the rules of court were not followed, and the fact that the Military Judge decided the issue prior to receiving, or soliciting, any input from the Government, the Government requests the military judge reconsider his ruling taking into account the following:

a. On 7 December 2007, the Defense served upon the Government and this Court a total of six motions to dismiss. Those six pleadings, not including their attachments, contained 35,520 words over a span of 69 pages. Notwithstanding the breadth of issues raised therein—ranging from statutory to constitutional to international law—the Government responded at 1639 on 14 December with responses to the Defense filings, but for a technical issue getting the motions scanned, within the 7 day timeline set forth in the Military Commission Trial Judiciary Rules of Court.

b. Yesterday's Defense request for delay is the latest in a series of requests for delay since the inception of this case. The Defense has requested delays for every proceeding and virtually every pleading filed in this case, while contemporaneously complaining in the media how the government has failed to bring the accused to trial, despite holding him

since July 2002. Granting the Defense request would effectively provide the Defense with 21 days to reply to the Government responses, three times the amount of time the Government was given to respond to the original Defense motions.

c. The most recent request is premised on two bases: (1) logistical difficulties have prevented the Defense from preparing replies while at Guantanamo Bay; and (2) the Government's response briefs have provided the Defense with a "first look" at some of the more important legal issues involved in this case. Neither basis supports the Defense request for an additional 15 days to file replies.

d. The Defense arranged to travel to Guantanamo Bay this week, having full knowledge that any replies would be required to be filed by Wednesday, 19 December. Furthermore, the technical difficulties the Defense encountered are the same that all parties face upon arrival at GTMO, and should always be anticipated and taken into account. The Defense has already been given an additional day to reply to the Government responses. Their most recent difficulties at Guantanamo certainly do not provide justification for an additional two weeks to reply to the Government responses.

e. The Defense second basis for delay is that the Government briefs provided the Defense with a "first look" at the issues involved in this case, claiming they are unable to adequately research and brief these issues in the time allotted by the court. This argument is completely unsupportable, considering the issues now before the Court were raised by the Defense. The Defense has had months to prepare its arguments on these motions, and, based on the breadth and depth of their treatment in the Defense's opening briefs, the Defense has obviously thought long and hard about the issues it considers relevant here.

f. It is absolutely unfair to the Government for this court to permit a schedule that allows the defense weeks, if not months, to prepare their opening briefs, requires the government to respond in seven days, and then permits the defense an additional 21 days to reply. Any reasonable litigator can see the unfairness in that schedule - and the unfairness is only magnified when one considers the complaints by the defense about the length of the accused's detention, the fact that the defense seeks delay at every juncture, and the fact that the defense's publicly-stated strategy is to drag this process out long enough to avoid a trial while convincing others that the accused should be released from detention.
This modified schedule, and every other defense request for delay that has been granted, plays right into the hands of that defense strategy.

g. The Government therefore respectfully opposes the latest Defense request for a delay. As the Government has previously noted, and as the Defense has repeatedly emphasized in its statements to the press, the Defense wants to litigate this case in the court of public opinion—not before the Military Judge. With each new request for delay, the Defense also requests a delay in the administration of justice.

h. The timelines established in the Military Commission Trial Judiciary Rules of Court are sufficient to allow the Defense to respond, just as the Government did. At most, the Defense should be granted a one (1) day extension in light of their difficulties encountered yesterday. The additional two week delay is not supportable by the record and is inherently unfair to the Government.

6. Additionally, the Government requests the Military Judge make clear that any additional time that he does permit in this instance, cannot and will not be used to support any further delays to the current trial schedule, including the legal motions due 11 January 2008.

V/R,

Major Groharing

[redacted], LTC, DoD OGC wrote:

> COL Brownback has directed that I forward the email below to counsel
> and other interested persons.
>

> v/r,
>
> LTC [redacted], USAR
>
>>Senior Attorney Advisor
>
> Military Commissions Trial Judiciary
> Department of Defense
>
> [redacted] D - 013
>
> LTC [redacted],
>
> The defense request to delay filing a reply in D - 013 is approved.
> The reply is due no later than 1700 hours, 4 January 2008.
>
> COL Brownback
>
> [redacted] Request for Additional Time to File
> Replies (D:011-013)
>
> Sir,
>
> 1. The defense respectfully requests additional time in which to file
> replies to three of the government response briefs to the defense
> motions to dismiss. The defense expects to be able to file the
> balance within the time currently allotted.
>
> 2. Defense counsel are currently at GTMO. Our flight was delayed
> leaving Virginia yesterday morning. We arrived in GTMO late yesterday
> afternoon to discover that, despite having submitted the request weeks
> ago, we had not received country clearance. We were detained at the
> air terminal, under armed guard, upon arrival until the matter was
> (for the time being) resolved. After finally arriving at the OMC
> offices last night, we discovered a number of computer and other
> logistical problems (in addition to those ordinarily present in GTMO)
> that have hampered our ability to competently respond to the
> government's briefs. These
> include:
>
> a. Our JTF computer accounts were disabled and had to be reactivated;
>
> b. The OSD "dial up" connection for our lap top had been disabled;
>
> c. Our printer connections had been deactivated;
>
> d. We were hampered in efforts to contact J6 for support by the late
> hour and the fact that we were issued cell phones with dead batteries;
>
> e. When we did make contact with J6 and they restored our accounts,
> we learned that 4 computers in our office would not work (the first 4

> we tried to use);
>
> f. Upon activation, the computers were particularly slow to boot up
> due to upgrades or patches installed by J6 staff since our last visit;
>
> g. Ms. Snyder's computer crashed; and
>
> h. For whatever reason, internet access has been unusually slow, it
> is often taking several minutes for web pages to load (particularly on
> LEXIS) and the pages sometimes timeout.
>
> 3. In addition to the technical issues cited above, we simply do not
> have ready access to a number of the sources (e.g., treatises) relied
> upon by the government in their response briefs and sources that we
> need to consult in our office in Washington. Due to weight limits on
> the government flight, we were unable to bring many books with us to GTMO.
> Although some of the sources are available on the internet, for the
> reasons mentioned above, it has proven unduly difficult to access and
> utilize these materials.
>
> 4. The issues raised by the defense motions and the government
> responses thereto are critical legal issues of first impression, which
> may be dispositive for this case. In addition, they bear on the
> legitimacy of the entire military commissions enterprise under the MCA.
> The government's response briefs are the defense's "first look" at
> some of the more important legal issues involved in the case -- for
> example, the government's extraordinary argument (made in all 6
> response briefs) that Congress possesses plenary authority to
> legislate without regard to the Ex Post Facto or Bill of Attainder
> Clauses. Under the circumstances in Gitmo, if required to file all
> replies by Thursday, it will simply be impossible for defense counsel
> to adequately research and brief those issues and competently represent our client.
>
> 5. Two full days this week (Monday and Thursday) will have been spent
> traveling to and from GTMO.
>
> 6. Based on the foregoing, defense counsel respectfully request
> additional time in which to reply to three of the six government briefs.
> Ms. Snyder will be on pre-approved leave from 22 Dec 07 until 31 Dec 07.
> As filing the reply will complete the briefing cycle for each motion,
> no prejudice results to the current trial schedule by granting the
> defense additional time to respond. Accordingly, the defense requests
> permission to file its replies to the government's responses to the
> motions below NLT 4 Jan 08:
>
> a. MTD Charge IV (D:011)
>
> b. MTD Charge V (D:012)
>
> c. MTD (Bill of Attainder) (D:013)
>
> 7. Thank you for your consideration of this request. Please note
> that the military judge is omitted from the cc line -- we do not
> currently have access to his regular e-mail account and because of the
> technical issues cited above are unable to obtain it.
>
> VR,
>
> LCDR Kuebler
--
Jeff Groharing
Major, U.S. Marine Corps
[redacted]ce of Military Commissions
[redacted]

[redacted], SSG, DoD OGC

[redacted]

Subject: FW: Prosecution Responses - D - 008 thru D - 013 US v Khadr

Attachments: Prosecution Response to Defense Motion to Dismiss Charge I.pdf; Prosecution Response to Defense Motion to Dismiss Charge II.pdf; FI - Khadr - 14 Dec 07.pdf

Prosecution Response to Defens... Prosecution Response to Defens... FI - Khadr - 14 Dec 07.pdf (44...

-----Original Message-----

[redacted] - 013 US v Khadr

COL Brownback has directed that I forward the attachments and the email below to counsel and other interested persons.

v/r,

LTC [redacted] USAR
Seni[redacted]visor
Military Commissions Trial Judiciary
Department of Defense

[redacted] D - 008 thru D - 013

LTC [redacted],

1. Please forward the email below to the counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

2. Please copy the file labelled Prosecution Response to Defense Mot to Dismiss Chg I and II.pdf. Name one of the versions, Prosecution Response to Defense Motion to Dismiss Charge I. Name the other version Prosecution Response to Defense Motion to Dismiss Charge II. Forward those two new files to all parties.

3. Please also forward a copy of the latest Filings Inventory.

COL Brownback

Counsel in the case of United States v. Khadr,

1. All counsel are once again urged to read the Rules of Court. Counsel, in this instance, are specifically urged to read and reread RC 2.2d.

2. The Rules of Court are not designed to aggravate counsel - they are designed to assist the commission. Compliance with the Rules helps the commission insure that matters are attended to as required.

3. The government was responding to six (6) separate defense motions. Each of those defense motions was assigned a filings designation. The government should have responded by six (6) separate emails. The subject line on the emails should have included the filings designation. For instance:

Prosecution Response to D - 013, Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder), US v. Khadr or, more simply, Khadr - Prosecution Response to D - 013.

If the defense chooses to reply to the response, the subject line should read:

Defense Reply to Prosecution Response to D - 013, Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder), US v. Khadr or, more simply, Khadr - Defense Reply to D - 013.

4. As may be inferred from the directions to LTC Chappell above, the government request to file a combined response is not granted. The commission will consider the response as to each motion separately. No further government action is required.

5. Counsel are directed to Schedule for Trial, 28 November 2007, paragraph 1a, Note 2.

6. Defense replies, if any, are due NLT 20 December 2007.

Peter E. Brownback III
COL, JA, USA
Military Judge

[redacted]ons to Dismiss Each of the Charges

> Sir,
>
>

> 1. The Government respectfully submits the following responses to the
> Defense's motions to dismiss.
>
> 2. The Government also respectfully requests leave from the Court to
> file its responses to the Defense's motions to dismiss charges I
> (murder) and II (attempted murder) as a single pleading. As explained
> in our response, the motions to dismiss charges I and II raise
> virtually identical issues, so for the convenience of both the
> Military Judge and the Defense, the Government has responded in the
> most efficient manner possible. Of course, the Government can file
> two separate briefs, if the Military Judge so directs.
>
> 3. I apologize for the late filing. We had difficulties getting the
> documents scanned and saved appropriately.
>
> V/R,
>
> Jeff Groharing
> Major, U.S. Marine Corps
> Prosecutor
> [redacted]issions
[redacted]

[redacted]: US v. Khadr - Defense Motion to Dismiss (Bill of Attainder)

Sir,

Please find attached an additional Defense Motion to Dismiss. The defense will be filing a total of 6 (rather than the initially anticipated 7) motions as part of this "round" of briefing, but respectfully reserves the right to file additional "law" motions IAW the Commission's 28 Nov 07 scheduling order. Thank you.

VR,

LCDR Kuebler

> [redacted]

[redacted]

> LtCol [redacted]
>
> Please find attached five motions, one to dismiss each charge.
>
> V/r
> Ms. Snyder

[redacted], SSG, DoD OGC

[redacted]

Subject: Filing Designation: D013 Defense Motion to Dismiss (Bill of Attainder) - Khadr

All parties,

The filing designation for the 7 DEC 07 Defense Motion to Dismiss (Bill of Attainder) is D013 Defense Motion to Dismiss (Bill of Attainder) - Khadr. See RC 5.

LTC [redacted], USAR, JA
Seni[redacted]dvisor
Military Commissions Trial Judiciary

UNITED STATES OF AMERICA	}	**D-015** **Ruling on Defense Motion for Appropriate Relief (to Preclude Further Ex Parte Proceedings Under Color of M.C.R.E. 505(e)(3))** **21 February 2008**
v **OMAR AHMED KHADR** a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khahi"	}	

1. The commission has considered the defense motion, the government response, and the defense reply.

2. The defense requests that the commission rule that Military Commission Rule of Evidence (M.C.R.E.) 505(e)(3) is inconsistent with the provisions of the Military Commissions Act of 2006 (MCA).

3. The defense request is apparently based on a train of logic that runs as follows:

a. MCA § 949d(b) states that, with certain exceptions, all proceedings shall be in the presence of the accused.

b. Black's Law Dictionary defines proceedings to include all possible steps in an action from commencement to the execution of judgment. (See Defense Motion, paragraph 6a(3).)

c. If the prosecution meets with the military judge, it is a proceeding, according to Black's, and is, therefore, barred by § 949d(b).

4. The commission notes that § 949d is titled "Sessions." The commission further notes that § 949d(a) is titled "Sessions Without Presence of Members," while § 949d(b) is titled "Proceedings in Presence of Accused." The defense motion does not address § 949d(a), which would seem to be more appropriate to discussion of M.C.R.E. 505(e)(3), since the defense does not contend that the defense counsel and the accused were somehow excluded from a Proceeding with Members.

5. § 949d(a) is generally analogous to 10 U.S.C. 839a (UCMJ Article 39a). Article 39a provides that the military judge can hold on the record proceedings without members -

although the accused shall be present (Case law exceptions to that rule are omitted.). However, despite the strictures of Article 39a (and 39b), no appellate court has ever held that a conference under the provisions of Rule for Courts-Martial 802 violates an accused's right to be present at proceedings in his case.

6. The defense definition of proceedings is not consistent with military jurisprudence in general or, more importantly, the MCA specifically (See, for example, § 949d(f)(2)(A) and (B)). The military judge is charged, by statute, with safeguarding national security information and the MCA does not require that the accused or defense counsel be present at all times while the military judge is carrying out that duty. The commission finds that M.C.R.E. 505(e)(3) is a valid exercise of the Secretary's powers to prescribe regulations as authorized by § 949a(a) and § 949d(f)(4).

7. The commission declines to grant the defense the relief requested. However, the commission will continue to use the procedures which it established in the government's initial request for review under the provisions of MCRE 505(e)(3) (See pp. 13-14, Defense Motion.). The commission notes that such procedures are specifically authorized by § 949d(f)(3). If the prosecution desires to have the commission change such procedures, it may so request by motion.

Peter E. Brownback III
COL, JA, USA
Military Judge

	D015
UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Reply to Prosecution Response to Defense Motion For Appropriate Relief** (to Preclude Further Ex Parte Proceedings Under Color of M.C.R.E. 505(e)(3)) 24 January 2008

1. **Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge.

2. **Reply:**

(a) The government devotes much of its response to explaining why it wishes Congress had said something other than what it plainly did say with respect to the issue at hand. (*See* Gov't Resp. at 2-4; 11-14.) Alternatively, the government contends that Congress was sufficiently unclear so as to leave the Secretary free to promulgate MCRE 505(e)(3). (*See* Gov't Resp. at 7-10.) Neither argument has merit.

(1) The Accused And Defense Counsel Have An Unambiguous Right To Be Present At All Proceedings Of A Military Commission And The Secretary Of Defense Does Not Have Authority To Issue A Rule Contravening This Right

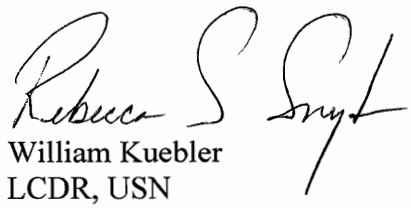
(i) With certain limited exceptions not applicable here, Congress unambiguously provided for the right of the accused (and counsel) to be present during all proceedings of a military commission. MCA § 949d(b). With regard to the actual issue before the Commission (i.e., whether MCRE 505(e)(3) is consistent with the plain language of MCA § 949d(b)), the government's entire argument boils down to an attempt to make the word "proceedings" mean something other than what it obviously (as a matter of law and common sense) means, and then argue that because the MCA authorizes proceedings that are something other than proceedings (let's call them "procedures"), the Secretary is free to prescribe rules allowing for such "procedures" as he sees fit. This argument is unsound.

(ii) Because Congress specified that the accused has a right to be present during all proceedings of a military commission and then carved out exceptions to the general rule, it does not follow that the exceptions are not "proceedings" of the military commission. And it certainly does not follow that the Secretary is free to disregard the provisions of the MCA in formulating procedures for trial by military commission as long as he calls the procedures something other than "proceedings." The net effect of the government's interpretation of the statute is that a "proceeding" of the military commission is whatever the Secretary says it is – an interpretation

that would render Congress' express statement preserving the right to be present at all proceedings of the commission a virtual nullity.

(iii) The government's citation to MCA § 949d(d)(3) *weakens* its position. (Gov't Resp. at 5.) Again, where Congress intended to authorize the extraordinary measure of *ex parte* proceedings it did so explicitly. The government's argument would have the Commission believe (and rule) that Congress used the terms *ex parte* and *in camera* (two terms with distinct legal significance) interchangeably.

(iv) Finally, the government's assertion that agreement with the defense position would make it "impossible for this or any other military commission proceeding to go forward without jeopardizing national security" is incredible. (*See* Govt't Resp. at 6-7.) Concluding, correctly, that MCRE 505(e)(3) is inconsistent with MCA § 949d(b) does not mean that the accused would gain access to "extraordinarily sensitive material" or "thwart the purpose of the MCA" (provided the "purpose of the MCA" is *not* something other than to provide a fair trial for the accused). As a practical matter it means that the accused would be present during an *in camera* review for purposes of a government claim of privilege in the course of discovery (consistent with Congressional intent), and that the accused's *counsel* (with appropriate security clearance) would have access to the information. What the government desires is a world in which it can seek to persuade in opposition to an empty chair and in which the prosecutor, as a function of his own whim, or the whim of whatever powers in the Executive are directing his actions, can decide which secrets to share with defense counsel in discovery and which ones not to. Whatever else Congress intended in enacting the MCA, it did not intend this result. We must presume that it would have said so if it did. Instead, it said the contrary.



William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Detailed Assistant Defense Counsel

UNITED STATES OF AMERICA	D 15
v.	GOVERNMENT'S RESPONSE
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	To the Defense's Motion to Preclude Further Ex Parte Proceedings **January 18, 2008**

1. Timeliness: This motion is filed within the time lines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 28 November 2007.

2. Relief Requested: The Government respectfully submits that the Defense's motion to preclude further *ex parte* proceedings should be denied.

3. Overview: The Defense maintains that Military Commission Rule of Evidence ("M.C.R.E.") 505(e)(3) conflicts with section 949d(b) of the Military Commissions Act of 2006 ("MCA"), insofar as the former authorizes the Government to move the Military Judge to determine *in camera* and *ex parte* whether classified information is subject to discovery. The construction of section 949d propounded by the Defense is squarely at odds with not only the text of the MCA, but also one of its primary objectives; namely, the protection of classified information during military commission proceedings. Indeed, the Defense's construction would make the MCA *less* protective of classified information than the rules applicable to courts-martial and federal courts, notwithstanding Congress's repeated insistence that commissions were necessary specifically to ensure that classified evidence is not shared with the enemy during wartime. It is clear from a full reading of the statutory text that Congress intended that certain matters involving classified materials would be handled in a setting from which the accused and Defense counsel would be excluded. Such circumstances were not considered by Congress to be "proceedings" of a military commission which required the presence of the accused. In addition, Congress specifically provided that the Secretary of Defense may prescribe additional procedures for the protection of classified information, and the procedures in M.C.R.E. 505(e)(3) are reasonable protections, consistent with the statute. Accordingly, the motion should be denied.

4. Burden and Persuasion: This motion presents a pure question of law. As the Defense is the moving party, it has the burden of persuasion. See R.C.M.905(c)(2)(B).

5. Facts:

a. Charges were sworn against the accused on 2 February 2007, and referred to trial by this military commission on 24 April 2007. Following dismissal of the charges by the Military Judge, appeal and remand, Khadr war arraigned on 8 November 2007.

b. On or about 1 December 2007, the trial counsel, invoking M.C.R.E. 505(e)(3), sought to provide classified information to the Military Judge for *ex parte, in camera* review in connection with its discovery obligations.

c. After the Military Judge informed counsel for the accused of the Government's submission, counsel objected to the procedure on the ground that it conflicted with Section 949d(b) of the MCA and requested the military judge to refrain from taking further action on the request pending briefing and argument on the issue.

d. On 5 December, 2007, the Military Judge issued an order asserting that the provisions of M.C.R.E. 505(e)(3) are not facially invalid. He instructed the Government to transfer the material at issue to the court for *ex parte* review with "no words exchanged." Def. Mot. Att. C. The Military Judge, however, authorized the Defense to submit a brief addressing the question whether M.C.R.E. 505(e)(3) was a permissible exercise of the Secretary of Defense's authority to implement the MCA. Id at 3.

e. On 6 December 2007, the Military Judge conducted an *ex parte* review of the classified material submitted by the Government, but did not issue an order addressing the Government's submissions.

6. Discussion:

a. The MCA Provides Unprecedented Protections For Classified Information.

(1) At the outset, one point should be abundantly clear: The MCA contains and authorizes unprecedented protections for classified information, far and above those provided in, for example, the Uniform Code of Military Justice ("UCMJ") or the Classified Information Procedures Act ("CIPA"). And the rationale for the MCA's expansive protections was obvious to its framers: Rather than authorizing the prosecution of our Nation's own soldiers or common criminals, the MCA authorizes the prosecution of our Nation's enemies in the midst of an ongoing armed conflict, men whose stated purpose on the planet is to terrorize and destroy the United States. Given those high stakes, Congress made plain—in the MCA's statutory text, structure, and its legislative history—that extraordinary measures were necessary to protect classified information at all stages of the military commissions process.

(2) Thus, the text of the MCA draws a sharp distinction between military commissions and other tribunals. For example, section 948b, which contains general principles and procedures governing the military commissions, provides that "the Uniform Code of Military Justice . . . does not, by its terms, apply to trial by military commission

except as specifically provided in this chapter," and that "judicial construction and application" of the UCMJ are "not binding on military commissions established under this chapter." 10 U.S.C. § 948b(c). Section 948b(d) goes on to make explicit a number of consequences of subsection (c)'s broad default rule, listing several specific UCMJ sections-including the broad discovery rule in Article 32—that "shall not apply to trial by military commission." Id § 948b(d). Moreover, the MCA includes new sections—such as section 949d(f)—which have no analogue under federal law, and which authorize the Secretary of Defense to issue rules for the protection of classified information at "all stages of the proceedings." Id. § 949d(f)(1)(A), (4). Congress even enacted a specific provision—again, with no analogue under federal law—to protect the disclosure of intelligence "sources, methods, or activities" during the discovery process. See id § 949j(c)(2). These provisions make clear Congress's intent to provide unprecedented protections for classified information. SeeNixon v. United States, 506 U.S. 224, 232 (1993) ("[T]he plain language of the enacted text is the best indicator of intent.").

(3) Congress confirmed the uniqueness of the MCA and its protections for classified information through the statute's structure. Rather than codifying it as an amendment or appendix to the UCMJ, and rather than simply incorporating or cross-referencing CIPA, Congress specifically enacted the military commissions process as a separate and independent chapter (47A) of title 10. This structure underscores that the MCA (in general) and its protections for classified information (in particular) are distinct from—and more expansive than—anything that came before it.

(4) The underlying principle reflected in the text and structure of the MCA—that the Act created a system of military commissions distinct in practice and procedure from existing regimes—was widely recognized by the Act's congressional supporters and detractors alike. Advocates lauded the bill for precisely this characteristic, arguing that a new kind of tribunal was needed to address the novel threats faced by the United States in fighting the War on Terror. Senate Majority Leader Frist, one of the co-sponsors of S. 3930 (the version of the MCA ultimately passed into law), explained that the bill's procedures for military commissions "recognize that because we are at war, we should not try terrorists in the same way as our uniformed military or common civilian criminals." 152 Cong. Rec. S-10243 (daily ed. Sept. 27, 2006) (statement of Sen. Frist). Rather, Senator Frist cautioned, "[w]e must remember that we are fighting a different kind of enemy in a different kind of war." Id Senator Graham similarly stated his belief that "we have created a new military commission . . . [a] court martial is not the right forum to try enemy combatants-non-citizen terrorists-the military commission is the right forum." 152 Cong. Rec. S-10354, 10392 (daily ed. Sept. 28, 2006) (statement of Sen. Graham). Senator Chambliss likewise argued that the bill "provides important rule of law procedures for illegal enemy combatants, [but] it does not give them the same protections which we afford lawful enemy combatants or our own military personnel, and that is a critical distinction." Id. at S-10391 (statement of Senator Chambliss). In the House debates on H.R. 6166 (the parallel bill to S. 3930) Representative Hunter, Chairman of the House Armed Services Committee, made the point even more clearly: "In this act, Congress authorizes the establishment of military commissions for alien unlawful enemy combatants . . . in a new separate chapter of title 10 of the U.S. Code, chapter 47A. While this new

chapter is based upon the Uniform Code of Military Justice, it creates . . . *an entirely new structure for these trials*." 152 Cong. Rec. H-7522, 7534 (daily ed. Sept. 27, 2006) (statement of Rep. Hunter) (emphasis added).

(5) Nor was the point lost on the MCA's opponents. For example, Rep. Langevin opposed the bill because, in his view, "the commissions it would establish vary significantly from other accepted forms of tribunals that have been used to prosecute crimes in times of war." See 152 Cong. Rec. H-7522, 7557-58 (statement of Rep. Langevin). Similarly, Senator Levin decried the bill because "instead of starting with the rules applicable in trials by court-martial and establishing exceptions, the Secretary of Defense is required to make trials by commission consistent with those rules only when he considers it practicable to do so." 152 Cong. Rec. S-10243, 10244 (daily ed. Sept. 27, 2006) (statement of Sen. Levin); see also id. at 10259 (statement of Sen. Reed) (arguing that the MCA "reverses the presumption" found in earlier legislation and suggesting that "[t]he exception has swallowed up the rule").

(6) The text, structure, and legislative history make clear that the MCA, and the procedures it authorizes, are unprecedented. Thus, the UCMJ and CIPA may be helpful as reference points, but only insofar as they establish a baseline from which the MCA's protections for classified information began and expanded.

b. The Language of Section 949d of the MCA Does Not Foreclose the Secretary of Defense From Authorizing *Ex Parte* Discovery Proceedings.

(1) The gravamen of Khadr's argument is that, save for two particularized exceptions, section 949d of the MCA authorizes the presence of the accused at all "proceedings." Then, relying upon a generic definition of the term "proceedings" lifted from a dictionary, he maintains that the process of submitting classified material to the Military Judge, under M.C.R.E. 505(e)(3) for *ex parte* review constitutes such a "proceeding" to which the accused is entitled to be present. Therefore, he concludes, insofar as that rule authorizes such "proceedings" to be conducted *ex parte,* it is in conflict with the governing statute and should be disregarded.

(2) Khadr's argument proves too much. The MCA specifically provides for *ex parte* review on matters falling outside section 949d's designated exceptions, making clear that Congress specifically understood the definition of "proceeding" to be limited and that the Military Judge, like his counterpart in courts-martial and federal trials, would have the ability to review classified information outside the presence of the Defense and the accused. Thus, it is apparent from the language of section 949d of the MCA that—like other judicial activities relating to the protection of national security information—the *ex parte* review of classified information was not intended by Congress to fall within the ambit of the term "proceeding."

Section 949d(b) provides as follows:

PROCEEDINGS IN PRESENCE OF ACCUSED – except as provided in subsections (c) and (e), all proceedings of a military commission under this chapter, including any consultation of the members with the military judge or counsel, shall –

(1) be conducted in the presence of the accused, defense counsel and trial counsel; and

(2) be made part of the record.

(3) The statute then identifies the two "proceedings" to which the right to "presence of the accused" does not apply. The first, contained in subsection (c), provides that, during deliberations or voting, only the members may be present. The second, contained in subsection (e), authorizes the exclusion of the accused from the proceedings, under certain circumstances, for contumacious conduct. Reading these provisions alone and out of context, Khadr argues that, because the review of classified information is not in either of the two paragraphs identifying "proceedings" from which the accused is excluded, it must be one where his presence is permitted.

(4) However, "[o]ver and over the [Supreme Court] has stressed that, '[i]n expounding the meaning of a statute, we must not be guided by a single sentence, or a member of a sentence but must look to the provisions of the whole law and to its objects and policy.'" United States National Bank of Oregon v. Indep. Ins. Agents of America, Inc., 508 U.S. 439, 455 (1993), (quoting United States v. Heris of Boisdore, 49 U.S. (8 How.) 113, 122 (1849)). Thus, the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute and consulting any precedents or authorities that inform the analysis." Dolan v. U.S. Postal Service, 546 U.S. 481, 486 (2006). As explained above, one of the primary purposes of the MCA—as evidenced by its text, structure, and history—was to provide broad protections for classified information during military commission proceedings, an objective that is squarely at odds with Khadr's construction of section 949d. Even more significantly, however, when that section is considered from the perspective of "the whole statutory text" (id.)—as opposed to Khadr's myopic analysis of section 949d—it is manifest that the term "proceeding" does *not* extend to judicial assessments of matters relating to the disclosure of national security information.

(5) More specifically, section 949d identifies three instances when the military judge can review such material outside the presence of the accused—and, importantly, these instances fall outside of the "exceptions" of the accused's right to be present for "proceedings" listed in subsections (c) and (e). First, in making a determination under section 949d(d)(2) that closure of a military commission proceeding is necessary for reasons of national security, such finding "may be based upon a presentation, *including a presentation ex parte or in camera,* by either trial counsel or defense counsel." See section 949d(d)(3) (emphasis added). Section 949d(f) governs the "national security privilege" and the protection of classified information, and subsection (f)(2)(C) addresses the trial counsel's right to assert an objection based upon the national security privilege during the examination of a witness. The latter provides as follows:

> Following such an objection, the military judge shall take suitable action to safeguard such classified information. Such action may include the review of trial counsel's claim of privilege by the military judge *in camera and on an ex parte* basis and the delay of proceedings to permit trial counsel to consult with the department or agency concerned as to whether the national security privilege should be asserted.

(emphasis added). Finally, section 949d(f)(3) similarly provides that "[a] claim of privilege under this subsection, and any materials submitted in support thereof, shall, upon request of the Government, be considered by the military judge in camera and *shall not be disclosed to the accused.*" (emphasis added).[1]

(6) Thus, although section 949d(b) articulates the general principle that the accused is entitled to be present at all "proceedings" and identifies two specific "proceedings" that constitute exceptions to that general principle, when considered in its totality, the very same statute also identifies three additional occasions—each involving the evaluation of classified information—in which the accused is not entitled to be present: a hearing on whether, for reasons of national security, the proceedings should be closed to the public (section 949d(d)(3)); a review of the trial counsel's objection, based on the national security privilege, in connection with a witness's examination (section 949d(f)(2)(C)); and consideration of other claims of a national security privilege and materials in support thereof, upon request of the Government (section 949d(f)(3)). Inasmuch as these exceptions to the right of presence are *not* included in the express limitations upon that right, the only logical conclusion is that Congress did not view occasions upon which the military judge is required to evaluate classified information or matters relating to the disclosure of such information as a "proceeding" governed by section 949d(b). Consequently, an *ex parte* discovery review by the military judge of classified information likewise does not constitute a "proceeding," and the Secretary of Defense's authorization of such a review in the Manual for Military Commissions therefore cannot contravene the accused's statutory right to presence at "proceedings."

(7) Finally, it bears noting that if the defense's interpretation of the MCA were correct, it would be impossible for this or any military commission proceeding to go forward without jeopardizing national security. The protections for classified information in the MCA—including those that allow deletions of classified material and the substitution of unclassified summaries in the materials provided to the defense—were

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[1] Section 949d(f)(3) establishes a floor, which requires all deliberations conducted thereunder to be conducted—at a minimum—in camera, outside the presence of the accused, and without ever informing the accused of the deliberations. Section 949d(f)(4) authorizes the Secretary of Defense to expand upon those protections, and the Secretary did so in M.C.R.E. 505(e)(3) by excluding defense counsel as well. As Khadr recognizes, defense counsel's right (or the lack thereof) to participate during *in camera* proceedings is a "distinct issue," which is not currently before the Court. Def. Mot. at 5 n.17. If and when Khadr raises such a claim, the Government respectfully requests the opportunity to oppose it through a supplemental pleading.

enacted precisely to prevent unlawful enemy combatants from *ever* having access to certain extraordinarily sensitive material. It would thwart the purpose of the MCA (in general) and its classified-information provisions (in particular) if the accused were entitled to review classified materials while the Military Judge is considering whether the defense is entitled to review them. Moreover, as noted in ¶ 6(d), infra, federal courts under CIPA and courts-martial under Military Rule of Evidence 505 routinely review such materials, and discuss them with the Government, outside the presence of the accused. Given the text, structure, and purpose of the MCA, it is impossible that the Military Judge lacks such authority here.

c. The Secretary Of Defense Acted Well Within His Authority In Promulgating M.C.R.E. 505(e)(3) and His Judgment In Doing So Is Entitled to Judicial Deference.

(1) As explained above, Section 949d(b) constitutes no statutory barrier to an evidentiary rule authorizing *ex parte* examination of classified information in connection with making judicial discovery determinations. In this Section, we demonstrate that, even if the statute is arguably ambiguous as to whether a military judge possesses such authority, the courts should defer to the judgment of the Secretary of Defense who is statutorily responsible for the promulgation of implementing rules, including, specifically, rules governing the protection of national security information.

(2) The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer and the principle of deference to administrative interpretations." Chevron, U.S.A, Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 843 (1984) (footnote and citations omitted). As the Chevron Court explained:

> If [in reviewing an agency's construction of a statute] the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 843. Thus, "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to a specific provision of the statute." Id at 844 (footnote omitted). See, e.g., United States v. Meade Corp, 533 U.S. 218, 227 (2001).[2]

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[2] It is a well-established principle that an agency's interpretation of its organic statute to establish procedural rules to govern an intra-agency adjudication are worthy of

(3) It is without doubt that, in enacting the MCA, Congress has "express[ly] delegat[ed] authority to the [Secretary of Defense] to elucidate a specific provision of [the MCA] by regulation." Chevron, 467 U.S. at 843. First, in a general sense, Congress has directed the Secretary of Defense to promulgate "[p]retrial, trial and post-trial procedures, including elements, and modes of proof, for cases triable by military commission under this chapter . . . in consultation with the Attorney General. Such procedures shall, so far as the Secretary considers practicable or consistent with military intelligence activities, apply the principles of law and the rules of evidence in trial by general court-martial [but] may not be contrary or inconsistent with [the MCA]." See 10 U.S.C. § 949a(a).

(4) Specifically, with respect to classified information, section 949d(f)(4) further provides:

> ADDITIONAL REGULATIONS – The Secretary of Defense may prescribe additional regulations, consistent with this subsection, for the use and protection of classified information during proceedings of military commissions under this chapter. A report on any regulation so prescribed, or modified, shall be submitted to the Committed on Armed Services of the Senate and the House of Representatives not later than 60 days before the date on which such regulations or modifications, as the case may be, go into effect.

(5) In other words, under the MCA, Congress provided a number of specific protections for classified information but recognized that it was not necessary to fix all of those procedures in statute. Rather, Congress specifically delegated to the Secretary of Defense the authority to "prescribe additional regulations for the use and protection of classified information." In this regard, Congress's action was consistent with the approach taken under the court-martial system, where the procedures authorizing *ex parte* and *in camera* review under Military Rule of Evidence 505 are set out by rule, rather than in the statute. In the exercise of his authority under the MCA (see Manual for Military Commissions, Foreword and Preamble), the Secretary of Defense issued M.C.R.E. 505(e)(3). It provides:

> (3) *Alternatives to discovery of classified information.* The military judge, upon motion of the Government, shall authorize, to the extent practicable, (A) the deletion of

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Chevron deference. See, e.g., De Sandoval v. U.S. Att'y Gen., 440 F.3d 1276, 1281 (11th Cir. 2006) (applying Chevron to Attorney General's promulgation of procedures for granting removal hearings to aliens in immigration adjudications within the Department of Justice). Regardless of whether Chevron applies to the Secretary's interpretation of the MCA's provisions for substantive offenses, see 10 U.S.C. §§ 950p-950w, it is incontestable that Chevron applies to the procedural rules that govern this motion.

> specified items of classified information from materials to be made available to the defense; (B) the substitution of a portion of summary of the information for such classified materials, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, subject to subsection (e)(4) of this rule. The government's motion and any material submitted in support thereof shall, upon request of the government, be considered by the military judge *in camera* and *ex parte*.

(6) Just as there can be no doubt that M.C.R.E. 505(e)(3) was the result of an express delegation of authority by Congress to the Secretary of Defense, there is little doubt that it satisfies the additional requirements for Chevron deference. First, in enacting the MCA (in general), and section 949d(f) (in particular), "Congress has not directly spoken to the precise question," Chevron, 467 U.S. at 843, as to the procedure for a judicial determination whether classified national security information is discoverable despite its statutory entitlement to particular protection from unnecessary disclosure. Rather, Congress specifically delegated the authority to set those procedures to the Secretary of Defense, and M.C.R.E. 505(e)(3) "fill[s] [the] gap left, . . . explicitly by Congress." Id. at 843-44.

(7) Nor can it be said that M.C.R.E. 505(e)(3) is not entitled to "controlling weight," Chevron, 467 U.S. at 844, on the ground that it is "arbitrary, capricious, or manifestly contrary to the statute." Id. (footnote omitted). As explained above, nothing in section 949d addresses the specific issue of whether judicial review of classified material for the purpose of complying with discovery obligations is a "proceeding" to which the accused our defense counsel is entitled to participate. To the contrary, it is evident that, by expressly providing for the exclusion of the accused and counsel from similar determinations involving classified information but omitting mention of such occasions in the particularization of "proceedings" in which the accused could be excluded, see 10 U.S.C. § 949d(b), Congress did *not* intend such reviews to fall within the ambit of the term "proceedings." Accordingly, it was not "manifestly contrary to the statute" for the Secretary to treat judicial determinations relating to the discovery of classified information to the defense in a like manner, viewing them as not a "proceeding" in which the accused or counsel was entitled to participate.[3]

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[3] Indeed, consistent with Section 949d(b)'s apparent determination that judicial assessments concerning the disclosure of classified information did not constitute "proceedings," the Secretary of Defense promulgated M.C.R.E. 505(b)(3) which expressly excluded *in camera* proceedings regarding the assertion of the national security privilege from the ambit of the term: It provides:

> *In camera presentation.* In accordance with 10 U.S.C. § 949d(f)(2)(C), an *in camera* presentation is not a "proceeding" within the meaning of 10 U.S.C. § 949d(b). Unless conducted *ex parte*, such presentations may be conducted as a conference under the provisions of R.M.C. 802, except that, at the

(8) Khadr observes that the provision of the MCA specifically dealing with the disclosure of classified information in connection with discovery and therefore "most relevant to any evaluation of M.C.R.E. 505(e)(3)" is 10 U.S.C. § 949j(c). Def. Mot. at 6 para. (5). In that connection, he observes that nothing in section 949j(c) expressly authorizes *ex parte* contact with the military judge in connection with the trial counsel's responsibilities for protecting classified information during the discovery process. Such an observation, however, is entirely beside the point. The consideration that is of salient importance for the purpose of Chevron is that nothing in that Section (or any other) forecloses the Secretary from promulgating an evidentiary rule requiring such determinations to be conducted *ex parte* at the behest of the Government. And, of equal importance, the authority granted the Secretary under section 949d(f)(C)(4) to issue rules governing the use and protection of classified information at military commission proceedings, is amply sufficient to embrace discovery matters relating to classified information under section 949j(c).[4]

(9) Khadr also cites Military Rule of Evidence ("M.R.E.") 505(g)(2), which provides for an *in camera* proceeding during courts-martial to determine whether classified information, subject to a claim of privilege, is discoverable. Apparently his rationale for the citation to a parallel provision of the rules of evidence governing courts-martial is to demonstrate that, in promulgating those rules, the President did not expressly provide that such proceedings also be conducted ex parte. But, as Khadr concedes, although this rule does not employ the phrase "*ex parte*" *in haec verba*, it provides that "[t]he government's motion and any materials submitted in support thereof shall, upon request of the government . . . not be disclosed to the accused." Thus—insofar as the accused is denied the right to be present—M.R.E. 505(g)(2) has the same effect as its

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> request of the trial counsel, the accused shall be excluded. . . . If so provided in this rule, an *in camera* presentation may be *ex parte*, in which case the presentation will be made by the trial counsel, in writing, to the military judge outside the presence of the accused and defense counsel.

(10) Khadr also argues (Def. Mot. at 6 para. (5)) that, because MCA Section 949(f)(2)(C) expressly authorizes the military judge of a military commission to entertain *ex parte* submissions by the trial counsel in connection with the assertion of a national security privilege at trial, the canon of construction *expressio unius est exclusion alterius* suggests that Congress intended to preclude *ex parte* contact between the trial counsel and the judge for the purpose of assessing discovery obligations. Such a canon of construction, however, does not apply to a statute in which Congress has expressly stated that the Secretary of Defense should prescribe additional procedures beyond those specified in the statute. See 10 U.S.C. § 949a(a). Congress here clearly did not intend to specify the procedures for the protection of classified information—and to exclude all others—but rather, intended to specify some and to leave the additional procedures to be defined by regulation.

counterpart governing classified discovery in connection with military commission proceedings.

(11) To be sure, M.R.E. 505(g)(2) and M.C.R.E. 505(e)(3) differ in that the latter rule authorizes *ex parte* proceedings, while the former refers only to "*in camera* proceedings." Khadr is simply wrong, however, in his suggestion that the MCA admonished the Secretary of Defense to model implementing rules governing military commissions upon practices and procedures governing courts-martial. SeeDef. Mot. at 6 para. 6. To the contrary, the MCA requires adherence to court-martial procedures only "so far as the Secretary considers [such consistency] practicable or consistent with military or intelligence activities . . . ." 10 U.S.C. § 949a(a); see also 152 Cong. Rec. S-10243, 10244 (daily ed. Sept. 27, 2006) (statement of Sen. Levin) (emphasizing this point). Thus, particularly where intelligence equities are involved, the legislation affords the Secretary necessary discretion to promulgate a more restrictive rule governing the presence or involvement of defense counsel in the process of determining the propriety of disclosing classified information than that which arguably governs courts-martial. Indeed, as we explain later, the practice of excluding defense counsel from deliberations relating to the discoverability of classified information generally governs such proceedings in the federal courts and has been repeatedly sustained in the face of judicial challenge.

(12) Finally, there is no merit to Khadr's claim (Def. Mot. at 6-7, para. 8) that the presence of the accused during judicial determinations relating to the discovery of classified information is compelled by Common Article 3 of the 1949 Geneva Conventions. To the contrary, Common Article 3 simply does not address the issue. Moreover, insofar as Common Article 3 purports to require the trial of an accused by a "regularly constituted court," *i.e.* one "'established and organized with the laws and procedures already in force in a country,'" (Def. Mot. at 7, quoting Hamdan v. Rumsfeld, 126 S. Ct. 2740, 2797 (2006)), the procedure of excluding the defendant from judicial deliberations concerning the discoverability of classified or sensitive information plainly so qualifies. In any event, section 948b(g) precludes Khadr from "invok[ing] the Geneva Conventions as a source of rights," and section 948b(f) also emphasizes that "[a] military commission established under [the MCA] is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions."

d. Under Principles of Law Governing Federal Courts, Ex Parte Proceedings To Determine the Discoverability Of Material in the Hands of the Government, Including Classified Information Are Plainly Permissible.

(1) There is yet an additional reason to defer to the Secretary's determination, in promulgating the *ex parte* provision contained in M.C.R.E. 505(e) (3). The practice is fully consistent with federal statutory and procedural norms governing the same matter and is supported by federal jurisprudence rejecting challenges to it. Accordingly, it can hardly be said that the Secretary adopted a novel practice lacking a congressional or judicial pedigree or otherwise acted in a manner that Congress would not have sanctioned. Cf. Chevron, 467 U.S. at 845 (administrative interpretations of a statute should not be

disturbed "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.").[5]

(2) Perhaps most significantly, section 4 of CIPA, 18 U.S.C. Supp. III, provides in part (emphasis added):

> **Discovery of classified information by the defendants**
> The court, upon a sufficient showing, may authorize the United States to delete specific items of classified information from documents to be made available to the defense through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. *The court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone.*

(3) Likewise, Fed. R. Crim. P. 16(d), captioned "Regulating Discovery," provides, in part, as follows:

> **Protective and Modifying Orders.** At any time the court may, for good cause, deny restrict or defer discovery or inspection, or grant any other appropriate relief. The court may permit a party to show good cause by written statement that the court will expect *ex parte*.

(4) Thus, both the provision of CIPA that is most analogous to M.C.R.E. 505(e)(3), and Fed. R. Crim. P. 16(d), which has an earlier origin, authorize the Government to make *ex parte* submissions in connection with claims that particular items of information are either not discoverable, or that such discovery should either be curtailed or substitutions permitted.

(5) The courts that have addressed the question in the wake of these enactments, have repeatedly sanctioned the use of *ex parte* hearings to determine the Government's

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[5] In the same vein, it is well settled that "'[w]e assume that Congress is aware of existing law when it passes [new] legislation.'" South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 351 (1998) (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990)). Thus, when Congress enacted the MCA, it was presumptively aware that its prior legislative enactments concerning the resolution of discovery issues in cases involving classified sensitive information, expressly authorized judicial resolution via *ex parte* proceedings, and that such proceedings have withstood subsequent judicial scrutiny. Nothing in the MCA suggests that, in cases involving the discovery of national security information in the context of military commission proceedings, Congress intended to provide for less protection of classified information than its prior legislative practice in treating the same issue.

discovery responsibilities, even rejecting claims—similar to Khadr's—that such procedures should not permit argument or written submissions by the Government. For example, in United States v. Klimavicius-Violria, 144 F.3d 1249 (9th Cir. 1998), the court observed that, although *ex parte* hearings are generally disfavored, "[i]n a case involving classified documents, . . . *ex parte, in camera* hearings in which government counsel participates *to the exclusion of defense counsel* are part of the process that the district court may use in order to decide the relevancy of the information. Such a hearing is appropriate if the court has questions about the confidential nature of the information or its relevancy." Id. at 1261 (emphasis added); see also United States v. O'Hara, 301 F.3d 563, 568 (7th Cir. 2002) (holding that district court properly conducted *in camera, ex parte* proceedings to determine whether classified information was discoverable); United States v. Marzook, 435 F. Supp. 2d 708, 745 (N.D. Ill. 2006) ("the plain text of [CIPA] Section 4 specifically permits a court to review classified information ex parte"); United States v. Libby, 429 F. Supp. 2d 46, 48 (D.D.C. 2006) (opinion on reconsideration) (authorizing the government to make *ex parte* "filings it deems appropriate, necessary and permissible under [CIPA] Section 4"); United States v. Abujihaad, 2007 WL 2972623, at *1 (D. Conn. Oct. 11, 2003) (noting that "numerous courts have upheld the propriety of *ex parte, in camera* proceedings in cases involving classified information"; collecting cases); United States v. Ressam, 221 F. Supp. 2d 1252, 1258 (W.D. Wash. 2002) ("*ex parte, in camera* hearings for the purpose of pretrial discovery rulings are entirely consistent with CIPA").[6]

(6) The courts have, likewise, uniformly rejected arguments that such hearings should, in any event, include the presence and participation of defense counsel. Specifically, they have reasoned that such involvement would effectively frustrate the overarching purpose of the *ex parte* procedures set out in Section 4 of CIPA and Fed. R. Crim. P. 16(d). In United States v. Sarkissian, 841 F.2d 959 (9th Cir. 1988), for example, the court addressed the argument that Section 4 did not authorize the Government to assert and litigate a claim of privilege *ex parte and in camera*. In rejecting this argument, it observed that:

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[6] In its 5 December 2007 ruling outlining the procedures for dealing with *ex parte* matters (Def. Mot. Att. C), this Court indicated that it would accept the Government's written motion and other materials submitted in support thereof from the prosecutor—but added that "there will be no words exchanged." Of course, such an environment does not allow for questions to be asked by the Court and addressed by the Government, or for clarifications to be made. Accordingly, silence between the Court and trial counsel should not be required; rather, employing the use of a court reporter with the appropriate security clearance would be a better alternative. It appears that the Court's instruction may have been based upon the language of M.C.R.E. 505(b)(3), which states that an *in camera, ex parte* presentation "will be made by the trial counsel, in writing, to the military judge, outside the presence of the accused and defense counsel." As the cases cited above clearly indicate, however, Article III courts have recognized that although CIPA Section 4 speaks only of the Government submitting a written statement, "*ex parte, in camera* hearings in which government counsel participates to the exclusion of defense counsel are part of the process that the district court may use," particularly "if the court has questions about the confidential nature of the information or its relevancy." Klimavicius-Viloria, 144 F.3d at 1261.

> [t]he clear language of the statute and its legislative history foreclose that contention. Section 4 allows the court to "permit the United States to make a request . . . in the form of a written statement to be inspected by the court alone. . . . The legislative history [of CIPA] emphasizes that "since the government is seeking to withhold classified information from the defendant, an adversarial hearing with defense knowledge would defeat the very purpose of the discovery rules." H.R. Rep. No. 831, 96th Cong. 2d., Sess. 27 n. 22.

Id. at 965-66 (citations omitted). And, likewise, in United States v. Meja, 448 F.3d 436, 457 (9th Cir. 2006), the court rejected the claim that "CIPA contemplates that judicial determinations regarding the disclosure of classified information will be made with the participation of the defendants and their counsel . . . ." It reasoned that "as the House Report [concerning the legislation that was to become CIPA] explains, 'since the government is seeking to withhold classified information from the defendant an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules.'"[7]

(7) In the context of military commission proceedings, it would likewise be an absurd construction of section 949j(c)(2), which authorizes the Government, in the course of complying with discovery obligations, "to protect from disclosure, sources, methods, or activities by which evidence," to disregard the very procedure, set out in M.C.R.E. 505(e)(3), for *ex parte* determinations whether such items are subject to discovery. As in the case of CIPA and Fed. R. Crim. P. 16(d), the presence of the accused and counsel at such a proceeding would frustrate its objective, exposing them to the very material that the Government is seeking to protect from disclosure via a judicial determination that it is either not discoverable or that the defendant's discovery rights can adequately be protected by the redaction of sensitive but irrelevant details. If Congress sought to prevent such consequences, via the enactment of CIPA and Fed. R. Crim. P. 16(d), in federal criminal trials (see, e.g., H.R. Rep. No. 96-831, pt. 1 at 27 n. 22 (1980)), it surely would not have intended a different results in trials involving unlawful enemy combatants where the stakes, involving the inadvertent or unnecessary disclosure of classified information, are immeasurably higher.

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[7] It is puzzling—to say the least—for Khadr to suggest that Defense counsel should be permitted to participate in *ex parte* proceedings under M.C.R.E. 505(e)(3) because "any information the government would seek to disclose to the military judge *ex parte* would appear to be within the scope of the government's discovery obligations." Def. Mot. at 5 n.17. The very purpose of such a hearing is to obtain a judicial determination whether the material at issue is discoverable and, in the event that it is, to obtain a judicially satisfactory substitute, excerpt, or redaction that can be provided to the defense. Nor is it of consequence that the accused's attorney possesses a security clearance. If the classified material at issue is not discoverable in the first place, even cleared counsel has no need or right to possess it.

7. Oral Argument: In light of the fact that the MCA directly and conclusively addresses the issue presented, the Prosecution believes that the motion could be readily denied. 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:

Jeffrey D. Groharing

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UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** **For Appropriate Relief** (to Preclude Further Ex Parte Proceedings Under Color of M.C.R.E. 505(e)(3)) 11 January 2008

1. **Timeliness:** This motion is filed within the timeframe established by R.M.C. 905 and the Military Judge's 5 December e-mail order.

2. **Relief requested:** The defense respectfully requests the Military Judge to issue an order declaring M.C.R.E. 505(e)(3) to be inconsistent with the provisions of the Military Commissions Act of 2006, P.L. 109-366, 120 Stat. 2600 (MCA), to the extent M.C.R.E. 505(e)(3) purports to authorize the government to resolve a claim of privilege relating to classified information through *ex parte* proceedings.

3. **Overview:**

a. With exceptions not applicable here, MCA § 949d(b) unambiguously provides the accused with the right to be present at all proceedings of a military commission. MCA § 949d(f)(2)(C) carves out an exceedingly narrow exception to this statutory right, in very limited circumstances, for the protection of classified information: the military judge *may* permit *ex parte* contact in limited circumstances following an objection by trial counsel "during the examination of any witness" at trial. Consistent with the accused's right to be present, the MCA otherwise allows the government to resolve claims of privilege relating to classified information *in camera*, not *ex parte*.[1] Notwithstanding the unambiguous statutory requirement that the accused be present during all proceedings, the Secretary of Defense promulgated M.C.R.E. 505(e)(3), which purports to authorize the government to resolve a claim of privilege relating to classified information in connection with discovery through an *ex parte* proceeding. The prosecution relied on this *ultra vires* provision to provide the Military Judge with materials relating to this case (and presumably otherwise within the scope of the government's discovery obligation) on 6 December 2007. The result was a proceeding of this Commission from which the accused and his counsel were excluded, over defense objection, in contravention of MCA § 949d(b).

4. **Burdens of proof and persuasion:** This motion principally presents a question of law. As the moving party, the burden of persuasion is on the defense.

[1] MCA § 949d(f)(3).

5. **Facts:**

a. Congress enacted, and the President signed into law, the MCA on 17 October 2006. The Secretary of Defense issued the Manual for Military Commissions on or about 18 January 2007.[2]

b. Charges were initially sworn against Mr. Khadr on 2 February 2007 and referred for trial by this Military Commission on 24 April 2007. Following dismissal of those charges, government appeal, and remand, Mr. Khadr was arraigned on 8 November 2007.

c. On or about 1 December 2007, without notification to the defense Major Jeffrey Groharing (trial counsel) invoked M.C.R.E. 505(e)(3), seeking to provide the Military Judge with classified matters *ex parte* in connection with discovery. The prosecution claimed that the matters were classified at the "secret/SCI" level.[3]

d. Upon notification of the government's request, the defense objected to the proposed procedure via e-mail on the grounds that M.C.R.E. 505(e)(3) conflicts with MCA § 949d(b) and requested the Military Judge to refrain from acting on the prosecution request before the opportunity for full briefing and argument on the issue.[4]

e. On 5 December 2007, the Military Judge issued an e-mail order finding that the provisions of M.C.R.E. are not "facially invalid," and indicating his intention to conduct the requested review. The order additionally directed the defense to file the instant motion on or before 11 January 2008.[5]

f. On 6 December 2007, the Military Judge reviewed matters submitted by the prosecution *ex parte* at Guantanamo Bay, Cuba. The Military Judge declined to issue an order under the provisions of M.C.R.E. 505(e).[6]

g. LCDR Kuebler, Mr. Khadr's detailed defense counsel, possesses a permanent "secret" clearance and an interim "top secret" clearance.[7]

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[2] *See* Manual for Military Commissions, Executive Summary, of 18 January 2007.

[3] (MAJ Groharing e-mail of 1 Dec 07 (Attachment A).)

[4] (LCDR Kuebler e-mail of 4 Dec 07 (Attachment B).)

[5] (LTC Chappell e-mail of 5 Dec 07 Attachment C.)

[6] (LTC Chappell e-mail of 6 Dec 07 (Attachment D).)

[7] (Chris M. Winch Memo of 27 Aug 07 (Attachment E).)

6. **Law and argument:**

a. The Accused And Defense Counsel Have An Unambiguous Right To Be Present At All Proceedings Of A Military Commission

(1) There can be little serious dispute that the right to be tried in one's presence lies at the very heart of Anglo-American notions of a fair trial.[8] It has long been recognized in court-martial proceedings under the Uniform Code of Military Justice (UCMJ)[9] (on which the MCA is "based")[10] as well.[11] While consciously choosing to omit many trial rights traditionally associated with criminal prosecution in the United States,[12] in enacting the MCA, Congress specifically elected to preserve this right: MCA § 949a(b)(B) provides that the "accused shall be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title. MCA § 949d(b), in turn, reiterates the right of the accused to be present with limited exceptions inapposite here:

> Except as provided in subsections (c) and (e), *all proceedings* of a military commission, including any consultation of the members with the military judge or counsel, shall—
>
> (1) be in the presence of the accused, defense counsel, and trial counsel; and
>
> (2) be made part of the record.

(2) Subsections (c) and (e) establish two narrow exceptions to the general rule that the accused has the right to be present: Subsection (c) provides that "[w]hen the members of a military commission . . . deliberate or vote, only the members may be present."[13] Subsection (e) provides that the accused may be excluded if, after warning by the military judge, "the accused persists in conduct that justifies exclusion from the courtroom—(1) to ensure the physical safety of individuals; or (2) to prevent disruption of the proceedings by the accused."[14] Neither exception applies here.

(3) Likewise, there can be little argument that provision of evidence by the prosecution to the military judge for review in connection with discharge of the government's

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[8] *See Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."); *see also Lewis v. United States*, 146 U.S. 370 (1892).

[9] 10 U.S.C.S. §§ 801 *et seq* (2007).

[10] MCA § 948b(c).

[11] 10 U.S.C.S. § 839(b) (2007) (accused must be present for all proceedings except "[w]hen the members of a court-martial deliberate or vote").

[12] *See, e.g.*, MCA § 948b(d) (listing UCMJ provisions not applicable in trials by military commission).

[13] MCA § 949d(c).

[14] MCA § 949d(e).

discovery obligations constitutes a "proceeding" of the military commission. Black's Law Dictionary defines "proceeding" to include "the form and manner of conducting juridical business before a court or judicial officer. . . . including *all possible steps* in an action from its commencement to the execution of its judgment."[15] Moreover, the language of MCA § 948d(b) mirrors the language of Article 39(b) of the UCMJ. That provision of the UCMJ has long been interpreted as prohibiting *ex parte* communications involving the military judge or the conducting of business by a court-martial otherwise outside the presence of the accused and counsel. *See United States v. Priest*, 42 C.M.R. 48 (C.M.A. 1970); *United States v. Chavira*, 25 M.J. 705 (A.C.M.R. 1987); *United States v. Dean*, 13 M.J. 676 (A.F.C.M.R. 1982). Thus, the 6 December 2007 *ex parte* review was clearly a proceeding of the military commission from which the accused and his counsel were excluded. Any other conclusion would defy the plain and unambiguous meaning of the word "proceeding," as well as common sense.

b. Provisions Of The MCA Dealing With Classified Information Do Not Provide The Secretary Of Defense With Authority To Issue A Rule Of Evidence Or Procedure In Contravention Of The Accused's Statutory Right To Be Present At All Proceedings Of The Military Commission

(1) The statute could not be clearer: *all proceedings* of a military commission must be conducted in the presence of the accused and counsel, except under the two narrow exceptions provided in MCA § 949d. Notwithstanding this clear statutory language, the Secretary of Defense prescribed (and the prosecution has invoked) M.C.R.E. 505(e)(3). This rule purports to authorize the prosecution to submit matters to the military judge "*in camera* and *ex parte*" in the course of complying with its discovery obligations in military commissions. To the extent this provision contemplates a proceeding of the commission from which the accused and counsel are excluded, it is plainly inconsistent with MCA §§ 949a(b)(B) and 949d(b) and therefore invalid.

(2) The Secretary of Defense has no authority to promulgate a rule of evidence or procedure that is inconsistent with the MCA. While MCA § 949a(a) does give the Secretary the authority to prescribe rules of evidence and procedure for military commissions under the MCA, such rules may not be "contrary to or inconsistent with" the MCA itself. Nothing in the statute gives the Secretary the authority to contravene Congress' clear statement that all proceedings of a military commission be conducted in the presence of accused and counsel.[16]

(3) Examination of the provisions of the MCA dealing with protection and discovery of classified information do not compel a contrary result. MCA § 949d(f) establishes a "national security privilege," which governs the use and disclosure of classified information in military commission proceedings. MCA § 949d(f)(3) provides that a "claim of privilege under this

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[15] *Black's Law Dictionary* 1204 (6th ed. 1990) (emphasis added).

[16] The government has acknowledged that the Secretary may not prescribe rules of procedure inconsistent with the MCA or the Constitution. (*See* Pros. Resp. to Def. Req. for Abeyance of Proceedings of 12 Oct 07.) Moreover, this Military Commission has already once rejected government efforts to rely on Secretarial gloss of the MCA to overcome an unambiguous statutory requirement. (*See* Disposition of Pros. Mot. for Reconsideration of 29 Jun 07.)

subsection and any materials submitted in support thereof, shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused." Subsection (f)(3) does not state or suggest that the accused or counsel may be excluded from an in camera proceeding for such purposes, merely that "materials submitted in support thereof . . . shall not be *disclosed to the accused*." (Emphasis added). Moreover, subsection (f)(3) says nothing that requires materials submitted by the government to be withheld from *counsel* for the accused.[17]

(4) The one provision of the MCA that does allow for "*ex parte*" contact under very limited circumstances simply provides no authority for M.C.R.E. 505(e)(3). MCA § 949d(f)(2)(C), which governs assertion of the national security privilege "*at trial*," states:

> During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such an objection, the military judge shall take suitable action to safeguard such classified information. Such action may include the review of trial counsel's claim of privilege by the military judge in camera and on an ex parte basis . . . .

Thus, the MCA contemplates one, very narrow set of circumstances (i.e., after a particular objection at trial during cross-examination of a witness) under which an *ex parte* contact *may* be authorized. It in no way provides authority for the Secretary to issue a rule requiring the military judge to allow the government to circumvent the accused's right to be present at all stages of the proceedings through a claim of privilege in the discovery phase of a military commission case.

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[17] Strictly speaking, the question of disclosure to defense counsel (as opposed to the presence of accused and counsel at the *in camera* review), presents a distinct issue. However, any information the government would seek to disclose to the military judge *ex parte* would necessarily appear to be within the scope of the government's discovery obligations under R.M.C. 701, otherwise there would be no need to invoke the M.C.R.E. 505(e)(3) procedure. Therefore, the government is clearly required to disclose the information to defense counsel. To the extent the government takes the position that matters not disclosed to the accused should not be disclosed to counsel, this would be exceedingly odd. The government has served 172 classified documents on defense counsel in discovery in this case, subject not only to federal statutes and regulations prohibiting disclosure to the accused, but subject to a protective order issued by the military judge as well, which prohibits disclosure to the accused. In addition, defense counsel are subject to protective orders requiring them to keep the names of witnesses from their client. (*See* Protective Orders Nos. 002-003.) Indeed, the government went so far as to serve two sets of unclassified discovery on the defense – one for counsel and one for the accused. Moreover, the MCA itself appears to contemplate defense counsel having access to information not necessarily provided to the accused. If the accused elects to be represented, he must be represented either by military counsel or, under MCA § 949c(b)(3), civilian defense counsel who is a U.S. citizen with a security clearance. MCA § 949c(b)(4) specifies civilian counsel's obligation to refrain from disclosing classified information to "any person not authorized to receive it[,]" including, presumably, the accused. Clearly, the government expects defense counsel to see and possess a considerable amount of information not disclosed to the accused. But seemingly, in the government's view, the *prosecution* gets to decide which classified matters *admittedly within the scope of its discovery obligation* will be provided to defense counsel and which matters will not. Congress could not have intended and indeed did not provide for such an anomalous result.

(5) The provision of the MCA specifically dealing with disclosure of classified information in discovery, and therefore most relevant to any evaluation of M.C.R.E. 505(e)(3), is MCA § 949j(c). That subsection provides that the military judge, "upon motion" of the trial counsel, shall authorize, "to the extent practicable," various alternatives to full disclosure (e.g., production of a substitution for or summary of classified information). While trial counsel's "motion" under this provision may, presumably, be resolved through a claim of privilege reviewed *in camera*, nothing in MCA § 949j(c) allows for such a claim of privilege, in the course of discovery, to be resolved on an *ex parte* basis or would allow the Secretary to issue a rule providing for such. Indeed, under the principle *expressio unius est exclusio alterius*, Congress' omission of any provision allowing for an *ex parte* contact in the course of discovery when it expressly allowed for such contacts (under limited circumstances) at trial, creates a strong negative inference that Congress intended to preclude use of such a procedure.[18]

(6) This conclusion is strengthened by examination of M.R.E. 505, governing use and disclosure of classified information in courts-martial. M.R.E. 505(g)(2), like MCA § 949j(c), provides for employment of alternatives to disclosure of classified information in connection with discovery. That subsection states that a government motion and materials in support thereof may "be considered by the military judge *in camera* and shall not be disclosed to the accused." M.R.E. 505(i)(1), in turn, defines an "*in camera* proceeding [as] a session under Article 39(a) from which *the public* is excluded. (emphasis added)." As the MCA is intended to establish a trial process "based upon" the practice and procedures of courts-martial, Congress' use of language mirroring the existing procedures in courts-martial creates a strong inference that it intended the same procedures to apply in military commissions, except where, as it did in MCA § 949d(f)(2)(C), Congress authorized a different procedure. It is clear that Congress considered and ordained employment of the same procedure for resolving claims of privilege as employed in courts-martial, i.e., an *in camera*, not an *ex parte* proceeding, which, in the government's view, would exclude the accused and counsel.[19]

(7) Finally, this conclusion is compelled by express Congressional intent to comply with U.S. obligations under Common Article 3 of the 1949 Geneva Conventions.[20] In *Hamdan*

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[18] *See Leatherman v. Tarrant County Narcotics Intelligence* & *Coordination Unit*, 507 U.S. 163, 168 (1993).

[19] M.C.R.E. 505(b)(3) states that an "*in camera* presentation" is not a "proceeding" of the military commission. The rule goes on to state that the accused may therefore be excluded at the request of the trial counsel. The attempt to torture language in this manner should be given no effect. As noted above, the relevant rule applicable in trials by court-martial, on which military commissions are based, defines an "*in camera*" proceeding as one from which the *public* is excluded. This is consistent with the ordinary and accepted meaning of the phrase "*in camera*," which entails a "judicial proceeding . . . had before the judge in his private chambers or when all *spectators* are excluded from the courtroom." *Black's Law Dictionary* 760 (6th ed. 1990) (emphasis added). For purposes of this motion, however, the Military Commission need not decide on the validity of M.C.R.E. 505(b)(3)'s creative "definition" of the term *in camera*; at most, it would allow a proceeding from which the *accused* could be excluded, not an *ex parte* proceeding such as that conducted on 6 December 2007.

[20] *See* MCA § 948b(f).

v. Rumsfeld,[21] a majority of the Supreme Court defined a "regularly constituted court" for purposes of Common Article 3 as one "established and organized in accordance with the laws and procedures already in force in a country."[22] Thus, the Supreme Court concluded that Mr. Hamdan was entitled under Common Article 3 to be tried by a tribunal employing the rules and procedures applicable in trial by courts-martial absent some "practical need" justifying deviation from court-martial practice. Here, Congress evidently considered, and rejected, the notion that there existed any "practical need" justifying a departure from court-martial practice under M.R.E. 505 as it relates to discovery. To the extent M.C.R.E. 505(e)(3) purports to authorize a procedure to the contrary, it simply violates the otherwise applicable requirement of MCA § 949d(b) (allowing the accused to be present) and is therefore invalid.

(8) The point is much more than academic. *Ex parte* proceedings, such as those contemplated here, undermine the effective operation of an adversarial justice system and the integrity of the truth-seeking process. Unable to examine classified information, defense counsel cannot dispute a claim that disclosure would undermine national security.[23] The government routinely overclassifies information or seeks to classify information available through open sources.[24] The military judge cannot be reasonably expected to invest the time and energy to develop the case that disclosure of a particular piece of classified information would not be "detrimental to the national security" – that is presumably the job of defense counsel. Nor can defense counsel dispute the practicability of proffered alternatives to full disclosure classified information or advocate for particular alternatives. Without doubting the good faith of the military judge or trial counsel, they simply cannot know the defense case, theories the defense may pursue, or how particular items of evidence may fit in with these theories or with evidence defense counsel have gathered from their client or through their own investigation. The result is a retardation of the truth-seeking process, and one completely unjustified by any countervailing governmental interest. It is simply impossible to see how disclosure of classified information to a military officer or other qualified counsel with appropriate security clearance would ever undermine national security. In such circumstances, the government's invocation of such a procedure can only serve to seriously undermine public confidence in the legitimacy of military commissions under the MCA. This cannot be consistent with the intent of Congress.

(9) Nothing in these provisions of the MCA allows for the Secretary to prescribe rules allowing *ex parte* proceedings in contravention of the clear statutory requirement that the accused and counsel be present at all proceedings. The Military Judge should issue an order to this effect, which will preclude future attempts to rely on this provision to violate Mr. Khadr's statutory rights in this proceeding.

---

[21] 126 S.Ct. 2740 (2006).

[22] *Id.* at 2797.

[23] *Cf.* MCA § 949d(f)(1) (classified information is protected from disclosure only if "disclosure would be detrimental to national security.").

[24] *See The 9/11 Commission Report*, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 417 (2004); *see also* Briefing Memo. Of Lawrence J. Halloran of 24 Feb 05 (Attachment F).

c. Conclusion:

(1) The MCA allows the government to protect classified information. The relevant section of the MCA allows the government to resolve claims of privilege *in camera*, subject to the general statutory right of the accused and counsel to be present at all stages of the proceedings. While classified information need not necessarily be shown to the accused in such a proceeding, nothing in the MCA suggests that classified information that is clearly material to the preparation of the defense be withheld from defense counsel with the requisite security clearance. To the extent M.C.R.E. 505(e)(3) purports to authorize *ex parte* proceedings to resolve claims of privilege in the course of discovery, it is inconsistent with the MCA and therefore invalid.

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

8. **Witnesses and evidence:** Attachments A through F.

9. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

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

11. **Attachments:**

A. MAJ Groharing e-mail of 1 Dec 07

B. LCDR Kuebler e-mail of 4 Dec 07

C. LTC Chappell e-mail of 5 Dec 07

D. LTC Chappell e-mail of 6 Dec 07

E. Chris M. Winch Memo of 27 Aug 07

F. Briefing Memo. Of Lawrence J. Halloran of 24 Feb 05

By: _____

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

> attempt to forward to your GTMO email.
>
> 2. Please confirm receipt.
>
> V/R,
>
>
> Jeff Groharing
> Major, U.S. Marine Corps
> Prosecutor
> Office of Military Commissions
[redacted]
>
>
>
>
> _____
>
[redacted]
> Subject: RE: MCRE 505/506 Matters US v. Khadr
>
>
> Sir,
>
> 1. The Prosecution intends to file matters in camera; ex parte under
> R.C.M. 701(f) and M.C.R.E. 505(e).
>
> 2. The Prosecution motion and supporting documents contain materials
> classified at the [redacted] level. The Prosecution will travel to
> Guantanamo Bay on Monday, 3 December and materials will be submitted
> to and filed under seal with the Court at an appropriate location upon
> the Prosecution's arrival at Guantanamo Bay, Cuba.
>
> 3. The Prosecution does not believe notice is required under M.C.R.E.
> 505(e). In the event the military judge believes such notice is
> required, this filing can be forwarded to the Defense notifying them
> of the Prosecution filing.
>
> 4. Please confirm Colonel Brownback will be available at Guantanamo
> Bay the week of 3 December.
>
>
> V/R,
>
> Jeff Groharing
> Major, U.S. Marine Corps
> Prosecutor
> Office of Military Commissions
[redacted]
>
>
>
>
> _____
>
[redacted]

Kuebler, William, LCDR, DoD OGC

[redacted]

Subject: RE: RE: MCRE 505/506 Matters US v. Khadr

Sir,

1. While the general substance of the defense's legal position is set forth in my e-mails of yesterday and today, the defense respectfully requests the opportunity to fully brief and argue the question of whether MCRE 505(e), as construed by the government, is consistent with relevant provisions of the MCA. This is a pivotal issue, which it seems will affect the conduct of proceedings in this case henceforth. The defense believes that the military judge should have the benefit of full briefing and argument on the matter before proceeding.

2. The defense is currently working to meet the 7 Dec 07 deadline for the submission of "law" motions. The defense can turn its attention to this issue immediately thereafter and would propose to have its brief filed by Tuesday of next week. Also, the defense would respectfully request the opportunity for oral argument at the earliest opportunity (and hereby invokes its right to such under RMC 905(h)). Even allowing the government 7 days to respond, there would appear to be no reason why the matter could not be argued late in the week of 17 Dec 07. Shortening the time would permit an earlier hearing.

3. In the event the military judge believes it is incumbent upon the government to raise the issue through noticed motion of its desire to submit matters pursuant to MCRE 505(e), the defense believes it can present the defense position on this matter by way of response to the government's motion. In any event, the defense requests oral argument on the matter (and hereby invokes its right to such under RMC 905(h)) prior to disposition by the military judge.

4. To the extent the military judge believes the matter has already been raised by motion, the defense requests oral argument pursuant to RMC 905(h).

VR,

LCDR Kuebler

-----Original Message-----

[redacted]

Kuebler, William, LCDR, DoD OGC

[redacted]

Subject: FW:Ruling - Government Request for an Ex Parte In Camera MCRE 505(e)(3) Review and Defense Request for Briefing and Oral Argument - US v Khadr

COL Brownback has directed that I send the email below to counsel and other interested parties.

LTC [redacted] USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

-----Original Message-----
From: Brownback, Peter E. COL USSOUTHCOM JTFGTMO
Sent: Wednesday, December 05, 2007 9:53 AM
To: [redacted] LTC USSOUTHCOM JTFGTMO
Subject: Ruling - Government Request for an Ex Parte In Camera MCRE 505(e)(3) Review and Defense Request for Briefing and Oral Argument

LTC [redacted],

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

Counsel in the case of United States v. Khadr,

1. References:

a. Email, LTC [redacted], 30 November 2007, 6:25 PM, Subject: FW: MCRE 505/506 Matters US v. Khadr.

b. Email, MAJ Groharing, 1 December 2007, 6:21 PM, Subject: RE: MCRE 505/506 Matters US v. Khadr.

c. Email, LTC [redacted] 2 December 2007, 3:12 PM, Subject: Fwd: MCRE 505/506 Matters US v. Khadr.

d. Email, LCDR Kuebler, 3 December 2007, 12:58 PM, Subject: RE: RE: MCRE 505/506 Matters US v. Khadr.

e. Email, [redacted] 3 December 2007, 1:41 PM, Subject: FW: RE: MCRE 505/506 Matters US v. Khadr.

f. Email, MAJ Groharing, 4 December 2007, 3:31 PM, Subject: RE: RE: MCRE 505/506 Matters US v. Khadr.

g. Email, LCDR Kuebler, 4 December 2007, 4:46 PM, Subject: RE: RE: MCRE 505/506 Matters US v. Khadr.

h. Email, LCDR Kuebler, 4 December 2007, 8:00 PM, Subject: RE: RE: MCRE 505/506 Matters US v. Khadr.

2. By reference 1b, the government requested that the military judge allow the government to file matters in camera and ex parte under the provisions of RMC 701(f) and MCRE 505(e). Notice of this request was given to the defense as required by reference 1a. The defense asserts, inter alia, in references 1d, 1g, and 1h that

a. MCRE 505(e) can not be read to authorize such a filing, and/or,

b. If MCRE 505(e) can be read to authorize such a filing, such filing is prohibited by the MCA.

Further, in reference 1h, defense requests additional briefing on the matter and oral argument (See paragraphs 8-9 below, for the commission's ruling on that request.).

3. The commission has reviewed Section 949d of the MCA, RMC 701, and MCRE 505.

4. The commission does not find that the provisions of MCRE 505(e) are facially invalid.

5. The government shall coordinate with the Court Security Officer. The Court Security Officer will advise the military judge when there is a secure location in which the military judge can review the matters (that is, the government's motion and any other matters submitted in support thereof IAW MCRE 505(e)(3)) which the government wishes the military judge to review. The government will hand the matters to the military judge and there will be no words exchanged. The military judge will conduct his review of the matters and make his determination IAW MCRE 505(e)(3). The determination will be marked by a court reporter and the court reporter will seal the determination and the matters considered by the military judge and arrange for storage. The government will be authorized to read the determination prior to it being sealed. The government may also make a copy of the determination, if necessary to enhance coordination with the agency from whom the information was received. The military judge will then prepare an unclassified version of the ruling. The unclassified version of the ruling will be examined by the Court Security Officer. He may determine that it is in fact

unclassified and authorize distribution. If he determines that there is a question as to classification, he will take whatever measures necessary to ensure the ruling can be properly released, either through coordination with the appropriate agency or redaction of the ruling. After such measures are taken, he will deliver either the original unclassified ruling to the military judge or a redacted version. The military judge will then deliver the final unclassified ruling to both parties.

6. The Appellate Exhibit in this matter will consist of:

a. the original government request for review with responses and replies and other matters as noted in paragraph 1 above. Unsealed.

b. all materials furnished to the military judge by the government as noted in paragraph 6 above. Sealed.

c. the military judge's classified ruling, if one is made. Sealed.

d. the military judge's initial unclassified ruling. Unsealed, unless redaction is required, in which case it will be Sealed.

e. the redacted version of the military judge's unclassified ruling, if one is made. Unsealed.

f. this ruling. Unsealed.

7. Counsel are invited to propose changes to the procedure delineated in paragraph 5 above. Proposals received after the process has started will be considered in the event of future similar reviews.

8. In connection with the defense request for further briefing and oral argument, the commission determines the following matters.

a. By reference 1b, the government asked the military judge to comply with a specific provision of the MCRE.

b. Prior to this request, the legality or propriety of MCRE 505(e) had not been raised in the commission.

c. The provision is not facially invalid.

d. By references 1d, 1g, and 1h, the defense propounds a systematic attack upon the provisions of MCRE 505(e).

e. The defense requests the opportunity to fully brief the issue and oral argument on the issue.

That request is granted. The defense motion in connection with the ex parte in camera provisions of MCRE 505 is due no later than 1200 hours, 11 January 2008. The response and reply will follow IAW the Rules of Court.

9. While the defense request to brief and argue the MCRE 505(e) issue is granted, the

commission sees no reason to delay the current review.
The commission finds that compliance with the provision can cause no harm to the defense - the only possible result is that one person, the military judge, will be aware of matters of which he was not previously aware. Further, noting that MCRE 505(e) deals with provision of discovery to the defense, the commission finds that continuing with the discovery process will help the defense in its goal of preparing for trial.

Peter E. Brownback III

COL, JA, USA

Military Judge

Kuebler, William, LCDR, DoD OGC

[redacted]

Subject: FW: MCRE 505 Review - 6 Dec 07 US v Khadr

COL Brownback has directed that I send the email below to the parties.

V/r,

LTC [redacted] USAR, JA
Senior Attorney Advisor
Military Commissions Trial Judiciary

-----Original Message-----
From: Brownback, Peter E. COL USSOUTHCOM JTFGTMO
Sent: Friday, December 07, 2007 7:52 PM
[redacted]
Subject: MCRE 505 Review - 6 Dec 07

LTC Chappell,

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

Counsel in the case of US v. Khadr,

1. From 1300 until 1333, 6 December 2007, the military judge conducted the review requested by the government in its email of 6:21 PM, 1 December 2007.

2. The matters were delivered to and retrieved from the military judge by the Court Security Officer.

3. Following the review, the military judge did not sign an order UP MCRE 505(e).

Peter E. Brownback III

COL, JA, USA

Military Judge

Department of Defense
Washington Headquarters Services
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

Aug 27, 2007

MEMORANDUM FOR: SECURITY MANAGER, DEFENSE LEGAL SERVICES AGENCY

SUBJECT: Security Clearance Notification

This is to advise you of the security clearance eligibility of the below named military member who is assigned to your organization, as established through checks of appropriate Military Department security clearance records.

Name:	KUEBLER, WILLIAM CHRISTOPHER
SSN:	[redacted]
Service:	USNAVY
Date of Birth:	[redacted]
Place of Birth:	ARIZONA
Security Clearance:	[redacted]
Granted by:	USNAVY
Date Granted:	[redacted]
Investigation:	[redacted]
Agency:	[redacted]
Investigation Date:	[redacted]

You are requested to retain a copy of this notification for your files and to notify the military member's supervisor of this notification.

CHRIS M. WINCH
CHIEF, PERSONNEL SECURITY OPERATIONS DIVISION

TOM DAVIS, VIRGINIA
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MINORITY MEMBER

ONE HUNDRED NINTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143

Majority (202) 225-5074
Minority (202) 225-5051

SUBCOMMITTEE ON NATIONAL SECURITY, EMERGING THREATS,
AND INTERNATIONAL RELATIONS
Christopher Shays, Connecticut
Chairman
Room B-372 Rayburn Building
Washington, D.C. 20515
Tel: 202 225-2548
Fax: 202 225-2382

MEMORANDUM

To: Members of the Subcommittee on National Security, Emerging Threats, and International Relations

From: Lawrence J. Halloran

Subject: Briefing Memorandum for the hearing, *Emerging Threats: Overclassification and Pseudo-classification*, scheduled for Wednesday, March 2, 1:00 p.m., 2154 Rayburn House Office Building.

Date: February 24, 2005

PURPOSE OF THE HEARING

The purpose of this hearing is to examine the proliferation of categories of information that are not classified but are withheld from public disclosure.

HEARING ISSUES

1. **To what extent do current policies and practices permit the excessive or abusive classification, or delayed declassification, of federal materials?**

2. **What is the impact of current classification policies and practices on efforts to enhance interagency and intergovernmental information sharing?**

BACKGROUND

The Final Report of the National Commission on Terrorist Attacks Upon the United States ("the 9/11 Commission Report") found that information security policies and practices impede the robust forms of information sharing required to meet the threat of terrorism. The Report states:

> Current security requirements nurture overclassification and excessive compartmentation of information among agencies. Each agency's incentive structure opposes sharing, with risks (criminal, civil, and internal administrative sanctions) but few rewards for sharing information. No one has to pay the long-term costs of over-classifying information, though this costs— even in literal financial terms— are substantial. There are no punishments for *not* sharing information. Agencies uphold a "need-to-know" culture of information protection rather than promoting a "need-to-share" culture of integration.[1]

The Commission endorsed creation of a decentralized, technologically advanced "trusted information network" to make threat information more widely accessible and to reverse Cold War paradigms and cultural biases against information sharing. The Commission noted such a network had been described in a task force report commissioned by the Markle Foundation **(Web Resources 1)**, but the concept "has not yet been converted into action."[2]

---

[1] The 9/11 Commission Report, *Final Report of the National Commission on Terrorist Attacks Upon the Unites States*, p. 417.

[2] Ibid., p.418.

Since 1940, classification of official secrets has been governed by policies and procedures flowing from executive orders of the President. Current security requirements are mandated by E.O. 12958 as amended by E.O. 13292. **(Attachment 1)** Successive executive directives reflect Cold War counterespionage concerns as well as persistent tension between the need for secrecy the public access to government information. By varying degrees, Presidents sought to protect national secrets through broader or narrower delegation of classification authority, by expanding or contracting categories of classifiable information and by endorsing or opposing the use of automatic declassification deadlines.

The first post-Cold War policy on classification was issued by President Clinton in 1995. E.O. 12356 reset previous default settings, directing classifiers *not* to shield information of doubtful value and to classify information at the *lowest* rather than the highest possible level. With some exceptions, the order sets a ten year limit on classification markings and provides broadened opportunities for declassification of official materials. Reclassification is prohibited if the material has otherwise been properly put in the public domain. A new Interagency Security Classification Appeals Panel was established to make final decisions on certain classification challenges and declassification exemptions. **(Attachment 1, p5)** President Bush issued E.O. 13292, amending E.O. 12958, that reverts to a "when in doubt, classify" standard, expands classification authorities and categories and postponed automatic declassification of some records.

Security concerns after the September 11th attacks prompted some departments and agencies to increase the type and volume of information shielded from public view by *Confidential*, *Secret* or *Top Secret* markings. But executive classification of significant portions of congressional investigative reports revived the debate over the objectivity of information security standards and the potential for excessive, abusive or politically motivated classification. Some have called for appointment of an independent panel to review and settle disputes over classification and declassification. **(Attachment 2, p. 2)**

The Information Security Oversight Office (ISOO) within the National Archives and Records Administration is responsible for executive branch oversight of security classification matters. The ISOO 2003 Report to the President noted that 3,978 separate offices or individuals made 238,030 classification decisions in FY03 affecting more than 14 million documents. Agencies reported an eight percent increase in original classifications over the previous year, with most of the increase attributable to the Departments of Defense and Justice. **(Web Resources 2)**

The report acknowledged that, "many senior officials will candidly acknowledge that the government classifies too much information, although oftentimes the observation is made with respect to the activities of agencies other than their own. The potential use of excessive classification is supported, in part, by agency input indicating that overall classification activity is up over the past several years." The report goes on to note the inevitable tendency to protect more information in times of war but notes the easy propensity to "err on the side of caution" concedes more error than a balanced system should tolerate, concluding that, "Too much classification unnecessarily impedes effective information sharing."

DISCUSSION OF HEARING ISSUES

1. **To what extent do current policies and practices permit the excessive or abusive classification, or delayed declassification, of federal materials?**

Most concede it is impossible to quantify the extent of overclassification, noting it is difficult enough to determine how much information remains classified at any given time. The problem of assessing the true scope of what is classified or overclassified is compounded by the proliferation of information media. One classification decision may affect one page, one thousand pages, or one thousand computer discs each containing one thousand pages.

According to a 1997 report, "Given this uncertainty, it should not be surprising that there is little agreement on the extent of overclassification. For over a decade the ISOO has estimated that between one and ten percent of all classified documents are unnecessarily classified. In 1995, a White Paper prepared by the DoD Inspector General concluded that the classification process at the DoD is "fundamentally sound" and that "the present size of classified holdings is not the result of too much information being needlessly classified." In contrast, a 1985 preliminary study prepared by the staff of two House subcommittees proposed a classification system in which "roughly nine-tenths of what is now classified" would no longer qualify for classification. More recently, former NSC Executive Secretary Rodney B. McDaniel estimated that only ten percent of classification was for "legitimate protection of secrets." Given the uncertainty surrounding the breadth of classification, however, efforts to quantify with any precision the extent of unnecessary classification not only may be futile, but are unlikely to help in understanding its causes or possible remedies." **(Web Resources 3)**

The report further noted that despite being required to mark documents to indicate which portions are classified and which are not, employees in some agencies continue to mark materials "Entire Text

Classified," increasing the difficulty of distinguishing which parts truly need protection and which might later be declassified.

The creation of classification safe harbors, or sacred cows, also contributes to the volume of information put into those categories and the set of documents that often remain beyond declassification review. Intelligence sources and methods, personnel levels and budgets have become classification icons into which very remotely related information can be secreted. The Cold War nuclear doctrine of "born classified, always classified" also encourages overclassification. **(Web Resources 4)**

Over-classification is viewed by some as an inevitable political and cultural bureaucratic response to an exclusive "need to know" security standard. Such an environment breeds what has been called "the cult of classification" whose members have every incentive to increase their own importance by increasing the volume of information only they can see. **(Attachment 3)**

2. **What is the impact of current classification policies and practices on efforts to enhance interagency and intergovernmental information sharing?**

A far more horizontal world - characterized by transnational terrorism and the need to respond using multinational military coalitions – challenges Cold War paradigms and policies designed to protect official secrets in vertical organizational structures. The 9/11 Commission concluded that inability to integrate the intelligence in hand – both classified and unclassified – across agency lines contributed to the failure to detect or deter the attacks.

As an example, according to recently declassified 9/11 Commission staff reports, the Federal Aviation Administration (FAA) reviewed numerous intelligence reports that warned about al-Qaeda's interest in airline hijackings and suicide operations prior to the New York World Trade Center

and Pentagon attacks. Although the FAA warned airport security officials about the possibility of suicide hijackings, the warnings "did not stimulate significant increases in security procedures." **(Web Resources 5) (Attachment 4, p. 62)** Some are questioning whether the Administration abused the classification process to improperly withhold the 9/11 Commission findings from Congress and the public until now based on political rather then purely security considerations.

Homeland Security has become a national priority and as a result, there has been a proliferation of categories of information that are not classified but held from public disclosure. These categories include *Sensitive Homeland Security Information*, *Sensitive Security Information*, and *Critical Information* among others. These categories are not well understood and may be misused causing damage to homeland security, freedom of information and government transparency. The Congressional Research Service (CRS) witness will testify about the basis for such designations and the criteria the information must meet in order to be so designated.

Overclassification makes integration of federal agency watch lists and other data bases more complex and more expensive given the need to maintain separate systems and protocols for secure information.

Classified information is also more difficult to include in alerts to state and local officials since many do not have required clearances and cannot justify committing to costly responsive actions based only on scrubbed, generic information. In testimony before the Government Reform Committee on August 3, Comptroller General David Walker noted that the federal government did not generally consider the role of state and local officials in national security matters but that September 11th and the continuing threat of terrorism create a compelling "need to share" intelligence information at that level. **(Web Resources 6)**

In 1970, the Defense Science Board concluded that overclassification also undermines the credibility of government security decisions. **(Web Resource 4, Note 2)** Indiscriminate and

excessive classification also tends to mask the volume and utility of information now available from open sources.

Overclassification ultimately incurs avoidable fiscal costs and compromises national security. Adversarial, versus automatic, declassifications procedures are cumbersome and time consuming. Safeguards for voluminous classified material require costly security measures. And government officials confronted with dizzyingly complex rules for numerous categories of classified information often cannot or do not distinguish truly significant security matters from routine material market secret out of an excess of caution or zeal. It is often observed in this regard "he who defends everything defends nothing."

ATTACHMENTS

1. CRS Report, *Security Classification Policy and Procedures: E.O. 12958, as Amended*, 97-771, January 7, 2005.

2. CRS Report, *Secrecy Versus Openness: Arrangements for Balancing Competing Needs,* RS21895, August 4, 2004.

3. "I Could Tell You, But I'd Have to Kill You: The Cult of Classification in Intelligence," STRATFOR Analysis, September 18, 2000.

4. 9/11 Commission staff report, August 26, 2004, *Part2. Civil Aviation Security and the 9/11 Attacks*

WEB RESOURCES

1. http://www.markle.org/downloadable_assets/nstf_report2_full_report.pdf

2. http://www.archives.gov/isoo/reports/2003_annual_report.html

3. http://www.fas.org//sgp/library/moynihan/

4. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB90/index.htm

5. http://www.democrats.reform.house.gov/Documents/20050210162128-39627.pdf

6. http://reform.house.gov/UploadedFiles/GAO%20-%20Walker%209-11%20Testimony.pdf

WITNESS LIST

Panel One

Mr. J. William Leonard, Director
Information Security Oversight Office
National Archives and Records Administration

RADM Christopher A. McMahon, USMS
Acting Director, Departmental Office of Intelligence, Security, and Emergency Response
Department of Transportation

Mr. Harold Relyea
Specialist in American National Government
Congressional Research Service (CRS)
Library of Congress

Panel Two

The Honorable Richard Ben-Veniste, Commissioner
National Commission on Terrorist Attacks Upon the United States

Panel Three

Mr. Thomas Blanton, Executive Director
National Security Archive
George Washington University

Mr. Harry A. Hammitt, Editor and Publisher
Access Reports: Freedom of Information
Lynchburg, Virginia

[redacted] **SSG, DoD OGC**

[redacted]

Subject: Ruling - D-015 - Motion for Appropriate Relief (to Preclude Furthe Ex Parte Proceedings Under Color of M.C.R.E. 505(e)(3)) - US v. Khadr

Attachments: D-015 - Ruling - Final.pdf

COL Brownback has directed that I forward the attached ruling to counsel and other interested persons.

v/r,

LTC [redacted], USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From: Pete Brownback [mailto:abnmj@cfl.rr.com]
Sent: Thursday, February 21, 2008 09:53
To: [redacted] LTC, DoD OGC
Subject: Ruling - D-015 - Motion for Appropriate Relief (to Preclude Furthe Ex Parte Proceedings Under Color of M.C.R.E. 505(e)(3)) - US v. Khadr

LTC [redacted],

Attached is the commission's ruling on D-015, the defense motion for appropriate relief to preclude further *ex parte* proceedings under color of M.C.R.E. 505(e)(3). Please forward it to counsel in the case of United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

[redacted] **SSG, DoD OGC**

[redacted]

Subject: RE: U.S. v. Khadr -- Defense Repy (Ex Parte Proceedings) D15

Attachments: 2008-01-24 Def Reply to Govt Respns to Mtn for Approp Relief (Ex Parte Proceedings).pdf

2008-01-24 Def Reply to Govt R...

Sir,

1. Please find attached for filing the defense reply to the government response to the defense motion to preclude further ex parte proceedings (D015).

2. The defense notes that it has elected not to file reply briefs with respect to D016, D017, and D019, and instead to allow the motions to be decided by the Military Judge on the basis of the motions and responses alone.

3. The defense decision not to submit replies should not be construed as agreement with or acquiescence in any of the government's positions, factual or legal, as set forth in their responsive pleadings. Rather, given limitations on time and resources available to the defense, it cannot competently continue its preparation for trial, prepare for the 4 February hearing, and adequately respond to the government's pleadings.

VR,

LCDR Kuebler

[redacted]ew, SSG, DoD OGC

[redacted]

Subject: Re: Filing Designation: D015 Motion to Preclude Further Ex Parte Proceedings - US v. Khadr

Attachments: D 15 - Prosecution Response - 505.pdf

D 15 - Prosecution Response - ...

Sir,

Prosecution response is attached.

V/R,

Major Groharing

[redacted], LTC, DoD OGC wrote:

> All parties,
>
> The filing designation for the 11 JAN 08 Defense Motion to Preclude
> Further Ex Parte Proceedings Under Color of MCRE 505(e)(3) is D015
> Motion to Preclude Further Ex Parte Proceedings - Khadr. See RC 5.
>
>
> v/r,
>
> LTC [redacted], USAR
> Seni[redacted]dvisor
> Military Commissions Trial Judiciary
> Department of Defense
>
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> ---
> --
> --------
> From: Snyder, Rebecca, Ms, DoD OGC
> [redacted]:28

[redacted]

> [redacted]
> [redacted] Ex Parte Proceedings
> Under Color of MCRE 505(e)(3)
>
>
> LtCol [redacted],
>
> Please find attached the defense motion to preclude further ex parte
> proceedings under color of MCRE 505(e)(3).
>
> V/r
> Ms. Snyder
>

--
Jeff Groharing
Major, U.S. Marine Corps
[redacted]ce of Military Commissions
[redacted]

UNITED STATES OF AMERICA	}	**D-020** **Ruling on Defense Motion for Relief from the Terms of Protective Order No. 001** **21 February 2008**
v **OMAR AHMED KHADR** a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khahi"	}	

1. The commission has considered:

a. The defense special request for relief, Email, LCDR Kuebler, 16 January 2008, 08:45 AM, Subject: U.S. v. Khadr -- Defense Special Request for Relief from Terms of Protective Order No. 001 (with attachments), which was designated as D-020 by LTC Chappell's email, 16 January 2008, 1:12 PM, Subject: FW: U.S. v. Khadr -- Defense Special Request for Relief from Terms of Protective Order No. 001 (D020).

b. The government response of 23 January 2008.

c. The defense request for ruling in LCDR Kuebler's email, 11 February 2008, 2:43 PM, Subject: U.S. v. Khadr -- D-020 -- Request for ruling.

d. The government's response to 1c above in MAJ Groharing's email, 12 February 2008, 3:10 PM, Subject: Re: U.S. v. Khadr -- D-020 -- Request for ruling.

e. Protective Order # 001, 9 October 2007 (AE 031).

2. Defense specifically requests that the commission authorize the defense to release two documents to Mr. Khadr's Canadian counsel, so that Canadian counsel may file the documents with the Registrar of the Supreme Court of Canada in the case of Minister of Justice, et al., v. Omar Ahmed Khadr, Case No. 32147. The documents were provided to the defense by the prosecution in fulfillment of the prosecution's responsibilities under the Manual for Military Commissions and under the provisions of Protective Order # 001.

3. Each of the documents in question has the label "FOUO/LAW ENFORCEMENT SENSITIVE". Each document is headed "CRIMINAL INVESTIGATION TASK FORCE (CITF) REPORT OF INVESTIGATIVE ACTIVITY" and each document has the following statement at the bottom "THIS DOCUMENT CONTAINS NEITHER

RECOMMENDATIONS NOR CONCLUSIONS OF CITF. IT IS THE PROPERTY OF THE CITF AND IS LOANED TO YOUR AGENCY; THIS DOCUMENT IS NOT TO BE RELEASED OUTSIDE OF YOUR AGENCY."

4. Provision of discovery by the government to the defense under Rule for Military Commission 701 is designed to assist the defense in performing its statutory and regulatory obligations under the Military Commissions Act of defending the accused before the military commission. Neither the prosecution nor the commission have the authority to release documents to the defense for any purpose other than providing defense services to an accused before a military commission.

5. The documents in question were given the label "FOUO/LAW ENFORCEMENT SENSITIVE" by the Criminal Investigation Task Force. That agency is the one which must authorize the release of any documents outside the ambit of the military commissions.

6. The defense request for relief is denied.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**D020** **Government Surreply** To Defense Motion to Compel Production of all Records Relating to the Accused's Confinement, Including Interrogation Plans and Manuals or Lists of Authorized Interrogation Techniques. 20 February 2008

1. **Timeliness:** This surreply is filed within the timeframe established by the Military Judge order dated 15 February 2008.

2. **Relief Sought:** The defense motion to compel production of all records relating to the confinement of the accused, including interrogation plans and manuals or lists of authorized interrogation techniques, should be denied as moot. Furthermore, the defense request for an order for the Prosecution to provide "a signed statement from the responsible counsel or official from each concerned government intelligence or law enforcement agency… indicating that all potentially relevant existing documents have been provided and /or if a document has been withheld identifying the document, its location, and the reasons for withholding" should be denied.

3. **Overview:** Orders to compel discovery should be issued when a party litigant refuses to provide documents that are subject to discovery. To date, the defense has failed to show the existence of any purported documents it seeks, let alone how those documents may, in fact, be relevant. Rather, the defense boldly, but mistakenly, asserts that the Prosecution somehow does not understand its discovery obligations. Furthermore, the Prosecution has affirmatively searched various locations of documents and provided required documents, therefore an order to compel discovery is unnecessary.

Discovery compliance is an affirmative Prosecutorial duty required of prosecutors, not for relevant agencies, to certify production or compliance with discovery obligations in criminal matters. The prosecution has not misunderstood its discovery obligations and has taken, by military justice standards, extraordinary affirmative steps to ensure its compliance with R.M.C. 701 *et al*. To date, the Prosecution believes that it has done so and, recognizing its continuing discovery obligations, will continue to do.

4. **Burden and Standard of Proof:** The burden of persuasion on this motion rests with the defense. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004).

5. **Facts:** An overview of relevant facts were set forth in the original defense motion and prosecution response. To properly detail the Prosecution's compliance with discovery obligations with respect to this motion, the following additional facts are submitted:

The Prosecution has affirmatively requested and reviewed a myriad of information from a variety of U.S. entities in order to fulfill its discovery obligations articulated in the Manual for Military Commissions and R.M.C. 701 et al. The Prosecution has provided discovery in accordance with R.M.C. 701 *et al*. The affirmative search for information establishes what the Prosecution believes is the realistic known universe of potential holders of information that may be relevant and discoverable.

Specifically, the following information has been provided:

The accused was captured by Afghan coalition forces being supported by U.S. Forces at a roadblock established at the entrance of the town of Taktepol, Afghanistan on November 24, 2001. The accused was questioned on approximately November 26, 2001. The two interrogation sessions were captured on videotape, identified as the "capture video." (See written motions and responses to D-018). Furthermore, relevant and necessary documents reporting the battle of Taktepol, the capture of accused, and the recovery of pocket litter were provided to the defense on June 10, 2005. Defense was notified of the ability to have access to "witness A" on December 21, 2007 and the Defense questioned this witness on February 14, 2008.

During the roadblock, U.S. Forces recovered a significant number of documents, hereinafter "pocket litter." The pocket litter was segregated and subsequently sent to additional U.S. officials for exploitation. Descriptions of pocket litter were provided the defense on September 10, 2004 and the pocket litter the Prosecution intends to use at trial was provided Defense on June 10, 2005 and December 21, 2007. Furthermore, relevant reporting documents associated with the seizure and initial exploitation of pocket litter were provided to the Defense on June10, 2005.

Approximately December 28, 2001, the accused arrived at Bagram Air Field, Afghanistan, where the small contingent of U.S. personnel took custody of the accused. Defense was provided this information in discovery on September 10, 2004. The accused was "formally in-processed" into the Bagram on December 28, 2001. The records associated with the in-processing were turned over to the Defense on or prior to December 21, 2007. These documents include medical notes by the staff surgeon, a photograph of the accused and the in-processing questionnaire.

For most of his time at Bagram, the accused was held in his original detention area, separated from other Al Qaeda or Taliban detainees. The Prosecution knows of no other non-interrogation records associated with the accused's detention at Bagram Air Base, including discipline records, interrogation plans, logs that would exist outside the interrogation documents previously provided Defense on December 18, 2003, September 19, 2004, December 21, 2007, and a newly discovered hearsay statement turned over to Defense on February 11, 2008.

The accused was transferred to the Kandahar detention facility on or around January 28, 2002. He remained in Kandahar until the April 28, 2002, when he was transferred to Guantanamo Bay, Cuba. The accused was in–processed into the Kandahar detention facility by military police and interrogators on January 28, 2002. That in-processing document and contact information for the individual responsible for it was provided to the defense. The document was provided no later then December 21, 2007 and the contact information was provided Defense on February 11, 2008.

While in U.S. control in Afghanistan, the accused was treated well; fed regular meals, received shelter and was protected from harm. The applicable regulation for interrogations by military officials was AR 34-52, a copy of which has been readily available to the Defense through the Department of Defense and via the internet. The Prosecution provided defense a copy of a website location where AR 34-52 could be downloaded, and on February 6, 2008, provided the Defense a hardcopy of the document.

The accused was questioned by a variety of U.S. Forces in Kandahar, and all known statements have long been turned over to the Defense. These statements were turned over to Defense on December 18, 2003, September 19, 2004, December 21, 2007. Similar to Bagram, there are no known additional confinement related documents regarding the accused's detention in Kandahar such as visitor logs or discipline history, nor does the Prosecution have a reasonable belief that these documents ever existed.

The accused was transferred to Guantanamo Bay, Cuba on April 28, 2002**.** The ATO manifest was provided to Defense on December 21, 2007. The accused was originally detained in Camp Delta. With respect to the time the accused has been detained at Guantanamo Bay, Cuba, the Defense has received:

All known statements of the accused to U.S. personnel. These statements were originally discovered to defense on December 18, 2003, September 19, 2004, December 21, 2007, and a newly discovered hearsay statement turned over to Defense on February 11, 2008. .

Names and contact information of translators at JTF-GTMO were provided on December 8, 2004.

Known relevant JTF-GTMO camp records associated with the accused. This includes:

Discipline history: The accused's discipline history was originally provided the Defense on September 10, 2004. That record was updated on February 8, 2008 (see Government response). The Prosecution believes the discipline history provided to the Defense is complete and accurate or nearly complete and accurate in that the first discipline entry occurred on May 29, 2002, within a month of the accused's arrival in Guantanamo Bay. There is no evidence or information that would lead one to expect additional documents exist or ever existed. There is no evidence to suggest any documents were destroyed. The prosecution believes it has complied with this request.

Movement records: These records were originally provided the Defense on September 10, 2004 and that information was updated again on February 8, 2008. There is no evidence or information that would lead one to expect additional documents exist or ever existed. There is no evidence to suggest any documents were destroyed. The prosecution believes it has complied with this request.

Recreation history: Per the prosecution response, this information was originally going to be denied but has since been provided to the Defense on February 11, 2008.

Medical Record: The current medical record of the accused was provided Defense on February 8, 2008.

The Standard Operating Procedures for treatment of Detainees at JTF-GTMO for the years 2003, 2005, and 2007.

There are no known interrogation plans for the accused held at JTF-GTMO.

6. Law and Argument:

a. R.M.C. 701(c) and (e) dictate prosecutorial obligations of "due diligence," "material preparation of defense" and "exculpatory evidence" standards for discovery in Military Commissions. The rules do not provide the Defense an "open door."

701(c) in relevant part states "the Government shall permit defense counsel to examine the following materials:

> (1) Any books, papers, documents photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody or control of the Government, the existence of which is *known or by the exercise of due diligence* may become known to trial counsel, and which are *material to the preparation of the defense* or are *intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial*.

RMC 701(e) directs the Government "disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

> (1) Negate the guilt of the accused of an offense charged;
>
> (2) Reduce the degree of guilt of the accused of an offense charged; or
>
> (3) Reduce the punishment.

The plain language of the discovery obligations sets both an affirmative duty on the Government (due diligence) to locate documents, but also qualifies that duty to disclose to only that information material to the preparation of the defense using the standard articulated in *United States v. Younis*, 867 F.2d 617 (D.C. Cir. 1989). *Younis* articulates a three prong test for the production of information. In this case the documents must be relevant, the perceived existence of a national security privilege must be determined, and then the court must do a balancing test. As such, R.M.C. 701(c) does not contemplate providing the Defense open access to information.

b. The Prosecution has complied with the due diligence requirement regarding the requested documents

The first issue before this court is the first prong of the Government's obligation, whether the Prosecution has acted with due diligence in conducting its search for information. The Defense contends that the Prosecution mistakenly applies its discovery obligations. This contention is not accurate. The Prosecution readily admits its discovery obligations extend

beyond the Prosecutor's own files.[1] In this case the Prosecution has conducted a multi-organization (several separate agencies and additional organizations within the Department of Defense) document search for information and documents and has provided the relevant and material information to the Defense. The statement of facts provides a detailed showing of documents provided from various search requests from different agencies. To the extent that documents ever existed, the Prosecution has reviewed them and applied the relevant discovery standards and the required documents were disclosed, either initially, or after the defense made the documents relevant through a separate motion, see attachment (c) of Prosecution response to D-020 in which it released documents they it believed were probably not relevant, but became relevant through allegations by the Defense contained in motion D-019 [motion for pre-trial confinement credit].

c. Defense motion is moot.

The Defense requested court order for the discovery of various types of documents listed below fails to articulate why those documents would otherwise be relevant or necessary under RMC 701 *et al*. However, with respect to the majority of types of documents listed in the Defense motion, those requested documents do not appear to have existed. Therefore, the analysis with respect to this requested documents stops after the showing of the Prosecution's due diligence. Each requested type of document is discussed separately.

With respect to the outstanding documents in Government's reply, each answer is spelled out below.

Visitor logs. The Prosecution search of records has failed to turn up any specific visitor logs associated with the accused in Afghanistan or Guantanamo Bay. Since there are no documents that meet our understanding of this term, the prosecution cannot determine the relevance of these documents. There is no evidence that the documents ever existed or were destroyed. The Prosecution has provided the detainee movement records on September 10, 2004 and that information was updated again on February 8, 2008. The movement records explain where and when the detainee was moved from his cell, including to see visitors. There is no evidence or information that would lead one to expect additional documents exist or ever existed. There is no evidence to suggest any documents were destroyed. The Prosecution believes it has complied with this request. If the defense has specific information to either further define its request or can provide a point of contact that can describe a location of where these documents purportedly existed, the prosecution is more then willing to further focus its search, further attempt to locate what these purported documents and then perform the required discovery analysis. Simply put, the prosecution has not located any documents that meet this request and therefore, an order to compel is inappropriate.

Disciplinary records. The Prosecution has provided the defense with all known disciplinary records of the accused. These records are from JTF-GTMO. The prosecution has received the accused's known detention records for the time he was in Afghanistan. Those documents were provided to the defense at various stages of discovery. There are no known

[1] *see United States v. Williams*, 50 M.J. 436 (1999) and *United States v. Simmons*, 38 M.J. 376 (C.M.A. 1993), defined the due diligence in discovering results of exams and tests.

additional disciplinary records of the accused for this time period. There is no evidence that the documents ever existed or were destroyed. If the defense has specific information to further define its request or can provide a point of contact that can describe a specific location of where these documents purportedly existed, the prosecution is more then willing to further focus its search, attempt to locate what these purported documents are and then perform the required discovery analysis. An order to compel documents that are not known to exist is inappropriate.

Standards of Conduct/Standard Operating Procedures. The defense requests the absurd, a signed statement that detention officials had no procedures for conducting detention operations during the times the accused was detained. The request is made even more absurd in light of the failure to address the relevance of such documents, in the absence of any structural allegation of improper conduct during the operation of any detention facility. To the extent the issue has been raised by the filing of D-019, those SOPs have been provided. Detention operations have and are governed by Army Regulations, readily available to Defense through the same military channels as the Prosecution. Due to the potential relevance of the structural elements of defense motion D-19, those SOPs have been provided.

Records/memoranda prepared by the U.S. Government concerning the accused. The Prosecution has turned over all discoverable records or memoranda prepared by the United States Government.

Interrogation plans/notes. While RMC 701(c)(3) appears to make this type of information discoverable, so long as they are both relevant and material to the preparation of the defense, however they simply do not exist. The Prosecution has previously provided the Defense all known notes of interrogations as well as all summaries of interviews or intelligence reports associated with the statements of the accused. Furthermore, any additional documented planning associated with individual interviews may be contained within documents previously turned over known as MFRs prepared by military interrogators. However, there are no known "interrogation plans" as cited by the defense in its reply.

Interrogation plans and documents cited by the Defense to suggest the existence of a special interrogation plan for the accused, (those mentioned in the January 12, 2005 Time Magazine article about detainee 063) **clearly and emphatically** do not exist. The Time Magazine article details the requirements of a special interrogation plan that was required by a then existing policy for enhanced interrogation directly approved by the Secretary of Defense. The accused was **NEVER** approved for such enhanced interrogation techniques. Thus, there was no interrogation log or plan developed for him similar to that of detainee 063. While not specifically relevant to this motion, the Schmidt-Furlow investigation provides a very time specific detailed factual overview of the special interrogation program and the fact that only two individuals were subjected to it. The accused was **NOT** one of them.

Interrogation techniques: The prosecution has complied with its discovery obligations regarding authorized interrogation techniques. The applicable interrogation manual during the time of the accused's interrogations was AR-34-52. That document has been provided the defense. As stated above, the accused was not the subject of so-called "enhanced interrogation techniques" that were the subject of the Schmidt-Furlow investigation. As such, the accused was

never subjected to any of separately approved interrogation techniques approved by the Secretary of Defense. The Prosecution has complied with this request.

d. Discovery compliance is a prosecutorial function done by prosecutors not agencies of the United States Government.

The Defense improperly asks for a court order that the Prosecution produce "a signed statement from the responsible counsel or official from each concerned government intelligence or law enforcement agency indicating that all potentially relevant existing documents have been provided and /or if a document has been withheld identifying the document, its location, and the reasons for withholding" and that the Prosecution seek certification in writing that no additional notes, plans or logs ever existed, or if they did, that they were destroyed, and if so, by whom and when.

These are improperly requested remedies for the court. Discovery compliance is a prosecutorial function. RMC 701 and rules of professional responsibility firmly place this burden on the prosecution not separate Department of Defense organizations or other government agencies. A certificate of compliance mandated or even contemplated from any government agency is simply improper.

In this case, Prosecutors have performed a due diligence search for required information among those entities that may possess relevant information. The Prosecution has done that.

e. Court ordered production is not proper remedy

RMC 701(l) allows the military judge to regulate discovery. However, in this case the prosecution has readily made available those documents that are discoverable under RMC 701. Absent a specific showing of non-compliance with obligations, there is no need to issue court orders and the prosecution asserts that this motion is moot.

f. Prosecution recognizes its continuing obligation and continues to comply

As previously stated, the prosecution realizes that discovery remains an ongoing obligation and the prosecution will continue to comply. This includes any information the defense may have that would lead to any additional information that may be discoverable.

7. Request for Oral Argument: The Prosecution does not require oral argument.

8. List of Witnesses: There is no need for witnesses.

9. Conference with Opposing Counsel: This surreply is submitted in accordance with the Military Judge's granting of special relief.

Respectfully submitted,

/s/
William B. Britt
LTC, JA, USA
Prosecutor

/s/
Timothy D. Stone
LCDR, JAGC, USN
Prosecutor

/s/
Mr. John Murphy
Department of Defense
Prosecutor

[redacted], SSG, DoD OGC

[redacted]

Subject: RE: U.S. v. Khadr -- Defense Reply re D020

Attachments: MuneerAhmad_ExhibitP.pdf; Exhibit 'N'.pdf; Exhibit 'O'.pdf

MuneerAhmad_ExhibitP.pdf (521 ... | Exhibit 'N'.pdf (128 KB) | Exhibit 'O'.pdf (298 KB)

Sir,

1. The defense submits the following in reply to the government response to the defense special request for relief (D020):

2. First, the defense notes that the basis for the FOUO/LES designation of these documents is doubtful to begin with. The government claims the documents are protected because they relate to an "ongoing" investigation of "Omar Khadr" as well as other individuals implicated by his statements. How the investigation of Omar Khadr can be "ongoing" over five years after his initial detention and over two years since he was initially charged is, to put it mildly, a mystery. Indeed, it seems unlikely that there is, in fact, any "ongoing" investigation of Mr. Khadr. As far as "other individuals" may be concerned, we have nothing other than the prosecution's conclusory statement on which to rely. In short, it seems highly questionable that there really is any information deserving of "protection" in these documents.

3. Much of the information contained in these documents is in the public domain. In particular, it is already publicly known that Canadian government officials interviewed Mr. Khadr in GTMO in February and September, 2003, and again in March, 2004. Some of the content of those interviews has been released by the Canadian government and filed with the Canadian courts. This information is reflected in the decision of Canada's Federal Court of Appeal and the Canadian government document attached to AE D020.

4. Additionally, the publicly available document now attached confirms that the interview of 30 March 2004 was conducted by a Canadian official named Jim Gould. The document contains the following statements:

Finally, as an amateur observer of the human condition, Mr Gould would describe Umar as a thoroughly "screwed up" young man. All those persons who have been in positions of authority over him have abused him and his trust, for their own purposes. In this group can be included his parents and grand-parents, his associates in Afghanistan and fellow detainees in Camp Delta [remainder of paragraph redacted].

5. This document has also been the subject of articles written by the media. See e.g.: Colin Freeze, "Guantanamo teen tortured, family says, Thoroughly 'screwed up' young man abandoned by parents, documents state", Globe and Mail, February 10, 2005.

6. The Canadian litigation's potential to result in discovery of information beyond that pertaining to the Canadian interviews:

7. The Prosecution argues that the Defense has failed to demonstrate how providing the Canadian court with information related to two particular interviews is relevant to the extensive amount of information believed to be held by the Canadian government (some 3,000 pages) or how it would lead to the Canadian government providing any additional information unrelated to those particular interviews.

8. At paragraph 5.c.7, the Prosecution argues that "At most, the information contained in the 24 February 2003 and 30 March 2004 Form 40s could possibly lead to relevant additional information in the possession of the Canadian government related to these interviews." This is not the case.

9. The Order granted by the Federal Court of Appeal, now under review by the Supreme Court of Canada, is not limited to information respecting the Canadian interviews. Rather, this Order clearly extends to all documents, records and other materials "which might be relevant" to the matters at issue in this prosecution. The terms of this Order read:

(a) the respondents, the Minister of Justice and Attorney General of Canada, the Minister of Foreign Affairs, the Director of the Canadian Security Intelligence Service and the Commissioner of the Royal Canadian Mounted Police, produce before the Federal Court unredacted copies of all documents, records and other materials in their possession which might be relevant to the charges against the appellant and which are therefore necessary for the purpose of allowing him to raise full answer and defense to the charges;

(See para. 44(a))

10. Hence, if the Supreme Court of Canada were to dismiss the appeal now before it, the Government's disclosure obligations would not be limited to the Canadian interviews.

11. As the Federal Court of Appeal also notes, the Government of Canada is in possession of some 3,000 pages of documentary materials relevant to this prosecution. This information extends far beyond that pertaining to the Canadian interviews. For example, one of the documents now before the Supreme Court of Canada is a facsimile request dated 31 August 2002, from Cpl. Richard Flewelling of the Royal Canadian Mounted Police ("RCMP") to the RCMP's Liaison Office in Islamabad which reads as follows:

Re: Omar Ahmed Khadr

Thank you for the information you provided to date and sorry to bother you on the weekend. However, senior management as well as DFAIT [Department of Foreign Affairs and International Trade] and PCO [Privy Council Office] have requested additional information on the events of the 27th of July when Omar was wounded and captured. Please attempt to acquire additional information as to the details surrounding this event. Clarification is required in order to brief government officials for Tuesday morning.

12. A facsimile response to the above request was sent on the same date of 31 August 2002, from Rob Morrison, Liaison Officer, from the RCMP's Liaison Office in Islamabad. This document consists of an unredacted cover page and some 8 pages of redacted information. If successful in the Canadian litigation, Mr. Khadr would receive the information redacted from this document which presumably contains "additional information on the events of the 27th of July when Omar was wounded and captured".

13. In Canada, the Court's authority to grant remedies for breaches of the Canadian Charter is governed by the language of s. 24(1) thereof which reads:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Enacted as Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11, s. 24(1).

14. In the Supreme Court of Canada's decision in Mills v. The Queen, the scope of authority conferred by s. 24(1) was described in the following terms:

What remedies are available when an application under s.24(1) of the Charter succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers "appropriate and just in the circumstances". It

is difficult to imagine language which could give the court a wider and less fettered discretion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion. No court may say, for example, that a stay of proceedings will always be appropriate in a given type of case. Although there will be cases where a trial judge may well conclude that a stay would be the appropriate remedy, the circumstances will be infinitely variable from case to case and the remedy will vary with the circumstances.

Mills v. The Queen, [1986] 1 S.C.R. 863 at 965-66.

15. In exercise of the above authority, the Federal Court of Appeal ordered the Canadian government to disclose “all documents, records and other materials in their possession which might be relevant to the charges against the appellant and which are therefore necessary for the purpose of allowing him to raise full answer and defense to the charges”.

16. The Adequacy of the FM40s: At paragraph 5.c.8, the Government argues that the Form 40s in question provide an “adequate summary” of the interviews in question. At paragraph 5.c.8.a the Government states that “The 24 February 2003 provides a detailed account regarding interviews conducted by Canadian officials on 13-16 February 2003.”

17. Firstly, as noted above, the Canadian litigation is not limited to the disclosure of information relevant to the interviews. Hence, whether or not the FM40’s contain adequate summaries of those interviews is of limited relevance to this motion.

18. Secondly, the Prosecution’s assertion that the FM40’s provide an “adequate summary” is difficult to reconcile with the contents of these documents. The 24 February 2003 report summarizes the NCIS officer’s review of the first 2 days of videotaped Canadian interviews as follows:

On 13Feb03, KHADR was interrogated in an interrogation room with a large table. He was sitting in a folding chair. The audio was very bad and neither the interrogators nor KHADR could be heard. He was provided food and he ate a burger and soda. The interview lasted approximately two hours. No verbal discourse could be understood.

On 14Feb03, KHADR again was placed in the same type of room with a large table and folding chair. The interrogators could be heard during some of the interview. KHADR was difficult to hear. He mumbled and had his head down. KHADR started the interview with a noticeable change in demeanor from the previous day. He would not look at his interviewers. He was provided with food.

19. In paragraph 5.c.9, the Prosecution states that it will not rely upon information obtained by Canadian officials in their case in chief.

20. It is not surprising that the Prosecution will not rely upon the information contained in the FM40’s at issue since said information is potentially exculpatory, and therefore of potential use to the defense. In this respect, it will be noted that the 24 February 2003 report was one of the documents included by the defense as one upon which the defense might rely at the UEC hearing then scheduled for November 8, 2007. (See email from Rebecca Snyder of 30 October, 2007, Re: “US v. Khadr - Unclassified Documents for UEC Hearing 1 of 4”, first attachment.) Mr. Khadr ought not to be hindered in his attempt to obtain information which might be of assistance to him in raising his defense.

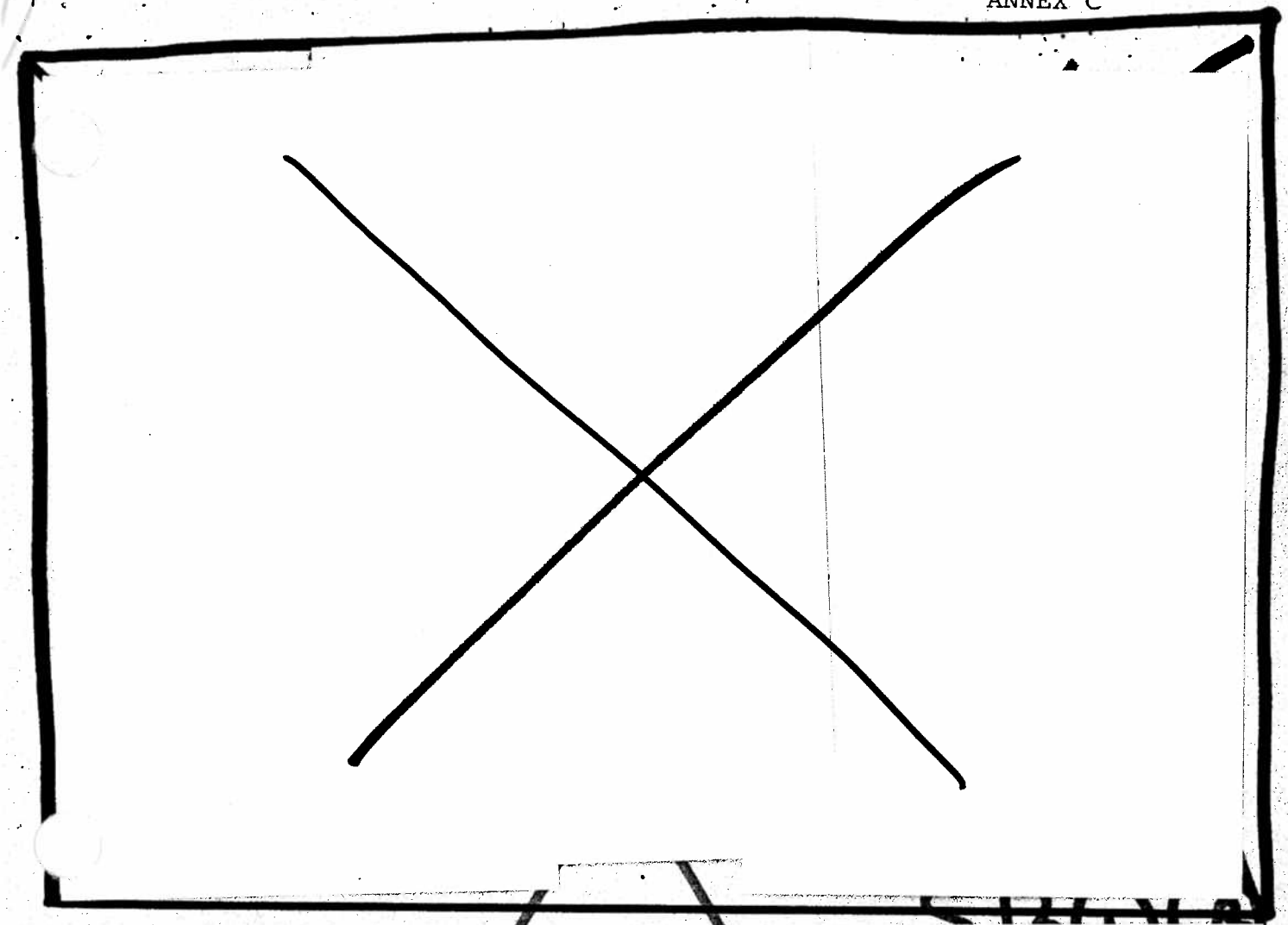
21. It is abundantly clear that the documents sought in the Canadian litigation are directly relevant to the factual issues in this case. As a result, contrary to the government's assertion, this is by no means a "fishing expedition." As the defense is quite confident that the government will do little to assist the defense in gaining access to relevant information in the possession of the Canadian government, it is in the interests of justice and judicial economy to permit the requested release of UNCLASSIFIED information to the Canadian Supreme Court, which will likely result in the production of relevant information to the defense.

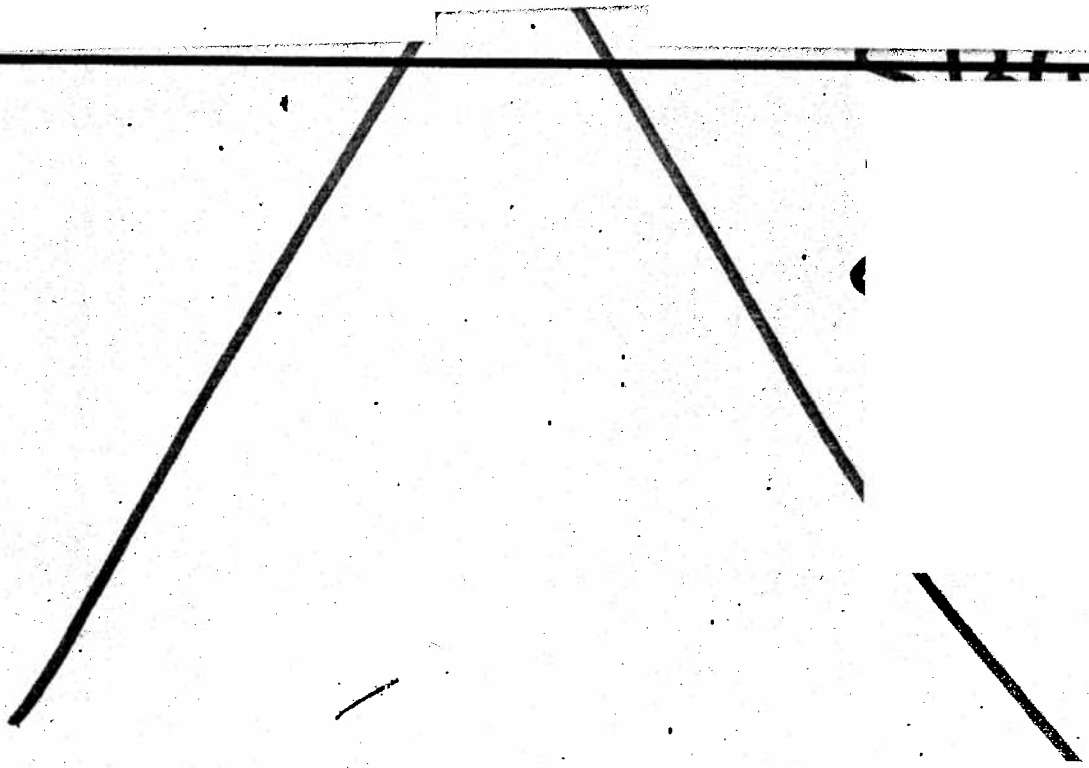
22. As a final matter, the defense notes its disagreement with the government's interpretation of the 18 Apr 04 Information Security Guidance memo and the government's attempt to contort that document into an alternative regime for the de facto

classification of information. It is only because the order of this court prohibits "public" release of the information and the Supreme Court filing could be considered such a "public" release that the defense filed this special request. Under the terms of the memo (as incorporated into the protective order) it appears any other "official" use of the information is permissible.

VR,

LCDR Kuebler





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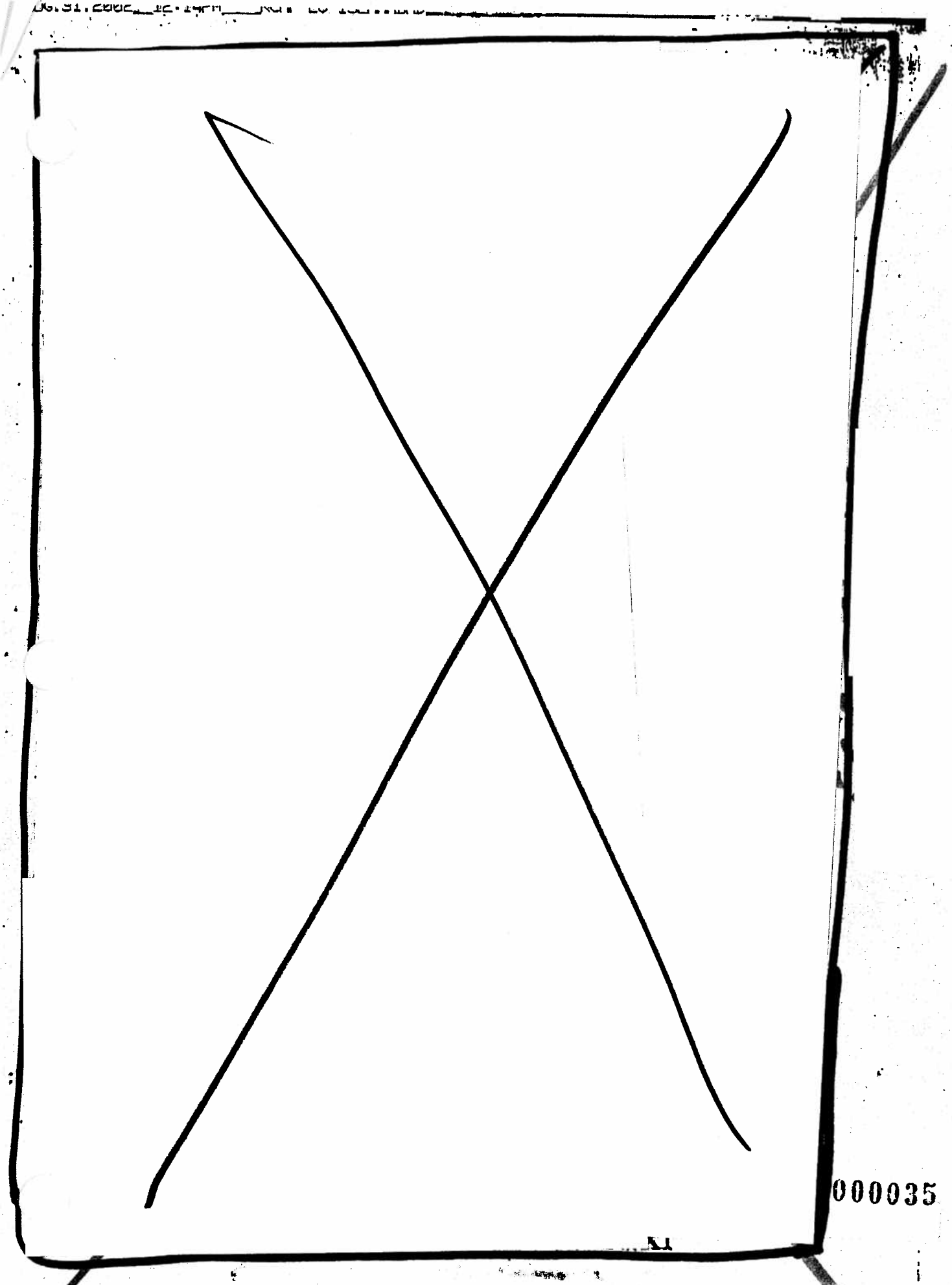

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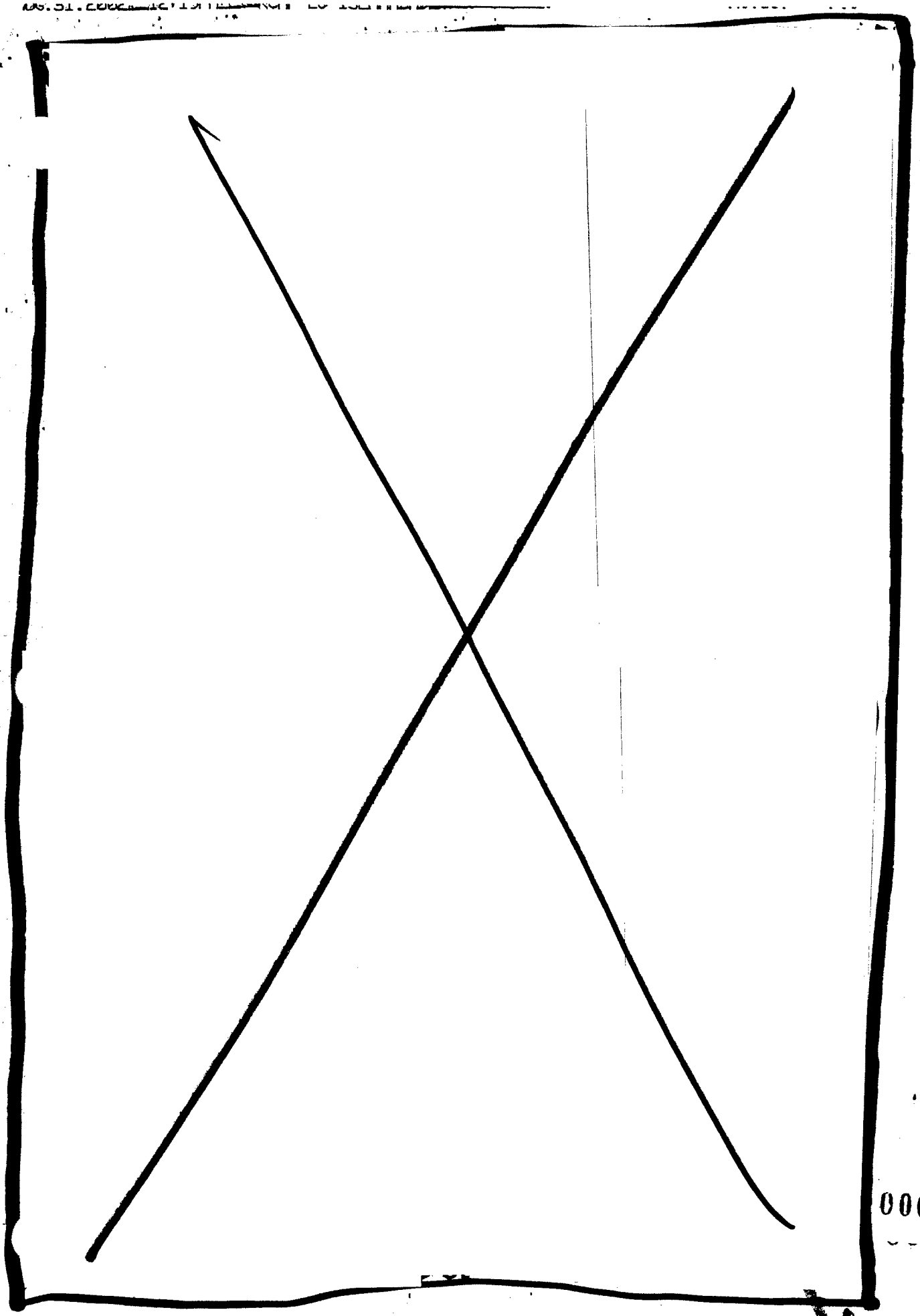

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T ■ and International Trade et du Commerce international J. Gould/995-0750

38

→ return to ISI / Gould

STINATAIRE MJW (via ISD)

ON ISI

P UR

FERENCE
FÉRENCE

BJECT Umar Khadr: a meeting with
JET

Security / Sécurité
[redacted]IR
[redacted]

File / Dossier
[Khadr]

Date
April 20, 2004

Number / Numéro
ISI-034

ENCLOSURES
PIÈCES JOINTES

DISTRIBUTION

BACKGROUND:

On Tuesday, 30 March, 2004, Jim Gould of this division was able to visit Guantanamo Bay Naval Station, sponsored by the US Department of Defense (DoD), Criminal Investigation Task Force (CITF). [redacted]

2. [redacted]

3. [redacted]

[redacted]

RECEIVED IN ISIR
MAY MAI 5 2004
RECU PAR ISIR

AE 62 (Khadr)…/2
Page 25 of 91

407 (93/12)

[redacted]

5. [redacted]

6. [redacted]

[redacted]

7. [redacted]

8. He refused the treats that had been brought (chocolate bars, etc), although he had accepted them last year, saying that they were only a temporary / temporal thing

12. Umar's eyes seemed fine.

13.

15. Umar does really not understand the gravity of his situation. He recognized that he would be on trial and also said that he believed that Canada could have him brought

home "if we wanted". He does not appear to have given much, if any, thought to what he might say to a lawyer, but he did allow - after some hesitation - that perhaps he would speak to a lawyer if one were to show up.

16. Finally, as an amateur observer of the human condition, Mr Gould would describe Umar as a thoroughly "screwed up" young man. All those persons who have been in positions of authority over him have abused him and his trust, for their own purposes. In this group can be included his parents and grand-parents, his associates in Afghanistan and fellow detainees in Camp Delta [redacted]

17. [redacted]

R. Scott Heatherington
Director
Foreign Intelligence Division

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

6. Oral argument. The Prosecution does not request oral argument.

7. Witnesses. None.

8. Attachments. None.

9. Submitted by:

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

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

Clayton Trivett, Jr.
Assistant Prosecutor
Department of Defense

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

[redacted], SSG, DoD OGC

[redacted]

Subject: U.S. v. Khadr -- Defense Special Request for Relief from Terms of Protective Order No. 001

Attachments: Exhibit C to Cross-Exam of Johnston.pdf; 00766 FM40 20040330.pdf; 00766 FM40 20030224.pdf; Judgment - May 10, 2007 (E5316756).PDF; Government Response to 9 NOV Defense Discovery Request.pdf

Sir,

[redacted]

[redacted]

VR,

LCDR Kuebler

Exhibit C: 4 page E-mail from Eccops to NOC, November 7, 2003

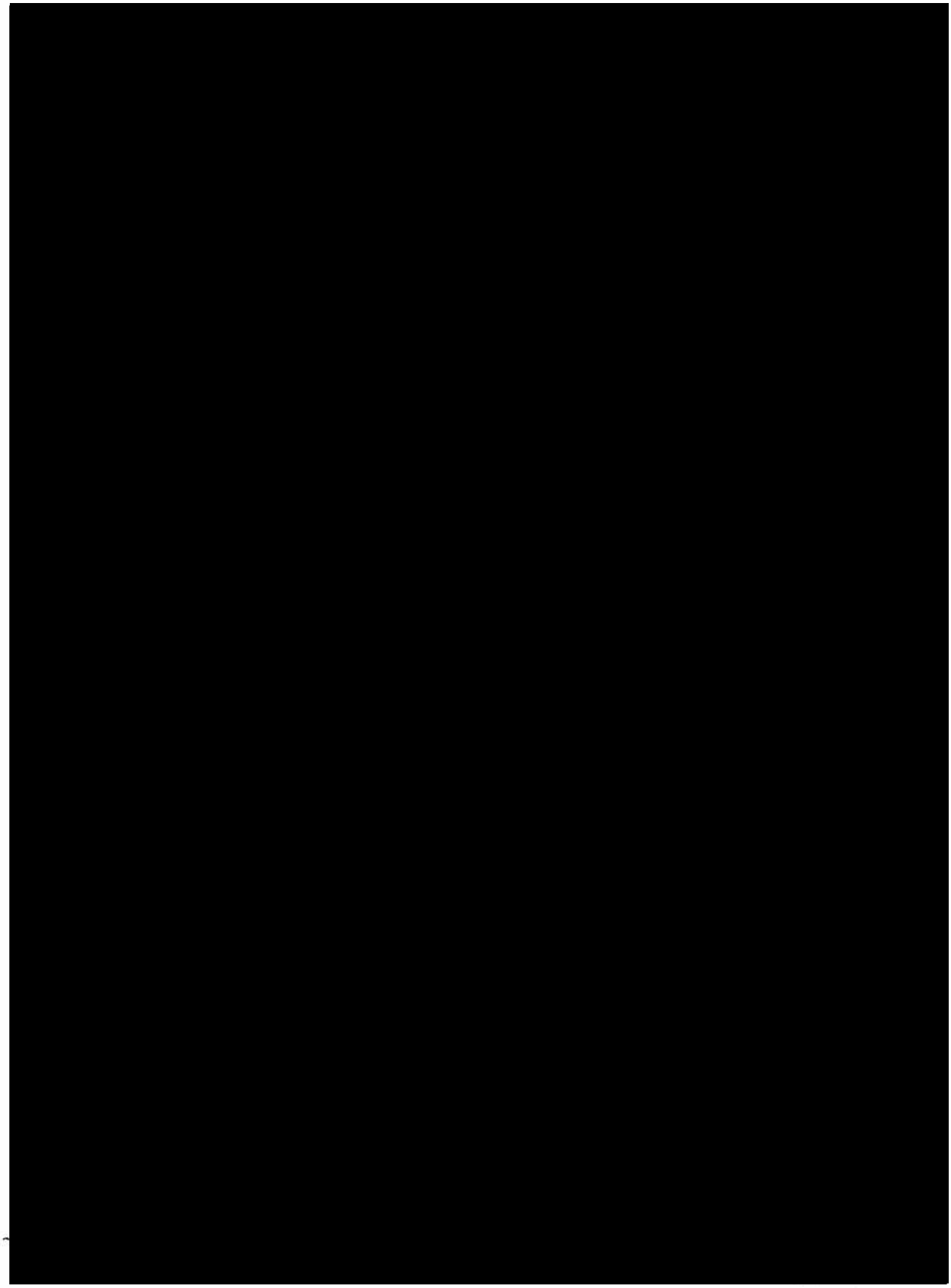


Exhibit C: 4 page E-mail from Eccops to NOC, November 7, 2003 *(cont'd)*

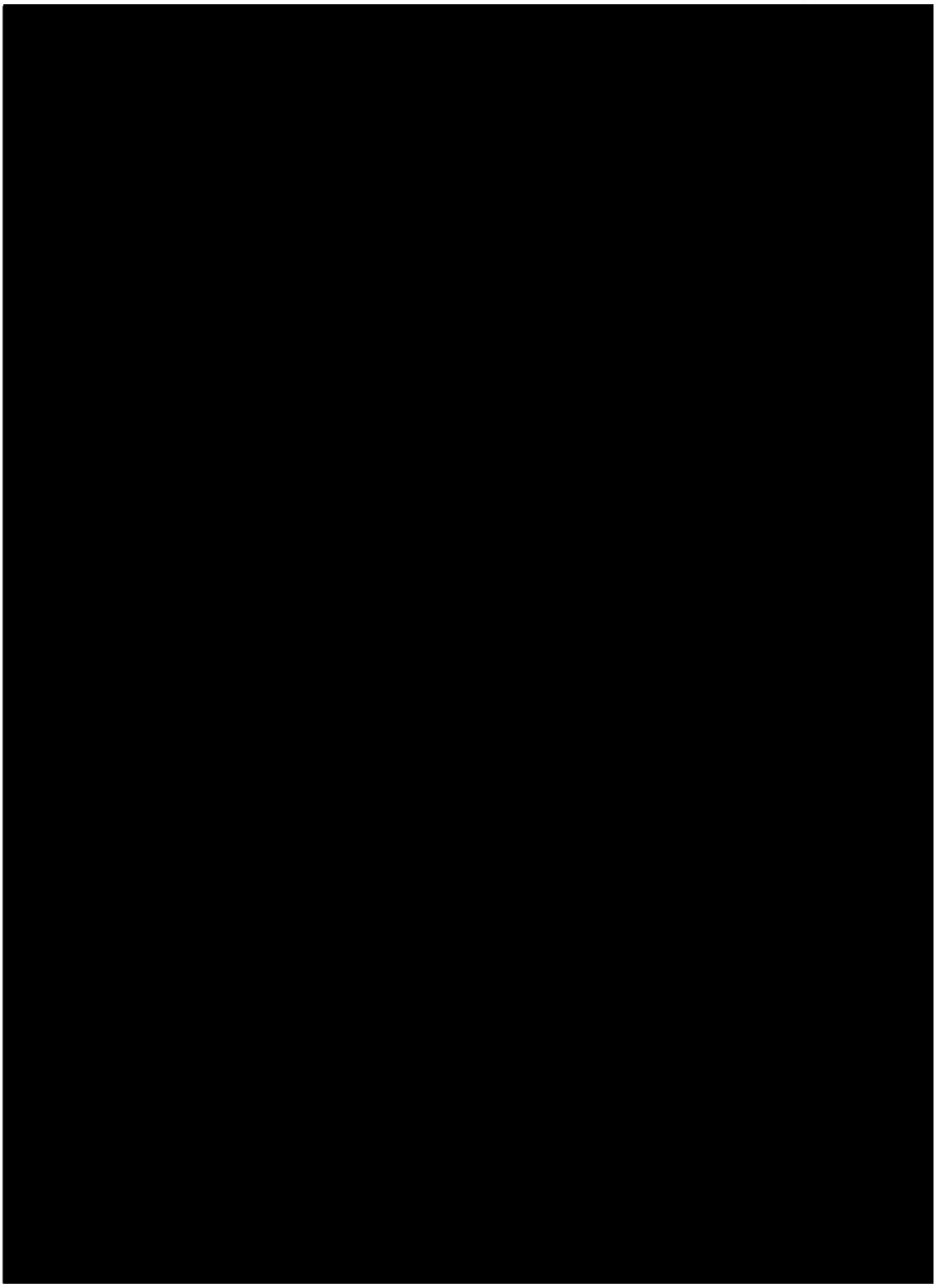


Exhibit C: 4 page E-mail from Eccops to NOC, November 7, 2003 *(cont'd)*

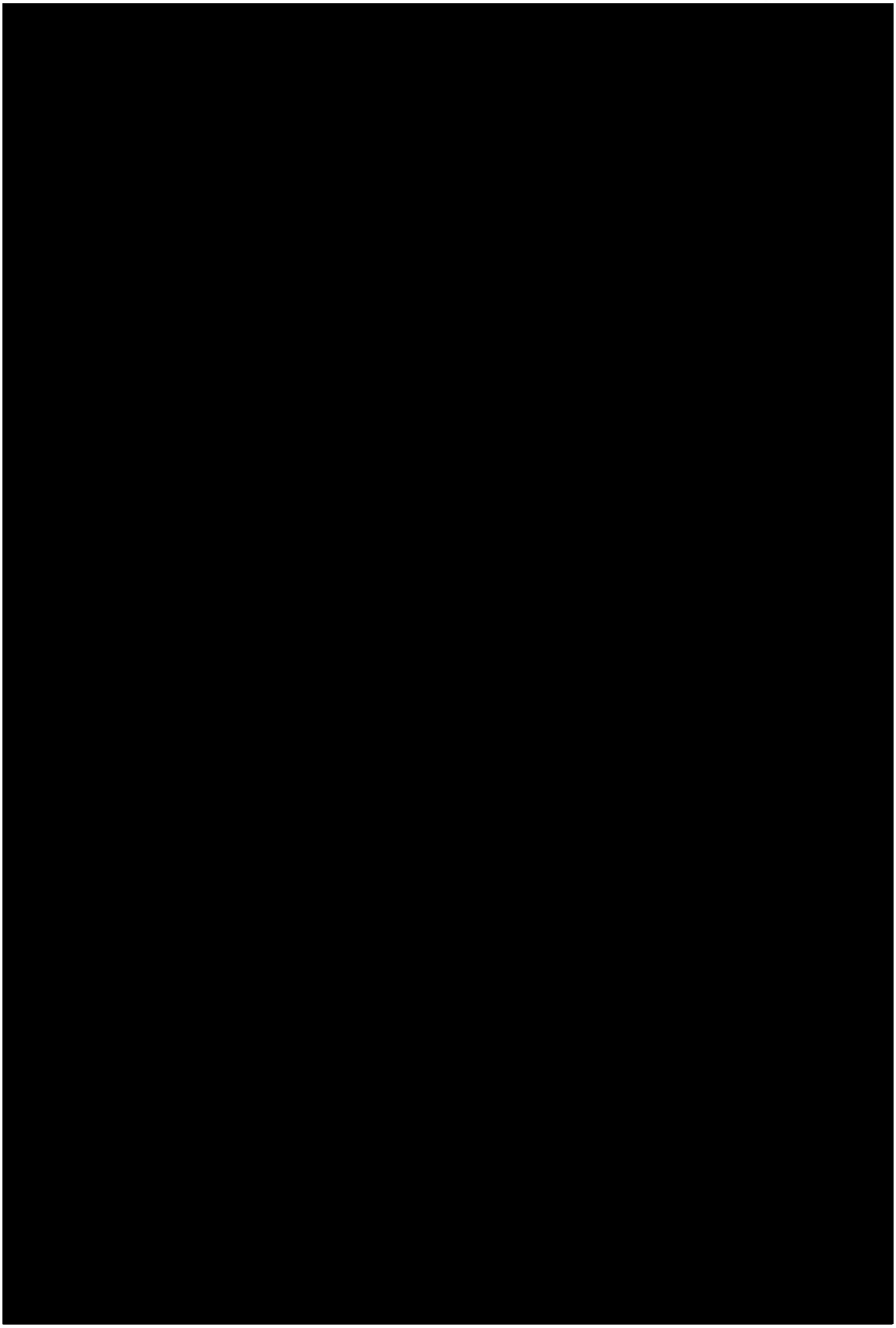
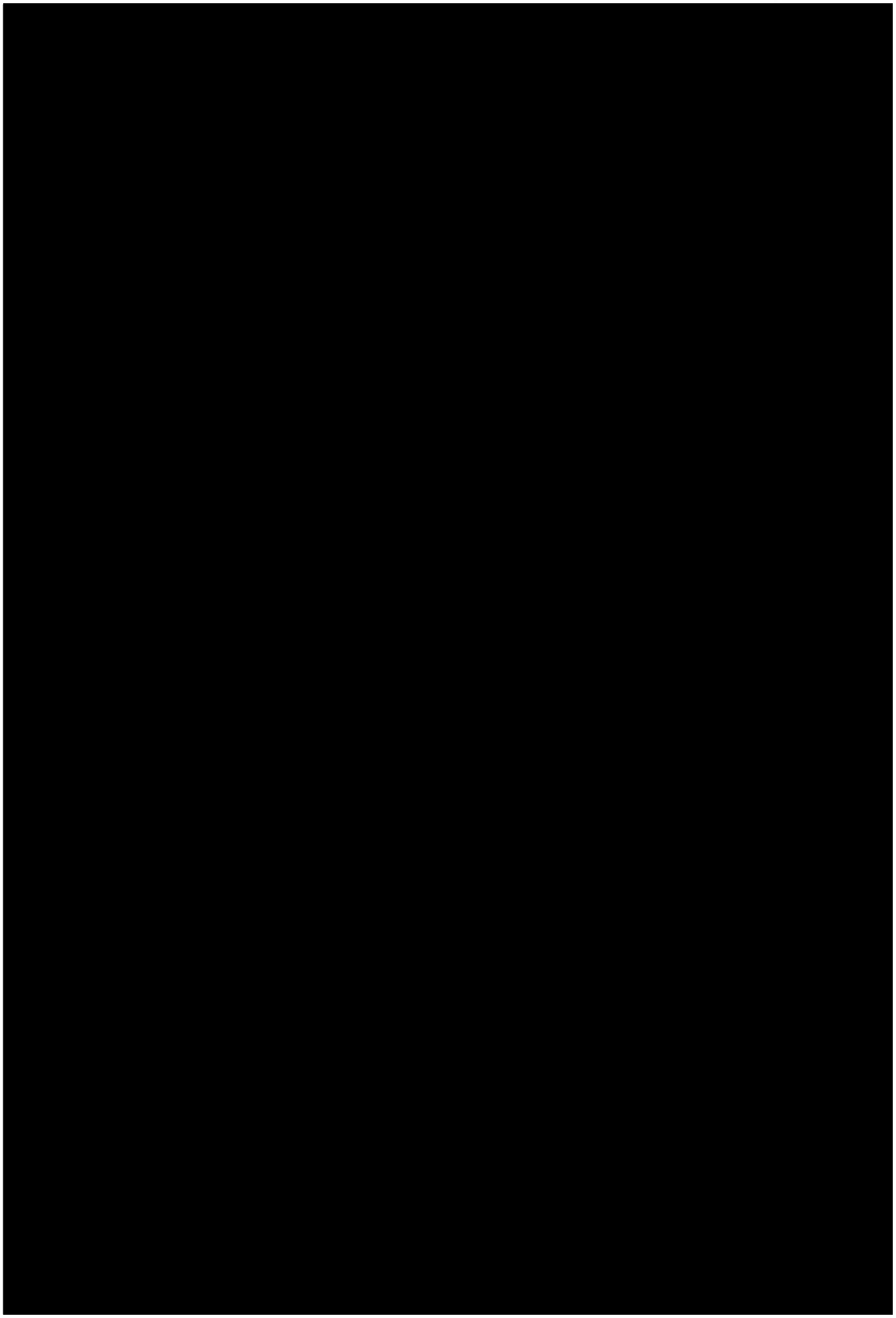


Exhibit C: 4 page E-mail from Eccops to NOC, November 7, 2003 *(cont'd)*



Federal Court of Appeal

Cour d'appel fédérale

Facsimile Transmittal Form/Formulaire d'acheminement par télécopieur

TO/À

Name/Nom: Mr. Denis Edney (780) 425-5247
Mr. Nathan Whitling (780) 423-2870
Ms. Doreen Mueller (780) 495-6300

Location/Endroit:

Facsimile No./Télécopieur:

Court No: A-184-06 Omar Ahmed Khadr v. The Minister of Justice et al

FROM/DE

Name/Nom: **Jean-François Duport**
Registry Officer/Agent du greffe
Federal Court of Appeal/Cour d'appel fédérale
2nd Floor, 90 Elgin Street
Ottawa, Ontario
K1A OH9

Telephone No./ Téléphone: (613) 996-6795

Facsimile No./ Télécopieur: (613) 952-7226

Date: May 10, 2007

Time/Heure:

TOTAL NUMBER OF PAGES/NOMBRE DE PAGES: 24
(Including this cover page/incluant le présent formulaire)

Comments/Commentaires

Please find herewith a copy of the Judgment and Reasons of the Court dated May 10, 2007.

Federal Court of Appeal Cour d'appel fédérale

Date: 20070510

Docket: A-184-06

Ottawa, Ontario, May 10, 2007

CORAM: **DESJARDINS J.A.**
LÉTOURNEAU J.A.
RYER J.A.

BETWEEN:

OMAR AHMED KHADR

Appellant

and

THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, THE MINISTER OF FOREIGN AFFAIRS, THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondents

JUDGMENT

This appeal is allowed with costs, the decision of the applications judge is set aside and the following order is granted:

An order is issued directing that:

(a) the respondents, the Minister of Justice, the Minister of Foreign Affairs, the Director of the Canadian Security Intelligence Service and the Commissioner of the Royal Canadian Mounted Police, produce before the Federal Court unredacted copies of all

documents, records and other materials in their possession which might be relevant to the charges against the appellant and which are therefore necessary for the purpose of allowing him to raise full answer and defence to the charges;

(b) the material produced be reviewed by a judge as defined in section 38 of the *Canada Evidence Act*; and

(c) the review be conducted pursuant to section 38 of the *Canada Evidence Act*.

"Alice Desjardins"
J.A.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20070510

Docket: A-184-06

Citation: 2007 FCA 182

CORAM: **DESJARDINS J.A.**
LÉTOURNEAU J.A.
RYER J.A.

BETWEEN:

OMAR AHMED KHADR

Appellant

and

THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, THE MINISTER OF FOREIGN AFFAIRS, THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondents

Heard at Edmonton, Alberta, on March 13, 2007.

Judgment delivered at Ottawa, Ontario, on May 10, 2007.

REASONS FOR JUDGMENT BY: DESJARDINS J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
RYER J.A.

Federal Court of Appeal

Cour d'appel fédérale

Date: 20070510

Docket: A-184-06

Citation: 2007 FCA 182

CORAM: **DESJARDINS J.A.**
LÉTOURNEAU J.A.
RYER J.A.

BETWEEN:

OMAR AHMED KHADR

Appellant

and

THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, THE MINISTER OF FOREIGN AFFAIRS, THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondents

REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] This appeal raises the question of whether government action which occurred outside Canada triggers the application of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter).

[2] The appellant, Omar Ahmed Khadr, is appealing the decision of von Finckenstein J. of the Federal Court (*Khadr v. Canada (Minister of Justice)*, 2006 FC 509) which dismissed his

application for judicial review. The appellant sought a remedy under subsection 24(1) of the Charter for a violation of his right under section 7 of the Charter to a full answer and defence to criminal charges. He sought an order in the nature of *mandamus* directing the respondents to make full and complete disclosure of all the documents, records and other materials in the possession of all departments of the Crown in Right of Canada which might be relevant to the charges laid against him by the government of the United States.

[3] The four respondents, the Minister of Justice and Attorney General of Canada, the Minister of Foreign Affairs, the Director of the Canadian Security Intelligence Service, and the Commissioner of the Royal Canadian Mounted Police (collectively referred to herein as the Crown), are officials of the government of Canada who are in possession of voluminous documentary materials which are allegedly relevant to the charges against the appellant.

THE FACTS

[4] The appellant, a Canadian citizen, was apprehended by the American military in July 2002. He is presently detained in U.S. Naval Station, Guantánamo Bay, Cuba.

[5] In November 2005, the appellant was charged with: conspiracy to commit offences triable by Military Commission; murder by an unprivileged belligerent; attempted murder by an unprivileged belligerent; and aiding the enemy. As of February 2, 2007, the charges against him read: 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.

[6] The charges relate to events which are alleged to have occurred in Afghanistan and elsewhere when the appellant was 15 years of age and younger. They carry a maximum penalty of life imprisonment. The prosecution is not seeking the imposition of the death penalty.

[7] The appellant currently awaits prosecution by a Military Commission established by Order of the Secretary of Defence of the United States. No date for trial has yet been set.

[8] Prior to the laying of charges, Canadian officials from the Canadian Security Intelligence Service (CSIS) and the Department of Foreign Affairs and International Trade (DFAIT), with the consent of U.S. authorities, attended at Guantánamo Bay and interviewed the appellant in the absence of his counsel. These visits were allegedly not welfare visits or covert consular visits but were purely information gathering visits with a focus on intelligence/law enforcement. The topics discussed with the appellant included matters which were the subject of the charges. Canadian agents took a primary role in these interviews, were acting independently and were not under instructions of U.S. authorities. Summaries of information collected were passed on to the RCMP and to U.S. authorities (*Khadr v. Canada (Attorney General)*, 2004 FC 1394 (T.D., para. 4); *Khadr v. Canada (Attorney General)*, 2005 FC 1076 (T.D); Exhibits to cross-examination of William Robert James Johnston, A.B. vol 11, tab 13, pp. 257-265; Reasons for order and order of von Finckenstein J. at para. 19 (iv)).

[9] Through requests pursuant to the *Access to Information Act*, R.S.C. 1985, c. A-1 (AIA) and through production and disclosure in Federal Court proceedings T-536-04 (an action by the

appellant seeking various remedies under the Charter for an alleged violation by Canadian officials of his right to silence and his right to counsel in conducting interviews in Guantánamo Bay) and T-686-04 (an application by the appellant's family in order to compel the government to extend consular and diplomatic services to him), the appellant obtained redacted copies of some of the documentary materials in the Crown's possession. The deletions and redactions were made on grounds of international relations, national defence and national security, and more specifically, pursuant to certain statutory exemptions under the AIA and a "specific public interest immunity" under section 38 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (CEA). Over 3,000 pages of documents were provided by the respondents. No steps were taken by the appellant to challenge the redactions and deletions made to these documents.

[10] On November 21, 2005, the appellant's counsel sent a letter to the respondents which read (A.B. vol. 1, p. 20-21):

> The writer, Mr. Dennis Edney and Professors Muneer Ahmad and Richard Wilson of American University act as counsel for Mr. Omar Ahmed Khadr. Mr. Khadr is currently detained by U.S. forces in Guantanamo Bay, Cuba. Mr. Khadr has recently been charged by the United States with the offences of Conspiracy, Murder by an Unprivileged Belligerent, Attempted Murder by an Unprivileged Belligerent, and Aiding the Enemy as detailed in the enclosed Charge Sheet. Kindly receive this letter as our formal joint demand pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms* for production of all relevant documents in the possession of the Crown in Right of Canada which might be relevant to the charges raised against Mr. Khadr and as such, are necessary to enable Mr. Khadr to raise full answer and defence to the charges.
>
> Through our experience as Mr. Khadr's counsel, we have obtained copies of voluminous materials from DFAIT, CSIS and the RCMP under both the *Access to Information Act* and the Crown's production requirements in Federal Court of Canada Numbers T-536-04 and T-686-04. Much of the content of these documents has been redacted or withheld from us on the basis of assertions of privilege, including the statutory privilege created by s. 38 of the

Canada Evidence Act. For further information regarding these materials, their content and the claims of privilege raised therein, we direct you to Mrs. Doreen Mueller, Department of Justice Canada, Counsel for Her Majesty the Queen in Action Numbers T-536-04 and T-686-04, (780) 495-8352.

Based on our review of these materials, it is apparent that DFAIT, CSIS, the RCMP and possibly other departments of the Crown in Right of Canada are in possession of materials which are relevant to the serious charges now raised against our client, and which materials are therefore necessary for Mr. Khadr to raise full answer and defence to said charges.

At the time that the claims of privilege referred to above were made, Mr. Khadr was not facing the charges. Consequently, Mr. Khadr's constitutional right to raise full answer and defence to the charges would not have been a factor taken into account. We take it you agree that Mr. Khadr's right to raise full answer and defence to the charges now overrides and outweighs the interests forming the basis of these previous assertions of privilege.

In light of the above, we hereby demand that you now provide us with copies of all materials in the possession of all departments of the Crown in Right of Canada which might be relevant to the charges raised against Mr. Khadr in accordance with the requirements of *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 as applied to extraterritorial prosecutions in such cases as *Purdy v. Canada (Attorney General)* (2003), 230 D.L.R. (4th) 361 (B.C.C.A.). Without limitations, these materials include all the content redacted from the documents referred to above. Relevance in this regard should be determined by reference to the matters pleaded in the enclosed charge sheet.

We confirm that we are willing to accept the materials requested above upon the provision of formal undertakings by the writer, Mr. Edney, Professor Ahmad and Professor Wilson that said materials may only be reviewed by ourselves and Mr. Khadr's soon-to-be-appointed military defence counsel absent consent from the Crown or direction from the Court.

[Emphasis added.]

[11] The request covered all materials in the possession of all departments of the Crown in Right of Canada which might be relevant to the charges against Mr. Khadr in accordance with the

requirements of *R. v. Stinchcombe*, [1991] 3 R.C.S. 326. It included all of the content redacted from the documents previously obtained under the AIA and in the context of Federal Court proceedings T-536-04 and T-686-04.

[12] The respondents did not respond to the request. On January 3, 2006, the appellant brought a judicial review application seeking:

> An Order in the nature of mandamus directing the Respondents to provide counsel for the Appellant with full and complete disclosure of all documents, records and other materials in the possession of all departments of the Crown in Right of Canada which might be relevant to the Charges and which are therefore necessary for the purpose of allowing the Applicant to raise full answer and defence to the Charges...

THE JUDGMENT BELOW

[13] The main issue before the applications judge was whether the Charter applied in the circumstances of this case and whether a *mandamus* should issue.

[14] The applications judge considered the Supreme Court of Canada decisions in *R. v. Cook*, [1998] 2 S.C.R. 597 and *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 . He also examined the decision in *Purdy v. Canada (Attorney General of Canada)* (2003), 226 D.L.R. (4th) 761 (B.C.S.C.) aff'd (2003), 230 D.L.R. (4th) 361 (B.C.C.A.). He decided that the requirement that there be a sufficient causal connection between the government of Canada's participation and the appellant's potential deprivation of the right to life, liberty and security of the person was not met. Furthermore, he was not convinced that the unique circumstances of *Purdy* applied.

[15] The applications judge concluded that the first two requirements for an order of *mandamus* to be granted were not met (*Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 at paragraph 45).

[16] He dismissed the application.

ISSUES

[17] This Court must decide whether the applications judge erred in finding that the Charter does not have extraterritorial application in the circumstances of this case. If it finds that the Charter applies and that section 7 is engaged, it must determine the nature of the order to be issued.

SUBMISSIONS

[18] According to the appellant, the applications judge erred in concluding that the Charter does not apply in the circumstances of this case. By withholding relevant documents, the Crown has itself frustrated the appellant's ability to raise full answer and defence to the charges and has itself increased the risk that the appellant might be wrongly convicted of the charges. The conduct of the Crown in gathering information and evidence which was then passed on to U.S. authorities is relevant in this regard. The Crown's refusal to disclose relevant documents constitutes a violation of the appellant's right under section 7 of the Charter and warrants a just and appropriate remedy pursuant to subsection 24(1) of the Charter.

[19] The respondents submit that the applications judge correctly dismissed the application since there is no causal connection between the actions of Canadian officials and the prosecution of the appellant by U.S. authorities.

[20] The respondents claim that the disclosure of documents pursuant to AIA requests and in the context of Federal Court proceedings T-536-04 and T-686-04 constitutes an adequate alternative remedy to an order under subsection 24(1) of the Charter. The appellant, they say, seeks concurrent disclosure of essentially the same documents already provided because, in the appellant's view, the allegations made in this underlying judicial review application allow for a more persuasive argument to challenge the redactions of the documents than in previous proceedings.

[21] The appellant admits that many of the documents at issue in these proceedings have been produced in Federal Court proceedings T-536-04 and T-686-04 and/or pursuant to requests under the AIA. He accepts the legal limits to disclosure. He wishes however to challenge, in the most effective manner possible, the respondents' reliance on public interest immunity claims and statutory exemptions under the AIA to provide heavily redacted copies of the documents sought or to withhold documents entirely. He wants to ensure that his challenge is determined under section of the *Canada Evidence Act* and not under section 50 of the AIA. He also wants to ensure that his right to make full answer and defence will be taken into consideration in the balancing of interests (*Gold v. R.*, [1986] 2 F.C. 129 at paragraphs 15-17 (C.A.); *Ribic v. Canada (Attorney General)* (2003), 185 C.C.C. (3d) 129 at paragraphs 13-32 (F.C.A.)). He was not facing charges at the time the earlier proceedings were initiated. Consequently, when applying section 38.06 of the *Canada Evidence Act*

in the context of T-536-04 and T-686-04, it is doubtful, in his opinion, that the designated judge may consider and weigh the appellant's right to raise full answer and defence in the balancing of interests required by subsection 38.06(2).

STANDARD OF REVIEW

[22] The Federal Court judge found that the Charter does not apply in the circumstances of this case. This is a question of law reviewable on the correctness standard: *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 at paragraph 31.

LEGISLATIVE PROVISIONS

[23] The relevant legislative provisions are the following:

Section 7 of the Charter:

Legal Rights **Life, liberty and security of person** 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**Garanties juridiques** **Vie, liberté et sécurité** 7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Subsection 24.1 of the Charter:

Enforcement **Enforcement of guaranteed riguts and freedoms** **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or	**Recours** **Recours en cas d'atteinte aux droits et libertés** 24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont

denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
[...]

garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.
[...]

Subsections 38.06(1) and (2) of the *Canada Evidence Act*:

Disclosure order
38.06 (1) Unless the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information.

Ordonnance de divulgation
38.06 (1) Le juge peut rendre une ordonnance autorisant la divulgation des renseignements, sauf s'il conclut qu'elle porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales.

Disclosure order
(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

Divulgation modifiée
(2) Si le juge conclut que la divulgation des renseignements porterait préjudice aux relations internationales ou à la défense ou à la sécurité nationales, mais que les raisons d'intérêt public qui justifient la divulgation l'emportent sur les raisons d'intérêt public qui justifient la non-divulgation, il peut par ordonnance, compte tenu des raisons d'intérêt public qui justifient la divulgation ainsi que de la forme et des conditions de divulgation les plus susceptibles de limiter le préjudice porté aux relations internationales ou à la défense ou à la sécurité nationales, autoriser, sous réserve des conditions qu'il estime indiquées, la divulgation de tout ou partie des renseignements, d'un résumé de ceux-ci ou d'un aveu écrit des faits qui y sont liés.

[...]

[...]

ANALYSIS

Duty to disclose

[24] Since the landmark decision of the Supreme Court of Canada in *R. v. Stinchcombe*, it is trite law that the Crown has a continuing obligation to disclose all relevant information to an accused, whether inculpatory or exculpatory, subject to the exercise of the Crown's discretion to refuse to disclose information that is privileged or plainly irrelevant (paragraphs 20, 29). The obligation to disclose is triggered by a request by or on behalf of the accused (paragraph 28).

[25] The Supreme Court of Canada has broadly defined the concept of "relevance" such that little information will be exempt from the Crown's duty to disclose: *R. v. Egger*, [1993] 2 S.C.R. 451 at 467; *R. v. Taillefer; R. v. Duguay*, [2003] 3 S.C.R. 307 at paragraph 60. The Crown's duty to disclose is triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence: *R. v. Dixon*, [1998] 1 S.C.R. 244 at paragraph 21; *R. v. Chaplin*, [1995] 1 S.C.R. 727 at paragraphs 26-27.

[26] A failure to disclose relevant information impedes an accused's ability to make full answer and defence and creates the risk of an innocent person being convicted and imprisoned. As one of the principles of fundamental justice, the right to make full answer and defence has been entrenched in the section 7 protection of the right to life, liberty and security of the person (*Stinchcombe* at paragraph 17).

[27] In *Stinchcombe*, the accused seeking disclosure from the Crown was facing criminal charges in Canada. It is in this context that the Supreme Court of Canada set out the guiding principles governing disclosure by the Crown. In the case at bar, the charges are not being prosecuted in Canada.

[28] In *R. v. Cook*, [1998] 2 S.C.R. 597, the Supreme Court of Canada has recognized that there may be rare circumstances in which the *Charter* may apply outside Canada, namely where (1) the impugned act falls within subsection 32(1) of the Charter; and (2) the application of the Charter to the actions of the Canadian detectives in the United States does not interfere with the sovereign authority of the foreign state and thereby generate an objectionable extraterritorial effect (paragraph 25).

Does the Charter have an extraterritorial reach in the circumstances of this case?

[29] In *United States of America v. Kwok*, [2001] 1 S.C.R. 532, the Supreme Court of Canada explained that "[o]nly where a justiciable Charter issue can arise from the potential involvement of the Canadian authorities in the gathering of evidence is it necessary to consider the degree of disclosure that might be required of the Requested State" (paragraph 106). [Emphasis added.] In doing so, the Supreme Court of Canada distinguished its earlier decision in *United States of America v. Dynar*, [1997] 2 S.C.R. 462 where it had stated that the disclosure requirements of *Stinchcombe* only applied to domestic criminal proceedings: "In *Dynar*, the fugitive was not entitled to disclosure from Canadian authorities because no justiciable Charter issue arose. Canadian authorities had not provided any assistance to the Americans in gathering evidence and, in any

event, the latter were not relying on anything but their own evidence." (paragraph 106). [Emphasis added.]

[30] In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraph 54, the Supreme Court of Canada reaffirmed a principle previously recognized in *United States v. Burns*, [2001] 1 S.C.R. 283:

> ... the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.
>
> [Emphasis added.]

[31] In *Purdy v. Canada (Attorney General)* (2003), 226 D.L.R. (4th) 76 (B.C.S.C.), a Canadian citizen, facing criminal charges in the United States following a joint sting operation involving the RCMP and American police petitioned the British Columbia Supreme Court for an order pursuant to subsection 24(1) of the Charter compelling the RCMP to provide copies of the materials within its possession that related to the investigation. The British Columbia Supreme Court granted the order sought. It explained, at paragraphs 19-22 of its reasons:

> In the case at bar, the Attorney General of Canada submits there is no justiciable Charter issue because in the absence of criminal charges in Canada, Mr. Purdy has no right to disclosure and the Crown has no obligation to disclose.
>
> This is a formidable argument worthy of consideration, but in my view, the unique circumstances of this case allow me to apply the general principle of Stinchcombe, that information ought not to be withheld if there is a

> reasonable possibility that the withholding of information will impair the right to make full answer and defence.
>
> The right to make full answer and defence is a common law right that has been incorporated in s. 7 of the Charter as one of the principles of fundamental justice:
>
> > The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and the incarceration of an innocent person. [Stinchcombe, supra, at p. 336.]]
>
> The petitioner is a Canadian national whose life and liberty has been put in jeopardy because of an investigation which took place in Canada and in which Canadian authorities played a major part. In a joint investigation, such as this one, the ultimate forum in which the accused is tried should not deprive the accused from the observance by Canadian authorities of Charter rights to which the accused would otherwise have been entitled.
>
> [Emphasis added.]

[32] The British Columbia Supreme Court ordered disclosure as a remedy for the infringement of Mr. Purdy's constitutional rights, finding that this was "the only practical remedy" (paragraph 28). This decision was affirmed by the British Columbia Court of Appeal, (2003), 230 D.L.R. (4th) 361, which found that the causal connection between Canada's participation and the deprivation of a liberty interest in a foreign state was direct and obvious (paragraph 20) and emphasized that "a justiciable issue on disclosure may arise in relation to foreign proceedings where Canadian authorities gathered some of the evidence" (paragraph 22). [Emphasis added.]

[33] In the case at bar, Canadian officials questioned the appellant in Guantánamo Bay prior to the laying of charges. As previously mentioned, the visits were purely information gathering visits with a focus on intelligence/law enforcement. Summaries of the information collected were passed

on to U.S. authorities. The Canadian officials were acting independently and were not under instructions of U.S. authorities.

[34] In these circumstances, the participation of Canadian officials in gathering evidence against the appellant at the pre-charge level raises, in my view, a justiciable Charter issue (*Kwok* at paragraph 106; *Purdy* at paragraph 22 (B.C.C.A.)). They took an active role in interviewing the appellant and in transmitting summaries of the information collected to U.S. authorities. In doing so, they assisted U.S. authorities in conducting the investigation against the appellant and in preparing a case against him. Canada's participation may have made it more likely that criminal charges would be laid against the appellant thereby increasing the likelihood that he would be deprived of his right to life, liberty and security of the person. I believe that in these circumstances the Charter applies. There is a sufficient causal connection between the Canadian government's participation in the foreign investigation and the potential deprivation of life, liberty and security of the person which the appellant now faces. I am satisfied that the applications judge erred in concluding that a sufficient causal connection did not exist.

Does the application of the Charter interfere with the sovereign authority of the United States?

[35] As an additional ground for dismissing the application before him, the applications judge found that the disclosure of relevant materials to Canadian citizens to defend against foreign prosecutions might lead to interference with foreign legal proceedings and could act as an impediment to the provision of consular services by Canadians.

[36] A similar argument was raised in *Purdy*. In that case, the British Columbia Court of Appeal found that the order did not interfere with the sovereign authority of the United States since disclosure does no more than put the individual in the position to offer the evidence obtained to the foreign court. It does not decide whether the evidence is admissible or the weight it deserves. The order did not take over the discovery process in the foreign court (at paragraph 24). This reasoning equally applies here. The appellant is not seeking any direction or order which would purport to direct the Military Commission to do anything.

Is section 7 of the Charter engaged?

[37] It is uncontested that as a Canadian citizen the appellant falls within the purview of the word "everyone" in section 7 of the Charter. He has the right under section 7 of the Charter not to be deprived of his right to life, liberty and security of the person except in accordance with the principles of fundamental justice. As recognized by the Supreme Court of Canada in *Stinchcombe*, the right to make full answer and defence to criminal charges is a principle of fundamental justice (at paragraph 17). Withholding relevant documents from an accused increases the risk or danger of that person being wrongfully convicted or imprisoned. The appellant has made a *prima facie* case showing a substantial risk of not being able to present a full answer and defence to the charges he faces in the United States if he is denied access to relevant information in the possession of the Crown. The appellant therefore has the right to full disclosure of all relevant documents within the Crown's possession. However, the Crown's disclosure obligation is not absolute. It is subject to privilege and public interest immunity claims which are reviewable by a court of law.

The nature of the order to be issued

[38] Where a court is persuaded that undisclosed information meets the *Stinchcombe* threshold, an accused has met his burden of establishing a violation of his Charter right to disclosure: *R. v. Dixon*, [1998] 1 S.C.R. 244 at paragraph 33.

[39] This Court is not in a position to decide, in the case at bar, whether the Crown failed to comply with its obligation under *Stinchcombe*. A number of documents have already been disclosed to the appellant pursuant to requests under the AIA and in the context of Federal Court proceedings T-536-04 and T-686-04. At this stage, this Court has no way of verifying whether there are other relevant documents which should have been disclosed and whether the public interest immunity claims and statutory exemptions previously raised are justified exceptions to *Stinchcombe* disclosure in the circumstances of this case.

[40] In *Purdy*, the British Columbia Supreme Court found a breach of section 7. In that case, however, no disclosure at all had been made by the Crown. It was therefore not necessary for the Court to examine the materials withheld.

[41] The matter should be returned to the Federal Court for a determination of the precise documents the appellant is entitled to obtain under section 7 of the Charter. Since the applications judge concluded that the Charter did not apply in the circumstances of the case, he did not turn his mind to that section of the Charter.

[42] The Federal Court will be unable to decide whether the Crown has complied with its disclosure obligation without having access to the all relevant documents including the unredacted documents at issue. For this reason, the respondents will be ordered to produce before a designated judge of the Federal Court all relevant documents within their possession. Any privilege or public interest immunity claim the Crown wishes to raise will be considered at that time. It will be up to the Federal Court to decide whether the Crown has complied with its disclosure obligation and exactly what documents the appellant may be entitled to.

CONCLUSION

[43] I am satisfied that the Charter applies in the circumstances of this case and that section 7 of the Charter is engaged. It may be that the respondents' refusal to disclose relevant information goes as far as violating the appellant's constitutional right to full answer and defence. This issue can only be determined by a review of the redacted and other relevant material and a balancing of the competing interests at stake with a view to reconciling them under the Charter.

[44] Consequently, I would allow this appeal with costs, I would set aside the decision of the applications judge and I would grant the following order :

> An order is issued directing that:
>
> (a) the respondents, the Minister of Justice and Attorney General of Canada, the Minister of Foreign Affairs, the Director of the Canadian Security Intelligence Service and the Commissioner of the Royal Canadian Mounted Police, produce before the Federal Court unredacted copies of all

documents, records and other materials in their possession which might be relevant to the charges against the appellant and which are therefore necessary for the purpose of allowing him to raise full answer and defence to the charges;

(b) the material produced be reviewed by a judge as defined in section 38 of the *Canada Evidence Act*; and

(c) the review be conducted pursuant to section 38 of the *Canada Evidence Act*.

"Alice Desjardins"
J.A.

"I agree
Gilles Létourneau J.A."

I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-184-06
STYLE OF CAUSE:	OMAR AHMED KHADR v. THE MINISTER OF JUSTICE AND OTHERS
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	MARCH 13, 2007
REASONS FOR JUDGMENT BY:	DESJARDINS J.A.
CONNCURRED IN BY:	LÉTOURNEAU J.A. RYER J.A.
DATED:	MAY 10, 2007

APPEARANCES:

MR. NATHAN J. WHITLING	FOR THE APPELLANT
MR. DENNIS EDNEY	FOR THE APPELLANT
MS. DOREEN MUELLER	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

PARLEE MCLAWS LLP EDMONTON, AB	FOR THE APPELLANT
EDNEY, HATTERSLEY & DOLPHIN EDMONTON, AB	FOR THE APPELLANT
JOHN H. SIMS, Q.C. DEPUTY ATTORNEY GENERAL OF CANADA OTTAWA, ON	FOR THE RESPONDENTS

DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

OFFICE OF THE CHIEF PROSECUTOR

[redacted]

[redacted]

[redacted]

[redacted]

CRIMINAL INVESTIGATION TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY	2. PLACE	3. ACTIVITY NUMBER
24 Feb 03	Guantanamo Bay, Cuba	[redacted]

4. REMARKS

Subject Interview of: (UNK) KHADR, OMAR AHMED

Date/Place: 24 Feb 03/Guantanamo Bay, Cuba

[redacted]

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4. REMARKS (Continued)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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4. REMARKS (Continued)

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

CRIMINAL INVESTIGATION TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY	2. PLACE	3. ACTIVITY NUMBER
30 Mar 04	Camp Delta , Guantanamo Bay, Cuba	[redacted]

4. REMARKS

Subject Interview of: (UNK) KHADR, OMAR AHMED

Date/Place: 30 Mar 04/Camp Delta , Guantanamo Bay, Cuba

[redacted]

THIS DOCUMENT CONTAINS NEITHER RECOMMENDATIONS NOR CONCLUSIONS OF CITF. IT IS THE PROPERTY OF THE CITF AND IS LOANED TO YOUR AGENCY; THIS DOCUMENT IS NOT TO BE RELEASED OUTSIDE YOUR AGENCY.

[redacted]

[redacted], SSG, DoD OGC

[redacted]

Subject: FW: U.S. v. Khadr -- Defense Special Request for Relief from Terms of Protective Order No. 001 (D020)

[redacted]-020 - Motion for Relief from the Terms of Protective Order No. 001 - US v. Khadr

COL Brownback has directed that I forward the attached ruling to counsel and other interested persons.
v/r,

LTC [redacted], USAR
Seni[redacted]dvisor
Military Commissions Trial Judiciary
Department of Defense

[redacted]for Relief from the Terms of Protective Order No. 001 - US v. Khadr

LTC [redacted]

Attached is the commission's ruling on D-020, the defense motion for relief from the terms of Protective Order No. 001. Please forward it to counsel in the case of United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

[redacted]rreply
Importance: High

Sir/ALCON - Please find attached the Prosecutions' Surreply to D020. Thank you.

WILLIAM B. BRITT
LTC, JA, USA
Deputy Chief Prosecutor

[redacted]

CONFIDENTIALITY NOTICE: This electronic transmission may contain attorney work-product or information protected under the attorney-client privilege, both of which are protected from disclosure under the Freedom of Information Act, 5 USC 552. Do not release outside of DoD channels without prior authorization from the sender.

-----Original Message-----
[redacted]f.gov]
[redacted]

Subject: Re: U.S. v. Khadr -- D-020 -- Request for ruling

Sir,

1. The government opposes release of the documents in question, absent a protective order.

2. Notwithstanding our initial objection to any release (see gov't response to D 20), the government subsequently agreed to allow the defense to release the documents subject to a protective order that would limit dissemination to the court and the parties in the case.

3. The defense has failed to demonstrate how a request to file the documents under seal would not be approved by the Canadian court.
During a conversation with Mr. Edney at GTMO, he seemed to indicate that filing documents under seal in Canada was not uncommon. It seems logical that Canadian courts would give great weight to a foreign government's
request to protect sensitive information from public release. At a
minimum, that request should be made to the Canadian court prior to the military judge taking the extraordinary step of authorizing public release of proteced information.

4. In paragraph 3 of their request for ruling the defense attempts to place the burden on the government to demonstrate the harm caused by disclosing the documents. It is not the government's burden to carry.
The burden is on the defense to demonstrate why release should be authorized under the protective order and Department of Defense policies regarding protection of FOUO/LES information. They have failed to do so.

V/R,

Major Groharing

[redacted], LTC, DoD OGC wrote:

> Per COL Brownback, what is the prosecution's position on the defense
> request below? The prosecution's response should be received NLT 1630
> hours, 13 February 2008.
>
> v/r,
>

> LTC [redacted] USAR
> Seni[redacted]visor
> Military Commissions Trial Judiciary
> Department of Defense
>
> ---
>
[redacted]20 -- Request for ruling
>
> LTC [redacted]
>
> Please ask the prosecution for its view of LCDR Kuebler's email
> below. The prosecution's response should be received NLT 1630 hours,
> 13 February 2008.
>
> COL Brownback
>
[redacted]
> Subject: U.S. v. Khadr -- D-020 -- Request for ruling
>
> Sir,
>
> 1. The defense and the prosecution have not been able to come to an
> agreement on the resolution of D-020. The government's position is,

> in essence, that they have no objection to release of the documents
> provided it is subject to an order of the Canadian court precluding
> public dissemination.
>
> 2. I am advised by Canadian counsel that it would be unlikely that
> the Canadian court would issue such an order.
>
> 3. The defense does not believe that the government has demonstrated
> that any harm would result from public disclosure of the documents.
> In light of their relevance to the Canadian proceeding and the
> prospects for relief in that court that would materially enhance the
> ability of the defense in this case to prepare for trial, the defense
> submits that the balance of considerations favors disclosure.
>
> 4. The defense respectfully requests a ruling from the Military Judge
> on D-020.
>
> VR,
>
> LCDR Kuebler
>

--
Jeff Groharing
Major, U.S. Marine Corps
[redacted]ce of Military Commissions
[redacted]
[redacted]y,
[redacted]dr -- Defense Special Request for Relief from Terms of Protective Order No. 001 (D020)

COL Brownback has directed that I forward the email below to counsel and other interested persons.

v/r,

LTC [redacted], USAR
Seni[redacted]dvisor
Military Commissions Trial Judiciary
Department of Defense

[redacted]e Special Request for Relief from Terms of Protective Order No. 001 (D020)

LTC [redacted]

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

Counsel in the case of US v. Khadr,

1. The defense is authorized to submit a reply to the government response, if it so desires.

2. Any defense reply must be submitted NLT 1630 hours, 28 January 2008.

Peter E. Brownback III
COL, JA, USA
Military Judge

[redacted] Special Request for Relief from Terms of Protective Order No. 001 (D020)

> Sir,
>
> Prosecution response is attached.
>
> V/R,
>
> Major Groharing
>
> [redacted] LTC, DoD OGC wrote:
>
>> COL Brownback has directed that I forward the email below to counsel
>> and other interested persons.
>>
>> v/r,
>>
>> LTC [redacted] USAR
>> Seni[redacted]visor
>> Military Commissions Trial Judiciary
>> Department of Defense
>>

[redacted]:14 PM

[redacted]t for Relief from Terms of Protective Order No. 001 - US v. Khadr

All parties,

The filing designation for the 16 JAN 08 Defense Special Request for Relief from Terms of Protective Order No. 001 is D020 Special Request for Relief from Terms of Protective Order No 001 - Khadr. See RC 5.

v/r,

LTC Mike Chappell, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

>> ----------
>> [redacted] Special Request for Relief from
>> Terms of Protective Order No. 001
>>
>> [redacted],
>>
>>
>> 1. Please give the defense request below a Filings Designation. The
>> government will have until 1630 hours, 23 January 2008, to respond.
>> Based on the government's response, the commission will determine
>> whether or not it requires a reply from the defense - if so, the
>> timing thereof will be provided to the parties.
>>
>>
>>
>> 2. Please forward the email below to the counsel in the case of
>> United States v. Khadr. Please distribute it to other interested
>> parties.
>>
>>
>>
>> COL Brownback
>>
>>
>>
>>
>>
>> Counsel in the case of US v. Khadr,
>>
>>
>>
>> 1. The government shall advise the commission as to the current
>> level of protection of each document and what agency made that
>> designation.
>>

>>
>>
>> 2. Regardless of their apparent designation, if the documents
>> are now in the public domain, the government shall so advise the commission.
>> And, if the documents are in the public domain, the government will
>> advise the commission as to whether the designations are being
>> changed or updated.
>>
>>
>>
>> 3. The government will provide their position on the release of
>> each document attached to the defense request. If the government is
>> opposed to the release of a document, their position will be fully
>> justified by a legal argument.
>>
>>
>>
>> 4. Should the government believe a further redaction is necessary
>> for any of the documents to be released, the government and the
>> defense will coordinate and work on the preparation of redacted
>> versions of the documents.
>>
>>
>>
>> 5. If the government and the defense are incapable of
>> coordinating and working together, the government will provide the
>> commission a redacted version of the documents which the government
>> believes could be released.
>>
>>
>>
>>
>>
>> Peter E. Brownback III
>>
>> COL, JA, USA
>>
>> Military Judge

[redacted], SSG, DoD OGC

[redacted]

Subject: FW: Special Request for Relief -- Discovery Motions - US v. Khadr

From: Chappell, Danny, LTC, DoD OGC

[redacted]

Subject: Commission Session - US v. Khadr - 13-14 March 2008

COL Brownback has directed that I forward the email below to counsel and other interested persons.

v/r,

LTC[redacted], USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

[redacted]

Subject: Commission Session - US v. Khadr - 13-14 March 2008

LTC[redacted]

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

Counsel in the case of US v. Khadr,

1. Reference is made to:

a. D-024 and the government response thereto.
b. D-025.
c. Email, LTC Chappell, 20 February 2008, 3:29, Subject: Discovery Motions - Khadr.
d. Email, LCDR Kuebler, 21 February 2008, 11:55, Subject: Special Request for Relief - Discovery Motion - US

v. Khadr.
e. RMC 802 Conference, 1500 hours, 21 February 2008 - Summary Being Prepared.

2. References 1a thru 1e establish that the parties are in complete disagreement about the status of the case. A significant problem affecting the case status is discovery.

3. Counsel for both sides will provide each other all discovery motions NLT 4 March 2008. If the short time period does not allow full briefing of the motion, counsel will provide a modified notice of motion - sufficient to identify the specific item of discovery, the need for the item, and the efforts already made to obtain the item. Counsel will respond to such motions NLT 10 March 2008. If a motion is set forth in notice of motion style, the response may be in the same style.

4. A session will be held in Guantanamo on 13 March 2008 and may run as late as noon on 14 March 2008. This session will resolve all pending discovery issues. The courtroom is available on 13 and 14 March. The military judge will be available for RMC 802 conferences on 11 and 12 March 2008.

5. Any discovery issue currently known to counsel must be identified to the commission.

Peter E. Brownback III
COL, JA, USA
Military Judge

[redacted]

Subject: Special Request for Relief -- Discovery Motions - US v. Khadr

Sir,

1. Reference is made to the Military Judge's e-mail order of 20 Feb 08.

2. The defense respectfully requests that the deadline of 29 Feb 08 for "all discovery motions" established in said e-mail order be vacated and that a date of 14 Mar 08 be substituted therefor. In addition, the defense respectfully requests that the order be clarified to extend only to those motions that the defense is in a position to file based on progress in discovery thus far.

3. The defense currently plans to file approximately 10-12 discovery motions based on its review of discovery provided to the defense and the government's response to the defense discovery request of 10 Nov 07. Defense counsel are unable to meet a deadline of 29 Feb 08 for the filing of these motions (and obviously cannot meet this deadline with respect to motions based on future developments in the process of discovery unknown to the defense at this time). The facts supporting the recent defense Motion for Continuance, D-024, are incorporated herein by reference. Moreover, defense counsel are scheduled to travel OCONUS TAD to interview witnesses in Canada next week (24-27 Feb). LCDR Kuebler is then scheduled to attend CONUS Replacement Course (CRC) beginning 29 Feb 08. In light of these facts, 14 Mar 08 is the earliest possible date at which the defense can be in a position to file the contemplated discovery motions. This date should allow sufficient time for the prosecution to respond and for a hearing on defense discovery motions to take place on or about 1 Apr 08 -- that date being the next date for a hearing of any type under the terms of the current scheduling order.

4. Moreover, the defense can only be expected to file those motions it has a basis for filing based on discovery in

the case thus far. The Military Judge recognized this during an RMC 802 conference conducted on 7 Nov 07. There, the Military Judge "explained that there is no reason to set deadlines for discovery motions because they should be filed as discovery issues arise at anytime during the process." (see para. 6 of AE 049.) That said, the defense has no objection to filing those discovery motions it is currently in a position to file, provided it is afforded sufficient time to do so in light of other demands on defense counsels' schedule. The defense has already filed one motion and had hoped to work with the prosecution to minimize the need to file others. However, as the Military Judge is aware, the prosecution has thus far refused to work with the defense to resolve discovery issues arising from the 10 Nov 07 defense request informally. This, obviously, makes matters more difficult and necessitates delay.

5. The defense hereby waives any right to oral argument or hearing in connection with this request.

VR,

LCDR Kuebler

[redacted]

Subject: Discovery Motions - US v. Khadr

COL Brownback has directed that I forward the email below to counsel and other interested persons.

v/r,

LTC [redacted], USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

[redacted]

Subject: Discovery Motions - US v. Khadr

LTC [redacted]

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

Counsel in the case of US v. Khadr,

1. The commission is in receipt of D-024 - Defense Motion to Compel Discovery (Eyewitnesses).

2. All discovery motions in this case are due no later than 1630 hours, 29 February 2008.

Peter E. Brownback III
COL, JA, USA
Military Judge

Memorandum for Record

Subject: RMC 802 Conference - 21 February 2008

1. At the request of the government, an RMC 802 conference was held by telephone from 1500-1525 hours, 21 February 2008.

2. Participating were:
   a. COL Brownback
   b. MCTJ - LTC Chappell, LTC Sowder
   c. Defense - LCDR Kuebler, Ms. Snyder
   d. Government - MAJ Groharing, CPT Petty, Mr. Oldham, Mr. Murphy

3. The conference was initially requested by the government based upon D-024 - a defense request for a continuance - which was submitted on 19 February 2008. The conference was further focused on D-025 - a defense discovery motion. [While D-024 was received on 19 February 2008, the motion itself was dated 15 January 2008. LCDR Kuebler stated that the date on the motion was a typographical error.] D-025 generated an email from LTC [redacted], on 20 February at 3:29, Subject: Discovery Motions - Khadr, in which the military judge established a NLT date for discovery motions. That 20 February email brought an email from LCDR Keubler, on 21 February at 11:55, Subject: Special Request for Relief - Discovery Motion - US v. Khadr. The government response to D-024 was received by the commission and parties 2:38 on February 21, 2008.

4. MAJ Groharing stated that he was concerned that D-024 would throw off the established trial date - his concern was also evident in his response to D-024. He requested the RMC 802 conference to find out what other justifications the defense has for moving the trial date. The military judge stated that he would allow the defense to respond to D-024 in writing rather than during the RMC 802 conference.

5. LCDR Kuebler recognized that a delay in the proceedings would indeed delay the established trial date. He voiced his objection to comments made in the government response to D-024.

6. The military judge stated that he was not going to rule on D-024 at this time.

7. The military judge stated that he was looking prospectively rather than retrospectively. He noted that the parties had been in Guantanamo with the military judge and an empty courtroom on the afternoon of 4 February and all day 5 February. The issues raised by D-024 were generally addressed in an RMC 802 conference at Guantanamo, but the discovery issues raised in D-025 and in LCDR Kuebler's email of 11:55, 21 February, were not presented to him by either party.

8. LCDR Kuebler set forth his view on the efforts that the defense has made in filing and litigating the law motions and is making to resolve discovery issues. Those efforts were related in his 21 February email. LCDR Kuebler explained that the defense had litigated fifteen motions with one-third of the government's resources. LCDR Kuebler also explained that the defense

had attempted to meet with the government to discuss discovery issues before filing discovery motions that discussions with the government could have rendered unnecessary, but that the government was unwilling to meet with the defense.

9. The military judge stated that he was not assigning blame to either party - except perhaps to himself. He urged the government to review their response to the defense discovery request to determine what discovery they could provide. He urged the defense to review the discovery request to identify what items of discovery it needs.

10. The military judge stated that the parties would meet in Guantanamo on 13 March 2008 and the discovery issues would be resolved then. He noted, in response to LCDR Kuebler's concern about future issues, that he was not precluding future discovery requests - however, the twelve or so motions to which LCDR Kuebler alluded in his 21 February 2008 email were certainly ripe for resolution. The military judge further stated that he would send an email establishing the session and setting out what would be covered at the session.

11. The military judge recognized that preparing the discovery issues in the time allotted might not allow for full and formal briefing. He pointed out that counsel could give notice of motion type identification - the discovery item in question, the need for it, the attempt to resolve it.

12. Both parties were asked if they had any significant obstruction to being in Guantanamo on 13 March. Neither party did.

3. The military judge stated that he would prepare a summary of the RMC 802 conference and coordinate with Ms. Snyder on it. Both sides agreed to have Ms. Snyder serve as the initial review person.

14. This summary was approved by counsel for both sides before it was adopted by the military judge. *See* Email, Ms. Snyder, 22 February 2008, 5:01 PM, Subject: Fw: KHADR Draft - RMC 802 Conference Summary - 21 February 2008.

Peter E. Brownback III
COL, JA, USA
Military Judge
1710 hours, 22 February 2008

Distribution: All Conference Participants

UNITED STATES OF AMERICA	)	
	)	
	)	**Order UNDER SEAL**
	)	
	)	**Authorizing Alternatives to Discovery of**
v.	)	**Specified Items of Classified Information**
	)	
OMAR AHMED KHADR	)	
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	**12 March 2008**
a/k/a "Ahmed Muhammed Khali"	)	

1. (U) This order is issued pursuant to the general authorities granted me under the Military Commissions Act, 10 U.S.C. §§ 948a, *et seq.*, the Manual for Military Commissions, and the Regulation for Trial by Military Commission, and the particular authorities found in 10 U.S.C. § 949d(f), R.M.C. 701(e) and (f), and M.C.R.E. 505(e)(3).

2. (U) I have examined the Government's 12 March 2008 Motion titled "*Ex Parte, In Camera* Motion Pursuant to M.C.R.E. 505(e)(3)," including the classified information contained therein and attached thereto. I have also examined the proposed unclassified substitutions that the Government seeks to provide to the defense in discovery as an alternative to the aforementioned classified information, pursuant to M.C.R.E. 505(e)(3).

3. (U) I find:

a. (U) The Government has properly claimed the National Security Privilege under M.C.R.E. 505; that is, the claim is made by an authorized person under 10 U.S.C. § 949d(f)(1)(B) and M.C.R.E. 505(c), and the specified classified material has been classified by the proper authorities in accordance with the appropriate regulations.

b. (U) The Government's proposed substitutions are an adequate alternative to disclosure of the aforementioned classified information and will allow the Government to provide the defense with additional, possibly relevant information in an unclassified format.

4. (U) Accordingly, IT IS HEREBY ORDERED:

(U) The alternatives to the discovery of specified items of classified information under M.C.R.E. 505(e)(3) proposed by the Government in their 10 March 2008 "*Ex Parte, In Camera* Motion Pursuant to M.C.R.E. 505(e)(3)" are approved. I authorize the Government to substitute the approved alternatives.

5. (U) The Government's 12 March 2008 *ex parte* motion and classified attachments shall remain *ex parte and under seal* until further order of this court.

6. (U) This order shall be provided to both parties and it is hereby sealed until further order of the court.

Peter E. Brownback III
Colonel, J.A., US, Army
Military Judge

12 March 2008

[redacted] **SSG USSOUTHCOM JTFGTMO**

[redacted]

Subject: MCRE 505(e)(3) Motion and Order US v Khadr

Attachments: 12 Mar 08 - MJ 505(e)(3) Order.pdf

12 Mar 08 - MJ 505(e)(3) Order...

COL Brownback has directed that I send the email below to counsel and other interested persons.

v/r,

LTC [redacted], USAR, JA
Seni[redacted]dvisor
Military Commissions Trial Judiciary

[redacted]

LTC [redacted]

Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

Counsel in the case of US v. Khadr,

1. From 1340 hours until 1430 hours, 12 March 2008, I conducted an MCRE 505(e)(3) review

at Guantanamo Bay, Cuba.

2. Mr. Powell, the Court Security Officer, delivered a motion to me for review. I reviewed the motion. There were no words exchanged concerning the motion.

3. Having reviewed the motion, I signed the attached order.

4. The motion will be attached to the record of trial as a sealed Appellate Exhibit. This email and the attached order will also be attached to the record of trial as an Appellate Exhibit.

Peter E. Brownback III

COL, JA, USA
Military Judge

Memorandum for Counsel 13 March 2008
United States v. Khadr

The following is a summary of an RMC 802 conference held at 1730 hours, 21 March 2008, at Guantanamo Bay, Cuba.

1. The following were present:

a. The Military Judge, COL Peter Brownback
b. Government Counsel, CPT Petty, Mr. John Murphy
c. Defense Counsel, LCDR Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The parties discussed the status of each of the discovery issues raised in motions and notice of motions D025 through D038. Regarding D025, MTC (eyewitnesses), the prosecution stated that it was in the process of fine tuning a list of eyewitnesses present at the 27 July 2002 firefight that it will give the defense tomorrow. Initially, the prosecution stated that the list was prepared by searching the files of the trial counsel, case investigator, CITF case agent and case paralegal. The prosecution later clarified that it has obtained information from OGAs in preparing this list. The prosecution stated that the defense will not necessarily get the names of each eyewitness, but that the defense will be given a means to speak with each eyewitness.

3. Regarding D026, MTC (documents relating to Charge III) the parties have not reached an agreement on this motion. The government was unsure whether it could obtain the documents referenced in Attachment A to D026. The military judge directed the government to determine whether it could obtain those documents.

4. Regarding D027, MTC (documents regarding investigation & prosecution of Sgt [ ]), the government stated that it intended to comply with the defense discovery request.

5. Regarding D028, Motion to Depose [redacted], the parties have not reached an agreement on this motion. The military judge asked the defense why the defense believes it entitled to depose [redacted] The defense explained that the information sought from [redacted] will impact further discovery in the case and is vital to reconstruct the events as one or two of the three reports he wrote were compiled immediately after the 27 July firefight and are based on [redacted] interviews of many witnesses. The defense explained it wanted to ask [redacted] who those witnesses were so that it could attempt to talk to them prior to trial. The defense also explained that it wanted to explore what led to [redacted] altering and apparently backdating the last report. The prosecution stated that while it could not guarantee that LtCol W would not deploy and be unavailable at trial, it did not think that was likely and it intended to call him as a witness. In responding to a question from the military judge, the prosecution stated that it would prefer to not be able to admit LtCol W's statements at trial if he were not available to testify than for the defense to depose him prior to trial.

6. Regarding D029, MTC (accused's statements), the government stated that summaries of additional statements were forthcoming. It explained that it could not find the first several statements the defense specified in it's motion. The government also explained that it has handwritten notes (in short-hand) containing the accused's statements that it has not produced to the defense because it has determined that they are not relevant or material.

7. Regarding D030, MTC (documents relating to investigation of Col Davis complaint), the parties have not reached an agreement on this motion. The military judge told the defense to review the Tate document available on the DoD website. In response to the military judge, the government explained that it could make the requested documents available to the defense.

8. Regarding D031, NOM (physical evidence), the government stated that it has done a thorough search and has not located any physical evidence that the defense does not have.

9. Regarding D032, NOM (documents regarding capture & detention), the defense clarified that it is requesting documents such as message traffic, casualty reports, and incident reports. The military judge directed the government to determine what unit or units and US elements were involved in the firefight, and whether there was an after action or other report of activity prepared by any of them. The military judge also instructed the government to search for relevant message traffic from 27-30 July 2002.

10. Regarding D033, NOM (communications between US & Canada), the government explained that it had a search performed for the requested documents at the State Department because it thought this agency was the most likely to contain relevant documents and that none were found. The defense explained that there must be some communications because something caused Canada to generate the response attached to D033 as Attachment A. The defense suggested that the communications might have been through US intelligence agencies rather than the State Department. The government then explained that it had conducted a search at other agencies as well and did not find the requested documents.

11. Regarding D034, MTC (documents regarding investigation of detainee abuse in Bagram), the government explained that it is going to produce documents in connection with D027, which should be sufficient. The defense explained that at least 27 people in one unit had been investigated for detainee abuse at Bagram so the documents relating to D027 may not be sufficient to satisfy the document request at issue in D034. The government was unsure of the scope of the investigation relating to D027 and thought that it might have been one large detainee abuse investigation, rather than multiple investigations, and said that it would check on that.

12. Regarding D035, NOM (interrogators), the government explained that it has given the defense all the names of the accused's interrogators. The defense explained that it has numbers, not names, for many of the interrogators, and that there are interrogators who are not identified in the many of the interview summaries, interrogation reports, etc. The defense also explained that it had just become aware of one potential interrogator through a recent newspaper article that was not contained in the discovery. The government explained that it would look further into what had been done to identify the accused's interrogators.

13. Regarding D036, NOM (SOPs & interrogation manuals), in Major Groharing's absence, Capt Petty was unsure of whether these items had been looked for and stated he would check.

14. Regarding D037, NOM (videos, audio recordings, photos of accused), the government stated that it was aware of only one video the defense did not have and it was working to obtain authorization to produce it to the defense. The defense stated that many photos of the accused had been taken, many of them in connection with medical care, and asked whether the government had them. It

stated it did not, but that it was unsure of whether the medical records contained those photos. The government explained that both the defense and government have done everything that is required to obtain the medical records, but that JTF had just informed Capt Petty and LCDR Kuebler that it would not release the medical records without authorization from the defense that JTF could give the records to the prosecution. The government also explained that it doesn't know whether the medical records JTF has include medical records from Bagram or other sources because JTF had not yet responded to the government question as to the scope of the records.

15. Regarding D038, NOM (classified report), the government stated that it will produce to the defense an unclassified summary of the report shortly.

16. The defense explained that it had submitted two supplemental discovery requests to the government, and the government explained that it submitted a discovery request to the defense. The military judge emphasized that he wanted to resolve the discovery issues and encouraged the parties to discuss the requests.

17. The parties discussed several administrative issues, including displaying attachments to the motions on the video screens in the courtroom, referencing attachments, publishing motions and responses on the DoD website.

18. The defense also told the military judge that it may be necessary to have a closed session in the event that it needed to discuss information contained in the classified documents attached to the motions. The military judge stated that the defense should refer to the information by paragraph and that there would be no need to have a closed session.

19. The defense explained that the convening authority had requested more information before deciding whether to grant the defense request for an expert consultant relating to al Qaeda. In the event the request is denied, the defense will need to litigate the expert request. The defense stated that if the convening authority denies the expert request, then the defense will file a motion to continue the deadline for responding to P003 as expert assistance is needed to respond.

20. The defense noted that the government's complaints in responding to the D024 (defense motion for to continue evidentiary motions deadline) that the defense has spent time going TAD rather than preparing for trial raises a question of whether counsel is competent since the government alleges they are not preparing for trial. The government responded that its response says the defense is competent and that it was not raising this ethical issue.

21. Any issues requiring a decision were withheld until the hearing tomorrow. The MJ urged both parties to talk to each other about discovery issues and try to resolve them amongst themselves. The military judge also urged both parties to come up with a trial schedule. Neither party had anything further.

22. This summary was agreed to by defense counsel and government counsel before it was signed by the military judge.

Peter E. Brownback III
COL, JA, USA
Military Judge

Memorandum for Counsel 14 March 2008
United States v. Khadr

The following is a summary of an RMC 802 conference held at 1825 hours, 13 March 2008, at Guantanamo Bay, Cuba.

1. The following were present:

   a. The Military Judge, COL Peter Brownback
   b. Government Counsel, MAJ Groharing, CPT Petty, Mr. John Murphy, SSG Ona
   c. Defense Counsel, LCDR Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The military judge reviewed each motion again to ensure that each side understood which motions he intended to rule on. Regarding D025, MTC (eyewitnesses) the military judge will not rule at this point. The prosecution is in the process of fine tuning a list of eyewitnesses present at the 27 July 2002 firefight that it will give the defense. The prosecution will provide names of people, but may not be able to provide units or contact information on some of the personnel.

3. Regarding D026, MTC (documents relating to Charge III), the military judge will not rule at this point. The prosecution is working on trying to obtain the conspiracy documents.

4. Regarding D027, MTC (documents regarding investigation & prosecution of Sgt [ ]), the military judge will not rule at this point. The government stated that it intended to comply with the defense discovery request.

5. Regarding D028, motion to depose [redacted] the military judge will rule by tomorrow.

6. Regarding D029, MTC (accused's statements), the military judge will rule by tomorrow.

7. Regarding D030, MTC (documents relating to the investigation of Col Davis complaint), the military judge will rule by tomorrow.

8. Regarding D031, NOM (physical evidence), the military judge will not rule at this point because the government says that it does not have any physical evidence not produced to the defense.

9. Regarding D032, NOM (documents regarding capture & detention), the military judge will not rule on the motion at this point. But the military judge instructed the government to comply with what was put on the record at the hearing today regarding searching for message traffic, etc. The search should cover 27 July – 8 August 2002.

10. Regarding D033, NOM (communications between US & Canada), the military judge will not rule at this point. The government must comply with what was put on the record when searching for communications with Canada. The search should cover 27 July through 31 December 2002.

11. Regarding D034, MTC (documents regarding investigation of detainee abuse in Bagram), the military judge will not rule at this point. The government

explained that it is going to produce documents in connection with D027 and that D027 is subsumed by D034.

12. Regarding D035, NOM (identity of interrogators), the military judge will rule by tomorrow.

13. Regarding D036, NOM (SOPs & Manuals), the military judge will not rule at this point. The government must look for any SOPs & interrogation manuals, other than the SOP mentioned in conjunction with D034/D027.

14. Regarding D037, NOM (videos, audio recordings, photos of accused), the military judge will not rule at this point.

15. Regarding D038, NOM (classified report), the military judge will not rule at this point since the government will provide to the defense an unclassified summary of the report shortly.

16. Regarding D024, defense motion for continuance of evidentiary motions deadline, the military judge will rule by tomorrow.

17. The government will provide the defense with the medical records tomorrow, 14 March 2008.

18. The military judge explained that the defense can raise further issues with the military judge if the defense is not satisfied with the documents produced by the government.

19. The government raised an issue regarding the release of filings. It said that it appears that the defense is releasing their filings before they are filed with the Court. The defense explained that it had the understanding that it could discuss the contents of their filings with people outside the defense team prior to the court releasing the filing to the public as long as it did not divulge FOUO information. The military judge stated that he is troubled with a motion being released before it reaches military judge’s hands. But the military judge explained the defense may call up the press and let them know a motion would be sent out the next day regarding XYZ and that it thinks it is entitled to the requested relief because of abc.

20. This summary was agreed to by defense counsel and government counsel before it was signed by the military judge.

Peter E. Brownback III
COL, JA, USA
Military Judge

[redacted] **SSG USSOUTHCOM JTFGTMO**

[redacted]

Subject: Summary - RMC 802 Conference - 13 March 2008 - US v Khadr

Attachments: 802 Summary - 13 Mar 08.pdf

802 Summary - 13 Mar 08.pdf (1...

COL Brownback has directed that I send the below email and attachment to counsel and other interested persons.

v/r,

LTC [redacted], USAR, JA
Seni[redacted]dvisor
Military Commissions Trial Judiciary

[redacted]arch 2008

LTC [redacted]

1. Please forward the email below to counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

2. Please make an appellate exhibit of this email and the attachment.

COL Brownback

Counsel in the case of US v. Khadr,

1. Attached is the summary of the RMC 802 Conference held on 13 March 2008.

2. With regard to D-025, D-026, D-027, D-032, D-033, D-034, D-036, and D-038, the commission will not rule on those motions (or notices of motion) until the government performs the tasks directed and the defense advises the commission that the relief requested has been either provided or not provided.

3. With regard to D-031, the commission will take no further action on this notice of motion. It will be moved to the inactive section of the filings inventory.

4. With regard to D-028, D-029, D-030, and D-035, rulings were issued on 13 March 2008. The commission will take no further action on these motions and notice of motion. They will be moved to the inactive section of the filings inventory.

5. With regard to D-024, a ruling was issued on 13 March 2008.

Peter E. Brownback III

COL, JA, USA

Military Judge

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Notice of Defense Motion** **To Compel Production of Physical Evidence** 4 March 2008

1. **Timeliness:** This notice of motion is filed within the timeframe established by the Military Judge's 21 February 2008 e-mail order.

2. **Notice of motion:** On or about 13 March 2008, the defense shall move this Military Commission for an order directing the government to produce the following documents or materials: Any physical evidence seized from the site of the 27 July 2002 firefight at or near Khost, Afghanistan, including, but not limited to, circuit boards, watches, or other materials allegedly used to manufacture explosive devices.

3. **Summary of basis for motion:**

a. The defense seeks production of physical evidence seized from the site of the 27 July 2002 firefight, which it requested from the government on 9 November 2007. (Def. Discovery Req. of 9 Nov 07, ¶ 3(j) (Attachment D to D-025 Def. Mot. to Compel Discovery (Eyewitnesses).) The government alleges, *inter alia*, that Mr. Khadr participated with others in an effort to manufacture explosive devices for use against U.S. forces. The defense should be afforded the opportunity to examine and independently test any physical evidence seized from the site. Such items are therefore material to the preparation of the defense.

b. The government has not produced any physical evidence to date on the basis that it "has provided all relevant physical evidence or photographs thereof known to trial counsel that are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief." (Govt Resp. of 4 Dec 07 to Def. Discovery Req. of 9 Nov 07, ¶ 3(j) (Attachment E to D-025, Def. Mot. to Compel Discovery (Eyewitnesses).) But the government's discovery obligation is not limited to physical evidence "known to trial counsel." Instead, the government is required to produce all physical evidence relating to the charges in this case that are in the possession of any governmental agency. *See* R.M.C. 701(c)(1) (stating trial counsel must produce evidence "within the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel"); *see also Kyles v. Whitley*, 514 U.S. 419, 432, 437, (1995) (prosecutors have an affirmative duty to disclose such evidence and a duty to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *see also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir.1992) (holding that prosecutor has the obligation to search files of governmental agencies "closely aligned with the prosecution" whenever there is "some reasonable prospect or notice of finding exculpatory evidence.");

United States v. Crivens, 172 F.3d 991, 996 (7th Cir. 1999) ("prosecutors may not simply claim ignorance of *Brady* material"). This duty is particularly important here, where "other government agencies" told prosecutors in the Office of Military Commissions that any exculpatory information would be withheld from the prosecutors. Capt Carr email of 15 Mar 04 (Attachment I to D-025, Def. Mot. to Compel Discovery (Eyewitnesses)) ("In our meeting with OGA, they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches.").

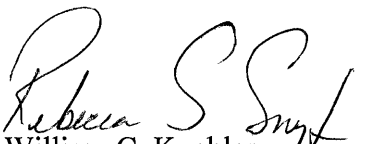
4. **Oral Argument**: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will allow for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

5. **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:

> Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))
>
> Government Response of 4 December 07 to Defense Discovery Request of 9 Novmeber 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))
>
> Capt Carr email of 15 Mar 04 (Attachment I to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

6. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

7. **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.



William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

[redacted] **SSG USSOUTHCOM JTFGTMO**

[redacted]

Subject: Summary - RMC 802 Conference - 13 March 2008 - US v Khadr

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v/r,

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Seni[redacted]dvisor
Military Commissions Trial Judiciary

[redacted]arch 2008

LTC [redacted]

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COL Brownback

Counsel in the case of US v. Khadr,

1. Attached is the summary of the RMC 802 Conference held on 13 March 2008.

2. With regard to D-025, D-026, D-027, D-032, D-033, D-034, D-036, and D-038, the commission will not rule on those motions (or notices of motion) until the government performs the tasks directed and the defense advises the commission that the relief requested has been either provided or not provided.

3. With regard to D-031, the commission will take no further action on this notice of motion. It will be moved to the inactive section of the filings inventory.

4. With regard to D-028, D-029, D-030, and D-035, rulings were issued on 13 March 2008. The commission will take no further action on these motions and notice of motion. They will be moved to the inactive section of the filings inventory.

5. With regard to D-024, a ruling was issued on 13 March 2008.

Peter E. Brownback III

COL, JA, USA

Military Judge