
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
(place or Places of Trial)

on

13 March 2008 Session
(Date or Dates of Trial)

Companion cases:
None.

Filings Inventory – US v. Khadr

As of 1930, 12 March 2008

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: Motion to Reconsider (Dismissal Order)				• See Inactive Section	
P 002: MCRE 505 Review Request				• See Inactive Section	
P 003: Motion to Pre-admit video – “The al Qaida Plan”	27 Feb 08	21 Mar 08	26 Mar 08	<ul style="list-style-type: none"> • Motion Filed • A. Defense email dtd 5 Mar 08 requesting additional time to respond • B. MJ email dtd 5 Mar 08 directing Pros to give view of request NLT 1400, 6 Mar 08 • C. Pros email dtd 6 Mar 08 in opposition of grant of additional time • D. MJ email dtd 6 Mar 08 granting special request – resp due NLT 21 Mar 08 – and directing DC account for OCONUS travel 	

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 003: Motion to Pre-admit video – “The al Qaida Plan” (Continued)	27 Feb 08	21 Mar 08	26 Mar 08	<ul style="list-style-type: none"> E. Defense email dtd 7 Mar 08 accounting for OCONUS travel 	
P 004: MCRE 505 Review Request				<ul style="list-style-type: none"> 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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 • F. MJ email dtd 19 Feb 08 instructing Defense to file Supplemental Reply by 1200 22 Feb 08 • G. Defense email dtd 21 Feb 08 declining to reply 	
D 013: Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder)				See Inactive Section	
D 014: Defense Motion to Dismiss Charges for Lack of Jurisdiction (Equal Protection)	11 Jan 08	18 Jan 08	24 Jan 08	<ul style="list-style-type: none"> • Motion Filed • A. Prosecution Response • B. 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 015: Defense Motion to Preclude Further Ex Parte Proceedings Under Color of MCRE 505(e)(3)				<ul style="list-style-type: none"> • See Inactive Section 	
D 016: Defense Motion to Dismiss Spec 2 of Chg IV on grounds of Multiplicity & UMC	11 Jan 08	18 Jan 08	N/A	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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 	
D 019: Motion to Strike Surplus Language (Charge III)	11 Jan 08	18 Jan 08	N/A	<ul style="list-style-type: none"> • Motion Filed • A. Prosecution Response • B. Email dtd 24 Jan 08, LCDR Kuebler stating no reply will be filed 	

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 020: Special Request for Relief from Terms of Protective Order No. 001				• See Inactive Section	
D 021: Defense Motion to Dismiss for Lack of Jurisdiction (Common Article 3)	17 Jan 08	24 Jan 08	29 Jan 08	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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 • E. Defense Reply • F. Defense email dtd 8 Feb 08 requesting Special Relief to admit statements of Sens. Lindsay Graham and John McCain • G. MJ email dtd 8 Feb 08 requesting Gov position per Def request • H. Prosecution email dtd 8 Feb 08 requesting until 13 Feb 08 to respond • I. MJ email dtd 9 Feb 08 directing Pros response NLT 1200 13 Feb 08 	

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 022: Defense Motion to Dismiss Charges for Lack of Jurisdiction (Child Soldier) (Continued)				<ul style="list-style-type: none"> •J. Prosecution response to Special Request to admit Senatorial Statements dtd 13 Feb 08 •K. Defense Reply to Special Request dtd 13 Feb 08 •L. Prosecution email dtd 22 Feb 08 containing surreply 	
D 023: Defense Motion for Appropriate Relief (Strike Murder from Chg III)	18 Jan 08	25 Jan 08	N/A	<ul style="list-style-type: none"> • Motion Filed • A. Prosecution Response • B. Email dtd 3 Feb 08, LCDR Kuebler stating no reply will be filed 	
D 024: Defense Motion to Continue	15 Feb 08	21 Feb 08	26 Feb 08	<ul style="list-style-type: none"> • Motion Filed • A. MJ email dtd 15 Feb 08 requesting Pros intent to Response and setting suspense for response • B. Pros email dtd 15 Feb 08 affirming intent to respond • C. Pros email dtd 19 Feb 08 requesting R.M.C. 802 hearing • D. Def email dtd 19 Feb 08 informing MJ of schedule conflict for proposed R.M.C. 802 hearing • E. Pros email dtd 19 Feb 08 reiterating necessity of R.M.C. 802 hearing 	

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 024: Defense Motion to Continue (Continued)	15 Feb 08	21 Feb 08	26 Feb 08	<ul style="list-style-type: none"> •F. MJ email dtd 19 Feb 08 setting R.M.C. 802 hearing for 1500 hrs 21 Feb 08 •G. Pros email dtd 19 Feb 08 confirming scheduling of R.M.C. 802 hearing •H. Prosecution response filed •I. MJ email dtd 21 Feb 08 Setting Discovery Issues hearing in GTMO for 13 Mar 08 •J. MJ email dtd 22 Feb 08 re summary of 21 Feb 08 R.M.C. 802 hearing •K. Defense reply filed •L. MJ email dtd 27 Feb 08 instructing parties to file evidentiary motions 	
D 025: Defense Motion to Compel Discovery (Eyewitnesses)	19 Feb 08	N/A	N/A	<ul style="list-style-type: none"> •Motion Filed •A. B. MJ email dtd 21 Feb 08 Setting Discovery Issues hearing in GTMO for 13 Mar 08 •B. MJ email dtd 22 Feb 08 re summary of 21 Feb 08 R.M.C. 802 hearing •C. Government email dtd 28 Feb stating a contact information list is being prepared for Defense •D. Defense email dtd 5 Mar 08 indicating no reply is nec due to lack of Government response 	
D 026: Defense Motion to Compel Discovery Relating to Charge III	3 Mar 08	10 Mar 08	N/A	<ul style="list-style-type: none"> •Motion filed 	

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 027: Defense Motion To Compel Discovery (Documents Relating to Investigation and Prosecution of Sgt [REDACTED] USA)	4 Mar 08	11 Mar 08	N/A	• Motion filed	
D 028: Defense Request to Depose LTC S.R.W., USA, SF	4 Mar 08	11 Mar 08	N/A	• Motion filed	
D 029: Defense Motion to Compel Discovery (Statements of Omar Khadr)	4 Mar 08	11 Mar 08	N/A	• Motion filed	
D 030: Defense Motion to Compel Production of Documents (Davis Complaint/Investigation)	4 Mar 08	11 Mar 08	N/A	• Motion filed	
D 031: Defense Motion to Compel (Physical Evidence)				• Notice of Motion filed 4 Mar 08	
D 032: Defense Motion To Compel Production of All Documents Relating to the Capture and Detention of the Accused				• Notice of Motion filed 4 Mar 08	
D 033: Defense Motion To Compel Production of Documents Evidencing Communications between the U.S. and Canadian Governments				• Notice of Motion filed 4 Mar 08	

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 034: Defense Motion To Compel Discovery (Documents Relating to Investigation and Prosecution of Detainee Abuse)				• Notice of Motion filed 4 Mar 08	
D 035: Defense Motion To Compel Production of Identities of Interrogators				• Notice of Motion filed 4 Mar 08	
D 036: Defense Motion To Compel Production of Manuals and SOPs Relating to Interrogation Techniques Employed on the Accused				• Notice of Motion filed 4 Mar 08	
D 037: Defense Motion to Compel Production of Video, Photo, & Audio Records of Accused				• Notice of Motion filed 4 Mar 08	
D 038: Defense Motion to Compel Production (Classified Report)				• Notice of Motion filed 4 Mar 08 • A. Pros email dtd 7 Mar 08 indicating intent to provide unclassified version	

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	<ul style="list-style-type: none"> • Sent to all parties 28 Nov 07 • A. Defense email dtd 18 Jan 08 reserving right to file additional law motions 	
MJ 010: Discovery Motion Deadline	<ul style="list-style-type: none"> • MJ email dtd 20 Feb 08 acknowledging receipt of D-024 and setting deadline for Discovery Motions for 1630 hours, 29 Feb 08 • A. Defense email dtd 21 Feb 08 requesting deadline shift to 14 Mar 08 • B. MJ email dtd 21 Feb 08 Setting Discovery Issues hearing in GTMO for 13 Mar 08 • C. MJ email dtd 22 Feb 08 re summary of 21 Feb 08 R.M.C. 802 hearing 	<p>OR – 063</p> <p>A – 063</p> <p>B – 063</p> <p>C - 063</p>

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	<ul style="list-style-type: none"> • 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 	<p>OR - 035</p> <p>A – 031</p> <p>B – 031</p> <p>C – 031</p> <p>D - 031</p>
2	Protective Order # 2	2	12 Oct 07	<ul style="list-style-type: none"> • 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 • 	<p>OR – 035</p> <p>A – 032</p> <p>B - 032</p> <p>C – 032</p> <p>D – 032</p> <p>E – 032</p> <p>F – 032</p> <p>G - 032</p>

Pro Ord #	Designation when signed	# of Pages in Order	Date Signed	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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		<ul style="list-style-type: none"> • 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 <ul style="list-style-type: none"> • 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 OR = 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)				<ul style="list-style-type: none"> •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 	<p>G – 054</p> <p>H – 054</p> <p>I - 054</p>
P 004: MCRE 505 Review Request	12 Mar 08			<ul style="list-style-type: none"> • Motion Submitted • A. Order signed 	<p>OR – 064</p> <p>A - 064</p>

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		<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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 OR = 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	<ul style="list-style-type: none"> •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				<ul style="list-style-type: none"> •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		<ul style="list-style-type: none"> •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	<ul style="list-style-type: none"> •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 OR = 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	<ul style="list-style-type: none"> •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	<ul style="list-style-type: none"> •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				<ul style="list-style-type: none"> •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 OR = 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)				<ul style="list-style-type: none"> •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
D 013: Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder)	7 Dec 07	14 Dec 07	4 Jan 07	<ul style="list-style-type: none"> • 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 MJ Ruling dtd 20 Feb 08 	OR – 060 A – 060 B – 060 C – 060 D – 060 E – 060 F - 060
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	<ul style="list-style-type: none"> • Motion Filed • A. Prosecution Response • B. Defense Reply • C. MJ ruling dtd 21 Feb 08 	OR – 061 A – 061 B – 061 C - 061
D 020: Special Request for Relief from Terms of Protective Order No. 001	16 Jan 08	23 Jan 08	27 Jan 08	<ul style="list-style-type: none"> • Motion Filed • A. Prosecution Response • B. Defense Reply • C. Defense Request for Ruling dtd 11 Feb 08 	OR – 062 A – 062 B – 062 C – 062

Designation Name	Motion Filed	Response Filed	Reply Filed	Status /Disposition/Notes OR = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 020: (Continued)	16 Jan 08	23 Jan 08	27 Jan 08	<ul style="list-style-type: none"> •D. Prosecution request for additional time and Discovery Resp dtd 11 Feb 08 •E. Prosecution email dtd 11 Feb 08 with attachments ordered by MJ on 7 Feb 08 •F. MJ email dtd 12 Feb 08 requesting Prosecution position on Def request for ruling •G. Prosecution email dtd 12 Feb 08 opposing Def request for ruling •H. Prosecution email dtd 20 Feb 08 with Surreply •I. MJ ruling dtd 21 Feb 08 	D – 062 E – 062 F –062 G – 062 H – 062 I - 062

Inactive Section

MJ Designations

Designation Name (MJ)	Status /Disposition/Notes OR = 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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

<p align="center">Designation Name (MJ)</p>	<p align="center">Status /Disposition/Notes OR = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference</p>	<p align="center">AE</p>
<p>MJ 005: Special Instructions to Parties re 8 Nov 07 Hearing to determine Initial Threshold Status</p>	<ul style="list-style-type: none"> • 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 	<p align="center">OR 036 A – 036 None</p>
<p>MJ 006: Motion by Press Petitioners for Public Access to Proceedings and Records</p>	<ul style="list-style-type: none"> • 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 	<p align="center">OR – 053 A – 053 B – 053 C – 053 D - 053</p>
<p>MJ 007: Special Instructions to Parties re Submitting Documents Requiring Redaction</p>	<ul style="list-style-type: none"> • MJ email dtd 30 Nov 07 instructing parties to ensure proper redaction takes place before submission of documents 	<p align="center">(None)</p>
<p>MJ 008: Emergency Weekend GTMO Visitation</p>	<ul style="list-style-type: none"> • 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) 	<p align="center">OR – 055 A – 055 B - 055</p>

UNITED STATES
OF
AMERICA

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} **D-016**
} **Ruling on Defense Motion to Dismiss Specification**
} **2 of Charge IV for Multiplicity and Unreasonable**
} **Multiplication of Charge**

14 March 2008

v }
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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 and the government response. The defense did not submit a reply.
2. Charge IV and its specifications are reproduced below:

CHARGE IV: VIOLATION 10 U.S.C. §950v(b)(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM

Specification 1 : 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 at least June 2002 through on or about July 27, 2002, intentionally provide material support or resources to wit: personnel, himself, to al Qaeda, an international terrorist organization founded by Usama bin Laden, in or about 1989, and known by the accused to be an organization that engages in terrorism, said al Qaeda having engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks, continuing to date against the United States; said conduct taking place in the context of and associated with armed conflict.

The accused provided material support or resources to al Qaeda including, but not limited to, the following:

1. 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," consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

2. 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.
3. In or about July 2002, Khadr attended one month of land mine training.
4. 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.
5. On or about July 27, 2002, Khadr engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.
6. Khadr threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.
7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

Specification 2: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, from at least June 2002 through on or about July 27, 2002, intentionally provide material support or resources to wit: personnel, himself, 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.

The accused provided material support or resources in support of acts of terrorism including, but not limited to, the following:

1. 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," consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
2. 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.
3. In or about July 2002, Khadr attended one month of land mine training.
4. 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.

5. On or about July 27, 2002, Khadr engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.
 6. Khadr threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.
 7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.
3. The relevant provisions and discussion of Rule for Military Commission 907 are:

RMC 907(b)(3)

(3) *Permissible grounds.* A specification may be dismissed upon timely motion by the accused if:

(A) The specification is so defective that it substantially misled the accused, and the military judge finds that, in the interest of justice, trial should proceed on remaining charges and specifications without undue delay; or

(B) The specification is multiplicitious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and should be dismissed in the interest of justice.

Discussion

A specification is multiplicitious with another if it alleges the same offense, or an offense necessarily included in the other. A specification may also be multiplicitious with another if they describe substantially the same misconduct in two different ways. For example, assault and disorderly conduct may be multiplicitious if the disorderly conduct consists solely of the assault. *See also* R.M.C. 1003(b)(1)(C).

Ordinarily, a specification should not be dismissed for multiplicity before trial unless it clearly alleges the same offense, or one necessarily included therein, as is alleged in another specification. It may be appropriate to dismiss the less serious of any multiplicitious specifications after findings have been reached. Due consideration must be given, however, to possible post-trial or appellate action with regard to the remaining specification.

4. Part IV, paragraph 6(25) of the Manual for Military Commissions provides the following:

Paragraph 6(25), Part IV, MMC

(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.

a. *Text.* “Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.”

b. *Elements.* The elements of this offense can be met either by meeting (i) all of the elements in A, or (ii) all of the elements in B, or (iii) all of the elements in both A and B:

- A. (1) The accused provided material support or resources to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24));
- (2) The accused knew or intended that the material support or resources were to be used for those purposes; and
- (3) The conduct took place in the context of and was associated with an armed conflict.

or

- B. (1) The accused provided material support or resources to an international terrorist organization engaged in hostilities against the United States;
- (2) The accused intended to provide such material support or resources to such an international terrorist organization;
- (3) The accused knew that such organization has engaged or engages in terrorism; and
- (4) The conduct took place in the context of and was associated with an armed conflict.

c. *Definition.* “Material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

d. *Maximum Punishment.* Confinement for life.

5. The specifications of the Charge allege violations of the Charge in two separate methods. Specification 1 alleges provision of support or resources to an international terrorist organization. Specification 2 alleges provision of support or resources to be used in carrying out an act of terrorism. Both of these specifications allege a separate offense.

6. Having reviewed the specifications and the requirements of RMC(b)(3), the commission does not find the interests of justice require dismissal of either specification or the merger of the specifications prior to the presentation of evidence.

7. The defense request to dismiss Specification 2 of Charge IV on grounds of multiplicity is denied. The defense may have grounds to raise the issue again after evidence has been presented.

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

UNITED STATES
OF
AMERICA

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} **D-017**
Ruling on Defense Motion for Appropriate Relief
(Bill of Particulars)

14 March 2008

v

}
}
} **OMAR AHMED KHADR**
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khahi"
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1. The commission has considered the defense motion and the government response. The defense did not file a reply.
2. The defense requests that the commission direct a bill of particulars with respect to Charge III - basing this request on the provisions of Rule for Military Commission (R.M.C.) 906(b)(5).
3. The Specification of Charge III reads as follows:

CHARGE III: VIOLATION OF 10 U.S.C. §950v(b)(28), CONSPIRACY

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 at least June 1, 2002 to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahrnan Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks, continuing to date against the United States; said agreement and enterprise sharing a common criminal purpose known to the accused to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism.

In furtherance of this agreement or enterprise, Omar Khadr knowingly committed overt acts, including, but not limited to, the following:

- 1. 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," consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.*
 - 2. 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.*
 - 3. In or about July 2002, Khadr attended one month of land mine training.*
 - 4. 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.*
 - 5. On or about July 27, 2002, Khadr engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.*
 - 6. Khadr threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.*
 - 7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.*
4. R.M.C. 906(b)(5) reads as follows:
- (5) Bill of particulars. A bill of particulars may be amended at any time, subject to such conditions as justice permits.*

Discussion

The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes.

A bill of particulars should not be used to conduct discovery of the Government's theory of a case, to force detailed disclosure of acts underlying a charge, or to restrict the Government's proof at trial.

A bill of particulars need not be sworn because it is not part of the specification. A bill of particulars cannot be used to repair a specification which is otherwise not legally sufficient.

5. Part IV of the MMC describes the offense of Conspiracy as follows in paragraph 6a(28):

(28) CONSPIRACY.

a. *Text.* “Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.”

b. *Elements.*

(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and

(3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

c. *Comment.*

(1) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(2) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact “triable by military commission.” Although the accused must be subject to the MCA, other co-conspirators need not be.

(3) The overt act must be done by the accused, and it must be done to effectuate the

object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(4) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. It is not essential that any substantive offense, including the object offense, be committed.

(5) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(6) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

d. *Maximum Punishment.* Death, if the death of any person occurs as a result of the conspiracy

6. The Specification alleges various acts in a short (1 June 2002 - 27 July 2002) time frame although in an area defined simply as Afghanistan. On the face of the specification, it would appear that at least one of the overt acts alleged would, if proven, constitute an overt act in furtherance of one of the criminal purposes alleged. Neither the M.M.C. nor the M.C.A. require more.

7. If the government's statement (D-017, Government Response, paragraph 6A(vi)) that the discovery provided includes all necessary information required to establish a defense

is not correct, then the proper avenue for redress would be available if the government attempts to offer evidence not provided in discovery.

8. The commission finds that the Specification of Charge III does not need to be supplemented by a Bill of Particulars in order to satisfy the requirements of RMC 906(b)(5). The defense request for a Bill of Particulars is denied.

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

**UNITED STATES
OF
AMERICA**

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**D-024
Ruling on Defense Motion For a Continuance and
Appropriate Relief from Terms of this
Commission's 28 Nov 07 Schedule for Trial**

13 March 2008

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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. The commission has also considered the oral argument on 13 March 2008.
2. The commission recognizes that the effect of the request for continuance, if granted, will be to delay the start of the trial on the merits. The commission notes that neither side presented the disputed discovery issues to the court until after the February 2008 session.
3. On the record on 13 March, the defense modified its request for a continuance. The government position, on brief and on the record, was that the 9 November 2007 trial schedule was sufficient.
4. The commission finds that the defense request for a continuance is reasonable. The commission finds that the failure of both sides to complete discovery in a timely manner is the specific reason for the need for a continuance.
5. Evidentiary motions and witness lists for the evidentiary hearing are due NLT 1630 hours, 1 May 2008. A hearing on the evidentiary motions will be held on 13-15 May 2008.
6. The commission has issued several rulings on accountability of time for the purposes of R.M.C. 707. The commission hereby rules that the time period from 20 November 2007 to 13 May 2008 is attributable to the defense as delay. Either party may object to this ruling by motion NLT 1630 hours, 21 March 2008.

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

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion
To Compel Discovery**

(Documents Relating to Investigation and
Prosecution of Sgt [REDACTED], USA)

4 March 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge's email order of 21 February 2008.

2. **Relief Sought:** The defense respectfully requests that this Commission order the government to produce the requested discovery: all materials within the possession, custody or control of the government relating to the investigation and prosecution of Sgt [REDACTED] (USA), which relate to his abuse and mistreatment of detainees, including the record of trial from his court-martial.

3. **Overview:**

a. The defense seeks production of information relating to Sgt [REDACTED], whom the government has described as a "key government witness" who interrogated Mr. Khadr "on numerous occasions" from August through October 2002 in Bagram, Afghanistan. Sgt [REDACTED] was convicted of mistreating detainees from October 2002 through February 2003, which led to the death of a detainee detained in Bagram, Afghanistan in December 2002, at the same facility where Mr. Khadr was being held. The government claims that because Sgt [REDACTED] is not on the government's current witness list, the government need not provide discovery relating to Sgt [REDACTED] treatment of detainees.

b. Under Military Commission Rule of Evidence (M.C.R.E.) 304(a)(1) statements elicited through torture are not admissible. Under M.C.R.E. 304(c)(1), statements obtained before December 30, 2005, that were obtained through coercion are not admissible if they are unreliable or the interests of justice would not best be served by their admission. In examining whether a statement admitted through coercion should be admissible the commission considers the totality of circumstances. M.C.R.E. 304(c), discussion. Mr. Khadr has a right to discovery of evidence that would give grounds for challenging the admissibility of his statements and that are otherwise material to the preparation of the defense.

c. The requested records are material for several reasons. First, they are material to whether or not Mr. Khadr's statements are admissible under the evidentiary rules. Second, they are material for the purpose of developing additional corroborating evidence regarding [REDACTED]

[REDACTED]. Third, they are relevant for the purpose of impeachment should Sgt [REDACTED] testify against Mr. Khadr or should the government introduce any statements

from Sgt ██████ against Mr. Khadr. Fourth, any mistreatment Mr. Khadr suffered in the hands of prison guards or interrogators in the early days of his detention is relevant to the determination of whether coercion existed in later interrogations due to a fear of further physical abuse. Fifth, the requested documents will likely corroborate Mr. Khadr's knowledge of the mistreatment of other detainees by guards and interrogators, which gives rise to a coercive environment and affects the reliability of his statements. Finally, even if Mr. Khadr's alleged inculpatory statements are not suppressed, the requested discovery is material to Mr. Khadr's ability to demonstrate to the factfinder that his statements are not reliable; evidence corroborating that Mr. Khadr made inculpatory statements under duress undercuts the reliability of those statements. The alleged inculpatory statements made by Mr. Khadr are a key part of the government's case-in-chief, particularly given that there are no eyewitnesses who saw Mr. Khadr throw the grenade that allegedly killed Sgt Speer. The requested documents meet the minimal standard for production of being "helpful to the defense of [the] accused." Indeed, they are key to the defense's ability to test the government's case and to the factfinders' ability to weigh the evidence. Thus, documents relating to the investigation and prosecution of Sgt ██████ for detainee abuse and mistreatment must be disclosed under Rules for Military Commission (R.M.C.) 701(c)(1) and (e)(1).

4. Burden of Proof: The defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. R.M.C. 905(c)(2)(A). The defense, however, need not show by a preponderance of the evidence that the requested discovery is material. *See generally, Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (On review, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

5. Facts:

a. On 9 November 2007, the defense submitted to the government a request for discovery that sought, among other items, the following: "All materials within the possession, custody and control of the government relating to the investigation and prosecution of ██████ ██████." (Def. Discovery Req. of 9 Nov 07, ¶ 3(c)) (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses)). The government responded that: "Mr. ██████ is not included on the government witness list and any matters related to his prosecution for unrelated acts are not relevant to the prosecution of the accused." (Govt Resp. of 4 Dec 07 to Def. Discovery Req., ¶ 3(c)) (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses)).

b. Sgt ██████ was convicted of maltreatment of unknown persons under U.S. control between on or about 1 October 2002 and on or about 1 February 2003, in violation of Article 93, UCMJ, 10 U.S.C. § 893, while he was stationed at Bagram Airbase, Afghanistan. Dept of the Army Report of Results of Trial ICO *United States v. ██████* at 1 (Bates No. 00766-001436) [hereinafter ██████ Results of Trial] (Attachment A). Sgt ██████ was also convicted of assaulting a detainee named ██████ by forcing water down his throat, grabbing him and pulling him across an interrogation table, and twisting a bag or hood tightly over the detainee's head on or about 9 December 2002. *Id.* at 1-2. This detainee died from physical abuse in December 2002. Tim Golden, *In U.S. Report, Brutal Details Of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1 (Attachment B). The government has not disclosed Sgt ██████'s adjudged sentence.

However, the convening authority disapproved adjudged confinement in excess of one year. ██████ Results of Trial at 1.

c. While imprisoned at Bagram Air Base, Mr. Khadr was interrogated by Sgt ██████ “on numerous occasions” in August through October 2002. Maj Groharing Memo of 1 May 06 re Clemency Request ICO Sgt ██████ ¶ 3 (Bates No. 00766-000832) [hereinafter Groharing Memo] (Attachment C); Col Davis Memo of 18 Nov 05 re Request for Grant of Immunity – Sgt ██████ ¶ 3 (Bates No. 00766-001430) [hereinafter Davis Memo] (Attachment D). The government, however, has disclosed to the defense only one occasion where Sgt ██████ was present during an interrogation of Mr. Khadr. *See* Agent’s Investigation Report No. T-157 of 16 Sep 02 at 2 (Bates No. 00766-000105) (Attachment E). The period for which Sgt ██████ was convicted of abusing detainees (October 2002 to February 2003) overlaps the period during which he interrogated Mr. Khadr (August through October 2002).

d. Sgt ██████ initially refused to speak to the prosecutors in this case about his interrogations of Mr. Khadr. Davis Memo ¶ 4. He was later granted testimonial immunity protecting him from prosecution for any UCMJ offenses he may have committed against Mr. Khadr would be revealed to prosecutors in discussing his interrogations of Mr. Khadr. BGen Lennox Memo of 15 Dec 05 re Grant of Immunity and Order to Testify ¶ 3 (Bates No. 00766-000831) (Attachment F). In exchange for the immunity, Sgt ██████ was also ordered to testify against Mr. Khadr should the prosecution call him as a witness. *Id.* ¶ 2.

e. In a letter requesting clemency for Sgt ██████ from his court-martial sentence, Major Groharing characterized Sgt ██████ as a “key government witness in the case of U.S. v. Khadr.” Groharing Memo ¶ 2; *see also* Prosecution Witness List of 31 Jan 06, ¶ 31 (Attachment G) (listing Sgt ██████ as a prosecution witness to be called at trial).

6. **Argument:**

a. **The M.C.A., R.M.C., Regulations for Trial by Military Commission, the Due Process Clause and International Law Require Disclosure of Documents Relating to the Investigation and Prosecution of Sgt ██████ for Detainee Abuse that Overlapped The Period During Which Sgt ██████ Interrogated Mr. Khadr on “Numerous Occasions”**

(1) The M.C.A. and Rules and Regulations Governing Military Commissions Require Disclosure

(i) The M.C.A. states that “Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.” *See* 10 U.S.C. § 949j. The rules and regulation echo the statute. *See* R.M.C. 703(a) (“The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules.”); Regulation for Trial by Military Commissions 17-2(a) (“Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.”).

(ii) R.M.C. 701(c)(1) requires the government to permit the defense to examine documents and things “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.” (Emphasis added). The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16¹ governing discovery in the context of the Classified Information Procedures Act (CIPA), for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to “information [that] is at least ‘helpful to the defense of [the] accused.’” *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (“materiality standard is not a heavy burden”) (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would “significantly help [] in ‘uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal’”) (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C. 1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is “at least helpful to the defense.” In addition, R.M.C. 701(e)(1) requires the government to disclose “the existence of evidence known to the trial counsel which reasonably tends to ... [n]egate the guilt of the accused of an offense charged.”

(iii) The Military Commission Rules of Evidence (“M.C.R.E.”) explicitly acknowledge the materiality of records such as those Mr. Khadr requests. M.C.R.E. 304(a)(1) provides that “[a] statement obtained by use of torture shall not be admitted into evidence against any party or witness, except against a person accused of torture as evidence that the statement was made.” M.C.R.E. 304(c) similarly places restrictions on the admission of “statements allegedly produced by coercion,” providing in relevant part that:

When the degree of coercion inherent in the production of a statement offered by either party is disputed, such statement may only be admitted in accordance with this section.

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

¹ The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical to R.M.C. 701(c)(1). It states: “Upon a defendant’s request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government’s possession, custody, or control and: (i) the item is material to preparing the defense.” Fed. R. Crim. Proc. 16(a)(1)(E)(i).

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

M.C.R.E. 304(c).

(iv) The requested records are material for several reasons. First, they are clearly material to whether or not Mr. Khadr's statements are admissible under the evidentiary rules. The requested discovery therefore is critical to the defense's ability to move for suppression of statements under M.C.R.E. 304(a)(1) or 304(c) on either the basis of torture or coercion resulting in unreliable statements. Indeed, the Discussion accompanying M.C.R.E. 304(c) explicitly provides that information such as that requested by the defense is material: "In evaluating whether [a statement made before December 30, 2005] is reliable and whether the admission of the statement is consistent with the interests of justice, the military judge may consider *all relevant circumstances, including the facts and circumstances surrounding the alleged coercion, as well as whether other evidence tends to corroborate or bring into question the reliability of the proffered statement.*" (Emphasis added).

(v) Second, they are material for the purpose of developing additional corroborating evidence regarding Mr. Khadr's claims of [REDACTED]

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(vi) Third, they are relevant for the purpose of impeachment should Sgt [REDACTED] testify against Mr. Khadr or should the government introduce any statements from Sgt [REDACTED] against Mr. Khadr.³ See *United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule. Such evidence is 'evidence favorable to an accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.") (citations omitted).

(vii) Fourth, any mistreatment Mr. Khadr may have suffered in the hands of prison guards or interrogators in the early days of his incarceration is also relevant to the determination whether coercion existed in later interrogations; Mr. Khadr would have no reason to doubt, during any interrogation, that the interrogators could again engage in physical abuse. See

² See generally Khadr Affidavit, 22 Feb 08 (Attachment H) (The government has not yet determined whether any portions of Mr. Khadr's affidavit are classified. Therefore, the defense has been instructed to redact all portions that could potentially be classified. The redacted copy is attached. An unredacted copy will be delivered to the Commission in Guantanamo Bay.)

³ The government has twice conceded that Sgt [REDACTED] is a material witness by stating that he is "a key witness in the case of U.S. v. Khadr", Groharing Memo ¶ 2, and by putting him on a witness list for this case in the previous military commission system, Prosecution Witness List of 31 Jan 06, ¶ 31. Sgt [REDACTED] does not appear on the government's current witness list.

Arizona v. Fulminante, 499 U.S. 279, 287 (1991) (recognizing confession can be involuntary as a result of psychological and physical coercion); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) (“[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.”); *Columbe v. Connecticut*, 367 U.S. 568, 605-06 (1961) (“There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men.”) (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949)).

(viii) Fifth, Mr. Khadr’s knowledge of the mistreatment of other detainees by guards and interrogators gives rise to a coercive environment and affects the reliability of his statements. See *Fulminante*, 499 U.S. at 287; *Blackburn*, 361 U.S. at 206; *Columbe*, 367 U.S. at 605-06 (quoting *Watts*, 338 U.S. at 52). The requested documents will likely corroborate Mr. Khadr’s claims that he knew other detainees were mistreated and that this made him afraid of the interrogators.⁴

(ix) Finally, even if Mr. Khadr’s alleged inculpatory statements are not suppressed in this case, disclosure of the requested information will still be critical to the preparation of the defense case. The alleged inculpatory statements made by Mr. Khadr are a key part of the government’s case-in-chief, particularly given that there are no eyewitnesses who saw Mr. Khadr throw the grenade that allegedly killed Sgt Speer. Obviously, evidence corroborating that Mr. Khadr made inculpatory statements under duress tends to undercut the reliability of those statements. If his statements are admitted into evidence, it is essential that Mr. Khadr be able to develop and introduce evidence at trial to demonstrate to the factfinder that they are not reliable. Cf. *United States v. Graves*, 23 U.S.C.M.A. 434, 436 (C.M.A. 1975) (“[I]f the matter [voluntariness of a confession] is placed in issue before the jury, the Government must present evidence sufficient to establish, beyond a reasonable doubt, that the inculpatory statement was voluntary. Once the issue is raised, the military judge has a *sua sponte* duty to instruct the court members to reject the accused’s confession in toto if they are not satisfied, beyond a reasonable doubt, of the voluntariness of the statement.”). Such evidence may be developed by the defense during cross-examination or introduced during the defense case. And the documents Mr. Khadr seeks could help in uncovering evidence for use at trial. If the defense is not permitted to develop and introduce such evidence, the factfinder may place unwarranted weight on a putative “confession” that was obtained by coercion – perhaps even torture. If the defense is not permitted access to that evidence of coercion, it will be crippled in its ability to develop its case. And moreover, the factfinder will make decisions based on incomplete and one-sided information.

(x) One pervasive fact increasing the relevance of the requested discovery is the fact that Mr. Khadr was a minor at the time of his arrest (it is uncontested that he was 15 years old at the time); this increases the likelihood that mistreatment by interrogators and guards resulted in

⁴ “In Bagram, I would always hear people screaming, both day and night. Sometimes it would be the interrogators [REDACTED], and sometimes it was the prisoners screaming from their treatment. I know a lot of other detainees who were [REDACTED] by the skinny blonde guy. Most people would not talk about what had been done to them. This made me afraid.” Khadr Affidavit, ¶ 29.

unreliable statements. *See Colorado v. Connolly*, 479 U.S. 157, 164 (1986) (the mental condition of the defendant is a factor in determining whether the defendant’s statement was coerced); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”); *cf. Schneckloth v. Bustamante*, 412 U.S. 218, 226 (1973) (applying a ‘totality of the circumstances’ test to determining voluntariness of a confession).

(xi) Another pervasive fact lowering the threshold for the type of treatment that may result in coercive or tortured statements is Mr. Khadr’s medical condition at the time of his interrogations. Early in the firefight on 27 July 2002, Mr. Khadr suffered injuries to his eyes and other parts of his body. Khadr Affidavit, ¶¶ 3, 25. Shrapnel was embedded in his eyes. *Id.* And he was shot in the back at two or three times during the firefight, resulting in two cavernous exit wounds in his upper left chest large enough to see deep into his chest cavity. *See* Photos of Mr. Khadr 00766-000977, 001021 (Attachment I); Undated Document Titled IIR-6-034-0258-03, 00766-000194 (Khadr “was shot 3 times”) (Attachment J). One soldier who participated in the firefight saw Mr. Khadr laying on the ground wounded and wrote in his journal that “[Khadr’s] missing a piece of his chest and I can see his heart beating.” Journal at 00766-001380 (Attachment K). Mr. Khadr’s chest wounds were infected, swollen, and still seeping blood nearly seven months after the firefight, and Mr. Khadr was in the hospital receiving treatment for the gunshot wounds ten months after the firefight.⁵ The defense is unaware of how many surgeries Mr. Khadr endured or how long his injuries remained painful.⁶

(xii) There is no question that the requested records meet the minimal standard of being “helpful to the defense of [the] accused” and negate the government’s case against Mr. Khadr. Indeed, they are key to the defense’s ability to test the government’s case and to the factfinders’ ability to weigh the evidence. Mr. Khadr is entitled to the requested discovery not only as a matter of fundamental fairness, but also to ensure that the instant proceedings elicit the truth and provide a fair trial worthy of confidence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (defining fair trial “as a trial resulting in a verdict worthy of confidence”); *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (same). Therefore, documents relating to the investigation and prosecution of Sgt ██████ for detainee abuse and mistreatment must be disclosed under R.M.C. 701(c)(1) and (e)(1).

⁵ *See* Report of Investigative Activity of 3 June 03 at 1, 00766-000154 (Khadr was interrogated during a June 2003 hospitalization due to infections to his gunshot wounds and hospitalization was expected to last six more weeks) (Attachment L); Report of Investigative Activity of 12 Mar 2003 at 1, 00766-000151 (Attachment M) (Khadr was scheduled to have surgery on his chest wounds on 13 Mar 2003); Report of Investigative Activity of 20 Feb 03 at 1, 00766-000146 (Attachment N) (Khadr’s wounds swelled to the point of bursting); Report of Investigative Activity of 17 Feb 03 at 2, 00766-000145 (Attachment O) (blood was seeping from Khadr’s wounds); Report of Investigative Activity of 6 Jan 2003 at 2, Bates No. 00766-000140 (Attachment P) (Khadr complained to interrogators of pain from his chest and shoulder injuries).

⁶ The prosecution has represented to the defense that it is in the process of obtaining and producing Mr. Khadr’s medical records.

(2) The Due Process Clause & MCA § 949j(d)(2) Require Disclosure

(i) The disclosure requirement under the R.M.C. 701(c) echoes a fundamental principle of U.S. law: The government's failure to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment" *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The government's duty to disclose such evidence encompasses exculpatory evidence, including impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 675 (1985) (impeachment evidence falls within *Brady* rule); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (characterizing impeachment evidence as exculpatory evidence). Such evidence is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. "The message of *Brady* and its progeny is that a trial is not a mere 'sporting event'; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory." *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986); *see also Bagley*, 473 U.S. at 675 ("The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.").

(ii) The MCA makes *Brady*, at least with respect to exculpatory evidence, applicable to military commissions. *See* 10 U.S.C. § 949j(d)(2). Section 949j(d)(2) of the MCA states that the prosecution must disclose exculpatory evidence that it "would be required to disclose in a trial by general court-martial." *Brady* governs disclosure of exculpatory evidence in general courts-martial. *Mahoney*, 58 M.J. at 349. Therefore, by virtue of MCA § 949j(d)(2), *Brady* applies to military commissions.⁷

⁷ The requested documents are also relevant to assess whether Mr. Khadr's statements violate his due process right not to be convicted on the basis of involuntary statements. *But see Boumediene v. Bush*, 476 F.3d 981 (2007), *cert. granted* 127 S. Ct. 3078 (2007). The use of coerced confessions – whether deemed otherwise reliable or not – as evidence to convict an accused violates due process. *See Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (due process violated where coerced confession used at trial). "The ultimate test [with respect to the admissibility of confessions] remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker?" *Culombe*, 367 U.S. at 602. A court looks at the totality of the circumstances, including "the characteristics of the accused and the details of the interrogation," to determine whether the statement is voluntary. *Schneckloth*, 412 U.S. at 226 (establishing 'totality of the circumstances' test to determine voluntariness of a confession). The totality of circumstances encompasses psychological, as well as physical coercion as well-settled Supreme Court cases "have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient." *Fulminante*, 499 U.S. at 287; *see also Columbe*, 367 U.S. at 605-06 (quoting *Watts v. Indiana* 338 U.S. 49, 52 (1949)); *Blackburn*, 361 U.S. at 206. To conform to seminal constitutional principles, therefore, any statements used against an accused must be the product of free will. *See Culombe*, 367 U.S. at 602.

(iii) The government intends to rely upon Mr. Khadr’s allegedly inculpatory statement as evidence of his guilt. Because the requested records will likely corroborate the defense claim that Mr. Khadr’s statements were obtained by coercion, they are likely “exculpatory” in nature, and there is a “reasonable probability” that the disclosure of this evidence will yield a different result in the instant proceedings. *Bagley*, 473 U.S. at 676, 682 (“A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”). If the defense is denied access to that information, then counsel will be hamstrung in its ability to investigate and prepare the defense case. As a result, Mr. Khadr could be convicted on the basis of a putative “confession” that is nothing more than a fabrication extracted under duress. This risk is of particular concern here, where there are no eye witnesses to the alleged facts forming the basis for the murder charge. Such an outcome would obviously prejudice Mr. Khadr’s most fundamental rights, but would also pervert the cause of justice and fair process. *Brady* and its progeny – made applicable to military commissions by MCA § 949j(d)(2) – therefore require disclosure of the requested records, independent of R.M.C. 701(c)(1)’s broader discovery provision.

(3) International Law Requires Disclosure

(i) The Military Commissions Act (M.C.A.) and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(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.”)⁸; R.M.C., Preamble (stating that the Manual for Military Commissions “provides procedural and evidentiary rules that [. . .] extend to the accused all the ‘necessary judicial guarantees’ as required by Common Article 3.”) They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

(ii) The Geneva Convention Relative to the Treatment of Prisoners of War prohibits “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.” *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common

⁸ Whether military commissions, in fact, comply with Common Article 3 is ultimately a judicial question that Congress does not have the power to answer. *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.”) (emphasis added). Any congressional attempt to legislative an answer to such a judicial question 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.”). Because a statute should be construed to avoid constitutional problems unless doing so would be “plainly contrary” to the intent of the legislature, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936), the only reasonable interpretation is that § 948b(f) is that it requires military commissions to comply with Common Article 3.

Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.⁹ Article 75(a) provides that the procedures for trial “shall afford the accused before and during his trial all necessary rights and means of defense.”¹⁰

(iii) Read in light of international law principles, precedents applying the U.S. Constitution, the rules governing this Commission, and the government’s denial of the defense request for documents relating to the investigation and prosecution of Sgt ██████ for abuse and mistreatment of detainees ignores fundamental concepts of fairness and places in question the integrity of these proceedings.

b. Denial of the Requested Documents Will Necessarily Result in Counsel Failing to Provide Competent Representation

(1) Failure to grant the defense access to the requested documents will deprive Mr. Khadr of competent representation by precluding the defense from inquiring into possible challenges to the voluntariness of his statements and possibly the ability to impeach government witnesses. *Cf. Smith v. Wainright*, 777 F.2d 609, 617 (5th Cir 1985) (discussing defense counsel failure to move for suppression of confession in assessing ineffective assistance of counsel claim). Governing military ethics rules require Mr. Khadr’s military counsel to provide “competent” representation. “Competent representation requires . . . access to evidence.” JAGINST 5803.1C (9 Nov 04). “[I]nvestigation is an essential component of the adversary process.” *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)). Thus, the adversarial process will not function properly if the defense counsel fails to investigate his client’s case or is denied access to evidence within the control of the government that is relevant to the investigation. *See id.* Here, the government’s view of what evidence is relevant and material to the preparation of the defense is so narrow as

⁹ *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978 [hereinafter Additional Protocol]. The Protocol has not been ratified by the United States, but the U.S. government has acknowledged that Article 75 is customary international law. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (stating that the government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled”). *See also* Memorandum from W. Hays Parks, Chief, International Law Branch, DAJA-IA, et. al., to Mr. John H. McNeill, Assistant General Counsel (International), OSD (8 May 1986) (stating art. 75 of Additional Protocol I is customary international law). The Supreme Court has also relied on the Additional Protocol in construing the meaning of Common Article 3 of the Geneva Conventions as applied to military commissions. *See Hamdan*, 126 S.Ct. at 2796.

¹⁰ The ICTY and the ICTR similarly provide “minimum guarantees” for the accused to “be entitled to a fair and . . . hearing.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 21(2), U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), *adopted by* Security Council 25 May 1993, U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, art. 20(2), *adopted by* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

to necessarily cause defense counsel to fail to provide competent representation to Mr. Khadr. Accordingly, this Commission should order the government to produce the requested documents.

c. Conclusion

(1) The Supreme court has said “that the United States Attorney is ‘the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.’” *Strickler*, 537 U.S. at 281 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). When the prosecution reserves to itself the determination of what evidence ought be considered, it disregards its duty to seek justice, and usurps the role of the court, defense counsel and the trier of fact. *Cf. Brady*, 373 U.S. at 87-88, n.2. The integrity of these proceedings will be fatally undermined if the defense is not afforded the opportunity to independently investigate the factual allegations at issue in the case. At a minimum, this requires that the defense be given documents relating to the investigation and prosecution of Sgt ██████ for detainee abuse and mistreatment that overlapped the period in which Sgt ██████ interrogated Mr. Khadr on “numerous occasions”. The Commission should therefore order the government to produce all statements of Mr. Khadr.

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

8. Witnesses & 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 November 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

Attachments A through P

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

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

11. Attachments:

- A. Dept of the Army Report of Results of Trial ICO *United States v.* [REDACTED]
- B. Tim Golden, *In U.S. Report, Brutal Details Of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1
- C. Maj Groharing Memo of 1 May 06 re Clemency Request ICO Sgt [REDACTED]
[REDACTED]
- D. Col Davis Memo of 18 Nov 05 re Request for Grant of Immunity – Sgt [REDACTED]
[REDACTED]
- E. Agent's Investigation Report No. T-157 of 16 Sep 02 at 2
- F. BGen Lennox Memo of 15 Dec 05 re Grant of Immunity and Order to Testify
- G. Prosecution Witness List of 31 Jan 06
- H. Khadr Affidavit, 22 Feb 08
- I. Photo of Mr. Khadr
- J. Undated Document Titled IIR-6-034-0258-03, 00766-000192-94
- K. Journal, 00766-001380
- L. Report of Investigative Activity of 3 June 03
- M. Report of Investigative Activity of 12 Mar 03
- N. Report of Investigative Activity of 20 Feb 03
- O. Report of Investigative Activity of 17 Feb 03
- P. Report of Investigative Activity of 6 Jan 03



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Rebecca S. Snyder
Assistant Detailed Defense Counsel

AFFIDAVIT OF OMAR AHMED KHADR

I, OMAR AHMED KHADR, make oath and say as follows.

1. I am the Applicant in these proceedings and as such have personal knowledge of the matters hereinafter deposed to save and except where stated to be based upon information and belief.
2. I am a Canadian citizen. My date of birth is September 19, 1986.
3. I am a prisoner in Guantanamo Bay, Cuba. I was first taken prisoner by U.S. forces on July 27, 2002, when I was 15 years old. I was severely wounded in the battle where I was captured. I was shot at least twice in the back, at least once through my left shoulder exiting through my left breast, and once under my right shoulder, exiting out of my upper right side. I was also struck with shrapnel in my left eye, and was wounded in my left thigh, knee, ankle and foot.
4. I believe I remained conscious after being wounded and captured. I remember being carried by my arms and legs to an area in the open where someone put some bandages on me. The soldiers were asking me questions about my identity. They then placed me on a wooden board and carried me into a helicopter. I lost consciousness during the trip in the helicopter.
5. I was unconscious for about one week after being captured. When I began to regain consciousness I asked what the date was and knew that I had been unconscious for a week since being captured. I was awake, but I was not right and was out of my wits for about three days. I was in extreme pain and my pain was all I could focus on. I was in a tent hospital on a stretcher. There were two other detainees there with me, one had lost both his legs and often screamed for pain medication. The other detainee was an older man.
6. While at the tent hospital I was guarded day and night by pairs of soldiers. During the day, I was guarded by a young blond soldier who was about 25, and a Mexican or Puerto Rican soldier.
7. During the first three days I was conscious in the tent hospital, the first soldier would come and sit next to my stretcher and ask me questions. He had paper and took notes. [REDACTED]
[REDACTED]. Due to my injuries, this caused me great pain. At least two of the interrogations during these first three days occurred when I was [REDACTED].
[REDACTED]. I was unable to even stand at this time, so I was not a

threat, and I could tell that this treatment was for punishment and to make me answer questions and give them the answers they wanted.

8. The Hispanic MP [REDACTED], and would often [REDACTED]. He would tell the nurses not to [REDACTED] since he said that I had killed an American soldier. He would also [REDACTED] me quite often.
9. There were no doctors or nurses present when I was interrogated. During the interrogations, the pain was taking my thoughts away. After I regained consciousness after being unconscious for a week, the first soldier told me that I had killed an American with a hand grenade. They would only give me [REDACTED] [REDACTED] at nighttime but the interrogations occurred during the daytime.
10. After about 2 weeks in the hospital I was immediately taken to an interrogation room at a military camp in Bagram. [REDACTED]. Then someone came in and started interrogating me. This interrogation lasted for about 3 hours. It was a skinny white interrogator with glasses who seemed to be about 25 years old. He had a small tattoo on the top of his forearm. He wore desert camouflage pants but a different kind of shirt. They asked me all kinds of questions about everything and I don't remember all the questions today.
11. During this first interrogation, the young blonde man would often [REDACTED] if I did not give him the answers he wanted. Several times, he forced me to [REDACTED], which caused me [REDACTED] due to my [REDACTED]. He did this several times to get me to answer his questions and give him the answers he wanted. It was clear that he was making me [REDACTED] because he knew that [REDACTED] and he wanted me to answer questions. I cried several times during the interrogation as a result of this treatment and pain.
12. During this interrogation, the more I answered the questions and the more I gave him the answers he wanted, the less [REDACTED] on me. I figured out right away that I would simply tell them whatever I thought they wanted to hear in order to keep them from causing me [REDACTED].
13. While detained in Bagram, I was held with other adult detainees in a building like an airplane hangar with some chicken-wire fencing dividing the prisoner area and some wooden plank dividers or walls for separate prisoner areas. I was still on a stretcher and still had holes in my body and stitching. I was kept with all the adult prisoners.
14. The soldiers at Bagram treated me roughly. I was interrogated many, many times by interrogators. For about the first two weeks to a month that I was there I could not get out of the stretcher and would be brought into the interrogation room on a stretcher.

15. During this time, my pain depended upon what I was doing. If I was just relaxing on the stretcher, the pain would be about a 4 or 5 on a scale of 1 to 10. If I was sitting up it was more severe. If I was treated roughly or if my wounds were touched, the pain would be a 10.
16. Everyday when I was at Bagram, five people in civilian clothes would come and change my bandages. They treated me very roughly and videotaped me while they did it.
17. On one occasion, interrogators grabbed and pulled me off the stretcher, and I fell and cut my left knee.
18. On some occasions, the interrogators brought barking dogs into the interrogation room while my head was covered with a bag. The bag was [REDACTED]. This terrified me. On other occasions, interrogators threw cold water on me.
19. Several times, the soldiers [REDACTED].
Because of my injuries, particularly the bullet wounds in my chest and shoulders, [REDACTED].
20. They often made me [REDACTED] in the stretcher in order to [REDACTED]. They knew it was painful for me because of my physical reaction and because I told them it was painful.
21. While my wounds were still healing, interrogators made me clean the floors on my hands and knees. They woke me up in the middle of the night after midnight and made me clean the floor with a brush and dry it with towels until dawn.
22. They forced me to carry heavy buckets of water, which hurt my left shoulder (where I had been shot). They were 5 gallon buckets. They also made me [REDACTED]. This was very painful as my wounds were still healing.
23. On several occasions at Bagram, interrogators threatened to have me raped, or sent to other countries like Egypt, Syria, Jordan or Israel to be raped.
24. When I was able to walk again, interrogators made me pick up trash, then emptied the trash bag and made me pick it up again. Many times, during the interrogations, I was not allowed to use the bathroom, and was forced to urinate on myself. They told me that [REDACTED].
25. Sometimes they would [REDACTED], particularly since both my eyes were badly injured and had shrapnel in them.

26. Sometimes when they were questioning me, they would tell me that they would [REDACTED].
27. One time, an interrogator gave me a pen and paper and told me [REDACTED]. While I was [REDACTED], the Hispanic MP from the tent hospital came up to me, turned around and farted in my face.
28. I think that I was interrogated 42 times in 90 days. I have a memory of 42 times, but I don't recall where I received that number.
29. In Bagram, I would always hear people screaming, both day and night. Sometimes it would be the interrogators [REDACTED], and sometimes it was the prisoners screaming from their treatment. I know a lot of other detainees who were [REDACTED] by the skinny blonde guy. Most people would not talk about what had been done to them. This made me afraid.
30. An old man who was captured with me was also brought to the Bagram camp. I saw bandages and injuries on his legs from where he had been [REDACTED]. Later, one of the interrogators told me that this man had died.
31. One time before I left, I had my [REDACTED], and the skinny blond interrogator with the tattoo told me that [REDACTED].
32. After about three months, I was taken to Guantanamo. For the two nights and one day before putting us on the plane, we were not given any food so that we would not have to use the bathroom on the plane. They shaved our heads and beards, and put medical-type masks over our mouths and noses, and goggles and earphones on us so that we could not see or hear anything. One time, a soldier kicked me in the leg when I was on the plane and tried to stretch my legs.
33. On the plane, I was shackled to the floor for the whole trip. When I arrived at Guantanamo, I heard a military official say, "Welcome to Israel". They half-dragged half-carried us so quickly along the ground off the plane that everyone had cuts on their ankles from the shackles. They would smack you with a stick if you made any wrong moves.
34. They left me in a waiting area for about one hour waiting for processing. They then took me into a room where I was stripped naked and subjected to a body cavity search.
35. I was feeling a lot of back and chest pain from my injuries, and I was also dizzy from the travel, pain and lack of sleep and food.
36. Two soldiers then took charge of me, one was black and one was white. These two soldiers then pushed me up against a wall. One pushed my back into the wall

- with his elbow, and the other pushed my face into the wall. Although the goggles and headphones had been removed, the mask was still over my mouth and nose and it was difficult to breathe. They held me like this, and I could not breathe, and passed out. When they felt me falling they would start to relax, but then when I began to wake up, they would do it again until I passed out and began to fall again. They did this to me about 3 or 4 times. There were other prisoners there who were not being treated like this.
37. During processing, they gave me a 2-minute shower, took blood, fingerprints and photographs, including photos of my wounds.
 38. I was taken to the Fleet Hospital, where I stayed for two days. While in the hospital, two interrogators came and interrogated me for six hours each day. One interrogator was in civilian dress clothes and I think he told me he was with the [REDACTED]. The other was in military camouflage. They asked me questions about everything. I don't think there was anything new. They had papers with them and they took notes.
 39. I did not want to expose myself to any more harm, so I always just told interrogators what I thought they wanted to hear. Having been asked the same questions so many times, I knew what answers made interrogators happy and would always tailor my answers based on what I thought would keep me from being harmed.
 40. After those first interrogations, I was put into [REDACTED]. These are cells with walls, and only a small window that you can't look out of – the window just lets you know if its day or night. There is no [REDACTED].
 41. I would often be [REDACTED] depending on whether or not I had been cooperating with the interrogators.
 42. I was not provided with any educational opportunities, no psychological or psychiatric attention, and was routinely interrogated.
 43. While at Guantanamo, I have been visited on numerous occasions by individuals claiming to be from the Canadian government. These included four visits in the course of four days in a row, starting on March 27, 2003.
 44. The first visit was by a group of three people: two men, one in his mid-30s and a second, older man, perhaps in his 70s, and a woman about 40-50 years old. The visitors introduced themselves as Canadians. They stated that they knew my mother and grandmother in Scarborough, Canada. We met in a special conference room, rather than the usual interrogation room, and this room was more comfortable. We met for approximately 2-3 hours. Rather than asking me how I was, the visitors had a lot of questions for me.

45. I was very hopeful that they would help me. I showed them my injuries and told them that what I had told the Americans was not right and not true. I said that I told the Americans whatever they wanted me to say because they would torture me. The Canadians called me a liar and I began to sob. They screamed at me and told me that they could not do anything for me. I tried to cooperate so that they would take me back to Canada. I told them that I was scared and that I had been tortured.
46. They came back three more days but I did not sob because they had no sympathy. They asked me about people, such as my father and [REDACTED]. They showed me pictures and asked who people were. I told them what I knew.
47. During this second visit, the visitors showed me approximately 20 pictures of various people, and asked me to identify them. The Canadian visitors never asked me how I was feeling or how I was doing, nor did they ever ask if I wanted to send a message to my family.
48. The next day, the two Canadian men who had visited me returned. I told them that if they were not going to help me then I wanted them to leave me alone.
49. On the third visit by the Canadians, I told the Canadian visitors that I wanted to return to my country, Canada, and that I would speak with them there.
50. After the Canadians left and I told the Americans that my previous statements were untrue, life got much worse for me. They [REDACTED]. They would [REDACTED]. One navy interrogator would pull my hair and spit in my face.
51. Approximately one month before Ramadan in 2003, two different men came to visit me. They told me that they were Canadian. One of the men was in his 20s and the other in his 30s. These two men yelled at me and accused me of not telling the truth. One of the Canadian men stated, "The U.S. and Canada are like an elephant and an ant sleeping in the same bed," and that there was nothing the Canadian government could do against the power of the U.S.
52. One of the men returned alone approximately one month after the Eid al-Adha holiday. The visitor showed me his Canadian passport, the outside of which was red in color. The Canadian visitor stated, "I'm not here to help you. I'm not here to do anything for you. I'm just here to get information." The man then asked me questions about my brother, [REDACTED].
53. Within a day of my last visit from the Canadians, my security level was changed from Level 1 to Level 4 minus, with isolation. Everything was taken away from me, and I spent a month in isolation. The room in which I was confined was kept very cold. It was "like a refrigerator".

54. Around the time of Ramadan in 2003, an Afghan man, claiming to be from the Afghan government, interrogated me at Guantanamo. A military interrogator was in the room at the time. The Afghan man said his name was [REDACTED], and that he was from Wardeq. He spoke mostly in Farsi, and a little in Pashto and English. He had an American flag on his trousers. The Afghan man appeared displeased with the answers that I was giving him, and after some time both the Afghan and the military interrogator left the room. A military official then removed my chair and short-shackled me by my hands and feet to a bolt in the floor. Military officials then moved my hands behind my knees. They left me in the room in this condition for approximately five to six hours, causing me extreme pain. Occasionally, a military officer and the interrogators would come in and laugh at me.
55. During the course of his interrogation of me, the Afghan man told me that a new detention center was being built in Afghanistan for non-cooperative detainees at Guantanamo. The Afghan man told me that I would be sent to Afghanistan and raped. The Afghan man also told me that they like small boys in Afghanistan, a comment that I understood as a threat of sexual violence. Before leaving the room, the Afghan man took a piece of paper on which my picture appeared, and wrote on it in the Pashto language, "This detainee must be transferred to Bagram".
56. During one interrogation at Guantanamo in the spring of 2003, an interrogator spit in my face when he didn't like the answers I provided. He pulled my hair, and told me that I would be sent to Israel, Egypt, Jordan, or Syria – comments that I understood to be a threat of torture. The interrogator told me that the Egyptians would send in "Askri raqm tisa" – Soldier Number 9 – which was explained to me was a man who would be sent to rape me.
57. The interrogator told me, "Your life is in my hands". My hands and ankles were shackled, and the interrogator then removed my chair, forcing me to sit on the floor. The interrogator told me to stand up. Because of the way I was shackled, I was not able to use my hands to do so, thus making the act difficult to do. As ordered by the interrogator, I stood up, at which time the interrogator told me to sit down again. When I did so, the interrogator ordered me to stand again. I could not do so, at which point the interrogator called two military police officers into the room, who grabbed me by the neck and arms, lifted me, up, and then dropped me to the floor. The military police officers lifted and dropped me in this manner approximately five times, each time at the instruction of the interrogator. The interrogator told me they would throw my case in a safe and that I would never get out of Guantanamo. This interrogation session lasted for approximately two to three hours.
58. On one occasion at Guantanamo, in the Spring of 2003, I was left alone in an interrogation room for approximately ten hours.

59. Around March of 2003, I was taken out of my cell at Camp Delta at approximately 12:00 – 1:00 a.m., and taken to an interrogation room. An interrogator told me that my brother was not at Guantanamo, and that I should “get ready for a miserable life”. I stated that I would answer the interrogator’s questions if they brought my brother to see me. The interrogator became extremely angry, then called in military police and told them to cuff me to the floor. First they cuffed me with my arms in front of my legs. After approximately half an hour they cuffed me with my arms behind my legs. After another half hour they forced me onto my knees, and cuffed my hands behind my legs. Later still, they forced me on my stomach, bent my knees, and cuffed my hands and feet together. At some point, I urinated on the floor and on myself. Military police poured pine oil on the floor and on me, and then, with me lying on my stomach and my hands and feet cuffed together behind me, the military police dragged me back and forth through the mixture of urine and pine oil on the floor. Later, I was put back in my cell, without being allowed a shower or change of clothes. I was not given a change of clothes for two days. They did this to me again a few weeks later.
60. When I was moved to Camp 5, I went on a hunger strike. I was very weak and could not stand. Guards would grab me by pressure points behind my ears, under my jaw and on my neck. On a scale of 1 to 10, I would say the pain was an 11. They would often knee me repeatedly in the thighs. Another time, when they took my weight, they pressed on my pressure points. I remember them videotaping me while they did this.
61. I continue to have nightmares. I dream about being shot and captured. I dream about trying to run away and not being able to get away. I dream about all that has happened. About feeling like there is nothing I can do. About feeling disabled. Besides my medical problems, the dreams are the worst right now. I continue to have back pain and pains in my joints.
62. I was first visited by lawyers in November of 2004. Before that, I had never been permitted to meet with lawyers.
63. In May 2005, they took all of my things including a calendar I had been keeping since sometime in 2004 regarding my treatment, events and other things. They never gave this back.

9.

I solemnly affirm that all of the forgoing statements are true and complete to the best of my knowledge

Omar A. Khadr

OMAR AHMED KHADR
22 February 2008

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Request

to Depose
LTC [REDACTED].W., [REDACTED]

4 March 2008

- 1. Timeliness:** This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge's email order of 21 February 2008.
- 2. Relief Requested:** The defense respectfully requests that this Military Commission order the deposition of Lieutenant Colonel ("LTC") [REDACTED].W., [REDACTED].
- 3. Overview:** Once charges are referred, the military judge may deny a deposition request only for "good cause." Due to exceptional circumstances, it is in the interest of justice that the defense take LTC W's deposition. He is a material witness for trial counsel in the case against Omar Khadr ("Mr. Khadr"). He compiled the only official records produced by the government that are close in time to CONOP AYUBKHEIL (the name of the operation involving the events of 27 July 2002), which recount the events leading to the death of Sergeant First Class ("SFC") Christopher Speer, USA, SF and the wounding and capture of Mr. Khadr. LTC W prepared at least two reports – one dated 27 July 2002 and the other dated 28 July 2002. The reports contain inconsistent statements regarding which enemy combatant allegedly threw the grenade that killed Sgt Speer. At some point, LTC W altered the document dated 28 July 2002, creating room to inculcate Mr. Khadr in the attack on SFC Speer. It is essential, therefore, for defense counsel to depose LTC W in order to ascertain the circumstances surrounding his composing these records, the witnesses upon whom LTC W relied in doing so, to whom he communicated the narrative he constructed as well as the circumstances that prompted him to alter the original 28 July report so as to shift the blame for SFC Speer's death to Mr. Khadr.
- 4. Burdens of Proof and Persuasion:** "[T]he military judge may order that a deposition be taken on request of a party." R.M.C. 702(b). "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." R.M.C. 702(a). As the requesting party, the defense carries the burden of establishing that a deposition is warranted. Pursuant to R.M.C. 702(c)(3)(A) the military judge may only deny a request for deposition "for good cause, e.g., to protect classified information, sources, methods and means of acquiring intelligence, subject to review by the military judge." The discussion to this rule further provides that "Good cause for denial includes: failure to state a proper ground for taking a deposition; failure to show the probable relevance of the witness' testimony, or that the witness' testimony would be unnecessary. The fact that a witness will be available for trial is good cause for the denial in the absence of unusual circumstances, such as

when the government has improperly impeded defense access to a witness.” R.M.C. 702(c)(3)(A), discussion.

5. Facts:

a. LTC W was the on-scene commander for CONOP AYUBKHEIL, during which Mr. Khadr was captured. *See* CITF Report of Investigative Activity, 17 Mar 04 at 1, 4 [hereinafter RIA of 17 Mar 04] (Attachment B to D022, Defense Reply in Support of Motion to Dismiss Due to Lack of Jurisdiction (Child Soldier)); After Action Report, 27 Jul 02 at 1 [hereinafter AAR] (Attachment A). It was during CONOP AUBKHEIL that SFC Speer received wounds allegedly from an exploded grenade, from which he died on 6 August 2002. *See* RIA of 17 Mar 04 at 5.

b. LTC W drafted an After Action Report dated 27 July 2002, describing the conduct of the troops under his command that day and events that allegedly occurred during the four-hour firefight on the compound where Mr. Khadr was captured. ARR. This report stated that “one badly wounded enemy soldier still had enough fight left in him to throw a grenade. The grenade seriously wounded the [redacted in defense copy] medic. Another [redacted in defense copy] shooter shot the enemy soldier, however, he did not die. *Id.* at 00766-000586.

c. LTC W drafted a memorandum on the operation he and his troops engaged in that day to identify and capture suspected bomb maker [REDACTED]. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 07, 00766-001766-70 [hereinafter Original Memorandum] (Attachment B). The Original Memorandum described the conduct of CONOP AYUBKHEIL in detail and contained a passage describing the death of SFC Speer that stated, in relevant part, “One badly wounded enemy was able to throw a grenade, which seriously wounded ‘Chris’, before the enemy was *killed* by another [redacted in defense copy] assaulter. Four enemy soldiers, 3 KIA and 1 WIA, with severe injuries, were found in a corner between two partially remaining walls. This is the location from which the grenade was thrown.” *Id.* at 00766-001768 (emphasis added).

d. Sometime after the drafting of the Original Memorandum, LTC W altered the Memorandum on the Operation to Positively Identify and Capture Suspected Bomb Maker [REDACTED] in the Vicinity of Khost Afghanistan, but did not change the date of the memorandum. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 07, 00766-001653-57 [hereinafter Altered Memorandum] (The government’s label for the file produced in discovery is “W[] - Updated 28 July 2002 Memorandum - to counsel.pdf”) (Attachment C). The Altered Memorandum described the conduct of CONOP AYUBKHEIL in terms identical to the Original Memorandum except for the passage describing the death of SFC Speer, which was changed to read, “One badly wounded enemy was able to throw a grenade, which seriously wounded ‘Chris’, before the enemy was *engaged* by another [redacted in defense copy] assaulter. Four enemy soldiers, 3 KIA and 1 WIA, with severe injuries, were found in a corner between two partially remaining walls. This is the location from which the grenade was thrown.” *Id.* at 00766-007655 (emphasis added).

e. During the period surrounding the 8 November 2007 arraignment of Mr. Khadr, defense counsel requested to interview LTC W. Trial counsel informed defense counsel that

LTC W would not speak to defense counsel.

6. Argument

a. **The Defense Has a Right to Depose Material Witnesses Pretrial Absent Good Cause for Denying the Deposition Where the Deposition is in the Interest of Justice**

(1) R.M.C. 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.” To obtain a deposition, the requesting party must provide the following:

- (A) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;
- (B) A statement of the matters on which the person is to be examined;
- (C) A statement of the reasons for taking the deposition;
- and
- (D) Whether an oral or written deposition is requested.

R.M.C. 702(c)(2).

(2) The defense right to interview a material witness is “unconditional.” *United States v. Killebrew*, 9 M.J. 154 (C.M.A. 1980). R.M.C. 701(j) provides that each “party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.” It has been held that it is reversible error to prevent the defense from interviewing a material witness before trial. *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976). “[B]road discovery contributes substantially to the truthfinding process and to the efficiency with which it functions. It is essential to the administration of military justice; because assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time consuming, clarification or resolution of matters before trial is essential.” *United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986). Accordingly, the military judge may only deny pre-trial depositions for “good cause.” When a witness is shown to have both information relevant to the defense “and he refuses to talk to defense counsel, there usually will be lacking any ‘good cause’ to forbid his deposition.” *Killebrew*, 9 M.J. at 161.

b. **Showing Required Under R.M.C. 702(a)**

(1) With respect to R.M.C. 702(c)(2)(A), defense counsel seeks to depose LTC W. The defense is unaware of his address, but has reason to believe the prosecution knows where LTC W can be contacted.

(2) With respect to R.M.C. 702(c)(2)(B), defense counsel would like to clarify the substance of and the facts surrounding statements contained in the discovery and referenced in

this request. LTC W was a company commander for CONOP AYUBKHEIL, during which Mr. Khadr is alleged to have unlawfully participated in combat that led to the death of SFC Speer. As company commander, LTC W had access to all of the relevant actors and witnesses to the events. The account he provided of the events leading to Mr. Khadr's wounding and capture, as well as to the death of SFC Speer, was not taken from his own observations but from those of eyewitnesses to the firefight. It is unknown which eyewitnesses his reports are based on as they are not listed. Furthermore, of all the evidence provided by trial counsel, LTC W's statements from 2002 are the closest in time to the actual events. The deposition will therefore cover the dates and times LTC W composed his statements, with whom he spoke in reconstructing his version of the events, to whom he communicated his version, and the circumstances surrounding his subsequent alteration of the 28 July Memorandum.

(3) With respect to R.M.C. 702(c)(2)(B), defense counsel requires a deposition in order to clarify a number of outstanding questions that cannot be resolved at trial.

(i) First, the defense seeks to clarify the dates on which the various statements from 2002 were generated. The Memoranda and the After Action Report all bear a date either on the day of the assault, 27 July 2002, or the day after, 28 July 2002. Given the events that occurred on the 27th and the length of the reports, it is not at all clear that these documents were actually generated on those dates. At some point the Altered Memorandum was substituted for the Original Memorandum, yet there is no indication of the date this occurred.

(ii) Second, the defense seeks to determine which individuals LTC W spoke with and when he spoke with them about the events recounted in the Memorandum and the After Action Report. LTC W was not himself an eyewitness, nor was he inside the compound during the relevant events. When read together, the first two versions of the event exculpate Mr. Khadr. They state that the person who threw the grenade was alive on the 27th, but had died by the 28th. These reports appear to refer to the other enemy combatant who initially survived the firefight. *See* CITF Report of Investigative Activity, 17 Mar 04 at 2 (Attachment B to D022 Reply in Support of Defense Motion to Dismiss for Lack of Jurisdiction (Child Soldier)) (stating that someone other than Mr. Khadr was alive when the grenade that allegedly killed Sgt Speer was thrown). The altered report, however, does not state whether the person who allegedly threw the grenade lived or died, opening the door for accusations that Mr. Khadr threw the grenade. Identifying the individuals who contributed to LTC W's initial exculpatory reports is essential for the defense to adequately prepare its case for trial. Should it not learn this information until the government has put on its case-in-chief, it will likely be necessary for the defense to request a continuance to attempt to speak to the witnesses on whom LTC W relied.

(iii) Third, the defense seeks to clarify the circumstances that prompted LTC W to alter his original 28 July memorandum that indicated that the enemy fighter responsible for throwing the grenade that killed SFC Speer was killed in action. There is no indication on the face of the document itself as to what prompted LTC W to change the word "killed" to the more general "engaged." There is also no indication why LTC W chose to alter his previous statement, passing it off as an original, when he could have simply filed a supplementary statement or amendment if he later thought his previous account was materially inaccurate.

(iv) Fourth, the defense seeks to clarify the communications LTC W had before and after the documents were generated and to whom and on what dates his accounts of what transpired were transmitted. It appears likely that at some point his reconstruction of the events was passed to individuals responsible for interrogating Mr. Khadr as Mr. Khadr was accused of killing a U.S. soldier when he became conscious in the tent hospital at Bagram about a week after the firefight.¹ See Khadr Affidavit, 22 Feb 08, ¶ 9 (Attachment H to Def. Mot. to Compel Discovery (Sgt [REDACTED]) filed 4 Mar 08). It is therefore essential to know who received LTC W's statements, which statements they received and on what dates, in order to account for inconsistencies in Mr. Khadr's interrogation reports.

(v) Fifth, the defense seeks to clarify the source of inconsistencies between LTC W's version of events and that of OC-1, who by all accounts was the principal eyewitness and agent in the events surrounding Mr. Khadr's wounding and capture.² LTC W's Memoranda describe only one enemy fighter having survived the bombardment, yet OC-1 reported two: Mr. Khadr, who was hors du combat leaning against a wall, and another individual, who actively engaged the SF team upon their entry into the compound. CITF Report of Investigative Activity, 17 Mar 04 at 2 (Attachment B to D022 Reply in Support of Defense Motion to Dismiss for Lack of Jurisdiction (Child Soldier)). LTC W's reports also fail to indicate that there was any hostile enemy fire upon the SF team entering the compound, which was central to OC-1's version of events insofar as it provided him the justification for directing fire at wounded enemies. RIA of 17 Mar 04 at 1-2. It is essential for the defense to ascertain whether OC-1 was one of the sources

¹ Mr. Khadr's account of being told that he killed a U.S. soldier upon becoming conscious is confirmed by interrogation reports that repeatedly refer, not to Mr. Khadr confessing to killing a U.S. soldier, but being *told* by interrogators that he had done so. See, e.g., RIA of 23 Nov 02 at 2, 00766-000964 (after the firefight, "Khadr was told . . . his actions resulted in one US soldier being killed") (Attachment D); Interim Interrogation Report 6-034-0374-03 at 00766-000206 (Khadr "was told he killed a U.S. Soldier") (Attachment E); Interim Interrogation Report R-6-034-0258-03 at 00766-000194 (after the firefight, Khadr "was told he killed a U.S. soldier") (Attachment F).

² Yet another version of events leading up to the capture of Mr. Khadr comes from the diary of a U.S. Army officer who witnesses the events at issue near the end of the firefight. The officer confirms that there were two individuals alive in the compound after a hand grenade was allegedly thrown. Officer Diary at 00766-001377 (Attachment G). But in contrast to the scene described by OC-1, the officer describes the death of the first combatant as follows: "I remember looking over my right shoulder and seeing [redacted by government] just waste the guy who was still alive. He was shooting him with controlled pairs . . ." *Id.* Going on to describe Mr. Khadr's capture, the officer states that "PV2 R[] had his sites right on him point blank. I was about to tap R[] on his back to tell him to kill him [Khadr] but the SF guys stopped us and told us not to." Officer Diary at 00766-001380. The officer's candid admissions in his diary about the circumstances under which the first combatant was killed and under which Mr. Khadr was captured (rather than executed) suggest that participants in the firefight may have possessed motive to fabricate parts of their accounts. It is therefore all the more essential that the defense be able to depose LTC W, who presumably spoke to these individuals at the scene or shortly thereafter in the course of compiling his reports, if the defense is to have any hope of reconstructing the events of that day.

upon which LTC W relied in drafting his version of events, both for the purpose of potentially impeaching OC-1 at trial or for ascertaining why LTC W failed to incorporate OC-1's account into the After Action Report and Memoranda.

(4) With respect to R.M.C. 702(c)(2)(B), defense counsel requests an oral deposition.

c. A Deposition of LTC W is in the Interests of Justice Because It is Essential for the Defense to Adequately Prepare for Trial

(i) As stated in paragraph 5e, *supra*, the defense sought and was refused an opportunity to interview LTC W.

(ii) LTC W's knowledge of the sources, dates and circumstances of his 2002 statements is essential for the preparation of a defense and his refusal to speak to defense counsel before trial cannot be adequately remedied by his testimony at trial. LTC W was not a witness to the events at issue inside the compound, but he authored the only official account the defense has been provided that is close in time to the events. It is essential for the defense to ascertain, prior to trial, the names of and accounts given by the eyewitnesses upon whom LTC W himself relied in creating his story. It is equally important to know to whom his story was circulated, since Mr. Khadr's confessions appear to have been the product of interrogations that proceeded from the scenario, now known to be contradictory and inaccurate, that LTC W provided. Without that information, the defense will not be able to construct a coherent timeline of the relevant events nor know which witnesses are material and necessary for trial.

(iii) Furthermore, because of changes to the rules limiting hearsay, trial counsel can admit LTC W's statements without ever calling him to testify. *See* R.M.C. 802. Absent a guarantee from the Secretary of Defense that LTC W will not be deployed and will be available for testimony at trial, deposing him now may be the only opportunity the defense will have to preserve material and potentially exculpatory evidence for trial.

(iv) LTC W was acting as a military officer and an employee of the U.S. government. The documents he generated in 2002 were done in his official capacity and related to his conduct and the conduct of those he supervised in a military operation. His refusal to divulge information to the defense pertaining to available witnesses, their communications with him and their communications with one another, all of which may be of an exculpatory nature, directly and improperly interferes with the defense's ability to access witnesses and prepare an adequate defense.

d. Conclusion

(1) It is in the interest of justice to grant the defense's request to depose LTC W. The first two reports he prepared exculpated Mr. Khadr, but the second report was altered and possibly backdated, making room for accusations that Mr. Khadr threw a grenade resulting in Sgt Speer's death. LTC W's reconstruction of events has been a cornerstone of trial counsel's theory of this case. Without an opportunity to depose LTC W, defense counsel will be prevented from

ascertaining who the most relevant witnesses are as well as who/what prompted LTC W to alter his story to inculcate Mr. Khadr.

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

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

Attachments A through G

CITF Report of Investigative Activity, 17 Mar 04 (Attachment B to D022 Reply in Support of Defense Motion to Dismiss for Lack of Jurisdiction (Child Soldier))

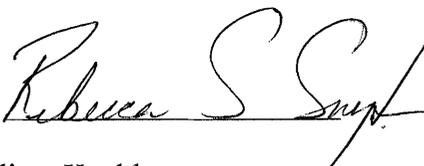
Khadr Affidavit, 22 Feb 08 (Attachment H to Def. Mot. to Compel Discovery (Sgt [REDACTED]) filed 4 Mar 08) as evidence

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

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

11. Attachments:

- A. After Action Report, 27 Jul 02
- B. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 07 (Original)
- C. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 07 (Altered)
- D. Report of Investigative Activity of 23 Nov 02
- E. Interim Interrogation Report 6-034-0374-03
- F. Interim Interrogation Report 6-034-0258-03
- G. Officer Diary Excerpt

By: 

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA

D-028

v.

GOVERNMENT RESPONSE

To Defense Request to Depose LTC W

11 March 2008

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

1. **Timeliness:** This motion is filed within the timelines established by the Military Judge's 15 February 2008 email.
2. **Relief Requested:** The Defense request to depose LTC W should be denied.
3. **Overview:** R.M.C. 702(c)(3)(A) provides that a request for a deposition may be denied for good cause. Specifically, in the Discussion to R.M.C. 702, good cause exists when a witness will testify at trial. LTC W will testify as a Government witness at trial, thereby allowing the Defense the opportunity to ask any relevant questions on cross-examination.
4. **Burden and Persuasion:** As the moving party, the Defense bears the burden of showing good cause for the requested deposition.
5. **Facts:**
 - a. On or about 7 November 2007, the Prosecution interviewed LTC W at Guantanamo Bay, Cuba. At the conclusion of the interview, and prior to any Defense request, the Prosecution informed LTC W that the Defense may request the opportunity to speak with him and that it would be his choice as to whether to do so. The Prosecution made clear that he was completely free to make his own decision. The Prosecution specifically stated that if he wanted to speak to the Defense, no law, rule, regulation, or policy could stand in his way.
 - b. LTC W stated that he did not wish to speak with Defense counsel.
 - c. On or about 8 November 2007, the Defense asked the Prosecution if LTC W was at Guantanamo Bay. The Prosecution answered in the affirmative.¹ The Defense then asked if it could meet with LTC W. The Prosecution conveyed to the Defense LTC W's wishes not to speak with the Defense prior to trial.

¹ The Prosecution was prepared to call LTC W at the then-scheduled jurisdictional hearing.

d. To the best of the Government's knowledge, and with the exception stated in paragraph 5c, at no time has the Defense made an effort to contact or speak with LTC W or any other person identified on the Government's witness list submitted to the Defense on 21 December 2007. LTC W's contact information is on the witness list.

6. Discussion:

a. R.M.C. 702(c)(3)(A) provides that "A request for a deposition may be denied for good cause." The Discussion following this section provides:

Good cause for denial includes: failure to state a proper ground for taking a deposition; failure to show the probable relevance of the witness' testimony, or that the witness' testimony would be unnecessary. *The fact that a witness will be available for trial is good cause for the denial* in the absence of unusual circumstances, such as when the Government has improperly impeded defense access to a witness.

Discussion, R.M.C. 702(c)(3)(A) (emphasis added).

b. The Military Judge has good cause to deny the Defense deposition request of LTC W. The Government provided the Defense with a witness list on 21 December 2007, which names LTC W as a Government witness. In every sense, LTC W "will be available for trial" thereby eliminating the Defense's need for a deposition. And, in the meantime, the Government has done nothing to impede the Defense's access to LTC W. To the contrary, the Government has provided the Defense with LTC W's contact information.

c. Since LTC W will be available for trial, the Defense will have the opportunity to cross-examine him, question him about the content of his reports, show him evidence and exhibits, and may even attempt to impeach him if any inconsistencies should present themselves. The arguments set forth in Defense counsel's motion do nothing but highlight the fact that they have identified issues that they may present to LTC W on cross-examination at trial.

d. The Defense reliance on *United States v. Killebrew*, 9 M.J. 154 (C.M.A.1980) and *United States v. Chestnut*, 2 M.J. 84 (C.M.A. 1976) is misplaced. In the *Killebrew* decision, the Court of Military Appeals remanded the trial court's ruling that an allegedly relevant witness, who was not on the Government witness list, was not subject to inquiry by the defense. The Court specifically stated "when there is some reason to believe that a witness has knowledge relevant to criminal charges and he refuses to talk to defense counsel, there usually will be lacking any 'good cause' to forbid his deposition *or to refuse to compel his appearance at trial.*" *Killebrew*, 9 M.J. at 161 (emphasis added). In this case, because LTC W will testify as a Government witness at trial, there is no need for either a deposition or to compel his appearance.

e. The *Chestnut* court similarly did not hold that a witness who will testify at trial must be compelled to give a deposition. In that case, the Court held that it was

reversible error to deny a defense motion to produce a rape victim for cross-examination at an Article 32 hearing. *Chestnut*, 2 M.J. at 85. At issue before the Court was the *availability* of the rape victim. In the present case, LTC W will be available at trial, as stated previously.

f. More persuasive than these cases is the actual rule, and the discussion of that rule, governing these proceedings. *See* Discussion, R.M.C. 702(c)(3)(A). Acting under these rules, the Government has not and will not take any action to impede the Defense's ability to prepare its case. R.M.C. 701(j). Moreover, while the Defense quotes R.M.C. 701(j) in its request, it mistakenly inserted the language from Rule for Courts-Martial 701(e),² which is more favorable to the Defense, but inapplicable here. D-028 at 3. As such, the fact that LTC W will be present for trial and will be available for Defense to conduct a thorough cross-examination is good cause to deny the deposition request.

g. Furthermore, the Defense fails to show how a minor update to a memorandum is relevant to anything in this case. LTC W's AAR and memos were drafted after the events relevant to this case took place. It appears that one of the memos was updated to accurately reflect a fact known to all parties in this case – that, contrary to what was initially believed to be the case, the accused survived his injuries in large part due to the medical attention provided by U.S. medics on 27 July 2002. The Defense maintains that the uncertainty surrounding the accused's survival "open[s] the door for accusations" that the accused threw the grenade that killed SFC Christopher Speer. Whatever the Defense hopes to gain with this line of inquiry, it will have its opportunity when they cross-examine LTC W at trial, where counsel will be able to ask about the documents, show him these documents, and present any other relevant issues and materials.

h. Similarly, with regard to comparisons made between OC-1's statements and those of LTC W, the Defense will have complete and full access to both witnesses at trial. OC-1 is also on the Government witness list and will be, as LTC W, subject to cross-examination by the Defense.

i. Ultimately, the Defense misreads the application and purpose of R.M.C. 702. Depositions serve the function of taking and preserving testimony of prospective witnesses for use at a military commission. R.M.C. 702(a). As mentioned above, there is no need to preserve LTC W's testimony, since he will be a Government witness at trial. Indeed, the "interests of justice" in this case have been served twofold by the Government. First, the Government has provided, and continues to supplement, all known statements and reports surrounding the circumstances of the alleged murder of SFC Christopher Speer, including all known documents prepared by LTC W. Second, the Defense will be able to test its various theories relating to the memos and reports, and

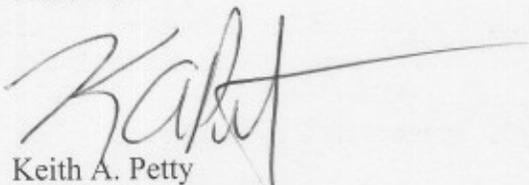
² It is worth noting that while R.M.C. 701(j) closely resembles R.C.M. 701(e), the standards are not the same. Specifically, R.M.C. 701(j) omits the standard that each party shall have "equal opportunity to interview witnesses and inspect evidence." R.C.M. 701(e). Under the R.M.C., then, Defense Counsel's ability to demand access to witnesses is more limited vis-à-vis the standard set forth in the R.C.M.

any other relevant inquiries, when they have the opportunity to cross-examine LTC W at trial.

j. Therefore, for failing to state a proper ground for taking a deposition, there is good cause to deny the deposition of LTC W. The Government respectfully requests that the Military Judge deny the present Defense request.

7. **Oral Argument:** The Government does not request oral argument.
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



Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant U.S. Attorney
Assistant Prosecutor

**UNITED STATES
OF
AMERICA**

}
}
} **D-028**
} **Ruling on Defense Motion to Order a Deposition of**
} **LTC [REDACTED].W., [REDACTED]**

13 March 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 request, categorized above as a defense motion, and the government response.
2. Under the provisions of RMC 701 (a)(3) and (l) and RMC 702, the commission finds that the taking and preserving of the testimony of LTC [REDACTED].W., [REDACTED] is in the interests of justice.
3. The commission hereby orders that LTC [REDACTED].W., [REDACTED], be orally deposed. The deposition shall be completed no later than 4 April 2008.

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

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion
To Compel Discovery**
(Statements of Omar Khadr)

4 March 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge's email order of 21 February 2008. S

2. **Relief Sought:** The defense respectfully requests that this Commission order the government to produce the requested discovery, namely any statements of Mr. Khadr that any government agent has obtained from him since July 27, 2002, whether written, or recorded, as well as the substance of any and all oral statements Mr. Khadr made that relate to the charges or are otherwise relevant to this prosecution. The defense is aware of several statements of Mr. Khadr that have not been produced: 1) statements obtained by interrogators from the time Mr. Khadr regained consciousness in the hospital on approximately 2 August 2002 until 12 August 2002, the date of the earliest statement of Mr. Khadr that the government has produced; 2) a [REDACTED] obtained on 18 August 2002; 3) a calendar documenting Mr. Khadr's treatment and other events that Mr. Khadr kept from approximately 2004 onward that was confiscated around May 2005 and never returned; and 4) notes taken by interrogators and perhaps other government agents during the numerous interrogations of Mr. Khadr since 27 July 2002. There may be other statements of which the defense is not aware that have not been produced. The defense seeks production of those statements as well.

3. **Overview:**

a. The defense seeks production of all statements of Mr. Khadr that relate to the charges or are otherwise relevant to the defense obtained by or that are under the possession, custody or control of the government, including, but not limited to, verbal and [REDACTED] statements; all results of any interrogations or interviews of Mr. Khadr; all draft FBI '302' forms and draft CITF '40' forms containing statements of Mr. Khadr; all interrogation reports (draft, interim or final), case notes, handwritten notes prepared by agents, interrogators or investigators containing statements of Mr. Khadr; any interview worksheets containing statements of Mr. Khadr; and a calendar Mr. Khadr kept from approximately 2004 to May 2005 containing notes of his treatment and events he experienced while confined. The government asserts that it has produced all "relevant" statements "known to trial counsel" that it deems "material to the preparation of the defense" or that it intends to use in its case-in-chief. The scope of statements that the government must produce, however, is not limited to statements "known to trial counsel." Rather, it encompasses all statements "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." R.M.C. 701(c)(3). Furthermore, the requirement that statements made

by the defendant be relevant and material to the defense is a low threshold. The production of the accused's statements is "practically a matter of right even without a showing of materiality." *United States v. Yunis*, 867 F.2d 617, 626 (D.C. Cir. 1989) (R.M.C. 701(c) relies upon *Yunis* for definition of materiality).

b. Here, Mr. Khadr's statements regarding his treatment and events he experienced are relevant because they relate to the circumstances under which statements were extracted from him and, therefore, bear on the reliability of statements obtained by investigators. These statements must be produced under R.M.C. 701(c)(3). And Mr. Khadr's statements relating to the charges are relevant because of the mere fact that they relate to the charges. They must be produced under R.M.C. 701(b)(1)(C) without a showing of relevance by the defense (it goes without saying that statements relating to the offenses are relevant). And while any purported admissions Mr. Khadr made are obviously relevant to the government, it follows that any inconsistent statements from those the government deems incriminating, are also relevant to a possible defense. Any statement made by Mr. Khadr relating to his treatment or his physical or mental condition at any time during his confinement and interrogation is particularly significant to the defense because it bears on the reliability of his statements in a case where not a single witness saw Mr. Khadr throw a grenade, even though this allegation is the basis for the most serious charge against him. Failure to produce Mr. Khadr's statements will ensure that he does not receive a fair trial.

4. Burden of Proof: The defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. R.M.C. 905(c)(2)(A). The defense, however, need not show by a preponderance of the evidence that the requested discovery is material. *See generally, Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (On review, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

5. Facts:

a. On 9 November 2007, the defense submitted to the government a request for discovery that sought, among other items, those listed below. The government's responses follow.

Defense request 3(a): "All drafts of FBI '302' forms and CITF '40' forms provided to the defense."

Government response: "The government has previously provided all FBI '302' forms and CITF 'Form 40s' resulting from interviews of the accused."

Defense request 3(g): "Any handwritten statement prepared by the accused."

Government response: "The government has provided all handwritten statements of the accused, 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."

Defense request 3(h): “All results of any interrogations or interviews of the accused.”

Government response: “The government has provided all relevant statements of the accused, 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.”

Defense request 8: “Any statement - oral, written, or recorded - made or adopted by the accused, that 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 the trial counsel, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial.”

Government response: “The government has provided all relevant statements of the accused, 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.”

Defense request 11: “A photocopy of the entire CITF or other investigative files, to include all case notes, case agent summaries, interim, final and supplemental CITF reports, interrogation reports, photographs, slides, diagrams, sketches, drawings, electronic recordings, handwritten notes, interview worksheets, and any other information in the CITF case file or associated with this case, including the files of any other government agency not a part of CITF.”

Government response: “The government has provided all relevant reports 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.”

(Def. Discovery Req. of 9 Nov 07, ¶¶ 3, 8, 11) (Attachment D to D-025 Def. Mot. to Compel Discovery (Eyewitnesses)); (Govt Resp. of 4 Dec 07 to Def. Discovery Req., ¶¶ 3, 8, 11) (Attachment E to D-025, Def. Mot. to Compel Discovery (Eyewitnesses)).

b. Mr. Khadr was unconscious from 27 July 2002 until approximately 2 August 2002. Khadr Affidavit ¶ 7 (Attachment H to Def. Mot. to Compel Discovery (Sgt [REDACTED]) filed 4 Mar 08).¹ He was interrogated immediately upon regaining consciousness and the interrogators took notes during these interrogations. *Id.* But the earliest record of a statement from Mr. Khadr that the government has disclosed is 12 August 2002. The government has not produced these notes.

c. Mr. Khadr [REDACTED] while he was detained in Bagram. Khadr Affidavit ¶ 27; Interrogator Notes of 18 Aug 02 at 00766-

¹ The government has not yet determined whether any portions of Mr. Khadr’s affidavit are classified. Therefore, the defense has been instructed to redact all portions that could potentially be classified. The redacted copy is attached to the Defense Motion to Compel Discovery of Documents Relating to Investigation and Prosecution of Sgt [REDACTED] filed 4 March 2008. An unredacted copy of Mr. Khadr’s affidavit will be delivered to the Commission during the next hearing in Guantanamo Bay.

002187 (Attachment A)². The government has not produced this statement or any other [REDACTED] by Mr. Khadr.

d. In May 2005, the government took a calendar Mr. Khadr had been keeping from 2004 until it was seized. Khadr Affidavit ¶ 63. The calendar contained Mr. Khadr's notes of his treatment and events he witnessed. *Id.* It has not been returned to him nor produced to the defense in discovery. *Id.*

f. With three isolation exceptions, the defense has not received from the government in discovery any of Mr. Khadr's statements contained in draft FBI "302" or CITF "40" forms (the government labeled many of the FBI "302" and CITF "40" forms produced in discovery "final version", suggesting there are draft versions); handwritten notes prepared by agents, interrogators or investigators, etc.; or interview worksheets. The three exceptions are that the defense has received three sets of interrogator notes from Special Agent Girod dated 28 November 2002, 4-5 November 2002, and 11 November 2002.

6. Discussion:

a. The M.C.A., R.M.C. and Regulation for Trial by Military Commission Require Production of Mr. Khadr's Statements

(i) The Military Commission Act ("M.C.A.") states that "Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense." *See* 10 U.S.C. § 949j. The Regulation echoes the statute. *See* Regulation for Trial by Military Commissions 17-2(a) ("Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.").

(ii) Rule for Military Commissions ("R.M.C.") 701 states the trial counsel "shall provide. . . [a]ny sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel." R.M.C. 701 (b)(1)(C). The same rule also requires the government to permit defense counsel to examine "[t]he contents of all relevant statements – oral, written or recorded – made or adopted by the accused, that 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 are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial." R.M.C. 701(c)(3).

(iii) Rule 701 further mandates that "trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably

² Attachment A is classified, therefore it is not attached to the unclassified version of this motion. The defense will submit a classified version of the motion along with Attachment A during the next hearing in Guantanamo Bay.

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.” R.M.C. 701(e).

(iv) Rule 701 also requires the government to permit the defense to examine documents and things “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.” R.M.C. 701(c)(1) (emphasis added). The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16³ addressing discovery, for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to “information [that] is at least ‘helpful to the defense of [the] accused.’” *Id.* at 623 (quoting *Roviario v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (“materiality standard is not a heavy burden”) (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would “significantly help [] in ‘uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal’”) (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C.1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is “at least helpful to the defense.”

³ The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical in substance to R.M.C. 701(c)(3). It states:

(A) *Defendant’s Oral Statement.* Upon a defendant’s request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) *Defendant’s Written or Recorded Statement.* Upon a defendant’s request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- the statement is within the government’s possession, custody, or control;

and

- the attorney for the government knows--or through due diligence could know--that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant’s recorded testimony before a grand jury relating to the charged offense.

Fed.R.Crim.P. 16(a)(1)(A)-(B).

(v) Both R.M.C. 701(c)(3) and Federal Rule of Criminal Procedure 16(a)(1) state that relevant statements of the accused must be produced. *See* R.M.C. 701(c)(3); Fed. R. Crim. Pro. 16(a)(1). Since R.C.M. 701 parallels the language of Federal Rule of Criminal Procedure 16, which delineates the basic discovery obligations of parties, federal case law interpreting Rule 16 is instructive and should be relied upon in interpreting Rule 701. *See United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845) (rule of statutory construction dictates that where diverse statutes address same subject matter, they are *in pari materia* and all should be taken into consideration in construing any one of them).

(vi) The federal courts have found that the requirement of relevance under Rule 16 is not a substantial one, particularly when discovery of an accused's statements is at issue:

The requirement that statements made by the defendant be relevant has not generally been held to create a very high threshold. Generally speaking, the production of a defendant's statements has become 'practically a matter of right even without a showing of materiality.'

United States v. Yunis, 867 F.2d 617, 626 (D.C. Cir. 1989) (discussing the "near presumption of relevance of a defendant's own statements.") (quoting *United States v. Haldeman*, 559 F.2d 31, 74 n.80 (D.C. Cir.1976) (*en banc*)). Notably, this ruling of the D.C. Circuit Court of Appeals in *Yunis* involved production of statements where the Classified Information Protection Act was at issue – a context where one might expect more stringent scrutiny of discovery obligations, and yet, the Court acknowledged a presumption in favor of production.

(vii) Courts have also held that a failure to produce statements of the accused is grounds for a new trial. *See Bagley*, 473 U.S. at 684 (a defendant is entitled to a new trial where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."); *see also, United States v. Rodriguez*, 799 F.2d 649, 651 (11th Cir.1986) (ruling "that noncompliance with an order to furnish a copy of a statement made by the defendant is so serious a detriment to the preparation for trial and the defense of serious criminal charges that where it is apparent, as here, that his defense strategy may have been determined by the failure to comply, there should be a new trial.") (citing *United States v. Padrone*, 406 F.2d 560, 561 (2d Cir. 1969)); *United States v. Maroney*, 319 F.2d 622 (3d Cir.1963) (finding that failure to disclose defendant's own statement concerning a witness' admission violated *Brady*).

(viii) Under the plain language of R.M.C.701, Mr. Khadr is patently entitled to government production of any statement he has made relating to the charges in this case, as well as any relevant statements that he made, including those that are favorable to his defense or that might assist him at sentencing. Case law applying the parallel Federal Rule of Criminal Procedure 16, also dictates this result.

b. Due Process, Notions of Fair Trial & the M.C.A. Require Production of Mr. Khadr's Statements

(i) The notion of a fair trial encompasses the right of access to evidence. *See* M.C.A., 10 U.S.C. § 949j; R.M.C. 701; Fed. R. Crim. P. 16. Well-settled U.S. Supreme Court precedents interpreting our Constitution – made applicable by MCA § 949j(d)(2) – support production of the statements obtained from an accused. In the seminal *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), the Supreme Court established that an accused is constitutionally entitled, under the Due Process Clause, to production of evidence favorable to his case. *Id.* at 87. *See also United States v. Bagley*, 473 U.S. 667 (1985). The government’s duty to disclose such evidence encompasses exculpatory evidence, including impeachment evidence. *Bagley*, 473 U.S. at 675 (impeachment evidence falls within *Brady* rule); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (characterizing impeachment evidence as exculpatory evidence). The good or bad faith of the government in failing to produce requested discovery is irrelevant to the analysis. *See Brady*, 373 U.S. at 87; *United States v. Agurs*, 427 U.S. 97, 110-11 (1976).

(ii) The MCA makes *Brady* applicable to military commissions, at least with respect to exculpatory evidence. *See* 10 U.S.C. § 949j(d)(2). Section 949j(d)(2) of the MCA states that the prosecution must disclose exculpatory evidence that it “would be required to disclose in a trial by general court-martial.” *Brady* governs disclosure of exculpatory evidence in general courts-martial. *Mahoney*, 58 M.J. at 349. Therefore, by virtue of MCA § 949j(d)(2), *Brady* applies to military commissions.

c. International Law Requires Production of Mr. Khadr’s Statements

(i) The M.C.A. and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(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.”)⁴; R.M.C., Preamble (stating that the Manual for Military Commissions “provides procedural and evidentiary rules that [. . .] extend to the accused all the ‘necessary judicial guarantees’ as required by Common Article 3.”) They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

⁴ Whether military commissions, in fact, comply with Common Article 3 is ultimately a judicial question that Congress does not have the power to answer. *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.”) (emphasis added). Any congressional attempt to legislative an answer to such a judicial question 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.”). Because a statute should be construed to avoid constitutional problems unless doing so would be “plainly contrary” to the intent of the legislature, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936), the only reasonable interpretation is that § 948b(f) is that it requires military commissions to comply with Common Article 3.

(ii) The Geneva Convention Relative to the Treatment of Prisoners of War prohibits “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.” *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.⁵ Article 75(a) provides that the procedures for trial “shall afford the accused before and during his trial all necessary rights and means of defense.”⁶

(iii) Read in light of international law principles, precedents applying the U.S. Constitution, and the rules governing this Commission, the government’s refusal to produce all the statements of Mr. Khadr ignores fundamental concepts of fairness and places in question the integrity of these proceedings.

d. Mr. Khadr’s Statements Are Material To the Preparation of the Defense

(i) The established principle for a fair trial will be vitiated if Mr. Khadr is not able to prepare his defense with full knowledge of all the statements that the government attributes to him. If the government is permitted to withhold Mr. Khadr’s statements, Mr. Khadr will be deprived of the chance to prepare an adequate defense that meets the evidence. *See United States v. Noe*, 821 F.2d 604, 607 (11th Cir 1987) (on appellate review, “the degree to which those rights [to a fair trial] suffer as a result of a discovery violation is determined not simply by weighing all the evidence introduced, but rather by considering how the violation affected the defendant’s ability to present a defense”). And given the questionable reliability of Mr. Khadr’s

⁵ *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978 [hereinafter Additional Protocol]. The Protocol has not been ratified by the United States, but the U.S. government has acknowledged that Article 75 is customary international law. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (stating that the government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled”). *See also* Memorandum from W. Hays Parks, Chief, International Law Branch, DAJA-IA, et. al., to Mr. John H. McNeill, Assistant General Counsel (International), OSD (8 May 1986) (stating art. 75 of Additional Protocol I is customary international law). The Supreme Court has also relied on the Additional Protocol in construing the meaning of Common Article 3 of the Geneva Conventions as applied to military commissions. *See Hamdan*, 126 S.Ct. at 2796.

⁶ The ICTY and the ICTR similarly provide “minimum guarantees” for the accused to “be entitled to a fair and . . . hearing.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 21(2), U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), *adopted by* Security Council 25 May 1993, U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, art. 20(2), *adopted by* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

statements due to his age,⁷ physical and mental condition,⁸ and the circumstances of his interrogations,⁹ it is even more important for the defense to have the entirety of Mr. Khadr's statements. Furthermore, while purported admissions Mr. Khadr made are obviously relevant to the government, it follows that any inconsistent statements from those the government deems incriminating, are also relevant to a possible defense.

(ii) The defense is aware of four statements or groups of statements of Mr. Khadr that the government has failed to produce. The first set of unproduced statements were obtained by

⁷ Mr. Khadr's young age at the time of his capture – fifteen years old – increases the likelihood that mistreatment by interrogators and guards resulted in unreliable statements. *See Colorado v. Connolly*, 479 U.S. 157, 164 (1986) (the mental condition of the defendant is a factor in determining whether the defendant's statement was coerced); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”); *cf. Schneekloth v. Bustamante*, 412 U.S. 218, 226 (1973) (applying a ‘totality of the circumstances’ test to determining voluntariness of a confession).

⁸ Early in the firefight on 27 July 2002, Mr. Khadr suffered injuries to his eyes and other parts of his body. Khadr Affidavit, ¶¶ 3, 25. Shrapnel was embedded in his eyes. *Id.* And he was shot in the back at two or three times during the firefight, resulting in two cavernous exit wounds in his upper left chest large enough to see deep into his chest cavity. *See* Photo of Mr. Khadr 00766-000977 (Attachment I to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08); Interim Interrogation Report 6-034-0258-03 at 00766-000194 (Khadr “was shot 3 times”) (Attachment J to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08). One U.S. Army officer who participated in the firefight saw Mr. Khadr laying on the ground wounded and wrote in his journal that “[Khadr’s] missing a piece of his chest and I can see his heart beating.” Officer Diary at 00766-001377 (Attachment K to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08). Mr. Khadr’s chest wounds were infected, swollen, and still seeping blood nearly seven months after the firefight, and Mr. Khadr was in the hospital receiving treatment for the gunshot wounds ten months after the firefight. *See* Report of Investigative Activity of 3 June 03 at 1, 00766-000154 (Khadr was interrogated during a June 2003 hospitalization due to infections to his gunshot wounds and hospitalization was expected to last six more weeks) (Attachment L to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08); Report of Investigative Activity of 12 Mar 2003 at 1, 00766-000151 (Attachment M to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08) (Khadr was scheduled to have surgery on his chest wounds on 13 Mar 2003); Report of Investigative Activity of 20 Feb 03 at 1, 00766-000146 (Attachment N to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08) (Khadr’s wounds swelled to the point of bursting); Report of Investigative Activity of 17 Feb 03 at 2, 00766-000145 (Attachment O to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08) (blood was seeping from Khadr’s wounds); Report of Investigative Activity of 6 Jan 2003 at 2, Bates No. 00766-000140 (Attachment P to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08) (Khadr complained to interrogators of pain from his chest and shoulder injuries). The defense is unaware of how many surgeries Mr. Khadr endured or how long his injuries remained painful. (The prosecution has represented to the defense that it is in the process of obtaining and producing Mr. Khadr’s medical records.)

⁹ *See generally* Khadr Affidavit.

guards and/or interrogators from the time Mr. Khadr regained consciousness in the hospital on approximately 2 August 2002 until 12 August 2002, the date of the earliest statement of Mr. Khadr that the government has produced. *See* Khadr Affidavit ¶ 7. As soon as Mr. Khadr regained consciousness, he was questioned by guards who took notes during the questioning. *Id.* If the guards did not like the answers Mr. Khadr gave, they [REDACTED], which resulted in him eventually giving them answers he thought would please them. *Id.* Second, at the direction of [REDACTED] on 18 August 2002, Mr. Khadr [REDACTED]. Interrogator Notes of 18 Aug 02 at 00766-002187. Third, the government has not produced the calendar it took from Mr. Khadr covering sometime in 2004 to May 2005 on which Mr. Khadr kept notes relating to his treatment and events he experienced. Finally, the government has produced only three sets of notes from a single interrogator taken while interrogating Mr. Khadr despite the fact that Mr. Khadr was interrogated many, many times by numerous investigators since August 2002 who took notes during the interrogations. *See, e.g.,* Khadr Affidavit, ¶¶ 7, 28, 38. R.M.C. 701(b)(1)(C) requires the government to produce each of the statements relating to the charges. And R.M.C. 701(c)(3) requires the government to produce Mr. Khadr's statements otherwise material to the defense, such as statements relating to his family background and statements documenting his physical and mental condition, treatment and experiences in confinement. Such matters may be relevant to extenuation and mitigation. And statements regarding Mr. Khadr's physical and mental condition as well as his treatment and experiences in confinement are relevant to the reliability of his statements obtained by interrogators. The reliability of Mr. Khadr's statements is particularly significant because not a single witness the government has revealed saw Mr. Khadr throw a grenade, yet this allegation is the basis for charging Mr. Khadr with murder. Accordingly, these statements are material to the preparation of the defense and must be produced under R.M.C. 701(c)(3).

(iii) Nothing in the MCA or the Rules of Military Commissions dictates that the government may be the arbiter of what constitutes "relevant statements." Indeed, both the MCA and the Rules affirm the idea that an accused is entitled a reasonable opportunity to obtain evidence, 10 U.S.C. § 949j, that trial counsel must produce any sworn or signed statements, R.M.C. 701(b)(1)(C), that an accused must be able to examine his own statements, R.M.C. 701(c)(3), and that an accused is entitled to obtain evidence favorable to him. R.M.C. 701(e). *See also Noe*, 821 F.2d at 607 ("the purpose of [Federal] Rule [of Criminal Procedure] 16(a) is 'to protect the defendant's rights to a fair trial.'") (quoting *Rodriguez*, 799 F.2d at 654). Applicable law and fundamental notions of fair trial, therefore, preclude the government from withholding statements of the accused.

(iv) The defense notes that, pursuant to R.M.C. 701(a)(5), "the duty to provide discovery is continuing." *See United States v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992) (the government's duty to disclose is continuous throughout the proceedings, and due process is violated where the government fails to disclose evidence it uncovers late in the proceedings). Accordingly, the defense's request for any and all statements any government agent has obtained from Mr. Khadr is on-going.

e. Denial of the Requested Documents Will Necessarily Result in Counsel Failing to Provide Competent Representation

(1) Failure to grant the defense request for discovery will deprive Mr. Khadr of competent representation by precluding the defense from inquiring into possible challenges to the voluntariness of his statements. *Cf. Smith v. Wainright*, 777 F.2d 609, 617 (5th Cir 1985) (discussing defense counsel failure to move for suppression of confession in assessing ineffective assistance of counsel claim). Governing military ethics rules require Mr. Khadr's military counsel to provide "competent" representation. "Competent representation requires . . . access to evidence." JAGINST 5803.1C (9 Nov 04). "[I]nvestigation is an essential component of the adversary process." *Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)). Thus, the adversarial process will not function properly if the defense counsel fails to investigate his client's case or is denied access to evidence within the control of the government that is relevant to the investigation. *See id.* Here, the government's view of what evidence is relevant and material to the preparation of the defense is so narrow as to necessarily cause defense counsel to fail to provide competent representation to Mr. Khadr. Accordingly, this Commission should order the government to produce the requested documents.

f. Trial Counsel Must Produce Statements Obtained by Any Government Agency

(i) In response to the defense discovery requests at issue, the government stated that it has "provided all relevant statements of the accused, known to trial counsel . . ." (Govt Resp. of 4 Dec 07 to Def. Discovery Req., ¶ 3(g)-(h)). But the government's discovery obligation is not limited to statements "known to trial counsel." Instead, the government is required to produce all statements of Mr. Khadr relating to the charges in this case that are in the possession of any governmental agency aligned with the prosecution. *See R.M.C. 701(c)(3)* (stating trial counsel must produce statements "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.").

(ii) Trial counsels' bald assertion that they have provided all evidence "known to trial counsel that are material to the preparation of the defense" is not a demonstration of due diligence. To the contrary, trial counsel have made no demonstration that they have sought the production of Mr. Khadr's statements within the possession of the government, let alone with any diligence.

g. Conclusion

The Supreme Court has said “that the United States Attorney is ‘the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.’” *Strickler*, 537 U.S. at 281 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). When the prosecution reserves to itself the determination of what evidence ought be considered, it disregards its duty to seek justice, and usurps the role of the court, defense counsel and the trier of fact. *Cf. Brady*, 373 U.S. at 87-88, n.2. The integrity of these proceedings will be fatally undermined if the defense is not afforded the opportunity to independently investigate the factual allegations at issue in the case. At a minimum, this requires that the defense be allowed to know the contents of all statements of Mr. Khadr within the government’s control that relate to the charges or that are otherwise relevant. The Commission should therefore order the government to produce all statements of Mr. Khadr.

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

8. Witnesses & 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 documents as evidence in support of this motion:

Defense Discovery Request of 9 November 2007 (Attachment D to D-025 Def. Mot. to Compel Discovery (Eyewitnesses))

Government Response of 4 December 2007 to Defense Discovery Request (Attachment E to D-025, Def. Mot. to Compel Discovery (Eyewitnesses))

Khadr Affidavit of 22 Feb 2008 (Attachment H to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08)

Capt Carr email of 15 Mar 04 (Attachment I to D-025, Def. Mot. to Compel Discovery (Eyewitnesses))

Photo of Mr. Khadr 00766-000977 (Attachment I to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08)

Interim Interrogation Report 6-034-0258-03 (Attachment J to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08)

Officer Diary Expert (Attachment K to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08)

Report of Investigative Activity of 3 June 03 (Attachment L to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08)

Report of Investigative Activity of 12 Mar 2003 (Attachment M to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08)

Report of Investigative Activity of 20 Feb 03 (Attachment N to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08)

Report of Investigative Activity of 17 Feb 03 (Attachment O to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08)

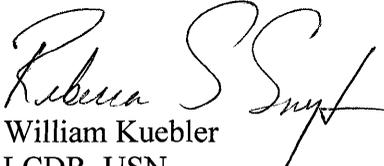
Report of Investigative Activity of 6 Jan 2003 (Attachment P to Def. Mot. to Compel Discovery (Sgt [redacted]) filed 4 Mar 08)

9. **Conference:** The defense has conferred with the prosecution regarding the requested relief. With the exception of producing the calendar, which the government will ask JTF-GTMO about, the government objects to the requested relief.

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

11. **Attachment**

A. Interrogator Notes of 18 August 2002¹⁰



William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
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¹⁰ See *supra* note 2.

UNITED STATES OF AMERICA

v.

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

D 29

GOVERNMENT'S RESPONSE

**To the Defense Motion to Compel
Discovery
(Khadr Statements)**

11 March 2008

1. Timeliness: This motion is filed within the timelines established by the Military Judge's 15 February 2008 email.

2. Relief Requested: The Government respectfully submits that the Defense Motion to Compel Discovery (Statements of Omar Khadr) should be denied.

3. Overview:

a. The Defense has made four specific requests for materials or information and a general request for all statements of the accused. Despite diligent efforts by the Government, we were unable to locate the first three items requested by the Defense: (1) Notes from interviews of the accused from 2 August 2002 to 12 August 2002; (2) a [REDACTED] obtained on 18 August 2002 from the accused; and (3) a calendar allegedly maintained by the accused from sometime in 2004 through May 2005. The fourth specific request is for any notes taken by investigators resulting from interviews of the accused. The Government has conducted a diligent search for all information related to the accused held by relevant U.S. Government agencies and completed a thorough review of all responsive documents it has identified. The Government has reviewed all notes of interviews of the accused and provided to the Defense any notes that are relevant and material, or contain any exculpatory material. Finally, the last Defense request is for any statements made by the accused, apparently regardless of their relevance or materiality. After review, the Government provided the Defense with over 200 reports reflecting statements made by the accused. That discovery includes all statements of the accused that are relevant and material, or contain possibly helpful information.

b. The Defense misstates the relevance and materiality standards in *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989). Under the correct reading of *Yunis*, the information sought by the Defense is not discoverable because it is neither relevant nor material to the offense charged.

c. The Defense improperly invokes the Due Process Clause, which is inapplicable to the accused. As a result, the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), does not apply to the accused as a matter of constitutional law. Further, the accused overstates the extent to which *Brady* is incorporated into the Military

Commissions Act of 2006 ("MCA") and the Manual for Military Commissions ("MMC"). In any event, neither *Brady*, nor the MCA or MMC, requires that *non-exculpatory* material be produced to the Defense, which is the only material the Defense seeks.

d. Although the Defense purports to rely on various principles of international law, the accused may not invoke the Geneva Conventions in general, or Common Article 3 in particular, in these proceedings. See 10 U.S.C. § 948b(g). In any event, even if there were some conflict between the MCA and pre-existing international law, the MCA would apply because it is a subsequently enacted statute.

e. Finally, the Defense's claim that not granting the instant motion will result in an incompetent defense is baseless. The MCA and MMC carefully define the evidence to which the Defense is entitled, and the Defense has proffered no basis for its assertion that implementing the MCA and MMC will deprive the accused of a fair trial.

4. Burden and Persuasion: The Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to relief. See MCM 905(c)2(A).

5. Discussion:

a. THE DEFENSE MISSTATES THE RELEVANCE AND MATERIALITY STANDARDS FROM *YUNIS*

i. The Defense misstates the standard it must meet in order to succeed in this motion. Rule for Military Commission ("RMC") 701(c) provides that

the Government shall permit the defense counsel to examine . . . [a]ny . . . documents . . . 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

As the discussion note to RMC 701(c) elucidates, the starting point for defining what is "material to the preparation of the defense" is *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989). In *Yunis*, the D.C. Circuit set forth a three-step analysis (of which only the first two are applicable for the present motion) for determining when the Government must disclose information to the Defense. In order for such information to be discoverable, the Defense must show that the requested information is both *relevant* and *material* to its case. See *id.* at 621-22.¹

¹ Under *Yunis*, where the requested information is classified and the Government asserts privilege under the Classified Information Protection Act ("CIPA"), the court may permit disclosure of the evidence only after balancing the defendant's interest in disclosure against the Government's need to keep the information secret. See *id.* at 625. This balancing test occurs only after the Defense has proven the relevance and materiality of the requested information. See *id.* Under the MCA and MMC, however, the Government's authority to withhold discovery with respect to classified evidence is even broader than under CIPA. See 10 U.S.C. § 949d(f)(1); RMC 701(f). In any event, at present, the Government has not

ii. The first step in the *Yunis* inquiry is relevance. In *Yunis*, the D.C. Circuit applied Federal Rule of Evidence 401, which provides that evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Yunis*, 867 F.2d at 622 (quoting Fed. R. Evid. 401) (internal quotation marks omitted). There, the Court of Appeals noted that granting an accused access to his own statements generally requires only a minimal showing of relevance. *See id.* at 621-22. The court determined that the defendant in that case had failed to meet even this lower standard of relevance since “[n]othing in the classified documents in fact goes to the innocence of the defendant *vel non*, impeaches any evidence of guilt, or makes more or less probable any fact at issue in establishing any defense to the charges.” *Id.* at 624.

iii. In the instant case, there can be no doubt that the information requested by the Defense fails to satisfy the above standard of relevance. The Defense maintains that it must merely show that the information is “at least helpful to the defense” for it to be discoverable. D-029 at 5. This bit of legerdemain by the Defense is a misreading of the actual quotation from *Yunis*, which states that the defendant “is entitled *only* to information that is at least ‘helpful to the defense of [the] accused.’” *Yunis*, 867 F.2d at 623 (emphasis added; alteration in original) (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)). That is, for information to be relevant it is *necessary*, but not sufficient, that the information be helpful to the defense.

iv. The Supreme Court in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), also set a higher relevance standard than that which the Defense claims should apply here. In *Valenzuela-Bernal*, the Supreme Court rejected the analysis of the Court of Appeals that a constitutional violation had occurred where the Government deprived the defense of evidence that could have produced a “conceivable benefit” to the defense. *See id.* at 862. Instead, the Supreme Court held that *Roviaro*’s test of materiality is the proper standard. *See id.* at 870-71. The Court elaborated upon this standard by explaining that there is no reversible error with respect to conviction unless there is “a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.” *Id.* at 874. So, too, here, Defense counsel has failed to demonstrate that the information sought would have a reasonable likelihood of affecting the outcome in this case.

b. THE GOVERNMENT HAS CONDUCTED A REVIEW OF ALL RELEVANT FILES HELD BY APPROPRIATE U.S. AGENCIES AND COMPONENTS OF THE DEPARTMENT OF DEFENSE AND THE ITEMS IN 1-3 OF THE DEFENSE MOTION WERE NOT FOUND

i. The specific documents requested by the Defense include: (1) Statements obtained by interrogators from Mr. Khadr from approximately 2 August 2002 until 12 August 2002; (2) a [REDACTED] obtained on 18 August 2002 from the accused;

asserted the national security privilege with respect to the information sought by the Defense. Were the Government to assert such a privilege, numerous other obstacles would be raised to the Defense’s instant motion.

and (3) a calendar (purportedly kept by the accused) documenting his treatment and other events.

A. Statements made from 2 August 2002 – 12 August 2002. The Government conducted a search and requested all appropriate organizations who might have spoken to the accused during this time to provide any relevant documents for review. The Government has provided all notes that we are aware of having been taken during that timeframe.

B. A [REDACTED] obtained on 18 August 2002 from the accused. Similarly, the Government conducted a search and requested all appropriate organizations who might have spoken to the accused during that timeframe to provide any relevant documents for review. After diligent review, no [REDACTED] fitting the description were found.

C. A calendar the accused purportedly kept from approximately 2004 until May 2005. After receiving this request, the Prosecution asked JTF-GTMO to review any relevant files and provide responsive documents. JTF-GTMO searched all appropriate locations. In response to that inquiry, JTF-GTMO responded that no relevant documents were found.

c. THE GOVERNMENT HAS CONDUCTED A REVIEW OF ALL RELEVANT FILES HELD BY APPROPRIATE U.S. AGENCIES AND COMPONENTS OF THE DEPARTMENT OF DEFENSE AND PROVIDED THE DEFENSE WITH ALL NOTES THAT ARE RELEVANT AND MATERIAL, OR THAT PROVIDE ANY EXCULPATORY INFORMATION

i. The Government has exercised due diligence and reviewed notes resulting from reasonable searches performed by the various organizations that have interviewed the accused since his capture on 27 July 2002. The Government has provided to the Defense all notes that are relevant and material, or exculpatory. None of the remaining notes reviewed provide additional helpful or exculpatory information not already contained in the companion reports, which have been provided to the Defense. Should a Government agent testify regarding a statement made by the accused, the Government will provide all relevant notes of that agent prior to his testimony.

d. THE GOVERNMENT HAS PERFORMED THE DUE DILIGENCE REQUIRED UNDER THE MILITARY COMMISSIONS ACT AND PROVIDED THE DEFENSE WITH ALL NECESSARY DISCOVERY

i. In addition to the four specific requests included in the Defense Motion and addressed above, the Defense Motion states: "There may be other statements of which the defense is not aware that have not been produced. The defense seeks production of those statements as well." Def. Motion at 1. The Defense cites *Yunis* for the proposition that "[g]enerally speaking, the production of a defendant's statements has become

'practically a matter of right, even without a showing of materiality.'" While the quoted text comes from *Yunis*, the Defense brief fails to mention that in *Yunis*, the D.C. Circuit held that the District Court had abused its discretion by ordering discovery of statements of the accused, finding "the ex parte showing falls far short of establishing the helpful or beneficial character necessary to meet the second step of the test." *Yunis*, 867 F.2d at 624.

ii. The Defense correctly notes that RMC 701(c)(1) requires the Government, subject to certain exceptions, to permit the defense to examine documents and things within the possession, custody, or control of the United States 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.

iii. The Government has conducted exhaustive searches in order to review information in the possession of the U.S. Government related to the accused. Specifically, the Government requested all relevant agencies of the United States Government and components of the Department of Defense to conduct appropriate searches for materials related to the accused and the offenses with which he is charged. The Government diligently reviewed the results of these searches and provided all documents to the defense that we intend to use or that could be helpful to the defense, as well as any documents that are exculpatory.

iv. The Government has produced over 200 reports reflecting statements made by the accused in this case. Those reports are the results of a reasonable review conducted by the Government reflecting all statements made by the accused that are relevant and material, or exculpatory. The extensive efforts undertaken by the Government more than satisfy the due diligence required under RMC 701(c).

f. THE ACCUSED HAS NO RIGHTS UNDER THE DUE PROCESS CLAUSE, AND THE DEFENSE MISDESCRIBES THE NON-APPLICABILITY OF *BRADY*

i. The Defense invokes the "fundamental principle of U.S. law" that "[t]he government's failure to disclose 'evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.'" Mot. to Compel at 4 (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). However, as the Prosecution has previously explained, *see, e.g.*, Government's Response to the Defense's Motion to Dismiss for Lack of Jurisdiction (Equal Protection) at 4-8 (18 Jan. 2008), the Due Process Clause does not apply to the accused.

ii. The Supreme Court has squarely held that alien enemy combatants held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no rights under the Due Process Clause. For example, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a group of German nationals—who were captured in China by U.S. forces during World War II and imprisoned in a U.S.

military base in Germany—sought habeas relief in federal court. Although the military base in Germany was controlled by the U.S. Army, *id.* at 766, the Supreme Court held that these prisoners, detained as enemies outside the United States, had no rights under the Fifth Amendment, *see id.* at 782-85. This is so because the prisoners “at no relevant time were within any territory over which the United States is *sovereign*, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States.” *Id.* at 777-78 (emphasis added).

iii. The Court further noted that to invest nonresident alien enemy combatants with rights under the Due Process Clause would potentially put them in “a more protected position than our own soldiers,” who are liable to trial in courts-martial, rather than in Article III civilian courts. *Id.* at 783. The Court easily rejected the argument that alien enemy combatants should have more rights than our servicemen and women, and held instead that the Fifth Amendment had no application to alien enemy combatants detained outside the territorial borders of the United States. *See id.* at 784-85 (“Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.”) (citation omitted).

iv. Forty years later, the Supreme Court reaffirmed its conclusion that nonresident aliens outside United States sovereign territory have no constitutional rights, and explained that “[n]ot only are history and case law against [the alien], but as pointed out in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the result of accepting this claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (rejecting the contention “that to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment to the United States Constitution”). Similarly, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court confirmed that “[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.” *Id.* at 693 (citing *Verdugo-Urquidez* and *Eisentrager*); *cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (“Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens . . .”). Following these precedents, the U.S. Court of Appeals for the D.C. Circuit consistently has held that a “foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.” *32 County Sovereignty Comm. v. Dep’t of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

v. Furthermore, even when an alien is found within United States sovereign territory, the alien’s lack of *voluntary* connection to the Nation denies him protection under the Constitution. As the Supreme Court explained in *Eisentrager*, the alien has been accorded an “ascending scale of rights as he increases his identity with our society,”

339 U.S. at 770, and the privilege of litigation has been extended to aliens “only because permitting their presence in the country implied protection,” *id.* at 777-78. Thus, an alien seeking constitutional protections must establish not only that he has come within territory over which the United States has sovereignty, but also that he has developed substantial voluntary connections with this country. See *Verdugo-Urquidez*, 494 U.S. at 271-72; accord *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) (“The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.”) (citing cases). In *Verdugo-Urquidez*, the Supreme Court held that a nonresident alien, who had no previous significant voluntary connection with the United States and was involuntarily transported to the United States and held against his will, had no Fourth Amendment rights with respect to the search of his property abroad by U.S. agents. 494 U.S. at 271. The Court reasoned that “this sort of presence [in the United States]—lawful but *involuntary*—is not of the sort to indicate any substantial connection with our country.” *Id.* (emphasis added).

vi. In light of these principles, the accused cannot credibly claim any constitutional protections, including those of the Due Process Clause. The accused is an alien who has no voluntary connection to the United States. Furthermore, he is detained at Guantanamo Bay, Cuba, and it is clear that Guantanamo is outside the sovereign territory of the United States. As the Supreme Court noted in *Rasul v. Bush*, 542 U.S. 466 (2004), under the 1903 Lease Agreement executed between the United States and Cuba, “‘the United States recognizes the continuance of the *ultimate sovereignty of the Republic of Cuba* over the [leased areas],’ while ‘the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.’” *Id.* at 471 (emphasis added; other alterations in original) (quoting Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 (6 Bevans 1113) (“1903 Lease”)). Indeed, in framing the question before it for review, the Court in *Rasul* expressly recognized a distinction between “ultimate sovereignty” and “plenary and exclusive jurisdiction” at Guantanamo.² 542 U.S. at 475 (internal quotation marks omitted); see *id.* (“The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty.’”). Cf. *United States v. Spelar*, 338 U.S. 217, 221-22 (1949) (lease for military air base in Newfoundland “effected no transfer of sovereignty with respect to the military bases concerned”); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380-81 (1948) (U.S. naval base in Bermuda, controlled by United States under lease with Great Britain, was outside United States sovereignty).³

² Indeed, the 1903 Lease prohibits the United States from establishing certain “commercial” or “industrial” enterprises over Guantanamo, a restriction wholly inconsistent with control congruent with sovereignty. See 1903 Lease, art. II.

³ It is worth noting that the Guantanamo Bay lease with Cuba gives the United States “substantially the same rights as it has in the Bermuda lease” that was held in *Connell* to describe territory *outside* United States sovereignty. *Connell*, 335 U.S. at 383.

vii. Despite the accused's previous suggestion that *Rasul* extended constitutional rights to alien enemy combatants held at Guantanamo Bay, Cuba, *Rasul* did nothing of the sort. The *Rasul* Court's determination that persons detained at Guantanamo are "within 'the territorial jurisdiction' of the United States," 542 U.S. at 480, was only with respect to the habeas statute, and *not* with respect to rights guaranteed by the Constitution: "Considering that [28 U.S.C.] § 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that *Congress* intended the *statute's* geographical coverage to vary depending on the detainee's citizenship." *Id.* at 481 (emphasis added). Thus, *Rasul's* holding was clearly limited to whether Congress intended a federal statute to cover aliens held at a place such as Guantanamo, and said nothing as to whether the *Framers* could ever have intended the *Constitution* to apply extraterritorially in such circumstances. *See id.* at 475-79, 484; *see also Rasul v. Myers*, No. 06-5209, slip op. at 31 (D.C. Cir. 11 Jan. 2008) ("[I]n *Rasul*, the Supreme Court, significantly, did not reach the issue of whether Guantanamo detainees possess constitutional rights and instead based its holding on 28 U.S.C. § 2241 only.") (citing *Rasul*, 542 U.S. at 478-84).

viii. Accordingly, because the Due Process Clause has no applicability to the accused, *Brady* and its progeny do not apply to the accused as a matter of constitutional law. Nevertheless, the accused argues that *Brady* applies based on the text of the MCA. In particular, the accused cites section 949j(d)(2) as evidence that Congress incorporated *Brady* into these military commissions. The accused, however, is mistaken.

ix. Section 949j(d)(1) provides that "[a]s soon as practicable, trial counsel shall disclose to the defense the existence of any evidence known to trial counsel that reasonably tends to exculpate the accused." This section also provides that "[w]here exculpatory evidence is classified, the accused shall be provided with an adequate substitute." *Id.* Section 949j(d)(2) glosses the term "evidence known to trial counsel" by explaining that, "in the case of exculpatory evidence, [it] means exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title."

x. Contrary to the Defense's claim, this section does not incorporate *Brady* into the MCA. *Brady* is never cited in the MCA, nor is it cited in the Manual for Military Commissions. The MMC makes clear that the Defense's right to obtain witnesses or other evidence exists only "as provided in these rules." RMC 703(a). RMC 701(e), which governs the production of exculpatory evidence by the Government, provides that trial counsel must "disclose to the defense the existence of [exculpatory] evidence known to the trial counsel." "[E]vidence known to the trial counsel" is, consistent with the MCA, defined by reference to "exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title." *Id.*⁴

⁴ In addition, as previously noted, *see supra* note 1, RMC 701(e) is further qualified by RMC 701(f), governing the national security privilege. The Defense does not once in its brief acknowledge the existence of RMC 701(f). In any event, were the Government to assert the national security privilege with respect to the information at issue, further obstacles would be raised to the Defense's motion.

xi. Neither the MCA nor the MMC incorporates *Brady*, its progeny nor any of *Brady*'s remedial aspects. It is therefore incorrect to state—as the Defense does—that “[t]he MCA makes *Brady* applicable to military commissions, at least with respect to exculpatory evidence.” Mot. to Compel at 7. Rather, the only aspect of courts-martial practice that is incorporated into military commissions by MCA § 949j(d)(2) and RMC 701(e) is the degree of due diligence required of trial counsel before a piece of evidence is deemed “known to trial counsel.” See RMC 701(e) Discussion Note. “Exculpatory evidence,” on the other hand, is defined purely by reference to the plain language of RMC 701(e), namely, as evidence that “reasonably tends to: (1) [n]egate the guilt of the accused of an offense charged; (2) [r]educe the degree of guilt of the accused of an offense charged; or (3) [r]educe the punishment.” As described below, the evidence sought by the accused fails to meet this clear definition of exculpatory evidence.

g. THE ACCUSED MAY NOT ASSERT ANY RIGHTS UNDER THE GENEVA CONVENTIONS, AND INTERNATIONAL LAW DOES NOT GRANT THE ACCUSED ANY RIGHTS THAT CONFLICT WITH THE MCA OR MMC THAT ARE ENFORCEABLE IN THIS COMMISSION

i. The Defense claims that the MCA and MMC “incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions.” Mot. to Compel at 7. As previously discussed, however, the accused may not invoke the protections of Common Article 3 in this proceeding. See 10 U.S.C. § 948b(g) (“No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”); see generally Government’s Response to the Defense’s Motion to Dismiss for Lack of Jurisdiction (Common Article 3) (24 Jan. 2008). As the Prosecution has previously explained, Congress and the President jointly determined that the MCA meets all requirements of Common Article 3 and the Geneva Conventions, and therefore expressly provided that the accused may not seek to invoke any additional rights that might arguably be found in the Geneva Conventions. See 10 U.S.C. § 948b(f).

ii. This determination by Congress and the President as to the compliance of the Military Commissions Act—an Act that concerns foreign affairs, the war power and aliens—with a treaty such as the Geneva Conventions must be accorded tremendous deference by a reviewing court. See, e.g., *Iceland S.S. Co., Ltd.—Eimskip v. U.S. Dep’t of the Army*, 201 F. 3d 451 (D.C. Cir. 2000) (“To the extent that the meaning of treaty terms are not plain, we give ‘great weight’ to ‘the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement.’”) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)); see also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.”) (quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976)); *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”) (alteration in original) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89

(1952)). It would be both extraordinary and unwarranted for a court to hold that the determination of both political branches with respect to the MCA's compliance with a treaty is incorrect.

iii. In enacting the MCA and delegating authority to the Secretary of Defense to promulgate the MMC, Congress and the President clearly intended that these instruments would wholly define the rights of the accused in this proceeding. Any principles of international law that may be to the contrary can have no effect in this court. *See, e.g., TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) ("Never does customary international law prevail over a contrary federal statute."); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) ("Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency."); *see also The Paquete Habana*, 175 U.S. at 700 (explaining that international law is relevant to U.S. courts "where there is no treaty and no controlling executive or legislative act or judicial decision").

iv. Similarly, even if Common Article 3 potentially applied to the procedures of the MCA, Congress always retains the authority to abrogate or repeal a treaty by a later-enacted statute. *See, e.g., Edye v. Roberston (Head Money Cases)*, 112 U.S. 580, 599 (1884) ("A treaty is made by the President and the Senate. Statutes are made by the President, the Senate, and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. . . . In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal."); *see also Reid v. Covert*, 354 U.S. 1, 18 (1957) ("This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [B]ut, if the two are inconsistent, the one last in date will control the other . . ."). Thus, even if Common Article 3 were somehow in tension with the MCA's various procedures, the MCA would remain lawful and enforceable, notwithstanding anything in Common Article 3, the Geneva Conventions or any other earlier-enacted treaty to the contrary.

v. Nor does the canon of construction articulated by *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), have any applicability. There, the Supreme Court held that an ambiguous statute should be construed, to the extent possible,

not to conflict with international law. *See id.* at 118. As the Court of Appeals has explained, however, “[t]his canon of statutory interpretation . . . does not apply where the statute at issue admits no relevant ambiguity.” *Oliva v. U.S. Dep’t of Justice*, 433 F.3d 229, 235 (2d Cir. 2005). Here, Congress has unambiguously stated the procedures for discovering and admitting evidence. Because none of these provisions is ambiguous, *Schooner Charming Betsy’s* canon of construction is inapplicable. *Cf. Clark v. Martinez*, 543 U.S. 371, 382 (2005) (“The canon [of constitutional avoidance] is . . . a means of giving effect to congressional intent, *not of subverting it.*”) (emphasis added). Moreover, Congress has expressly legislated that the accused may not invoke the Geneva Conventions as a source of rights, *see* 10 U.S.C. § 948b(g), which necessarily prevents him from relying on *Schooner Charming Betsy’s* canon of construction to impose Common Article 3 on the MCA and MMC.

vi. This likewise answers the accused’s argument in footnote 4 of his motion that principles of constitutional avoidance require the Military Judge to disregard the framework that Congress and the President so carefully articulated in the MCA in favor of the accused’s preferred reading of international law. Congress has surely not mandated that this court review the MCA and MMC with a fine-tooth comb looking for compliance *vel non* with Common Article 3. Rather, Congress and the President have emphatically stated that the MCA and MMC *comply* with Common Article 3. *See* 10 U.S.C. § 948b(f). As discussed in our prior brief, *see* Government’s Response to the Defense’s Motion to Dismiss for Lack of Jurisdiction (Common Article 3) at 12-24, that determination by Congress and the President is surely correct. However, even if it were not, the MCA and MMC were enacted *subsequent* to Common Article 3, and therefore it is the MCA and MMC that must govern in the event of any inconsistency with Common Article 3.⁵

vii. With respect to the Defense’s other arguments, including the non-applicability of Additional Protocol I to the Geneva Conventions, we respectfully refer the Military Judge to our earlier arguments on this subject. *See, e.g.,* Government’s Response to the Defense’s Motion to Dismiss for Lack of Jurisdiction (Common Article 3) at 6 n.1.

h. DENYING THE DEFENSE’S MOTION AND ENFORCING THE DISCOVERY AND EVIDENTIARY PROVISIONS OF THE MCA AND MMC WILL NOT RENDER THE DEFENSE INCOMPETENT

i. The Defense’s final argument is that the accused will receive incompetent representation if the Military Judge does not grant him every piece of information he seeks. *See* Mot. to Compel at 11 (“Failure to grant the defense request for discovery will deprive Mr. Khadr of competent representation . . .”). However, the Defense is entitled only to evidence as provided under the MCA and MMC. *See* 10 U.S.C. § 949j(a) (“Defense counsel in a military commission under this chapter shall have a reasonable

⁵ We note that the accused in footnote 6 states that “[t]he ICTY and the ICTR similarly provide ‘minimum guarantees’ for the accused to ‘be entitled to a fair and . . . hearing.’ [sic]” Mot. to Compel at 8 n.6 (omission in original). This statement—whatever its degree of accuracy—is irrelevant, since the accused is not being tried before the ICTY or ICTR.

opportunity to obtain witnesses and other evidence *as provided in regulations prescribed by the Secretary of Defense.*") (emphasis added); RMC 703(a) ("The defense shall have reasonable opportunity to obtain witnesses and other evidence *as provided in these rules.*") (emphasis added).

ii. Congress and the President certainly understood that a competent defense requires access to material or exculpatory evidence, subject to national security interests. The MCA and MMC implement that conclusion and define what evidence the accused may have access to. The Defense's implicit claim seems to be that the evidence available to it under the MCA and MMC fails to provide the accused with competent representation. However, Congress and the President have carefully defined what evidence the Defense is entitled to. That determination, which post-dates the various standards of competent representation to which the Defense cites, is the standard that governs this commission's decisions as to what evidence is discoverable or admissible. The accused's motion attempts to subvert this careful standard by asking this court to superimpose some vague standard in terms of what evidence the Defense is entitled to, while ignoring the generous and careful evidentiary provisions set forth in the text of the MCA and MMC. This court should reject the instant motion and follow the clear rules of the MCA and MMC.

i. CONCLUSION

i. The Government has searched and reviewed materials from all possible relevant agencies and provided the Defense with all the materials required under the MCA and MMC.

ii. Because the evidence sought by the accused is neither relevant, material nor exculpatory, the Defense has no right to it under the MCA or MMC. In addition, Congress has provided that the accused may not invoke the Geneva Conventions in general, or Common Article 3 in particular, before this commission, thus defeating any attempt by the accused to invoke such sources of international law. Finally, the discovery and evidentiary provisions of the MCA and MMC are robust and fair, and enforcing them will not render the accused's defense incompetent.

6. **Witnesses and Evidence:** None.
7. **Certificate of Conference:** Not applicable.
8. **Additional Information:** None.
9. **Submitted by:**

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

A handwritten signature in black ink, appearing to read 'KAP', with a long horizontal stroke extending to the right.

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney

A handwritten signature in black ink, appearing to read 'KAP', with a long horizontal stroke extending to the right.

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Assistant U.S. Attorney

**UNITED STATES
OF
AMERICA**

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**D-029
Ruling on Defense Motion to Compel Discovery of
Statements of Omar Khadr**

13 March 2008

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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 and the government response.
2. The commission has further considered the non-binding Discussion to RMC 701(c)(3).
3. Based on the representations of counsel on the record on 13 March 2008, the court takes no action with regard to the first three matters noted in paragraph 2 of the defense motion.
4. With regard to the fourth matter noted in paragraph 3 of the defense motion, the commission orders that the government make available for examination by the defense all notes taken by interrogators and other government agents during all interrogations of Mr. Khadr since 27 July 2002. Once the defense has examined the notes, the defense may request further relief, if required.

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

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Motion
To Compel Production of Documents
Relating to Allegations of Interference with the
Office of the Chief Prosecutor

4 March 2008

1. **Timeliness:** This motion is filed within the timeframe established by R.M.C. 905 and the Military Judge's email order of 21 February 2008.

2. **Relief requested:** The defense respectfully requests the Military Judge to issue an order requiring the government to produce any and all documents relating to an investigation into allegations of interference in the Office of the Chief Prosecutor by the legal advisor to the convening authority.

3. **Overview:** The defense has requested all records relating to allegations of prosecutorial misconduct and unlawful interference in the Office of the Chief Prosecutor by the legal advisor to the convening authority. The prosecution has provided none of the requested documents. Mr. Khadr's fundamental right of access to potential evidence and witnesses is provided for in statute and in treaty, and Mr. Khadr hereby asserts that right. 10 U.S.C. § 949j (2006); Rule for Military Commission (R.M.C.) 701(j); Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, Common Article 3, entered into force Oct. 21, 1950 (hereinafter Common Article 3).

4. **Burdens of proof and persuasion:** As the moving party, the burden of persuasion is on the defense.

5. **Facts:**

a. On 15 November 2007, the Defense submitted a supplemental request for discovery requesting all documents relating to the complaints made by Colonel Morris Davis, USAF, the former Chief Prosecutor for Military Commissions, "relating to allegations of interference or attempts to improperly influence Colonel Davis in the performance of his duties." (Def. Supp. Discovery Req. of 15 Nov 07, ¶ 1 [hereinafter Def. 15 Nov 07 Discovery Req.] (Attachment A)). The defense specifically stated that production of these materials was necessary in order to enable the defense to investigate potential claims of unlawful command influence in violation of 10 U.S.C. § 949b. (Def. 15 Nov 07 Discovery Req. ¶ 2.)

b. On 2 December 2007, the prosecution denied the request, claiming that the defense had failed to establish how any of the information requested would be material to the preparation of the defense. (Govt. Resp. of 2 Dec 07 to Def. Supp. Discovery Req. of 15 Nov 07, ¶ 2 (Attachment B)).

c. On 19 February 2008, Colonel Davis related the following facts concerning the preferal of charges in this case: Colonel Davis was contacted by Mr. James Haynes, General Counsel, Department of Defense, in January 2007. Mr. Haynes told him that it was necessary to charge David Hicks. Colonel Davis objected that such action would be premature as the Regulation for Trial by Military Commission had not yet been issued and that it would be inappropriate to charge before the system was fully in place. Mr. Haynes also said that it would look strange if just Hicks were charged and therefore asked Colonel Davis if there were any other cases that could be brought at the same time. Colonel Davis indicated that this conversation was referenced in his initial complaint concerning improper interference with the functions of the Chief Prosecutor. Kuebler Aff., 4 Mar 08, ¶ 3 (Attachment C.)

d. Charges were initially preferred against Mr. Khadr on 2 February 2007. Sworn Charge Sheet of 2 Feb 07 (Attachment A to D008, Def. Mot. to Dismiss Chg. III). Colonel Davis indicated that Mr. Khadr's case was one of two cases for which charges were sworn so that Hicks would not be the only detainee facing charges. Kuebler Aff. ¶ 3.

6. Law and argument:

a. **The Government Should Be Ordered to Produce the Investigation Into Colonel Davis's Complaint**

(1) Rule for Military Commission (R.M.C.) 701(j) establishes the standard for discovery in military courts: Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence. *See also* 10 U.S.C. § 949j (2006) ("Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.").

(2) Furthermore, R.M.C. 701(c)(1) requires the government to permit the defense to examine documents and things "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." (Emphasis added). The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16¹ governing discovery in the context of the Classified Information Procedures Act (CIPA), for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to "information [that] is at least 'helpful to the defense of [the] accused.'" *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*,

¹ The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical to R.M.C. 701(c)(1). It states: "Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense." Fed. R. Crim. Proc. 16(a)(1)(E)(i).

992 F.2d 348, 351 (D.C. Cir. 1993) (“materiality standard is not a heavy burden”) (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would “significantly help [] in ‘uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal’”) (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C. 1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is “at least helpful to the defense.”

(3) Military courts recognize “a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts.” *United States v. Reece*, 25 M.J. 93, 94 (C.M.A. 1987). Regarding discovery, “military law has been preeminent, jealously guaranteeing to the accused the right to be effectively represented by counsel through affording every opportunity to prepare his case by openly disclosing the Government’s evidence.” *United States v. Enloe*, 15 U.S.C.M.A. 256 (C.M.A. 1965). The rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

(4) A defendant has the right to prepare to meet the charges against him. *United States v. Strong*, 16 U.S.C.M.A. 43, 46 (C.M.A. 1966); *United States v. Woolheater*, 40 M.J. 170, 173 (C.M.A. 1994) (“In a criminal trial, the defendant has a constitutional right of access to witnesses and evidence.”). To deny him any access to relevant evidence and witnesses until the trial of the charges against him “makes such entitlement ‘in most part an empty and high-sounding phrase.’” *Aycock*, 15 U.S.C.M.A. at 162 (quoting *Leahy v. State*, 111 Tex. Crim. 570 (Tex. Crim. App. 1928)).

(5) In 2007, Colonel Morris Davis resigned due to alleged interference in his duties by the legal advisor to the convening authority. Colonel Davis filed a formal complaint because of the interference, which resulted in an official investigation. Colonel Davis has since publicly alleged that the convening authority in this case, and her staff, interfered with his office. Col. Morris Davis, *Military Justice Goes AWOL*, Toronto Star, Dec. 12, 2007 (Attachment D). Specifically, Colonel Davis alleges that the convening authority is actively directing the prosecution’s pretrial preparation of cases and assigning prosecutors to cases. *Id.* “Intermingling convening authority and prosecutor roles perpetuates the perception of a rigged process stacked against the accused.” *Id.*

(6) Based on Colonel Davis’s 19 February remarks, it appears that the alleged improper interference extended to the instant case. At a minimum, improper influence resulted in a decision to charge Mr. Khadr months before he would have otherwise been charged and before the military commission system was “up and running.” The defense does not know what other matters in the complaint or investigation relate to this case and therefore needs to review the entirety of these materials to determine whether there is a basis for a motion based on unlawful command influence.²

² This case thus differs from *United States v. Hamdan*, in which the Military Judge recently denied a defense request for production of the investigation into Colonel Davis’s complaint. In

(7) If substantiated, allegations of unlawful command influence and prosecutorial misconduct could warrant the dismissal of this case. *United States v. Edmond*, 63 M.J. 343 (C.A.A.F. 2006); *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005). Even the appearance of unlawful command influence can require dismissal of charges with prejudice. *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006). This is due to the fact that unlawful command influence is the “mortal enemy of military justice”³ and the “appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial.” *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003) (quoting *United States v. Stoneman*, 57 M.J. 35, 42-43 (C.A.A.F. 2002)).

(8) The importance of the prevention of unlawful command influence is reflected in the Military Commissions Act (M.C.A.) itself. While Congress attempted to strip detainees of many of our most basic and cherished freedoms, Congress ensured that the prohibition against unlawful command influence contained in Article 37, UCMJ, was codified in the M.C.A. 10 U.S.C. § 949b (2006). The Prosecution’s assertion that the discovery to the Defense of an official investigation into “the mortal enemy of military justice” is not potentially relevant, especially under the broad discovery provisions of R.M.C. 701, is patently absurd.

(9) The defense, as well as the prosecution, must comply with applicable rules and procedures governing the production and presentation of evidence at trial. *Williams v. Florida*, 399 U.S. 78, 82 (1970). This Commission has the authority to impose sanctions for noncompliance with discovery obligations, ranging from an order permitting discovery to an order prohibiting the offending party from offering evidence not disclosed. R.M.C. 701(1)(3). Based on the available evidence, it is beyond question that the defense has met its burden of showing that the requested documents are material to the preparation of the defense.

b. Conclusion:

(1) The available evidence clearly shows that the materials sought by the defense likely contain evidence of unlawful command influence in Mr. Khadr’s case in violation of 10 U.S.C. § 949b. They are therefore material to the preparation of the defense and should be produced in accordance with R.M.C. 701.

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.

contrast to *Hamdan*, there is direct evidence to support the proposition that the Chief Prosecutor’s discretion was materially interfered with in the decision to proceed in this case, as well as evidence that the materials sought by the defense contain evidence thereof. *See United States v. Hamdan*, Ruling on Motion to Compel Discovery, dated 15 February 2008 (Attachment E).

³ *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

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

Attachments A – E

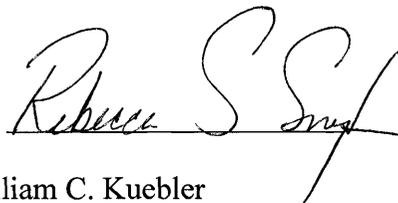
Sworn Charge Sheet of 2 Feb 07 (Attachment A to D008, Def. Mot. to Dismiss Chg III)

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. Defense Supplemental Discovery Request of 15 November 2007
- B. Government Response of 2 December 2007 to Defense Supplemental Discovery Request of 15 November 2007
- C. LCDR Kuebler Affidavit of 4 March 2008
- D. Col. Morris Davis, *Military Justice Goes AWOL*, Toronto Star, Dec. 12, 2007
- E. *United States v. Hamdan*, Ruling on Motion to Compel Discovery, dated 15 February 2008

By: 

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

Rebecca S. Snyder
Assistant Detailed Defense Counsel

15 November 2007

From: LCDR William C. Kuebler, JAGC, USN, Detailed Defense Counsel
To: MAJ Jeffrey Groharing, USMC, Trial Counsel

Subj: SUPPLEMENTAL REQUEST FOR DISCOVERY ICO U.S. V. OMAR KHADR

Ref: (a) R.M.C. 701(c)

1. Pursuant to reference (a), the defense respectfully requests production of, or the opportunity to inspect and photocopy, the following materials:

a. Any complaint or report of misconduct filed by or on behalf of Colonel Morris Davis, U.S. Air Force, against Brigadier General Thomas Hartmann, U.S. Air Force, or any other person, relating to allegations of interference or attempts to improperly influence Colonel Davis in the performance of his duties as Chief Prosecutor for Military Commissions;

b. Any complaint or report of misconduct filed by or on behalf of Brigadier General Hartmann relating to Colonel Davis;

c. Any investigation or inquiry conducted by the Office of the Convening Authority, Office of the General Counsel, Office of the Chief Prosecutor, or other entity relating to matters referenced in subparagraphs a or b above;

d. Any statement or summary of interview in the possession of the Office of the Convening Authority, Office of the General Counsel, Office of the Chief Prosecutor, or other entity relating to matters referenced in subparagraphs a or b above;

e. Any other document, electronic mail communication, or other writing relating to matters referenced in subparagraphs a or b above in the possession, custody or control of the U.S. Government.

2. Production of the aforementioned items is essential to the ability of the defense to investigate conduct potentially in violation of 10 U.S.C. § 949b. These matters are therefore "material to the preparation of the defense" within the meaning of reference (a). Should you have any questions or concerns regarding this request, please contact me at (202) 761-0133 (ext. 116).

/s/
W. C. KUEBLER

Attachment A



**DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS**



OFFICE OF THE CHIEF PROSECUTOR

December 2, 2007

MEMORANDUM FOR DEFENSE COUNSEL IN UNITED STATES V. OMAR KHADR

SUBJECT: DEFENSE SUPPLEMENTAL DISCOVERY REQUEST DATED 15 NOV 2007

1. The Government provides the following response to the Defense discovery request submitted by the Detailed Defense Counsel on 15 November 2007.
2. The Defense request does not establish how any of the information requested would be "material to the preparation of the defense." See *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989). Absent such showing, the Government will not provide any of the information requested.
3. I may be reached by phone at [REDACTED] or email at [REDACTED]

//s//

JEFF GROHARING
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions



UNITED STATES OF AMERICA

v.

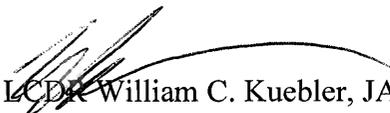
OMAR AHMED KHADR

**Affidavit of LCDR William C. Kuebler in
Support of Defense Motion
To Compel Production of Documents**

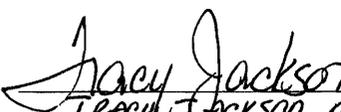
4 March 2008

I, LCDR William C. Kuebler, would, if called as a witness, testify as follows:

1. I am the Detailed Defense Counsel for Omar Khadr in the military commission case of *United States v. Omar Khadr*.
2. On or about 19 February 2008, I attended a meeting with Colonel Morris Davis, USAF, at the Rosslyn office of the Office of the Chief Defense Counsel. In the course of that meeting, I had the opportunity to ask Colonel Davis questions about his participation in this case prior to stepping down as Chief Prosecutor.
3. Colonel Davis related the following facts: Colonel Davis was contacted by Mr. James Haynes, General Counsel, Department of Defense, in January 2007. Mr. Haynes told him that it was necessary to charge David Hicks. Colonel Davis objected that such action would be premature as the Regulation for Trial by Military Commission had not yet been issued and that it would be inappropriate to charge detainees before the system was fully in place. Mr. Haynes also said that it would look strange if just Hicks were charged and therefore asked Colonel Davis if there were any other cases that could be brought at the same time. Colonel Davis said that this conversation was referenced in his initial complaint concerning improper interference with the functions of the Chief Prosecutor. Colonel Davis indicated that Mr. Khadr's case was one of two cases for which charges were sworn so that Hicks would not be the only detainee facing charges.


LCDR William C. Kuebler, JAGC, USN

Subscribed to and sworn before me this 4th day of March 2008


TRACY JACKSON, MSGT, USAF
Authority: 10 U.S.C. § 936

1 of 1 DOCUMENT

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Guelph Mercury (Ontario, Canada)

December 12, 2007 Wednesday
Final Edition

SECTION: OPINIONS; Pg. A9

LENGTH: 860 words

HEADLINE: Military justice goes AWOL

BYLINE: MORRIS D. DAVIS

BODY:

I was the chief prosecutor for the military commissions at Guantánamo Bay, Cuba, until Oct. 4, the day I concluded that full, fair and open trials were not possible under the current system. I resigned on that day because I felt the system had become deeply politicized and that I could no longer do my job effectively or responsibly.

In my view -- and I think most lawyers would agree -- it is absolutely critical to the legitimacy of the military commissions that they be conducted in an atmosphere of honesty and impartiality. Yet the political appointee known as the "convening authority" -- a title with no counterpart in civilian courts -- was not living up to that obligation.

In a nutshell, the convening authority is supposed to be objective -- not predisposed for the prosecution or defence -- and must make important decisions at various stages in the process. The convening authority decides which charges filed by the prosecution go to trial and which are dismissed, chooses who serves on the jury, decides whether to approve requests for experts and reassesses findings of guilt and sentences, among other things.

Earlier this year, Susan Crawford was appointed by the U.S. secretary of Defence to replace Major General John Altenburg as the convening authority. Altenburg's staff had kept its distance from the prosecution to preserve its impartiality. But Crawford had her staff assessing evidence before the filing of charges, directing the prosecution's pretrial preparation of cases (which began while I was on medical leave), drafting charges against people who were accused and assigning prosecutors to cases, among other things.

How can you direct someone to do something -- use specific evidence to bring specific charges against a specific person at a specific time, for instance -- and later make an impartial assessment of whether they behaved properly? Intermingling convening authority and prosecutor roles perpetuates the perception of a rigged process stacked against the accused.

The second reason I resigned is that I believe even the most perfect trial in history will be viewed with skepticism if it is conducted behind closed doors. Telling the world, "Trust me, you would have been impressed if only you could have seen what we did in the courtroom" will not bolster our standing as defenders of justice. Getting evidence through the classification review process to allow its use in open hearings is time-consuming, but it is time well spent.

Crawford, however, thought it unnecessary to wait because the rules permit closed proceedings.

There is no doubt that some portions of some trials must be closed to protect classified information, but that should be the last option after exhausting all reasonable alternatives. Transparency is critical.

Finally, I resigned because of two memos signed by U.S. Deputy Secretary of Defence Gordon England that placed the chief prosecutor -- that was me -- in a chain of command under Defence Department General Counsel William J. Haynes. Haynes was a controversial nominee for a lifetime appointment to the 4th U.S. Circuit Court of Appeals, but

Military justice goes AWOL Guelph Mercury (Ontario, Canada) December 12, 2007 Wednesday

his nomination died in January 2007, in part because of his role in authorizing the use of the aggressive interrogation techniques some people call torture.

I had instructed the prosecutors in September 2005 that we would not offer any evidence derived by waterboarding, one of the aggressive interrogation techniques the administration has sanctioned.

Haynes and I have different perspectives and support different agendas, and the decision to give him command over the chief prosecutor's office, in my view, cast a shadow over the integrity of military commissions. I resigned a few hours after I was informed of Haynes' place in my chain of command.

The Military Commissions Act provides a foundation for fair trials, but some changes are clearly necessary. I was confident in full, fair and open trials when Altenburg was the convening authority and Brigadier General Tom Hemingway was his legal adviser. Collectively, they spent nearly 65 years in active duty, and they were committed to ensuring the integrity of military law. They acted on principle rather than politics.

The first step, if these truly are military commissions and not merely a political smokescreen, is to take control out of the hands of political appointees like Haynes and Crawford and give it back to the military.

President George W. Bush first authorized military commissions in November 2001, more than six years ago, and the lack of progress is obvious. Only one war-crime case has been completed. It is time for the political appointees who created this quagmire to let go.

U.S. Senators John McCain and Lindsey Graham have said that how we treat the enemy says more about us than it does about him.

If we want these military commissions to say anything good about us, it's time to take the politics out of military commissions, give the military control over the process, and make the proceedings open and transparent.

Morris D. Davis is the former chief prosecutor for the U.S. Office of Military Commissions. This commentary first appeared in the Los Angeles Times .

LOAD-DATE: December 12, 2007

UNITED STATES OF AMERICA

v.

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

D-030

GOVERNMENT RESPONSE

To Defense Motion
To Compel Production of Documents

11 March 2008

1. **Timeliness:** This motion is filed within the timelines established by the Military Judge's 15 February 2008 email.
2. **Relief Requested:** The Defense request should be denied.
3. **Overview:**
 - a. The Defense has requested "all records relating to allegations of prosecutorial misconduct and unlawful interference in the Office of the Chief Prosecutor by the legal advisor to the convening authority," specifically requesting an "investigation" into complaints made by the former chief prosecutor, Colonel Morris Davis. Production of the "assessment" based on Colonel Davis' allegations, is not required under the Military Commissions Act.
 - b. The Government notes that the Defense again misstates the correct standard for discovery obligations under the Military Commissions Act. Rather than repeat the previous Government response on this issue, the Government respectfully requests the Military Judge to incorporate the Government response to D-26 Defense Motion to Compel – Discovery of Documents relating to Charge III.
 - c. The Defense's request should be denied. The Government has reviewed the assessment in question, and it contains no information at all relevant to the case of *United States v. Khadr*, much less any information suggesting any improper influence affecting the *Khadr* case, or any other case. The assessment contains no information that is relevant, helpful, or exculpatory and, therefore, it need not be provided to the Defense. If the Military Judge wishes to review the assessment, utilizing procedures similar to those used by the Military Judge in *United States v. Hamdan*, the Government will provide the assessment for the Judge's inspection.
4. **Burden and Persuasion:** As the moving party, the Defense bears the burden of showing good cause for the requested deposition.

5. Facts:

a. There are no additional facts necessary to deny this motion.

6. Discussion:

a. The Defense concedes—as it must—that a similar request filed by Prosecutors in the *Hamdan* case was denied by the Military Judge, Captain Keith Allred, USN, on 15 February 2008, after the military judge spent several hours reviewing all 231 pages of the subject assessment and its underlying documents. Captain Allred found that “the assessment was not relevant to the Defense of this case (Hamdan) because it does not contain evidence of unlawful command influence; because this case (Hamdan) was already insulated from General Hartmann’s actions by virtue of having previously been referred and placed under the control of the Commission; and because Colonel Davis himself expressly denied under oath that any of his decisions were affected by the General’s actions.” *United States v. Hamdan*, “Motion to Compel Discovery D 017” at 7.

b. Procedurally, the *Khadr* and *Hamdan* cases are virtually identical. Both cases were sworn on 2 February 2007, and referred on 24 April 2007 and 10 May 2007, respectively. Brigadier General Hartmann did not arrive at the Office of the Convening Authority until July 2007, months after *Khadr* was referred for trial. He played no role in the referral of the *Khadr* case.

c. The defense attempts to distinguish the *Khadr* case from *Hamdan*, referencing a 19 February 2008 conversation between the Defense Counsel and Colonel Morris Davis, wherein Colonel Davis alleged that Mr. Haynes, General Counsel for the Department of Defense, made statements regarding the timing of referral of cases, specifically *United States v. Hicks*, *United States v. Hamdan*, and *United States v. Khadr*. At the time of the Tate Assessment, Colonel Davis’ complaints focused primarily on the relationship between himself and Brigadier General Thomas Hartmann. The assessment focused on this relationship, and does not reveal any complaint made by Colonel Davis suggesting an unlawful command influence affecting this case.

d. The Defense appears to have all the access they need to pursue Colonel Davis’s irrelevant complaint. If Colonel Davis believes any conduct by Mr. Haynes or any other official resulted in unlawful command influence, the Defense should file an appropriate motion, detailing how the actions in question amounted to unlawful command influence, and present evidence, if available, to support that conclusion. The Tate Assessment failed to provide the defense with any necessary or helpful information in this regard and the Military Judge should deny the request for its compelled production.

7. Oral Argument: The Government does not request oral argument.

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

A handwritten signature in black ink, appearing to read "Keith A. Petty", written over a horizontal line.

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney

**UNITED STATES
OF
AMERICA**

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**D--030
Ruling on Defense Motion To Compel Production
of Documents Relating to Allegations of
Interference with the Office of the Chief Prosecutor**

13 March 2008

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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 and the government response.
2. The commission has further considered the non-binding Discussion to RMC 701(c)(3).
3. The commission orders that the government make available for examination by the defense the complete investigation conducted with regard to the allegations involving Colonel Davis. Once the defense has examined the complete investigation, the defense may request further relief, if required.

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

**UNITED STATES
OF
AMERICA**

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**D-035
Ruling on Defense Notice of Motion to Compel
Production of Identities of Interrogators**

13 March 2008

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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 notice of motion and the oral argument by both sides on 13 March 2008.
2. The government will provide the defense a list of all personnel who conducted interrogations of Mr. Khadr. The personnel will be identified, at least by a number which can be related to the date on which a specific interrogation was conducted. If the defense wishes to interview any specific interrogator, the government will provide a phone number and a time at which the interrogator can be interviewed.
3. If after interviewing any given interrogator the defense believes further relief is necessary, it may so request.

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